2017 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Case of Ricardo Madeira et al. v. Republic of Zircondia

Bench Memorandum

CONFIDENTIAL

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Washington, 2017

FOREWORD

This document is structured in two parts. The first presents a general background on international humanitarian law, its relation to international human rights law, and the manner in which it has been taken into account by the Inter-American Court in its jurisprudence. The second deals specifically with the Hypothetical Case, analyzing its various facets and explaining the different arguments that the teams could present in relation to the three instances of alleged human rights violations that occurred in Zircondia.

In this sense, this memorandum seeks to present to the judges guiding criteria, which will allow them to value the arguments of the teams that defend the different positions, but it does not pretend to be exhaustive, since the facts narrated in the Hypothetical Case will undoubtedly inspire different lines of argument for each of the judges and competitors. The explanations and comments provided here also seek to be in accordance with the level of preparation of the teams (undergraduate).

It should be noted that, although the author works for the International Committee of the Red Cross, the comments and analysis contained herein do not necessarily reflect the views and policies of the institution.

I sincerely hope that the study of this year's Hypothetical Case has succeeded in generating or strengthening the interest of the participants for this discipline, so important in the current international scene, which is international humanitarian law.

PART I: GENERAL BACKGROUND

1. Sources and Principles of International Humanitarian Law (IHL)[1]

International Humanitarian Law (IHL) can be defined as the branch of international law limiting the use of violence in armed conflicts by: sparing those who do not or no longer directly participate in hostilities, and restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy. Also known as law of armed conflicts (or *jus in bello*) is one of the most codified branches of international law. In practice, therefore, the most relevant sources of IHL are treaties applicable to the armed conflict in question. For example, in situations of international armed conflict, the most important sources of applicable IHL would be the four 1949 Geneva Conventions,[2] their Additional Protocol I, and weapons treaties, such as the 1980 Convention on Certain Conventional Weapons, the 1997 Ottawa Treaty on Landmines, the 2008 Convention on Cluster Munitions, or the 2013 Arms Trade Treaty, among others.

The First Convention, which protects wounded and sick soldiers on land during war is an updated version of earlier instruments adopted in 1864, 1906 and 1929. It also provides protection for medical and religious personnel, medical units and transports, and recognizes the distinctive emblems (mainly the Red Cross and the Red Crescent on a white background). The Second Convention closely follows the provisions of the first Geneva Convention in structure and content, and specifically addresses war at sea. The Third Convention deals with prisoners of war, establishing the categories of persons entitled to this status, the conditions and places where captivity can occur, the relief they are entitled to, and the judicial proceedings that can be instituted against them. The Convention establishes the principle that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. The Fourth Convention addresses the protection of civilians in wartime, defines the status and treatment of protected persons, and stresses the obligations of an occupying power with regards to the civilian population, among other topics.

The rules governing the conduct of hostilities, which limit the methods and means of warfare that parties to a conflict may use, are set out in the Hague Conventions of 1899 and 1907. They regulate the conduct of military operations in an armed conflict by defining proper and permissible uses of weapons and military tactics.

In the two decades that followed the adoption of the Geneva Conventions, the world witnessed an increase in the number of non-international armed conflicts (NIACs) and wars of national liberation. This is why two Protocols Additional to the four Geneva Conventions were adopted in 1977, which bring together and develop the rules on the protection of individuals and the conduct of hostilities, with the idea of strengthening the protection of victims of international (Protocol I) and non-international (Protocol II) conflicts and place limits on the way wars are fought. Protocol II was the

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[1] See MELZER, Nils, *International humanitarian law - a comprehensive introduction*, Geneva, ICRC, 2016, pp. 17 ss (available at: *https://www.icrc.org/en/publication/4231-international-humanitarian-law-comprehensive-introduction)* and SALMON, Elizabeth, *Introducción al derecho internacional humanitario*, 3rd ed., CICR-PUCP, 2012, pp. 53 ss; available at: *http://idehpucp.pucp.edu.pe/wp-content/uploads/2012/10/Introducci%C3%B3n-al-Derecho-Internacional-Humanitario-2012-3.pdf.*
Also, the online casebook *How does law protect in war* on the International Committee of the Red Cross' web site: *https://casebook.icrc.org/*.

[2] See ICRC, *Summary of the Geneva Conventions of 12 august 1949 and their Additional Protocols*, *https://www.icrc.org/eng/assets/files/publications/icrc-002-0368.pdf.*

first-ever international treaty devoted exclusively to situations of non-international armed conflicts. In 2005, a third Additional Protocol was adopted creating a new protective emblem, the Red Crystal (which does not replace the Red Cross and Red Crescent).

Treaty IHL applicable in NIACs is significantly less developed; the most important sources are Article 3 (common to the four Geneva Conventions)[3] and, in certain circumstances, Additional Protocol II.

Article 3 stresses:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
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> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2. The wounded and sick shall be collected and cared for.
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

In 2005, after extensive research and consultations with experts throughout the world, the ICRC published a report,[4] now referred to as "the study on customary IHL." In essence, the study provides a snapshot of what the ICRC considered to be customary IHL at the time of publication. Volume I of the study lists 161 rules that the ICRC considers to be binding as customary IHL; among them, 136 also apply to non-international armed conflicts,[5] and 13 rules are applicable in NIACs alone.

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[3] For a commentary of Common Article 3, see: International Committee of the Red Cross, *Commentary on the First Geneva Convention*, Cambridge, Cambridge University Press, 2016, "Article 3"; available at: *https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument.*

[4] See HENCKAERTS, Jean-Marie & DOSWALD-BECK, Louise, *Customary International Humanitarian Law – Vol I: Rules*, ICRC – Cambridge University Press, Geneva, 2005; available at: *https://www.icrc.org/spa/resources/documents/publication/pcustom.htm.*

[5] SASSOLI, Marco *et al.*, *How does law protect in war? - Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Volume I "Outline of International Humanitarian Law", 3rd ed., ICRC, Geneva, 2012, Chapter 12: "The Law of Non-International Armed Conflicts"; available at: *https://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf*

Customary law plays an important role in IHL, given the fact that a number of rules and principles set out in treaties have not been ratified by certain States, including rules governing the conduct of hostilities and the treatment of persons not or no longer taking a direct part in hostilities. Since they are also part of customary law, they are therefore binding on all States, regardless of which treaties they have or have not adhered to. For instance, a belligerent State may not have ratified a treaty prohibiting the use of certain weapons (for example, the ones that can cause "superfluous injury or unnecessary suffering"), but as there is a universally recognized customary prohibition against such means and methods of warfare, that State would be prohibited from using these weapons under customary IHL. It is also important to underscore that several customary rules establish in greater detail than treaty law the obligations of parties involved in a NIAC, particularly with regards to the conduct of hostilities. For example, treaty law does not expressly prohibit attacks on civilian objects in NIAC, but customary international law does.

The other recognized sources of IHL are the general principles of law, soft law, case law and doctrine.

As in the context of the hypothetical case, the vast majority of contemporary armed conflicts are nowadays waged between States and organized armed groups or between such groups.

States have never agreed to treat international and non-international armed conflicts equally, mainly because for a long time such conflicts were considered internal affairs governed by domestic law, and no State was ready to accept that its citizens would wage war against their own government; this is why the law applicable to NIACs is more recent. The IHL of NIACs often involves the same principles as the one applicable to international wars, although established in less detail. However, in the last decades the norms of NIACs have developed, for instance through the case law of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

The ICRC Study on customary international humanitarian law has confirmed the customary nature of most of the treaty rules applicable in NIACs (Art. 3 common to the Conventions and Protocol II in particular). Additionally, the study demonstrates that many rules initially designed to apply only in international conflicts also apply – as customary rules – in NIACs.

Treaty IHL governing NIACs consists, first and foremost, of Common Article 3 and Additional Protocol II. A number of treaties on the regulation, prohibition or restriction of certain types of weapon also apply in non-international armed conflicts. Last but not least, owing to the relative scarcity of applicable treaty IHL, customary law is of great importance for the regulation of non-international armed conflicts.[6]

Additional Protocol II of 1977 develops and supplements the contents of Common Article 3; its first Article states:

> 1. This Protocol (...) shall apply to all armed conflicts which are not [of international character] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under

[6] MELZER, Nils, *op. cit.*, pp. 66 ss.

> responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
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> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.

From the foregoing, a few fundamental principles of International humanitarian law can be drawn.[7] The principle of *necessity* entails that only the force required for the complete or partial submission of the enemy and not otherwise prohibited by the law of armed conflict may be used.

According to the principle of *distinction*, parties to a conflict are obliged to distinguish between combatants and civilians and between military objectives and civilian objects; therefore, attacks may be directed only at combatants and military objectives.

The principle of *limitation*; the right to choose means and methods of warfare is not unlimited. A number of instruments either restrict or prohibit the use of weapons or methods of a nature to cause superfluous injury or unnecessary suffering.
Under the principle of *proportionality*, a balance must be struck between the expected incidental loss of civilian life, injury to civilians and damage to civilian objects on the one hand, and the concrete and direct military advantage anticipated on the other hand. Attacks expected to inflict excessive incidental harm on civilians or civilian objects are prohibited.
A related principle - that of *precaution* - establishes a duty to avoid or, at least, minimize the infliction of incidental death, injury and destruction on persons and objects protected against direct attack.

2. The relationship between IHL and International Human Rights Law

Much has been written on the interplay that exists between the two disciplines.[8] The essence of the relationship is that while humanitarian law applies only to armed conflicts, as stipulated, for instance, in Common Article 2 of the 1949 Geneva Conventions, human rights law applies in both peace and war.[9]

The position adopted by the International Court of Justice (ICJ) reflects the state of the art. Firstly, in its opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court acknowledged that the protection offered by the International Covenant of Civil and Political Rights "does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." Although the law holds that no one can be

[7] For a description of the fundamental principles, refer to the Study on Customary IHL.
[8] See, for example, MURRAY, Daragh, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford, Oxford University Press, 2017 (Chapter 4); HEINTZE, Hans-Joachim, "Theories on the Relationship between International Humanitarian Law and Human Rights Law", as well as GOWLLAND-DEBBAS, Vera & GAGGIOLI, Gloria, "The Relationship between International Human Rights and Humanitarian Law: An Overview", both in KOLB, Robert & GAGGIOLI, Gloria, *Research Handbook on Human Rights and Humanitarian Law*, Northampton, Edward Elgar Publishing, 2013; HATHAWAY, Oona A., "Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law", *Minnesota Law Review*, Vol. 96, 2012; or ARNOLD, Roberta & QUENIVET, Noelle, *International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law*, Leiden, Brill Publishers, 2008.
[9] ORAKHELASHVILI, Alexander, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", *EJIL*, Vol. 19, Núm.1, 2008, p. 162.

arbitrarily deprived of his life, the interpretation of what is to be considered as arbitrary corresponds, according to the ICJ, to "the applicable *lex specialis*, namely, the law applicable in armed conflict."[10]

The interdependence between these two fields is reaffirmed by the ICJ in its Opinion issued on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it established that, in a situation of armed conflict, the governing law over the right to life is international humanitarian law, as opposed to human rights law, even though it also stated that "[in] regards [to] the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." Later, in its decision on the *Case concerning armed activities on the territory of the Congo*, the Court determined that human rights treaties continue to apply in wartime, together with humanitarian law.[11]

Furthermore, the International Criminal Tribunal for the Former Yugoslavia has established that human rights law and humanitarian law are mutually complementary and their use for ascertaining each other's content and scope is both appropriate and inevitable.[12]

3. The position adopted by the Inter-American Court

Because of the many armed conflict situations occurring on the continent since the inception of the Inter-American system of human rights, the question of the place to be given to IHL has always been present. In October 1997, the Inter-American Commission adopted its report in the *La Tablada* case, which dealt with an attack launched by 42 armed persons on military barracks of the national armed forces of Argentina in 1989, triggering a 30 hour battle which finalized with the death of several attackers and State agents. The surviving attackers filed a complaint with the Commission. In its report the Commission examined in detail if it was competent to apply IHL directly, and decided in favor of this position.[13]

As pointed out by Prof. Elizabeth Salmon, the relationship between the Inter-American Court and IHL has gone through three different phases.[14] Initially, in the first one, although the Court was asked to decide upon cases taking place in contexts of armed conflict, its analysis ignored the impact of IHL provisions in Peru and Colombia, for instance. Things changed starting in 2000 with the *Bámaca Velásquez* case, when the Court stressed that neither the Commission nor the Court have jurisdictional authority to apply IHL directly or to declare State responsibility for IHL violations, but acknowledged the possibility for the judges to use in order to interpret the provisions of the American Convention, when necessary.[15] In 2012, a new phase began with the decision issued by the Court in the *Santo Domingo Massacre* Case, marked by the use of rules of customary IHL to interpret international human rights law, while the Court includes arguments that seem to leave IHL out of its range of subject matter jurisdiction, for no clear reason. Professor Salmon indicates that this could be

[10] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J., (8 July 1996), Par. 25.
[11] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C J., 136 (9 Jul. 2004), Par. 106, and Democratic Republic of the Congo v. Uganda , 2005 I.C.J., (19 Dec. 2005), Par. 216.
[12] ICTY, *Prosecutor* v. *Kunarac* , IT-96-23-T, Judgment of 22 Feb. 2001, at para. 467.
[13] See ZEGVELD, Liesbeth, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case", *International Review of the Red Cross*, No. 324, 1998.
[14] SALMON, Elizabeth, "Institutional Approach between IHL and IHLR – Current Trends in the Jurisprudence of the Inter-American Court of Human Rights", *Journal of International Humanitarian Legal Studies*, Vol. 5, 2014, pp. 161-165.
[15] TABAK, Shana, "Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals", *Michigan Journal of International Law*, Vol. 37, No. 4, 2016, pp. 662 & 664.

aimed at preventing the States from claiming that the Court is applying treaties that are out of its range of competence.

It is important to recall at this point two key provisions of the American Convention. Article 29 ("Restrictions Regarding Interpretation") states:

> No provision of this Convention shall be interpreted as:
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 62, part of Chapter VIII of the Convention which addresses the role of the Court within the Inter-American system, establishes:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
> 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 62(3) of the American Convention clearly defines the limits of the Court's jurisdiction *ratione materiae* and nowhere does it include the law of armed conflicts; therefore, the Court is not responsible for applying it. However, the Court has indicated from an early stage that it reserved the possibility of relying on "international treaties" other than the American Convention for interpretation purposes.[16]

In the *Las Palmeras* Case, the Court asserted that the American Convention "has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself and not with the 1949 Geneva Conventions."[17]

[16] BURGORGUE-LARSEN, Laurence & ÚBEDA DE TORRES, Amaya, ""War" in the Jurisprudence of the Inter-American Court of Human Rights", *Human Rights Quarterly*, Vol. 33, 2011, p. 163.
[17] Corte IDH. Caso *Las Palmeras* v. *Colombia.* Excepciones Preliminares. Sentencia de 4 de febrero de 2000. Serie C No. 67, Para. 33.

But the Court has also interpreted the prohibition under Article 29 – no interpretation restricting the scope of Human Rights – as an *authorization* to enlarge the content of the rights protected by the Convention. This broad interpretation of Article 29 is justified by the Court itself given the aim and object of the American Convention, which is the protection of *Human* Rights. This is the so-called *pro homine* interpretation of the American Convention.[18]

In the *Case of the Massacre of Mapiripan*, the Court explained the role played by IHL in its legal reasoning:[19]

> 114. [T]he Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties. (…)
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> 115. The obligations derived from said international provisions must be taken into account, according to Article 29.b) of the Convention, because those who are protected by said treaty do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are; instead, those rights complement each other or become integrated to specify their scope or their content. While it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged in the instant case. (…)

The Court reaffirmed the same principle in a similar case denouncing forced disappearances in *Bámaca Velásquez v. Guatemala* (2000), where it interpreted Article 1 of the American Convention in light of Common Article 3:[20]

> 208. Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.

In the *Ituango Massacres* Case, involving grave breaches of human rights committed by paramilitary groups supported by the Colombian State, the Court interpreted the right to property (Article 21 of the American Convention) in the light of Articles 13 and 14 of Additional Protocol II to the Geneva Conventions. In its subsequent decision in *Las Dos Erres Massacre v. Guatemala*, the Court analyzed the

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[18] TIGROUDJA, Hélène, "The Inter-American Court of Human Rights and International Humanitarian Law", in KOLB, Robert & GAGGIOLI, Gloria, *op. cit.*, p. 472

[19] Corte IDH. Caso de la *"Masacre de Mapiripán"* v. *Colombia*. Sentencia de 15 de septiembre de 2005. Serie C No. 134, Para. 114-115.

[20] Corte IDH. Caso *Bámaca Velásquez* v. *Guatemala*. Fondo. Sentencia de 25 de noviembre de 2000. Serie C No. 70, Para. 208.

protection granted to children during armed conflict in the light of Article 4(3) of Additional Protocol II.[21] In its decision in the *Ituango Massacres* Case, it also held that it is useful and appropriate, in keeping with Article 29 of the American Convention, to use international treaties such as Additional Protocol II to the Geneva Conventions to interpret the American Convention's provisions in accordance with the evolution of the inter-American system, taking into account corresponding developments in the field of IHL.

4. Definition of a Non International Armed Conflict (NIAC)

An "armed conflict not of an international character" (to use the terms of Common Article 3 to the Geneva Conventions) is a situation of violence that reaches certain thresholds of confrontation which distinguish it from lesser forms of violence, and trigger the application of IHL. The law of armed conflict does not apply to situations other than armed conflict, which are governed by the human rights obligations of the State concerned.

The law of NIAC distinguishes two such situations: that in which the armed group has achieved a certain minimum control over a territory and that in which it has not.[22] In the first case, Additional Protocol II, which develops and supplements Common Article 3, is applicable in addition to other instruments. Specifically, it contains an extended list of fundamental rights and protections; provisions regarding persons whose liberty has been restricted and relating to prosecution and punishment of criminal offences related to NIACs; and more precise provisions on the protection granted to the civilian population. In its preamble, it is recalled that "international instruments relating to human rights offer a basic protection to the human person", thus establishing a link between the Additional Protocol and such instruments, including the American Convention.[23]
The threshold a situation must meet in order to be considered an armed conflict according to Common Article 3 is therefore lower, since the only requirement is practically that the conflict is taking place on the territory of one of the States.

Some elements of a legal definition of NIAC, based on the case law of international tribunals, in particular that of the ICTY, are also to be considered:[24]

> Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation.*[25]

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[21] TIGROUDJA, Hélène, *op. cit.*, p. 470

[22] QUÉNIVET, Noëlle, "Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict", in JINKS, Derek *et al.* (Eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, The Hague, Asser Press, 2014.

[23] See International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987; available at *www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.*

[24] See notably ICTY, *Prosecutor* v. *Tadic*, IT-94-1-T, Judgement, 7 May 1997, par. 561-568; ICTY, Prosecutor v. Limaj, IT-03-66-T, Judgement, 30 November 2005, par. 135-170; ICTY, Prosecutor v. Haradinaj, IT-04-84-T, Judgement, 3 April 2008, par. 32-62; ICTY, Prosecutor v. Boskoski, IT-04-82-T, Judgement, 10 July 2008.

[25] "How is the Term "Armed Conflict" Defined in International Humanitarian Law ?", ICRC Opinion Paper, March 2008, p.5; available at: *http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm.*

The following academic definitions of NIACs are also relevant:

> Non-international armed conflicts are armed confrontations that take place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand. […] Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power.[26]
> The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, [i.e] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements.[27]

The two above-mentioned NIAC criteria -- organisation of the parties and intensity of the violence – are meant to distinguish an armed conflict "from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[28] "The criteria are closely related. They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis."[29] The criteria are assessed by weighing up several indicative factors, none of which are, in themselves, essential to establish whether each criterion is fulfilled.

Regarding the organisation criterion, governmental forces are always presumed to reach the minimum level of organisation required.[30] Therefore the assessment of the level of organisation concerns only non-State armed groups (including dissident armed forces) involved in the violence.
Where in a given case there is insufficient information to conclude that the armed group meets the requisite threshold of organisation, the latter may nonetheless be deduced from factors indicating that the intensity threshold is met – notably the kind, complexity and frequency of the armed confrontations. Conversely, the requisite level of intensity of the violence can obviously not be deduced from the mere existence of an organised armed group. It is therefore preferable to begin by analysing the organisation criterion before that of intensity, as doubts regarding the former may subsequently be resolved in light of the latter.

According to the ICTY, the following are the main indicative factors of organisation of the parties:[31]

- hierarchical structure and chain of command;
- capacity to plan and launch coordinated military operations;
- capacity to recruit, train and equip new combatants;
- existence of an internal regulation or a code of conduct;

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[26] GASSER, Hans-Peter, "International Humanitarian Law: an Introduction", in HAUG, H. (Ed.), *Humanity for All: the International Red Cross and Red Crescent Movement*, Paul Haupt Publishers, Berne, 1993,
p. 555.
[27] SCHINDLER, Dietrich, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCADI*, Vol. 163, 1979-II, p. 147.
[28] ICTY, *Prosecutor* v. *Tadic*, *op. cit.*, para. 562.
[29] ICTY, *Prosecutor* v. *Boskoski*, IT-04-82-T, Judgement, 10 July 2008, para. 175.
[30] See ICTY, *Prosecutor* v. *Haradinaj*, IT-04-84-T, Judgement, 3 April 2008, para. 60.
[31] *Ibidem*, para. 194-206.

- commanders have a minimum capacity to control the members of the group and thus to ensure respect for IHL;
- control of territory.

With regards to the main indicative factors of intensity of the violence, the Tribunal cites the following:[32]

- number, duration and gravity of the armed confrontations / clashes;
- number of fighters/units deployed on both sides and type of government forces involved (police, security forces, armed forces);
- types of weapons used;
- number of military and civilian victims; extent of damage caused to objects;
- effects of the violence on the civilian population (e.g. displacement).

If it is determined that the NIAC criteria are met, the governing legal framework is Common Article 3 to the Geneva Conventions and customary rules of IHL applicable in NIACs. In addition, Additional Protocol II to the Geneva Conventions applies if the concerned State is party to the Protocol, and if the NIAC involves the State's armed forces against dissident forces or other organised armed groups which "exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement" the Protocol (Article 1(1)).

As mentioned, IHL does not apply to situations of violence other than armed conflict, which are governed instead by International Human Rights Law and domestic legislation. Such situations include "internal disturbance and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts", in the terms of Article 1 (2) of Additional Protocol II, which are generally recognized as stating the lower threshold for all NIACs.

International case law has confirmed the relevance of how force is being used by the authorities when qualifying a situation. The ICTY has observed in this respect that an indicative factor of internal armed conflict is the way that organs of the State, such as the police and military, use force against armed groups. In such cases, it may be instructive to analyze the use of force by governmental authorities, in particular, how certain human rights are interpreted, such as the right to life and the right to be free from arbitrary detention, in order to appreciate if the situation is one of armed conflict. As is known, in situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force, but, where applicable, human rights law restricts such usage to what is no more than absolutely necessary and which is strictly proportionate to certain objectives. The European Court of Human Rights has held in a number of cases that to use lethal force against a person whom it is possible to arrest would be "more than absolutely necessary". However, when a situation reaches the level of armed conflict, the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law, where a different proportionality test applies.[33]

This said, it cannot be excluded that numerous smaller confrontations between two parties add up, together with other relevant factors, to reach an intensity corresponding to the "protracted armed violence" required by the ICTY for qualifying a situation as non-international armed conflict,

[32] *Ibidem*, para. 177-193.
[33] *Ibidem*, para. 178.

perhaps especially when in addition to such confrontations the situation also presents numerous unilateral acts of violence, such as killings. The situation may then amount to a non-international armed conflict even when it does not constitute the type of high intensity conflict the ICTY was addressing in the above mentioned cases.

The ICTY has explained in this regard that "[t]he essential point made by the Trial Chamber in *Tadic* is that isolated acts of violence, such as certain terrorist activities committed in peace time, would not be covered by Common Article 3"[34], and that "what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities."[35] The tribunal further considered that "while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict." [36]

It is important to highlight that, in its case law (such as the *Bámaca* decision), the Inter-American Court has clearly explained the consequence of determining the existence of a NIAC as part of its analysis of the events surrounding the alleged violations of provisions of the American Convention:

> 207. The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala (*supra* 121 b). As has previously been stated (*supra* 143 and 174), instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed *hors de combat* for whatever reason, humane treatment, without any unfavorable distinctions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.

5. Use of force: International human rights law vs. IHL[37]

Law enforcement officials, tasked with the exercise police powers, including those of arrest or detention, including military authorities or State security forces if they carry out such duties, are bound by the United Nations Code of Conduct for Law Enforcement Officials (adopted in 1979) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted in 1990). Although these two instruments are only considered as *soft law*, they offer useful guidance on specific issues related to the maintenance of law and order, and have often been referred to by the Inter-American Court. The teams will most likely cite them as the Hypothetical Case does not make any reference to any particular legislation in force in Filipolandia / Serena / Zircondia.
According to the referred documents, the essential principles underlying the use of force and firearms are those of: legality, precaution, necessity and proportionality.

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[34] ICTY, *Prosecutor* v. *Ljube Boskoski et al.*, IT-04-82-T, Judgement, 10 July 2008, para. 185.
[35] *Idem.*
[36] *Ibidem*, para. 190
[37] See, generally, ICRC, *Violence and the use of force*, Geneva, 2011; available at: *https://www.icrc.org/eng/assets/files/other/icrc_002_0943.pdf.* See also ICRC, *The use of force in armed conflicts: interplay between the conduct of hostilities and law enforcement paradigms – Report of an expert meeting*, Geneva, 2013, pp. 4 ss.; available at: *https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf.*

Law enforcement officials may resort to using force only when all other means of achieving a legitimate objective have proven useless (necessity) and the use of force can be justified (proportionality) with regards to the importance of the legitimate objective (legality) they seek to achieve. They must exercise restraint when using force and firearms and act in proportion to the seriousness of the offence and the legitimate objective to be achieved,[38] and may only use as much force as is necessary to achieve a legitimate objective.

As far as the use of firearms goes, since it is considered an extreme measure, Basic Principles 9, 10 and 11 underscore that law enforcement officials shall not use firearms against persons, except: in self-defense or defense of others against the imminent threat of death or serious injury; to prevent the perpetration of a particularly serious crime involving grave threat to life; or to arrest, or to prevent the escape of, a person presenting such a danger and resisting their authority; and only when less extreme means are insufficient to achieve these objectives.

Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life[39] The rules of behavior to be observed prior to using a firearm (precaution), stated in Basic Principle 10, require law enforcement officials to identify themselves as such; give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed (unless such warning would unduly place the law enforcement officials at risk, create a risk of death or serious harm to other persons, be clearly inappropriate or pointless in the circumstances).

The Inter-American Court has established in its case law that the principles of legality, absolute necessity and proportionality are paramount; in the Case of *Nadege Dorzema and others* vs. *Dominican Republic*,[40] among others, it has for instance stated:

> 85. In order to respect the appropriate measures to take if the use of force becomes essential, this must be used in keeping with the principles of legality, absolute necessity, and proportionality:
> *i. Legality*: the use of force must be addressed at achieving a legitimate goal (…). The law and training should established (*sic*) how to act in this situation (…).
> *ii. Absolute necessity*: it must be verified whether other means are available to protect the life and safety of the person or situation that it is sought to protect, in keeping with the circumstances of the case. The European Court has indicated that it cannot be concluded that the requirement of "absolute necessity" for the use of force against people who do not pose a direct threat is proved, "even when the lack of the use of force would result in the loss of the opportunity to capture them." (…)
> *iii. Proportionality:* The level of force used must be in keeping with the level of resistance offered. Thus, agents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.

Based on the foregoing, a few relevant differences between conduct of hostilities and law enforcement paradigms can be identified.[41]

[38] Basic Principles 4 and 5.
[39] Basic Principle 9.
[40] Paragraph 85; see also Corte IDH. Caso Cruz Sánchez y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 17 de abril de 2015. Serie C No. 292, para. 265.

Under the conduct of hostilities paradigm, the principle of *necessity* (military necessity to use force against legitimate targets) is presumed, given that combatants / fighters can be attacked with lawful means while civilians are protected against direct attack, unless they take a direct part in hostilities; in the case of the law enforcement paradigm, the principle of "absolute necessity" implies that the use of force must be the last resort and can be used only in order to pursue a legitimate aim (thus, the force must be absolutely necessary in order to maintain public security, law and order).

As for the *principle of proportionality*, under IHL it protects only surrounding civilians and civilian objects from damage which would be excessive in relation to the concrete and direct military advantage anticipated of an attack; therefore, the legitimate target (combatant, fighter or civilian directly participating in hostilities) is not covered by such principle. Under human rights law, when a State agent is using force against an individual, the proportionality principle requires a balancing between the risks posed by the individual and the potential harm to this individual as well as to bystanders. Thus, the life of the individual posing an imminent threat himself is to be taken into account, in contradistinction to IHL. Also, whenever the lawful use of force and firearms is unavoidable, the human rights proportionality test requires to use the smallest amount of force necessary (including possibly through the use of less than-lethal weapons) and to apply an escalation of force procedure unless this appears impossible. Finally, in human rights law, the use of force must avoid as far as possible deaths or injuries of bystanders, while the IHL principle of proportionality prohibits only *excessive* incidental civilian losses.

Regarding the *principle of precaution*, under the conduct of hostilities paradigm, belligerents are to take constant care to ensure that the civilian population as well as civilian objects are spared from attacks, whereas under the law enforcement paradigm, all precautions must be taken to avoid, as far as possible, the use of force as such and therefore State agents must take all measures possible to minimize injury and respect and preserve human life.

PART II: THE HYPOTHETICAL CASE

1. Overall Situation in Zircondia

1.1. Existence of one - or two - NIAC(s)

The hypothetical case does not provide many details as to the existence of a NIAC in Filipolandia or Serena, so the teams are expected to be able to invoke elements provided in the Hypothetical Case as well as the Questions and Clarifications in order to defend the existence (or non-existence) of a NIAC if they decide to address the issue of the qualification of the situation. If there is a NIAC, then principles of IHL would prove applicable.

In light of the criteria provided above, it could be argued that the situation described in the Hypothetical Case indicates that there is a NIAC between the Government and the FNC, within the meaning of Additional Protocol II (see particularly paragraphs 11, 12 and 13 of the Hypothetical Case, which establish that the FNC is well structured, heavy weapons are being used, and there has been constant fighting during a six month period). It is therefore to be expected that the teams will invoke

[41] ICRC, Report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,* Geneva, October 2011, pp. 18-19; available at *https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf*.

provisions of IHL within their briefs and as part of the oral pleadings. Also, the State's authorities seem to acknowledge the existence of a NIAC by referring to Restrepo as a "legitimate target" (although it is not clear if they are using that term within the meaning provided for by IHL). However, it must be recalled that the existence (or not) of a NIAC does not depend upon the declaration made by a State in one sense or another.

The situation in Serena is deliberately more difficult to qualify based on the information provided in the Hypothetical Case and the answers to the Clarification Questions; the main actors involved in the violence are the security and armed forces of the government, which are presumed to fulfil the organization criterion, and the two main gangs, whose level of organization must be examined in light of the indicators mentioned earlier. Based on Paragraphs 25 to 29 of the Hypothetical Case, the teams might be inclined to present their legal reasoning based on the premise of the specific (in)existence of a NIAC in Serena.

1.2. State of emergency

Most constitutions contain emergency clauses that empower the head of State or the government to take exceptional measures (including restrictions on or the suspension of certain rights) with or without the consent of the Legislative branch in times of war or in other emergency situations. The decision to enact such clauses is taken by States when they lose confidence in their ability to control a situation with the measures they have at their disposal, and should be aimed at reestablishing a situation of normality; this has occurred in several countries of the continent since the inception of the Inter-American Human Rights System. Whenever national law allows emergency measures to be taken in the interests of national security, public safety or public order, the application of such measures may not be arbitrary or discriminatory. Thus, the right to freedom of expression, peaceful assembly and association may be limited as a consequence of internal disturbances and tensions only where such limitations are lawful and necessary.

In the case of the countries that have ratified the American Convention, Article 27 states as follows:

> Article 27. Suspension of Guarantees
> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
> 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

It is important to point out the Turku / Abo Declaration of minimum humanitarian standards adopted in 1990 by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University, which ought to guide States' actions during states of emergency.[42]

According to the "Questions and Clarifications", the answer provided to Question 13 indicates that the President of Zircondia addressed a communication to the Secretary General of the OAS on August 18, 2006, informing him that he believed that a "broad and general" suspension of the obligations assumed under the American Convention was necessary in Zircondian territory for a period of six months. The teams will most likely argue that this declaration is (in)compatible with the wording of Article 27, depending on the position they have to defend.[43]
Among the interpretations of Article 27 by the Inter-American Court, the following is particularly useful:[44]

> 120. This Court has established that the suspension of guarantees constitutes an exceptional situation in which it is licit for the Government to apply certain restrictive measures on rights and freedoms that, under normal conditions, are prohibited or subject to more rigorous requirements. The Court notes that the Convention does not prohibit the suspension of the right to personal liberty under Article 7 of the Convention, temporarily and to the extent strictly necessary to deal with the exceptional situation. Nevertheless, this Court has already indicated that, "according to Article 27(2) of this instrument, the legal procedures established in Articles 25(1) and 7(6) of the American Convention […] cannot be suspended, because they constitute essential judicial guarantees to protect rights and freedoms that cannot be suspended according to this same provision." Similarly, international human rights bodies have expressed a similar opinion that, as in the case of the right of everyone deprived of liberty to have recourse to a competent judge or court to decide the legality of his detention or habeas corpus, the prohibition of the arbitrary deprivation of liberty is a non-derogable right that cannot be suspended. In addition, the International Committee of the Red Cross has established that the prohibition of arbitrary deprivation of liberty is a rule of customary international humanitarian law, applicable to both international and non-international armed conflicts. Consequently, pursuant to "the obligations that […] are imposed by international law," the prohibition of arbitrary detention or imprisonment cannot be suspended during an internal armed conflict.

2. Exhaustion of domestic remedies / Preliminary objections

Considering the facts of the Hypothetical Case and the Clarifications provided, it has to be understood that the Commission, within the boundaries established in Articles 24 and 30 to 32 of the Rules of Procedure of 2006 (in force at the time), decided to admit the petition filed by the Association of PhDs in Law (most likely based in part on the situation prevailing in Zircondia – i.e. the state of emergency, the difficulty / impossibility to exhaust domestic remedies, etc.).

The relevant articles of those rules are reprinted below for quick reference:

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[42] Available at: *http://www.abo.fi/fakultet/en/Content/Document/document/24254*.
[43] For a commentary of this particular article, see : STEINER, Christian & URIBE, Patricia (Eds.), *Convención Americana sobre derechos humanos – Comentario*, Konrad Adenauer Stiftung, 2014, pp. 678 ss.; available at: *http://www.kas.de/rspla/es/publications/38682/*.

[44] Corte IDH. Caso Osorio Rivera y familiares Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 26 de noviembre de 2013. Serie C No. 274.

> Article 24. Consideration *Motu Proprio*
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> The Commission may also, *motu proprio*, initiate the processing of a petition which, in its view, meets the necessary requirements.
>
> Article 30. Admissibility Procedure
>
> (…)
>
> 5. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of these Rules of Procedure. (…)
>
> Article 31. Exhaustion of Domestic Remedies
>
> 1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.
>
> 2. The provisions of the preceding paragraph shall not apply when:
>
> a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
>
> b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
>
> c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.
>
> 3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.
>
> Article 32. Statute of Limitations for Petitions
>
> 1. The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.
>
> 2. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

Furthermore, it has to be underscored that the answer to Question 35 of the "Clarifications Questions", which precisely enquires if the State has presented any preliminary objections, establishes that this is not the case. It should therefore be understood that, for undisclosed reasons, the State has not found it necessary to present such objections, in accordance with Articles 41 and 42 of the mentioned Rules, and therefore it is not expected that such arguments should be presented at this stage by the teams.

3. The case of Ricardo Madeira and Milena Reyes

3.1. Brief summary of the facts

In September 2006, Madeira and Reyes were caught by surprise on a dirt road by a group of six members of the Terror Squad (a group mainly involved in stealing shipments of minerals, and carrying

out kidnappings). Their belongings were confiscated, including their computers and cell phones, and both were taken to a clandestine jail. They were chained by their hands and feet, monitored by a closed-circuit camera, and given food that did not appear fit for human consumption; interrogated for more than four hours at a time in order to obtain from them additional information about the next rare earth shipments, using methods such as submerging their heads in a basin of freezing water.[45]

According to foreign media correspondents, there are ties between members of the Terror Squad and members of the provincial police forces, as they provide each other with mutual support to conduct illegal activities.[46] Some members of the Police Forces have agreed to turn a blind eye to the criminal activities of the Terror Squad in exchange for financial compensation; in some cases, police give the Terror Squad advance notice of operations planned against it. On rare occasions, some police officers have helped the Squad identify potential victims and carry out kidnappings.[47]

The facts surrounding the capture and detention of Ricardo Madeira were reported by his brother Gerardo in a letter sent to the Minister of Justice, and a formal complaint was filed with the Office of the Special Human Rights Prosecutor, on October 11, 2006,[48] leading to criminal case 2006/212 being opened, and the investigating judge traveling to the town of San Fermín, the place from which Milena Reyes had escaped.[49] Through an anonymous tip, a mass grave is found containing the remains of Madeira, who died of a close-range gunshot; Timoteo Anaya (one of the captors) is accused of murder,[50] convicted and sentenced to 12 years in prison. The attorneys for the Madeira family appealed the judgment, which was affirmed by the appeals court. A panel of judges from Zircondia's Supreme Court of Cassation dismissed the request for reconsideration of the judgment.[51] The State deemed the case concluded with this penalty, and offered the Madeira family US $50,000 in compensation, which they accepted.[52]

3.2. Possible attribution of the acts committed by the Terror Squad to the State

The obligation to respect the human rights listed in the American Convention can be violated through actions and omissions of State organs. The Inter-American Court has established that "a State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction" and "even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State", "its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals".[53] The case law of the Inter-American Court has established that it is possible, under certain circumstances, to attribute to the State the acts that

[45] Paragraph 15.
[46] Paragraph 14.
[47] See answer to Clarification Question 10.
[48] Paragraph 18.
[49] Paragraph 19.
[50] Paragraph 20.
[51] Paragraph 21.
[52] Paragraph 22.
[53] Corte IDH. Caso de la Masacre de Pueblo Bello Vs. Colombia. Sentencia de 31 de enero de 2006. Serie C No. 140, Para. 123.

have been carried out by private actors.[54]

In the *Paniagua Morales* v. *Guatemala* Case, the Court highlighted the following:

> 91. Unlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the authors of such violations.

In the *Mapiripán Massacre* v. *Colombia* Case, the Court specifically asserted:

> 110. In other words, the origin of the international responsibility of the State is found in "acts or omissions by any authorities or bodies of the State, whatever their hierarchical level, that violate the American Convention", and it is generated immediately with the internationally unlawful act attributed to the State. To establish that there has been an abridgment of the rights embodied in the Convention it is not necessary to establish, as would be the case in domestic criminal law, the guilt of its perpetrators or their intent, and it is also not necessary to individually identify the agents deemed responsible for said abridgments. It is enough to prove that there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention, or omissions that enabled these violations to take place.
> 111. Said international responsibility may also be generated by acts of private individuals not attributable in principle to the State. The States Party to the Convention have *erga omnes* obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons. The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these *erga omnes* obligations embodied in Articles 1(1) and 2 of the Convention.

Some teams might invoke the *2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts and its Commentary*,[55] which are also relevant for this discussion.

It is interesting to point out that, in her concurring opinion issued in relation to the judgment of the Inter-American Court in the *Case of González and others ("Cotton field") v. Mexico*, Judge Medina Quiroga underscored that there is a trend of international supervisory bodies "which have been establishing a tendency to attribute State responsibility for acts of torture committed by non-State agents", adding that the Court in the cited decision should have followed that trend, and marked "an important

[54] See BALLESTEROS MOYA, Vanessa, *Actores no estatales y responsabilidad internacional del Estado*, Barcelona, Bosch editor, 2016, pp. 268 ss. Also, Inter-American Commission on Human Rights, *Report on citizen security and human rights*, OEA/Ser.L/V/II. Doc. 57, 2009, para. 40.

[55] Text adopted by the International Law Commission at its fifty-third session (2001), and submitted to the UN General Assembly as a part of the Commission's report covering the work of that session (A/56/10).

development and provided clarification on an issue regarding which the Court should certainly continue to occupy itself."[56]

The Commission has recently issued reports in the matters of *Noel Emiro Omeara Carrascal and others* as well as *Victor Manuel Isaza Uribe* (both against Colombia), in which it identifies the need for the Court to further develop its case law on the issue of international responsibility of the State arising from collaboration between its agents and private actors.[57]

3.3. Enforced disappearance / ill treatment / torture

The Inter-American Court has examined the right to personal liberty (Art. 7 of the American Convention) in light of IHL, as it relates to the deprivation of liberty as one of the concurrent and constituent elements of forced disappearance.[58] In so doing, it has cited Rule 99 of the Study on Customary International Humanitarian Law, which indicates that: "(…) Arbitrary deprivation of liberty is prohibited." Accordingly, the Court has held that pursuant to the obligations imposed by international law—especially Article 27(1) of the American Convention—the prohibition against arbitrary detention or imprisonment may not be suspended during a NIAC[59] and is also applicable when an individual is detained for public safety reasons.[60]

In addition, based on Rule 117 of the Study on Customary International Humanitarian Law, the Court has specified that the States must "take all feasible measures to account for persons reported missing as a result of armed conflict," and provide their family members with any information it has on their fate, regardless of the circumstances surrounding the disappearance.[61] Based on the same provision, the Court has additionally found that withholding the truth from relatives of victims of forced disappearance in the context of a NIAC and impunity in the respective investigations constitute a violation of the right of victims' relatives to know the truth, in violation of the right to humane treatment.[62]

With respect to the right to life (Art. 4 of the American Convention), the Court has stressed that IHL does not preclude the applicability of that provision, "but rather strengthens the interpretation of the clause of the Convention that prohibits the arbitrary deprivation of life" due to events occurring in the context of and in connection with an armed conflict.[63] In addition, and as a complement to the right to humane treatment (Art. 5 of the American Convention), the Court has underscored the obligation of States involved in a NIAC to "(…) grant those persons who are not participating directly in the hostilities or who have been placed *hors de combat* for whatever reason, humane treatment, without any

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[56] Paragraph 20.

[57] See Report No. 40/15, Case 11.482 "Noel Emiro Omeara Carrascal, Manuel Guillermo Omeara Miraval, Héctor Álvarez Sánchez, et al." (available at: *https://www.oas.org/en/iachr/decisions/court/2016/11482FondoEn.docx*, and Report No. 25/15, Case 10.737 "Víctor Manuel Isaza Uribe and Family" (available at *https://www.oas.org/en/iachr/decisions/court/2016/10737FondoEn.pdf.* See also Press releases No. 055/16 and 101/16 announcing the filing of the cases with the Court.

[58] Case of Osorio Rivera and Family Members (cited), Para. 113.

[59] *Ibidem*, Para. 120.

[60] Corte IDH. Caso Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia) Vs. Colombia. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 14 de noviembre de 2014. Serie C No. 287, Para. 402.

[61] *Ibidem*, Para. 478.

[62] Corte IDH. Caso Gudiel Álvarez y otros ("Diario Militar") Vs. Guatemala. Fondo Reparaciones y Costas. Sentencia de 20 noviembre de 2012. Serie C No. 253, Paras. 295-302.

[63] Case of Cruz Sánchez *et al.*(cited), Para. 272.

unfavorable distinctions," in keeping with Common Article 3, given that IHL "prohibits [violations of the rights to life and humane treatment] […] at any place and time."[64]

Regarding torture and cruel, inhuman or degrading treatment or punishment, in its decision in *Espinosa González* vs *Peru*, the Court stated:

> 141. The Court has established that torture and cruel, inhuman or degrading treatment or punishment are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, states of emergency, or internal unrest or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes. Nowadays, this prohibition is part of international *jus cogens*. Both universal and regional treaties establish this prohibition and the non-derogable right not to be subjected to any form of torture. Also, numerous international instruments recognize this right and reiterate the same prohibition, including international humanitarian law.

In *Bueno Alves* v. *Argentina*, the Inter-American Court explained the requirements for declaring that torture has been committed, understanding that an act constitutes torture when the ill-treatment: (a) is intentional; (b) causes severe physical or mental suffering, and (c) is committed with a specific goal or purpose.[65] Thus, it can be said that what really distinguishes torture from other types of ill treatments, according to the explanation presented by the Court in the Case of *Bueno Alves*, is the severity of the physical or mental suffering.

In the "Cotton Field" case, the judges debated, based on Article 5(2) of the American Convention, the possibility of attributing violations of the physical, mental, and emotional integrity of individuals to the States, classifying them as "torture," when they are acts carried out by private individuals or persons not identified as public servants. According to the Inter-American Convention to Prevent and Punish Torture (to which Zircondia is a party), four elements are required to classify a series of acts as "torture": *i*) physical or mental pain or suffering; *ii*) intent; *iii*) purpose, and *iv*) participation of the State.

In this regard, the United Nations Committee Against Torture has stated:[66]

> 18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible

[64] Corte IDH. Caso Bámaca Velásquez Vs. Guatemala. Fondo. Sentencia de 25 de noviembre de 2000. Serie C No. 70, Para. 207.
[65] Corte IDH. Caso Bueno Alves Vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 11 de mayo de 2007. Serie C No. 164, Para. 79, and Caso Bayarri Vs. Argentina. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de octubre de 2008. Serie C No. 187, Para. 81.
[66] General comment no. 2, Doc. CAT/C/GC/2, 24 January 2008.

> under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. (…)

Also, a report issued by the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (at the time), stresses that:[67]

> 31. The central role of the State in article 1 of the Convention, which restricts the definition of torture to acts "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", has frequently been used to exclude violence against women outside direct State control from the scope of protection of CAT. However, the Special Rapporteur wishes to recall that the language used in article 1 of the Convention concerning consent and acquiescence by a public official clearly extends State obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals. (…)

With regards to the European Court of Human Rights, in its judgement concerning the case of *A.* v. *The United Kingdom*, it highlighted:[68]

> 22. (…) The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. (…)

It has to be noted that the use of suffocation by or under water has been recognized as an act of torture.[69]

Finally, it is important to underscore that, with respect to the obligation to investigate, prosecute, and, if appropriate, punish perpetrators of human rights violations (Art. 1(1), in relation to Arts. 8 and 25 of the American Convention), the Inter-American Court has made clear that the fact that victims died in the context of a NIAC does not exempt the State "from its obligation to open an investigation, (…) although the Court may take account of specific circumstances or limitations arising from the conflict situation when assessing the State's compliance with its obligations."[70]

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[67] Human Rights Council, "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development - Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak", Doc. A/HRC/7/3, 15 January 2008.
[68] European Court of Human Rights, Case of *A.* v. *The United Kingdom*, 100/1997/884/1096, Judgment of 23 September 1998.
[69] International Committee of the Red Cross, *Commentary on the First Geneva Convention*, Cambridge, Cambridge University Press, 2016, "Article 3", op. cit., Para. 638.
[70] Case of *Cruz Sánchez et al.*(cited), Para. 350.

3.4. Possible arguments submitted by the teams

3.4.1. Petitioner Arguments

- The responsibility for the acts of the Terror Squad can be attributed to the State, due to the fact it did not adopt diligently the necessary measures to protect the civilian population from such acts.[71]

- The acts Madeira and Reyes were subjected to between the moment they were deprived of their liberty and the death of the first and the escape of the second, amounted to torture. It could be argued that if the Court decides to find a violation of Article 5.2 of the American Convention, identifying it as "torture," the reparations ordered should be greater—both quantitatively and qualitatively—than those granted in the case of cruel, inhuman or degrading treatment; this would be in addition to the opprobrium of a finding of State responsibility in a case of this kind.

- In order to comply with what is provided in Article 4 of the American Convention, in relation to its Article 1(1), the State has a positive obligation to ensure the full and free exercise of all human rights by adopting all appropriate measures to protect and preserve the right to life of the individual subject to its jurisdiction.[72]

- There were rumors about detention sites where members of the Squad would keep kidnap victims while they waited for the ransom to be paid.[73] Based on these allegations, the State should have carried out a more thorough investigation.
- The 12-year sentence for Anaya: not a strong enough punishment.

3.4.2. State Arguments

- The teams defending the position of the State could argue that the evidence is not clear enough to establish that the State was aware or contributed to the crimes, and therefore, these are not attributable to the State (see the defense presented by Colombia in *Mapiripán*). According to the information available, is the "mutual support" occurring between the Terror Squad and the State at play in the case of the kidnapping and illegal detention of Madeira and Reyes?

- The exhaustion of domestic legal remedies was permitted for Madeira. At both levels of appeal, the judges reached the conclusion that the lower court judge had properly considered all relevant aspects of the case to determine the sentence imposed.[74]

- The criminal system worked well, and the State actions were effective, as Madeira's body was found and duly identified. The right to know of the family members was respected

- Twelve years is a median / average sentence according to national standards (and was

[71] Case of *Pueblo Bello* (cited), Para. 140
[72] Corte IDH. Caso de las Masacres de Ituango Vs. Colombia. Sentencia de 1 de julio de 2006. Serie C No. 148, Para. 130
[73] See answer to Clarification Question 73.
[74] See answer to Clarification Question 54.

confirmed by the appellate tribunal)

- 50.000 USD lump sum compensation was granted to the family in accordance with domestic law; it is sufficient and acceptable with reference to Inter-American system / international standards,

- The competent authorities, with the support of the Army, launched an exhaustive operation to find the kidnapped victims.[75] The State continued to investigate the facts even after Timoteo Anaya was convicted, with a view to finding other perpetrators.[76]

- The State has made specific and ongoing efforts to confront, to the extent possible, the threat that the Terror Squad poses to the private citizens who live in the region. The Army and the Police have concentrated on the protection of the population.[77]

4. The case of Reynaldo Restrepo

4.1. Brief summary of the facts

On November 19, 2006, at 3:00 a.m., a drone controlled and directed by staff members of a private security company attacked the Provincial Museum of San Hipólito, where the Army had knowledge (through intelligence reports that were not in the public domain at that point)[78] that the FNC was storing military material. The soldiers present in the area had announced, throughout the day, throughout the town, using megaphones, that the attack was imminent. Civilians heeded the warning, which explains why only two people died in the attack. It is not known specifically how the deceased individuals reacted when they found out that the attack was imminent.[79]

The attack destroyed much of the museum, killing two people who were in the building, including the museum's curator, Reynaldo Restrepo; spent ammunition, unexploded antipersonnel mines, and components of long weapons were found in the rubble.[80] The attack was planned and ordered by the Army.[81] The State has indicated that the Military Intelligence Services consider that Restrepo was a member of the FNC, and he was therefore a "legitimate target of attack".[82] There are photographs in which he appears on at least three different occasions with high-ranking leaders of the FNC, as well as reports from state agents who infiltrated the FNC, confirming that those meetings had taken place since at least July 2006.[83]

There is no evidence that indicates that the State had any knowledge that people were inside the Museum at the time of the attack.[84]

[75] See answer to Clarification Question 20.
[76] See answer to Clarification Question 4.
[77] See answer to Clarification Question 45.
[78] See answer to Clarification Question 63.
[79] See answer to Clarification Question 69.
[80] Paragraph 17.
[81] See answer to Clarification Question 1.
[82] Paragraph 42.
[83] See answer to Clarification Question 41.
[84] See answer to Clarification Question 17.

Three days after the attack, the Army conducted the expert work that made it possible to identify Restrepo's remains. It was not possible to determine the identity of the other person who died as a result of the attack.[85]

The main features of the drone, a "Hawk 11" as described in the manufacturer's catalog, are as follows: it is an aircraft equipped to fly at medium altitudes, at a cruising speed of 280 km/h, with up to 8 hours of autonomous flight, and the capacity to carry two BB-9 missiles that can be launched from a distance of up to six kilometers.[86]

No domestic legislation regulates the activities of private military and security companies in Zircondia.[87]

4.2. Use of drones[88]

According to IHL, drones are not expressly prohibited, nor are they considered to be inherently indiscriminate; the weapons launched by a drone are no different from weapons launched from manned aircraft such as helicopters or other combat aircraft. Of course, their use has to comply with international law norms.

Drones are not specifically mentioned in weapon treaties or other IHL instruments, but are subject to the rules of international humanitarian law when used as part of an armed conflict. This means among other things that, when using drones, parties to a conflict must always distinguish between combatants and civilians and between military objectives and civilian objects. They must take all feasible precautions in order to spare the civilian population and infrastructure. Another issue that can be considered has to do with the potential psychological impact of unmanned airplanes, and the level of stress induced by a repetitive use on the mental health of the populations in areas the drones fly over.

4.3. Legal Framework

A military objective is defined as an object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage at the moment the attack is launched. It is therefore not lawful to launch an attack which only offers potential or indeterminate advantages, and the party launching the attack must have sufficient intelligence information available to take this requirement into account. A military objective on a given day might not be one the following day, because of a change in circumstances.

The protection of cultural property is covered by a specific treaty, namely the 1954 Hague Convention on Cultural Property (supplemented by the 1999 Protocol). The Convention and the Protocol apply equally in international and non-international armed conflicts. Rule 10 of Study on Customary IHL is also applicable.

A cross-reading of Rules 38 ("Attacks Against Cultural Property") and 10 indicates that civilian objects

[85] See answer to Clarification Question 11.
[86] See answer to Clarification Question 46.
[87] See answer to Clarification Question 83.
[88] See generally, ICRC, Statement: "Ensuring the use of drones in accordance with international law"; available at: *https://www.icrc.org/en/document/ensuring-use-remotely-piloted-aircraft-or-armed-drones-counterterrorism-and-military*.

lose protection from attacks if they become military objectives, and for as long as they remain such objectives, since they are being used for military purposes or for military actions.
If such an object is to be attacked, the use of force should be preceded by a warning giving the opponent a reasonable amount of time to comply. Also, damage should be kept to the absolute minimum.

In the present case, if the Court was to consider that there is indeed a NIAC occurring in Filipolandia, it may wish to take into account the circumstances under which the attack was carried out, as it has done so in cases taking place during an armed conflict (e.g. the *Santo Domingo Massacre* Case). As mentioned in the first part of this document, the analysis could consider the principles of distinction (Rule 12 of the Study on Customary IHL), proportionality (Rule 14), and precaution (Rules 15-20), among other items.

4.4. Possible arguments submitted by the teams

4.4.1. Petitioner Arguments

- The attack destroyed a good part of the Museum – it may have been disproportionate (the information available does not allow us to know the extent of damages compared to the size of the museum). The question of the military advantage is also at play.

- It could be argued that the information provided in the Hypothetical Case and the answers to the Clarification Questions is insufficient to determine if Restrepo was really participating in the activities of the FNC, or if he was just a sympathizer of the movement.

- The investigation carried out after the attack may not have been sufficient in the case of this suspicious death.

4.4.2. State Arguments

- There is no legal argument barring the State from using drones on its territory, in furtherance of its legitimate objectives.

- In the present case, given that the Museum is a public structure, it could be inferred that in order to place weapons and ammunitions, there had to exist some kind of help from within (maybe the Curator).

- The weapons found in the rubble seem to indicate that the intelligence the Army possessed was indeed accurate.

- A warning of an impending attack was given (principle of precaution); Restrepo should not have been there.

- Some measures were undertaken after the attack to verify that the person killed was a member of the FNC,[89] and the presence of his body in the rubble must be taken as a confirmation that he was.

5. The case of Esteban Martínez

5.1. Brief summary of the facts

On January 5, 2007, a demonstration was held to protest against the Federal and Provincial Governments. The members of the Military assigned to supervise the march managed to identify Esteban Martinez, one of the leaders of "los Locos," in the midst of the demonstrators. His mobile phone was under surveillance, and it was known that he was close to launching an attack on government institutions. An operation to apprehend him was improvised at that time. To this end, the authorities used megaphones and loudspeakers to ask the demonstrators to disperse. However, that call was taken as a provocation, and the protests intensified and turned more violent.[90]

In order to face the situation, the State agents initially used tear gas, tanks equipped with water cannons, and rubber bullets. However, upon receiving a report that Martinez and other members of "los Locos" were armed ("highly credible" information),[91] and that he had taken the employees inside one of the buildings hostage (releasing them after half an hour) and fired shots at the soldiers, the order was given to shoot real bullets.[92]

The warrant to authorize the wiretapping of Esteban Martinez's mobile phone was requested from and issued by the National Security Court in October 2006, and was valid for one year.[93]

Esteban Martinez is captured, and is one of the 14 detainees named in the writ of *habeas corpus* filed on their behalf.[94] He decides to go on a hunger strike, together with other fellow inmates.[95] After 27 days, the authorities undertake to force feed them, using the method known as parenteral nutrition (intravenous feeding), which the medical team considered appropriate to address the inmates' situation at that time.[96] During the procedure, Esteban Martinez takes one of the doctors as a hostage,[97] and is killed as a result of the ensuing rescue operation.

Esteban Martinez is not brought before a judge before his death, as during declared states of emergency, Zircondian national law allows the authorities to have an extended period of 40 days to conduct certain proceedings.[98] The officer who shot and killed Esteban Martinez is discharged from

[89] GAGGIOLI, Gloria, "A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL", *Questions of International Law*, *Zoom-in* 36, 2017, p. 46; available at*: http://www.qil-qdi.org/*.
[90] Paragraphs 30-32.
[91] See answer to Clarification Question 56.
[92] Paragraph 33.
[93] See answer to Clarification Question 8.
[94] See answer to Clarification Question 12.
[95] See answer to Clarification Question 5.
[96] See answer to Clarification Question 6.
[97] See answer to Clarification Question 32.
[98] See answer to Clarification Question 21.

service, but the National Police has not pressed criminal charges against him, and there is no known explanation for this situation.[99]

Given the pressure from human rights defense organizations and from the governments of some neighboring States, the Federal Government has decided to create an Investigation Commission tasked with establishing the facts of what happened during the march and at the jail.[100]

5.2. Legal framework

5.2.1. During the demonstration

According to Basic Principles 9, 13 and 14 on the Use of Force (see above), in the dispersal of assemblies that are violent, law enforcement officials may use firearms only when less dangerous means are not practicable, and only to the minimum extent necessary. Only imminent threat of death or serious injury warrant the use of firearms. Principle 14 does not authorize indiscriminate firing into a violent crowd as a means of dispersing it. All precautions must be taken to avoid excessive use of force and endangering or injuring uninvolved persons, and the authorities must take all possible measures to minimize damage.

5.2.2. Conditions of detention

The teams will most likely address one or more of the following issues: Living space in the cell; access to fresh air; and forced feeding (see Part 5.3).

As a reference, the Inter-American Court has established the following:[101]

> (…) As it has previously held, this Court recognizes "the existence of the authority, and even obligation, of the State to 'guarantee its security and to maintain public order'." Nevertheless, the power of the State in this matter is not unlimited; the State must conduct its actions "within limits and according to procedures that preserve both public safety and the fundamental rights of the human person." Accordingly, the Court considers that the conduct of the State in matters of prison security and safety is subject to certain limits, such that "[d]iscipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life."

The teams are expected to invoke the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); the main rules applicable to the present case are the following:

> *Rule 12*
> 1. Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

[99] See answer to Clarification Question 27.
[100] Paragraph 40.
[101] Order of the Inter-American Court of Human Rights of July 7, 2004 - Provisional Measures regarding Brazil - Matter of *Urso Branco Prison*, Para. 12 of the Considerations.

> 2. Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.
>
> *Rule 15*
> The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
>
> *Rule 23*
> 1. Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
> 2. Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end, space, installations and equipment should be provided.

It would also be feasible for the competitors to cite other documents on the subject: the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*;[102] the *Basic Principles for the Treatment of Prisoners*;[103] and the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.*[104]

5.2.3. Hostage taking situation

As the Court has affirmed, hostage-taking is prohibited "at any time, in any place," according to Common Article 3 and Rule 96 of the Study on Customary International Humanitarian Law.[105]

With regard to the use of force in the instant case, it is particularly relevant to cite the following reasoning of the Inter-American Court:[106]

> 264. The American Convention does not establish a catalog of cases and/or circumstances under which a death resulting from the use of force can be considered justified as absolutely necessary under the circumstances of the specific case. Therefore, the Court has referred to the various international instruments on the subject and, in particular, to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and to the Code of Conduct for Law Enforcement Officials, to provide content to the obligations arising from Article 4 of the Convention. The Basic Principles on the Use of Force establish that, "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." Ultimately, the international standards and the case law of this Court have established that "State agents must distinguish between persons who, by their actions, constitute an imminent threat of

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102 UN General Assembly Resolution 43/173, 9 December 1988.
103 UN General Assembly Resolution 45/111, 14 December 1990, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.
104 Inter-American Commission on Human Rights. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008.
105 Case of *Cruz Sánchez* et al., Para. 269.
106 *Ibidem*, Para. 264.

> death or serious injury and persons who do not present such a threat, and use force only against the former."

It follows that the use of deadly force against Esteban Martínez should be examined in light of the Principles analyzed in the first section of this document.

5.3. POSSIBLE ARGUMENTS SUBMITTED BY THE TEAMS

5.3.1. Petitioner Arguments

During the protest:

- The members of Battalion 22 were young, thus possibly lacking the required experience to participate in a law enforcement / crowd control type situation.

- There probably was no warning that real bullets would be used.

During detention:

- It could be argued that the 40-day period granted by Zircondian law to State agents to carry out certain proceedings is unacceptable.

- Institutions such as the National Association for the Care and Resettlement of Offenders (based in the United Kingdom) advocate for a minimum floor space of 5.4 m² per detainee, regardless of whether he / she is alone in the cell or shares it with another person.[107]

- Esteban Martinez is deprived of any communication with the outside world, including his family, which could be construed as amounting to cruel, inhuman and degrading treatment.[108]

- The Tokyo Declaration, adopted by the World Medical Association, states: "Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially (…) The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner."[109]

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[107] CASALE, Silvia S. G., *Minimum Standards for Prison Establishments: A NACRO Report*, London, National Association for the Care and Resettlement of Offenders, 1984.

[108] Suarez Rosero decision, Para. 91

[109] WORLD MEDICAL ASSOCIATION, *WMA Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, Revised by the 67th WMA General Assembly, Taipei, Taiwan, October 2016, Para. 8; available at: *http://www.wma.net/en/30publications/10policies/c18/*. See also World Health Organization, *Prisons and Health*, WHO Europe, Copenhagen, 2014, pp. 13 ss.; available at: *www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf*. The position of the International Committee of the Red Cross on this matter closely corresponds to that of the World Medical Association: see "Hunger strikes in prison: The ICRC's position", available at: *https://www.icrc.org/en/document/hunger-strikes-prisons-icrc-position.*

After the death of Esteban Martinez:

- The internal investigation was not thorough enough and too prompt to reach its conclusions: It does not appear to have been discharged seriously and not as a mere formality.[110] In order to meet the criteria of effectiveness, such an investigation must be prompt, thorough, independent and impartial.[111]

- No criminal prosecution was initiated against the agent who used lethal force against Esteban Martínez.

- The Commission created by the State to investigate the events which occurred during the protest and the detention cannot be taken seriously.

5.3.2. State Arguments

During the protest:

- The members of Battalion 22 were young, but among the best of their class;

- Martinez took hostages, which justified the ensuing measures adopted by the State.

During detention:

- Each detainee has 4 m² of living space, which is consistent with the criterion adopted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[112] which also considers that the individual space allowed per inmate in a cell should be 4m². It can be added that, with regards to ICRC experience, the recommended minimum floor space per detainee in dormitories is 3.4 m².[113]

- The detainees are allowed to go out for two hours every day, which seems to comply with Mandela Rule 23 (although the Hypothetical Case does not specify if the detainees are allowed to exercise).

- With regards to the judicial guarantees of the detainees, the State was entitled to certain leeway, given the 40-day period afforded by Zircondian law to carry out certain procedures.

- The forced feeding of detainees cannot be considered illegal (the information provided in the Hypothetical Case does not indicate that the measure went against Zircondian law). Also, in *Nevmerzhitsky* v. *Ukraine* (2005), the European Court of Human Rights found that "a measure which is of therapeutic necessity from the point of view of established principles of medicine

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110 Corte IDH. Caso Blake Vs. Guatemala. Fondo. Sentencia de 24 de enero de 1998. Serie C No. 36, Para. 65.

111 GERVASONI, Luca, "A contextual-functional approach to investigations into right to life violations in armed conflict", *Questions of International Law*, *Zoom-in* 36, 2017, p. 10; available at: *http://www.qil-qdi.org/*.

112 Council of Europe, « Living space per prisoner in prison establishments: CPT standards", Doc. CPT/Inf (2015) 44, Par. 9; available at: *www.cpt.coe.int/en/working-documents/cpt-inf-2015-44-eng.pdf*.

113 ICRC, *Water, sanitation, hygiene and habitat in prisons*, 2013, p. 18; available at: *https://shop.icrc.org/eau-assainissement-hygiene-et-habitat-dans-les-prisons-458.html*.

cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food".[114] This holding was reiterated by the same Tribunal several years later in *Rappaz* v. *Switzerland* (2013).

- A doctor is taken as hostage, which justifies the use of lethal force.

- The medical team that performed the forced feeding operation had been sent from the Army and therefore had basic training to act in combat situations. Furthermore, the tactical team on duty conducted a few drills in scenarios that replicated the jail as closely as possible.[115] In its judgement in *Cruz Sánchez*, the Court took into account similar efforts aimed at protecting the lives of hostages.[116]

After the death of Esteban Martinez

- An internal investigation is carried out, and a policeman is dismissed.

- A Commission is created by the State to investigate the circumstances surrounding the events which took place during the protest and during the detention, which can be seen as a token of its good faith.

[114] European Court of Human Rights, Case of *Nevmerzhitsky* vs. *Ucraine*, Judgment of 5 April 2005, Para. 94.
[115] See answer to Clarification Question 43.
[116] Para. 284.

BIBLIOGRAPHY

ARNOLD, Roberta & QUENIVET, Noelle, *International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law*, Leiden, Brill Publishers, 2008.

BALLESTEROS MOYA, Vanessa, *Actores no estatales y responsabilidad internacional del Estado*, Barcelona, Bosch editor, 2016.

BURGORGUE-LARSEN, Laurence & ÚBEDA DE TORRES, Amaya, ""War" in the Jurisprudence of the Inter-American Court of Human Rights", *Human Rights Quarterly*, Vol. 33, 2011.

DOSWALD-BECK, Louise, "The right to life in armed conflict: does international humanitarian law provide all the answers?", *IRRC*, Vol. 88, No. 864, December 2006.

GAGGIOLI, Gloria, "A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL", *Questions of International Law*, *Zoom-in 36, 2017;* available at: *http://www.qil-qdi.org/*.

GASSER, Hans-Peter, "International Humanitarian Law: an Introduction", in HAUG, H. (Ed.), *Humanity for All: the International Red Cross and Red Crescent Movement*, Paul Haupt Publishers, Berne, 1993.

GERVASONI, Luca, "A contextual-functional approach to investigations into right to life violations in armed conflict", *Questions of International Law*, *Zoom-in 36, 2017,* available at*: http://www.qil-qdi.org/*.

GIRALDO MUÑOZ, Marcela, *Criterios de la Corte Interamericana sobre la interpretación de los derechos humanos a la luz del derecho internacional humanitario*, Ciudad de México, Comision nacional de los derechos humanos, 2016; available en: *appweb.cndh.org.mx/biblioteca/archivos/pdfs/fas-CSIDH-Criterios-CIDH.pdf.*

GOWLLAND-DEBBAS, Vera & GAGGIOLI, Gloria, "The Relationship between International Human Rights and Humanitarian Law: An Overview", in KOLB, Robert & GAGGIOLI, Gloria, *Research Handbook on Human Rights and Humanitarian Law*, Northampton, Edward Elgar Publishing, 2013.

HATHAWAY, Oona A., "Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law", *Minnesota Law Review*, Vol. 96, 2012.

HEINTZE Hans-Joachim, "Theories on the Relationship between International Humanitarian Law and Human Rights Law", in KOLB, Robert & GAGGIOLI, Gloria, *Research Handbook on Human Rights and Humanitarian Law*, Northampton, Edward Elgar Publishing, 2013.

HENCKAERTS, Jean-Marie & DOSWALD-BECK, Louise, *Customary International Humanitarian Law – Vol I: Rules*, ICRC – Cambridge University Press, Geneva; available at: *https://www.icrc.org/spa/resources/documents/publication/pcustom.htm.*

IBÁÑEZ RIVAS, Juana María, "El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos", *Revista Derecho del Estado*, núm. 36, January-June 2016.

MELZER, Nils, *International humanitarian law - a comprehensive introduction*, Geneva, ICRC, 2016; available at: *https://www.icrc.org/en/publication/4231-international-humanitarian-law-comprehensive-introduction.*

MURRAY, Daragh, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford, Oxford University Press, 2017.

OBERLEITNER, Gerd, *Human rights in armed conflict – Law, practice, policy*, Cambridge, Cambridge University Press, 2015.

OLIVER, Dawn & FEDTKE, Jorg (Ed.), *Human Rights and the Private Sphere – A Comparative Study*, London, Routledge, 2007.

ORAKHELASHVILI, Alexander, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", *EJIL*, Vol. 19, Núm.1, 2008, p. 162.

QUÉNIVET, Noëlle, "Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict", in JINKS, Derek *et al.* (Eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, The Hague, Asser Press, 2014.

SALMON, Elizabeth, "Institutional Approach between IHL and IHLR – Current Trends in the Jurisprudence of the Inter-American Court of Human Rights", *Journal of International Humanitarian Legal Studies*, Vol. 5, 2014.

------, *Introducción al derecho internacional humanitario*, 3rd ed., CICR-PUCP, 2012; available at: *http://idehpucp.pucp.edu.pe/wp-content/uploads/2012/10/Introducci%C3%B3n-al-Derecho-Internacional-Humanitario-2012-3.pdf.*

SASSOLI, Marco *et al.*, *How does law protect in war? - Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Volume I "Outline of International Humanitarian Law", 3rd ed., ICRC, Geneva, 2012; available at: *https://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf.*

SCHINDLER, Dietrich, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*", RCADI*, Vol. 163, 1979-II.

STEINER, Christian & URIBE, Patricia (Eds.), *Convención Americana sobre derechos humanos – Comentario*, Konrad Adenauer Stiftung, 2014; available at: http://www.kas.de/rspla/es/publications/38682/.

TABAK, Shana, "Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals", *Michigan Journal of International Law*, Vol. 37, No. 4, 2016.

TIGROUDJA, Hélène, "The Inter-American Court of Human Rights and International Humanitarian Law", in KOLB, Robert & GAGGIOLI, *Research Handbook on Human Rights and Humanitarian Law*, Northampton, Edward Elgar Publishing, 2013.

ZEGVELD, Liesbeth, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case", *International Review of the Red Cross*, No. 324, 1998.

INTERNATIONAL ORGANISATIONS

CASALE, Silvia S. G., *Minimum Standards for Prison Establishments: A NACRO Report*, London, National Association for the Care and Resettlement of Offenders, 1984.

Council of Europe, "Living space per prisoner in prison establishments: CPT standards", Doc. CPT/Inf (2015) 44, Par. 9; available at: *www.cpt.coe.int/en/working-documents/cpt-inf-2015-44-eng.pdf.*

Human Rights Council, "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development - Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak", Doc. A/HRC/7/3, 15 January 2008.

ICRC Opinion Paper, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?", March 2008; available at: *http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm.*

ICRC, *Violence and the use of force*, Geneva, 2011; available at: *https://www.icrc.org/eng/assets/files/other/icrc_002_0943.pdf.*

ICRC, *The use of force in armed conflicts: interplay between the conduct of hostilities and law enforcement paradigms – Report of an expert meeting*, Geneva, 2013; available at: *https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf.*

ICRC, *Summary of the Geneva Conventions of 12 august 1949 and their Additional Protocols*, available at: *https://www.icrc.org/eng/assets/files/publications/icrc-002-0368.pdf*

International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987; available at: *www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.*

ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,* Geneva, October 2011; available at: *https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf*

International Committee of the Red Cross, *Commentary on the First Geneva Convention*, Cambridge, Cambridge University Press, 2016, "Article 3"; available at: *https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument.*

ICRC, *Water, sanitation, hygiene and habitat in prisons*, 2013, p. 18, available at *https://shop.icrc.org/eau-assainissement-hygiene-et-habitat-dans-les-prisons-458.html*

ICRC, "Hunger strikes in prison: The ICRC's position", available at: *https://www.icrc.org/en/document/hunger-strikes-prisons-icrc-position.*

Inter-American Commission on Human Rights, *Report on citizen security and human rights*, OEA/Ser.L/V/II. Doc. 57, 2009.

International Law Commission, "2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts and its commentary", Text adopted by the International Law Commission at its fifty-third session (2001), and submitted to the UN General Assembly as a part of the Commission's report covering the work of that session (A/56/10).

UNGA, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", Resolution 60/147 of 16 December 2005.

UNHCHR, *International legal protection of human rights in armed conflict*, New York, 2011.

World Health Organization, *Prisons and Health*, WHO Europe, Copenhagen, 2014; available at: *www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf.*

World Medical Association, *WMA Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, Revised by the 67th WMA General Assembly, Taipei, Taiwan, October 2016; available at: *http://www.wma.net/en/30publications/10policies/c18/*.

CASE LAW

Corte IDH. Caso *Bámaca Velásquez* v. *Guatemala*. Fondo. Sentencia de 25 de noviembre de 2000. Serie C No. 70.

Corte IDH. Caso *Blake* v. *Guatemala*. Fondo. Sentencia de 24 de enero de 1998. Serie C No. 36.

Corte IDH. Caso *Bayarri* v. *Argentina*. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de octubre de 2008. Serie C No. 187.

Corte IDH. Caso *Bueno Alves* v. *Argentina*. Fondo, Reparaciones y Costas. Sentencia de 11 de mayo de 2007. Serie C No. 164.

Corte IDH. Caso *Cruz Sánchez y otros* v. *Perú*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 17 de abril de 2015. Serie C No. 292.

Corte IDH. Caso *González y otras ("Campo Algodonero")* v. *México*. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 16 de noviembre de 2009. Serie C No. 205.

Corte IDH. Caso *Gudiel Álvarez y otros ("Diario Militar")* v. *Guatemala*. Fondo Reparaciones y Costas. Sentencia de 20 noviembre de 2012. Serie C No. 253.

Corte IDH. Caso Las Palmeras Vs. Colombia. Excepciones Preliminares. Sentencia de 4 de febrero de 2000. Serie C No. 67.

Corte IDH. Caso de la *"Masacre de Mapiripán"* v. *Colombia*. Sentencia de 15 de septiembre de 2005. Serie C No. 134.

Corte IDH. Caso de la *Masacre de Pueblo Bello* v. *Colombia*. Sentencia de 31 de enero de 2006. Serie C No. 140.

Corte IDH. Caso de las *Masacres de Ituango* v. *Colombia*. Sentencia de 1 de julio de 2006. Serie C No. 148.

Corte IDH. Caso *Osorio Rivera y familiares* v. *Perú*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 26 de noviembre de 2013. Serie C No. 274.

Corte IDH. Caso *Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia)* v. *Colombia*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 14 de noviembre de 2014. Serie C No. 287.

Corte IDH. Caso *Suárez Rosero* v. *Ecuador*. Fondo. Sentencia de 12 de noviembre de 1997. Serie C No. 35.

ECtHR, Case of *Nevmerzhitsky* v. *Ucraine*, Judgment of 5 April 2005.

ECtHR, Case of *A.* v. *The United Kingdom*, 100/1997/884/1096, Judgment of 23 September 1998.

ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J., 8 July 1996.

ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C J., 9 Jul. 2004.

ICJ, *Democratic Republic of the Congo* v. *Uganda* , 2005 I.C.J., 19 Dec. 2005.

ICTY, *Prosecutor* v. *Boskoski*, IT-04-82-T, Judgement, 10 July 2008

ICTY, *Prosecutor* v. *Haradinaj*, IT-04-84-T, Judgement, 3 April 2008

ICTY, *Prosecutor* v. *Kunarac*, IT-96-23-T, Judgment of 22 February 2001.

ICTY, *Prosecutor* v. *Limaj*, IT-03-66-T, Judgement, 30 November 2005

ICTY, *Prosecutor* v. *Ljube Boskoski et al.*, IT-04-82-T, Judgement, 10 July 2008.

ICTY, *Prosecutor* v. *Tadic*, IT-94-1-T, Judgement, 7 May 1997