IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

MEMORIAL FOR THE APPLICANT

THE CASE CONCERNING THE HELIAN HYACINTH

THE 2020 PHILLIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

THE STATE OF ADAWA

(APPLICANT)

v.

THE REPUBLIC OF RASASA

(RESPONDENT)

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STATEMENT OF JURISDICTION

The State of Adawa ["**Adawa**"] instituted proceedings against the Republic of Rasasa ["**Rasasa**"] before the International Court of Justice pursuant to Article 40(1) of the Statute of the Court regarding the dispute concerning alleged violations of international law by Rasasa.

Rasasa made known its intention to file counterclaims under Article 80 of the Rules of Court on 12 July 2019.

On 22 July 2019, the Agents of the Parties agreed to have all the claims and counterclaims heard together in a single set of proceedings, and that all issues of jurisdiction and admissibility would be determined alongside the merits, and after negotiations, the Agents of the Parties jointly communicated to the Court the Statement of Agreed Facts on 9 September 2019.

The Agents of the Parties have agreed that a "dispute" between the Parties exists with respect to each of the aforementioned claims and counterclaim and 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.

QUESTIONS PRESENTED

The State of Adawa respectfully asks this Honourable Court to decide:

1. Whether the Court has jurisdiction over Adawa's claims, given that it is a party to the 1929 Treaty of Botega.
2. Whether Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is in violation of international law. And whether it should be dismantled.
3. Whether this Court may adjudicate Adawa's claim that Rasasa's imposition of tariffs on Helian products from Adawa violates the CHC Treaty, and whether Adawa is entitled to compensatory damages reflecting the financial harm it has suffered to date, such amount to be determined in subsequent proceedings.
4. Whether the arrest and detention of Ms. Darian Grey was consistent with Adawa's obligations under international law, and whether Adawa may proceed to render her to the International Criminal Court.

STATEMENT OF FACTS

1 INTRODUCTION

The State of Adawa and the Republic of Rasasa are neighbouring countries in the Region of Crosinia, the only place on Earth where the Helian hyacinth is cultivated. This flowering plant, of slow and difficult growth, produces the expensive flavouring spice Helian.

Adawa and Rasasa share a border that is 201 kilometers long. Rasasa is a substantial participant in the international technology sector, whilst Adawa's economy is primarily focused on the exploitation of natural resources.

2 POLITICAL AND ECONOMIC SITUATION OF THE REGION OF CROSINIA

There are six States in total in the Region. Until 1928, all six Crosinian States were provinces of the Kingdom of Crosinia. In 1924, a conflict erupted because of a dispute as to the succession to the throne. The conflict became a full-fledged civil war in 1927, ending in 1929 when Rasasa, Adawa and Zeitounia met in Botega to conclude negotiations to end the bloodshed. Adawa and Zeitounia formed the Adawa-Zeitounian Union ["**AZU**"] and signed the Treaty of Botega on Armistice and Pacification ["**TOB**"] with Rasasa. In 1939, Adawa and Zeitounia amicably dissolved the Union.

As exports of Helian spice contribute significantly to the six Crosinian States GDPs, and in light of the specific and exacting procedures needed for successful cultivation of the hyacinth, the six Crosinian States in 1969 formed the Crosinian Helian Community ["**CHC**"]. The parties to the CHC agreed to impose no customs duties within the CHC on Helian spice or equipment and materials used to harvest it.

3 HURRICANE MAKAN AND CONFLICT IN THE REGION

On 14 July 2012, Hurricane Makan struck Crosinia. Unemployment and subsequent crime rates began to increase across the Region, owing to the destruction of Helian hyacinths.

By August 2016, small criminal gangs apparently organized themselves into larger armed groups, carrying out raids on Rasasan soil and stealing Helian bulbs, growing and processing equipment, and virtually anything else of value. Rasasa and Adawa established a high-level task

force to consider joint responses but were unable to formulate a comprehensive plan to suppress the gangs. By February 2017 these gangs had become an organized militia.

4 DEVELOPMENT AND DEPLOYMENT OF THE WALL

In October 2012, the President of Rasasa, Beta Tihmar, convened a meeting with corporate executives to elicit ideas on how to address the crime wave. Darian Grey, the CEO of the Rasasan Robotics Corporation ["**RCC**"], offered the expertise of her enterprise, and a system she had in mind called the "Weaponized Autonomous Limitation Line" ["**WALL**"]. All six CHC Member States devoted funds and provided government and private scientists and engineers to the research and development phase of the project.

On 6 July 2015, Ms. Grey publicly announced the completion of the project and presented the technical characteristics of the system. However, technical information of the WALL was kept classified by the Rasasan government and was not disclosed to the public. At this time, Adawa and Rasasa expressed their will of not going further with the project.

On 25 June 2017, newly elected Rasasan President Pindro authorized the deployment and installation of the WALL along the Rasasa-Adawa border, without consulting or notifying the Adawan government prior to the decision. The objective of the system was to limit anyone illegally crossing the border in either direction. For this purpose, the WALL is equipped with disabling chemical weapons, .50 caliber machine guns and high definition infrared cameras, among others. Adawa is gravely concerned about the legality of the WALL, since its fully autonomous character presents the threat of deploying illegitimate lethal force against Adawan nationals within Adawan territory.

5 RASASAN TARIFFS

In an effort to encourage Rasasa's domestic processors to return to local farms for their feedstock after a commercial downturn, and invoking "essential security interests", President Pindro submitted a bill introducing 25% ad valorem tariff on certain Helian products.

In January 2018, with little debate, the Rasasan Parliament adopted the tariffs on unprocessed Helian materials imported into Rasasa. Adawa protested this decision, and the

CHC's Director-General issued a statement reminding Rasasa of its obligations under Article 3 of the Treaty Establishing the Crosinian Helian Community ["**CHCT**"]

In October 2018, Adawa formally requested consultations with Rasasa pursuant to the Dispute Settlement Understanding ["**DSU**"] of the World Trade Organization ["**WTO**"]. Government officials from both Adawa and Rasasa met but were unable to resolve the dispute amicably. In February 2019, Adawa requested the establishment of a WTO panel, alleging that Rasasa's tariffs on Helian products were an unjustifiable breach of its commitment to maintain the bound rate of zero on such items.

The International League for the Support of Agriculture published a study evidencing that, as a direct result of the tariffs imposed by Rasasa, Adawan farmers were estimated to have lost more than €10 million in revenue. It projected that these losses would increase in coming years.

6 MS. DARIAN GREY'S ARREST AND DETENTION

Between 1979 and 2016, Ms. Darian Grey was the CEO of the RRC, a privately held company headquartered in Botega. RRC advises governments on computerized and autonomous defence and security systems; designs, develops, and implements these systems in conflict zones around the world, and more.

On 2000, Human Rights Watch accused Ms. Grey and the RRC of "active complicity in keeping some of the worst despotic regimes in the world securely in power."

On February 2009, the remote island Republic of Garantia formally referred a situation to the Prosecutor of the International Criminal Court ["**ICC**"] concerning war crimes and crimes against humanity that were alleged to have occurred during the 2007-2009 civil war in that State. The referral specifically mentioned RRC as one of the accused foreign contractors, and cited Ms. Grey as having been personally responsible for its activities. In accordance with ICC procedures, the Office of the Prosecutor opened an investigation in August 2009.

Ms. Grey was appointed Minister of Foreign Affairs of Rasasa by President Pindro in January 2017 and was duly confirmed by Parliament on the 15th of the same month.

On April 2019, the Prosecutor of the ICC requested the issuance of a warrant for the arrest of Minister Grey, assigning her criminal responsibility for certain alleged activities of the RRC in Garantia, which included war crimes. On 20 June 2019, a Pre-Trial Chamber of the ICC granted the Prosecutor's request and issued both a warrant of arrest for Minister Grey and a request for her arrest and surrender.

On 18 June 2019, the CHC held one of its regular meetings in Novazora, the Adawan capital, Minister Grey assisted in representation of Rasasa. On 22 June 2019, officers of the Novazora police approached Minister Grey as she was leaving the hotel and detained her in conformity with Article 59 of the Rome Statute. Minister Grey would remain under house arrest, pending this Court's disposition of the case.

SUMMARY OF PLEADINGS

1 FIRST PLEADING

The International Court of Justice ["**ICJ**"] has jurisdiction to adjudge over Adawa's claims because Adawa is a party to the 1929 TOB. Such jurisdiction is granted on the terms of Article VI of the Treaty, which contains a dispute settlement clause, the effect of which is to recognize the jurisdiction of this Tribunal. Adawa is part of the treaty because it has succeeded to it from the Adawa-Zeitounia Union, one of the original signatories along with Rasasa. The dissolution of the Union in 1939 and the subsequent birth of Adawa as an independent nation constitute a situation that is consistent with Article 34 of the Vienna Convention on Succession of States, a norm of a customary nature which provides for automatic succession of all treaties following the separation of parts of the original State. But even if this was not accepted, the territorial character of the Treaty prevents it from being affected by the dissolution of the Union. This rule has been recognized by this Court as one of a customary character.

2 SECOND PLEADING

The development and deployment of the WALL by Rasasa is not in conformity with international human rights law because the conflict amounts to an internal disturbance and not an armed conflict. Since the WALL was developed to be used in war, its deployment outside of an armed conflict is unlawful and violates the principles of necessity, proportionality and precaution under customary human rights law. It also threatens the right to life under Article 6 of the International Covenant on Civil and Political Rights. In any event, Rasasa's development and deployment of the WALL would violate International Humanitarian Law governing the implementation of lethal autonomous weapon systems based on emerging technologies. Particularly, Rasasa failed to detect that the operation of the WALL breaches the principles of distinction, proportionality and military necessity. Furthermore, the installation of the WALL breaches the prohibition of the threat or use of force under the UN Charter and the TOB. Thus, since Rasasa is responsible for the commission of ongoing internationally wrongful acts, it must cease its wrongful conduct by dismantling and removing the WALL.

3 THIRD PLEADING

The WTO's jurisdiction does not preclude the ICJ's, because the General Agreement on Tariffs and Trade ["**GATT**"] is not applicable. Furthermore, general *competènce* principles allow the parties to select the jurisdiction of their choice. Moreover, there are no admissibility issues rising from litispendence, as the ICJ and WTO are of different characters, the relief sought before them is diverse, and this is not an applicable doctrine under international law. As to the merits of the case, Rasasa's tariffs on Adawan Helian products violates the CHCT. Further, they were not justified as necessary to protect Rasasa's essential security interests, as they were for protectionist purposes. Accordingly, Adawa is entitled to compensatory damages reflecting the financial harm suffered to date, as this claim fulfils all the requirements for compensation under the law of State responsibility and the DSU's regime of remedies is not applicable.

4 FOURTH PLEADING

The situation occurred in Garantia, involving Ms. Grey, falls within the jurisdiction of the ICC. Immunities *ratione personae* enjoyed by officials of States non-parties to the Rome Statute are not a bar to jurisdiction before certain international tribunals. This is because a customary exception to personal immunities has developed. That's a corollary of the ICC's mandate to exercise the international community's *ius puniendi*. The scope of this exception extends to any act of cooperation of national courts when acting at the request and on behalf of the ICC. This is widely recognized in State practice and *opinio iuris*. Hence, Adawas's arrest and detention of Ms. Grey was lawful and she must be immediately transferred to the ICC.

PLEADINGS

1 THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER ADAWA'S CLAIMS BECAUSE ADAWA IS A PARTY TO THE 1929 TREATY OF BOTEGA

The State of Adawa respectfully submits that the Court has jurisdiction in this dispute because (1.1.3) Adawa succeeded the AZU in its treaty rights regarding the 1929 TOB. Alternatively, (1.2) the TOB possesses a territorial character, thus it is succeeded *ipso iure* by the State of Adawa.

1.1 Adawa succeeded the AZU in its treaty rights regarding the TOB

State succession is defined as "the replacement of one State by another in the responsibility for the international relations of territory."[1] It poses the question as to what fate treaties face in situations such as the one submitted to this Court. Article 34 of the 1979 Vienna Convention on Succession of States in respect of Treaties ["**VCSS**"] enshrines the customary rule applicable to succession of treaties in cases of dissolution of States.[2]

Adawa succeeded the AZU in regard to the TOB, because (1.1.1) Article 34 of the VCSS reflects customary international law ["**CIL**"]; (1.1.2) this case meets the criteria for the automatic succession of treaties under said article; and, () none of the exceptions set in its Paragraph 2 apply to this case.

1.1.1 Article 34 of the VCSS reflects CIL

Article 34 of the VCSS provides "that treaties in force at the date of the dissolution should remain in force *ipso iure* with respect to each State emerging from the dissolution."[3] Relevant State practice in this regard mainly relates to cases concerning the dissolution of State

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[1] Vienna Convention on Succession of States in Respect of Treaties. ILC YRBK. (1978), Art. 2 ["**VCSS**"].

[2] *VCSS*, Art. 34.

[3] Draft Articles on Succession of States in Respect of Treaties with Commentaries adopted by the ILC at its twenty-sixth session. Vol. III. Doc. A/CONF.80/4, Commentary to Art. 34 ["**VCSS Commentaries**"].

Unions and subsequent continuity of treaties,[4] as is the present case.[5] The most notable examples include the disintegration of the Austro-Hungarian Empire,[6] the dissolution of the Union between Iceland and Denmark,[7] and the withdrawal of Syria from the United Arab Republic;[8] all of which confirm the rule in discussion. Additionally, the dissolutions of the Socialist Federal Republic of Yugoslavia,[9] and the Czech and Slovak Federative Republic,[10] serve as examples which "tend to confirm the customary law nature of this rule."[11]

Regarding *opinio iuris*, the vast majority of States attending the United Nations ["**UN**"] Conference on the Succession of States in Respect of Treaties ["**Conference**"] asserted that the

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[4] *Conference*, 41st Meeting of the Committee of the Whole, Vol. II, Doc. A/CONF.80/C.1/SR.41.

[5] Statement of Agreed Facts: Case Concerning the Helian Hyacinth, ¶¶5 - 7 ["**SAF**"].

[6] Fifth Report on Succession in Respect of Treaties, by Sir Humphrey Waldock, Special Rapporteur, UN Doc A/CN4/256 and Add 1-4, ILC Yrbk (1972) II, 36 ¶5-7 ["**Waldock**"]; R.W. DE MURALT, THE PROBLEM OF STATE SUCCESSION WITH REGARD TO TREATIES (1954), 89-90; COMTE STEN LEWENHAUPT, RECUEIL DES TRAITÉS, CONVENTIONS ET AUTRES ACTES DIPLOMATIQUES DE LA SUEDE ENTIEREMENT OU PARTIELLEMENT EN VIGUEUR AU 1ER JANVIER,VOL.II 559 (1926); Weltner v. Cassutto Court of Appeal, Tireste, 2 Il Foro delle Venezie 289 (1931); Del Vecchio v. Connio (1920) Court of Appeal, Milan, 46 Foro Italiano (1) 209, 226; Germany v. Reparation Commissions. Reports of International Arbitral Awards, vol. 1 429. *Waldock*, 37-38 , ¶ 8*; Stjórnartidindi* C 2-1964, 86-123 (List of treaties in force as of 31 December 1964, published by the Icelandic Foreign Ministry).

[7] *Waldock*, 38-39, ¶¶9-11.

[8] *Ibid.*

[9] M. CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES 236-238 (2007) ["**Craven**"]; Art. 153 of the Constitution of the Republic of Slovakia; Art. 4 and 5, Constitutional Act No. 4/1993 Coll. of the Czech National Council, of December 15th, 1992, on Measures Related to the Dissolution of the Czech and Slovak Federative Republic; Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, 7 ¶121 ["**Gabčíkovo-Nagymaros**"].

[10] Art. 153 of the Constitution of the Republic of Slovakia; Art. 4 and 5, Constitutional Act No. 4/1993 Coll. of the Czech National Council, of December 15th, 1992, on Measures Related to the Dissolution of the Czech and Slovak Federative Republic; *Gabčíkovo-Nagymaros*, ¶121; *Craven*, 236 – 237.

[11] A. Zimmermann, *State Succession in Treaties*, MPEPIL, ¶D (3) (2006) ["**Zimmermann**"].

codification of this rule was meant to promote stability[12] and protect the interests of peoples that participated in the conclusion of treaties celebrated by their predecessor State.[13] In the Conference, Paragraph 1 of article 33 (now 34) was approved by 77 votes to 3, with 5 abstentions; while paragraph 2 of the same article was approved by 80 votes to none, with 3 abstentions.[14] Commenting on the subject, James Crawford states that "The process of evolution towards a general regime of treaty continuity in non-colonial context was, remarkably, completed at the Second Session of the Vienna Conference".[15]Other highly qualified publicists, including Endre[16] and Detlev Vagts.[17]

1.1.2 Adawa's case meets the criteria for automatic succession of treaties

Letter a) of Article 34 calls for automatic succession of treaties as long as they are applicable to the entire territory of the predecessor State at the date of succession. The TOB, which was in force at the date of the dissolution of the Union in 1939,[18] applies to the former AZU territory, as it was signed without any indication that it was intended to apply only to the territory of Zeitounia[19]. Therefore, the treaty falls within the scope of application of the rule and "continues in force in respect of each successor State so formed."[20]

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[12] *Conference*, 42nd Meeting of the Committee of the Whole, Vol. II, Doc. A/CONF.80/C.1/SR.42, 63, ¶1 ["**42nd meeting**"]; *42th meeting*, 66, ¶30.

[13] *42nd meeting*, 64, ¶7; *42nd meeting*, 65, ¶22.

[14] *Conference*, Vol. II. Doc. A/CONF.80/16 Add.1, 48th meeting, 41.

[15] J. Crawford, *The Contribution of Professor D.P. O'Connell to the Discipline of International Law*, 51 BR. YEARB. INT. LAW 40 (1980).

[16] ILC Yrbk (1972) 74, ¶20.

[17] D. Vagts, *State Succession: The Codifiers' View*, 33 VAJIL 275 (1992-3).

[18] *SAF*, ¶7.

[19] Art. III.1 applies specifically to "*the Zeitounian region of the Adawan-Zeitounia Union*". *A contrario*, the rest of the treaty applies to the AZU as a whole.

[20] *VCSS*, Art. 34.

1.1.3 None of the exceptions set in its Paragraph 2 apply to this case

It is to be noted that none of the exceptions contained in paragraph 2 of Article 34 apply to this case. According to the first exception, the rule of automatic succession does not apply when States decide against the succession of a treaty;[21] in the present case, the parties have not agreed on the discontinuance of the TOB. As a matter of fact, the continuity of this treaty is one of the main points in dispute between the parties,[22] a controversy that shows that the agreement required to apply this exception was not reached in this case.

As for the second exception, the automatic succession does not apply when "the application of the treaty is incompatible with the object and purpose of the treaty or would radically affect the conditions for its operation". In relation with the main object and purposes of the TOB, as is established in its preamble,[23] they consist of saving "succeeding generations of Crosinians from the scourge of war",[24] which includes "(ensuring) the pacific settlement of future disputes which may arise between them."[25] The achievement of these is not affected by the continued application of the TOB after the dissolution of the AZU.[26] As to the conditions of application of the treaty, the dissolution of a State Union, especially when executed in a peaceful and orderly manner,[27] cannot constitute a fundamental change of circumstances that affects provisions on peaceful settlement of disputes. [28]

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[21] *VCSS,* Art. 34(2).

[22] *SAF*, ¶5.

[23] Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, 226. ¶¶56-58.

[24] Treaty of Botega on Armistice and Pacification of 1 November 1929, Preamble ["**TOB**"].

[25] *Ibid.*

[26] *TOB*, Art. VI.

[27] *SAF*, ¶7.

[28] D. P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 2-3 (1967) ["**O'Connell**"]; *Craven*, 226.

1.2 Alternatively, the TOB is of a territorial character; thus, it is succeeded *ipso iure* by Adawa

The TOB imposes rights and obligations relating to territory upon its signatory States,[29] and as such, is to be considered a "territorial" or "localized" treaty. According to Articles 11 and 12 of the VCSS, territorial obligations and rights are established by a treaty and relate to the regime of a boundary[30] or the use of a territory.[31] These obligations are unaffected by the event of State dissolution,[32] and therefore, are succeeded automatically.[33]

Adawa submits that it has succeeded the TOB because (1.2.1) it is effectively of a territorial character, and (1.2.2) treaties of this character are succeeded automatically under a rule of CIL, as enshrined in Articles 11 and 12 of the VCSS.

1.2.1 The TOB is of a territorial character

A certain category of treaties has been "described as of 'territorial', 'dispositive', 'real', or 'localized'."[34] Their defining characteristic is that their performance is inherently territorial,[35] which covers, among others matters, agreements regarding international boundaries[36] and demilitarised zones[37]. The TOB contains provisions regulating armistice demarcation lines,[38] demilitarisation of international borders,[39] and the settlement of disputes aimed at preserving

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[29] *TOB*, Art. III.

[30] *VCSS*, Art. 11.

[31] *VCSS*, Art. 12.

[32] *ILC Commentaries*, Arts. 11, 12, ¶17; Case concerning Right of Passage over Indian Territory (Merits), Judgrnent of 12 April 1960: I.C.J. Reports 1960, 40.

[33] H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 418 (1952).

[34] *ILC Commentaries*, Arts. 11, 12, ¶1.

[35] *O'Connell*, 191.

[36] *ILC Commentaries*, Arts. 11, 12, ¶10.

[37] M. SHAW, INTERNATIONAL LAW 874 (2003).

[38] *TOB*, Art. I.

peace in the region.[40] Thus, the performance of the obligations imposed by the treaty "runs with the land",[41] and would not be possible without considering the territory in which they ought to be performed.

1.2.2 CIL dictates that treaties of a territorial character are to be succeeded automatically

Articles 11 and 12 provide for the automatic succession of treaties of a territorial character. These treaties constitute a special category [42] and are not affected by State dissolution.[43] This is well established in State practice, as several States have consistently considered treaties and obligations of a territorial nature to be unaffected by the occurrence of succession.[44] Furthermore, States have also declared that the practice consistent with the rule represents a legal obligation,[45] and that the content of the rule itself was intrinsically related to the search for international peace and security.[46]

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[39] *TOB*, Art. III.

[40] *TOB*, Art. VI.

[41] *O' Connell*, 191.

[42] League of Nations, Official Journal, Special Supplement No. 3 (October 1920), 18; *Conference*, Vol. I. Doc. A/CONF.80/C.1/SR.18, 18th meeting, ¶¶22, 30, 41, 73, 76. ["**18th meeting**"].

[43] *ILC Commentaries*, Arts. 11, 12, ¶2; A. MCNAIR, THE LAW OF TREATIES 256 (1961); E. DE VATTEL, THE LAW OF NATIONS 355 (1758); L. CHEN, AN INTRODUCTION TO INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 486 (2015); *Zimmerman*; ¶E (1).

[44] MCNAIR, THE LAW OF TREATIES 2ND EDITION, 657-662, (1962); Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C. J. Reports 1962, 16; OAU doc AHG/Res16 (1); ILA Committee on Aspects of the Law of State Succession,"Raport Final Sur la Succession en Matiere de Traties" 70 ILA Rep, New Delhi Conference (2002) 610.

[45] *18th meeting* ¶22.

[46] *Conference*, Vol. I. A/CONF.80/C.1/SR.17, 17th meeting, ¶¶29, 44, 49; *18th meeting*, ¶5.

This position was held by the PCIJ in *Upper Savoy and the District of Gex*, when it stated that treaty stipulations bind successor States in relation with their territories.[47] The ILC, when referring to this case expressed that the PCIJ "made a pronouncement which is perhaps the most weighty rule of the existence of the rule requiring a successor State to respect a 'territorial treaty' affecting the territory to which a succession of States relates."[48] And most importantly, this Court, in *Gabčíkovo-Nagymaros*, confirmed that "Article 12 reflects a rule of customary international law"[49] and that a "Treaty itself cannot be affected by a succession of States."[50-51]

[47] Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), 1930 P.C.I.J. (ser. A) No. 24 (Order of Dec. 6) 17.

[48] *ILC Commentaries*, Arts. 11, 12, ¶3.

[49] *Gabčíkovo-Nagymaros*, ¶123.

[50] *Ibid.*

[51] Article 37 of the ICJ Statute clearly establishes that "*Whenever a treaty 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.*"

2 RASASA'S DEVELOPMENT AND DEPLOYMENT OF THE WALL ALONG THE BORDER BETWEEN ADAWA AND RASASA IS IN VIOLATION OF INTERNATIONAL LAW, THUS THE COURT MUST ORDER ITS DISMANTLEMENT AND REMOVAL

Rasasa's development and deployment of the WALL violates (2.1) International Human Rights Law ["**HRL**"] applicable in cases of internal disturbances, and (2.2) International Humanitarian Law ["**IHL**"] governing the use of new weapons. Additionally, (2.3) the deployment of the WALL violates the prohibition of threat or use of force under the UN Charter and the TOB. Finally, (2.4) Rasasa must be ordered to dismantle and remove the WALL forthwith.

2.1 Rasasa's development and deployment of the WALL violates HRL

Since (2.1.1) the conflict doesn't amount to a "non-international armed conflict", Rasasa's development and deployment of the WALL violates (2.1.2) the obligation to protect HRL during law enforcement operations and specially (2.1.3) the right to life under the International Covenant on Civil and Political Rights ["**ICCPR**"].

2.1.1 The conflict does not constitute an armed conflict of non-international character

The legal regime applicable to this conflict[52] depends on its legal characterization. If it amounted to a "non-international armed conflict" under common article 3 to the Geneva Conventions ["**GCs**"], the governing legal body would be IHL; however, since the conflict is merely an internal disturbance, general HRL applies.[53]

Non-international armed conflicts have been defined as "protracted armed violence between governmental authorities and organized armed groups".[54] The International Criminal Tribunal for the former Yugoslavia ["**ICTY**"] has extracted two elements from this definition in

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[52] *SAF*, ¶35 – 38.

[53] A. CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 117-122 (2010) ["**Cullen**"].

[54] Prosecutor v. Duško Tadic, Jurisdiction Decision, ICTY, IT-94-1-A (2 October 1995) ¶70. ["**Tadic**"].

order to distinguish non-international armed conflicts from mere "unorganized and short-lived insurrections"[55], namely: (2.1.1.1) the organization of the parties, and (2.1.1.2) the intensity of the conflict.

2.1.1.1 Organization of the parties

In order to determine that a situation amounts to a non-international armed conflict, the non-state actor involved must be organized in given manner. Amongst the relevant indicators identified by caselaw, the following are mentioned: the existence of an official joint command structure, headquarters, designated zones of operation, the ability to procure, transport and distribute arms, and the ability to coordinate a unified military strategy though a chain of command.[56]

Applicant does not contend that there is a coordinated drug cartel operating within Rasasa.[57] However, if drug cartels were to be categorized as "organized armed groups" simply because of their natural structures, then all existing drug cartels in the world would generate armed conflicts.[58] This constitutes a severe misconception of the law which leads us to conclude that the cartel operating within Rasasa cannot be qualified as an organized armed group.

2.1.1.2 Intensity of hostilities

Both doctrine and caselaw agree that the "degree of intensity hinges on the interpretation of the word *'protracted'*".[59] This implies a temporal element that is met when hostilities are

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[55] Prosecutor v. Duško Tadic, Trial Chamber Judgement, ICTY, IT-94-1T (7 May 1997) ¶562.

[56] *Prosecutor v. Miloševic,* Trial Chamber Decision, ICTY, IT-02-54-T, (16 June 2004). ¶23 ["***Miloševic***"]; *Prosecutor v. Limaj et al.,* Trial Chamber Decision, ICTY, IT-03-66-T, (30 November 2005) ¶94, 129, 171 ["***Limaj***"].

[57] *SAF*, ¶35.

[58] P. Gallahue, *Mexico's 'War on Drugs' - Real or Rhetorical Armed Conflict?,* 24 JILPAC : 39–45 (2011).

[59] *Cullen*, 127; *Prosecutor v. Kordic and Cerkez,* Appeals Chamber Judgement, ICTY, IT-95-14/2-A, (17 December 2004) ¶341.

extended over time.[60] Indicative factors of the intensity of hostilities include: the length of the conflict and the seriousness of armed clashes, the spread of the conflict over the territory of the State, the destruction of property, and the number of casualties.[61]

In the present case, the reported clashes between the insurgents and Rasasan law enforcement officials have been sporadic and isolated cases[62] that have remained confined to the Rasasan border area.[63] Furthermore, the minimal degree of destruction of property and number of casualties do not meet the threshold of a war.[64]

In conclusion, since the conflict is not an armed conflict, the standards of HRL apply.

2.1.2 The WALL violates Rasasa's obligation to protect HRL during law enforcement operations

The rules governing the use of force by law enforcement officials are comprised of CIL and general principles of law[65] articulated in the UN Code of Conduct[66] and Basic Principles on the Use of Force and Firearms.[67] When assessing the legality of the use of force by law enforcement officials the binding principles of necessity, proportionality and precaution are

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[60] Thahzib-lie and Swaak-Goldman, *Determining the Threshold*, in LIJNZAAD ET AL., MAKING THE VOICE OF HUMANITY HEARD 248 (2004).

[61] *Miloševic*, ¶¶28 – 31; *Limaj,* ¶¶134, 142, 167.

[62] *SAF*, ¶¶ 28 – 29.

[63] *SAF*, ¶35.

[64] *SAF,* ¶36.

[65] *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, in GENEVA ACADEMY, ACADEMY IN-BRIEF 5 (2016).

[66] *Code of Conduct for Law Enforcement Officials*, UNGA Resolution 34/169, A/RES34/169, December 17, 1979 Arts. 1 – 2. ["**Code of Conduct"**].

[67] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, ¶3 (1990). ["**Basic Principles**"].

particularly relevant.[68] Since the WALL was developed to be used in war,[69] its deployment outside of an armed conflict is unlawful[70] and violates all the aforementioned principles under international HRL.

2.1.2.1 Necessity

"Law enforcement officials should only use force when it is strictly necessary [...] to achieve a lawful and legitimate law enforcement objective."[71] Due to ever-changing environmental conditions, it is difficult to believe that lethal autonomous weapon systems ["**LAWS**"] can be designed to act lawfully when encountering unforeseen situations that escape their program.[72] Additionally, even if LAWS were programmed to work perfectly, they would still lack certain human qualities that would allow them to appropriately asses the need to use force.[73] Thus, the fully autonomous character of the WALL[74] does not allow it to comply with the principle of necessity.

2.1.2.2 Proportionality

Force should not be used when it results excessive in comparison to the legitimate objective to be achieved.[75] If we take the technical characteristics of the WALL[76] and compare

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[68] European Court of Human Rights ["**ECHR**"], Benzer v Turkey, Judgement, App nº 23502/6, 12 November 2013, ¶90; Inter-American Court of Human Rights, Cruz Sánchez et al v Peru, Judgement, 17 April 2015, ¶264.

[69] SAF, ¶24, 37.

[70] Marco Sassòli, "Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified," *U.S. Naval War College International Law Studies* 90 (2014): 308–40. ["**Sassóli**"].

[71] Office of the High Commissioner for Human Rights, ["**OHCHR**"] "United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement," (August 2019), 4.

[72] Human Rights Watch, ["**HRW**"] "Mind the Gap: The Lack of Accountability for Killer Robots", International Human Rights Clinic, ["**IHRC**"] 9 (2015) ["**HRW, Mind the Gap**"].

[73] *HRW*, Losing Humanity: The Case against Killer Robots, IHRC, 29 (2012) ["**HRW, Losing Humanity**"]

[74] *SAF*, ¶24.

[75] *Code of Conduct*, Art. 3 commentary; *Basic Principles*, ¶5 (a).

them to the objective it was designed to achieve,[77] it is evident that the use of force that could result from its deployment is disproportionate. Furthermore, nothing assures that the dividing line between a criminal and a non-criminal is crystal clear to the WALL's algorithms,[78] especially since there are certain technical aspects of the WALL which remain classified.[79] Consequently, the WALL is incapable of abiding by the principle of proportionality.

2.1.2.3 Duty of precaution

Law enforcement operations must be designed to avoid the recourse to force and minimize the severity of potential injury.[80] Meaning that "all possible measures should be taken 'upstream' to avoid situations where the decision to pull the trigger arises".[81] As the WALL lacks communicational links that would allow to cancel an attack in cases where the need to use force is unclear,[82] Rasasa has failed in its duty of precaution.

In sum, since the WALL does not comply with the aforementioned principles, its development breaches the obligation to respect HRL during law enforcement operations.

2.1.3 The WALL poses a threat to the right to life

Article 6 of the ICCPR obliges States to uphold the right to life under any circumstance.[83] The UNHRC has stated that, "States parties may be in violation of article 6 even if such threats and situations do not result in the loss of life".[84]

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[76] *SAF,* ¶24.

[77] *SAF,* ¶¶18,19, 37.

[78] *ECHR*, K.H.W v Germany (Berlin Border Guard Case), App n°37201/97, 22 March 2001, ¶ 20.

[79] SAF, ¶24.

[80] *Basic Principles*, ¶11.

[81] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN. Doc: A/HRC/6/36, 1 April 2014, ¶63 ["**Heyns Report**"].

[82] *SAF*, ¶24.

[83] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, 136, ¶106.

LAWS with characteristics like the WALL pose a grave threat to the right to life of civilians.[85] Rasasan authorities have confirmed that once activated, the weapon leaves no room for human intervention[86] precluding the possibility of making accurate judgements over the life or death of civilians in complex cases,[87] thus breaching article 6 of the ICCPR.[88]

In light of these arguments, Adawa submits that Rasasa's development and deployment of the WALL violates international HRL.

2.2 Rasasa's developement and deployment of the WALL violates IHL

Under CIL,[89] when developing LAWS, States must determine whether their employment would be prohibited under international law,[90] particularly IHL.[91] Since Rasasa's legal review did not address the predictability and reliability of the WALL in light of its fully autonomous character,[92] its conclusions are flawed.[93] A diligent review of the WALL would have detected its

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[84] *OHCHR*, General Comment No. 36 on Article 6 of the ICCPR, on the Right to Life (October 30, 2018).

[85] *HRW, Mind the Gap*, 9.

[86] *SAF* ¶24.

[87] *HRW, Losing Humanity,* 29.

[88] *SAF*, ¶ 60.

[89] *ICRC*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Art. 36.

[90] *ICRC*, A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977, 88 (834) IRRC 931–956 (2006). ["**ICRC Guidelines**"].

[91] Draft Report of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of LAWS, UN Doc. CCW/GGE.1/2019/CRP.1/Rev.2 (August 21, 2019), Annex IV ["**GCE Draft Report**"].

[92] *SAF* ¶¶ 23, 24, 38.

[93] N. Davison, A legal perspective: Autonomous weapon systems under international humanitarian law, UNODA OCCASIONAL PAPERS No. 30, 10 (November 2017).

incompliance with the IHL principles of (2.2.1) distinction, (2.2.2) proportionality and (2.2.3) military necessity, thus prohibiting its deployment.[94]

2.2.1 Distinction

"A robot must be able to sense all the necessary information in order to distinguish between targets in the same manner as a person",[95] however, the absence of moral judgement in LAWS make them incapable of making accurate targeting decisions.[96] No matter how advanced its algorithms may be, LAWS will never be able to replace human moral judgement. Consequently, nothing ensures that the WALL won't ever target innocent civilians.[97]

2.2.2 Proportionality

LAWS must constantly be updated in their programs to be able to correctly assess whether their use of force would comply with the proportionality principle.[98] This, in Sassòli's view, is "the most serious IHL argument against even the theoretical possibility of deploying weapons that remain fully autonomous over considerable periods of time."[99] Since there is no evidence of the WALL having been updated on the plans and progress of operations since its installation,[100] it does not comply with this principle.

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[94] *GGE Draft Report*, 4.

[95] *Sassòli,* 327.

[96] HRW, *Losing Humanity*., p. 3 – 4.

[97] *SAF* ¶20, 38, 39.

[98] *Sassòli*, 339.

[99] *Sassòli*.,332.

[100] *SAF*, ¶39.

2.2.3 Military necessity

In the transfer of targeting decisions to machines, programmers cannot predict all future scenarios, thus LAWS will inevitably face situations which escape their programming.[101] Since these unpredictable circumstances require a certain degree of human rationale to be correctly assessed,[102] the operation of LAWS like the WALL do not comply with this principle.

In conclusion, the deployment of the WALL violates the applicable IHL rules.

2.3 The deployment WALL breaches the prohibition of the threat or use of force

Autonomous weapons systems which allow for cross-border attacks like the WALL[103] "must be countered by *'ius ad bellum'* and disarmament".[104] Article 2.4 of the UN Charter bans the unilateral threat or the use of force by States in the conduction of their international relations. The ICJ has interpreted that "The notions of *'threat'* and *'use'* of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal [...] then the threat to use such force will likewise be illegal."[105]

Although it has not yet deployed lethal force,[106] the WALL has the potential to use force in a manner inconsistent with HRL and IHL. Therefore, the WALL constitutes an illegal threat of force under the UN Charter. Additionally, since the TOB establishes a peace and armistice

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[101] P. Asaro, *Ethical Issues Raised by Autonomous Weapons Systems*, Expert Meeting on Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects, (March 2014), 50.

[102] *HRW, Losing Humanity*, 34.

[103] 2020 Philip C. Jessup International Law Moot Court Competition Correction and Clarifications to the Statement of Agreed Facts ¶3. ["**C&C**"].

[104] *Sassòli*, 315.

[105] *Ibid,* ¶7. Emphasis added.

[106] *C&C*, ¶4.

agreement between the parties,[107] the WALL also violates the prohibition to use force under said treaty.[108]

2.4 Rasasa must be ordered to dismantle and remove the WALL forthwith

Since (2.4.1) Rasasa is responsible for the commission of ongoing internationally wrongful acts, (2.4.2) it must be ordered to cease the commission of said acts.

2.4.1 Rasasa is responsible for the commission of ongoing internationally wrongful acts

States commit internationally wrongful acts when conducts attributable to them breach binding international obligations. [109] In the present case, as the decisions to develop and deploy the WALL were made by the former[110] and current[111] Rasasan Presidents, the acts are attributable to Rasasa under Article 4 of the Articles on International Responsibility of States for Internationally Wrongful Acts ["**ARSIWA**"]. Additionally, as mentioned, Rasasa's development and deployment of the WALL breaches a series of international obligations, namely international HRL and IHL. Thus, Rasasa is responsible for the commission of internationally wrongful acts.

2.4.2 Rasasa must be ordered to cease the commission of internationally wrongful acts

Article 30 of ARSIWA prescribes that States must cease the commission of internationally wrongful acts if they are ongoing and offer the appropriate assurances of non-repetition. As long as the WALL remains installed in the border, Rasasa will be responsible for the commission of internationally wrongful acts. Thus, since the wrongful acts remain ongoing

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[107] *TOB,* Art. 1.

[108] See Pleading I.

[109] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 2 ["**ARSIWA**"].

[110] *SAF,* ¶19.

[111] *SAF,* ¶37.

and the obligations breached remain in force,[112] Adawa requests the Court to order that the WALL be dismantled and removed forthwith.

[112] Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93. V.3), 215 (1990), ¶113.

3 THIS COURT MAY ADJUDICATE ADAWA'S CLAIM THAT RASASA'S IMPOSITION OF TARIFFS ON HELIAN PRODUCTS FROM ADAWA VIOLATES CHC TREATY, AND THAT ADAWA IS ENTITLED TO COMPENSATORY DAMAGES

This Court may adjudicate this claim because (3.1) the WTO and the ICJ do not have conflicting jurisdictions, and (3.2) there is no litispendence to declare it inadmissible. In any case, (3.3) Rasasa's imposition of tariffs on Helian products from Adawa violates the CHCT, and therefore, (3.4) Adawa is entitled to compensatory damages.

3.1 The WTO's jurisdiction does not preclude this Court's jurisdiction

The ICJ's (3.1.1) jurisdiction is not precluded by any overlapping jurisdiction[113] between the forums; (3.1.2) this is reinforced by general *compètence* principles. Finally, (3.1.3) the CHCT's Essential Security Interest ["**ESI**"] clause does not exclude the ICJ's jurisdiction. Thus, the ICJ has competence over this claim.

3.1.1 The forums do not have overlapping jurisdictions

The WTO has exclusive jurisdiction over the parties' conduct in relation to the GATT.[114] However, it is a "self-contained regime"[115] in the sense that its adjudicative bodies can only judge over the "rights and obligations under the provisions of the Agreement Establishing the

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[113] V. Lowe, *Overlapping Jurisdiction in International Tribunals*, 191 AUSTRALIAN YBIL 4 (1999).

[114] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), Art. 23 ["**DSU**"]; US-Section 301 Trade Act, WTO Doc WT/DS152/R, 22 December 1999, ¶7.43; EC – Commercial Vessels, WTO Doc WT/DS301/R, 22 April 2005, ¶7.193; G. Marceau, *The Primacy of the WTO Dispute Settlement System*, in 23 QUESTIONS OF INTERNATIONAL LAW 4 (2015).

[115] M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission. A/CN.4/L.682. 2006, 165 ["**Koskenniemi**"].

WTO".[116] That is, the panel established per the request of Adawa[117] only has jurisdiction over WTO agreements;[118] therefore, it cannot judge over the CHCT, which is not one of them.

As the CHCT is a Regional Trade Agreement[119] whose object and purpose[120] is to regulate the Helian industry within Crosinia,[121] it is a more specific agreement than the GATT, which is a general trade law agreement. Therefore, because of the general principle[122] of *lex specialis derogat lege generali*[123] the CHCT governs this case. As the WTO panel cannot adjudicate over the latter, and the ICJ can, this is not a case of overlapping jurisdictions.

3.1.2 General *competènce* principles allow the parties to select the jurisdiction of their choice

Parties to a dispute have the freedom to entrust their dispute to the tribunal of their choice.[124] Therefore, the ICJ's valid jurisdiction[125] may not be excluded by another forum's. Furthermore, when the Court has to define its jurisdiction in relation to that of another tribunal it cannot allow its own competence to yield to that of others, unless there is a clear clause that

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[116] *DSU*, Art. 1.

[117] *SAF*, ¶47.

[118] *DSU*, Arts. 3.2, 19.2.

[119] *C&C*, ¶5; *GATT*, Art. XXIV.

[120] Vienna Convention on the Law of Treaties, 23 May 1969, UN Treaty Series, vol 115, p.331, Art. 31.1 ["**VCLT**"].

[121] *CHC*, Arts. 1 – 3; *SAF*, ¶10 – 12.

[122] *ICJ Statute*, Art. 38.1(c).

[123] *Koskeniemmi*, 34-40; Mavrommatis Palestine Concessions case, PCIJ Series A, No. 2 (1924), 31; Beagle Channel Arbitration (Argentina v. Chile) ILRR vol. 52 (1979) 141, ¶36, 38.

[124] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 95. [**"UN Charter"]**.

[125] See Pleading 1.

defines such exclusion, for a danger of a denial of justice.[126] There is no such clause in the CHCT.

3.1.3 The ESI clause does not exclude this Court's jurisdiction

The caselaw of this Court has consistently stated that ESI clauses do not exclude its jurisdiction *ratione materiae*.[127]

3.2 Adawa's claim is admissible as no litispendence exists

The procedure before the WTO panel does not constitute litispendence, as it would require the configuration of elements that have not been met in the present case, such as (3.2.1) the same character of the two bodies adjudicating the case, (3.2.2) identical relief sought, and (3.2.3) the existence of such a rule in international law.

3.2.1 The ICJ and WTO are of different characters

If two forums are adjudging over the same matter, but their character is not the same, then no claim of litispendence can be made.[128] The WTO panel is a quasi-judicial forum because, although its members are independent individuals,[129] their objective is to assist the ruling of the Dispute Settlement Body,[130] which is comprised by government representatives.[131] Thus, the

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[126] *Factory at Chorzów* (F.R.G. v Poland), 1927. PCIJ (ser. A.) No9, at 30 (July 26) **["Chorzów Factory"]**.

[127] Military and Paramilitary Activites in and Against Nicaragua (Nicaragua v. United States of America) Merits, Judgement ICJ Reports 1986, 14 **["Nicaragua"]** ; Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objections, Judgement, ICJ Reports 1996, 803 **["Oil Platforms"]**; Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Request for the indication of provisional measures, Order of 3 October 2018, 11 – 12.

[128] Certain German Interests in Polish Upper Silesia (Germany v Poland). PCIJ, Judgement. 25 of August 1925, 20 **["Certain German Interests"].** Cited and applied in: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Dissenting Opinion of Judge *Ad Hoc* Cot, June 2019, ¶6-7 ["**Application CERD, Opinion of Judge Cot**"].

[129] *DSU*, Arts. 8.1-8.2.

[130] *DSU*, Art. 11.

final, authoritative decision, although based on WTO law, is that of a political entity.[132] On the other hand, the ICJ is a judicial organ,[133] hence, of a different nature from the panel.

3.2.2 The reliefs sought are diverse

When the actions before two forums are diverse, litispendence is not configured.[134] Indeed, the relief that Adawa is seeking before this Court is not the same as that which it seeks before the WTO panel. Adawa's *petitum* before this Court is that of monetary reparation for the resulting financial harm,[135] whilst the term of reference before the panel consists in the declaration of an unjustifiable breach of its commitment to maintain the bound rate of zero.[136] Therefore, although the factual bases of the allegations before the WTO panel and the ICJ are the same, the reliefs sought are not.

3.2.3 Litispendence is not applicable in international law

There is no explicit rule in international law that allows for the application of litispendence.[137] Moreover, this Court's criteria in cases in which litispendence issues could be at stake is to adjudge anyways,[138] even when the cases are pending before WTO panels[139] or GATT

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[131] *DSU*, Art. 2.

[132] G. Gillaume, *The Future of International Judicial Tribunals*, 44 ICLQ 860 (1995).

[133] *UN Charter*, Article 92; *ICJ Statute*, Art. 1.

[134] *Certain German Interests*, 20. Cited and applied in: *Application CERD, Opinion of Judge Cot* ¶8-11.

[135] *SAF*, ¶61.

[136] *SAF*, ¶¶47, 57.

[137] K. Ooellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions*, 5 MAX PLANCK UNYB 87 (2001).

[138] *Chorzow Factory*; *Certain German Interests*.

[139] United Arab Emirates – Measures Relating to Trades in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526/DS (2018); and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, June 2019.

panels.[140] This has also been the WTO's practice, in cases such as *Mexico – Tax Measures on Soft Drinks and Other Beverages,*[141] and more implicitly so in *Chile – Measures Affecting the Transit and Importing of Swordfish.*[142]

For all the aforementioned reasons, Applicant submits that the claim be declared admissible as litispendence cannot be applied in the present case.

3.3 Rasasa's tariffs on Helian products form Adawa violate the CHCT

Rasasa's tariffs (3.3.1) violate the CHCT's prohibition of customs duties on Helian products, (3.3.2) without being justified as necessary to protect Rasasa's security interests.

3.3.1 The CHCT is clear on the prohibition of customs duties on Helian products

The CHCT is explicit when prohibiting the imposition customs duties on Helian products.[143] That outlaws the introduction of 25% *ad valorem* tariffs[144] outright.

3.3.2 The measures taken were not necessary to protect Rasasa's security interests

The ESI clause[145] cannot be invoked in this case as an exception to the prohibition on tariffs because, (3.3.2.1) as this clause must be determined objectively, (3.3.2.2) the tariffs cannot be qualified as necessary for Rasasa's ESI.

3.3.2.1 Security interests must be qualified objectively

The CHCT does not expressly give Member States the unilateral power to decide what constitutes ESI, and such discretion cannot be presumed.[146] Although article 22 (a) grants

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[140] United States – Trade Measures Affecting Nicaragua, Report by the Panel, L/6053, 13 October 1986; *Nicaragua.*

[141] Mexico- Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R (Mar. 6, 2006)

[142] Chile – Measures Affecting the Transit and Importing of Swordfish, WTO/DS193 (Jun 3., 2010)

[143] *CHCT*, Art. 3.

[144] *SAF*, ¶33.

[145] *CHCT*, Art. 22.b.

Member States a margin of appreciation regarding what they consider an ESI in regards of the disclosure of information, article 22 (b) does not grant them the same attribution regarding the application of measures. As this Court noted in an analogous situation, this "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 GATT."[147] In contrast with the treaty that the Court analysed, and the CHCT, the GATT does include the potestative condition "which it considers" regarding the application of measures.

Thus, even if its article 22 (b) allows for the application of measures necessary to protect its ESI, such a strict and objective[148] qualification is an attribution of the tribunal and not of the respective State.[149]

Moreover, allowing for subjective determination of exemption from trade duties, although still subject to an obligation of good faith,[150] would gravely undermine the Treaty's *effet utile*,[151] subjecting the existence of a CHC Member's obligations to a mere expression of its unilateral will.[152]

3.3.2.2 The tariffs were not necessary to protect Rasasa's ESI

ESI are "*those interests relating to the quintessential functions of the State, namely, the protection (...) from external threats.*"[153] However, the tariff was introduced with the explicit

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[146] S. Schill, and R. Briese, *"If the State Considers": Self-Judging clauses in International Dispute* Settlement, 13 MAX PLANCK UNYB 68 (2009).

[147] *Ibid*, 166, ¶222.

[148] *Oil Platforms*, 196, ¶73

[149] *Nicaragua,* 116, ¶¶222, 282.

[150] Certain Questions of Mutual Assistance in Criminal Matters (Dijbouti v. France) Judgement of 4 June 2008, I.C.J. Reports 2008, 177, ¶145.

[151] Russia – Measures Concerning Traffic in Transit, WT/DS512/R, 5 April 2019, ¶7.65 **["Russia – Transit"]**

[152] *Ibid.*, ¶7.79.

[153] *Russia –Transit,* ¶7.130

aim of encouraging Rasasa's domestic processors to return to local farms for their feedstock,[154] and not in order to protect Rasasan territory and its population from external threats. These are private objectives unrelated to sovereignty issues that could be understood as quintessential functions of the State. Further, these protectionist measures go against the fundamental principles of international trade law,[155] and it is unlawful to invoke them under the guise of a security issue.[156]

Further, according to the CHCT[157] and this Court,[158] the measures must be "necessary" for that purpose. However, even if one were to understand that the measures were for the prevention of the "belligerent exercise"[159] against Rasasa, there is no evidence of the connection or effectivity of the tariffs in preventing this situation, rendering them unnecessary.

Therefore, Rasasa cannot invoke ESI to justify its tariffs.

3.4 Adawa is entitled to compensatory damages reflecting the financial harm it has suffered to date

Adawa is entitled to compensation because (3.4.1) the damages it suffered fulfil the necessary requisites under ARSIWA and (3.4.2) the DSU's regime of remedies is not *lex specialis* applicable to this case.

3.4.1 The damages suffered by Adawa fulfil the requisites for compensation

Article 36 of the ARSIWA establishes the requisites for compensation to be granted, which are met in this case. Firstly, Rasasa's violation of Article 3 of the CHCT,[160] as detailed

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[154] *SAF*, ¶33.

[155] E. Petersmann, *World Trade, Principles*, MPEPIL (2010); *GATT*, Article VIII.

[156] *Russia – Transit,* ¶7.81.

[157] *CHC*, Art. 22.b.

[158] *Nicaragua*, 141, ¶282.

[159] *SAF*, ¶40.

[160] *SAF*, ¶46.

above, amounts to the commission of an internationally wrongful act.[161] Secondly, the damage is financially assessable; moreover, it has already been assessed by the International League for the Support of Agriculture, amounting to €10 million[162] in loss of profits.[163] Finally, this damage is not fully made good by restitution,[164] as restitution for loss of profits is materially impossible[165] and it would not eliminate the €10 million in damage already effected to the Adawan economy. The damage can only be wholly remedied with financial compensation, an appreciation which the injured State is fully entitled to do.[166]

Rasasa must also cease in its wrongful tariff increase.[167]

3.4.2 The DSU's regime of remedies is not *lex specialis* applicable to this case

Article 55 of ARSIWA establishes that when special rules of international responsibility apply, the application of the former is precluded. However, this is a case governed by the CHCT; therefore, although the DSU contains a criticized[168] special remedy regime,[169] the ICJ should not apply it, as this is only applicable before the WTO.[170] On the other hand, as the CHCT does not

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[161] *ARSIWA*, Art. 3.

[162] *SAF*, ¶46.

[163] *ARSIWA*, Art. 36.2.

[164] *ARSIWA*, Art. 36.1; Factory at Chorzów, Jurisdiction, (1927) PCIJ Ser. A No. 9, 21, 47.

[165] *ARSIWA*, Art. 35.a.

[166] *ARSIWA*, Art. 43.2 (b) ; Commentaries to the Draft Articles on State Responsibility (I.L.C. Yearbook 2001-II) Pt. II, 120.

[167] *ARSIWA*, Art. 30.

[168] M. Bronckers & N. van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8(1) JIEL 101-126 (2005).

[169] *DSU*, Art. 22.

[170] *DSU*, Art. 23.

establish its own remedies, and to comply with the principle of full reparation,[171] ARSIWA's remedies must be applied to this case.

[171] *Chorzów Factory*, 47.

4 THE ARREST AND DETENTION OF DARIAN GREY WAS CONSISTENT WITH ADAWA'S OBLIGATIONS UNDER INTERNATIONAL LAW, AND ADAWA MAY PROCEED TO RENDER HER TO THE INTERNATIONAL CRIMINAL COURT

Adawa respectfully submits that (4.1) the counterclaim asserted by Rasasa may be deemed inadmissible. (4.2) The arrest and detention of Darian Grey was consistent with international law, and (4.3) Adawa may proceed to render Ms. Grey to the ICC.

4.1 The counterclaim asserted by Rasasa may be deemed inadmisible

Under Article 80 of the Rules of the Court, [172] two requirements must be met for a counter-claim to be admissible: [173] it must come within the jurisdiction of the Court and it must be directly connected with the subject-matter of the claim of the other party.

If the Court were to adjudge that it lacks jurisdiction based on Article VI of the TOB, this would also preclude jurisdiction over the counterclaim raised by Rasasa. [174]

4.2 The arrest and detention of Ms. Grey was consistent with international law

The arrest and detention of Ms. Grey was consistent with international law because (4.2.1) Adawan national courts could exercise jurisdiction over Ms. Grey when acting on behalf of the ICC, and (4.2.2) Adawa complied with its obligations under the Rome Statute.

4.2.1 Adawan national courts could exercise jurisdiction over Ms. Grey when acting on behalf of the ICC

Adawan national courts could exercise jurisdiction over Ms. Grey when acting on behalf of the ICC because (4.2.1.1) the ICC has jurisdiction, (4.2.1.2) immunities *ratione personae* do

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[172] Rules of the Court, Art. 80, Amendment entered into force on 1 February 2001.

[173] Oil Platforms (Islamic Republic of Iran v. United States of America) - Counter-Claims, Order of 10 March 1998, I.C.J. Reports 1998, ¶33 ["**Oil Platforms Counter-Claims**"]; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) - Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001, ¶35 ["**Armed Activities Counter-Claims**"].

[174] *SAF*, ¶58.

not bar the ICC from exercising jurisdiction, and (4.2.1.3) the aforementioned exception also applies before national courts when acting in cooperation with that tribunal.

4.2.1.1 The ICC has jurisdiction over the situation occurred in Garantia

Under Article 12.2 (a) the ICC can exercise jurisdiction if the State in which the conduct in question occurred is a party to the Rome Statute. This criterion is satisfied if at least some elements of the crime in question have occurred within the territory of a State Party.[175]

On February 2009 Garantia, a party to the Rome Statute,[176] referred to the Prosecutor of the ICC a situation affecting its territory and involving Ms. Grey.[177] The Office of the Prosecutor opened an investigation,[178] and on June 20 2019,[179] the ICC issued both an arrest warrant against Ms. Grey and a request for her surrender. The ICC's jurisdiction has not been contested until this date.

4.2.1.2 Under CIL, immunities ratione personae do not bar the ICC from exercising jurisdiction

In the Nicaragua Case, the Court stated that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law".[180] The rationale is that new lines of conduct may replace original rules with new norms, especially in light of novel circumstances.[181]

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[175] *ICC*, Prosecution's Request for a Ruling on Jurisdiction under Art. 19(3) of the Statute, Decision No. ICC-RoC46(3)-01/18-37, 6 September 2018, ¶70, 73.

[176] *C&C*, ¶2.

[177] *Idem*; *SAF*, ¶15.

[178] *Idem.*

[179] *SAF*, ¶50.

[180] *Nicaragua*, ¶207.

[181] A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 97 (1971).

Under CIL, Ministers of Foreign Affairs enjoy immunity *ratione personae* from the criminal jurisdiction of other States.[182] This immunity applies in respect of national criminal proceedings, as it is intended to protect officials representing foreign States from abuses by the forum State.[183] Article 32 of the CHCT is built upon the same rationale, which aims to protect representatives of members States in the exercise of their functions while attending meetings convened by the CHC.

In contrast, at the international level and given recent developments on international criminal law, CIL has developed an exception to immunity *ratione personae* before international criminal courts. In this regard, in *Arrest Warrant* the ICJ stated that the immunities enjoyed by an incumbent Minister for Foreign Affairs should not represent a bar to criminal prosecution when such officials are "subject to criminal proceedings before certain international criminal courts, where they have jurisdiction", such as the ICC.[184]

This customary exception has been crystalized by States in Article 27(2) of the Rome Statute. As it reflects near-universal acceptance, it is particularly indicative of custom.[185] The ICC has referred to this exception in *Al-Bashir*[186] and other cases[187]. Furthermore, in *Al-Bashir*,

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[182] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, ¶51, 53 **["Arrest Warrant"]**.

[183] P. Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?* 7 JICJ 320 (2009) **["Gaeta"].**

[184] Arrest Warrant, ¶61.

[185] Eritrea-Ethiopia Claims Commission, Partial Award: Prisoners of War, Ethiopia's Claim 4, 1 July 2003, UNRIAA, vol. XXVI, ¶31; Special Court for Sierra Leone, Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision of 31 May 2004, ¶17 – 20; Continental Shelf (Libyan Arab Jamahiriya/ Malta), I.C.J. Reports 1985, ¶27; 122 States are parties to the Rome Statute: *ICC*, The States Parties to the Rome Statute https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

[186] ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-139-Corr, 13 December 2011, ¶43 **["Malawi Decision"]**; ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-140-tENG, 13 December 2011, ¶13 ["**Chad Decision**"].

the ICC's Appeals Chamber stated that "such immunity [*ratione personae*] has never been recognized in international law as a bar to the jurisdiction of an international court".[188]

This exception is reinforced by the nature of the ICC.[189] In *Taylor,* the Special Court for Sierra Leone[190] ["**SCSL**"] stated that immunities *ratione personae* "derive from the sovereign equality of States and therefore they have no relevance to international criminal courts", which do not act as organs of a particular State but exercise their mandate on behalf of the international community.[191]

The ICC acts on behalf of the international community,[192] and the enforcement of its *ius puniendi* cannot be considered an expression of sovereign authority of a State upon another;[193] thus, in cases heard by the ICC, the grounds that justify the recognition of immunity and inviolability to State officials do not apply.

Hence, as a customary rule, the exception to immunities *ratione personae* before international courts, also applies to nationals of States not Parties to the Rome Statute.[194] Thus,

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[187] ICC, The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision No. ICC-01/09-01/11-777, 18 June 2013, ¶67.

[188] ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09 OA2, 6 May 2019, ¶113 ["**Jordan's Appeal**"].

[189] Yearbook of the International Law Commission 1996, Vol. II, Part II, 27, footnote 69.

[190] ILC Rep., United Nations General Assembly Official Records, 70th Sess., Supp. No 10, UN Doc A/73/10, 150.

[191] The Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Document No. SCSL-2003-01-I, 31 May 2004, ¶51.

[192] References to the international community: *VCLT*, Art. 54; Barcelona Traction (Belgium v. Spain), Judgment, 5 February 1970, I.C.J. Reports 1970 ¶33.

[193] Jordan's Appeal, para. 115; Gaeta, p. 321; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Preamble, para. 4. ["**Rome Statute**"].

[194] *Gaeta*, 322-325.

this kind of immunity, irrespective of their source, does not bar the ICC from issuing an arrest warrant in respect of Ms. Grey, nor from requesting her arrest and surrender.[195]

4.2.1.3 The exception to immunities ratione personae before the ICC also applies before national courts when acting in cooperation with that tribunal

The exception to immunity *ratione personae* before international courts also applies to the exercise of jurisdiction by States when they act at the request and on behalf of an international tribunal, before which immunities do not apply. This does not constitute the recognition of a new rule of CIL, but the delimitation of the scope of such exception.[196]

This must be read in conjunction with the reliance of the ICC on national authorities to successfully prosecute situations referred to it. Suspected persons and indispensable evidence are always located under sovereign authority of States, thus if they refuse to cooperate, the ICC turns out to be utterly impotent.[197]

In its *Malawi Decision*, the ICC Pre-Trial Chamber I stated that "unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions".[198] This finding was confirmed in its subsequent decisions regarding Chad's and Jordan's failure to cooperate.[199]

This reasoning is coherent with national practice. Many States Parties to the Rome Statute have enacted laws establishing that immunities of sitting officials shall not be a bar to

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[195] *C&C*, ¶8.

[196] O.TRIFFTERER & K.AMBOS, K. (EDS.), ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 2136-2137 (2016) **["Triffterer RS:C"]**; C. KREß, THE INTERNATIONAL CRIMINAL COURT AND IMMUNITIES UNDER INTERNATIONAL LAW FOR STATES NOT PARTY TO THE COURT'S STATUTE, IN M. BERGSMO & L. YAN (EDS.), STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW 258 (2012) **["Kreß"]**.

[197] *Triffterer RS:C*, 2004.

[198] *Malawi Decision*, ¶44.

[199] *Chad Decision*, ¶13; *Jordan's Appeal*, ¶113.

requests of cooperation by the ICC.[200] For instance, the Court of Kenya issued a provisional warrant of arrest against Mr. Al-Bashir in 2011, pursuant to the request of arrest and surrender issued by the ICC.[201] Likewise, in *Gaddafi*, the Supreme Court of Chile issued an arrest request against Mr. Muammar Gaddafi while he was Libya's Head of State,[202] in the wake of an arrest warrant issued by the ICC.[203]

Moreover, during Security Council meetings, certain States have expressed the need to execute arrest warrants issued by the Court in compliance with their obligations to cooperate,[204] thus indicating that they do not consider that personal immunities constitute an obstacle for the exercise of national criminal jurisdiction when acting in cooperation with the ICC.

In conclusion, the customary exception to immunites *ratione personae vis-à-vis* international courts rendered all the immunities and the inviolability enjoyed by Ms. Grey non-applicable before Adawan national Courts[205] in the proceedings aiming to comply with the request for arrest and surrender issued by the ICC.[206]

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[200] Burkina Faso: Act No. 52 of 2009, Arts. 7 and 15.1; Norway: Act No. 65 of 15 June 2001, Art. 2; France: Act No. 2002-268 of 26 February 2002, Art. 627.8; Germany: Courts Constitution Act Arts. 20.1 and 21; New Zealand: ICC Act 2000, Art. 31.1; Uganda: Act No. 18 of 2006, Art. 25.1 (a) and (b)

[201] Nairobi High Court, Kenya Section of the International Commission of Jurists v. Attorney General & Other (2011), Kenyan Law Reports, 28 November 2011; Kenya: Act No. 16 of 2009, Article 27.

[202] Supreme Court of Chile, Decision No. 9.260-2011, 14 October 2011.

[203] *ICC*, The Prosecutor v. Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Decision No. ICC-01/11-01/11-e-tENG, 27 June 2011.

[204] France and Germany: UN Security Council 6778th Meeting, 5 June 2012, S/PV.6778, 12, 18; Colombia: UN Security Council 6887th Meeting, 13 December 2012, S/PV.6887, 13; Australia: UN Security Council 7337th Meeting, 12 December 2014, S/PV.7337, 4.

[205] *SAF*, ¶51.

[206] *C&C*, ¶8.

4.2.2 Adawa complied with its obligations under the Rome Statute

Adawa complied with its obligations under the Rome Statute because (4.2.2.1) it is up to the ICC to determine the existence of conflicting obligations and (4.2.2.2) Adawa complied with the required arrest proceedings.

4.2.2.1 States Parties to the Rome Statute entrusted the ICC with the power to determine the existence of legal obligations of those States with respect to immunities

Article 98 of the Rome Statute does not expressly recognize any immunities under international law,[207] in contrast, it establishes the ICC's sole authority to decide whether immunities are applicable in a particular case.[208] In this sense, Adawa agreed that the Court acts on its behalf on the identification of an international criminal law exception to immunities, consequently, it must be loyal to the conclusions reached by the Court as long as they are not manifestly mistaken.[209] This rule is reinforced by Article 119(1) of the Rome Statute, which provides the ICC the power to settle its own disputes concerning its judicial functions.[210]

4.2.2.2 Adawa complied with the required arrest proceedings

Adawa arrested Ms. Grey on 22 June 2019 as requested by the ICC, and in conformity with article 59 of the Rome Statute.[211] Rasasan diplomats were duly notified and she was brought promptly before a magistrate who confirmed her identity.[212] Ms. Grey appealed on 25 June 2019, nonetheless it was denied, both circumstances were notified to the ICC in accordance with Article 59(5).[213] Ms. Grey remains under house arrest pending the Court's decision.[214]

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[207] *Kreß*, 232

[208] *Malawi Decision*, ¶11.

[209] *Triffterer RS:C*, 2137.

[210] ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-195, 9 April 2014, ¶16.

[211] *C&C*, ¶8.

[212] *SAF*, ¶51.

[213] *C&C*, ¶9.

[214] *SAF*, ¶52.

4.3 Adawa may proceed to render Ms. Grey to the ICC

Considering the foregoing, Adawa may proceed to render Ms. Grey to the ICC, as requested by that Court[215] and in conformity with its obligations under the Rome Statute.[216]

[215] *SAF*, ¶50

[216] *Rome Statute*, Art. 89.

PRAYER FOR RELIEF

Under the light of the reasons presented above, the State of Aurok respectfully requests this Court to adjudge and declare that:

1. The International Court of Justice has jurisdiction over Adawa's claims because Adawa is a party to the 1929 Treaty of Botega.
2. Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is in violation of international law, thus the Court must order its dismantlement and removal.
3. This Court may adjudicate Adawa's claim that Rasasa's imposition of tariffs on Helian products from Adawa violates CHCT, and that Adawa is entitled to compensatory damages.
4. The arrest and detention of Darian Grey was consistent with Adawa's obligations under international law, and Adawa may proceed to render her to the International Criminal Court.