
IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

RICARDO MADEIRA et al

Petitioners

v.

THE REPUBLIC OF ZIRCONDIA

Respondent

MEMORIAL FOR THE STATE

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS.....1

II. TABLE OF AUTHORITIES2

III. STATEMENT OF FACTS7

IV. LEGAL ANALYSIS.....12

A. ADMISSIBILITY12

Statement of Jurisdiction12

B. MERITS12

An Armed Conflict has arisen in Zircondia.....12

Relevant Law to apply in situations of armed conflict before IACtHR18

Article 4- Right to Life20

Article 5 The Right to Humane Treatment.....33

Article 7 Right to Personal Liberty.....36

V. PRAYER FOR RELIEF.....41

II. TABLE OF AUTHORITIES

Books and Articles

A.P.V, Rogers, <i>Law on the Battlefield</i> , 2 nd ed. (Huntington, NY:Juris, 2004).....	27
Brian Farrell, 'The Right To Habeas Corpus In The Inter-American Human Rights System' [2017] 33(2) Suffolk Transitional Law Review.....	42, 43
D Cassel, " <i>The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights</i> ," in M. Bossuyt, P. Lemmens, K. De Feyter, and S. Parmentier, eds., <i>Out of the Ashes: Reparations for Gross Violations of Human Rights</i> (2006)	40
Goldman, <i>International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts</i> , 9 AM. U. J. INT'L L. & POL'Y 49, 62-72 (1983)	36
I/A Court H.R., 2010 Annual Report of the Inter-American Court of Human Rights. OAS. San José, Costa Rica	41
Ian Brownlie, <i>System of the Law of Nations: State Responsibility, Part I</i> (Oxford, Clarendon Press, 1983).....	23
ICRC, <i>Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law</i> , May 2009, available at: http://www.refworld.org/docid/4a670dec2.html [accessed 27th March 2017]	27
Inter-American Commission on Human Rights, 'REPORT ON TERRORISM AND HUMAN RIGHTS' [2002] (OEA/SerL/V/II116 Doc 5 rev 1 corr).....	20, 38
International Committee of the Red Cross (ICRC) Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' [2008]	

<<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 27th March 2017 16

Jean-Marie Henckaerts, *International Review of the Red Cross New Rules for the Protection of Cultural Property in Armed Conflict* , No. 835 30th Septmeber 1999 28

Joint Report of the Special Rapporteur for Torture, Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Bacre Waly Ndiaye, submitted in compliance with resolutions 1994/37 and 1994/82 of the Commission on Human Rights of the United Nations Economic and Social Council. Visit to the Republic of Colombia of the Special Rapporteurs from October 17 to 26, 1994, E/CN.4/1995/111 of January 16, 1995 22

R. Jennings, A. Watts (eds,) *Oppenheim’s International Law*. 9th ed. Vol. 1. Harlow: Longman 1996..... 23, 35

Sylvain Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' [2009] 91(873) *International Review of the Red Cross* 14

The International Committee Of The Red Cross, 'The International Committee of the Red Cross’s (ICRC’s) role in situations of violence below the threshold of armed conflict- Policy Document' [2014] 96(893) *International Review of the Red Cross* 18

UK Ministry of Defence, “*The Manual of the Law of Armed Conflict*” (Oxford: Oxford University Press, 2004), Section 2.2 (Military Necessity). The modern application of the nomenclature of ‘military necessity’ has been greatly influenced by and fashioned after the definition at Art. 14 of the "Lieber Code" 31

Cases

Case Concerning United States Diplomatic and Consular Staff in Thran ‘Teheran Hostages Case’ (United State of America v Iran) [1980] ICJ Reports 3 24

ECtHR, *Case of Ahmet Özkan and Others v. Turkey*, Application No. 21689/93, 6 April 2004. 32

ECtHR, *Case of Andronicou and Constantinou v. Cyprus*, Application No. 86/1996/705/897), 9 October 1997..... 30

ECtHR, *Case of Hugh Jordan v United Kingdom*, Application No. 24746/94, 4 May 2001 32

Haradinaj Case (Judgment) ICTY IT-04-84bis-T (29 November 2012)..... 13, 16

I/A Court H.R., *Case of Anzualdo Castro v. Peru* (Preliminary Objection, Merits, Reparations and Costs), Judgment of September 22, 2009, Series C No. 202 21

I/A Court H.R., *Case of Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of September 15, 2005, Series C No. 134 19, 20

I/A Court H.R., *Case of Santo Domingo Massacre v. Colombia*, (Preliminary Objections, Merits and Reparations, Judgment of November 30, 2012, Series C No.259..... 20

I/A Court H.R., *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, Judgment of November 19, 1999, Series C No 63 21

I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.)*.(Preliminary Objections, Merits, Reparations and Costs). Judgment of November 24, 2006. Series C No. 158 41

I/A Court H.R., *Case of the Pueblo Bello Massacre* (Merits, Reparations and Costs) Judgment of the January 31, 2006, Series C No. 140..... 21, 22

I/A Court H.R., *Case of Vélasquez Rodríguez v. Honduras* (Merits) Judgment of July 29, 1998, Series C No. 4 22, 38, 39, 40

I/A Court H.R., *Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*, *Advisory Opinion OC-8/87*, Judgment of January 30, 1987, Ser. A No. 8 43

I/A Court H.R., *the Case of Godínez Cruz* (Merits) January 20, 1989, Series C No. 5..... 33

I/A Court H.R., *the Case of Neira Alegria et al.* (Merits) Judgment of January 19, 1995 Series C No. 20..... 33

I/A Court H.R., *the Case of Sawhoyam* (Merits, Reparations and Costs) Judgment of March 29, 2006, Series C No. 146 30

I/A Court H.r., *the Case of Vargas Areco* (Merits, Reparations and Costs) Judgment of September 26, 2006, Series C No. 155 32

I/A/ Court H.R., *the Case of the Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs) Judgment November 25, 2006 Series C No 160..... 33

I/A/ Court H.R., *the Case of Ximenes Lopes* (Merits, Reparations and Costs) Judgment July, 4 2006, Series C No. 149 32

IACHR, *Case of Bámaca Velásquez v. Guatemala* (Merits) Inter-Am. C.H.R, Series C No. 70, 2000..... 19

IACHR, *Case of Las Palmeras v. Colombia* (Preliminary Objections), IACHR, 2000, Series C No 67..... 19

IACHR, *Report No. 55/97, Case 11.137 Juan Carlos Abella v Argentina*, OEA/Ser.L/V/II.95, doc 7 rev 18, 32

Israel Medical Association et. al. v. Knesset et. al Case HCJ 5304/15 (September 11, 2016) 36

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Reports 136 20

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] I.C.J. Reports 1996..... 20, 21

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), (Merits),
[1986] ICJ Rep. 4..... 24

Prosecutor v Boškoski (Trial Judgment) ICTY IT-04-82-T (10 July 2008),..... 16, 17

Prosecutor v Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal) ICTY IT-
94-1-AR72 (2 October 1995)..... 13, 14, 15, 16

Shimoda case (Compensation claim against Japan), Tokyo District Court, The Japanese Annual
of International Law, Vol. 8, 1964, p. 231. (7 December 1963)..... 27

III. STATEMENT OF FACTS

The State of Zircondia has been a relatively peaceful, economically viable and stable democracy for 113 years.¹ when in 1960 tranquillity was disturbed due to global changes concerning raw materials and the emergence of a dominant economic and political class.² In this context, Luis Román formed the political party ‘Alternative for Zircondia’ and subsequently became President in 1998,³ serving two terms.⁴ Under Román’s tenure the monist State ratified: the American Convention on Human Rights (1999); the two Additional Protocols of 1977 to the Geneva Convention (2001); the Inter-American Convention to Prevent and Punish Torture (2002) and has recognized the Inter-American Court of Human Rights’ jurisdiction (2002). The UN and OAS member State has also ascribed to the four Geneva Conventions (1981) and the Convention for the protection of Cultural Property in the event of Armed Conflict (1981).⁵

Birth of the ‘Front for a New Beginning’

In February, 2006, armed rebellion emerged in the southern province of Filipolandia led by Orlando Monteverde with economic aspirations which became political with the creation of the ‘Front for a New Beginning’(FNC) advocating for unilateral succession⁶ of the richest Zircondian region.⁷ By May, Monteverde garnered an armed force of over 3,000, receiving routine firearms and war tactics training and controlled 70% of Zircondia.⁸ Confrontations

¹ Hypothetical, para 1, 3

² Hypothetical, para 3

³ Hypothetical, para 4

⁴ Hypothetical, para 6

⁵ Hypothetical, para 9

⁶ Hypothetical, para 10

⁷ Hypothetical, para 7

⁸ Hypothetical, para 11

protracted over six months.⁹ A system of high-powered weaponry supply to the FNC and foreign interference in support of FNC by the southern neighbouring Rosetta were revealed.¹⁰ Whilst support was mainly financial,¹¹ Rosetta's tankers also penetrated Zircondia and it was believed that Monteverde intended to annex Filipolandia to Rosetta.¹²

Emergence of the 'Terror Squad'

Simultaneously, a criminal enterprise called the 'Terror Squad' emerged, 'extorting merchants, kidnapping business people and members of wealthy families'.¹³ The State made specific and ongoing efforts to confront, the threat posed to private citizens.¹⁴ In September, 2006, they apprehended company workers Ricardo Madeira and Milena Reyes, held them incommunicado in a clandestine jail and chained, recorded, intensely interrogated and sub-humanely fed and tortured them.¹⁵ Company officials were cognizant of the kidnappings the following day but did not alert State officials until three days later after failed attempts via intermediary; in response the state launched an exhaustive operation.¹⁶ Reyes escaped and reported beliefs of Madeira's demise and on 11th October Madeira's brother filed formal complaints¹⁷ resulting in an immediate investigation culminating in the investigating judge travelling to where Reyes' escaped¹⁸ and anonymous letters were taken seriously leading to the exhumation and DNA analysis of a mass grave confirming Madeira's cause of death.¹⁹

⁹ Hypothetical, para 13

¹⁰ Hypothetical, para 12

¹¹ Clarification Questions & Answers 34

¹² Hypothetical, para 12

¹³ Clarification Questions & Answers 77

¹⁴ Clarification Questions & Answers 45

¹⁵ Hypothetical, para 15

¹⁶ Clarification Questions & Answers 20

¹⁷ Hypothetical, para 18

¹⁸ Hypothetical, para 19

¹⁹ Hypothetical, para 20

Subsequently, Timoteo Anaya was convicted and sentenced.²⁰ Zircondia also compensated Madeira's family \$50,000.00²¹ and continued investigations subsequent to conviction.²²

Drone Attack at Hipolito

On November 19, 2006, Zircondian officials contracted a security firm to attack a museum in central Filipolandia, where the army had specific intelligence that the FNC stored military material. State officials took exhaustive precautions to protect life as soldiers announced the imminent attack using megaphones the entire day. A portion of the museum was destroyed and two persons were killed inclusive of the curator, Reynaldo Restrepo.²³ On the 22nd, the army conducted expert analysis to identify Restrepo but it was impossible for the other casualty.

Gang Warfare: Los Locos & Los Duros

Serena is one of the most violent regions in the world.²⁴ Since 2001, two gangs ("Los Locos" and "Los Duros") have been engaging in confrontations with each other and with the authorities, leading the provincial Minister of the Interior to state that the safety and protection of large segments of the population is in jeopardy.²⁵ There have been several confrontations per week between 2001 and 2006 resulting in 42,562 deaths recorded including 3,238 members of the National Police and the Army, which has been called in to provide support in maintaining public order.²⁶ The gangs are generally well-organized, with a national leader and various local leaders, all of whom can impose general disciplinary rules that the members must respect.²⁷ Both gangs take part in a variety of relatively complex criminal activities. They also have a substantial

²⁰ Hypothetical, para 21

²¹ Hypothetical, para 22

²² Clarification Questions & Answers 4

²³ Hypothetical, para 17

²⁴ Hypothetical, para 24

²⁵ Hypothetical, para 25

²⁶ Hypothetical, para 26

²⁷ Hypothetical, para 27

arsenal including weaponry restricted to use by State armed forces, as well as explosives and hand grenades.²⁸

March and Detainment of Esteban Martínez

On January 5, 2007, a march was held that was organized by peasant farmers, parents, and opposition parties.²⁹ During the march a soldier identified Esteban Martínez, one of the leaders of “los Locos,” it was known that he was close to launching an attack on government institutions.³⁰ An operation to apprehend him was improvised at that time, authorities used megaphones and loudspeakers to ask the demonstrators to disperse. However, that call was taken as a provocation, and the protest intensified turning more violent. Around 70 participants managed to enter government buildings, and severely beat some public servants and later, three government vehicles were set on fire. Martínez was a participant, and tried to blend into the crowd to avoid capture.³¹ Upon receiving a highly credible³² report that Martínez and other members of “Los Locos” were armed, had taken employees inside one of the buildings hostage, fired shots at soldiers, the order was given to shoot real bullets.³³ Ultimately, the federal Minister of the Interior stated that 12 people were killed and 14 injured.³⁴ 22 individuals who were arrested, including Esteban Martínez, were taken to a maximum security jail, due to the danger they were believed to present to society.³⁵

Six inmates went on a hunger strike and the Warden sent a document to the Office of the Special Human Rights Prosecutor, requesting the intervention of the National Police in order to

²⁸ Hypothetical, para 29

²⁹ Hypothetical, para 30

³⁰ Hypothetical, para 31

³¹ Hypothetical, para 32

³² Clarification Questions & Answers 51

³³ Hypothetical, para 33

³⁴ Hypothetical, para 34

³⁵ Hypothetical, para 35

guarantee the safety of a medical team that was going to force-feed the hunger strikers³⁶ using means which the medical team considered appropriate.³⁷ At the end of the force-feeding procedure, a doctor was taken hostage by an inmate who had been concealing a bladed weapon. After more than five hours of negotiating, the Warden authorized an operation by a tactical team that resulted in the doctor's rescue and in the death of three inmates, including Esteban Martínez. Relatives of the deceased inmates were notified by letter of the deaths.³⁸ Subsequently, the officer who shot and killed Martinez was discharged from service.³⁹ On March 4 an Investigation Commission tasked with establishing the facts of what happened during the march and at the jail was created.⁴⁰

Zircondia has objected to the petitions filed before the Inter-American Commission with respect to the Petitioners, by explaining that if the case were to be submitted to the Inter-American Court, it would detail its arguments at that time and its position would prevail. In the specific case of Reynaldo Restrepo, it indicated that the Military Intelligence Services had him fully identified as a member of the FNC, and he was therefore a "legitimate target of attack."⁴¹

The Inter-American Commission, deemed the case admissible, and found violations of Articles 4, 5, and 7 of the American Convention, all in relation to Article 1.1 thereof, to the detriment of Ricardo Madeira, Milena Reyes, Reynaldo Restrepo, and Esteban Martínez and asked the State to implement its recommendations.⁴² The State completely disagrees with this report and as a result the matter comes before this Honourable Court for adjudication.

³⁶ Hypothetical, para 37

³⁷ Clarification Questions & Answers 6

³⁸ Hypothetical, para 38

³⁹ Hypothetical, para 39

⁴⁰ Hypothetical, para 40

⁴¹ Hypothetical, para 42

⁴² Hypothetical, para 43

IV. LEGAL ANALYSIS

A. ADMISSIBILITY

Statement of Jurisdiction

The Republic of Zircondia (hereinafter “The State” or “Zircondia”) ratified the American Convention on Human Rights (hereinafter “The Convention” or “ACHR”) in 1999 and accepted the contentious jurisdiction of the Inter-American Court (hereinafter “the Court” or “IACtHR”) since 2002.⁴³ The State being dissatisfied with the merits report of the Inter- American Commission on Human Rights⁴⁴ (hereinafter “ IACHR” or the “the Commission”) referred the matter to the Court for adjudication.⁴⁵ All facts being disputed have occurred after the date of ratification. Therefore, under Article 62(3) of the ACHR the Court has jurisdiction to hear this case.

B. MERITS

An Armed Conflict has arisen in Zircondia

Armed conflict persists whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁴⁶

In *Haradinaj*, it was affirmed that the criterion of protracted armed violence is to be interpreted

⁴³ Hypothetical, para 9

⁴⁴ Hypothetical, para 42

⁴⁵ Hypothetical, para 44

⁴⁶ Common Article 3, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC-IV); *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal) ICTY IT-94-1-AR72 (2 October 1995),70

as referring more to the intensity of the armed violence than to its duration.⁴⁷ Additionally, armed groups involved ought to have a minimum degree of organization. The factors relied upon when assessing intensity include: “the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.” Regarding degree of organization contemplated, indicative factors include: i) the existence of a command structure and disciplinary rules and mechanisms within the group; ii) the existence of a headquarters; factum of control over certain territory; the ability of the group to access weaponry, other military equipment, recruits and military training; “iii) its ability to plan, coordinate and carry out military operations, including troop movements and logistics; iv) its ability to define a unified military strategy and use military tactics; v) and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.”⁴⁸

The Conflict with FNC is of an international nature

Article 2 (1) of the 1949 Geneva Convention applies ‘to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.’ This is inclusive of ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’.⁴⁹ Such situations manifest through

⁴⁷ *Haradinaj Case* (Judgment) ICTY IT-04-84bis-T (29 November 2012), para.392-395

⁴⁸ *Haradinaj Case (supra)* para.392-395

⁴⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, Entered into force 7 December 1978) 1125 UNTS 3, Art. 1(4).

direct conflict or by intervention in a situation previously of an internal nature.⁵⁰ International tribunals have stated that internal conflict may become international or in peculiar circumstances may co-existentially be both if (i) ‘another State intervenes in that conflict through its troops, or ‘some of the participants in the internal armed conflict act on behalf of that other State.’⁵¹ Pursuant to international law, it is unnecessary for the intervener to plan all operations of its dependent units, select targets, or issue particular instructions regarding military operations and any alleged breaches of international humanitarian law.⁵² However, courts have notably departed from the strict application of the concept of effective control per Nicaragua.⁵³

The control contemplated may be founded where a State has a role ‘organising, coordinating or planning military action, in addition to financing, training and equipping or providing operational support’. A fortiori, the actions of the group or its members may consequently be regarded as acts of the controlling State regardless if any instructions were meted out pertaining to each act.⁵⁴ It is further submitted that where there exists geographical contiguity between the State exerting control and there are territorial enlargement motivations on the State in which conflict exists, it is easier to substantiate the threshold.⁵⁵

While the establishment of the ‘Front for a New Beginning’ was out of the desire for self-determination⁵⁶ the situation transformed into an international armed conflict due to the foreign support of the FNC by the State of Rosetta as a sophisticated supply network of ammunition was

⁵⁰ Sylvain Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' [2009] 91(873) International Review of the Red Cross 69-94, 71

⁵¹ *Prosecutor v. Tadic*, (ICTY) Case No. IT-94- 1-A, Judgment (Appeals Chamber), 15 July 1999, para 84

⁵² *Prosecutor v. Tadic* (*supra*), 137

⁵³ *Prosecutor v. Tadic* (*supra*), 125

⁵⁴ *Prosecutor v. Tadic* (*supra*), 125

⁵⁵ *Prosecutor v. Tadic* (*supra*), 140

⁵⁶ Hypothetical para 10

revealed over the border.⁵⁷ Although it may be argued that Rosetta's involvement is mainly fiscal through means of discounted weaponry sales with preferential payment plans, battalions of Rosetta's army manoeuvring in military equipped tanks have also been observed penetrating the sovereign territory of Zircondia⁵⁸ thus transforming the nature of involvement. This transformed involvement is further compounded and solidifies the international nature of the conflict due to the aspirations of the possibility of the annexation of Filipolandia to Rosetta,⁵⁹ a region of immense oil reserves and an expanse of 70% of Zircondia of which FNC forces have consolidated its rebellious control.⁶⁰ Thus, the rules of International humanitarian law find applicability to this situation.

The conflict involving Los Locos v Los Duros is of a Non-International Armed nature

There exist a NIAC "whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"⁶¹ The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show minimum organization.⁶² Two instruments should be employed in the analysis of the notion of NIAC: Common article 3 of the 1949 Geneva Conventions and article 1 of the 1977 Additional Protocol II to the 1949 Geneva Conventions.

The applicable dual-pronged test to the existence of an armed conflict for Common Article 3 of the Geneva Convention is: i) 'intensity' and ii) 'the organization of the parties to the

⁵⁷ Hypothetical, para 12

⁵⁸ Clarification Questions & Answers 34

⁵⁹ Clarification Questions & Answers 26

⁶⁰ Hypothetical, para 11

⁶¹ *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal) ICTY IT-94-1-AR72 (2 October 1995),70

⁶² International Committee of the Red Cross (ICRC) Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' [2008] <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 27th March 2017

conflict.’⁶³ This test is now considered to be reflective of customary international law. These criteria are to be employed in circumstances of armed conflict of a non-international nature as well as situations of a mixed character as a minimum for the demarcation of armed conflict from ‘banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.’⁶⁴ Relevant determinants for duration and organization include (1) the existence of a command structure; (2) an ability to carry out operations in an organized manner; (3) the level of logistics; (4) a level of discipline and ability sufficient to implement the basic obligations of Common Article 3; and (5) an ability to speak with one voice.⁶⁵

Factors as indicators that the required level of intensity has been reached include: (1) the seriousness, increase and spread of clashes over territory and time; (2) the distribution and type of weapons; (3) government forces (number, presence in crisis area and the way force is used); (4) the number of casualties; (5) the number of civilians fleeing the combat zone; (6) the extent of destruction; (7) blocking, besieging and heavy shelling of towns; (8) the existence and change of front lines; (9) occupation of territory; (10) road closures; and (11) UN Security Council attention. In turn, the de jure Government is to have ‘recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. Although the conflict does not directly involve the de jure government this does not negate the classification of an incident of non-international armed conflict.’⁶⁶

It is documented by the State that there have been persistent and long term confrontations per week from 2001 to 2006 usually involving high-calibre weaponry culminating in ‘42,562’

⁶³ *Prosecutor v Duško Tadić* (Trial Judgment) ICTY IT-94-1-T (7 May 1997), 562

⁶⁴ *Haradinaj Case* (Trial Judgment) ICTY IT-04-84-T (3 April 2008), 49

⁶⁵ *Prosecutor v Boškoski* (Trial Judgment) ICTY IT-04-82-T (10 July 2008), [199-203][277]

⁶⁶ *Boškoski case* (Trial Judgment), (*supra*) para 177

deaths spanning this period.⁶⁷ Both gangs also have semblances of organization indicative through its delegation of tasks, hierarchy⁶⁸ and succession planning.⁶⁹ Thus, there is an entity capable of bearing responsibility for acts of subordinates. They also have paramilitary capabilities as it stores arsenal of such a calibre that is intended for sole usage by State forces.⁷⁰ Therefore, the applicable rules are codified at Common Article 3.

The Situation with the Terror Squad constitutes an internal disturbance

The ambit of operation of Common Article 3 is not to be applied to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.’⁷¹ Dissident forces must also exert such control over a portion of the territory thus enabling the carrying out of sustained and concerted military operations.⁷² The ICRC non-exhaustively outlines situations that would constitute internal disturbance and tension: (i) riots, that is to say, all disturbances which from the start are not directed by a leader and have no concerted intent; (ii) isolated and sporadic acts of violence, as distinct from military operations carried out by armed forces or organized armed groups; (iii) other acts of a similar nature which incur, in particular, mass arrests of persons because of their behaviour or political opinion.⁷³

Internal disturbances and tensions may include *inter alia* the suspension of fundamental judicial guarantees, either by the proclamation of a state of emergency or by a *de facto* situation and increase in the number of acts of violence (such as sequestration and hostage-taking) which

⁶⁷ Hypothetical,26

⁶⁸ Hypothetical,27

⁶⁹ Hypothetical,28

⁷⁰ Hypothetical, para 29

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (adopted 8 June 1977, entry into force 7 December 1978) 1125 UNTS 609, Article 1(2)

⁷² Additional Protocol II, supra note 87, Article 1(1)

⁷³ ICRC, Draft Additional Protocols to The Geneva Conventions Of August 12, 1949: Commentary (1973), p. 133

endanger defenseless persons or spread terror among the civilian population.⁷⁴ Situations of internal disturbances and tensions are not regulated by Common Article 3, but instead are governed by domestic law and relevant rules of international human rights law.⁷⁵

It is submitted that the Terror Squad is merely an instance of armed banditry exploiting the existence of an international armed conflict between the FNC and the de jure government and carrying out hostage-taking of defenceless persons and inflicting terror on civilians. Whilst there is a situation of the degeneration into open struggle within Zircondia, this is due to confrontations with the FNC. Furthermore, the apparent control over territory which may be inferred by the Squad's reign of terror is also contingent on the struggle between with the FNC. It is to be deemed sporadic acts of violence that is distinct from military operations carried out by the FNC and the army. Therefore, the criminal cell is to be amenable to the judicial mechanisms of the domestic criminal jurisdiction.

Relevant Law to apply in situations of armed conflict before IACtHR

The Court has indicated on several occasions that although “the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not attribute the said competence to it, it may observe that certain acts or omissions that violate human rights under the treaties that it is competent to apply also violate other international instruments that protect the individual, such as the 1949 Geneva Conventions and especially their common Article 3.”⁷⁶ In *Las Palmeras v. Colombia*, the Court particularly indicated that the relevant provisions of the Geneva Conventions could be taken into account as

⁷⁴ The International Committee Of The Red Cross, 'The International Committee of the Red Cross's (ICRC's) role in situations of violence below the threshold of armed conflict- Policy Document' [2014] 96(893) International Review of the Red Cross

⁷⁵ *Juan Carlos Abella v Argentina*, Case 11.137, Inter-Am. C.H.R., Report No 55/97, OEA/Ser.L/V/II.95, doc 7 rev, 151

⁷⁶ *Case of Bámaca Velásquez v. Guatemala* (Merits) [2000], Inter-Am. C.H.R, Series C No. 70, 208

elements for the interpretation of the ACHR.⁷⁷ In the *Mapiripán Massacre case* the Court held that although the ACHR expressly refers to the norms of general international law for its interpretation and application, it is the obligations contained in Articles 1(1) and 2 of the Convention that constitute the definitive basis for the determination of a State's international responsibility for violations thereof. Consequently, the attribution of international responsibility to the State, as well as the scope and effects of the acknowledgement made in the instant case, must be made in light of the Convention itself.⁷⁸

In *Santo Domingo Massacre case* the Court reiterated that although the American Convention has only empowered it to determine the compatibility of the States' acts and omissions or laws with this Convention and not with the provisions of other treaties or customary norms, when making this analysis, it can, as it has in other cases, interpret the obligation and the rights contained in the American Convention in light of other treaties by using International Humanitarian Law ('IHL') as a supplementary norm of interpretation to the treaty-based provisions. The Court can observe the regulations of IHL, as the specific law in this area, in order to make a more specific application of the provisions of the Convention when defining the scope of the State's obligations.⁷⁹

This approach has been adopted by other international tribunals such as the ICJ in the *Nuclear Weapons Advisory*.⁸⁰ Therefore, in the present case of an armed conflict circumstance

⁷⁷*Case of Las Palmeras v. Colombia* (Preliminary Objections) [2000], IACtHR Series C No 67, [32-34]; See also, *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs) [2005], Inter-Am. Ct. H.R., Series C No. 134 para. [115], and *Case of Bámaca Velásquez v. Guatemala* (Merits), *supra*, para.209.

⁷⁸*Mapiripán Massacre v. Colombia* (*supra*),107

⁷⁹*Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, IACtHR Series C No. 259 (30 November 2012), para.24

⁸⁰*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] I.C.J. Reports 1996, p. 226, para. 25; See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, para.106;

the appropriate body of law is international humanitarian law which may serve as *lex specialis* in interpreting and applying international human rights instruments.⁸¹

Article 4- Right to Life

Article 4 (1), buttressed by Article 1(1) of the Convention, states that: ‘every person has the right to have his life respected’ and that no one shall be arbitrarily deprived of their life.⁸² It is a fundamental right of which the enjoyment of all other human rights is contingent upon.⁸³ The court has also stated in the case of the "*Street Children*" that the right to life entails the right to be free from impediments which hinder or prevent enjoyment of a dignified existence.⁸⁴

Whilst Article 27(2) of the Convention speaks to the scope of the right as being non-derogable, the Convention issues in a degree of ‘conditionality’ to the right to life as its wording contemplates the permissibility of instances of non-arbitrary deprivation of life. The test of arbitrary deprivation of life in the context of armed hostility is to be considered in terms of the apt ‘*lex specialis*’. Therefore, it is submitted in *Nuclear Weapons Case* that the issue of classification of the deprivation of life as arbitrary must be decided by reference to the applicable law of armed hostilities and not merely deduced from the provisions of the IHL.⁸⁵

The Court has interpreted the right to life quite generously and places obligations on the State. The court has enunciated in the case of *Castro v Peru* the positive obligation of the State to

⁸¹Inter-American Commission on Human Rights, 'REPORT ON TERRORISM AND HUMAN RIGHTS' [2002] (OEA/SerL/V/III16 Doc 5 rev 1 corr) 57-62

⁸² Convention, Article 4(1)

⁸³ *Case of the Pueblo Bello Massacre* Merits, Reparations and Costs, IACtHR Series C No. 140 (31 January 2006), 120

⁸⁴*Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, IACtHR, IACtHR Series C No 63 (19 November 1999), [144-146]

⁸⁵*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 1996, p. 226, para. 25.

enact legislation and other measures, investigate effectively, punish and to take preventative steps in efforts of the elimination of the threat to the right to life.⁸⁶ The Court further obliges states to investigate deaths and give probable explanation as to the location of detained persons.⁸⁷ The Court in *Velásquez-Rodríguez v. Honduras* affirmed that the duty to prevent and to investigate is not breached merely because a satisfactory result was not yielded once it was undertaken seriously and not as a ‘mere formality preordained to be ineffective.’ Furthermore, the investigation process must have a mandate and is to be undertaken by the State as its own legal duty. Where acts of third parties are not duly investigated, they are deemed to be assisted by the government, thus attracting state responsibility.⁸⁸

It is submitted that a finding of attribution to the State for a breach of the right to life is weightier where there is a finding of a ‘planned policy of systematic violations’ of human rights which is so serious, frequent and numerous over a prolonged period whereby it could not be dealt with as if it were an ‘isolated’ or ‘individual’ case of misconduct by ‘middle and lower rank officers, without attaching any political responsibility to the civilian and military hierarchy.’⁸⁹ It was further held in *Pueblo Bello Massacre Case* that where it is possible for the State to substantiate that its security forces were constrained by having to adopt measures to protect another village from an attack at the same time as the one complained of may form a plausible basis of inaction.⁹⁰

⁸⁶ *Anzualdo Castro v. Peru* (Preliminary Objection, Merits, Reparations and Costs), IACtHR Series C No.202 (22 September, 2009), para 65.

⁸⁷ *Vélasquez Rodríguez v. Honduras* (Merits) Inter-Am. Ct. H.R. Series C. No. 4 (29 July 1988), 149

⁸⁸ *Velásquez-Rodríguez v. Honduras* (Merits), (*supra*) para 177.

⁸⁹ Joint Report of the Special Rapporteur for Torture, Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Bacre Waly Ndiaye, submitted in compliance with resolutions 1994/37 and 1994/82 of the Commission on Human Rights of the United Nations Economic and Social Council. Visit to the Republic of Colombia of the Special Rapporteurs from October 17 to 26, 1994, E/CN.4/1995/111 of January 16, 1995, para. 109

⁹⁰ *Case of the Pueblo Bello Massacre* (Merits, Reparations and Costs) (*supra*) 134

Ricardo Madeira

The Act of the Terror Squad in the death of Ricardo Madeira is not attributable to the State

The international legal regime governing the attributability of State responsibility for acts which contravene its international obligations is enumerated in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*⁹¹ ('ARSIWA') and is constitutive of customary international law. The constituent indicative elements of an internationally wrongful act on behalf of the State are characterized at Article 2, insofar that it must be action or omission by the State which is 'attributable to the State under international law' and 'constitutes a breach of an international obligation of the State.'⁹²

International law recognizes the autonomy of persons acting pursuant to their own volition and not at the prompting of a public authority.⁹³ Thus, the present state of customary international law engenders that only conduct of the organs of government, others acting under the directive, prompting or control of those organs may attract the responsibility of the State and therefore be duly attributable to the State at the international level.⁹⁴ Therefore, the corollary of the conventional position of international law of state responsibility connotes that States are not ipso facto responsible for the acts of private actors.⁹⁵

However, it is contemplated that 'conduct which is not attributable to a State... shall nevertheless be considered an act of that State under international law if and to the extent that the

⁹¹ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two (3 August 2001) U.N. Doc. A/56/83 (2001)

⁹² ARSIWA, Article 2

⁹³ ARSIWA Commentary, p.38

⁹⁴ I. Brownlie, System of the Law of Nations: State Responsibility, Part I (Oxford, Clarendon Press, 1983), pp. 132–166

⁹⁵ R. Jennings, A. Watts (eds), Oppenheim's International Law 9th ed Vol. 1 Harlow: Longman 1996, pp.502-503

State acknowledges and adopts the conduct in question as its own.’⁹⁶ Responsibility may be imputed in an instance where the state fails to take ‘appropriate steps’ to prevent an attack or to stop it before it reached its completion and must be due to more than ‘mere negligence’ or ‘lack of appropriate means.’⁹⁷ Also, total inaction in light of urgent and repeated requests for assistance may impute state responsibility.⁹⁸

Moreover, in the context of the provision of mutual support between an organ of the state and a criminal terror cell, the criteria applicable to attributability of responsibility is determinative by international law and not simply based on ‘mere recognition of a link of factual causality’⁹⁹ The Court must either be convinced that the terror cell was created by the State or that the State gave ‘direct and critical combat support’ to it, tantamount to the State wholly devising the strategic and tactical operations of the contra group.¹⁰⁰ Therefore, the court must determine whether the relationship between the terror cell and the State was ‘so much one of dependency on the one side and control on the other’ that it would be correct to equate the group, for legal purposes, with an organ of the State.¹⁰¹ Moreover, whether the State ‘devised the strategy and directed the tactics’ of the group is dependent upon the extent to which the State made use of the ‘potential for control inherent in the dependence’.¹⁰² The decisive criterion in such a matter is the element of ‘effective control’ over the operations for the attraction of valid legal responsibility.¹⁰³

⁹⁶ ARSIWA, Article 11

⁹⁷ *Case Concerning United States Diplomatic and Consular Staff in Thran ‘Tehran Hostages Case’ (United State of America v Iran)* [1980] ICJ Reports 3 (ICJ), 63

⁹⁸ *Tehran Hostages Case*, 64

⁹⁹ ARSIWA, Commentary: Attribution of Conduct to a State, p. 38-39

¹⁰⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, (Merits), [1986] ICJ Rep. 4, para. 108.

¹⁰¹ *Nicaragua v. U.S.*, 109

¹⁰² *Nicaragua v. U.S.*, 110

¹⁰³ *Nicaragua v. U.S.*, 115

The alleged human rights violations perpetrated against Ricardo Madeira and Milena Reyes are not attributable to the State. The acts were perpetrated by the Terror Squad.¹⁰⁴ Acquiescence on behalf of Zircondia is further dispelled as the state took swift action in investigating the matter based on the promptings of Milena Reyes to the Ombudsman of Antara¹⁰⁵ and the complaint launched by the brother of Ricardo Madeira concerning his brother's detention and his whereabouts.¹⁰⁶ Zircondia, through its judicial arm took swift action in opening investigations into the matter and the investigating judge even travelled to the town where Milena Reyes escaped from.¹⁰⁷ The State also took anonymous emails sent to a local newspaper seriously, thus leading to the exhumation of a mass grave; a fortiori the State took the further step of conducting DNA testing to conclusively state that Ricardo had met his demise at the hands of the Terror Squad and the manner of his death to bring about some level of closure to the family of Ricardo Madeira.¹⁰⁸ Furthermore, whilst speculative evidence presented tying members of the Terror Squad to the provincial police¹⁰⁹ suffices to show a link of mere factual causality, it says nothing of the attraction of state responsibility as the standard required is that of the State exerting effective control.

The dignified existence of Ricardo Madeira was upheld

Whilst the Terror Squad may constitute an impediment to a dignified existence, Zircondian security forces have been constrained by having to adopt measure to combat the FNC rebels simultaneously with the matter concerning Madeira.¹¹⁰ It is evident that Zircondia has put

¹⁰⁴ Hypothetical, 15

¹⁰⁵ Hypothetical, para 16

¹⁰⁶ Hypothetical, para 18

¹⁰⁷ Hypothetical, para 19

¹⁰⁸ Hypothetical, para 20

¹⁰⁹ Hypothetical, para 14

¹¹⁰ Hypothetical, para 14

in place the requisite legislative provisions pertaining to murder by which Anaya have been tried and convicted against.¹¹¹ Effective investigation was also undertaken, as whilst states are obliged to give probable conclusions as to location and cause of death, the exact location of the mass grave and DNA identification of the Madeira's remains were carried out.¹¹² Zircondia also took preventative steps to protect life by taking specific and ongoing efforts to confront, to the extent possible, the threat that the Terror Squad poses to the private citizens and the army has focused and the Police have concentrated more on the protection of the population.¹¹³ Therefore, Zircondia cannot be deemed to have tacitly consented or affirmed the actions of the Squad. Furthermore, the alleged relationship between the Terror Squad and police force does not evidence a 'planned policy of systematic violations' of human rights of such a flagrant and prolonged nature that could not be dealt with as 'isolated' or 'individual' cases of misconduct by 'middle and lower rank officers, without attaching any political responsibility to the civilian and military hierarchy' as it appears that merely some officers agreed to turn a blind eye and even rarer is the occurrence of officers assisting in kidnappings and targeting of victims.¹¹⁴

Reynaldo Restrepo

Restrepo is a civilian directly participating in hostilities

Parties to conflict must distinguish between civilian populations and combatants and between civilian objects and military objectives. They are obliged to direct their operations only against military objectives. Civilian populations nor individual civilians are to be subject to

¹¹¹ Hypothetical, para 21

¹¹² Hypothetical, para 20

¹¹³ Clarification Questions & Answers 45

¹¹⁴ Hypothetical, para 10

attack.¹¹⁵ However, even civilians may fall susceptible to legitimate military targeting when they forfeit this protection by ‘directly participat[ing] in hostilities.’¹¹⁶

Acts qualifying as direct participation must: 1. Be likely to adversely affect the military operations or military capacity of a party to an armed conflict or to inflict death, injury, or destruction on persons or objects protected against direct attack; 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part; 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.¹¹⁷ Direct participation entails ‘preparation, execution, or command of acts or operations amounting to direct participation in hostilities which may all be integral to the act.’¹¹⁸

It is submitted that a civilian makes himself vulnerable to attack when in a palpable military objective without losing civilian status.¹¹⁹ Civilians not directly partaking in hostilities, but indirectly contribute commission of hostilities by working in transportation, communication and industrial facilities would be deemed military objectives.¹²⁰

Restrepo is directly participatory in hostilities as he allowed for the museum’s usage for military storage by the FNC as its curator.¹²¹ Such actions meet the threshold as it is a reasonable assertion to contend that the storage and weaponry is likely to adversely affect the operations of

¹¹⁵ Additional Protocol I, Articles 48 and 51(2); International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I: Rules, Rule 1.

¹¹⁶ Protocol I, Arts 51(3); Protocol II 13(3); ICRC, Customary Humanitarian Law, Rule 6.

¹¹⁷ ICRC, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, May 2009, available at: <http://www.refworld.org/docid/4a670dec2.html> [accessed 27th March 2017], p. 46

¹¹⁸ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) (*supra*) at 34.

¹¹⁹ A.P.V, Rogers, *Law on the Battlefield*, 2nd ed. (Huntington, NY:Juris, 2004), 11-12.

¹²⁰ *Shimoda case* (Compensation claim against Japan), Tokyo District Court translated in *The Japanese Annual of International Law*, vol. 8, 1964, p. 231. (7 December 1963)

¹²¹ Hypothetical,¹⁷

the government or cause death, injury and destruction as there is direct causality between storage and the subsequent supply to combatants resulting in harm. Restrepo's role constitutes a coordinated military operation which forms an integral component of the fruition of the overall FNC military objective. Furthermore, evidentiary weight is to be attached to photographs attaching him to meetings with high-ranking FNC officials since July 2006.¹²²

Restrepo is a civilian casualty on a legitimate military objective

Alternatively, Restrepo is an unfortunate collateral casualty of the attack on a legitimate military objective. Even if a civilian, and his participation deemed indirect his preparatory and logistical role and presence in a military objective leaves him susceptible.

The museum lost its protection as 'cultural property' impervious from attack

Article 4(1) of the 1954 Hague Convention for the Protection of Cultural Property mandates that: "The High Contracting Parties undertake to respect cultural property situated within their own territory... by refraining from any act of hostility directed against such property."¹²³ However, this obligation may be waived in instances of military necessity¹²⁴ as cultural property may be a proper subject of attack where its function has been displaced by becoming a military objective.¹²⁵ Such cultural property is inclusive of 'moveable and immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history'¹²⁶ and buildings whose main an effective purpose is to

¹²² Clarification Questions & Answers,41

¹²³ UNESCO, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 240 (adopted 14 May 1954, entry into force 7 August 1956), Article 4(1)

¹²⁴Hague Convention for the Protection of Cultural Property, Article 4(2)

¹²⁵ New Rules for the Protection of Cultural Property in Armed Conflict 30-09-1999 Article, International Review of the Red Cross, No. 835, by Jean-Marie Henckaerts

¹²⁶Hague Convention for the Protection of Cultural Property, Article 1(a)

exhibit such property such as museums.¹²⁷ It is a breach to ‘use such objects in support of the military effort’ and ‘to make such objects the object of reprisals’.¹²⁸

Whilst the Hipolito museum is ipso facto protected from attack, this protection is not absolute and was displaced when the FNC used it as a military storage facility based on intelligence reports of the Zircondian army. Therefore, it was the FNC that used the cultural property in support of its military efforts and made it susceptible to reprisal. Intelligence reports of this usage were validated as ‘spent ammunition’, ‘unexploded mines’ and parts of long weapons were found.¹²⁹ Effective warning was also disseminated based on reactions to the warning as ‘civilians heeded the warnings, which explains why only two people died in the attack.’

Zircondia adequately endeavoured to distinguish between civilians, shown by the clarion calls echoed throughout the area by soldiers on megaphones. The proper identification of the museum as a legitimate military objective also indicates distinction as the army’s reliance on intelligence reports were substantiated based on the findings of spent ammunition and unexploded antipersonnel mines in the ruins of the museum.¹³⁰

State took Protective Operational Measures

In *Sawhoyamaxa Case* the Court specified that to find State responsibility for risks to life, it must be determined that at the time of the events, the authorities were cognizant of the existential situation posing a ‘real’ and ‘imminent’ risk to life, and failed to take requisite measures to prevent or avoid such risk.¹³¹ However, It is further submitted that the requisite

¹²⁷ Hague Convention for the Protection of Cultural Property, Article 1(b) (a)

¹²⁸ Additional Protocol I, Article 53 (a) and (b); see also Article 16 of Additional Protocol II

¹²⁹ Hypothetical, para 17

¹³⁰ Hypothetical,17

¹³¹ *Sawhoyamaxa Case* (Merits, Reparations and Costs) IACtHR Series C No. 146 (29 March 2006), para. 155

standard of precaution cannot place an impractical or unrealistic burden on the State, rather the standard must correlate to what is reasonably practicable in each situation.¹³² Further, in instances of attack what is required is the dissemination of effective warning where circumstances allow¹³³ and also persists in situations which might impact civilians.¹³⁴ They must also take every feasible measure in the assessment of proportionality as to whether the proposed attack is expected to inflict excessive incidental civilian casualty disproportionate to the intended military advantage sought, and refrain from such an attack in instances of disproportionality.¹³⁵ It is submitted that feasibility of precautions refers to what is ‘practicable’ or ‘practically possible’ taking into account the prevailing circumstances inclusive of ‘humanitarian and military considerations.’¹³⁶

Attack was not indiscriminate

An attack is indiscriminate where weaponry is not directed at a particular military objective; or which utilizes methodology of delivery which is not directed at a specific military objective; or which is expected to result in incidental loss of life, injury, or damage without distinction.¹³⁷ This notion is also inclusive of attacks which are predicted to impose disproportionate collateral harm to civilians.¹³⁸ It is submitted that drones are capable of non-indiscriminate attacks and therefore are not prohibited under humanitarian law and are also subject to the principles of distinction, proportionality, and precaution.¹³⁹

¹³² *Andronicou and Constantinou v. Cyprus*, ECHR (86/1996/705/897) (9 October 1997), para. 183, 192.

¹³³ Additional Protocol II, Article 6(d)

¹³⁴ Additional Protocol I, Article 57(2)(c).

¹³⁵ Additional Protocol I, Articles 57(2)(a)(i)-(iii) and 57(2)(b); ICRC, Customary Humanitarian Law, Rules 16 -19.

¹³⁶ United Nations, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (As Amended on 3 May 1996), 10 October 1980, Art. 3(4)

¹³⁷ Art 3(3), Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Geneva, 10 October 1980. See also *Art. 51(4) Additional Protocol I; ICRC, Customary Humanitarian Law, Rule 12*

¹³⁸ Additional Protocol, Art. 51(5); ICRC, Customary Humanitarian Law, Rule 19.

¹³⁹ William Boothby, *The Law of Targeting* (Oxford University Press 2012), p. 281

The attack was clearly directed at the museum which became a military objective based on the subsequently founded intelligence reports of the army employing a drone capable of making a directed strike. The attack could not have been predicted to impose disproportionate collateral harm to civilians based on measures of advanced notice and most importantly, the operation was carried out at 3:00am,¹⁴⁰ outside of typical hours of visitation during which it is expected that civilians would be present.

The Attack was necessary and proportionate

It is avowed that in time of armed hostilities, ‘absolute necessity’ is displaced by the widened scope of ‘military necessity’. It permits “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”¹⁴¹ This principle is further complimented by the principle of humanity which “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.”¹⁴²

The attack on the museum was one of military necessity as it was to achieve the legitimate goal of destroying the arsenal of the rebels being held in the museum according to state intelligence reports¹⁴³ in efforts of bringing the FNC to submission at the earliest point of the conflict. This military operation could also be deemed necessary and proportionate in the

¹⁴⁰ Hypothetical, para 17

¹⁴¹ UK Ministry of Defence, “*The Manual of the Law of Armed Conflict*” (Oxford: Oxford University Press, 2004), Section 2.2 (Military Necessity). The modern application of the nomenclature of ‘military necessity’ has been greatly influenced by and fashioned after the definition at Art. 14 of the “Lieber Code”.

¹⁴² UK Ministry of Defence, “*The Manual of the Law of Armed Conflict*”, Section 2.4 (Humanity).

¹⁴³ Hypothetical, para 17

interest of avoiding loss of life and resources in observance of the principle of humanity, as confrontations have been protracted over 6 months.¹⁴⁴

The State investigated the attack

The court has held that the duty to investigate instances of the application of lethal force by agencies of the State is a corollary of the right to life and failure to do so may equate to a breach of the right.¹⁴⁵ Effective investigation must be: i) immediate; ii) exhaustive and impartial; and iii) independent in hierarchical, institutional and practical terms.¹⁴⁶ Moreover, the investigatory process and its findings are to be subject to ample public scrutiny involving the next of kin of the victim.¹⁴⁷ The investigation must be fulfilled through all legal means available to the determination of the truth and the investigation, prosecution, and punishment of those responsible.¹⁴⁸

Zirconia satisfied investigatory requirements of the drone attack that was immediate, exhaustive, impartial and institutionally independent as three days later the army conducted expert investigations and analysis of the scene which led to the identification of Restrepo's remains.¹⁴⁹

Esteban Martinez

¹⁴⁴ Hypothetical, para 8

¹⁴⁵ *Juan Carlos Abella v. Argentina (La Tablada) Case*. Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271(18 November 1997), para.244. *Case of Vargas Areco* (Merits, Reparations and Costs) Inter-Am.Ct.H.R Series C No. 155 (September 26, 2006), para. 77;

¹⁴⁶ *Abella (La Tablada) case*, 412

¹⁴⁷ *Hugh Jordan v United Kingdom*, ECtHR (Application no. 24746/94) (4 May 2001), para 109. See also *Ahmet Özkan and Others v. Turkey*, ECtHR (Application No. 21689/93) (6 April 2004), para 187

¹⁴⁸ *Case of Ximenes Lopes* (Merits, Reparations and Costs) Inter-Am.Ct.H.R Series C No. 149 (July 4, 2006), 148.

¹⁴⁹ Clarification Questions and Answers 11

Medical personnel involved in the treatment of the sick or in prevention of disease are to be protected in all circumstances.¹⁵⁰ The Court accepts the power, moreover the obligation, of the State to ensure security and preserve public order, particularly in prisons and employing force if necessary.¹⁵¹ It is submitted that State forces may recur to usage of lethal weapons where ‘strictly inevitable to protect a life’ and where less extreme actions prove futile.¹⁵² There must exist adequate elements justificatory of the magnitude of force employed.¹⁵³ An indicative element is whether the inmates at the instigation of the ‘operative’ were in a state of mutiny resulting in cause for legitimate use of force in the State’s first act of attack.¹⁵⁴

Zircondia was obligated to protect the lives of the medical personnel in all circumstances even where recourse is to be had to lethal force, given that it undertook less extreme measures such as five hours of protracted negotiations with the inmate holding the doctor hostage which proved to be futile.¹⁵⁵ The attack was also proportional in interest of law enforcement. The magnitude of force is also justified considering Martinez’s propensity towards violence as he was the mastermind behind the conspiracy to attack government institutions¹⁵⁶ and also participated in beating public servants and burning government vehicles.¹⁵⁷ Moreover, an essential element was that the inmates’ resistance by taking hostages was the precursor to the

¹⁵⁰ ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, Article 24

¹⁵¹ *Case of Godínez Cruz* (Merits) IACtHR Series C No. 5 (January 20, 1989) para. 162;

¹⁵² U.N., *Basic Principles on the Use of Force and Fire Arms by Law Enforcement Officers*, adopted by the Eight Congress of the United Nations for the Prevention of Crime and Treatment of Delinquents, Habana, Cuba, August 27th through September 7th, 1990, Principles 4 and 9.

¹⁵³ *Case of Neira Alegría et al.* (Merits). Inter-Am.Ct.H.R Series C No. 20 (January 19, 1995) para. 74

¹⁵⁴ *Case of the Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs) Inter-Am.Ct.H.R Series C No 160 (November 25, 2006), 215,241

¹⁵⁵ Hypothetical, para 38

¹⁵⁶ Hypothetical, para 31

¹⁵⁷ Hypothetical, para 32

fatal attack and was not an instinctive reaction in defence of their life and personal integrity to the offensive of prison officials.¹⁵⁸

Cognizant of the possibility of ‘real’ and ‘imminent’ risk to life, officials also took necessary precautions to prevent such risk as they utilized an army medical team with basic training in combat situations and the tactical team carried out drills replicating the hostage situation before intervention. Whilst the doctor initially broke free, the inmates further antagonized the ordeal by making aggressive gestures in efforts of recapturing the hostages, at which point they were taken down.¹⁵⁹

Article 5 The Right to Humane Treatment

Article 5 of the ACHR Guarantees the right to humane treatment and provides that no one shall be subjected to torture, cruel or inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.¹⁶⁰ Where individuals fall under the authority and control of the state in situations outside of armed conflict, their treatment is governed exclusively by international human rights law. Where an armed conflict is underway, however, the treatment of detainees and others is also subject to international humanitarian law.¹⁶¹

Ricardo Madeira and Milena Reyes

As mentioned previously, the corollary of the conventional position of international law of state responsibility connotes that States are not ipso facto responsible for the acts of private

¹⁵⁸ Hypothetical, para38

¹⁵⁹ Clarification Questions & Answers 43

¹⁶⁰ ACHR, Article 5

¹⁶¹ Third Geneva Convention Articles 21, 97 Fourth Geneva Convention, Articles 41-43, 68, 78-88, 124

actors.¹⁶² The actions of the criminal group “The Terror Squad” are not attributable to the State and therefore it is not possible to affiliate their actions as if they were that of the State. While the State sympathises with the persons affected by the acts of the Terror Squad, it is an unreasonable burden to require the State to foresee every potential threat to the lives of each and every one of its citizens. The Convention against Torture identifies that for actions to amount to torture, there must be an intentional infliction of severe pain or suffering, for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination, by or at the instigation of or with the consent or acquiescence of State authorities.¹⁶³

The harsh treatment¹⁶⁴ endured by both Madeira and Reyes during their capture can be identified as torture. The actions of “The Terror Squad” with respect to Milena Reyes and Ricardo Madeira during their capture are evident of an infringement of humane treatment.¹⁶⁵ The State submits that domestic legal remedies were used effectively to identify and determine the responsibilities of the alleged perpetrators¹⁶⁶ and that the correct procedure based on international law has been followed to ensure that a criminal investigation into the matter was conducted¹⁶⁷ and Timoteo Anaya was prosecuted for his violations. In addition, the Madeira family has been compensated for the violations which occurred.¹⁶⁸

Esteban Martinez

Prison Conditions

¹⁶² R. Jennings, A. Watts (eds.) Oppenheim’s International Law. 9th ed. Vol. 1. Harlow: Longman 1996, pp. 502-503

¹⁶³ 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 1

¹⁶⁴ Hypothetical para, 15

¹⁶⁵ ACHR, Article 5

¹⁶⁶ Hypothetical, para 19,21

¹⁶⁷ Hypothetical, para 19, 20

¹⁶⁸ Hypothetical para. 22

In situations of non-international armed conflict, unprivileged combatants i.e. persons who do not have the combatant's privilege, but nevertheless directly or actively participate in hostilities¹⁶⁹ are protected under Geneva Convention IV¹⁷⁰ Martinez is the leader of Los Locos, a well-organized gang with various local leaders who impose rules that the gang must respect¹⁷¹ The actions of Martinez during the demonstration¹⁷² amount to that of non-international armed conflict, therefore as a detainee of the State, he is entitled to certain fundamental guarantees.¹⁷³ Article 85 of the Geneva Convention IV outlines minimum conditions of detention covering such issues as accommodation, food, clothing, hygiene, and medical care during times of armed conflict.¹⁷⁴ The State submits that based on the provisions of Article 85, there has been no violation in light of the complaints of the prisoners with regard to having to eat in their cells, the privacy in the bathrooms or any other conditions during internment.¹⁷⁵

Force Feeding

In the *Israel Medical Association et. al. v. Knesset et. al* Case¹⁷⁶ the Court unanimously rejected the petitioners' arguments and upheld the law as both constitutional and in compliance with international law. The ECtHR also took up the issue as well and after citing both the *Convention for the Prevention of Torture's* language and the *World Medical Association's Declaration of Malta*, held that force-feeding is not torture, provided there is genuine medical necessity. The Court reiterates that a measure which is of therapeutic necessity from the point of

¹⁶⁹ Goldman, International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts, 9 AM. U. J. INT'L L. & POL'Y 49, 62-72 (1983).

¹⁷⁰ CDDH/SR.41, O.R. Vol. VI, p. 155

¹⁷¹ Hypothetical, para 27

¹⁷² Hypothetical, para 31,32,33

¹⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annex I and II (1977), reprinted in 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

¹⁷⁴ Geneva Convention IV, art 85

¹⁷⁵ Hypothetical, para 37

¹⁷⁶ HCJ 5304/15 (Sep. 11, 2016)

view of established principles of medicine 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 which was reiterated in *Rappaz v Switzerland*¹⁷⁷ where the ECtHR dismissed the suit on the ground of legitimate medical necessity.

Article 7 Right to Personal Liberty

The right to personal liberty provides that everyone shall have the right to personal liberty and security and protects against arbitrary arrest and imprisonment.¹⁷⁸ The concept that detention must not be arbitrary is part of both international humanitarian law and human rights law.¹⁷⁹ The court has established, personal liberty is not an absolute right; rather, its restriction is legitimate provided that certain requirements are met.¹⁸⁰

Should a terrorist situation within a state's jurisdiction be of such nature or degree as to give rise to an emergency that threatens a state's independence or security, other aspects of the right to liberty and personal security may potentially be suspended. A state might, for example, be justified in subjecting individuals to periods of preventative or administrative detention for a period longer than what would be permissible under ordinary circumstances. Any such detention must, however, continue for only such period as is necessitated by the situation and remain subject to the non-derogable protections.¹⁸¹ The court has also noted that in cases of forced disappearances could include violations against the right to personal liberty.¹⁸²

Esteban Martinez

¹⁷⁷ *Rappaz v Switzerland* (Dec): ECHR 26 Mar 2013

¹⁷⁸ ACHR, Article 5

¹⁷⁹ ICRC, Customary International Humanitarian Law, rule 99.

¹⁸⁰ I/A Court H.R., Case of Gangaram Panday v. Suriname. Judgment of January 21, 1994. Series C No. 16,

¹⁸¹ IACHR, Report on Terrorism and Human Rights, (*supra*)

¹⁸² *Case of Velásquez-Rodríguez v. Honduras* (Merits), (*supra*) para.155.

Zircondia sent communication to the OAS Secretary General regarding the broad suspension of the obligations pursuant to the American Convention on August 18, 2006 for a defined period of six-months with the possibility of extension.¹⁸³ The situation in Serena also warranted emergency protections and fell under the scope of the declaration. Whilst the derogation was general and broad, deference must be weighted to the need to preserve the perpetuity of the state in the precarious Zircondian context of ongoing armed confrontations.¹⁸⁴ Based on an adjudication of the intensity, nature and context of the conflict it appears necessary and proportionate to impose measures derogating from Article 7 of the Convention. Article 27 of the ACHR provides that 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.¹⁸⁵ International humanitarian law, the *lex specialis* in this regard, in turn, like international human rights law, permits the detention of persons based upon certain grounds and subject to certain conditions. Of particular significance in this regard is the fact that international humanitarian law has throughout its history recognized that enemy combatants in armed conflicts may, upon capture, continue to be held and interned.¹⁸⁶ The exceptional circumstances that have occurred in Serena, allows Zircondia to derogate from its obligation to uphold Martinez's right to personal liberty as he was an unprivileged combatant, participating in

¹⁸³ Clarification Questions & Answers 13

¹⁸⁴ Hypothetical, para 13

¹⁸⁵ ACHR, Article 27

¹⁸⁶ Third Geneva Convention, Art. 5

hostilities directed against the State.¹⁸⁷ and was also believed to be ‘a present danger to society.’¹⁸⁸

Milena Reyes and Ricardo Madeira – Enforced Disappearance

The UN Declaration on Enforced Disappearance, adopted by consensus, specifies that enforced disappearance constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person. There is extensive practice indicating that the prohibition of enforced disappearance encompasses a duty to investigate cases of alleged enforced disappearance.¹⁸⁹ The Court has concluded that the right to personal liberty, humane treatment, acknowledgement of juridical personality and right to life all become apparent in the case of a forced disappearance.¹⁹⁰

Among the duties for the purpose of preventing and taking action in response to disappearances outlined by the UN Declaration are; the prompt, through and impartial investigation by a competent and independent state authority, the prosecution of alleged perpetrators and compensation for the family. In the case of *Velasquez-Rodriguez*, the court found government agents responsible directly for the abduction of Mr Velasquez but , it said that even if the government was not directly liable, it would still be liable for the violations found because of its breach of Article 1.1¹⁹¹ States are in fact obligated to investigate situations involving a violation of the rights protected by the Convention¹⁹² It is understood that the responsibility is then placed on the State for the disappearances of Madeira and Reyes. The State submits that it has acted in conformity with its domestic law and the Convention by opening a

¹⁸⁷ Hypothetical, para 32

¹⁸⁸ Hypothetical, para 35

¹⁸⁹ ICRC, Customary International Humanitarian Law, rule 98

¹⁹⁰ *Case of Velásquez-Rodríguez v. Honduras* (Merits), IACtHR, July 29,1998, para.155.

¹⁹¹ *Case of Velásquez-Rodríguez v. Honduras* (Merits), (*supra*)

¹⁹² *Case of Velásquez-Rodríguez v. Honduras* (Merits), (*supra*) para.176.

criminal case investigating the disappearance of Madeira and Reyes,¹⁹³ the subsequent prosecution of Timoteo Anaya and the compensation to the Madeira family.

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State.¹⁹⁴ Article 63.1 of the Convention provides that if the Court finds that there has been a violation of a protected right or freedom, the Court shall rule if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. The Court is thus expressly authorized to order three kinds of reparations: (1) to ensure enjoyment of rights or freedoms, (2) to remedy consequences of violations, and (3) to award fair compensation.¹⁹⁵ The Court has also held that the domestic remedies must to the interested party, must resolve the issue in question effectively and in a well-reasoned manner, and potentially provide the appropriate reparation.¹⁹⁶ Measures of satisfaction are designed to provide redress for the non-pecuniary damages (suffering and hardship caused by the violation, such as harm to values that have great significance for the individual and any change in the victims' living conditions that is not financial in nature)¹⁹⁷ Measures of satisfaction include measures for the investigation and prosecution of the

¹⁹³ Hypothetical, para 19

¹⁹⁴ United Nations Guidelines on the Right to a Remedy and Reparation, principle 9

¹⁹⁵ Cassel, D, The Expanding Scope of Reparations Awarded by the Inter – American Court of Human Rights

¹⁹⁶ I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.)*.(Preliminary Objections, Merits, Reparations and Costs). Judgment of November 24, 2006. Series C No. 158, para. 126.

¹⁹⁷ I/A Court H.R., 2010 Annual Report of the Inter-American Court of Human Rights. OAS. San José, Costa Rica, p. 11.

perpetrators of human rights violations, the determination and dissemination of the truth, the search for disappeared persons, the location and release of victims' mortal remains to their relatives¹⁹⁸ The Respondent investigated the disappearance of Madeira and Reyes¹⁹⁹ which subsequently led to the discovery of Madeira's body²⁰⁰ and the prosecution and conviction of Anaya who was responsible for the death of Madeira.²⁰¹ Moreover the state offered \$USD 50,000 to the family of Madeira in compensation, which they accepted.

The State submits that the appropriate financial compensation was offered to the family of Ricardo Madeira for his kidnapping and unfortunate death. The family was offered and accepted \$US 50,000.00. The State also submits that the appropriate measure of satisfaction was taken on behalf of Milena Reyes with the execution of the criminal investigation and subsequent prosecution and conviction of Timeteo Amaya. It is further submitted that these actions are in keeping with the Zircondia's international obligation

Esteban Martinez - Habeas Corpus

Article 7 of the ACHR guarantees the right to habeas corpus by enunciating that "anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."²⁰² While no precise definition was given, (of the word delay) it was agreed that the term "did not mean without any delay." It has been asserted that the term means "within several weeks."²⁰³ While the Inter-American Court of Human Rights has not established a bright-line rule as to what constitutes "delay" it is clear that this mandate

¹⁹⁸ Ibid.

¹⁹⁹ Hypothetical, para 19

²⁰⁰ Hypothetical, para 20

²⁰¹ Hypothetical, para 21

²⁰² American Convention Art. 7 (6)

²⁰³ NOWAK, (*supra*), 179

requires compliance with domestic law. As the Court has not yet addressed the question of “delay” the European Court has emphasized that the determination of speediness in judging the legality of detention under Article 5 paragraph 4 of the European Convention turns on the circumstances of each case.²⁰⁴ In view of the urgent threat to the country’s public order and national security, the President of Zircondia has issued broad and general suspension of the obligations assumed under the American Convention seen as necessary in Zircondian territory for a period of six months; the President further indicated in that letter that he reserved the right to extend the measure at the end of the six-month term.²⁰⁵ In keeping with domestic law and in light of the present state of emergency, authorities have been granted an extended period of 40 days to conduct certain proceedings²⁰⁶ Included in these proceedings is issuing a response to the writ of Habeas Corpus filed by the family and friends of the detainees to include Martinez²⁰⁷ Due to the exceptional circumstances presently occurring in Serena²⁰⁸ and in light of the State of Emergency in Zircondia²⁰⁹ the State, in keeping with domestic law has delayed the proceedings of habeas corpus for the 14 detainees, including Martinez. As opposed to a suspension of habeas corpus which the court has found to be non-derogable even in exceptional circumstances²¹⁰ the state is capable of acting in accordance with domestic law and therefore finds it reasonable to delay these proceedings until the 40 day period has expired.²¹¹

V. PRAYER FOR RELIEF

²⁰⁴ Brian Farrell, 'The Right To Habeas Corpus In The Inter-American Human Rights System' [2017] 33(2) Suffolk Transitional Law Review

²⁰⁵ Clarification Questions and Answers 13

²⁰⁶ Clarification Questions and Answers 21

²⁰⁷ Hypothetical, para 36

²⁰⁸ Hypothetical, para 32-35

²⁰⁹ Clarification Questions and Answers 13

²¹⁰ *Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights), *Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).

²¹¹ Brian Farrell, 'The Right To Habeas Corpus In The Inter-American Human Rights System' [2017] 33(2) Suffolk Transitional Law Review

Based on the aforementioned submissions, the Republic of Zircondia respectfully requests that the Honourable Court declare and adjudge that the petition is inadmissible.

In the alternative hold that:

- (i) The Republic of Zircondia did not violate Articles 4, 5 and 7 in conjunction with Article 1 (1);
- (ii) The reparations provided were adequate;
- (iii) That the Republic of Zircondia has fulfilled its responsibility in accordance with the American Convention of Human Rights; and
- (iv) That the petitioners pay the cost of the proceedings.