# BENCH MEMORANDUM

## CASE CONCERNING THE HELIAN HYACINTH

Version 2.0
April 2020

# *** CONFIDENTIAL***

Only for use by Appointed Judges of the
2020 Philip C. Jessup International Law Moot Court Competition

## IMPORTANT INFORMATION REGARDING THE BENCH MEMORANDUM

The Bench Memorandum is a **confidential document** that may be read only by judges and administrators of the Jessup Competition. Every possible measure must be taken in order to maintain the confidentiality of the Bench Memorandum, including compliance with the following guidelines:

- Do not leave copies of the Bench Memorandum lying in public places.
- Do not, under any circumstance, discuss the Bench Memorandum or its contents with anyone other than judges and administrators.
- Do not, under any circumstance, distribute the Bench Memorandum to team members or team advisors, not even after the regional or national competition that you have judged is over.

If you have received this Bench Memorandum, you are no longer eligible to assist a team in any manner, including as a judge for practice oral rounds. Doing so could result in the disqualification of the team from the competition. See Official Rule 2.14.

The contents of the Bench Memorandum will remain confidential until the conclusion of the International Rounds in April 2020.



The Bench Memorandum is an evolving document. As the competition season progresses, new versions of the Bench Memorandum will become available. ILSA encourages judges and competition staff to make sure that they possess the most recent version of the Bench Memorandum.

ILSA welcomes comments and recommendations on the Bench Memorandum. Please send all suggestions to jessup@ilsa.org.

**TABLE OF CONTENTS**

## 1 PURPOSE OF THE BENCH MEMORANDUM

The Bench Memorandum provides judges with basic factual and legal information to evaluate the written memorials and oral pleadings of participating teams. It should be read in conjunction with the Jessup Problem.

The Problem was designed to present the competitors with legal issues that have strengths and weaknesses on each side. Jessup teams should be able to construct logical arguments as both Applicant and Respondent. As a judge, your task is to evaluate the quality of each team's analysis, knowledge of international law, and advocacy skills. Please make sure not to confuse this task with an evaluation of the merits of the case.

The Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Problem. It cannot cover every last detail, though we do aim to contextualize the law both within society and within the events of the Problem. In many instances, relevant case law and State practice is alluded to, but may not be discussed in depth. Competitors should address cases and principles of law. State practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised if competitors present arguments or cite authorities that may not be discussed in this Memorandum. This is perfectly appropriate and does not suggest that such arguments are not relevant or credible. Similarly, judges should keep in mind that Jessup teams are under both word count limitations in memorials and time restrictions during oral rounds that will make it necessary for them to condense their arguments in certain instances.

As always, judges are encouraged to engage in their own independent research on the issues or examine the suggested research materials given to students. These materials are available online at www.ilsa.org: the First Batch of Basic Materials; the Second Batch of Basic Materials; and the Jessup Problem Expert Panel Discussion (International Law Weekend, Fordham Law School).

One of the most rewarding parts of Jessup for students is being asked questions during oral arguments. This Bench Memorandum provides two tools to help you ask questions:

- There are sample questions embedded throughout the Bench Memorandum.
- There are many occasions where there are two bullets outlining the principle arguments for, respectively, Adawa (the Applicant) and Rasasa (the Respondent). When an oralist representing Adawa is speaking, you may consider interjecting with questions from Rasasa's bullet, and *vice versa.*

## 2 SUMMARY OF THE FACTS

The 2020 Jessup Problem concerns four issues: (1) State succession to treaties; (2) the legality of autonomous weapons systems; (3) overlapping international jurisdictions in the context of a trade dispute; and (4) the arrest of a State's foreign minister pursuant to a warrant issued by the International Criminal Court (ICC).

Applicant (Adawa) and Respondent (Rasasa) are two States in the Region of Crosinia. The Region is the only place on earth where the Helian hyacinth – a flowering plant that is the source of the valuable spice Helian – is cultivated. Adawa has a population of roughly 5.4 million and a nominal GDP per capita of €17,500. Rasasa has a population of roughly 9.9 million and nominal GDP per capita of €21,000. The two States share a border that is 201 kilometers long.

Adawa, Rasasa, and the four other States of the Crosinian Region were previously provinces of the Kingdom of Crosinia. In 1924 the last Crosinian king died without an heir, leading to a civil war in which Rasasa and three other provinces supported the King's brother, while Adawa and the province of Zeitounia supported the King's daughter. The civil war ended by 1929 with each the six provinces of Crosinia declaring independence. Rasasa declared itself an independent republic, while Adawa and Zeitounia united to form the Adawa-Zeitounia Union (AZU). On 29 October 1929, Rasasa and the AZU signed the Treaty of Botega on Armistice and Pacification (the "Treaty of Botega"), which is attached as Annex A to the Problem. After a decade of significant economic and social stresses, Adawa and Zeitounia agreed to dissolve their union effective 1 January 1939.

All six Crosinian States have long engaged in the growing, harvesting, and processing Helian hyacinth pollen and exporting Helian spice. In 1969, the six States signed a Treaty forming the Crosinian Helian Community (the "CHC Treaty"). The member States agreed to impose no customs duties within the CHC on Helian spice or the equipment and materials required to harvest it. The CHC Treaty is attached to the Problem as Annex B.

In 1982 and 1985, respectively, Rasasa and Adawa acceded to the General Agreement on Tariffs and Trade ("GATT"), submitting their then-applicable tariff schedules in the process. With respect to Helian plants, bulbs, pollen, spice, and related material, both countries set the "bound rate" for tariffs at zero. Both Adawa and Rasasa became members of the World Trade Organization ("WTO") in 1995.

In July 2012, a devastating tropical cyclone, Hurricane Makan, struck the Crosinian Region. More than 60% of the Helian hyacinths in Rasasa, 20% of those in Adawa, and 15-20% of those in the other Crosinian States were destroyed. Crime rates skyrocketed, with armed gangs roaming the countryside, stealing salvageable Helian plants and committing a variety of other criminal acts.

In October 2012, the Rasasan President convened a meeting of corporate executives to discuss ideas for addressing the crime wave. Ms. Darian Grey, founder and chief executive of the Rasasan Robotics Corporation ("RRC"), proposed to create an autonomous security system to suppress criminal activities in Rasasa and throughout the Crosinian Region. Ms. Grey's proposed system would be called the "Weaponized Autonomous Limitation Line" (or the "WALL"). The WALL would use machine learning algorithms, developed on the basis of "training data" received from Rasasan police and the police and military forces of 10 other States. The data had been meticulously tagged by RRC engineers working with Rasasan police and military officials to assist the WALL in distinguishing between armed threats and individuals *hors de combat*. The Rasasan President showed great interest in the WALL and invited the other five Crosinian States to collaborate in its development. All six CHC Member States, including Adawa, devoted funds, researchers, and resources to the development of the WALL.

In July 2015, Ms. Grey announced the completion of the WALL, noting that it would consist of 10-meter tall towers topped with sensors, and would have the ability to respond to threats with both lethal and non-lethal force. Importantly, the WALL would be fully autonomous and independent of human control. The WALL had been tested by experts from more than 30 countries, and Adawan scientists involved in its development indicated that it would be far more accurate than human police or soldiers in distinguishing combatants from civilians. However, neither the Rasasan nor Adawan governments elected to purchase the WALL, declaring that it was not economically or politically feasible to go further with the project.

In October 2016, the Rasasan Helian Growers Association (RHGA) published a report showing that Rasasa's share of the global Helian market had fallen relative to other States in the Crosinian Region, and that Rasasan Helian processors had increasingly begun to purchase their raw material from Adawan farmers rather than Rasasan suppliers, who could not meet their demand. The RHGA concluded that continuation of the current trend would lead to the collapse of the Rasasan Helian industry.

In December 2016, Venevar Pindro, a former military officer, was elected President of Rasasa. Shortly after taking office in January 2017, he submitted a bill that would invoke Rasasa's "essential security interests" to justify the imposition of a 25% tariff on raw Helian products imported into Rasasa. He also submitted a bill that called for expedited review of options to harden the Adawa-Rasasa border, in an attempt to thwart armed gangs.

President Pindro also nominated Ms. Grey to be his Minister of Foreign Affairs. This move was protested by Rasasan human rights groups and opposition politicians, who pointed to press reports that Ms. Grey and RRC had been involved in the supply of arms and training of military personnel in numerous conflict zones. One such conflict zone was in the remote island Republic of Garantia, which had undergone a civil war from 2007-2009. The Prosecutor of the International Criminal Court ("ICC") had opened an investigation into allegations of war crimes and crimes against humanity in Garantia, but Ms. Grey had not been charged with any crimes at the time of her nomination. She was confirmed as Minister of Foreign Affairs by the Rasasan Parliament on 15 January 2017.

In early 2017, both Rasasan and international sources indicated that Adawan gangs had evolved into organized militias engaged in the trafficking of illegal drugs. Both Adawa and Rasasa indicated that domestic police efforts had been ineffective in countering this threat. On 1 June 2017, the militia simultaneously attacked nine Rasasan Border Police stations with military-grade weapons, killing 21 officers.

On 25 June 2017, President Pindro authorized the purchase of the WALL from RRC, informing President Omar Moraga of Adawa that the WALL would be erected on Rasasan soil, and would surveil up to 200 meters on each side of the Adawa-Rasasa border. He claimed that the WALL would prevent illegal border crossings while virtually guaranteeing that no innocents would be harmed by mistake. The WALL was installed on 1 February 2018. President Moraga responded to these events by stating that Adawa considered the deployment of lethal autonomous weaponry along its border to be contrary to international law. In the four months following the installation of the WALL, police reports from both Adawa and Rasasa indicated that trans-border incidents had decreased by 80 percent. To date, there have been no instances of the WALL using lethal force, although Adawa has maintained its opposition to the program on legal grounds.

In January 2018, Rasasa's parliament passed the bill recommended by President Pindro imposing a 25% tariff on Helian imports. Adawa and the Director-General of the CHC protested this decision, arguing that it constituted a violation of the CHC Treaty. Rasasa defended the move on national security grounds. In January 2019, the International League for the Support of Agriculture (ILSA) published a report indicating that Adawan farmers had suffered €10 million in lost revenue between

January and October 2018 due to the Rasasan tariffs. In February 2019, Adawa requested the establishment of a panel under Article 6.2 of the WTO Dispute Settlement Understanding ("DSU"), alleging that Rasasa's Helian tariffs were an unjustifiable breach of its commitment to maintain the "bound rate" of zero on such items.

On 13 April 2019, the ICC Prosecutor announced that she was requesting the issuance of an arrest warrant for Minister Grey, relating to alleged war crimes committed by RRC in Garantia between 2007 and 2009. On 20 June 2019, an ICC Pre-Trial Chamber granted the Prosecutor's request and issued a warrant for Minister Grey.

In the meantime, Minister Grey had arrived in Novazora, the capital of Adawa, on 18 June 2019 for the annual meeting of the CHC. On 22 June 2019, officers of the Novazora police arrested Minister Grey, despite her protest that she "enjoyed diplomatic immunity." Rasasan consular agents were notified and provided access to Ms. Grey, who was able to freely select counsel. Her counsel argued that she was entitled to immunity while on Adawan soil in her official capacity, but an Adawan magistrate rejected this argument and a judicial appeal was denied. Minister Grey remains under house arrest in Adawa.

In light of escalating tensions between the parties, Adawa sought third-party dispute resolution by submitting an application to the International Court of Justice ("ICJ") on 1 July 2019, invoking the compromissory clause in the 1929 Treaty of Botega. Rasasa contested Adawa's status as a party to the Treaty of Botega, arguing that Adawa did not become a party to the Treaty as successor to the AZU and therefore that the ICJ lacked jurisdiction over Adawa's claims. Nevertheless, Rasasa indicated on 12 July 2019 that it intended to file, as an alternative argument, a counterclaim with the ICJ concerning Adawa's arrest and detention of Minister Grey.

# 3 PRELIMINARY AND GENERAL LEGAL MATTERS

## 3.1 JURISDICTION AND ADMISSIBILITY

### 3.1.1 ICJ Jurisdiction in General

The fundamental principle in international dispute settlement is the principle of consent: a court or tribunal has jurisdiction to settle a dispute only if the parties consented to the court or tribunal doing so. This consent may be given before or after the dispute arises. There are four bases for the ICJ's jurisdiction:

- **Optional clause declarations (Art. 36(2) of ICJ Statute)** – both States make a declaration stating that they will accept the jurisdiction of the Court over any dispute (or over certain disputes) filed against it by another State that made the same declaration.
- **Special Agreement / "Compromis" (Art. 36(1) of ICJ Statute)** – both States conclude a treaty to submit a particular dispute to the Court after the dispute has arisen.
- **Compromissory clause / Dispute settlement clause (Art. 36(1) of ICJ Statute)** – both States had already concluded a treaty (or were parties to a treaty) which provides for settlement of any disputes (or certain disputes) by the Court.
- ***Forum prorogatum* (Art. 38(5) of ICJ Rules of Court)** – one State institutes proceedings against a second State over which the Court does not have jurisdiction, but the second State consents to the Court's jurisdiction for purposes of that case.

In the contemporary practice of the ICJ, compromissory clauses are by far the most commonly invoked basis of jurisdiction.

### 3.1.2 Jurisdiction in the Present Problem

Unlike many prior Jessup cases, the 2020 Problem does not involve a special agreement, or "*Compromis*." Here, Adawa is attempting to invoke the compromissory clause contained in Article VI of the Treaty of Botega as the basis for the Court's jurisdiction. Rasasa maintains that Adawa is not entitled to invoke this clause, and that the Court therefore lacks jurisdiction.

Teams should avoid referring to the Problem as a "*compromis*" or "special agreement" in their written memorials and oral pleadings. Teams should refer to it as the "Statement of Agreed Facts" or simply the "Problem." However, Teams should not be penalized substantially for using the incorrect terminology in writing or oral arguments given the long history of "*Compromis*" in the Jessup.

In the Statement of Jurisdiction of their written memorials, **Applicant** teams should state that the Court's jurisdiction is based on Article VI of the Treaty of Botega, along with Article 36(1) of the ICJ Statute. **Respondent** teams should indicate that the Court does *not* have jurisdiction under Article VI of the Treaty of Botega (but they may include the statement that, should the Court find that it has jurisdiction under the Treaty of Botega, then Rasasa's counterclaim also falls within that jurisdiction).

During oral arguments, **Respondent** teams are expected to argue, particularly during discussion of the first Question Presented (*see* Section 4.1, below), that the Court does not have jurisdiction in the present case because Adawa did not become a party to the Treaty of Botega through State succession, and therefore is not entitled to invoke the compromissory clause in that Treaty. **Applicant** teams are of course expected to argue the opposite. All oralists should be able to answer general questions about the Court's jurisdiction in this case.

Judges should note that teams may raise the argument that, because Article VI of the Treaty of Botega uses language nearly identical to Article 36(2) of the ICJ Statute, it should be treated as if it were an

optional clause declaration (rather than a compromissory clause). This distinction could have implications for the law that applies to the interpretation and application of Article VI.

However, the prevailing view is that clauses like Article VI are **not** legally equivalent to optional clause declarations, notwithstanding similar language. Article VI of the Treaty of Botega is based upon Article XXXI of the Pact of Bogotá, a dispute resolution treaty concluded under the auspices of the Organization of American States. The ICJ has emphasized that Article XXXI of the Pact of Bogotá is a "treaty commitment" that exists independently of any optional clause declaration.[1] Additionally, states have in the vast majority of cases treated this provision as a compromissory clause within the meaning of Article 36(1) of the ICJ Statute, and the ICJ Registry lists the Pact of Bogotá as a treaty conferring jurisdiction on the Court. Thus, it may be difficult for teams to make a strong argument that the similarly-worded provision in Article VI of the Treaty of Botega should be treated as anything other than a compromissory clause under Article 36(1) of the Statute.

| | |
|---|---|
| **Q:** | (for Adawa) Agent, what is the basis for the Court's jurisdiction in this case?<br>• Article VI of the Treaty of Botega, together with Article 36(1) of the ICJ Statute. |
| **Q:** | Does the Court have jurisdiction over any of the claims raised in these proceedings if the Treaty of Botega is not applicable?<br>• No, Article VI of the Treaty of Botega is the only possible basis of ICJ jurisdiction in the present case. If the Treaty is not applicable, then the Court must find that it lacks jurisdiction to decide on any of the substantive claims raised. |

### 3.1.3 Article 37 of the ICJ Statute

Article VI of the Treaty of Botega refers disputes to the Permanent Court of International Justice, a judicial body that operated as the predecessor to the ICJ from 1922 and was dissolved in 1946. In order to justify the ICJ's jurisdiction in the present case, teams will need to refer to Article 37 of the ICJ Statute, which provides that "[w]henever a treaty or convention in force provides for reference of a matter [...] to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice." According to Article 37, therefore, the reference to the Permanent Court in Article VI of the Treaty of Botega should be deemed a reference to the ICJ.

### 3.1.4 Objections to Jurisdiction and/or Admissibility with Respect to Specific Claims

In addition to the general objection to jurisdiction (QP 1), the Problem also calls for teams to consider the Court's jurisdiction over (or the admissibility of) Adawa's trade law claim in QP 3 (*see* Section 4.3, below). Parties to disputes before the ICJ may object to the Court's jurisdiction over (or the admissibility of) a particular claim, rather than the entire Application (*i.e.*, all the claims at once).[2]

---

[1] *See Alleged Violations of Sovereign Rights and Maritime Spaces (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 25, ¶ 45; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, I.C.J Reports 1988, pp. 84-88, paras. 33-41.

[2] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States), Preliminary Objections, Judgment, I.C.J. Reports 2019*, ¶¶ 126(2), 126(5). The United States challenged the Court's jurisdiction over Iran's claims relating to foreign sovereign immunity, and the Court ultimately ruled that it lacked jurisdiction over those claims, while upholding jurisdiction over the case as a whole.

In this case, Respondent teams are expected to argue that the Court lacks jurisdiction over Adawa's claim that Rasasa's tariffs on Helian products violate the CHC Treaty, **and/or** that such claims are inadmissible. This argument may require teams to address the difference between objections to jurisdiction and objections to admissibility.

The distinction between jurisdiction (of a court or tribunal) and admissibility (of a claim) is often unclear in international practice. With respect to the ICJ specifically, Professor Robert Kolb applies the following set of criteria:[3]

| Jurisdiction | Admissibility |
|---|---|
| Questions connected to the Court's capacity to hear the case | Questions connected to the propriety of the claim and to possible defects in it |
| Questions which are matters of the public interest and are raised by the Court of its own volition | Questions of private interest left to the parties to object to if they so desire |
| Questions arising from the ICJ Statute | Questions arising from international law external to the Statute and law of the Court |

While these criteria are helpful, it is by no means required that teams reference or apply them. Teams should have some leeway in characterizing objections to Adawa's trade law claim as objections to jurisdiction or admissibility, but should be able to answer basic questions about the distinction between these concepts.

| | |
|---|---|
| **Q:** | (for Rasasa) Agent, is your objection to Adawa's trade law claim an objection to jurisdiction or an objection to admissibility?<br>• Either answer is theoretically possible, but good teams will be able to advance a legal reason in support of their classification. |
| **Q:** | What is the difference between an objection to jurisdiction and an objection to admissibility?<br>• The answer to this question is not clear-cut, but good teams might reference the ICJ's Nicaragua-Colombia Continental Shelf case, Professor Kolb's criteria, or a similar source. |

### 3.2 COUNTER-CLAIMS

Because Adawa initiated the proceedings against Rasasa, the claims Adawa makes against Rasasa are called "claims" and the claim Rasasa makes against Adawa (*see* Section 4.4, below) is called a "counter-claim".

With respect to counter-claims, Article 80 of the ICJ's Rules of Court provides: "The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party." This provision contains two requirements.

- First, the counter-claim must come within the jurisdiction of the Court. In the present case, the relevant treaty provision (Article VI of the Treaty of Botega) is broad enough to encompass both the claims and counter-claims because it provides the Court with jurisdiction over "all disputes of a juridical nature" concerning "[a]ny question of international law."

---

[3] Robert Kolb, *The International Court of Justice* (Oxford, Hart Publishing 2013), p. 204.

- Second, the counter-claim must be directly connected with the subject matter of the claim of the other party. In this case, the Court's Order of 20 September 2019 indicates that the "Agents of the Parties have agreed … that the counterclaim is 'directly connected with the subject matter' of at least one of the claims within the meaning of Article 80 of the Rules of Court." Therefore, Adawa cannot object to Rasasa's counter-claim on this ground.

| | |
|---|---|
| **Q:** | Agent, what are the two requirements for counter-claims under the ICJ's Rules of Court, and does Rasasa's counter-claim meet these requirements? |

In the present case, there is some tension between the fact that Rasasa contests the Court's jurisdiction under the Treaty of Botega, while simultaneously raising a counter-claim. Respondent should be able to explain that the counter-claim is an *alternative argument*, raised in case the Court *does* find that it has jurisdiction. Respondent teams may recall that the Parties have explicitly agreed to have questions of jurisdiction, claims, and counter-claims heard together in a single proceeding.

| | |
|---|---|
| **Q:** | (for Rasasa) Agent, if you believe that the Court lacks jurisdiction over this case, why are you raising a counter-claim? |
| **Q:** | (for Rasasa) If the Court agrees with you that we lack jurisdiction under the Treaty of Botega, may we still consider your counter-claim?<br>• Here the answer must necessarily be "no," since there would be no jurisdictional basis for the Court to rule on Rasasa's counter-claim. |

## 4 QP1: STATE SUCCESSION TO TREATIES

| *Adawa's Claim* | *Rasasa's Claim* |
|---|---|
| The Court has jurisdiction over Adawa's claims because Adawa is a party to the 1929 Treaty of Botega. | The Court lacks jurisdiction over Adawa's claims because Adawa is not a party to the 1929 Treaty of Botega. |
| ***Adawa's Anticipated Argument*** | ***Rasasa's Anticipated Argument*** |
| Adawa succeeded the AZU as a party to the Treaty of Botega, because: (1) the Treaty of Botega is a "territorial" or "localized" treaty; (2) the Treaty establishes a boundary; and/or (3) there is a rule of customary international law mandating automatic succession to treaties in cases of a State's dissolution. | Adawa did not succeed the AZU as a party to the Treaty of Botega, which is neither a territorial nor a boundary treaty. There is no customary law rule of automatic succession in dissolution cases. |

### 4.1 Background

Question 1 concerns State succession to treaties. Does a treaty which previously applied to a given territory continue to do so after the succession has taken place?[4] Succession may take place in a wide variety of scenarios.[5] The present case deals with the dissolution of a State (the Adawa-Zeitounia Union, or "AZU") to form two new States (Adawa and Zeitounia).

The rules concerning succession to treaties are those of customary international law, together with the Vienna Convention on Succession of States in Respect of Treaties ("VCST").[6] In the present case, neither Adawa nor Rasasa are parties to the VCST. However, the ICJ has previously found that certain provisions of the VCST reflect customary international law,[7] and teams are expected to argue that certain provisions of the VCST have customary status and are therefore binding on Adawa and Rasasa, notwithstanding that neither is a party to the VCST.

| | |
|---|---|
| **Q:** | Agent, does the Vienna Convention on Succession of States to Treaties apply in this case? |
| **Q:** | Do any provisions of the VCST reflect customary international law? |

The law of State succession to treaties is characterized by a fair amount of uncertainty, as no generally-accepted codification of this body of law exists (only 23 States are party to the VCST).

---

4 *Ibid*, ¶ 2.

5 Andreas Zimmermann, State Succession in Treaties, Max Planck Encyclopedia of Public International Law (2006), ¶ 1 (listing cession of territory, secession of parts of a State, dismemberment of a State, incorporation of one State into another, or merger of States as examples).

6 Malcolm Shaw, *International Law* (7th ed., 2014), p. 700.

7 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, ¶ 123.

Moreover, State practice is relatively scarce and contradictory.[8] It can therefore be challenging to establish the existence of customary international law rules on State succession.

Historically, the law of State succession to featured two divergent approaches:

- The universal succession or continuity approach, according to which the succession of new States to treaties should generally be presumed;
- The "clean slate" or *tabula rasa* approach, according to which new States are presumptively not bound by the treaties to which their predecessors were parties.

The current prevailing view, however, is that neither of these approaches is practicable across the various scenarios in which succession can take place, and instead customary international law has developed "more nuanced solutions."[9]

| | |
|---|---|
| **Q:** | Agent, should we examine the content of the Treaty of Botega in order to determine whether or not Adawa succeeded to it? |
| **Q:** | Agent, does the context in which the succession of States took place matter? What type of succession are we dealing with here? |

In support of Adawa's succession to the Treaty of Botega, Applicant may argue: The Treaty of Botega is a territorial treaty (Section 4.1.2); that the Treaty of Botega is a boundary treaty (Section 4.1.3); and that there exists a customary law rule of continuity in dissolution cases (Section 4.1.4). Distinct or ancillary arguments the parties can raise are discussed in Sections 4.1.5-4.1.6. Adawa need only establish one such ground for succession to succeed.

### 4.2 The Treaty of Botega as a "Territorial" or "Localized" Treaty

It is widely accepted that obligations and rights contained in "territorial" treaties (also referred to as "localized," "real" or "dispositive" treaties) are not affected by a succession of States.[10] Put simply, this type of treaty is considered "binding upon the territory affected notwithstanding any succession of States."[11]

| | |
|---|---|
| **Q:** | Agent, what is a "territorial treaty"? What type of attributes must it possess to be qualified as such? |

Article 12 of the VCST, titled "Other territorial regimes" codifies the law relating to territorial treaties. It reads, in relevant part:

> 2. A succession of States does not as such affect:
>
> (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

---

[8] Andreas Zimmermann, State Succession in Treaties, Max Planck Encyclopedia of Public International Law (2006), ¶ 4.

[9] *Ibid.*, ¶ 5.

[10] *See* Malcolm Shaw, *International Law* (7th ed., 2014), pp. 702-03.

[11] Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p. 196, Arts. 11-12, ¶ 1.

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

In its Commentary on the draft version of Article 12, the International Law Commission ("ILC") identified treaties relating to "rights of transit on international waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities, etc." as constituting territorial regimes.[12]

The ICJ addressed Article 12 in its 1997 Judgment in *Gabčíkovo-Nagymaros Project*.[13] In that case, Hungary argued that a bilateral 1977 treaty it had concluded with Czechoslovakia had ceased to be in force due to the dissolution of that State on December 31, 1992.[14] Slovakia argued that it was a party to the treaty as a successor State, including because the treaty was one "attaching to [the] territory" within the meaning of Article 12 of the VCST. The ICJ made several important findings in that case[15]:

- The Court found that Article 12 reflects a rule of customary international law, such that it applies even when the VCST itself is not applicable;

- The Court sided with Slovakia, finding that the 1977 treaty involved the proposed construction of large and complex installations [*i.e.*, a system of locks] along specific sections of the Danube river, and "also established the navigational regime for an important sector of an international waterway." The Court thus found that the 1977 treaty was a territorial regime per Article 12.

- The Court found that, even though Article 12 refers only to "obligations" and "rights" within treaties being unaffected by a succession of States, its effect was that the treaties themselves would be binding on successor States.

| | |
|---|---|
| **Q:** | Has the ICJ ever dealt with any provisions of the VCST? |
| **Q:** | Does Article 12 actually mean that successor States automatically become parties to |

[12] Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p. 196, Arts. 11-12, ¶ 1. One potentially relevant example of a treaty dealing with "neutralization" is Article XCII of the Act of the Congress of Vienna, which established that the territories of Chablais and Faucigny were to be neutralized. When France succeeded the Sardinia as the sovereign in these territories in 1860, it recognized that it was bound to maintain the neutrality of those two territories. *See ibid.*, p. 205, ¶ 31.

[13] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, ¶¶ 117-24.

[14] *Ibid.*, ¶ 117.

[15] *Ibid.*, ¶ 123 ("In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, ¶ 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" (*ibid.*, p. 33, ¶ 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (*ibid*,, pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.")

| | |
|---|---|
| | territorial treaties? Or does it only apply to certain "rights" and "obligations" contained within those treaties, as it terms indicate? |

Teams may refer to older cases (discussed by the ILC in its commentary on the draft VCST) to show that territorial treaties are considered as automatically binding on successor States.

| *Year* | *Forum* | *Case* | *Description* |
|---|---|---|---|
| 1920 | League of Nations Committee of Jurists | *Åaland Islands* dispute | Obligations contained in 1856 Åaland Islands Convention (which called for the demilitarization of the Islands) binding on Finland as successor to Russian Empire.[16] |
| 1930 | Permanent Court of International Justice (PCIJ) | *Free Zones of Upper Savoy and the District of Gex* | Provision of 1816 Treaty of Turin between Switzerland and Sardinia considered binding on France (as Sardinia's successor), insofar as it imposed restrictions on customs duties in the "Zone of St. Gingolph". |

| | |
|---|---|
| **Q:** | Agent, can you provide examples of other international cases in which a territorial treaty has been considered binding on a successor State? |
| **Q:** | Agent, what types of treaties have been considered "territorial treaties" in international judicial practice? |

In the present case, Article III(1) of the Treaty of Botega calls for the creation of an "International Zone of Peace" along the border between Rasasa and the Zeitounian region of the Adawa-Zeitounia Region, which "shall be accessible to all citizens of both high Contracting Parties without the need for border formalities" (Problem, Annex A, Art. III(1)). Article III(2) adds that Rasasa and the Adawa-Zeitounia Union "agree to explore" the possibility of extending the International Zone of Peace "to other areas on or in close proximity to the border between Zeitounia and Rasasa." In addition to Article III, the Preamble to the Treaty of Botega makes clear that the Treaty was meant to "save succeeding generations of Crosinians from the scourge of war."

**Applicant** teams may argue that the Treaty of Botega is a territorial treaty within the meaning of Article 12 of the VCST, and Adawa is therefore a Party to it as a successor State, for the following reasons:

- It establishes an "International Zone of Peace," which is a regime "attaching to the territory" of the Contracting Parties, and is analogous to the demilitarized zone in the *Åaland Islands* case or the customs free zone in the *Free Zones* case.
- More specifically, the fact that Article III(2) contemplates extending the International Zone of Peace – including to areas possibly near or bordering Adawan territory – shows that Adawa is an intended beneficiary of the Zone of Peace regime and thus succeeded to the Treaty.

---

[16] As the ILC noted, the Committee of Jurists in this case appeared to consider that the Åaland Islands Convention represented an "international settlement established in the general interest of the international community (or at least of a region)," and that Finland was therefore "succeeding to an established régime or situation constituted by the treaty rather than to the contractual obligations of the treaty as such." Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p. 199, Arts. 11-12, ¶ 5. This approach could be considered different from the ICJ's approach in *Gabčíkovo*, in which the Court held that under Article 12 of the VCST, a successor becomes bound by the treaty itself, rather than just the régime created by the treaty.

- The preamble to the Treaty makes clear that it was intended to be an international settlement for the benefit of the States of the Crosinian region, much like the 1856 Åaland Islands Convention or other agreements that were the inspiration for Article 12 and Adawa, as a Crosinian State, is therefore a successor.

**Respondent** may argue that the Treaty of Botega is not a territorial treaty, and therefore Adawa cannot claim to be bound by it as a successor State for the following reasons:

- There is no precedent in international law for the proposition that a treaty that creates a Zone accessible without border formalities constitutes a territorial treaty.
- In any event, the International Zone of Peace is located on the border between Rasasa and Zeitounia. Therefore, the main reasons underlying the rule contained in Article 12 (*e.g.*, the preservation of important treaty regimes attaching to particular territories) do not apply in the present case.
- In *Gabčíkovo-Nagymaros Project*, Hungary and Slovakia had agreed that Slovakia was the sole successor to the 1977 bilateral treaty between Hungary and Czechoslovakia, as the dam project on the Danube envisioned by that treaty did not implicate Czech territory.[17]

| | |
|---|---|
| **Q:** | (for Adawa) Agent, why does the International Zone of Peace matter in this case, given that it does not touch any part of Adawan territory? |

### 4.3 The Treaty of Botega as a Boundary Treaty

Applicant teams may also seek to argue that the Treaty of Botega is a boundary treaty within the meaning of Article 11 of the VCST.

Article 11, entitled "Boundary regimes", provides that:

> A succession of States does not as such affect:
>
> (a) a boundary established by a treaty; or
>
> (b) obligations and rights established by a treaty and relating to the regime of a boundary.

Like Article 12, Article 11 is one of the few provisions of the VCST that unambiguously reflects a rule of customary international law.[18] However, in the *Libya/Chad* case, the ICJ found that "[W]hen a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed."[19] Thus, with respect to boundary treaties, Rasasa may argue that succession takes place "not as such to the boundary treaty but rather to the boundary as established by the treaty."[20] This would mean that Adawa did not succeed to the compromissory clause in Article VI of the Treaty of Botega, and therefore that the Court lacks jurisdiction.

---

17 *See Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, ¶ 2.

18 *See* Malcolm Shaw, *International Law* (7th ed., 2014), pp. 701-02; Andreas Zimmermann, State Succession in Treaties, Max Planck Encyclopedia of Public International Law (2006), ¶ 13 ("Both State practice up to and after the [VCST], as well as Article 11 […] itself, as well as various decisions of international (arbitral) tribunals confirm that a succession of States does not, as such, affect a land or maritime boundary established by a treaty. […] This is in line with the general interest of the international community in the stability and inviolability of boundaries, which is also enshrined in the *uti possidetis* docrine.").

19 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, ¶ 73.

20 Malcolm Shaw, *International Law* (7th ed., 2014), p. 702.

On the other hand, in the *Temple of Preah Vihear* case, Cambodia took the position that it was the successor to bilateral boundary treaties concluded between Thailand and France, including provisions of those treaties that provided for the jurisdiction of the ICJ over disputes.[21]

| | |
|---|---|
| **Q:** | Agent, if a treaty establishes a boundary, is it only the boundary that remains unaffected by a succession of States, or the boundary treaty as a whole? |

In the present case, the only relevant provision in the Treaty of Botega is Article I(2), which creates "Armistice Demarcation Lines" aimed at separating the armed forces of Rasasa and the AZU. However, Article I(2) explicitly states that the Armistice Demarcations Lines are "without prejudice to the ultimate settlement" of the dispute between the parties.

- **Adawa** may seek to argue that, because there is no evidence that the armistice line established by the Treaty of Botega was ever changed, that line effectively constitutes an international boundary, making the Treaty a boundary treaty within the meaning of Article 11.
- **Rasasa** may argue that, based on the explicit language of Article I(2), the Treaty of Botega does not create a permanent international boundary.

| | |
|---|---|
| **Q:** | Agent, do the armistice lines created by the Treaty of Botega qualify as a boundary settlement? |

Adawa may also argue that the International Zone of Peace creates "obligations and rights … relating to the regime of a boundary" because it provides for freedom of movement across a border in a particular area. In this sense, the Treaty of Botega is similar to an 1897 Treaty between the United Kingdom and Ethiopia, which both established a boundary between Ethiopia and British Somaliland and provided that local Somali tribes could freely cross the boundary to reach traditional grazing grounds.[22]

Ultimately, Adawa will encounter the same difficulty with an Article 11 argument as it would with Article 12 – namely that the key provision (establishing the International Zone of Peace) does not touch Adawan territory, but rather only the territories of Rasasa and Zeitounia.

### 4.4 Customary Rule of Continuity in Dissolution Cases

Adawa can argue that there is a customary international law rule providing for automatic (or *ipso jure*) succession in cases of the complete dissolution of a State, subject to certain narrow exceptions. Article 34 of the VCST embodies this rule, but Applicants will have to make the case that Article 34 reflects a rule of customary international law.

#### 4.4.1 Rule of Continuity in the VCST (Article 34)

Article 34 of the VCST, entitled "Succession of States in cases of separation of parts of a State", provides, in relevant part:

> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

---

[21] Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p. 200, Arts. 11-12, ¶ 7.

[22] *Ibid.*, ¶ 13.

(a) any treaty in force at the date of succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; [...]

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

The ILC, in its commentaries on this provision, made clear that it was meant to apply to cases of dissolution (such as in the present case) in which the predecessor State ceases to exist.[23] The ILC did not draw a distinction between multilateral and bilateral treaties and also considered that, in dissolution cases, it did not matter what type of internal governmental structure the predecessor State possessed.[24]

On the whole, the ILC found that State practice was consistent enough to support a rule that "treaties in force at the date of dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution."[25]

### 4.4.2 Article 34 as Customary International Law

Applicant must show that there is sufficient (1) State practice and (2) *opinio juris* to establish the customary-law status of Article 34. The ILC considered that there was sufficient State practice to justify the inclusion in the VCST of a general rule of continuity, but there has been substantial debate on this subject.[26]

A nuance in this case is that the purported automatic succession of Adawa to the Treaty of Botega would have taken place in 1939. Therefore, under the **intertemporal rule**, according to which "a juridical fact must be appreciated in the light of the law contemporary with it,"[27] the relevant customary international law is that which existed in 1939. Strong teams will prioritize examples of State practice from before this year. Teams may still refer to State practice post-dating 1939, *e.g.* to confirm the existence of a customary rule of automatic succession or further define its content. The ICJ recently applied and discussed the intertemporal rule in the *Chagos* advisory opinion.[28]

| | |
|---|---|
| **Q:** | Agent, do we need to assess the state of customary international law as of the present date, or as of the time of Adawa's purported succession? When did this succession take place? |

---

[23] Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p. 265, Arts. 33-34, ¶ 23.

[24] *Ibid.*, ¶ 25.

[25] *Ibid.*

[26] *See, e.g.*, James Crawford, *Brownlie's Principles of Public International Law* (9th ed., 2019), pp. 423-34 ("The rule of non-transmissibility [or 'clean slate' rule] applies both to secession of 'newly independent states' (i.e. to cases of decolonization) and to other appearances of new states by the union or dissolution of states."); Malcolm Shaw, *International Law* (7th ed., 2014), p. 710; Andreas Zimmermann, State Succession in Treaties, Max Planck Encyclopedia of Public International Law (2006), ¶ 10.

[27] *Island of Palmas* (Netherlands/Unitied States of America), UNRIAA, vol. II, p. 829, at p. 845 (1928).

[28] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 25 February 2019*, p. 34, ¶ 142 *et seq.*

In both the *Gabčíkovo* and *Bosnian Genocide* cases, Slovakia and Bosnia-Herzegovina, respectively, argued that Article 34 of the VCST reflected customary international law, while Hungary and Serbia-Montenegro took the opposite position. The Court ultimately reached a decision on more narrow grounds in each case,[29] and therefore it has never pronounced upon the customary status of Article 34.

Stronger Applicant teams may argue that Article 34 only reflects customary international law insofar as it relates to the complete dissolution of a State (as opposed to cases of secession), as this appears to be the more defensible position in light of State practice.

| | |
|---|---|
| **Q:** | Agent, has the ICJ ever considered whether or not Article 34 of the VCST reflects customary international law? |
| **Q:** | What are the standards applied by the ICJ to determine if a treaty provision reflects customary international law? |

### 4.4.3 State Practice

There are many instances of State practice, both historical and contemporary, to which teams may refer. In terms of historical practice, teams may discuss the examples of dissolutions cited by the ILC in its commentaries on the draft version of Article 34 (which was then Article 33). Relevant examples are summarized below:

- **Gran Colombia --> Republic of New Granada, Venezuela, Ecuador** (1829-1831): Gran Colombia had signed treaties of amity with the United States (1824) and Great Britain (1825). After dissolution, the U.S. and the successor State of New Granada (later Colombia) appeared to consider that the 1824 treaty was still in force between them. Similarly, Great Britain, Venezuela, and Ecuador appear to have acted on the basis that the 1825 treaty continued in force in their mutual relations.[30]
- **United Kingdoms of Norway and Sweden --> Norway & Sweden** (1905): Upon dissolution, Norway and Sweden issued notifications stating that treaties made on behalf of the union as a whole would continue to apply to each State individually. Great Britain accepted the continuance in force of union treaties conditionally, stating that it had the right to examine these treaties *de novo*. France and the United States shared the view of Norway and Sweden that union treaties continued in force on the basis set out in the latter States' notifications.[31]
- **Austria-Hungary --> Austria & Hungary** (1918): Austria persisted in the view that it was a new State not *ipso jure* bound by Austria-Hungary's treaties. Hungary, however, appears to have generally accepted that it should be considered as remaining bound by its predecessor's treaties *ipso jure*.[32]
- **Iceland-Denmark --> Iceland & Denmark** (1944): During the period of union (1918-1944), Denmark could make treaties binding upon Iceland with the latter's consent. After 1944, Iceland considered union treaties as continuing in force with respect to itself, and this view appears to have been taken by the other States parties to those treaties.[33]

---

[29] *See Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, ¶ 123; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, ¶ 23.

[30] Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p. 260, Arts. 33-34, ¶ 2.

[31] *Ibid.*, pp. 260-61, ¶ 3.

[32] *Ibid.*, p. 261, ¶ 5.

[33] *Ibid.*, ¶ 7.

- **United Arab Republic (UAR) --> UAR (later Egypt) & Syria** (1960): After Syria withdrew from the UAR, it declared in regard to both multilateral and bilateral treaties that any treaty concluded by the UAR was to be considered in force with respect to Syria. Egypt considered itself a continuation of the UAR and therefore also felt it was bound by UAR treaties. The UN Secretary General and various treaty depositaries also appear to have considered that UAR treaties were binding on Egypt and Syria.[34]

In addition to these historical examples, teams can also refer to more contemporary examples of dissolution:

- Dissolution of Yugoslavia: a 1999 study of State practice commissioned by the Council of Europe concluded that "successor States of the former Yugoslavia have tended to succeed to the treaties of their predecessor State" and that third States have also tended to "strive for a continued application of pre-existing treaties."[35]
- Dissolution of Czechoslovakia, the Council of Europe Study found that "the two successor States have clearly favoured the applicability of the rule contained in Art. 34 of the [VCST]".

Scholars have observed that "State practice on the matter reveals that States, most notably in the context of the dissolution of Czechoslovakia and Yugoslavia, have more or less followed the procedure set out in Article 34 [of the VCST]".[36] Applicant teams in particular may refer to the Separate Opinion of Judge Tomka in the *Bosnian Genocide* case, in which he took the position that "the rule of *ipso jure* succession to treaties for cases involving the dissolution of a State may be considered a rule of customary international law."[37]

However, the practice of some States is inconsistent with Article 34 of the VCST. Italy's *Corte di Cassazione*, for instance, has applied the "clean slate" rule to *all* situations of succession, including dissolutions.[38]

| | |
|---|---|
| **Q:** | (for Adawa) Agent, can you provide some examples of State practice tending to show acceptance of Article 34 of the VCST? |

| | |
|---|---|
| **Q:** | (for Rasasa) Agent, are there any States whose practice is contrary to Article 34 of the VCST? |

Both Adawa and Rasasa should be mindful when referring to State practice that involves cases of secession, and not dissolution. While the ILC designed Article 34 to apply to both secession and dissolution,[39] State practice in favor of applicability of Article 34 appears to be much stronger in dissolution cases.

Distinguishing between cases of secession and dissolution can at times be difficult. For instance, the case of the former U.S.S.R. is sometimes considered to be a dissolution. However, Russia is generally

---

[34] *Ibid.*, p. 262, ¶¶ 8-10.

[35] *State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe* (Jan Klabbers et al., eds., 1999), pp. 114-16.

[36] Andreas Zimmermann & James G. Devaney, *Succession to Treaties and the Inherent Limits of International Law*, Research Handbook on the Law of Treaties (Christian Tams et al. eds., 2014), p. 505.

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Separate Opinion of Judge Tomka, I.C.J. Reports 2007,* p. 310, ¶ 33.

[38] *See Succession to Bilateral Treaties: The Consent of the 'New' State is a Necessary but not Sufficient Condition*, The Italian Yearbook of International Law, Vol. XXVII (2017), p. 429.

[39] Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, pp. 263-64, Arts. 33-34, ¶¶ 12-18.

accepted as being the "continuator" State of the U.S.S.R., and therefore the other post-Soviet republics could be considered as having seceded. Application of Article 34 in this situation has been characterized by uncertainty.[40]

| | |
|---|---|
| **Q:** | Which examples of State practice are the most analogous to the present case? |
| **Q:** | To what extent should the Court take into consideration examples of State practice involving secession, as opposed to dissolution? What about the case of the U.S.S.R.? |

### 4.4.4 Bilateral Treaties and Succession

Some authors have argued that there is no rule of continuity or automatic succession with respect to bilateral treaties in particular because the specific identity of the States takes on a greater importance in the case of bilateral treaties.[41] Therefore, bilateral treaties can only become binding on successor States as a result of an agreement between the predecessor and successor State.[42]

On the other hand, some authorities support the proposition that there is no meaningful distinction between bilateral and multilateral treaties as regards succession. As mentioned above, the ILC did not distinguish between the two types of treaty in drafting Article 34 and observed that there is a presumption that the rule applies.[43] Finally, in many examples of State practice, the rule contained in Article 34 appears to have considered equally applicable to both bilateral and multilateral treaties. (*see, e.g.*, the examples of Gran Colombia, the United Arab Republic, and Czechoslovakia, discussed above).

More advanced Applicant teams may also argue that the practice of negotiations on succession is consistent with Article 34, given that such negotiations are either meant to confirm the "existing legal situation" of automatic succession,[44] or represent an opportunity to for States to opt out of automatic succession by agreement – something that is explicitly contemplated in Article 34(2)(a).[45]

In the present case, the Treaty of Botega was originally a bilateral treaty between Rasasa and the AZU, and no negotiations between Adawa and Rasasa regarding succession have taken place. The parties may thus argue as follows:

- **Rasasa**: Given that the Treaty of Botega is a bilateral treaty, it could not become binding on Adawa unless the parties had negotiated and agreed that Adawa could become a party as a successor State. Therefore, even if Article 34 reflects customary international law, it doesn't allow Adawa to become a party to the Treaty of Botega in this case.

---

[40] Andreas Zimmermann & James G. Devaney, *Succession to Treaties and the Inherent Limits of International Law*, Research Handbook on the Law of Treaties (Christian Tams et al. eds., 2014), p. 526.

[41] *See, e.g.*, Patrick Dumberry, *An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?*, 6 J. Int'l Disp. Settlement 74 (2014), at p. 79.

[42] Andreas Zimmermann & James G. Devaney, *Succession to Treaties and the Inherent Limits of International Law*, Research Handbook on the Law of Treaties (Christian Tams et al. eds., 2014), p. 526.

[43] *See* International Law Association, *Rapport Final sur la Succession en matière de traités*, New Delhi Conference 2002, Committee on Aspects of The Law of State Succession, at p. 18 (Unofficial translation) ("En ce qui concerne les traités bilatéraux, la pratique générale est celle de discussions bilatérales plus ou moins formelles destinées à clarifier la situation. Un examen attentif de la pratique semble cependant démontrer que ces discussions sont fondées sur l'idée qu'il existe une règle de continuité de traités bilatéraux.")

[44] *State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe* (Jan Klabbers et al., eds., 1999), pp. 114-16 (noting with respect to the case of Yugoslavia that "frequently, the existing legal situation is acknowledged by way of an exchange of notes or similar instruments.").

[45] Article 34(2)(a) provides for automatic succession unless "the States concerned otherwise agree".

- **Adawa**: State practice shows that the customary international law rule contained in Article 34 applies equally to bilateral treaties. The fact that States have negotiated the specifics of succession is not inconsistent with the applicability of Article 34.

| | |
|---|---|
| **Q:** | Does it matter, for succession purposes, whether or not a treaty is bilateral or multilateral? |
| **Q:** | Were the parties required to negotiate and agree on Adawa's succession to the Treaty of Botega? |

### 4.4.5 Bilateral Investment Treaties

The parties may refer to State practice and arbitral decisions related to bilateral investment treaties (BITs) in making their arguments. A number of investor-State arbitrations have involved BITs originally entered into by a State that later underwent dissolution (*e.g.* Czechoslovakia). In these arbitrations, investors have brought claims against a successor State (*e.g.* the Czech Republic or Slovakia), thus potentially raising the issue of whether or not the successor State was bound by the BIT entered into by its predecessor.

Most arbitral tribunals to have considered this type of issue appear to have assumed (without analysis) that the successor State succeeded to the BIT. This was the case, for instance, in *Lauder v. Czech Republic* and *Frontier Petroleum Services v. Czech Republic*.[46] Other tribunals have offered token analysis, stating for instance that "after [Czechoslovakia] ceased to exist on December 31, 1992, the Czech Republic succeeded to the rights and obligations…under the treaty."[47]

In *Saluka v. Czech Republic*, the tribunal observed that the Czech Republic "confirmed to the Kingdom of the Netherlands that, upon the separation of the Czech and Slovak Federal Republic into two separate republics, the Treaty remained in force between the Czech Republic and the Kingdom of The Netherlands."[48] Adawa could point to this language to suggest that discussions between the Czech Republic and the Netherlands were limited to "confirming" the fact the Czech Republic had become a party to the BIT by automatic succession. Rasasa, on the other hand, could argue that the fact that the parties felt the need to confirm shows that succession was not considered automatic.

In *World Wide Minerals v. Kazakhstan*, the arbitral tribunal apparently found that Kazakhstan was bound as a successor State to the BIT between Canada and the U.S.S.R. However, the award is as of yet unpublished, so the reasoning behind this decision is unknown.

| | |
|---|---|
| **Q:** | Agent, are there any lessons to be drawn from investment treaty arbitration as regards succession to bilateral treaties? |

---

[46] Patrick Dumberry, *An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?*, 6 J. Int'l Disp. Settlement 74, 85-86 (2014)

[47] *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 3; *see also Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 5; *Eureko B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 48.

[48] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, ¶ 2; *see also Achmea B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (Number 2), Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 1, fn. 1 ("[T]he Slovak Republic confirmed in an exchange of letters…that the BIT remained in force between the Slovak Republic and the Kingdom of the Netherlands."); *Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, ¶ 8 ("The applicability of the [BIT] by way of State succession was confirmed by an exchange of diplomatic notes…").

### 4.4.6 Other Exceptions to Article 34

Article 34 of the VCST contains two "built-in" exceptions to the rule of continuity/automatic succession: (1) situations where the States concerned have agreed on a solution other than automatic succession; or (2) situations where automatic succession would be contrary to the object and purpose of the treaty or would radically change the conditions for its operation.

This year's problem was not deliberately designed to put either of these issues in play. However, it is possible that Respondent teams may raise arguments under either of these two provisions.

With respect to agreement, there is nothing in this year's problem suggesting that Adawa and Rasasa agreed upon (or even discussed) anything related to the Treaty of Botega prior to the institution of the present proceedings. Any argument that the parties *tacitly* agreed that Adawa would not succeed to the Treaty (based on both parties' long-term silence regarding the treaty) would be difficult to sustain, as the ICJ has stated that "[e]vidence of a tacit agreement must be compelling."[49]

With respect to the object and purpose of the Treaty, the preamble and substantive provisions of the Treaty tend to indicate that the purpose of the treaty is to "save succeeding generations of Crosinians from the scourge of war" and promote peaceful dispute settlement in lieu of armed conflict. It will be difficult for Rasasa to argue that having Adawa be automatically bound by the Treaty runs contrary to this purpose. Similarly, it would appear difficult to argue that having Rasasa be bound to peacefully settle disputes with Adawa, rather than the AZU, would "radically change" the conditions for the operation of the Treaty of Botega.

| | |
|---|---|
| **Q:** | (for Adawa) Agent, if your State considered that it was bound by the Treaty of Botega, why did it never invoke it or discuss it at all for 80 years, until it instituted the present proceedings? |

## 4.5 Other Possible Arguments

Both Adawa and Rasasa could potentially invoke other arguments to support their respective positions on Adawa's succession to the Treaty of Botega:

- Lack of notice: Rasasa could argue that Adawa needed to provide notice of its intent to succeed to the Treaty of Botega. It may point to the fact that even in the cases of the dissolutions of Yugoslavia and Czechoslovakia, successor States usually provided notice of their intent to succeed to various treaties.[50] However, the prevailing view appears to be that these notifications were declaratory, and not constitutive, in nature (*i.e.* the notifications were not necessary to complete the succession process).[51] The VCST requires notification of intent to succeed for "newly independent States" in the decolonization context,[52] but does not contain such a requirement in cases of dissolution.

- Humanitarian / Human Rights Treaty: Adawa could argue, as an alternative basis for succession, that the Treaty of Botega is akin to a humanitarian or human rights treaty, and that such treaties generally involve automatic succession. Both the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of

---

[49] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, ¶ 253.

[50] *See* Patrick Dumberry, *An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?*, 6 J. Int'l Disp. Settlement 74, 83 (2014).

[51] *See, e.g.*, Andreas Zimmermann & James G. Devaney, *Succession to Treaties and the Inherent Limits of International Law*, Research Handbook on the Law of Treaties (Christian Tams et al. eds., 2014), p. 528 (describing the practice of exchanging "non-constitutive" diplomatic notes when discussing succession to bilateral treaties).

[52] Compare VCST, Art. 17(1) ("Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates") with VCST, Art. 34 (quoted above).

Human Rights (ECtHR) have found that successor States automatically succeed to certain humanitarian or human rights treaties.[53] This is in line with the approach of human rights bodies, such as the ICCPR Human Rights Committee.[54] Adawa could argue by analogy that the Treaty of Botega, which is geared towards preventing armed conflict in the Crosinian Region, should be treated like a human rights or humanitarian treaty. However, even assuming that a rule of automatic succession applies to these categories of treaties, such a rule would most likely not encompass the Treaty of Botega, because it is not a major multilateral convention which expresses "fundamental human rights."

- Zeitounia as "Continuator State": Some Respondent teams may argue that Zeitounia succeeded to all of the Adawa-Zeitounia Union's treaty obligations (including the Treaty of Botega) as the "continuator" of the Union, while Adawa effectively seceded to form a new State, and does not succeed to the Union's treaty obligations. In making this argument, teams may rely on the fact that, during the Union's existence, the central government was under "heavy Zeitounian influence," and after the Union's dissolution in 1939, Zeitounia retained the Union's monarchical form of government under Queen Goleta.[55] It is not always clear exactly what qualifies a State to be a "continuator" as a matter of international law. The Russian Federation was recognized as the continuator State of the Soviet Union in a number of contexts, e.g., as member of the UN Security Council or a party to the Nuclear Non-Proliferation Treaty. On the other hand, claims by the Federal Republic of Yugoslavia (encompassing Serbia and Montenegro) to be the continuator of the Socialist Federal Republic of Yugoslavia were generally rejected by the international community. In the present case, there is likely insufficient evidence about the relative characteristics of Adawa and Zeitounia (area, population, economy) to enable teams to make a strong argument that Zeitounia is a continuator State of the Union.

---

[53] *Prosecutor v. Mucic et al. (Čelebici* case), IT-96-21-A, Appeals Chamber Judgment, 20 February 2001, ¶¶ 111-12; *Bijelic v. Montenegro and Serbia*, Application no. 11890/05, Judgment, 28 April 2009, ¶ 58.

[54] *See* General Comment No. 26: Continuity of obligations: 08/12/97, CCPR/C/21/Rev.1/Add. 8/ Rev.1.

[55] Problem, ¶ 6.

## 5 QP2: LEGALITY OF AUTONOMOUS WEAPONS SYSTEMS

| *Adawa's Claim* | *Rasasa's Claim* |
|---|---|
| Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is in violation of international law, and the WALL must be dismantled and removed forthwith. | Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is consistent with international law. |
| ***Adawa's Anticipated Argument*** | ***Rasasa's Anticipated Argument*** |
| Rasasa's development and deployment of the WALL violates: (1) international humanitarian law; (2) international human rights law; and (3) the prohibition on the threat of force contained within Article 2(4) of the UN Charter and customary international law. | Rasasa's development and deployment of the WALL does not violate any provision of: (1) international humanitarian law; (2) international human rights law; or (3) the prohibition on the threat of force in the UN Charter and customary international law. |

Question 2 deals with the lawfulness of autonomous weapons systems ("AWS"), an emerging technology that is hotly debated in international law circles.

As the text of the parties' requests for relief makes clear, teams are expected to address both the development and deployment of the WALL. In other words, the question is not simply about how the WALL has been used, but also whether or not the way in which it was developed complies with international law.

### 5.1. Background and Definition of Autonomous Weapons

There is no single accepted definition of what constitutes an autonomous weapon system, but generally the term refers to weapons that can select, detect, and engage targets with little to no human intervention.[56] The International Committee of the Red Cross ("ICRC"), a key non-governmental actor in the field of international humanitarian law, has defined autonomous weapons as:

> Any weapon system with autonomy in its critical functions – that is, a weapon system that can select (search for, detect, identify, track or select) and attack (use force against, neutralize, damage or destroy) targets without human intervention.[57]

It is clear that the WALL falls under the scope of the definition provided by the ICRD. Teams may provide alternative definitions, but the problem was not designed to promote extensive debate regarding the status of the WALL as an AWS.

| **Q:** | Agent, what is the definition of an autonomous weapon system? |
|---|---|

Please note, agents for applicant and respondent may also place the WALL into sub-categories of AWS including but not limited to: (1) an **out-of-the-loop** or fully autonomous system that operates

---

[56] *See* Hayley Evans & Natalie Salmanowitz, *Lethal Autonomous Weapons Systems: Recent Developments*, Lawfare (Mar. 7, 2019, 3:28 PM), *available at* https://www.lawfareblog.com/lethal-autonomous-weapons-systems-recent-developments.

[57] *See* Neil Davison, *A Legal Perspective: Autonomous Weapons Systems under International Humanitarian Law*, UNODA Occasional Papers No. 30 (2017), p. 5.

completely on its own without human intervention; (2) a **Lethal Autonomous Weapon Systems ("LAWS")** because "it has autonomous 'choice' regarding the selection of a target and the use of lethal force"[58] and; (3) **anti-personnel 'sentry' weapon** which are used "at specific sites, perimeters or borders, and have been developed to have increasing levels of autonomy in the critical functions of selecting and attacking targets."[59] Teams should be able to provide definitions and sources for any designation used.

### 5.2 Autonomous Weapons in International Law

Given the evolving and emerging nature of autonomous weapons systems, there are no specific rules of international law that teams can apply. Rather, competitors will need to discuss general rules of international law and develop arguments as to why such rules should or should not apply to AWS.

- **Adawa** – Although there are no treaties or rules of international law that specifically address AWS, we will demonstrate how International Humanitarian Law, International Human Rights Law and the Prohibition of the Use of Force apply to the present case.

- **Rasasa** – Because there is no general rule of customary international law and "there is no specific international treaty banning autonomous weapons,"[60] the systems *per se* can be considered legal under international law. This follows from the so-called Lotus principle, enunciated by the Permanent Court of International Justice in the *Lotus* case, whereby in the absence of a prohibition, a State is free under international law to act within "a wide measure of discretion."[61]

Teams may address the legality of AWS under several International Humanitarian Law, International Human Rights Law, and/or Prohibition on the Use of Force.

#### 5.2.1 International Humanitarian Law

Teams should be prepared to address the legality of AWS under international humanitarian law ("IHL"), otherwise known as the law of armed conflict or *jus in bello*. The principal inter-governmental discussions of AWS currently are being held under the auspices of the U.N. Convention on Certain Conventional Weapons ("CCW"). The States party to the CCW established a multinational Group of Governmental Experts ("CGE") to study AWS and their legal implications. In 2018, the CGE affirmed a number of "Guiding Principles" applicable to its discussions of AWS, the first Principle being that "International humanitarian law continues to apply fully to all weapons systems, including the potential development and use of lethal autonomous weapons systems."[62]

---

[58] Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (A/HRC/23/47), United Nations General Assembly-Human Rights Council, 9 April 2013, at 8, *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf; *see also* US Department of Defense Directive, *"Autonomy in Weapons Systems"*, Number 3000.09 of 21 November 2012, Glossary Part II. *See also* United Kingdom Ministry of Defence, *The UK Approach to Unmanned Aircraft Systems* ¶¶ 202-203, *available at* https://www.gov.uk/government/publications/jdn-2-11-the-uk-approach-to-unmanned-aircraft-systems.

[59] *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons,* Expert meeting, Versoix, Switzerland, International Committee of the Red Cross, 15-16 March 2016, at 73, *available at* https://www.icrc.org/en/publication/4283-autonomous-weapons-systems.

[60] *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons,* Expert meeting, Versoix, Switzerland, International Committee of the Red Cross, 15-16 March 2016, at 41, *available at* https://www.icrc.org/en/publication/4283-autonomous-weapons-systems.

[61] *S.S. Lotus (France v. Turkey)*, Judgment of 7 Sept. 1927, P.C.I.J. Ser. A, No. 10 ¶ 46, *available at* https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf.

[62] Draft Report of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, CCW/CGE.1/2019/CPR.1/Rev.2, 21 Aug. 2019, Annex IV, p. 13. Note that the 2019 Chair of the CGE has stated that the "IHL prism should permeate all areas of our focus…". Chair's First Letter to Accompany Provisional Agenda, 8 February 2019.

Additionally, teams may point to facts in the Problem that support the applicability of IHL. For instance, the WALL itself was designed with the assistance of military officials (¶ 20), and there is arguably a non-international armed conflict ("NIAC") underway between the Rasasan military and the armed militias that attacked Rasasan border police stations (¶¶ 35-36).[63] The installation of the WALL took place immediately after (and arguably in response to) these militia attacks (¶¶ 37-39). There is, therefore, arguably reason to believe that the WALL constitutes a "means or method of warfare" within the meaning of key IHL instruments (see Section 4.2.3 below).

| **Q:** | Does international humanitarian law apply in the present case? If so, why? |
|---|---|

### 5.2.2 International Human Rights Law

Even if IHL is applicable in the present case, it may also be appropriate to apply human rights law. In its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war," particularly the protections for the right to life.[64] In the *Wall* advisory opinion, the Court further observed that "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."[65] The Court concluded that it would "have to take into consideration both these branches of international law."[66]

With respect to AWS in particular, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions has called on international human rights bodies to undertake a legal study of AWS and their compliance with international human rights law.[67]

Moreover, the Problem makes clear that the WALL was designed at least in part (if not primarily) for law enforcement purposes. The WALL was a response to a serious crime wave (¶ 18) and was meant to "reduce the pressure on [the] respective police forces" of the States in the Crosinian Region (¶ 19). Police officers from Rasasa and elsewhere were involved in the development of the WALL (¶ 20).

It is thus arguable that the WALL should be evaluated in light of human rights norms applicable to weapons in the law enforcement context, including the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[68]

---

[63] The ICRC explains that a non-international armed conflict is any armed conflict "in which one or more non-State armed groups are involved." There are two requirements: (1) there must be hostilities that rise to a minimum level of intensity, *e.g.*, a level where the government is obliged to use military force against the insurgents instead of mere police forces; and (2) the non-State groups involved must possess sufficiently organized armed forces, *e.g.*, they must be under a certain command structure and have the capacity to sustain military operations. *See ICRC Glossary, Non-international armed conflict, available at* https://casebook.icrc.org/glossary/non-international-armed-conflict.

[64] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, ¶ 25 ("The Court observes that the protection of 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. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.").

[65] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 178, ¶ 106.

[66] *Ibid.*

[67] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Chrisof Heyns, 9 April 2013, A/HRC/23/47, ¶¶ 35, 113-14.

| | |
|---|---|
| **Q:** | Does international human rights law apply to the WALL? If so, why? |
| **Q:** | Should the WALL be evaluated as if it were a means of warfare, a law enforcement tool, or both? |

#### 5.2.3 Prohibition on the Threat of Force

As part of the Guiding Principles it adopted in 2018, the CCW Group of Governmental Experts stated that "international law, in particularly the United Nations Charter and international humanitarian law…should guide the continued work of the Group."[69] The CGE thus acknowledged that key principles of international law contained within the Charter, including Article 2(4)'s prohibition on the "threat or use of force against the territorial integrity or political independence of any State," should be taken into account when assessing the legal dimensions of AWS.

### 5.3 Compliance with International Humanitarian Law

#### 5.3.1 General Rules

Under IHL, States do not have unlimited discretion in choosing which weapons or methods of warfare to employ. This basic principle is enshrined in Article 35 of Additional Protocol I to the Geneva Conventions, which states in relevant part that:

> 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

Another key provision is Article 36 of Additional Protocol I (entitled "New Weapons"), which establishes that:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

In the present case, neither Adawa nor Rasasa is party to any of the Additional Protocols to the Geneva Conventions. Moreover, Additional Protocol I in particular deals with *international* armed conflicts, while in the present case any conflict between Rasasa and the organized militias operating on its territory would at most be a *non-international* armed conflict (*i.e.* a conflict that is not between two States). Therefore, teams should be prepared to explain why any provisions of Additional Protocol I are applicable in this case. The answer, in brief, is that many of the relevant provisions of Additional Protocol I are widely considered to reflect rules of customary international law.

For instance, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the ICJ noted that "all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law."[70] Specifically, the ICJ endorsed the notion

---

[68] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 (1990), UN Doc A/CONF.144/28/Rev.1.

[69] Draft Report of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, CCW/CGE.1/2019/CPR.1/Rev.2, 21 Aug. 2019, Annex IV, p. 13.

[70] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, ¶ 84.

that, as a matter of customary law, "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited."[71]

| | |
|---|---|
| **Q:** | Agent, are there any rules of IHL binding on the Parties to this case that would restrict which types of weapons they can use? |
| **Q:** | Does Additional Protocol I to the Geneva Conventions apply in this case? |
| **Q:** | Has the ICJ ever discussed legal standards that apply to new weaponry? |

In addition to Articles 35 and 36 of Additional Protocol I, another general provision is the so-called "Martens Clause," a long-standing principle of IHL according to which,

> [C]ivilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[72]

This principle, which the ICJ considers as forming part of customary international law,[73] provides a baseline standard against which any new weapons systems must be measured. Arguably, references to concepts such as "the dictates of public conscience" requires adjudicators to take into account factors such as public opinion in determining the lawfulness of a weapon.[74]

In the present case, Adawa and Rasasa will contest whether or not the WALL, by virtue of being a fully autonomous weapon system, contravenes these basic principles of IHL and is, therefore, unlawful.

### 5.3.2 Required Level of Human Control

At the heart of the debate about AWS and compliance with IHL is the discussion of whether there is a minimum level of human control required to ensure that weapons are consistent with international law. The importance of this debate was underscored by the CCW Group of Governmental Experts in its 2019 report, which concluded that "[h]uman judgment is essential" to ensure that AWS comply with international law, and that compliance with specific IHL principles requires that "human beings make certain judgments in good faith based on their assessment of the information available to them at the time."[75]

Authors have also noted that there is a general consensus amongst States that "meaningful" or "effective" human control, or "appropriate levels of human judgment," must be retained over autonomous weapons systems.[76] It is not entirely clear, however, exactly what level of human control

---

[71] *Ibid.*, ¶ 95.

[72] Additional Protocol I, Art. 1(2).

[73] *Nuclear Weapons* Advisory Opinion, ¶¶ 78-79.

[74] Human Rights Watch, International Human Rights Clinic, *Losing Humanity: The Case against Killer Robots*, 2012, ¶ 13 ("Both experts and laypeople have [...] expressed a range of strong opinions about whether or not fully autonomous machines should be given the power to deliver lethal force without human supervision. While there is no consensus, there is certainly a large number or whom the idea is shocking and unacceptable. States should take their perspective into account when determining the dictates of public conscience.").

[75] Draft Report of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, CCW/CGE.1/2019/CPR.1/Rev.2, 21 Aug. 2019, p. 4, ¶¶ 17(e)-(f).

[76] *See, e.g.*, Neil Davison, *A Legal Perspective: Autonomous Weapons Systems under International Humanitarian Law*, UNODA Occasional Papers No. 30 (2017), p. 11.

is necessary to ensure that AWS comply with IHL, with different States taking different views on the subject.[77]

Additionally, human control may come into play at different stages of the development, deployment, and use of an autonomous weapon, ranging from (1) the initial development and deployment of the system to (2) its activation and (3) its operation (*i.e.* targeting and engagement).[78] Human control therefore could be meaningfully exercised through the design of the systems' software and algorithms.[79]

| | |
|---|---|
| **Q:** | Agent, is it necessary for human beings to exercise control over the key functions of an autonomous weapons system, such as selecting targets? |
| **Q:** | Can meaningful human control be exercised at the development stage of an autonomous weapon system? |

In the present case, the WALL is described as "fully autonomous and independent of human control," and it is designed to make decisions "so rapidly that second-guessing by humans is practically impossible" (¶ 24). On the other hand, it has also been programmed with "training data" supplied by 10 States, and this data was meticulously tagged by engineers to enable the WALL to distinguish between threats and civilians (¶ 20).

- **Adawa**: There is a general consensus among states that there must be "meaningful" and "effective" human control over autonomous weapons systems in order for them to comply with international humanitarian law. The WALL can target and engage individuals with lethal force without any human intervention, and humans are effectively powerless to stop the WALL once it has engaged. The WALL therefore does not comply with international law.
- **Rasasa**: There is no consensus as to what "meaningful human control" means in practice, as is made clear by the fact that States continue to call for studies into this issue. In any event, the WALL is characterized by sufficient human judgment, as human beings programmed the WALL, selected and tagged the training data that provide the foundation for the WALL's functionality.

### 5.3.3 Principle of Distinction

The ICJ has held that one of the "cardinal principles" of IHL is "the distinction between combatants and non-combatants."[80] The Court, summarizing this principle, explained that "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."[81]

---

[77] Belgium, Ireland, and Luxembourg have argued that weapons which can target or use lethal force without human intervention, or that cannot be interrupted or deactivated by a human, would be "problematic." *See* CCW/CGE.1/2019/WP.4, ¶ 3. On the other hand, the United States has instead focused on "human judgment over the use of force," considering that the key issue is whether or not autonomous weapons "help effectuate the intention of commanders and operators." In the U.S. view, this concept is distinct from human control, and that human judgment "can be implemented through the use of automation." *See* CCW/CGE.2/2018/WP.4, ¶¶ 1, 13. Other States, such as Japan, have acknowledged the consensus that "meaningful human control is essential," but have argued that there is "no common understanding" of the term. CCW/GGE.1/2019/WP.3, ¶ 26.

[78] Neil Davison, *A Legal Perspective: Autonomous Weapons Systems under International Humanitarian Law*, UNODA Occasional Papers No. 30 (2017), pp. 12-15.

[79] *See* Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 Int'l L. Stud. 308, 323 (2014).

[80] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, ¶ 78.

[81] *Ibid.*

Generally speaking, combatants may be subject to attack unless they are *hors de combat* (*e.g.* captured, wounded, shipwrecked).[82] Civilians, on the other hand, may not be the object of military operations, "unless and for such time as they take a direct part in hostilities."[83]

Some commentators consider that AWS are (or would be) fundamentally incapable of distinguishing between combatants and civilians. In this case, the Problem makes clear that the WALL proved extremely accurate during tests, with a false positive rate less than 0.0001% (¶ 25). It also indicates that there have been no incidents of lethal force deployed by the WALL to date, and therefore no indication as to its accuracy in practice (¶ 42).

- **Adawa**: The WALL does not comply with the principle of distinction because crucial functions such as determining whether or not a civilian is "taking direct part in hostilities" require human judgment that cannot be programmed into a machine.[84] Additionally, because the WALL employs machine learning software to adapt to changing circumstances on its own, it is too unpredictable to know whether it will make mistakes in distinguishing between combatants and non-combatants.[85]
- **Rasasa**: The WALL has been shown through testing to be *more* accurate than human beings at distinguishing between combatants and non-combatants. It can sense and process more information more quickly than a human, and is less likely to make mistakes.[86] Moreover, it was programmed with training data taken from a wide variety of sources and carefully tagged to enable the machine learning software to distinguish between combatants and non-combatants, and to tell when individuals are *hors de combat*.

### 5.3.4 Principle of Proportionality

The principle of proportionality prohibits attacks that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[87]

A common criticisms of AWS is that they would not be able to comply with the principle of proportionality because the principle requires commanders to weigh expected civilian losses with the anticipated military advantage, and this is a process "riddled with inevitably subjective value judgments."[88] Moreover, some scholars have argued that, in order to comply with the principle of

---

[82] ICRC, *Customary IHL Database*, rule 47.

[83] *Ibid.*, Art. 51(3); *see also* Art. 51(4) ("indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction").

[84] Jarna Petman, *Autonomous Weapons Systems and International Humanitarian Law: 'Out of the Loop'?* (2017), p. 30; Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 Int'l L. Stud. 308, 327 (2014).

[85] Jarna Petman, *Autonomous Weapons Systems and International Humanitarian Law: 'Out of the Loop'?* (2017), pp. 33-34 (using the example of the chess-playing computer *Deep Blue*, which became so advanced that its programmers themselves were unable to tell if certain moves were bugs or good tactics).

[86] *See* Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 Int'l L. Stud. 308, 310 (2014).

[87] Additional Protocol I to the Geneva Conventions, arts. 51(5)(b), 57(2)(a)(iii); ICRC, *Customary IHL Database*, rule 14.

[88] Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 Int'l L. Stud. 308, 331.

proportionality, an autonomous weapon would need to be "constantly updated about military operations and plans," something that may not be technically feasible.[89]

On the other hand, some scholars have suggested that it is technically possible for AWS to assess the likelihood of collateral damage during an attack, and that major militaries already do this through a system known as "Collateral Damage Estimation Methodology," which relies on scientific data and objective standards.[90] It has also been argued that geographical restrictions on the use of autonomous weapons might make compliance with the principle of proportionality less problematic (*e.g.* if the weapons were located in a sparsely populated area, or placed along a demilitarized zone).[91]

With regard to the WALL specifically:

- **Adawa**: The WALL cannot comply with the principle of proportionality, as the weighing of anticipated military advantage against expected civilian casualties necessarily requires human value judgment. Moreover, it is not possible for humans to fully understand the WALL's machine learning algorithm and how it would make decisions regarding proportionality, so it is impossible to say whether or not it would be in compliance.
- **Rasasa**: The WALL contains numerous safeguards to ensure that it does not use disproportionate force, including the fact that it will first favor non-lethal deterrence (Problem, ¶ 25), and its high degree of accuracy in distinguishing combatants from civilians. Moreover, the WALL only occupies a fixed location in a border region, and therefore it is unlikely that it will need to consider complex issues of military advantage and strategy.

### 5.3.5 Principle of Precautions in Attack

The principle of precautions in attack, reflected in Article 57 of Additional Protocol I to the Geneva Conventions, requires that those who plan or decide upon an attack (1) do everything feasible to verify that the objectives to be attacked are military in nature and not civilian, and (2) take all feasible precautions in the choice of means and methods of attack with a view to avoiding or minimizing injury to civilians or civilian objects.[92] This principle also requires that attacks be cancelled or suspended if it becomes apparent the target is subject to special protection or if the harm caused would be disproportionate.[93]

As with the principles of distinction and proportionality, one of the major criticisms of AWS is that the principle of precautions require assessments that are highly complex and very difficult to translate into a form suitable for artificial intelligence software.[94] Moreover, according to some scholars, the principle of precaution means that autonomous weapons would be lawful only if it were not feasible

---

89 *Ibid.*, p. 332.

90 Vincent Boulanin & Maaike Verbruggen, *Mapping the Development of Autonomy in Weapon Systems*, SIPRI, Nov. 2017, p. 74; *see also* Michael Schmitt, *Autonomous Weapons Systems and International Humanitarian Law: A Reply to the Critics*, 73 Harvard Nat. Sec. J., pp. 19-20 (2012).

91 Vincent Boulanin & Maaike Verbruggen, *Mapping the Development of Autonomy in Weapon Systems*, SIPRI, Nov. 2017, pp. 47, 75 (noting the argument that fully autonomous or "out of the loop" weapons may not be legally problematic

92 Additional Protocol I, art. 57(2)(a)(i)-(ii) ("those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects").

93 *Ibid.*, art. 57(2)(b) ("an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

94 Vincent Boulanin & Maaike Verbruggen, *Mapping the Development of Autonomy in Weapon Systems*, SIPRI, Nov. 2017, p. 75.

to use another system that would provide better protection of civilian objects without sacrificing military advantage.[95]

However, it has also been argued that AWS may *enhance* compliance with the principle of precautions, as they can act conservatively by "shooting second" and possess more powerful sensors than would human soldiers. It has also been argued that if AWS are capable of distinguishing between civilians and combatants in the first place, they should equally be able to sense changes in situational context and cancel attacks where it became apparent that civilians would be in the line of fire.[96]

With respect to the WALL in particular:

- **Adawa**: The WALL cannot comply with the principle of precautions in attack for the same reasons it cannot comply with the principles of distinction and proportionality. Moreover, there is no indication in the Problem that the WALL's attacks can be cancelled by a human operator, and it is not clear that the WALL could or would call off an attack if it became apparent that it would violate IHL.
- **Rasasa**: The WALL already contains built-in precautions, such as the fact that it is programmed to prefer non-lethal force and is extremely accurate at distinguishing between civilians and combatants. Moreover, because the WALL is a machine, it can behave more conservatively than a human by waiting until it is sure there is a threat. The WALL has been effective at reducing cross-border crime and there is no evidence that any other methodology would have been equally effective and better at protecting civilians.

### 5.3.6 Martens Clause / Customary Rule Against Autonomous Weapons

Adawa may also seek to argue that there is an emerging customary international law norm *against* fully autonomous weapons:

- **Adawa**: There is an emerging norm of customary international law against fully autonomous weapons, as evidenced by the fact that most States who have expressed an opinion on the matter (nearly 30 States) appear to favor a ban on fully autonomous weapons.[97]
- **Rasasa**: There is insufficient State practice and *opinio juris* to establish a customary prohibition on fully autonomous weapons. For instance, a number of States, including the United States, Russia, the United Kingdom, South Korea, and Israel, have opposed even negotiating a treaty regulating autonomous weapons.[98] Moreover, several States currently use some form of autonomous weapons (in a limited capacity),[99] and/or are attempting to develop new autonomous weapons.[100]

Adawa's stronger argument, however, would be that the WALL violates the Martens Clause (*see* Section 5.3.1, above), specifically because fully autonomous weapons run counter to the "dictates of the public conscience."

---

[95] Thurnher, J., *Means and methods of the future: autonomous systems*, *in* Targeting: The Challenges of Modern Warfare ( P.A.L. Ducheine et al., eds., 2016), p. 190.

[96] Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 Int'l L. Stud. 308, 336 (2014).

[97] *See* Hayley Evans & Natalie Salmanowitz, *Lethal Autonomous Weapons Systems: Recent Developments*, Lawfare (Mar. 7, 2019, 3:28 PM), *available at* https://www.lawfareblog.com/lethal-autonomous-weapons-systems-recent-developments.

[98] *Ibid.*

[99] These include, for instance, the "Phalanx" air defense system employed by the U.S. and its allies, the "Harpy" drone employed by Israel, and the SGR-A1 "sentry weapon" employed by South Korea. *See* Vincent Boulanin & Maaike Verbruggen, *Mapping the Development of Autonomy in Weapon Systems*, SIPRI, Nov. 2017, pp.

[100] *See, e.g.*, *Off The Leash: The Development of Autonomous Military Drones in the UK*, Drone Wars UK, November 2018, *available at* https://dronewarsuk.files.wordpress.com/2018/11/dw-leash-web.pdf.

- **Adawa**: The WALL violates the Martens Clause because it is clear that the global public strongly opposes fully autonomous weapons. Recent polls show that over 60% of people across 26 countries oppose the development of lethal autonomous weapons, including majorities in China, Russia, France, the U.K., and the U.S.[101] NGOs such as Human Rights Watch and the Campaign to Stop Killer Robots, along with hundreds of industry experts such as Elon Musk, have also voiced opposition to AWS.[102] Finally, in a March 2019 statement, U.N. Secretary General António Guterres stated that "machines with the power and discretion to take lives without human involve are politically unacceptable, morally repugnant and should be prohibited by international law."[103]
- **Rasasa**: The Martens Clause does not apply to the present case, as it is meant to apply to situations not covered by existing IHL instruments. As the WALL is consistent with these instruments, there is no need to apply the Martens Clause. In any event, the fact that numerous States have refused to support a ban on fully autonomous weapons (and that some are even advancing their development of autonomous weapons) shows that any public opposition to such weapons does not reflect a binding rule of international law.

### 5.3.7 Other IHL Arguments

There are several other arguments Adawa could advance to claim that the WALL violates IHL:

- The WALL's ability to use **riot-control agents** is in violation of the IHL and the Chemical Weapons Convention.
    - **Adawa**: The use of riot-control agents as a method of warfare is prohibited. This is reflected both in State practice as recognized by the ICRC,[104] and by Article I(5) of the Chemical Weapons Convention.[105] The WALL's ability to use "disabling chemicals"[106] as part of its graduated series of non-lethal and lethal measures is therefore a violation of international law. This is particularly so given that the WALL's "training data" come from both law-enforcement and armed conflict scenarios, and therefore there is no guarantee the WALL will not get these two scenarios confused.
    - **Rasasa**: The fact that the WALL possesses the capability to use disabling chemicals does not in itself violate any provision of international law. The WALL has been programmed with the supervision of both law enforcement and military personnel, and will be able to distinguish between law enforcement and armed conflict scenarios. The WALL has not used any riot-control agents during the Rasasan military's conflict with armed militia groups, while it *has* used warning shots, suggesting it can appropriately identify when the use of riot-control agents is appropriate.

---

[101] Amnesty International UK, *Killer robots: new global poll shows growing public opposition to autonomous weapons*, 22 Jan. 2019, *available at* https://www.amnesty.org.uk/press-releases/killer-robots-new-global-poll-shows-growing-public-opposition-autonomous-weapons.

[102] Samuel Gibbs, *Elon Musk leads 116 experts calling for outright ban of killer robots*, The Guardian, 20 August 2017, available at https://www.theguardian.com/technology/2017/aug/20/elon-musk-killer-robots-experts-outright-ban-lethal-autonomous-weapons-war.

[103] *Autonomous Weapons that Kill Must Be Banned, Insists UN Chief*, UN News, 25 March 2019, *available at* https://news.un.org/en/story/2019/03/1035381.

[104] *See* ICRC, Customary IHL Database, Rule 75, *available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule75.

[105] Article I(5) provides that "Each State party undertakes not to use riot control agents as a method of warfare."

[106] Problem, ¶ 37.

- Rasasa violated Article 36 of Additional Protocol I by inadequately reviewing the WALL's compliance with international law.
    - **Adawa**: While the WALL was subject to "a review by advisers from the Rasasan government for compliance with international law" (Problem, ¶ 23), there is no information concerning how this review was conducted or whether or not Rasasa considered specific provisions of IHL. Moreover, because the WALL employs unpredictable machine learning software, any such review would necessarily be inadequate, as it could not be determined whether the WALL would reliably comply with IHL in most or all cases.
    - **Rasasa**: Rasasa satisfied Article 36 by reviewing the WALL's compliance with international law. Article 36 imposes no specific requirements on the content or form of such a review. Moreover, the WALL was peer-reviewed by experts in over 30 countries and has been shown to be compliant with the key principles of IHL (¶ 25). In any event, Adawa participated in the development process of the WALL, including its testing, and therefore cannot complain that the review was inadequate.
- The WALL is vulnerable to being hacked
    - **Adawa**: The WALL's normal functioning could be disrupted or sabotaged by hackers, since it necessitates a constant flow of data and connectivity to other computers in order to function. This creates an added risk that the WALL will violate IHL.
    - **Rasasa**: Human-operated defences are also subject to sabotage, plus carry the additional risk of human error. There is nothing inherently riskier about an autonomous weapons system.

## 5.4 Compliance with International Human Rights Law

As discussed above, it may also be appropriate to consider the legality of the WALL through the lens of international human rights law ("IHRL") (*see* Section 5.2.2 above)

Applicant teams can potentially raise a wide variety of human rights arguments, but the most significant of these is the right to life.

### 5.4.1 Right to Life

The right to life is enshrined in Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), a convention to which both Adawa and Rasasa are parties. Article 6(1) of the ICCPR provides that: "Every human being has the inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of life." No derogation from this right is permitted.

The Human Rights Committee ("HRC"), a body of experts charged with monitoring the implementation of the ICCPR, issued General Comment 36 in October 2018, in which they elaborated upon Article 6. The HRC stated that:

> [T]he development of autonomous weapon systems lacking in human compassion and judgment raises difficult legal and ethical questions concerning the right to life … The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.[107]

---

[107] Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, ¶ 65 (emphasis added) [hereinafter HRC General Comment 36].

| | |
|---|---|
| **Q:** | Agent, should we take into account the views of treaty bodies like the HRC?<br>• Yes, the ICJ in the *Diallo* case said that the views of such bodies are entitled to "great weight". |
| **Q:** | Has the HRC ever addressed the subject of autonomous weapons? |

The practice of international and regional human rights bodies shows that the use of lethal force in the law enforcement context is subject to three core requirements:

- Legality: States are under an obligation to put in place appropriate legislation controlling the use of force by law enforcement officials, and any use of force must serve a legitimate objective established by law.[108]
- Necessity: The use of potentially lethal force for law enforcement purposes should be resorted to only when strictly necessary to protect life from an imminent threat.[109]
- Proportionality: Use of force by law enforcement should be moderated to minimize the harm and injuries that may result, including by accounting for the intensity and danger of the treat and other surrounding circumstances.[110]

The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("Basic Principles") represent a key instrument that has added additional substance to these three requirements.[111] These principles have been relied upon by numerous human rights bodies, including the HRC, the European Court of Human Rights, and the Inter-American Commission/Court on Human Rights.[112]

Several of the Basic Principles relevant to this case include:

- Principle 2, according to which States should equip law enforcement officials with non-lethal and defensive materials to reduce the need to use weapons.
- Principle 4, according to which law enforcement officials "shall, as far as possible, apply non-violent means before resorting to the use of force and firearms".
- Principle 9, according to which firearms shall not be used except to guard against imminent threat of death or serious injury, and "only when less extreme means are insufficient to achieve these objectives".
- Principle 10, according to which law enforcement officials shall identify themselves and give a clear warning of their intent to use firearms with sufficient time for the warning to be observed.
- Principle 20, according to which law enforcement officials shall be trained, *inter alia*, in alternatives to the use of firearms, the peaceful settlement of conflicts, and methods of persuasion, negotiation and mediation.

---

[108] *Ibid.*, ¶ 13; *see also* Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, December 31, 2009, ¶ 97.

[109] HRC General Comment 36, ¶ 12.

[110] *Ibid*, ¶ 14; *see also* Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, December 31, 2009, ¶ 119; *McCann and Others v. The United Kingdom*, ECtHR, Application No. 18984/91, 27 Sept. 1995, ¶ 149.

[111] The Basic Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990.

[112] *See, e.g.*, HRC General Comment 36, ¶ 13; *McCann and Others v. The United Kingdom*, ECtHR, Application No. 18984/91, 27 Sept. 1995, ¶¶ 138-40; Inter-American Commission on Human Rights, Annual Report 2015, p. 506, ¶ 7.

In sum, compliance with human rights law requires law enforcement officials to employ a "graduated response," identifying potential threats, considering whether force is necessary, employing warnings and non-lethal means of addressing the threat, and finally using proportionate force if no other means can adequately address the threat.[113]

Critics of AWS consider that autonomous systems would be incapable of meeting these requirements, as they involve "inherently human skills."[114]

| | |
|---|---|
| **Q:** | Agent, what type of source are the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials? Should we take them into account? |

- **Adawa**: The WALL is inconsistent with Article 6 of the ICCPR, as it does not meet the key requirements of legality, necessity, and proportionality. Since the WALL uses unpredictable machine learning, we cannot know for sure if it will comply with existing Rasasan laws on the use of force. Moreover, while the WALL may be programmed to "prefer" non-lethal deterrence, it does not possess the humanity needed to exhaust all non-lethal options prior to using force (such as negotiation or persuasion) and cannot make the value judgment of whether force is proportional in given circumstances.
- **Rasasa**: The WALL was programmed with the assistance of Rasasan police officials, and therefore was designed to comply with relevant law enforcement regulations. The WALL possesses a wide range of means to deter threats, including the ability to issue warnings, and in fact is designed to prefer non-lethal options, and therefore can perform the required "graduated response" to potential threats. The WALL has been shown through testing to be exceedingly accurate, and the fact that it hasn't used lethal force a single time since it has been installed shows that it is capable of complying with the principles of strict necessity and proportionality.

Stronger Applicant teams may also note that the "training data" which formed the basis for the WALL's programming came from both police and military sources (Problem, ¶ 20). This arguably creates the risk that the WALL's algorithms will be biased towards the use of force because the weapon is more accustomed to dealing with armed conflict.

- **Adawa**: The WALL also violates human rights law because its programming is likely to be unduly biased towards the use of force. This is because the training data fed into the programming do not deal simply with law enforcement scenarios, but also include data from armed conflicts.
- **Rasasa**: The testing of the WALL shows that it is extremely accurate at identifying threats regardless of whether it is an armed conflict or law enforcement scenario. The fact that the WALL has yet to use lethal force even though there is arguably a non-international armed conflict underway shows there is no bias towards force.

| | |
|---|---|
| **Q:** | (for Rasasa) Agent, is it problematic that the WALL uses training data taken from both prior instances of armed conflict and criminal activities? |

Finally, some Respondent teams may raise the issue of the extraterritorial application of the right to life as contained in the ICCPR (as, presumably, some of the victims of the WALL may be on Adawan territory). However, the HRC has stated that "a State party has an obligation to respect and ensure the rights under article 6 of all persons subject to its jurisdiction," including "persons located outside any

---

[113] *See* Amnesty International, *Autonomous Weapons Sstems: Five Key Human Rights Issues for Consideration*, 2015, pp. 13-14.

[114] *Ibid.*, pp. 11, 13.

territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner."[115] Therefore, teams should not spend considerable time addressing the issue of extraterritoriality.

| | |
|---|---|
| **Q:** | Agent, must Rasasa respect Article 6 even with respect to individuals located on Adawan territory? |

### 5.4.2 Other Human Rights Arguments

There are a variety of other arguments teams can raise with respect to human rights. A non-exhaustive list of such arguments is considered below:

- Obligation to investigate, monitor, and provide a remedy: Many commentators have observed that human rights law imposes an obligation on States to investigate any uses of force by law enforcement, monitor the functioning of AWS, and provide a remedy by holding violators of human rights accountable.[116] Some have suggested that there is an accountability problem in the case of autonomous weapons, since it is not possible to hold machines responsible for human rights violations and it is unclear which humans could or would be held responsible for mistakes made by machines.[117] The Problem references that the Rasasan border police established a telephone and internet hotline to allow members of the public to communicate concerns about the WALL to authorities (¶ 42), and also that a joint Adawa-Rasasa task force has reviewed reports from both States' national police forces concerning the WALL (¶ 41).
- Right to Security of Person: Some commentators have suggested that the use of lethal force by AWS may violate the right to security of person, as reflected in Article 9(1) of the ICCPR.[118] According to the HRC in its General Comment 35, States violate this right when they "unjustifiably inflict bodily injury."[119] In this case, major arguments about Article 9 are expected to mirror those concerning Article 6 and the right to life.
- Right to Privacy: Teams may conceivably argue that the WALL violates the right to privacy, as its placement along the border and use of high-tech sensors to assess threats constitute spying. Some commentators have observed that the use of artificial intelligence technologies for law enforcement may create data privacy concerns.[120] This is a difficult argument in the present case, as the Problem does not provide any information about the WALL's storage of data, or about the scope of population potentially impacted.
- Right to freedom of movement: Adawa may argue that the WALL violates the freedom of movement of Adawan citizens on the Adawan side of the border, because its ability to use lethal force "fills all Adawans with dread."[121] However, the Clarifications to the Problem make clear that there are no permanent settlements within 200 meters of the Rasasa-Adawa border.[122]

---

115 HRC General Comment 36, ¶ 63; *see generally* ICCPR Art. 2(1).

116 *Ibid*, ¶ 13 (noting that States are expected to provide for "mandatory reporting, review, and investigation of lethal incidents and other life-threatening incidents").

117 *See* Amnesty International, *Autonomous Weapons Sstems: Five Key Human Rights Issues for Consideration*, 2015, pp. 25-26.

118 *See ibid*, p. 11.

119 Human Rights Committee, General Comment 35, CCPR/C/GC/35 (2014), ¶ 9.

120 Andrea Spagnolo, *Human Rights Implications of Autonomous Weapon Systems in Domestic Law Enforcement: Sci-fi Reflections on a Lo-fi Reality*, 43 QIL 33, 52 (2017).

121 Problem, ¶ 40.

122 Problem, Clarifications, ¶ 3.

- Right to due process: Adawa may argue that the WALL's ability to use force without trial or without considering extenuating circumstances is a violation of due process.
- Obligation to protect the right to life: Rasasa may argue that the WALL is actually a means to uphold its obligation to the right to life, as it is designed to protect civilians against armed militias.[123]

## 5.5 Threat of Force

Article 2(4) of the U.N. Charter prohibits the "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

There are two questions teams may need to address in considering whether the deployment of the WALL constitutes a threat of force:

- (1) would the use of the WALL against individuals located on Adawan territory constitute a use of force; and
- (2) does the placement of the WALL near the border constitute a "threat"?

### 5.5.1 Defining Use of Force

With respect to the first question, Adawa can make a strong argument that if the WALL were to fire into Adawan territory and strike persons there, this would qualify as a use of force. Article 2(4) was intended by its drafters to "state in the broadest terms an absolute all-inclusive prohibition" and ensure that "there should be no loopholes."[124]

Moreover, the ICJ found in *Oil Platforms* that the mining of a single warship could not only constitute a use of force, but could meet the higher threshold of "armed attack".[125] In the *Nicaragua* case, the Court suggested that "mere frontier incidents" – while not an armed attack – might still constitute a "less grave form" of an illegal use of force.[126]

On the other hand, "state practice reveals that, when faced with territorial incursions ostensibly or allegedly lacking hostile intent" – including incidents in which shots were accidentally fired across a border – "states often refrain from invoking the language of Article 2(4)."[127] Thus, when Switzerland accidentally fired shells across the border into Liechtenstein, the States treated this as a violation of Lichtenstein's sovereignty, but not of the prohibition on the use of force.[128]

| | |
|---|---|
| **Q:** | Agent, if the WALL fired upon individuals located on Adawan territory, would this constitute an illegal use of force? |

---

[123] HRC General Comment 36, ¶ 21 ("…State parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups…States parties should also disband irregular armed groups…that are responsible for deprivations of life…")

[124] 6 Documents of the United Nations Conference on International Organization 339, 334-35 (1945); *see also* Tom Ruys, *The Meaning of Force and the Boundaries of the* Jus ad Bellum*: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)*, 108 Am. J. Int'l L. 159, 164 (2014).

[125] *Oil Platforms (Iran v. United States), Merits, Judgment, I.C.J. Reports 2003*, ¶ 72.

[126] *See* Philippa Webb, International Judicial Integration and Fragmentation, pp. 117-18 (2013).

[127] Tom Ruys, *The Meaning of Force and the Boundaries of the* Jus ad Bellum*: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)*, 108 Am. J. Int'l L. 159, 189 (2014).

[128] *Ibid.*, p. 190.

### 5.5.2 Existence of a Threat of Force

In the *Nuclear Weapons* advisory opinion, the ICJ stated that "if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal." More specifically, the "stated readiness" to use force in a way that would be unlawful would constitute an illegal threat of force.[129]

Many commentators have considered that there must be an element of intent (or *animus*) in order for a given action to count as a threat of force.[130] In other words, the allegedly threatening State must intend to put pressure on its counterpart.[131] There appears to be a minority view that there is a threat so long as the allegedly threatened state feels "justified fear" that it will be exposed to "serious and irreparable harm."[132]

The context of the alleged threat is also important. In the *Nicaragua* case, for instance, the ICJ considered that U.S. military and naval exercises near the Nicaraguan border did not, "in the circumstances in which they were held," amount to a breach of Article 2(4).[133] Similarly, the Court in *Corfu Channel* found that the passing of four British warships through the Channel (near the Albanian coast) did not amount to "a demonstration of force for the purpose of exercising political pressure on Albania" because this action was reasonable in light of past actions on Albania's part.[134]

State practice also suggests that the placement of armed police or military units near an international boundary does not necessarily constitute a threat of force.[135]

- **Adawa**: Rasasan President Pindro's statement that the WALL would "surveil up to 200 meters on each side of our shared frontier" and would "detect threats, and … prevent them from becoming reality" (Problem, ¶ 37) constitutes "stated readiness" to illegally use force against individuals located on the Adawan side of the border, and this is therefore an unlawful use of force.
- **Rasasa**: President Pindro made no express statement to the effect that Rasasa was ready to use force against individuals on Adawan territory. Moreover, Rasasa the mere presence of military equipment near a boundary does not constitute a threat of force, as shown in the ICJ's case law and State practice. Adawa has not proven any intent on Rasasa's part to threaten Adawa.

---

129 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, ¶ 47.

130 The ILC Report on the Draft Code of Offenses against Peace and Security of Mandkind points out that "the word 'threat' denotes acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State.' ILC Yearbook (1989-II, pt. 2), p. 68. *See also* Ian Brownlie, *International Law and the Use of Force by States* (1963), p. 364 (defining a threat of force as "an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government").

131 Marco Roscini, *Threats of Armed Force and Contemporary International Law*, *in* Netherlands International Law Review 2007, p. 240 (indicating that "military manoeuvres, the presence of naval forces off the coast of another state, or the acquisition of certain weapons" may constitute a threat of force "if the only aim is to put abusive pressure on the victim state without a predetermined intention to use force").

132 *Ibid.*, p. 234.

133 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986*, ¶ 227.

134 *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

135 Andrea Spagnolo, *Human Rights Implications of Autonomous Weapon Systems in Domestic Law Enforcement: Sci-fi Reflections on a Lo-fi Reality*, 43 QIL 33, 40-41 (2017) (noting that South Korea has placed SGR-A1 "sentry weapons" near the demilitarized zone on the Korean peninsula, and also that "[r]obots are currently employed to patrol …the line dividing Israel and Palestine along the Gaza strip and between the U.S. and Mexico").

| Q: | Agent, is there an intent element to the concept of a threat of force? |
|---|---|

## 6 QP3: HELIAN TARIFFS & THE CHC TREATY

| *Adawa's Claim* | *Rasasa's Claim* |
|---|---|
| The ICJ has jurisdiction over Adawa's CHC claim, and the claim is admissible. Rasasa's imposition of tariffs on helian products violates its obligations under the CHC Treaty and Adawa is entitled to compensatory damages for the financial harm suffered as a result of these tariffs. | The ICJ does not have jurisdiction to hear Adawa's claim regarding Rasasa's national security tariffs. In the event that the ICJ has jurisdiction, Adawa's claim is not admissible. If the ICJ determines that it has jurisdiction and that Adawa's claim is admissible, Rasasa's tariffs do not violate the CHC Treaty. |
| ***Adawa's Anticipated Argument*** | ***Rasasa's Anticipated Argument*** |
| The ICJ's jurisdiction is unaffected by the ongoing WTO dispute between Adawa and Rasasa regarding the tariffs. Nothing precludes the ICJ from hearing this dispute, and the WTO cannot adjudicate claims under the CHC Treaty. Moreover, compensatory damages – the relief sought from Adawa – are not typical in the WTO context.<br><br>Rasasa's tariffs are a clear violation of Article 3 of the CHC Treaty, and Rasasa cannot justifiably rely on Article 22(b) of the treaty to justify the tariffs. | The ICJ does not have jurisdiction to hear Adawa's claim regarding the tariffs. There is an ongoing dispute at the WTO between the parties regarding the legality of the tariffs, and the WTO, rather than the ICJ, is the appropriate forum for trade disputes such as this one. Even if the ICJ has jurisdiction, it should find that Adawa's claim is inadmissible.<br><br>If the ICJ decides to adjudicate Adawa's claim regarding the tariffs, it should find that they are legal under Article 22(b) of the CHC Treaty, which permits "measures necessary to protect a Member State's essential security interests." |

### 6.1 Two-Part Inquiry: Jurisdiction/Admissibility & Legality

QP3 entails a two-part inquiry. First, the Court must consider whether it has jurisdiction to hear Adawa's challenge of the Helian tariffs (and, if it does, whether Adawa's claim is admissible). If "yes," the Court must second consider whether the tariffs are legal under the CHC treaty.

The first question entails an assessment of general versus specialized international law, and the remedies available under each. Prior to the ICJ case, Adawa brought a dispute against Rasasa under the World Trade Organization (WTO) Dispute Settlement Understanding (DSU).[136] WTO Members are subject to compulsory, binding dispute settlement regarding their rights and obligations under the various WTO Agreements. Under the DSU, an ad-hoc, three-member panel adjudicates a dispute, which may be appealed to a standing, seven-member Appellate Body (AB).[137]

Adawa has challenged the Helian tariffs under the WTO DSU, though the Problem does not specify with respect to which WTO Agreements it has done so. The WTO cannot hear claims brought under non-WTO treaties, such as the CHC Treaty.

---

[136] Problem at ¶ 45.

[137] As of 10 December 2019, the AB is currently non-operational due to insufficient membership resulting from an ongoing political crisis. Please see Section 6.9 *infra* for a discussion of this and how it may affect arguments in the context of the Jessup Problem.

There is no rule prohibiting Adawa from seeking relief for the tariffs under multiple tribunals. Yet there are a number of practical considerations affecting this approach, such as potentially inconsistent legal judgments. Competitors' arguments will likely focus on this, as well as whether legal principles can support or undermine ICJ jurisdiction. A handful of cases have been brought before both the ICJ and the WTO. Competitors may cite to these as reasons to deny or grant jurisdiction.

Assuming that the ICJ has jurisdiction, answering the second question will depend on whether Rasasa can justify the Helian tariffs as a measure "necessary" to protect its "essential security interests" under CHC Article 22(b) – an almost-identical provision to Article XXI of the General Agreement on Tariffs and Trade (GATT) – the WTO's foundational treaty.

### 6.2 The Nature of Jurisdiction Before the ICJ

Please see the discussion in Section 3.1.1 *supra* with respect to ICJ jurisdiction generally. The consideration of ICJ jurisdiction in QP3 is related, but unique in light of the overlapping nature of this claim with Adawa's existing WTO complaint against Rasasa.

Neither the UN Charter nor the ICJ Statute definitively address overlapping or conflicting jurisdiction between the ICJ and other tribunals.[138] Article 95 of the UN Charter states:

> Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Thus, the UN Charter acknowledges that UN Member States may seek recourse to tribunals other than those of the UN (including the ICJ) to resolve disputes. However, it does not establish any hierarchy or preference between these tribunals. Article 36, paragraph 6 of the ICJ Statute states:

> In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

In other words, the Court can determine its own jurisdiction, but there is no guidance as to <u>when</u> the exercise of that jurisdiction is appropriate. Section 6.6 *infra* discusses various theories on the basis of which the Court may find that it does or does not have jurisdiction; or, upon which it may decline to exercise jurisdiction that it possesses (*i.e.*, Adawa's claim is not admissible).

| | |
|---|---|
| **Q:** | Agent, is there anything in the Statute of this Court, or in international law more generally, that precludes this Court from hearing Adawa's trade law claim? |

[138] For a more extensive discussion of these issues, *see* Giorgio Gaja, *Relationship of the ICJ with Other International Courts and Tribunals*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (Zimmerman et al., eds., 3d ed. 2019).

### 6.3 Disputes Under the WTO DSU

It is helpful to have a basic understanding of WTO disputes in order to contextualize this issue and how it may affect teams' arguments regarding QP3. DSU Article 3.7 establishes a hierarchical preference for resolving trade disputes:

- The first preferred outcome is a "solution mutually acceptable to the parties to a dispute and consistent with" the WTO Agreements.

- If this is not possible, the next most appropriate outcome is "the withdrawal of the measures concerned" if a WTO panel and/or the AB finds that the measures are inconsistent with the relevant WTO Agreement(s) (*i.e.*, illegal).

- If immediate withdrawal is "impracticable," then Members may resort to "compensation . . . as a temporary measure" pending withdrawal of the illegal measure.

- The "last resort" is "suspending the application of concessions or other obligations" under the WTO Agreements "vis-à-vis the other Member" (*i.e.*, retaliatory measures) "subject to authorization" by the WTO Dispute Settlement Body (DSB).

WTO disputes proceed in stages. Members first engage in consultations (attempting to resolve the dispute through negotiation).[139] If consultations fail, the complaining Member may request the establishment of a panel under DSU Article 6. The DSB can establish a panel, but the panel must then be composed (*i.e.*, staffed) with three adjudicating panelists, upon which Members must agree. If they cannot, the WTO Director-General can appoint the panelists.[140] Thus, the process of establishment and composition can delay proceedings.

As a result, although DSU Article 12.9 requires that panel proceedings (from composition to adoption[141] of a panel report) take 6-9 months, in practice, the process can take anywhere from 10 months to 2 years. In this case, Adawa requested the establishment of a panel in February 2019, but the Problem is otherwise silent on the panel's composition or current state of proceedings.[142]

Once the panel issues its decision, either the losing party must comply with it, or either party may appeal the decision to the AB. DSU Article 17.5 requires the AB to issue its decision within 60 to 90 days of appeal. However, the historical average length of an appeal is 126 days (and, in 2018-2019, was 425 days). Generally, the appeals process adds about 12 to 18 months to a WTO dispute. However, as explained in section 6.9 *infra*, the AB is currently nonfunctional.

Assuming that a measure is found WTO-inconsistent, the losing party has a "reasonable period of time" (RPT) after adoption to implement the panel/AB decision (the "compliance phase"). The RPT can be determined through the losing party's proposal;[143] the mutual agreement of parties;[144] or binding arbitration.[145] RPTs are fact-intensive and politically sensitive, but have historically ranged, on average, from 9 to 12 months.

---

139 *See* DSU Article 4.

140 *See* DSU Articles 6 through 8.

141 In order to have legal effect, the DSB must "adopt" a panel or AB report.

142 Problem ¶ 47.

143 DSU Article 21.3(a).

144 DSU Article 21.3(b).

145 DSU Article 21.3(c).

After the compliance phase, if the winning party still believes that the losing party has not removed or altered the measure pursuant to the panel/AB decision, it can challenge such compliance (or lack thereof) under DSU Article 21.5 (a "compliance dispute"). The process includes another set of panel (and possible AB) proceedings, making the timeline similar to an initial dispute.

If the compliance panel/AB report still finds violation, only then does the issue of compensation and/or retaliation arise under DSU Article 22. DSU Article 22.1 establishes compensation and retaliation as secondary to elimination of the measure. It explicitly states that "compensation is voluntary and, if granted, shall be consistent with" the WTO Agreements. DSU Article 22.2 further requires the disputing parties to negotiate compensation. Please see section 6.7 *infra* regarding the issue of compensation as it relates to parties' arguments in this case.

If there is no agreement regarding compensation, the winning Member may move to implement retaliatory measures. The amount of retaliation is subject to authorization by the DSB and, if any Member objects, binding arbitration.

In sum, depending on the different elements described above, the full length of a WTO dispute (that is, a final, binding outcome) can last anywhere from two to five years. Some complex cases can last up to, and beyond, a decade before a final outcome is rendered – but these tend to be more complex, contentious cases. Both Applicant and Respondent may cite to these timeframes as reasons militating for or against the ICJ's jurisdiction in this case – but given how fact-intensive such an argument is, along with the lack of information in the Problem – it is not particularly persuasive.

Finally, it is important to note that the structure and nature of WTO dispute settlement is such that, at any stage, parties can easily settle the dispute rather than seek panel/AB adjudication.[146]

| | |
|---|---|
| **Q:** | (to Rasasa) Agent, if Adawa were to withdraw its WTO case, how would your argument be affected? |
| **Q:** | (to Adawa) Agent, if Adawa and Rasasa agreed to the WTO that they had reached a "mutually agreed solution" pursuant to the DSU, how might that affect your claim? |

### 6.4 The Nature of Jurisdiction before the WTO

In the context of WTO law, conflicting jurisdiction has arisen as an issue in trade disputes falling under the WTO and regional trade agreements (RTAs), such as the North American Free Trade Agreement (NAFTA). The CHC Treaty is an RTA.[147] In reality, RTAs typically have dispute settlement provisions that explicitly address jurisdictional conflicts. The Problem is silent as to such a provision in the CHC Treaty.

Generally, a WTO panel cannot decline to exercise jurisdiction. The clearest such declaration is in the AB report for *Mexico – Tax Measures on Soft Drinks and Other Beverages* (*Mexico – Soft Drinks*). In the early 1990s, the United States restricted imports of Mexican sugar. Mexico challenged these restrictions under NAFTA, which provides that "any matter arising under both" the NAFTA and the WTO Agreements "may be settled in either forum at the discretion of the complaining party."[148] Relying on institutional limitations in the NAFTA, the United States blocked this dispute from

---

[146] *See, e.g.*, Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. ON DISP. RESOL. 141, 147 (2003); Joost Pauwelyn, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes,* 19 OHIO ST. J. ON DISP. RESOL. 121, 133–39 (2003)

[147] Clarifications, ¶ 5.

[148] NAFTA Article 2005(1). NAFTA Article 2005(6) requires that, once a dispute has initiated in one forum, that forum must be used to the exclusion of the other. Mexico did not raise this provision in the WTO context.

moving ahead. Mexico retaliated through an import tax against high-fructose corn syrup soft drinks, which the United States challenged at the WTO in *Mexico – Soft Drinks*.

Mexico argued that the WTO panel could not adjudicate the dispute because, as an adjudicative body, the panel had "the power to refrain from exercising jurisdiction in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as NAFTA provisions."[149]

The Panel ruled that it had jurisdiction; the AB agreed on appeal. Specifically, the AB found that declining jurisdiction would violate several mandatory DSU provisions, including:[150]

- The panel's obligation to address the relevant provisions and claims in a dispute;[151]
- The panel's obligation to make an "objective assessment" of the claims before it;[152] and
- The requirement that Members have recourse to a panel to "seek the redress of a violation of obligation" under the WTO Agreements.[153]

The AB concluded that "a WTO panel 'would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction.'"[154]

Finally, although the WTO and CHC claims are similar, they are not identical. Although the Problem is silent with respect to the WTO Agreement(s) under which Adawa has brought its WTO dispute, it is well-established that a WTO panel can only hear challenges brought under a WTO Agreement. That is, a panel would not consider an alleged violation of the CHC Treaty by Rasasa (nor, by the same token, could the ICJ consider an alleged violation of a WTO Agreement).

| | |
|---|---|
| **Q:** | Agent, given what we know in the Statement of Agreed Facts with respect to Adawa's WTO complaint, how should the current state of the WTO dispute affect this Court's approach to this claim?<br>• Applicant should or will likely highlight the fact that the parties could stop the WTO proceeding at any time, and that *Mexico – Soft Drinks* is distinguishable from this case.<br>• Respondent will likely point to *Mexico – Soft Drinks* to argue that the WTO panel will almost certainly adjudicate the case, and that this therefore militates against the ICJ's jurisdiction/admissibility. |
| **Q:** | Agent, can the WTO Panel consider whether Rasasa violated the CHC Treaty? Can this Court consider Rasasa violated any WTO Agreements? |

149 Panel Report, *Mexico Soft Drinks*, ¶ 4.103.

150 Appellate Body Report, *Mexico Soft Drinks*, ¶¶ 47-53.

151 *See* DSU Article 7.2.

152 *See* DSU Article 11.

153 *See* DSU Article 23.

154 Appellate Body Report, *Mexico Soft Drinks*, ¶ 52 (quoting Panel Report, *Mexico Soft Drinks*, ¶¶ 7.8).

## 6.5 Interplay of ICJ and WTO Regimes

A key element of consideration when evaluating teams' arguments is the status of the WTO in the broader framework of international law.

As the judicial organ of the UN, the ICJ is recognized as an authority on all matters arising under international law.[155] However, numerous tribunals exist for disputes in more specialized areas of law. International trade law is one such area, for which the WTO is primarily responsible.

The coexistence of these regimes has been the subject of much debate in the international legal community – particularly, the degree to which specialized regimes are "self-contained" or separate from broader public international law; or, the degree to which international law is "fragmented." To address this problem, the ILC established a Study Group on the Fragmentation of International Law. That group's 2006 final report containing several relevant findings, as follows:

> (4) *The principle of harmonization.* It is a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of comparable obligations . . . .
>
> (5) *General principle*. The maxim *lex specialis derogate legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. . . .
>
> (8) *Functions of* lex specialis. Most of international law is dispositive. This means that special law may be used to apply, clarify, update or modify, as well as set aside, general law.
>
> (9) *The effect of* lex specialis *on general law*. The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization under conclusion (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[156]

The report further applied the principles of *lex specialis* to "special regimes" (defined as a "group of rules and principles concerned with a particular subject matter") and identified the WTO as one such regime.[157] Many have adopted this view. As the former WTO Director-General explained:

> Contrary to what may happen in other international forums, for example the International Court of Justice, all WTO Members have, by definition, accepted the compulsory and exclusive jurisdiction of the DSB for all matters relating to the WTO agreements . . . . it is

---

[155] For example, as stated in Article 36(1) and (2) of the ICJ Statute (emphasis added):

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
>
> 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

[156] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006), ¶¶ 4-9 (emphasis added).

[157] *Ibid.* at ¶¶ 11, 15, n. 980.

> unlikely that a WTO panel would decline jurisdiction because another dispute process – albeit more relevant and better equipped – has been seized for a similar or related dispute . . . it will be for the WTO judge to determine the balance, the 'line of equilibrium' between trade norms and norms of other legal orders.[158]

This distinction is particularly important with respect to both jurisdiction and Rasasa's security exception defense, discussed below. Judges should expect that teams will cite to the ILC report in making their arguments and, if not, judges should question teams with respect to the concepts of *lex specialis* and special regimes.

| | |
|---|---|
| **Q:** | Agent, how should this Court regard the WTO regime in the broader context of public international law? How does that affect its potential jurisdiction? |
| **Q:** | Agent, if we consider the WTO to be *lex specialis* or a special regime of trade law, does that affect this Court's jurisdiction or the admissibility of Adawa's trade law claims? |

### 6.6 Legal theories and principles regarding the exercise of jurisdiction and/or admissibility

The distinction between jurisdiction and admissibility is addressed in Sections 3.1.3 and 6.1, *supra.* Please see above for discussion regarding these concepts and general questions related to them.

Applicant teams will likely argue that, because the Court has jurisdiction, it should proceed to assess the claim. Respondent teams will likely argue that the Court does not have jurisdiction and that, even if it does, the Court should rule that the claim is not admissible.

| | |
|---|---|
| **Q:** | Agent, if we find that the Court has jurisdiction to hear Adawa's trade law claim, are we required to consider its merits?<br>• Applicant teams will argue that the Court should hear the claim but may have difficulty in citing a legal reason that it must.<br>• An effective Respondent team will pick up on this to argue that the claim is inadmissible. |
| **Q:** | Agent, assuming we agree that the Court has jurisdiction to hear Adawa's trade law claim, why should we consider it admissible?<br>• Applicant teams will likely rely on a mix of legal and factual bases for admissibility – *e.g.*, that the WTO cannot hear challenges under the CHC treaty, or that compensation is not typically awarded in WTO disputes.<br>• Respondent teams will likely point to one or some of the theories discussed below, along with the existence of the WTO dispute, to argue that the claim is not admissible. |

Sections 6.6.1 through 6.6.5, *infra,* summarize several concepts that the teams may raise in their memorials as justifications for the exercise or denial of jurisdictions.

For each theory, when raised, judges should press students on the basis for adopting such theory – *i.e.*, whether it applies factually as well as legally, and *how* the Court can rely on such theories.

---

[158] Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 976, 983 (2006).

namely under Article 38 of the ICJ Statute (*e.g.*, based on jurisprudence, as a general principle of international law, or a customary norm).

### 6.6.1 Judicial Propriety

The ICJ has occasionally raised judicial propriety when considering jurisdiction. That is, the ICJ will find that it does not have jurisdiction, or that a claim is inadmissible, because exercising jurisdiction or considering the claim would be "improper." For example, in *Northern Cameroons*:

> [E]ven if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.[159]

Judge Fitzmaurice, in a separate opinion, further explained:

> The Court has not, I think, pronounced the claim to be formally inadmissible, but it has in effect (to make use of the French term *recevabilité*) treated it as nonreceivable or unexaminable because of the consequences (i.e. strictly, the lack of any) which would ensue if it was acceded to. . . .
>
> Underlying the Judgment of the Court there are clearly considerations of propriety, and this raises a general issue of principle – that is to say, of how far and in what circumstances a court which has, or may have, jurisdiction to go into a case, can and should decline to exercise that jurisdiction (or even to consider the question of jurisdiction) on the ground that it would not be proper for it to do so in the circumstances.[160]

Both the ICJ and the PCIJ have relied on this concept in other cases (albeit in advisory opinions).[161]

In light of the explicit mention of judicial propriety in ICJ decisions, teams may cite to this as a reason for or against ICJ jurisdiction. However, given the vague terms of this theory, judges should press teams to further explain why jurisdiction is proper (or not) in this context, as well as tie the standard to the question of the Court's "judicial function" raised in *Northern Cameroons*.

### 6.6.2 Comity

Similar to judicial propriety, comity is a legal principle, often applied in common law countries, that "calls on courts 'to respect and demonstrate a degree of deference to the law' and the court decisions of other jurisdictions."[162] Some international tribunals have cited to comity in their jurisdictional decisions. Some prominent examples, which teams may raise in their memorials or at oral rounds, include:

- In *Southern Pacific v. Egypt*, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal suspended proceedings "as a matter of comity" due to parallel

---

[159] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 37-38. As background, the Court found that even if it were properly seized of a matter, it was not required to administer justice as to the merits of Cameroon's claims. The Court explained that any judgment it might give could not affect the decision of the General Assembly providing for the attachment of the Northern Cameroons to Nigeria in accordance with the results of a plebiscite carried out under the trusteeship system. Therefore, in the Court's view, it would be contrary to its judicial function to issue a judgment that would be moot or "without object."

[160] *Northern Cameroons*, Separate Opinion of Judge Sir Gerald Fitzmaurice, ICJ Reports (1963), pp. 97, 101.

[161] *See, e.g.*, *Free Zones*, Judgment, PCIJ, Series A/B, No. 46, pp. 96, 161.

[162] Tim Graewart, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*, 1(2) CONTEMP. ASIA ARB.J. 287, 315 (2008).

proceedings before the French *cour de cassation*, and took up the case again when the French court declined jurisdiction.[163]

- In the *MOX Plant Case*, Ireland and the UK agreed to proceedings before the arbitration tribunals of both the Convention for the Protection of the Maritime Environment of the North-East Atlantic (OSPAR) and the UN Law of the Sea Convention (UNCLOS). The UK challenged the jurisdiction of the UNCLOS tribunal because, in its view, the European Court of Justice (ECJ) had exclusive jurisdiction under relevant EU law. The UNCLOS tribunal suspended its proceedings "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions."[164]

Teams may cite to additional sources to argue for or against comity in international law. However, there is recognition that it has not yet crystallized as custom,[165] and "there are difficulties to recognising it as a general principle of law according to Article 38(1)(c) of the Statute of the ICJ."[166]

Thus, judges should press teams on providing sufficient legal and/or factual support for whether comity is a reason to either exercise or decline jurisdiction.

### 6.6.3 *Lis Pendens*

*Lis pendens* "provides that once a process has begun, no other parallel proceedings may be pursued."[167]

There is debate as to whether the principle of *lis pendens* is applicable internationally.[168] Applicant teams can point to the fact that neither the ICJ nor the PCIJ have ever applied the principle. Additionally, the PCIJ in *Factory at Chorzów* appeared to take the position that only an explicit treaty provision could lead it to decline to exercise jurisdiction over a dispute in the context of overlapping jurisdiction with another tribunal.[169]

Respondent teams can note that, in the *Certain German Interests* case, the PCIJ left open the possibility that the doctrine of *lis pendens* applies internationally, declining to explicitly rule on this question but noting that, in any event, the requirements of *lis pendens* were not met in the circumstances of that case.[170] Respondent teams may also point to more recent authorities, such as the dissenting opinion of Judge *ad hoc* Cot in the *Qatar v. UAE* case, in which he expressed the view that

---

163 *Ibid.* at 316.

164 *Ibid.* at 316-17.

165 *See* Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19 EUR. J. INT'L L. 571, 583-85 (2008).

166 Tim Graewart, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*, 1(2) CONTEMP. ASIA ARB.J. 287, 315 (2008).

167 Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, 41 CAN. Y.B. INT'L L. 83, 103 (2003).

168 Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 106 (2009).

169 C. McLachlan, *Lis Pendens* in International Litigation, Hague Academy of International Law 2009, pp. 456-57 (citing *Case concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), Judgment No. 8, 1927 P.C.I.J. Series A, No. 9*, p. 30) (noting that the Court "cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.").

170 *Case concerning certain German Interests in Polish Upper Silesia, Judgment No, 6, 1925, P.C.I.J. Series A, No. 6*, p. 19.

the doctrine of *lis pendens* applied to parallel proceedings in the ICJ and the Committee on the Elimination of All Forms of Racial Discrimination.[171]

To the extent it does apply, many believe that application of the principle requires satisfaction of the "triple identity" test – namely that between two legal actions, "(1) the parties are the same, (2) the object or subject matter (*petitum*) is the same, and (3) the cause of action (*causa petendi*) is the same)."[172] In this case, (1) and (2) are likely satisfied, but Rasasa has a harder argument with (3) because Adawa's cause of action before the ICJ – brought under the CHC Treaty – is materially different from its cause of action before a WTO panel, brought under one or some of the WTO Agreements.

Rasasa may thus attempt to persuade the Court "to soften"[173] these criteria. In this respect, Respondent teams may refer, for example, to the *Southern Bluefin Tuna* arbitration, in which an arbitral tribunal convened under the U.N. Convention on the Law of the Sea ("UNCLOS") was called upon to assess whether or not an UNCLOS claim filed against Japan by Australia and New Zealand should be dismissed in light of the fact that a related dispute was pending between the same parties in relation to a different treaty – the Convention on the Conservation of the Southern Bluefin Tuna ("CCSBT"). The UNCLOS tribunal ultimately dismissed the claim, finding along the way that:

> [T]he Parties to this dispute [...] are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.[174]

As one scholar explained, "[i]t follows from this precedent that a dispute may be considered a single identical dispute based on identical grounds where claims are based on two fairly different treaties as long as they all relate to the same factual background. This principle applies even more where two separate treaties contain essentially identical provisions."[175]

Rasasa can thus attempt to make the case that the stricter requirements of the "triple identity test" should not be applied, and that the principle of *lis pendens* can apply even where parallel proceedings are brought under separate treaty regimes (*e.g.* the WTO agreements and the CHC Treaty). Rasasa would still need to make the case that these two treaty regimes are similar enough that it would be "artificial" to consider the WTO dispute as distinct from the CHC Treaty dispute. Arguments related to the availability of compensation as a remedy (*see* Section 6.7 below) may be relevant in this regard.

---

171 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 28 July 2018, Dissenting Opinion of Judge* ad hoc *Cot, I.C.J. Reports 2018*, p. 485.

172 Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 103 (2009) (referring to *res judicata*); *see also* Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, 41 CAN. Y.B. INT'L L. 83, 103 (2003). (referring to both *res judicata* and *lis pendens*).

173 *See* Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 104 (2009).

174 *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, XXIII R.I.A.A. 1 (4 August 2000), ¶ 54.

175 August Reinisch, *The Use and Limits of* Res Judicata *and* Lis Pendens *as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, *in* 3 The Law and Practice of International Courts and Tribunals 37 (2004), p. 68

### 6.6.4 *Abus de droit*/Good faith

Some have suggested that arguments based on the principle of *abus de droit* (abuse of rights) and/or good faith can be invoked to prevent overlapping jurisdiction of multiple tribunals.[176]

- Under the theory of *abus de droit*, "a state, by initiating a second proceeding on the same matter, may be viewed as abusing its process or procedural rights."[177] Ian Brownlie has identified this "as a general principle of law."[178] Thus, a "tribunal could decline jurisdiction if it considers that the proceedings have been initiated to harass the defendant or that they were frivolous or groundless."[179]

- With respect to good faith, a team could argue that "the general obligation of states to enforce their treaty obligations in good faith obliges them to use the most appropriate forum to settle their disputes or to use them in any sequence."[180]

Support for this argument can be found in the *Orascom TMT v. Algeria* arbitral award, in which the tribunal found that the initiation of multiple arbitrations by several companies in the same corporate chain (including the claimant), seeking relief for the same harm, constituted an abuse of rights that rendered the claimant's claims inadmissible.[181]

Respondent may accuse Applicant of *abus de droit* and/or failing to act in good faith in this case, given that it had already launched a WTO dispute over the tariffs. These arguments will be difficult, given that Adawa has legitimate claims under both the WTO Agreements and the CHC Treaty, and that it has identified specific shortcomings under the WTO (the lack of compensation) as a reason for bringing its ICJ claim. Indeed, some have noted that *abus de droit* or good faith arguments tend to succeed in "extraordinary" cases.[182]

## 6.7 Compensation

A central element of Adawa's claim is that the ICJ should exercise jurisdiction because compensation is unlikely at the WTO. Judges should test both Applicant and Respondent teams on this claim. As

---

[176] Wen-Chen Shih, *Conflicting Jurisdictions Over Disputes Arising From the Application of Trade-Related Environmental Measures*, 8 RICH. J. GLOBAL L. & BUS. 351, 378 (2009) ("Still other scholars provide that the principles of good faith and *abus de droit* might be applicable to deal with or prevent issues of conflicting jurisdictions over a dispute arising from the application of TREMs between the dispute settlement mechanism of the WTO and that of the MEAs.") (citation omitted).

[177] Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, 41 CAN. Y.B. INT'L L. 83, 100 (2003).

[178] Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 447-48 (5th ed. 1998).

[179] Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, 41 CAN. Y.B. INT'L L. 83, 100 (2003).

[180] Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, 41 CAN. Y.B. INT'L L. 83, 100 (2003).

[181] *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, paras. 546-48.

[182] Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 105 (2009) ("[I]n exceptional cases, doctrines such as good faith, estoppel, or abuse of process could be applied to curb genuinely abusive sequential litigation); *see also* Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, 41 CAN. Y.B. INT'L L. 83, 100 (2003) ("[I]t is unlikely that any adjudicating body, including those of the WTO, would find the allegations that their constitutional treaty has been violated to be 'vexatious,' especially when, in all probability, the claims would be drafted to capture the specific competence of that tribunal . . . . if states have negotiated the possibility of referring disputes to various fora, it has to be assumed that they intended to retain the possibility of using such fora freely, yet in good faith.").

explained above, the DSU provides for the possibility of compensation, but requires that it be voluntary and negotiated.

Thus, although Applicant may argue that the WTO system is insufficient to provide its desired remedy (*i.e.*, financial compensation), it cannot claim that it is impossible under the WTO system – only that it is rare. Indeed, the United States has provided financial compensation in the *US – Copyright* dispute, but such compensation has not been widely used in other cases.[183]

Alternatively, Applicants may rely on varying interpretation of "compensation" in the DSU to refer to "trade compensation" rather than "financial compensation."[184] "Trade compensation" refers to a situation "whereby the non-compliant Member reduces tariff barriers equivalent to the amount of harm suffered through its measures."[185] This is different from the compensation sought by Adawa. Indeed, these views support Adawa's basic argument:

> The concept of financial compensation is not a novel idea. In fact, despite having long been a part of public international law, the concept of financial compensation has often been raised and rejected throughout the history of the GATT/WTO . . . . the legality of financial compensation under the current DSU remains questionable as there is nothing in the text of the DSU or any other WTO agreement which provides a clear basis for its usage, and multiple attempts to include such a legal basis have failed.[186]

| | |
|---|---|
| **Q:** | Agent, is the right to compensation essential to finding jurisdiction for/admissibility of Adawa's claim? |
| **Q:** | (for Adawa) Agent, are you contending that a WTO panel will not, under any circumstances, provide for the possibility of compensation? |
| **Q:** | Agent, if this Court finds that compensation is possible under the WTO DSU, should it deny jurisdiction to hear/admissibility of Adawa's claim? |

The debate over compensation also invokes the broader question of *lex specialis* and special regimes. As discussed above, certain norms in specialized legal systems can supersede broader norms of international law. Compensation is rooted in principles of internationally wrongful acts, namely Article 36 of the ILC Draft Articles on State Responsibility:

> *Article 36. Compensation*
>
> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

However, Article 55 of the ILC Draft Articles states:

---

[183] Brian Mercurio, *Why Compensation cannot replace trade retaliation in the WTO Dispute Settlement Understanding*, 8 WORLD TRADE REV. 1, 14-15 (2009) ("In US–Copyright, a panel found that US laws exempting certain small businesses from paying music copyright licence fees contravened Article 9.1 of the TRIPS Agreement . . . . the US agreed to financially compensate the EC in exchange for allowing the continuation of the infringing practices.)") (citations omitted).

[184] Brian Mercurio, *Why Compensation cannot replace trade retaliation in the WTO Dispute Settlement Understanding*, 8 WORLD TRADE REV. 1, 14 (2009).

[185] *Ibid.*

[186] *Ibid.*

*Article 55. Lex specialis*

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

In light of the discussion in Section 6.5, *supra*, the WTO is a form of *lex specialis* and/or special regime, the rules of which could arguably supersede the obligation to provide compensation. Former ICJ Judge Bruno Simma has explained:

> It is clear that the DSU contains a *lex specialis* on cessation of the breach and on continued performance of the obligation . . . . However, it is far from clear whether the WTO system contains remedies akin to reparation and countermeasures . . . . [And, t]he question of monetary compensation remains. The WTO Agreements contain no functional equivalent of retrospective reparation . . . . WTO panels have shown an inclination to recognize an obligation to grant *restitutio in integrum*, where restitution was feasible . . . . [And, m]onetary compensation . . . raises a number of problems . . . . Given the current state of WTO law, it seems reasonable to infer that the treaty-law mechanisms of Article 22 DSU are indeed exhaustive when it comes to monetary compensation . . . . The object and purpose of the DSU do not permit a state to have parallel recourse to claims for compensation or countermeasures under the general international law of state responsibility.[187]

| **Q:** | Agent, assuming that compensation is unlikely under the WTO DSU, is this not an embodiment of the rule of *lex specialis derogate legi generali*? In other words, by participating in the WTO dispute settlement system, has Adawa foregone its right to compensation? |
|---|---|

### 6.8 Cases brought before both the ICJ and the WTO

In a few instances, countries have brought cases before both the ICJ (or similar tribunals) and the WTO. However, caveats apply to each of these cases, and none of these situations has yet resulted in two opinions (*i.e.*, one from each forum) on the same legal issue. Accordingly, if teams cite to any of these cases, judges should question them on the cases' legal and factual details.

- In response to the 2017 economic blockade imposed on it by other members of the Gulf Cooperation Council (GCC), Qatar launched:
  - The WTO dispute *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* against the UAE, challenging the blockade under the GATT, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).
  - The ICJ case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, contending that actions against Qatari-owned entities and citizens in the UAE, deriving from the same blockade, violates the International Convention on the Elimination of All Forms of Racial Discrimination.

  Both cases are ongoing, and to date, neither the WTO panel nor the ICJ has issued a substantive opinion in either case.

- After a 1999 Nicaraguan tax measure on Honduran and Colombian imports, and Nicaragua's cancelation of Honduran and Colombian vessels' fishing permits, the two countries launched:

---

[187] Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, EJIL (2006), Vol. 117 No. 3, at p. 520.

- The WTO disputes *Nicaragua – Measures Affecting Imports from Honduras and Colombia* (DS188 and DS201).

- The ICJ *Case Concerning Maritime Delineation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*

Honduras' WTO complaint never proceeded to the panel stage as of June 2000. The DSB established a panel in May 2000 for Colombia's WTO complaint, but it was never composed. The ICJ delivered its judgment in May 2007.

- After Chile limited fishing vessels' rights in the Southeast Pacific in 1999, the EU launched:

  - The WTO dispute *Chile – Measures affecting the Transit and Importing of Swordfish* (DS193).

  - The International Tribunal for the Law of the Sea (ITLOS) *Case Concerning Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Communities)*

  The EU withdrew its WTO complaint in December 2007, and both parties ultimately settled the ITLOS through diplomatic means in 2009.

- In response to an economic embargo and US covert military operations, Nicaragua launched:

  - The GATT dispute *United States – Trade Measures Affecting Nicaragua* (GATT was the WTO's predecessor organization from 1947-1994; its dispute settlement mechanism was considerably weaker than that of the WTO).

  - The ICJ case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

  Although both the GATT panel and the ICJ issued opinions, the GATT report was never adopted and did not have the legal mandate to analyze the GATT Article XXI security exception (see Section 6.10, *infra*).

### 6.9 The Appellate Body Political Crisis

In recent years, the United States has blocked appointment of new members to the AB due to its "concerns" over the AB and the WTO system. As AB members' terms expired, a crisis developed because the AB cannot function without a minimum of three members to hear an appeal.[188] Since 11 December 2019, with the retirement of two of the last three remaining members, the AB cannot hear any new appeals, leaving the appellate function of the WTO defunct.

Some applicant teams may seize on this development to argue that the ICJ must hear Adawa's trade law claims because the WTO cannot viably adjudicate its WTO dispute. Judges should engage with teams on this argument, but not spend excessive time on it: although the AB is defunct, WTO Members are still free to bring disputes and the DSB can still establish and compose panels. Although the long-term legal certainty of any WTO decision is in doubt, this does not invalidate the entire organization.

| | |
|---|---|
| **Q:** | (if raised affirmatively) Agent, how, if at all, does the AB's political crisis affect this Court's consideration of Adawa's trade law claim? |

[188] For more information, *see, e.g.*, Jeffrey J. Schott & Euijin Jung, *The WTO's Existential Crisis: How to Salvage Its Ability to Settle Disputes*, Peterson Institute for International Economics, Policy Brief 19-19 (Dec. 2019), *available at* https://www.piie.com/sites/default/files/documents/pb19-19.pdf.

| | |
|---|---|
| | • Applicant teams will argue that it throws the reliability of the WTO system into question and undermines it as a viable judicial forum for its claims regarding Rasasa's tariffs.<br>• Respondent teams should point to the fact that panels can still hear WTO disputes, and that, as the body responsible for international trade disputes, the DSB remains a more appropriate forum irrespective of these developments. |

### 6.10 Second Inquiry: Legality of the tariffs

Assuming the ICJ has jurisdiction and deems Adawa's claim admissible, the question then turns to whether Rasasa's Helian tariffs are legal.

Applicant teams will argue that the Helian tariffs violate CHC Article 3, which prohibits Member States from imposing "customs duties on Helian products, as well as goods that are primarily or exclusively used in the harvesting or processing of the Helian hyacinth, which originate from the territory of a Member State." This is a fairly straightforward claim.

Respondent teams may concede that the tariffs *prima facie* violate CHC Article 3, but seek to justify the tariffs under CHC Article 22(b), which is a treaty-based security exception.

One general consideration is that, unlike the GATT, the CHC Treaty does not contain a "general exceptions" clause (like the one found in GATT Article XX), but rather only the narrower exception contained in Article 22. Applicant teams may thus suggest that the CHC Treaty should be construed as establishing a more absolute prohibition on customs duties than is present in the GATT.

#### 6.10.1 Treaty-based security exceptions

Under CHC Article 22 (relevant portion in underline):

> Nothing in this Treaty shall be construed as:
>
> a. Requiring any Member to furnish information, the disclosure of which it considers contrary to its security interests, or
>
> b. Precluding the application of measures necessary to protect a Member State's essential security interests.

The language of CHC Article 22(b) and of GATT Article XXI (*i.e.*, the WTO security exception) are almost identical. GATT Article XXI reads as follows (relevant portion in underline):

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Because the tariffs are an "action" under GATT Article XXI and a "measure" under CHC Article 22, the underlined portions above are most relevant to the Problem. The key difference is that GATT Article XXI is subjective, permitting a WTO Member to take an action that "it considers necessary for protection of its essential security interests." CHC Article 22 entails an objective standard; the measure must be "necessary to protect a Member State's essential security interests."

### 6.10.2 Interpretation of CHC Article 22(b)

The ICJ has adjudicated cases in which it considered security exceptions similar to CHC Article 22. Both teams will likely cite to these in the course of making their arguments.

In *Nicaragua*, the United States cited Article XXI(1)(d) of the 1956 Treaty of Friendship, Commerce, and Navigation to defend its actions challenged by Nicaragua before the ICJ, and the ICJ had jurisdiction to evaluate the claim.[189] That provision was identical to CHC Article 22(b):

> . . . the present Treaty shall not preclude the application of measures . . .
>
> *(d)* necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

The ICJ specifically contrasted this provision with GATT Article XXI:

> That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.[190]

Judges should therefore reject any argument by Respondent teams asserting that CHC Article 22 is self-judging or subjective, akin to GATT Article XXI.

In turn, when evaluating teams' arguments, the essential consideration will depend on whether the teams can demonstrate that the tariffs (1) concerned Rasasa's "essential security interests" and (2) were "necessary" to protect those interests. To that end, the ICJ explained in *Nicaragua* that:

> [T]he concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and

---

189 *See generally Nicaragua*, ¶¶ 221-282.

190 *Nicaragua*, ¶ 222.

secondly, whether the measures presented as being designed to protect those interests are not merely useful but necessary.[191]

The ICJ concluded that the United States failed to demonstrate that its actions were justified under Article XXI of the 1956 Treaty, but did not elaborate extensively on those conclusions:

> [T]he Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as "necessary" to protect the essential security interests of the United States . . . . But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party; the text does not refer to what the party "considers necessary" for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests.

The ICJ revisited this issue in *Oil Platforms*, in which the United States argued that military actions taken against Iranian oil platforms were "necessary" to protect its "essential security interests" under Article XX of the 1955 Treaty of Amity, Economic Relations and Consular Rights. The United States cited to its interest in the flow of maritime commerce, its naval vessels in the Gulf, and financial losses of its citizens as "essential security interests," and explained that "armed action in self-defense" was necessary because diplomatic options had failed to deter Iran.[192]

Importantly, the ICJ stated that its reasoning, both in *Oil Platforms* and *Nicaragua*, relied on the fact that the actions in question entailed the use of force. As the Court explained, "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective . . . [entailing] the criteria of necessity and proportionality in the context of international law on self-defence."[193] After analyzing such factors (*e.g.*, military activity on Iran's oil platforms, proportionality of the U.S. attack, appropriateness of the targets), the ICJ ruled that U.S. actions were not "necessary" to protect essential security interests.[194]

Here, the action complained of is the imposition of tariffs – which is substantively and substantially different from the use of force. As a result, the analysis with respect to both "essential security interests" and "necessity" must change, and judges should not simply accept citation to *Nicaragua*, *Oil Platforms*, and/or other, similar cases regarding security exceptions regarding the use of force.

To this end, teams might rely on arguments from customary international law, or WTO jurisprudence, discussed in Section 6.10.4, *infra*.

Respondent teams might identify various legal reasons to consider that economic crises might implication "essential security interests." In addition to the ICJ's statement in *Nicaragua* that the concept of essential security interests has been subject to "very broad interpretations in the past," Rasasa may point to arbitral awards such as *CMS v. Argentina*, in which the arbitral tribunal found that "major economic crises" could not be excluded from the scope of a treaty provision worded similarly to Art. 22(b) of the CHC Treaty.[195] The tribunal in *LG&E v. Argentina* reached a similar conclusion, noting that "[t]o conclude that [...] a severe economic crisis could not constitute an

---

191 *Nicaragua*, ¶ 224.

192 *Oil Platforms*, ¶ 49.

193 *Oil Platforms*, ¶ 73

194 *Oil Platforms*, ¶¶ 74-78.

195 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 359-60.

essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of a government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[196]

| | |
|---|---|
| **Q:** | Agent, is there any authority or precedent for considering that economic crises may implicate a State's "essential security interests"? |
| **Q:** | Agent, what is the "essential security interest" at stake in applying the Helian tariffs?<br>• Applicant teams will likely argue that the "security interest" at stake in applying the tariffs is tenuous. In particular, the Foreign Ministry deemed the "survival" of Rasasan Helian growers as a "vital matter of national security."[197] But this is removed from, *e.g.*, military security cited in the ICJ cases above. By the same token, some governments have used economic security as part of broader national security to justify trade restrictions (most notably, the United States in imposing "national security" tariffs on steel and aluminum). Such instances, however, do not qualify as customary international law.<br>• Respondent teams will likely argue that the viability of farmers is linked to the broader health and well-being of the population to link this issue to national security. |

### 6.10.3 Interpretation of GATT Article XXI

Historically, GATT Article XXI has been subject to very few disputes.[198] Largely due to its subjective language, many WTO Members considered it "non-justiciable" and self-adjudicating.[199]

Because GATT Article XXI concerns national security exceptions in the trade context, some teams may cite to it as relevant to this case. Judges should press students on the type of authority that WTO jurisprudence constitutes under the ICJ Statute.

In April 2019, a WTO panel issued the first-ever analysis of GATT Article XXI in *Russian Federation – Measures Concerning Traffic in Transit* (*Russia – Traffic in Transit*). In that case, Ukraine challenged Russian measures limiting or prohibiting exports of certain goods to and from Ukraine. Russia successfully defended its use of these measures by invoking GATT Article

---

196 *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 238.

197 Problem, ¶ 44.

198 Prior to the establishment of the WTO in 1995, GATT Article XXI was invoked in ten cases: United States - Embargo on strategic goods exports to Czechoslovakia (1949); United States - Suspension of obligations between the US and Czechoslovakia (1951); Peru - Prohibition of imports from Czechoslovakia (1954); Ghana - Ban on imports of Portuguese goods (1961); United States - Embargo on trade with Cuba (1962); Egypt - Boycott against Israel and secondary boycott (1970); EC, Australia and Canada - Trade measures against Argentina (1982); United States - Imports of sugar from Nicaragua (1982); United States - Embargo on trade with Nicaragua (1985); and EEC and ten other countries – trade measures against Yugoslavia (1991). However, only one case – United States - Embargo on trade with Nicaragua (1985) – saw the establishment of a panel, and the panel in that case explicitly stated that it would not consider the invocation of Article XXI by the United States.

Since the establishment of the WTO in 1995 – and until April 2019, when the first panel report with a GATT Article XXI analysis was issued – Members invoked GATT Article XXI in three cases: *United States The Cuban Liberty and Democratic Solidarity Act* (DS38) (1996); *Nicaragua Measures Affecting Imports from Honduras and Colombia* (DS188) (2000); and *India Import Restrictions Maintained Under the Export and Import Policy 2002-2007* (DS279) (2002). Each of these disputes has stopped short of formal panel proceedings.

199 For a more extensive discussion, *see* Iryna Bogdanova, Adjudication of the GATT security clause: to be or not to be, this is the question, World Trade Institute Working Paper 01/2019.

XXI(b)(iii), concerning measures "taken in time of war or other emergency in international relations." To date, this remains the only panel decision interpreting Article XXI – though others are pending.[200]

The panel report (which was not appealed to the Appellate Body) rejected the view of Article XXI as "self-adjudicating" and considered Russia's defense. Most importantly, it set a "plausibility" standard, requiring Russia to prove "that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests."[201] The panel examined "whether the measures are so remote from, or unrelated to, the . . . emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency."[202]

The Panel further elaborated on the language and provisions in Article XXI, which teams may cite to in making their arguments. Namely:

- The panel deemed an "emergency in international relations" as "an objective state of affairs" and defined it as "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[203]

- A Member's discretion to invoke GATT Article XXI is limited by an obligation to do so "in good faith" – it may not "elevate any concern to that of an 'essential security interest'."[204] And, the Member must "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity[,]" adding that "a sufficient level of articulation will depend on the emergency in international relations at issue."[205]

- Finally, the panel added that the burden on the party to explain its invocation will vary based on the type of essential security interest: "the less characteristic is the 'emergency in international relations' invoked by the Member, *i.e.* the further it is removed from armed conflict, or a situation of breakdown of law and public order … the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict."[206]

Teams may cite to the discussion of "essential security interests" in *Russia – Traffic in Transit* as justifications for or against the invocation of CHC Article 22. Judges should push students to explain why this jurisprudence is more relevant than the ICJ decisions above, and/or other sources of international law; as well as how this decision is classified under Article 38 of the ICJ Statute.

---

200 *E.g.*, *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (Qatar's challenge of the blockade enforced by members of the Gulf Cooperation Council against it) and *United States — Certain Measures on Steel and Aluminium Products* (challenges brought by China, India, the EU, Norway, Russia, Switzerland, and Turkey against the United States' enforcement of "national security" tariffs on steel and aluminum imports).

201 *Russia — Traffic in Transit*, ¶ 7.138.

202 *Russia — Traffic in Transit*, ¶¶ 7.138–7.139 (emphasis added).

203 Panel Report, *Russia — Traffic in Transit*, ¶¶ 7.77, 7.111.

204 Panel Report, *Russia — Traffic in Transit*, ¶ 7.132.

205 Panel Report, *Russia — Traffic in Transit*, ¶¶ 7.134-7.135.

206 *Russia — Traffic in Transit*, ¶ 7.135 (emphasis added).

### 6.10.4 Customary definition of necessity

Because (1) the ICJ cases on security exceptions deal with necessity in a substantively different manner (*i.e.*, relating to the use of force); and (2) the WTO jurisprudence does not thoroughly address necessity in light of its subjective nature, teams might rely on customary definitions of necessity in arguing whether Rasasa's tariffs were "necessary." One definition of this is as follows:

> [N]ecessity reflects an international customary rule according to which a factual situation of grave and imminent peril for the essential interests of a State would legally justify a breach of an international obligation by such State as the only means to safeguard such essential interests.[207]

Teams will likely rely on a mix of facts and any of the various definitions of "necessary" discussed above; judges should push these arguments to see how far Applicant or Respondent is able to support its claims of necessity (or lack thereof).

| | |
|---|---|
| **Q:** | Agent, why are the Helian tariffs "necessary"? |

[207] Attila Tanzi, *Necessity, State of*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1071?prd=EPIL.

## 7 QP4: GREY'S ARREST AND DETENTION

| *Adawa's Claim* | *Rasasa's Claim* |
|---|---|
| Adawa's arrest and detention of Darian Grey were consistent with Adawa's obligations under international law, and Adawa may proceed to render Grey to the ICC. | Adawa's arrest and detention of Darian Grey constitute internationally wrongful acts, and Grey must be immediately repatriated to Rasasa. |
| ***Adawa's Anticipated Argument*** | ***Rasasa's Anticipated Argument*** |
| As a party to the Rome Statute, Adawa has an obligation to render Darian Grey to the ICC. She is not entitled to immunity under customary international law, and any immunity otherwise afforded to her is stripped by the Rome Statute.<br><br>Grey does not enjoy immunity under the CHC Treaty for the same reasons she does not enjoy it under customary international law, and, in any event, Article 32 only affords functional and not absolute immunity. | Adawa's arrest and detention of Darian Grey violated her immunity, *ratione personae*, as Foreign Minister under customary international law. Neither the Rome Statute nor any other purported exception operates to strip her of that immunity.<br><br>Adawa further violated the immunity and inviolability Grey enjoys under the CHC, which is of an absolute and diplomatic nature. Neither the Rome Statute nor any purported customary norm can overcome the obligations of the CHC Treaty as between Adawa and Rasasa. |

### 7.1 Background

The key question raised in this QP is whether Adawa, which has been requested by the ICC to arrest and surrender Grey, can do so where arresting and surrendering Grey might violate immunities otherwise owed to Rasasa (and through Rasasa to Grey).

The question of the immunities of high-ranking State officials in relation to ICC proceedings functions at two different levels. First, whether the official is immune from proceedings before the ICC (sometimes referred to as "vertical immunity"), and second, whether the official is immune from arrest by another State (also known as "horizontal immunity") where that State acts to execute an arrest warrant issued by the Court.

This QP also requires engagement with immunities granted through an international organization (IO), in this case, the Crosinian Helian Community and its constituent treaty (the CHC Treaty).

### 7.2 Interaction Between ICJ and ICC

Although the ICJ has not heard a dispute requiring it to interpret the Rome Statute, it has been called upon to settle disputes where another tribunal, with jurisdiction over the issues in dispute, has already rendered an opinion or is in the course of rendering an opinion with respect to criminal law matters. In the *Bosnian Genocide* case, the Court determined that it would "accept as highly persuasive" the relevant findings of fact and certain legal conclusions drawn from those facts given by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[208]

---

[208] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. Rep. p. 134, ¶ 223; *see also Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168.

Nonetheless, the relationship between the ICJ and other bodies, particularly over questions pertaining to the constitutive treaties of those bodies, is uncertain. Notably, the ICC Pre-Trial Chamber, in its much-criticized Chad and Malawi decisions concerning these States' failure to arrest President al Bashir of Sudan, stated that it has "the sole authority" to decide whether immunities are applicable in a given case under the Rome Statute and customary international law.[209] The weight the ICJ would likely afford the Pre-Trial and Appeals Chamber's decisions on the legal question of immunity is particularly open to debate.

| | |
|---|---|
| **Q:** | Agent, does the ICJ have jurisdiction to interpret the Rome Statute? |

| | |
|---|---|
| **Q:** | Agent, under the Vienna Convention on the Law of Treaties, should the Court interpret the Rome Statute in light of other applicable rules of international law, such as customary international law provisions on immunity?[210] |

### 7.3 ICC Procedure

Article 58 of the Rome Statute provides that the Pre-Trial Chamber may issue an arrest warrant where the prosecutor can show evidence that "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court," including reasonable evidence of the sub-elements of those crimes.[211]

States Parties to the Rome Statute are obligated to "cooperate fully" with the ICC under Article 86 of the Rome Statute.[212] While the ICC does not have independent powers and capabilities to execute an arrest, it does have the authority to issue arrest warrants. Article 98 indicates that States parties "shall . . . comply with requests for arrest and surrender."

- **Adawa** – Applicant teams will argue that Adawa was obligated to arrest Minister Grey. They may look to ICC Pre-Trial Chamber decisions concerning Chad, Malawi, Democratic Republic of Congo, South Africa, and Jordan that have found those States to have breached the Rome Statute. The ICC Appeals Chamber recently confirmed Jordan's breach of its Rome Statute obligations for failing to comply with an ICC arrest warrant. Moreover, two national courts -- the South African High Court and Supreme Court of Appeal and Kenyan High Court -- have found their respective States to have acted unlawfully by failing to comply with the ICC's arrest warrant for Omar al Bashir.
- **Rasasa** – Respondent teams will argue that Adawa was not obligated to arrest Minister Grey and that it acted unlawfully in doing so. In the relevant ICC decisions, the ICC had also issued a request for cooperation under Article 87 of the Rome Statute. The Statement of Agreed Facts does not suggest that a request for cooperation was made under Article 87.

---

[209] Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09 (Dec. 13, 2011), p. 5, ¶ 10.

[210] See Vienna Convention on the Law of Treaties art 31(3)(c) ("There shall be taken into account, together with the context . . . Any relevant rules of international law applicable in the relations between the Parties").

[211] Rome Statute Art. 58 (1); Matthew E. Cross, "The Standard of Proof in Preliminary Examinations," *in* Quality Control in Preliminary Examination: Volume 2 (Morten Bergsmo and Carsten Stahn eds. 2018), p. 227; Johan D. Van der Vyver, Prosecutor v. Omar Hassan Ahmed Al Bashir, 104 Am. J. Int'l L. (2010).

[212] Rome Statute Art. 86 ("States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.").

| Q: | Agent, on which parties is the ICC arrest warrant binding? |
|---|---|

### 7.4 Customary International Law Immunity for High-Ranking State Officials

High-ranking State officials enjoy "horizontal" immunity from foreign criminal jurisdiction under customary international law. This immunity is generally understood to be grounded in the notion of the sovereign equality of States and the need for stability in international relations. Immunity from foreign criminal jurisdiction takes two forms:

- Immunity *ratione personae* applies to a small group of officials: heads of state, heads of government, and foreign ministers. According to the ILC, this is "the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations."
- Immunity *ratione materiae* (also known as "functional" immunity) applies in relation to acts performed by an official in his or her official capacity. Because it applies to "acts," former officials who are no longer in office may rely on it with respect to those acts which they carried out officially.[213]

A minister of foreign affairs enjoys both immunities. Once his/her mandate has ceased, he/she enjoys immunity only for the acts performed in his/her official capacity (immunity *ratione materiae*). He/she may be prosecuted for private acts performed before or during his/her mandate.[214] In this case, the crimes for which as arrest warrant have been issued, occurred prior to Grey's appointment as the Foreign Minister. Therefore, only immunity *ratione personae* would apply.

The ICJ recognized these principles in the *Arrest Warrant* Case, where the Court held that a minister of foreign affairs enjoys full immunity, without distinguishing between acts performed in his/her official capacity and those performed in his/her private capacity, or between acts committed before his/her mandate and those committed while he/she is in office. The broad scope of this immunity ensures that the minister of foreign affairs can travel freely to perform his/her functions.[215]

| Q: | (Question for Rasasa) Agent, what source of law provides immunity to foreign ministers, and are there exceptions to its invocation? |
|---|---|

#### 7.4.1 Immunity in Relation to the Rome Statute

A distinction must be made between international criminal tribunals established by UN Security Council resolutions, such as the International Criminal Tribunal for the former Yugoslavia ("ICTY") or the International Criminal Tribunal for Rwanda ("ICTR"), and other international tribunals established by treaties, such as the ICC. While the former may remove all immunities due to the fact that almost all States consented to their jurisdiction by virtue of their UN membership and the legally

---

[213] Seventh Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepcion Escobar Harnandez, International Law Commission, 71st Session, A/CN.4/729 (18 April 2019), p. 69.

[214] Compare draft article 4 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction with draft article 6, pp. 69-70.

[215] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 ICJ Rep. 3 (hereinafter "*Arrest Warrant*") ¶¶ 51-55.

binding nature of the Security Council resolution establishing those tribunals, the latter may not. The ICC can remove the immunity of nationals of States only if they are parties to the Rome Statute.[216]

In the *Arrest Warrant* case, the ICJ left open the question of whether an official who otherwise enjoys immunity under customary international law might lack immunity before an international court or tribunal. It stated: "the immunities enjoyed under international law . . . do not represent a bar to criminal prosecution in certain circumstances . . . . [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."

The exception to immunity before the ICC derives from Article 27 of the Rome Statute, which provides:

> **Article 27 Rome Statute -- Irrelevance of official capacity**
>
> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[217]

The problem, however, is that the ICC does not have independent powers of arrest and surrender and thus relies on domestic State mechanisms to this end.[218] Article 98 of the Rome Statute seeks to address this issue by providing:

> **Article 98 Rome Statute -- Cooperation with respect to waiver of immunity and consent to surrender**
>
> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[219]

The combined effect of Article 27 and Article 98 is that while high-ranking officials of member States parties cannot enjoy immunity before the ICC (Article 27), the Rome Statute is less clear as to whether the same is true of the high-ranking officials of non-States parties.

---

[216] Dapo Akande, *International Law and Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 417 (2004); *see also* Liberia's Challenge to the prosecution of its president before the Appeals Chamber of Sierra Leone.

[217] Rome Statute, Art. 27.

[218] Dapo Akande, *International Law and Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 420 (2004).

[219] Rome Statute, Art. 98.

Immense disagreement nonetheless surrounds Article 98, and teams should be prepared to offer arguments on its appropriate interpretation. In the Jessup Problem, there is the added issue of how to understand Article 98's reference to "state" and "diplomatic" immunity. While this Article has been found to apply to "head of State" immunity, some debate may arise as to whether this category can naturally extend to foreign ministers.[220]

There are three cases in which the ICC has exercised its jurisdiction over nationals of non-party States: (1) Laurent Gbabgo, (2) Omar Al Bashir, and (3) Muammar Gaddafi. While the first case was based on the acceptance of the Court's jurisdiction by Cote d'Ivoire, the latter two cases were referred to the ICC by the U.N. Security Council. Teams may note that in the present case, a Security Council Resolution has not been issued. Respondent Teams may argue that a Security Council Resolution is necessary to remove Grey's horizontal immunity.

| | |
|---|---|
| **Q:** | Agent, of what relevance is the lack of a UN Security Council Resolution in this case? |

In *Prosecutor v. Al Bashir*, the ICC requested the arrest of the Sudanese president by South Africa. However, as the president managed to flee, South Africa was found to be in breach of its international obligation to cooperate under the Rome Statute. It is worth noting that the Court in that case confirmed the following:

> The absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State.
>
> [...]
>
> In such situations, the requested State Party is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of the Court's jurisdiction.[221]

In practice, some States such as Canada and New Zealand leave the final decision regarding immunity to the ICC, while others such as Malta or the United Kingdom specify that arrest warrants contrary to the customary principle of immunities shall not be executed.[222]

In May 2019, the Appeals Chamber of the ICC unanimously confirmed a decision of ICC Pre-Trial Chamber II finding Jordan, a State party to the Rome Statute, in breach of its obligations under the Rome Statute by failing to arrest al Bashir and surrender him to the ICC while he was on Jordanian territory attending the League of Arab States' Summit.[223] The long, confusing, and heavily criticized opinion held: Article 27(2) of the ICC Rome Statute reflects the status of customary international law

---

220 Jens Iverson, "Head of State Immunity is not the same as State Immunity: A Response to the African Union's Position on Article 98 of the ICC Statute," EJIL:*Talk!* (Feb. 13, 2012), https://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/.

221 *Prosecutor v. Al Bashir* ¶¶ 2-3.

222 *See* Canadian Crimes Against Humanity and War Crimes Acts (2000); New Zealand International Crimes and International Criminal Court Act (2000); The International Criminal Court Act of Malta (2002); The Criminal Court Act of the UK (2001).

223 Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 (May 6, 2019) and Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa.

and there is no head of State immunity under customary international law vis-à-vis an international court. States have since questioned the Appeals Chamber's decision in the Sixth Committee.

However, even if the high-ranking officials of non-States parties are found not to enjoy immunity before the ICC, it is not clear that this lack of immunity before an international tribunal would automatically remove the immunity of the State official before national authorities.[224] Teams should be able to clearly distinguish between the two levels of immunity even as they offer a theory for how one level should or should not interact with the other. For example, some may attempt to argue that in arresting and extraditing Grey, Adawa has acted only as a "surrogate" to the ICC, exercising in effect, the ICC's jurisdiction, and not its own.

| | |
|---|---|
| **Q:** | Agent, even if a general rule could be established that no immunity exists before international courts, wouldn't a State still violate its horizontal obligations where it arrests an individual from a third State that is not a party to the Statute of that Court? |
| **Q:** | Does Article 27 remove immunity at the domestic level (such as from domestic procedures initiated in response to an arrest warrant), or only before the ICC? |

| | |
|---|---|
| **Q:** | Agent, does the rule set out in Article 27(2) of the Rome Statute reflect customary international law? |
| **Q:** | Agent, of what value is the Joint Concurrence in the ICC Appeals Chamber decision in the Jordan case before this Court? |

### 7.4.2 Other ICC-related Issues

- Jurisdiction of the ICC over Crimes Committed by Grey in Garantia. Either territorial or personal jurisdiction are required for the ICC to exercise jurisdiction to prosecute an individual. In this case, Grey has committed crimes the effects of which are realized in Garantia, however, the facts do not suggest that she was ever physically present in Garantia. Because Rasasa is not a State party to the Rome Statute, the question is whether the requirements of territorial jurisdiction are met. In September 2018, ICC Pre-Trial Chamber I dealt with a situation which offers some parallels. The ICC determined that even though Myanmar was not a party to the Rome Statute,[225] it nevertheless could "exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh," as Bangladesh is a State party.[226] The Pre-Trial Chamber found that when the crime of deportation under Article 7(1)(d) is initiated in the territory of a non-State party to the Rome Statute, but completed within the territory of a State party, the Court has jurisdiction over the crime under Article 12(2)(a). It emphasized the importance of at least one element of the crime taking place in the territory of the State party. If any of the charges against Grey do not contain at least one element that took place in Garantia, the ICC would lack jurisdiction over that crime.

---

[224] Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?" 7 J. Int'l Crim. J. 315 (2009).

[225] Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Pre-Trial Chamber I (Sep. 6, 2018).

[226] Kevin Jon Heller, "The ICC and the Deportation of Civilians from Syria to Jordan," Opinio Juris (Mar. 25, 2019), https://opiniojuris.org/2019/03/25/the-icc-and-the-deportation-of-civilians-from-syria-to-jordan.

- *Aut Dedere Aut Judicare*. This principle refers to the legal obligation of states to prosecute persons who commit serious international crimes where no other state has requested extradition. The ILC has stated that it is doubtful that *aut dedere aut judicare* obligations can be interpreted as waivers of immunity.[227] As the customary international legal status of this principle remains open to significant debate, teams invoking this principle should -- at a minimum -- be prepared to explain what treaty provisions they are relying as the source of such obligations, whether both Adawa and Rasasa are party to those treaties, and what prior practice supports a view that these provisions strip otherwise applicable immunities.

### 7.5 International Organization (IO) Immunities

In addition to her immunity under customary international law as a sitting foreign minister, another relevant source of Grey's immunity is Article 32 of the CHC Treaty.

| | |
|---|---|
| **CHC - Article 32** | "*Representatives of Member States at meetings convened by the Community shall, while exercising their functions and during their journeys to and from the place of meeting, enjoy immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind.*" |

This language is taken from the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (and has been included in numerous instruments since). Teams should rely by analogy on these instruments, their commentaries and the opinions of the legal offices of various international organizations.

| | |
|---|---|
| **Q:** | Agent, how should we interpret Article 32? Are there similar provisions in other international treaties and conventions? |

Although ostensibly a strong point for Respondent, this provision raises several issues that are often debated in the context of the UN. Despite being phrased as a functional immunity ("while exercising their functions"), this provision has long been understood as affording essentially absolute diplomatic immunity.

- **Adawa** - Strong Applicant teams may make textual arguments in order to insist that Article 32 only provides immunity for acts that would fall within her functions, thus excluding war crimes and crimes against humanity.

- **Rasasa** - Respondent teams will rely on UN practice to point to the diplomatic nature of the immunities of a representative to an international organization.

A key difference between Article 32 of the CHC and the 1946 Convention is that the 1946 Convention also contains a so-called "catch all" provision that affords "*such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy*." This *renvoi* to diplomatic immunities has been used to justify an expansive reading of the immunity of representatives to the UN. Similar language was expressly removed from the 1947 Convention covering the Specialized Agencies. Strong Applicant teams may pick up on this distinction and insist that the CHC Treaty does not provide absolute diplomatic immunity, but only functional immunity.

---

[227] Seventh Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepcion Escobar Hernandez, International Law Commission, 71st Session, A/CN.4/729 (18 April 2019), p. 34, ¶ 91.

At the same time, commentators suggest such provisions granting immunity from personal arrest and detention – protection typically unavailable to UN staff and officials – in effect extend a form of immunity that is "quasi-diplomatic" in nature.[228]

| | |
|---|---|
| **Q:** | Agent, does Article 32 of the CHC Treaty provide for functional or absolute immunity? How do these terms relate to immunity *ratione personae* and *ratione materiae*? |
| **Q:** | Agent, should this provision be read as incorporating diplomatic immunities for representatives to the CHC? |

It has been debated whether the "holder" of the immunity of representatives to international organizations is the State or the organization. Some teams may also frame this issue as an issue of "standing." In our case, the CHC Treaty is silent as to who – the State or organization – is empowered to waive the immunity of representatives of Member States.

- **Rasasa** - Strong Respondent teams should make parallels to other treaties on privileges and immunities, which almost invariably place the power to waive immunity in the hands of the State in question.
- **Adawa** - Applicants may rely on the Treaty's silence to argue the opposite.

| | |
|---|---|
| **Q:** | Agent, can the CHC waive Minister Grey's immunity under the CHC Treaty? |
| | Agent, is there a standing issue to consider? Can we consider whether the CHC Treaty is violated without knowing the views of the CHC as to her immunity? |

The ICJ has previously recognized the importance of who is entitled to waive immunity amidst disputes over the applicability of immunity to particular persons. It has suggested that IO immunities are owed to the IO itself, that the IO has the clearest information about whether persons are acting within the scope of their duties, and thus that the views of an IO on issues of immunity are entitled to a weighty presumption which can only be set aside "for the most compelling reasons."[229] Because the CHC does not specify who can waive CHC immunities, and the CHC has not offered any opinion as to Minister Grey's immunity, Adawa could potentially argue that its view is entitled to greater deference.

While Article 32 underscores that a representative cannot be arrested or detained – inviolability – it limits judicial immunities to those for "official functions." This could be understood to mean that Grey would *not* have immunity from extradition proceedings, but that her detention/arrest is in violation of the CHC Treaty.

| | |
|---|---|
| **Q:** | Agent, does the CHC Treaty guarantee the immunity or inviolability of representatives? What is the difference, and how is it relevant here? |

Teams may also pick up on more technical issues that have been subject to debate in the context of the UN, such as the temporal scope of the provision, or whether her status as a representative was

---

[228] A Reinisch (ed) *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies* (Oxford University Press, 2016), p. 439.

[229] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C. J. Reports 1999*, p. 87, ¶ 61.

adequately notified to the CHC. Although creative arguments should be welcomed, there are not enough facts (or time) to discuss these issues at length.

In addition, Article 32 should be distinguished from other sources of Grey's immunity for two reasons:

- First, this immunity is found in the constituent instrument of an international organization and is thus designed to ensure the independence and functioning of the organization as a whole. Therefore, it is not derived from a "horizontal" obligation owed between States, but is perhaps the equivalent of a more "vertical" obligation owed to a community of States.

| | |
|---|---|
| **Q:** | Agent, does the purported customary international law exception to immunities before international courts and tribunals extend to immunities deriving from international organizations? Are the immunities contained in Article 32 best understood as "horizontal" or "vertical" in nature? |

- Second, this immunity is provided by a treaty and not customary international law. Therefore, its interaction with other norms will be slightly different. While both Adawa and Rasasa are parties to the CHC Treaty, only Adawa is party to the Rome Statute. This suggests that, per Article 30(4)(b) of the Vienna Convention on the Law of Treaties,[230] the CHC treaty prevails. The interaction between treaty and custom is more complicated. Respondent teams could argue that any purported customary exception to immunity before international courts cannot contravene the binding treaty obligations contained in Article 32 CHC. Applicant teams will argue that such a customary norm should influence the interpretation of Article 32 so as to create an exception.

| | |
|---|---|
| **Q:** | Agent, as between the Parties, which norm prevails: the CHC Treaty or the Rome Statute? |
| **Q:** | Agent, what happens when a customary norm and a treaty norm conflict? |

Teams may attempt to refer to other international instruments, such as the 1963 Vienna Convention on Diplomatic Relations, or the 1975 Vienna Convention in the Relations with International Organizations of a Universal Character. Neither instrument is on point. First, although both Adawa and Rasasa are parties to the 1963 Convention, its scope covers bilateral relations between States. Second, Adawa and Rasasa are not parties to the 1975 Convention, which in any event is not in force, does not represent custom, and most importantly is limited in scope to universal international organizations, which the CHC is not.

Other Procedural Issues

- Timing & Judicial Determinations – The ICJ has suggested that issues of immunity are to be dealt with by national courts "expeditiously" and *in limine litis*. The facts do not lend themselves to much of an argument to suggest that this requirement has been violated, or that the procedures adopted by Adawa are otherwise contrary to international law.
- Due Process – Teams may attempt arguments pertaining to human rights obligations pertaining to the criminal process, but are not expected to in light of the few facts available to support arguments on this point.

---

[230] Vienna Convention on the Law of Treaties Art. 30(4) (b) ("When the parties to the later treaty do not include all the parties to the earlier one . . . As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations").