IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

MEMORIAL FOR THE RESPONDENT

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 ["**ICJ**"] 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 Republic of Rasasa respectfully requests this Honourable Court to decide:

1. Whether the ICJ lacks jurisdiction over Adawa's claims, given that Adawa is not 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 consistent with international law.
3. Whether Adawa's claim that Rasasa's Helian tariffs violate the CHC Treaty falls outside the ICJ's jurisdiction or is inadmissible. In the alternative, whether the imposition of the tariffs did not violate the CHC Treaty.
4. Whether Adawa's arrest and detention of Darian Grey constitutes an internationally wrongful act, and whether she must be immediately repatriated to Rasasa.

STATEMENT OF FACTS

1 POLITICAL SITUATION IN THE REGION OF CROSINIA

The State of Adawa and the Republic of Rasasa are neighbouring countries in the Region of Crosinia, sharing a border that is 201 kilometres long.

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

In 1939, Adawa and Zeitounia dissolved the Union. There is no evidence of any kind of diplomatic exchange between Rasasa and Adawa regarding the TOB.

2 THE HELIAN INDUSTRY

Helian hyacinth is a flowering plant that produces the flavouring spice Helian and can only be cultivated in the Region of Crosinia. Its farming requires very specific equipment and a 20 years interval to produce export-quality spice.

As exports of Helian spice contribute significantly to the GDP of all States in Crosinia, and in light of the specific and rigorous procedures needed for successful cultivation of the hyacinth, the six Crosinian States formed the Crosinian Helian Community ["**CHC**"] in 1969. 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.

In 1982 and 1985, respectively, Rasasa and Adawa acceded to the General Agreement on Tariffs and Trade ["**GATT**"] and later became original members of the World Trade Organization ["**WTO**"], as did all other parties to the Treaty Establishing the Crosinian Helian Community ["**CHCT**"]. When they joined the GATT, both States submitted their then-applicable tariff schedules. With respect to Helian plant, bulbs, pollen, spice, and other material, the bound rates were zero.

3 HURRICANE MAKAN AND ARMED CONFLICT IN THE REGION

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

By August 2016, the small criminal gangs organized themselves into larger armed groups, carrying out violent raids on Rasasan soil and stealing Helian bulbs, growing and processing equipment, resulting in the death of several Rasasan citizens. 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. However, these were ineffective. On February 2017 the gangs had used their profits to become a heavily armed, organized militia with headquarters within Rasasan territory.

Both Adawa and Rasasa declared that their domestic police efforts had been ineffective in counteracting the militia, in part because criminal operatives were able to freely cross the Adawa-Rasasa border. On 1 June 2017, the militia simultaneously attacked nine Rasasan Border Police stations, killing 21 officers.

4 THE 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. The CEO of the Rasasan Robotic Corporation ["**RRC**"], Ms. Darian Grey, offered to devote their expertise, and a system she had in mind called the "Weaponized Autonomous Limitation Line" ["**WALL**"]. Its principal feature, she contended, was that it would deploy advanced technology to deter and apprehend criminals, while using force only when absolutely necessary and when the chance of targeting innocents was reduced to virtually zero.

President Tihmar expressed great interest, and in January 2013 she notified the other five CHC Member States that Rasasa had contracted with RRC to undertake the research and development of the WALL. On February 2013, the RRC distributed further technical details in a report signed by 15 police and military technology experts from 12 States, including all six CHC Member States. The report disclosed that the WALL employed machine learning algorithms, developed from a large quantity of "training data" acquired from the Rasasan police and the police and military forces of other 10 States, in order to identify threats. The data is based on vast

empirical information and features an advanced form of "supervised learning". All six CHC Member States devoted funds and provided leading government and private sector scientists and engineers to the research and development phase of the project. However, all States but Adawa and Rasasa eventually withdrew from the project by August 2013.

The head of the Adawan team declared in 2015 that the WALL is unimaginably more reliable than human police or soldiers, demonstrating a "false positives" rate of less than 0,0001%.

On 6 July 2015, Ms. Grey announced the completion of the project, describing it as a physical infrastructure with an advanced surveillance and response unit and fully autonomous system. Each unit is equipped with an array of options.

After the violent attacks on Rasasan Border Police stations, recently elected Rasasan President Pindro authorized the deployment of the Rasasan Army against the militia camps within Rasasa, as well as the purchase of the WALL from RRC and its installation along the Rasasa-Adawa border. Its objective would be to disable anyone that intended to illegally cross it.

5 TARIFFS BASED ON ESSENTIAL SECURITY INTERESTS

Invoking "essential security interests", President Pindro submitted a bill that was adopted by the Rasasan Parliament in 2018, introducing a 25% *ad valorem* tariff on Helian unprocessed products. In reply, Adawa formally requested consultations and subsequently the establishment of a panel before the WTO.

6 THE ARREST AND DETENTION OF MINISTER GREY

Ms. Darian Grey is a highly renowned individual within Rasasa; she is the founder of the RRC and served as her chief executive officer from 1970 to 2016. In 2017, she was appointed as Minister of Foreign Affairs by President Pindro. As of the time of her nomination, neither the RRC nor Ms. Grey had been charged with crimes in any domestic or international tribunal. The appointment was confirmed by Parliament on 15 January 2015.

On 18 June 2019 the CHC celebrated its 50th anniversary, alongside its regular annual meeting, in Novazora, the capital city of Adawa. As the Rasasan Minister of Foreign Affairs, Ms. Grey attended this event. On 22 June 2019, while leaving her hotel, Minister Grey was taken into

custody by local police officers, following a request for arrest and surrender issued by a Pre-Trial Chamber of the International Criminal Court ["**ICC**"] only two days prior.

Minister Grey was taken before a magistrate, her counsel argued that she was entitled to immunity, but the argument was rejected, noting that "the Rome Statute of the ICC makes no exception for sitting government ministers." Rasasa is not a party to the Rome Statute.

Minister Grey remains under house arrest at a monitored diplomatic guesthouse in Adawa, pending this Court's decision.

SUMMARY OF PLEADINGS

1 FIRST PLEADING

The ICJ lacks jurisdiction over Adawa's claims because Adawa is not a party to the 1929 TOB, and thus the clause of dispute settlement contained in Article VI of the Treaty cannot be invoked. Adawa is not a part of the Treaty because it has not complied with the rules that govern succession of States in respect of treaties. It has not obtained the consent of its counterpart, the Republic of Rasasa, for the continuance of the Treaty, thus going against what is established in customary international law ["**CIL**"]. A case of territorial succession is not possible either, since the TOB does not contain territorial obligations, and even if it had, it is well established in International Law that in these cases succession is in relation to obligations attached to a territory, and never to the treaty itself or its non-territorial obligations. The obligation contained in Article VI does not have such a character, and therefore, cannot be succeeded.

2 SECOND PLEADING

Rasasa's development and deployment of the WALL is consistent with international law because it was lawfully developed to combat an organized armed group within Rasasan territory, in conformity with international humanitarian law governing armed conflicts. Empirical data regarding the WALL's functions since its installation evidences its capacity to comply with the humanitarian principles of precautions in attack, proportionality and distinction. Furthermore, the WALL is in conformity with international human rights law since, firstly, it does not breach the right to life under Article 6 of the International Covenant on Civil and Political Rights, and secondly, as Rasasa is involved in a non-international armed conflict, it is allowed to suspend certain human rights. Finally, since the development and deployment of the WALL is consistent with international law, the Applicant cannot sustain that Rasasa has committed internationally wrongful acts. Thus, the Court has no grounds to order the Respondent to dismantle and remove the WALL forthwith.

3 THIRD PLEADING

Adawa's claim that Rasasa's Helian tariffs violate the CHCT fall outside the ICJ's jurisdiction, as this case, governed by the GATT through the *lex posteriori* principle, is of exclusive jurisdiction of the WTO. Alternatively, Adawa's claim is inadmissible, primordially because the specialized forum is the appropriate one to review the case, and Adawa's conduct of forum shopping opposes general principles of international law that emanate from good faith, such as abuse of rights and estoppel. Further, Rasasa's imposition of tariffs is non-justiciable, providing that they are justified by the self-judging essential security interests clause. In any case, the tariffs are justified as they were necessary for Rasasa's essential security interests ["**ESI**"], having been taken in time of war or emergency in international relations. Finally, compensation should not be awarded, because the application of Articles on the Responsibility of States for Internationally Wrongful acts ["**ARSIWA**"] is precluded by *lex specialis*, and the claim does not fulfill the requisites for compensation, such as a necessary causal link and diplomatic protection.

4 FOURTH PLEADING

In the event this Court adjudges that it has jurisdiction in the present case, the counterclaim asserted by Rasasa is admissible under Article 80 of the Rules of the Court. The arrest and detention of Minister Grey by Adawa was unlawful because she enjoys absolute immunity *ratione personae* before national courts during her term in office. Her personal immunities are not affected by the intervention of the ICC, because Article 27(2) of its Statute does not apply to non-State parties. The current status of State practice does not amount to a customary exception to personal immunities when cooperating with the ICC. Additionally, Adawa was obliged to respect Minister's Grey immunities and inviolability under the Rome Statute. Hence, Adawa committed an internationally wrongful act and is obliged to immediately repatriate Minister Grey.

PLEADINGS

1 THE COURT LACKS JURISDICTION OVER ADAWA'S CLAIMS BECAUSE ADAWA IS NOT A PARTY TO THE 1929 TREATY OF BOTEGA

The Republic of Rasasa submits that the ICJ lacks jurisdiction over Adawa's claims, since the latter is not a party to the TOB, because (1.1) it has not fulfilled the requirements for the TOB to be succeeded. (1.2) Jurisdiction cannot be granted on the basis of territorial succession. In any event, (1.3) the treaty has been affected by a fundamental change of circumstances.

1.1 Adawa has not fulfilled the requirements for the TOB to be succeeded

The principle of consent dictates that States can be bound by an international obligation only if they so agree.[1] Rasasa submits that Adawa has not succeeded the TOB because, (1.1.1) it did not negotiate its succession with Rasasa, and (1.1.2) the rule of automatic succession does not apply.

1.1.1 Adawa did not obtain Rasasa's consent regarding the continuance of the TOB

Under CIL the continuance of a treaty is subject to the consent given by the parties following the occurrence of State succession.[2] According to relevant practice, States can only be bound by treaties when a tacit or explicit agreement has been reached. This is evidenced by substantially uniform[3] diplomatic correspondence and consultations[4] in emblematic situations which include: the dissolution of the Union of Soviet Socialist

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[1] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (1995).

[2] A. Di Stefano, "*Article 24*", in G. DISTEPHANO AND G. GAGGIOLI (EDS.), COMMENTAIRE A LA CONVENTION DE VIENNE SUR LA SUCCESSION D' ÉTATS EN MATIÈRE DE TRAITÉS (2015) ¶14, 56, 76; R. SZAFARZ, SUCCESSION OF STATES IN RESPECT OF TREATIES IN CONTEMPORARY INTERNATIONAL LAW 130 (1983).

[3] J. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24 (2012) ["**CRAWFORD**"].

[4] P. Dumberry, *State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession*, 34 ARBITRATION INTERNATIONAL 450 (2018) ["**Dumberry BITs**"].

Republics,[5] the separation of the Czech and Slovak Federative Republic, [6] and the breakup of the State Union of Serbia and Montenegro.[7]

Case law has confirmed the aforementioned rule.[8] The Permanent Court of Arbitration explicitly established that, even if a treaty was ratified by a predecessor State, it could not apply to its successors if an agreement was not reached in a previous instance.[9]

Adawa did not obtain such consent after the dissolution of the AZU.[10] There have not been any negotiations regarding the continuance of the TOB, hence, the existence of an agreement is not to be presumed. Therefore, the treaty is not succeeded, and the general clause regarding the Court's jurisdiction therein contained cannot be invoked.[11]

1.1.2 The rule of automatic succession does not apply

Adawa and Rasasa are not parties to the Vienna Convention on Succession of States in Respect of Treaties ["**VCSS**"] and cannot not be bound by its provisions.[12] The rule of

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[5] R. Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 ICLQ 488 (1993); ["**Mullerson**"] M. CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES, 240- 241 (2007). ["**Craven**"].

[6] *Craven*, 241.

[7] C. Tams, *State Succession to Investment Treaties: Mapping the Issues*, 31 ICSID REV, 331 (2016). ["**Tams**"].

[8] European Media Ventures SA v. Czech Republic, Partial Award, 17 March 2006, ¶¶30-31; Achmea BV v Slovak Republic, Award on Jurisdiction and Admissibility, 20 May 2014; Investmart v Czech Republic, Award, 26 June 2009, ¶8.

[9] European American Investment Bank AG (EURAM) v Slovak Republic, Award on Jurisdiction, 22 October 2012, ¶¶79-81.

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

[11] Treaty of Botega on Armistice and Pacification of 1 November 1929, Article VI ["**TOB**"].

[12] P. Dumberry, *State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention*, 28 LJIL 14 (2015). ["**Dumberry Succession**"]; 2020 Philip C. Jessup International Law Moot Court Competition, Correction and Clarifications to the Statement of Agreed Facts Clarifications, ¶e) ["**C&C**"]; United Nations ["**UN**"], Vienna Convention on the Law of Treaties, 23 May 1969, UN Treaty Series, vol 115, p.331, Article 34 ["**VCLT**"].

automatic succession of treaties, governing cases of a non-colonial nature, contained in its Article 34 does not reflect CIL. State practice[13] and prevailing scholarly opinion[14] support this conclusion. Consequently, it cannot be invoked in the present case.

1.2 Jurisdiction cannot be granted on the basis of territorial succession

Treaties may be classified as political or territorial depending on the manner in which the obligations they contain are to be performed.[15]

Territorial treaties are instruments whose performance is perpetually associated with the territory[16] to which they grant rights of use or enjoyment. [17] They create a situation which is independent of the personality of States, by impressing on a territory,[18] as is the case of treaties of navigation,[19] irrigation,[20] fishing,[21] and rights of way.[22]

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[13] UN Conference on the Succession of States in Respect of Treaties ["**Conference**"] 40th meeting of the Committee of the Whole, Vol. II., Doc: A/CONF.80/C.1/SR.40 ¶¶26 – 28, 31, 55 ["**40th meeting**"]; First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur, Vol. II, Doc: A/CN.4/278 and Add.1-6, 69, ¶391.

[14] *Mullerson* 474, 488; *Dumberry Succession*, 15.; D.P. O'Connell, *Reflection on the State Succession Convention*, 39 ZAÖRV 726 (1979).

[15] D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 231 (1967). ["**O'CONNELL**"].

[16] *Ibid.*

[17] H. Waldock, Fifth Report on Succession of in Respect of Treaties, UN Doc A/CN4/256 and Add 1-4, Yearbook of the ILC (1972), 59, ¶45; 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 Arts. 11, 12, ¶¶10, 21 ["**VCSS Commentary**"].

[18] D.P. O'CONNELL, THE LAW OF STATE SUCCESSION 49 (1956); *Conference*, 21st meeting of the Committee of the Whole, Vol. I, Doc: A/CONF.80/C.1/SR.21, ¶6. ["**21st meeting**"]

[19] *E.g.* Treaty of Budapest of 1977.

[20] *E.g.*: Art. 358 of the Treaty of Versailles of 1919.

[21] *E.g*: Treaty of Ghent of 1814.

[22] *E.g.*: Article 294 of the Treaty of Trianon of 1920.

In contrast, political treaties are characterized by a performance strictly associated with the fulfillment of reciprocal rights and duties of States in the "ordinary exercise of political discretion."[23] These treaties do not survive the dissolution of a State.[24]

Respondent submits that (1.2.1) the TOB is not a territorial treaty and (1.2.2) even if it was, its Article VI does not have a territorial character.

1.2.1 The TOB is not a territorial treaty

The TOB is not a territorial treaty because (1.2.1.1) its object and purpose characterize it as a treaty of a political nature and (1.2.1.2) it does not contain any obligations of a territorial character.

1.2.1.1 Its object and purpose characterize it as a treaty of a political nature

The TOB, by reason of its very name, is officially recognized as a treaty of "Armistice and Pacification", the purpose of which is to the establish a suspension of hostilities between the parties, with the objective of restoring peace and security to their inhabitants.[25]

Armistices are agreements between leaders of the belligerent States whose purpose is to suspend hostilities.[26] When taking the form of treaties, they are political instruments because the ceasing of hostilities carry intrinsically political implications,[27] while establishing obligations whose performance is entirely dependent on the will of States. This is the case of the TOB.

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[23] *O' Connell*, 231.

[24] *VCSS Commentary*, 196 – 197.

[25] *TOB*, Preamble.

[26] S. Bastid, *The Cease-Fire, in General Report of the International Society of Military Law and the Law of War*, Proceedings of the Sixth International Congress held at The Hague 22-25 May 1973, 33. ["**Bastid**"].

[27] *Bastid*, 40.

1.2.1.2 The TOB does not contain any territorial obligations

The TOB declares a general armistice, defines armistice demarcation lines, establishes an international zone of peace, and contains a dispute settlement clause.[28]

The obligation to respect armistice demarcation lines is established with the objective of preventing the resurgence of violence in the war-torn region. States contracted this obligation with the objective of eventually achieving a definitive peace, a status which is intrinsically associated with the reciprocal nature of their relations.[29] Thus, the performance of this obligation is political, since it depends on the political will of States bound by it.

On the other hand, the international zone of peace, while establishing a territorial legal regime, entails an obligation to be performed in Zeitounian and Rasasan soil, with no reference whatsoever to the Adawan territory.[30] Therefore, no such territorial obligation exists between Rasasa and Adawa under the TOB.

1.2.2 Article VI of the TOB is not territorial

Territorial obligations survive succession because they attach to legal situations that are created by the treaty, such as boundaries or servitudes.[31] *A contrario*, since the treaty itself is an instrument, it is not succeeded. This has been recognized as a general principle of international law by States [32], the ILC[33] and scholarly opinion.[34]

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[28] *TOB*, Articles I, III & VI.

[29] *O' Connell*, 231.

[30] *TOB*, Article III.

[31] *VCSS* Commentary, Arts. 11, 12, ¶1.

[32] Conference, 20th meeting of the Committee of the Whole, Vol. I, Doc: A/CONF.80/C.1/SR.20, ¶32; *21st meeting*, ¶4.

[33] *VCSS Commentary* Arts. 11, 12, ¶18.

[34] *O' Connell*, 14-15.; Resolution 8, Report of the Fifty-Third ILA Conference - Held at Buenos Aires, August 25th to August 31st, 1968 25-31 Aug. (1969) xiv-xv; R. Ago in Yearbook of the ILC (1972) Vol. II. Doc. A/CN.4/SER.A/1972/Add.J, 251, ¶13.

This rule applies to situations in which treaties contain both territorial and political obligations.[35] Even if the TOB contained territorial obligations, it would be impossible to consider Article VI as such. What this provision establishes is a clause that does not refer in any way to an attachment relative to a particular territory. It is thus abrogated by the event of State Succession and ceases to have force for the Parties in this dispute. Therefore, it cannot be invoked as a basis for jurisdiction before this Court.

1.3 In any case, the performance of the treaty is affected by a fundamental change of circumstances

The doctrine of *rebus sic stantibus* provides for termination or withdrawal from treaties following a fundamental change of circumstances.[36] This doctrine is enshrined in article 62 of the Vienna Convention on the Law of Treaties ["**VCLT**"], to which both Applicant and Respondent are parties of. [37] This only applies if the changed circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and the effect of the change is to radically transform the extent of obligations still to be performed under the treaty.[38] Exceptions to this rule include: treaties establishing borders, and fundamental change of circumstances provoked by the party invoking it through a breach of its obligations.[39]

The TOB is a bilateral treaty,[40] and as such, the identity of the signatory States constitutes an essential basis of the consent of the parties.[41] This has been acknowledged by

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[35] M. Helal, *Inheriting International Rivers: State Succession to Territorial Obligations, South Sudan, and the 1959 Nile Waters Agreement*, 27 EMORY INTL L REV 980 (2013); Office of Legal Affairs, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation, p. 127, UN Doc ST/LEG/SER.B/12, UN Sales No. 63. V. 4 (1963).

[36] M. SHAW, INTERNATIONAL LAW, 855 (2003), ["**Shaw**"]; Draft Articles on the Law of Treaties with commentaries, ILC Yearbook of 1966, Vol. II, Doc. A/CN.4/SER. A/1966/Add. Commentary to article 59 (61), ¶1-2.

[37] *SAF*, ¶60.

[38] *VCLT*, Article 62 (1) ; Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, 7, ¶65.

[39] *VCLT*, Article 62 (2).

[40] *TOB*, preamble.

the ILC[42], whose explanation regarding this kind of treaties leads to the conclusion that "negotiation between different entities necessarily leads to different outcomes."[43] This means that the disappearance of the AZU precludes the consent of its former territorial units[44] to be bound by the TOB.

The bilateral character of this treaty is also important to assess the extent of the pending obligations. The TOB was drafted taking into consideration the unique characteristics of the AZU, and the conviction that the obligations attached to it would ensure the pacification of the region.[45] The dissolution of the AZU, and its replacement by States with a different territory, political system, and identity,[46] increases the burden of the obligations in such a way that it renders their performance as something essentially different from what was originally agreed.[47] The TOB cannot bind States whose specific characteristics were not taken into consideration when the scope of those obligations was defined.[48]

Meanwhile, the exceptions set by the VCLT do not find application in this case. The TOB does not establish a territorial boundary and its termination is not a consequence of a breach of obligations, that would create a fundamental change of circumstances, attributable to Rasasa. The fundamental change originates from the dissolution of the AZU, [49] an event that escapes from the will of Rasasa.

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[41] *40th meeting*, ¶50; *Mullerson*, 89.

[42] *VCSS Commentary*, Article 23, ¶3.

[43] *Dumberry Succession*, 26.

[44] Nowadays the States of Adawa and Zeitounia.

[45] *TOB*, Preamble.

[46] *SAF*, ¶7.

[47] Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, 20-21; E. LAUTERPACHT (ED.) 55 INTERNATIONAL LAW REPORTS 183.

[48] *SAF*, ¶5.

[49] *SAF*, ¶7.

2 RASASA'S DEVELOPMENT AND DEPLOYMENT OF THE WALL ALONG THE BORDER BETWEEN ADAWA AND RASASA IS CONSISTENT WITH INTERNATIONAL LAW

The WALL is consistent with international law because (2.1) it was lawfully developed and deployed to combat an armed group within Rasasa, (2.2) it's use is in accordance with international humanitarian law ["**IHL**"], and (2.3) international Human Rights Law ["**HRL**"]. Consequently, (2.4) Rasasa cannot be ordered to dismantle and remove the WALL.

2.1 The WALL was lawfully developed and deployed to combat an organized armed group within Rasasa

Weapons are equipment supplied by States to their armed forces so that, in times of armed conflict, they may use these to take legitimate action against an enemy attack.[50] Since (2.1.1) Rasasa is engaged in a non-international armed conflict with a well-organized militia, (2.1.2) the development and deployment of the WALL is a lawful measure taken to combat these insurgents under IHL.

2.1.1 Rasasa is in a non-international armed conflict with a well-organized group of insurgents

According to caselaw, an "armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups".[51] Two elements have been extracted from this definition in order to distinguish non-international armed conflicts from mere "unorganized and short-lived insurrections [...] which are not subject to international humanitarian law",[52] namely: (2.1.1.1) the organization of the parties, and (2.1.1.2) the intensity of hostilities.

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[50] International Committee of the Red Cross ["**ICRC**"], *Weapons*, How does law protect in war? - Online casebook, https://casebook.icrc.org/glossary/weapons.

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

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

2.1.1.1 The 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.[53]

Reports of the Rasasan Border Police and the United Nations Office on Drugs and Crime ["**UNODC**"] documented that in early 2017 the previously unorganized Adawan bandits had used their profits to create a "structured" and "well-armed militia" with headquarters of operations in Rasasa.[54] Eyewitnesses also stated that the attacks carried out by the militia reflected "a high level of prior planning and training."[55] Thus evidencing how mere acts of banditry escalated in early 2017 to an armed conflict at the hands of an organized militia.

2.1.1.2 The intensity of hostilities

As for the intensity of hostilities, factors that must be analyzed include: the length or protracted nature of the conflict and the seriousness of armed clashes, the increase in number of governmental forces and the type of weaponry used,[56] the destruction of property, and the existence of casualties.[57]

Over a period of three years,[58] Rasasan high-level police task forces have been ineffective in countering a heavily armed militia equipped "with military-grade weapons".[59]

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[53] *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***"].

[54] *SAF,* ¶¶34, 35.

[55] *Ibid,* ¶36.

[56] *Prosecutor v. Miloševic,* Trial Chamber Decision, ¶¶28, 30, 31.

[57] *Prosecutor v. Limaj et al.,* ¶¶134, 142; See also: *Prosecutor v. Ljube Boškoski and Johan Tarculovski,* Trial Chamber Judgement, ICTY, IT-04-82-T (10 July 2008) ¶177.

[58] *SAF* ¶¶34, 35.

The simultaneous attacks of nine Rasasan Border Police stations which left 21 fatal casualties, and the continuous assault and killing of Rasasan villagers[60] evidence this emergency. All of these facts indicate that the intensity of hostilities between Rasasa and the organized militia has escalated to an armed conflict.

Conclusively, since Rasasa is in a non-international armed conflict with the organized armed militia, the development and deployment of the WALL constitutes a lawful measure under IHL.

2.1.2 The development and deployment of the WALL is lawful under IHL

States have the freedom to choose the means and methods of warfare of their liking, as long as they do not contravene international law,[61] in particular IHL.[62] Legal reviews must be conducted to assess whether weapons based on emerging technologies in the area of autonomous weapons systems [**"AWS"**] would be prohibited by rule of international law.[63]

The International Committee of the Red Cross [**"ICRC**"] has emphasized that reviews should include technical descriptions of the functions of the weapon, and consider a wide range of expertise and viewpoints.[64] Furthermore, the authorities responsible for developing the new weapon should "order any tests or experiments needed to carry out and

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[59] *SAF* ¶¶29, 34, 35.

[60] *SAF* ¶¶28, 36.

[61] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C.J. Reports 1996, 226. ¶78. ["**Nuclear Weapons**"].

[62] UN Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, *Draft Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, (Report of the Secretariat, 21 Aug. 2019) ¶17.

[63] *Ibid.*

[64] *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 IRRC 931 – 956 (2006).

complete the review from the relevant government departments or external actors as appropriate."[65]

Rasasa conducted a thorough review of the WALL's functions which included the participation of leading government and private sector scientists and engineers from all six CHC Member States.[66] Over two years it was subjected to thousands of computer simulations and field tests under the close supervision of police, military, and engineering experts from both Rasasan and Adawan governments.[67] Additionally, Rasasan government advisers reviewed its compliance with international law, and scientific conclusions which reflected the WALL's ability to function in consistency with international law were presented. [68]

Conclusively, the WALL constitutes a measure lawfully developed to combat an organized armed group.

2.2 The development and deployment of the WALL is consistent with IHL

AWS must be capable of complying with the principles of IHL.[69]. Rasasa submits that the WALL complies with the principles of (2.2.1) precautions in attack, (2.2.2) proportionality, and (2.2.3) distinction, thus it is lawful under IHL.[70] In fact, "an attack executed by autonomous weapons would have many advantages in terms of distinction, proportionality and precautions over an attack directly executed by human beings."[71]

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[65] *Ibid,* 953.

[66] *SAF*, ¶21.

[67] *SAF*, ¶23.

[68] *SAF* ¶¶23, 25.

[69] N. Davison, *A legal perspective: Autonomous weapon systems under international humanitarian law*, UNODA OCCASIONAL PAPERS No. 30, 5 – 18 (November 2017).

[70] *ICRC, IHL and the Challenges of Contemporary Armed Conflicts*, Report (November 22, 2019).

[71] M. Sassòli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 NAVAL WAR COLL REV 308 – 340 (2014) ["**Sassòli – Autonomous Weapons**"].

2.2.1 Precautions in attack

Under CIL, precautions in attack to avoid or minimize incidental loss of civilian life must only be taken if they are feasible.[72] The standard of "feasibility" refers to the possibilities available to the human operating the machine.[73] Thus, because in the programming of machines human life is not at risk, AWS allow for additional precautions to be taken.[74]

All feasible precautions were taken by Rasasa to ensure that the WALL would not cause loss of civilian life, injury to civilians or damage to civilian objects.[75] Furthermore, the Rasasan Border Police established a telephone and internet hotline that allow members of the public to communicate any concerns regarding the WALL.[76] Consequently, the WALL complies with this principle.

2.2.2 Proportionality

Proportionality requires that "the harm to civilians be measured, prior to the attack, against the anticipated military advantage to be gained from the operation."[77] Programming AWS to respect this principle has "the advantage of obliging States to agree on how exactly proportionality must be calculated."[78] Furthermore, the standard applicable to AWS is not faultlessness, but rather the degree of compliance that would be expected from an average soldier.[79]

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[72] *ICRC, Customary IHL - Rule 15. Principle of Precautions in Attack*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15.

[73] *Sassòli – Autonomous Weapons*, 339.

[74] *Ibid*, 336.

[75] *SAF*, ¶¶19 – 25.

[76] *SAF*, ¶42.

[77] Report of the Special Rapporteur on extra judicial, summary or arbitrary executions, Christof Heyns, UN. Doc. A/HRC/23/47C (UNGA, 9 Apr. 2013) 13 ["**UNGA A/HRC/23/47C**"].

[78] *Sassòli – Autonomous Weapons.*

[79] *UNGA A/HRC/23/47C*, 14.

In the development of the WALL, special attention was paid to whether it "might deploy deadly force when the situation does not warrant such response."[80] Testing results concluded that it "would mistakenly use excessive force no more than once in two hundred million encounters",[81] thus evidencing the WALL's ability to comply with this principle better than an average soldier.[82] A question further evidenced by the fact that, out of a total of 105 occasions, no injuries have been reported to have occurred as a result of the measures taken by the WALL.[83]

2.2.3 Distinction

Distinction seeks to minimize the impact of armed conflict prohibiting the targeting of civilians and indiscriminate attacks.[84] In this regard, "A robot must be able to sense all the necessary information in order to distinguish between targets in the same manner as a person"[85] meaning that the degree of precision expected must equal the standard of a human soldier. Special Rapporteur Heyns has stated that machines may offer increased precision and make less mistakes than humans.[86]

The WALL features advanced machine learning algorithms developed from a vast quantity of data gathered from law enforcement officials of 11 different States, and meticulously "tagged" by teams of software engineers.[87] This ensures that the WALL accurately distinguishes between legitimate and unlawful targets even more precisely than a human. Consequently, the WALL's advanced technology allows it to act in accordance with the principle of distinction.

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[80] *SAF*, ¶25.

[81] *Ibid.*

[82] *Sassóli – Autonomous Weapons*, 310.

[83] *C&C*, ¶4.

[84] *ICRC, Customary IHL - Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7.

[85] *Sassòli – Autonomous Weapons*, 327.

[86] *UNGA A/HRC/23/47C*, 13.

[87] *SAF*, ¶20.

In light of the arguments presented, Rasasa submits that the WALL's development and deployment is lawful under the principles of IHL.

2.3 The WALL complies with HRL

The ICJ has stated that "the protection offered by human rights conventions does not cease in case of an armed conflict."[88] The development and deployment of the WALL by Rasasa is in conformity with HRL because it (2.3.1) does not breach the right to life, and (2.3.2) constitutes a measure which suspends obligations under the International Covenant on Civil and Political Rights.

2.3.1 The WALL does not breach the right to life

Under Article 6 of the International Covenant on Civil and Political Rights ["**ICCPR**"], "States parties must respect the right to life and have the duty to refrain from engaging in conduct resulting in arbitrary depravation of life."[89] The ICJ has stated that in armed conflicts the protection of this right must be assessed in relation to IHL, as it is the applicable *lex specialis* in these cases.[90] Thus, since the WALL has the ability to comply with the principles of IHL, its deployment is not a conduct which would result, *per se,* in an arbitrary depravation of life. Furthermore, since no casualties or injuries are known to have occurred as a result of the installation of the WALL,[91] it has not breached the right to life under Article 6 of the ICCPR.

2.3.2 The WALL is a measure that suspends obligations under Article 4 of the ICCPR

In times of war, parties to the ICCPR[92] may take measures which suspend obligations contained in the Covenant under its Article 4.[93] Since the WALL is not

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[88] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 136, ¶106.

[89] UN Human Rights Committee, *General Comment No. 36 on article 6 of the ICCPR, on the right to life*, CCPR/C/GC/36 (30 Oct. 2018).

[90] *Nuclear Weapons*, ¶25.

[91] *C&C*, ¶4

[92] *SAF*, ¶60.

[93] *Nuclear Weapons*, ¶25.

inconsistent with other obligations under international law, and Rasasa is in an armed conflict with a well-organized militia,[94] the WALL constitutes a lawful measure which suspends the State's obligations in relation to the Covenant.[95]

2.4 Rasasa cannot be ordered to dismantle and remove the WALL

The means of reparation contemplated by the ARSIWA serve to amend an injury caused as a result of the commission of internationally wrongful acts.[96] Rasasa submits that it cannot be ordered to dismantle and remove the WALL because it has not committed such acts.

Article 2 of ARSIWA prescribes that for a State to be held responsible for the commission of internationally wrongful acts, it must have breached an international obligation binding upon it.[97] According to the commentary to ARSIWA, "it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation."[98]

As aforementioned, the WALL is a weapon that was lawfully developed and deployed by Rasasa to combat an armed group of insurgents within its territory, consistent with IHL and HRL. In other words, Rasasa has not breached any primary rule binding upon it by developing and deploying a lawful weapon during an armed conflict. Consequently, Rasasa cannot be ordered to dismantle and remove the WALL.

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[94] *SAF* ¶¶34, 35.

[95] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UN Treaty Series, vol. 999, 171, Article 4 (1).

[96] 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 31 ["**ARSIWA**"].

[97] *ARSIWA*, Article 2.

[98] Commentaries to the Draft Articles on State Responsibility (I.L.C. Yearbook 2001-II) Pt. II, 54, ¶2. ["**Commentaries ARSIWA**"].

3 ADAWA'S CLAIM THAT RASASA'S HELIAN TARIFFS VIOLATE THE CHC TREATY FALLS OUTSIDE THE COURT'S JURISDICTION OR IS INADMISSIBLE; IN ANY CASE, THE IMPOSITION OF THE TARIFFS DID NOT VIOLATE THE CHC TREATY

Adawa's claim that Rasasa's Helian tariffs on Helian hyacinths[99] violate the CHCT (3.1) fall outside the jurisdiction of the ICJ, or (3.2) are inadmissible. In any case, (3.3) the tariffs were justified by ESI and (3.4) compensation should not be awarded.

3.1 Adawa's claim falls outside the jurisdiction of the ICJ

Adawa's claim (3.1.1) is governed primarily by the GATT and as (3.1.2) the WTO has exclusive jurisdiction over the GATT, this matter falls outside the competence of the ICJ.

3.1.1 The GATT is the main treaty that governs this claim

The VCLT's regulation on the application of successive treaties relating to the same subject matter dictates that, when all parties to an earlier treaty are parties to a latter one, the latter must prevail in conflicts of law.[100] Both the GATT and the CHCT relate to international trade law, and all the parties to the CHCT[101] later became members of the GATT.[102] Therefore, the relationship of the Dispute Settlement Understanding, ["**DSU**"] and the GATT to the CHC is of *lex posteriori*, as the former treaties supersede the previous one in those provisions where they are incompatible.

3.1.2 The WTO has exclusive jurisdiction over its agreements

Under Article 23 of the DSU, WTO Members, when seeking redress for an obligation's violation, shall have recourse to the rules and procedures therein contained.

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[99] *SAF*, ¶¶33,61.

[100] *VCLT*, Article 30.3; M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the ILC. Un. Doc. A/CN.4/L.682.2006 ¶251 – 252 [**ILC Fragmentation**].

[101] *SAF*, ¶¶10,12.

[102] *C&C*, ¶5.

This clause grants the WTO exclusive jurisdiction over WTO agreements,[103] such as the GATT. As this claim is governed predominantly by the GATT, the ICJ's jurisdiction is precluded by the WTO's exclusive one.

3.2 Alternatively, Adawa's claim is inadmissible

Rasasa submits that this Court should declare this case inadmissible as (3.2.1) the specialized forum is the appropriate one to review the case and (3.2.2) in attention to general principles of international law.

3.2.1 The specialized forum is the appropriate one to review the case

The doctrine of *forum non conveniens* establishes that the more appropriate forum should be the one to adjudicate the case,[104] allowing the ICJ to decline jurisdiction.[105] In such a determination, the efficiency in the administration of justice and the institutional contexts are decisive criteria.[106] As the WTO's prompt,[107] specialized, and technical[108] system is more appropriate than the non-specialized ICJ to adjudicate this tariffary issue, this Court should declare this claim inadmissible.

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[103] T. Graewart, *Conflicting Law and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*,1(2) CONTEMPORARY ASIA ARB. J. 293, 294 (2008) ["**Graewart 2008**"]; D. Steger, *The Jurisdiction of the World Trade Organization*, 98 ASILPROC 142-143 (2004).

[104] Spiliada Maritime Corp v. Cansulex Ltd, AC 460, House of Lords (UK) (1987).

[105] United Nations, Statute of the International Court of Justice, 18 April 1946, Article 36.6; K. Kwak & G. Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Tarde Agreements*, 41 ACDI 102 (2003).

[106] J. Pauwelyn & L. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*. 77 CORNELL INTL LJ 110 (2009) 114.

[107] 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), Articles 3.3 and 20 ["**DSU**"].

[108] *ILC Fragmentation*, ¶8.

3.2.2 Adawa's conduct of forum shopping opposes general principles of international law

Although States have a choice of means as to how to settle their disputes,[109] they are nonetheless under an obligation to do so in good faith,[110] as it is a general principle of international law.[111] Adawa's conduct of erratically instituting proceedings against Rasasa, first before the WTO[112] and then before the ICJ,[113] is in bad faith because (3.2.2.1) Adawa's forum shopping constitutes an abuse of rights, and (3.2.2.2) Adawa is estopped from initiating further proceedings.

3.2.2.1 Adawa's forum shopping constitutes an abuse of rights

An abusive exercise by a State of its own treaty rights results in the breach of the treaty rights of the other State,[114] as they are "exercised intentionally for an end which is different from that for which the right has been created".[115] Forum shopping constitutes such an abuse as "rational litigants exploit existing avenues for litigating cases to their own advantage".[116] Adawa incurred in this conduct by instituting these proceedings before the ICJ in consideration of the remedy sought,[117] after requesting the establishment of a WTO panel. Adawa abused its right to seek justice by instituting proceedings erratically against Rasasa, based on its own convenience and to the Respondent's disadvantage.

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[109] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Articles 33, 95 ["**UN Charter**"].

[110] Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I. C. J. Reports 2000,12, ¶53.

[111] UN Charter, Article 2.2; *VCLT*, Articles 26, 31; Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, 253, ¶46.

[112] *SAF*, ¶47.

[113] *SAF*, ¶57.

[114] United States - Import Prohibition of Certain Shrimp and Shrimp Products [1998] WT/DS58/AB/R ¶158.

[115] A. Kiss, "Abuse of Rights" in *Max Planck Encyclopedias of International Law*, 2006.

[116] L. SALLES, FORUM SHOPPING IN INTERNATIONAL ADJUDICATION: THE ROLE OF PRELIMINARY OBJECTIONS 2 (2014).

[117] *SAF*, ¶57.

3.2.2.2 Adawa is estopped from initiating further proceedings

Estoppel precludes States from adopting different, subsequent positions on the same issue.[118] Adawa has made clear and consistent representations through authorized State agents[119] of giving the WTO competence, by requesting and assisting to consultations with Rasasa pursuant to the DSU,[120] and subsequently requested the establishment of a WTO panel.

This created the legitimate expectation in Rasasa that Adawa invested the WTO panel with competence. Thus, Adawa is estopped from initiating proceedings before the ICJ, as it waived the possibility of other defining judgements over the matter.

3.3 In any case, Rasasa's imposition of tariffs does not violate the GATT or the CHCT

Rasasa is exempted from the prohibition to impose custom duties on Helian products contained in the CHCT[121] and the GATT,[122] because Rasasa can take any actions which it considers necessary for the protection of its ESI.[123] This exception (3.3.1) is not justiciable, and even if it was, (3.3.2) the tariffs are necessary to protect Rasasa's ESI.

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[118] T. Cottier & J. Müller, *Estoppel*, MPEPIL (2007).

[119] Chagos Marines Protected Area (Republic of Mauritius v. United Kingdom), Award, 18 March 2015, 162 International Law Reports, 249, ¶438.

[120] *SAF*, ¶45.

[121] Treaty Establishing the Crosinian Helian Community of 20 June 1969, Article 3 ["**CHCT**"].

[122] GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) Article II.7 ["**GATT**"], in relation to *SAF* ¶12.

[123] *GATT*, Article XXI.b.

3.3.1 The ESI exception is self-judging and hence non-justiciable

Self-judging clauses are "provisions in international legal instruments by means of which States retain their right to [...] derogate from an international obligation based on [...] their subjective appreciation."[124] Thus, they cannot be judged in legal forums.[125]

The GATT's exception is self-judging, as it is up to each State to take the actions "which it considers" necessary for the protection of its ESI.[126] The Court has argued that, considering the terms used in that treaty, it could not adjudge it.[127] The same formula is employed by the CHCT when referring to ESI.[128]

The nature of this exception is evident from the ordinary meaning of the terms of the treaty. It is also reinforced by State practice[129] stemmed from the GATT[130] and its *travaux preparatòires*.[131] Furthermore, caselaw on these clauses[132] have evidenced that they rely on the rationale that "specific interests that are considered directly relevant to the protection of a State from such external or internal threats will depend on the particular

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

[125] D. McGoldrick, *The Boundaries of Justiciability*, 59 ICLQ 981 (2010). Cited in I. Bogdanova, *Adjudication of the GATT security clause: to be or not to be, this is the question,* in WORLD TRADE INSTITUTE WORKING PAPER (01/2019) p. 4.

[126] *GATT* Article XXI (b).

[127] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Reports 1986, ¶222. ["**Nicaragua**"].

[128] *CHCT* Article 22(a).

[129] *VCLT*, Article 31.3(b) and 32.

[130] World Trade Organization ["**WTO**"], *WTO Analytical Index: Guide to WTO Law and Practice, Article XXI – Security Exceptions*.

[131] Second Session of the Preparatory Committee of the UN Conference on Trade and Employment, Report of the Legal Drafting Committee of the Tariff Agreement Committee on Part II of the General Agreement.

[132] Ireland v. United Kingdom, ECTHR, Ser. A, N°25, Judgement of 1 January 1978, ¶207.

situation and perceptions of the State in question".[133] Consequently, the ICJ cannot adjudge what is left to the sovereign discretion of Rasasa.

3.3.2 The tariffs were necessary to protect Rasasa's ESI

Even if this Court considers the tariffs to be justiciable, they fulfill the requirements for exceptional measures to be applied under the GATT and CHCT.

3.3.2.1 The measures were taken in time of war or emergency in international relations

The GATT establishes that exceptional measures might be "taken in time of war or other emergency in international relations."[134] As the WTO stated in *Russia-Transit*, when these situations are chronologically concurrent with the measure taken, "there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate (its) necessity".[135]

The tariffs adopted by the Rasasan Parliament in January 2018[136] were concurrent with the war that escalated in 2017.[137] Thus, they are lawful under the GATT.

Alternatively, this case meets the standard of being an emergency in international relations. These are situations of "heightened tension or crisis, or of general instability engulfing or surrounding a State",[138] which the violent and persistent crimes[139] produced along the border by organized Adawan gangs configure.

3.3.2.2 Under the CHCT, the measures taken were necessary to preserve Rasasa's ESI

ESI relate "to the quintessential functions of the State, namely, the protection (…) from external threats, and the maintenance of law and public order internally."[140] The

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[133] *Russia – Measures Concerning Traffic in Transit,* WT/DS512/R, 5 April 2019, ¶7.131 **["Russia – Transit"]**.

[134] *GATT*, art XXI (b) (iii).

[135] *Russia – Transit*, ¶7.108.

[136] *SAF*, ¶43.

[137] See Pleading 2.

[138] *Russia – Transit*, ¶7.76

[139] *SAF*, ¶28.

[140] Russia-Transit, ¶7.130.

Rasasan border was threatened by the commerce of misappropriated Helian hyacinths, and the use of these profits to fund the militias,[141] posing an external threat to public order.

Additionally, as required by the CHCT, the tariffs are necessary[142] to protect Rasasa's ESI as Rasasa must do everything in its power to prevent the financial strengthening of this militia, which includes diminishing their income based on stolen Helian products.

In any case, Adawa has the burden of proof under the security clause, as Rasasa cannot be required to furnish information the disclosure of which it considers contrary to its ESI.[143]

3.4 Compensatory damages should not be awarded

Financial compensatory damages should not be awarded in the present case because (3.4.1) the DSU's remedies apply specifically. However, (3.4.2) if ARSIWA was to be applied, this claim does not fulfill the requisites for compensation.

3.4.1 The application of ARSIWA is precluded by *lex specialis*

Under Article 55 of ARSIWA, its dispositions do not apply where the matter is governed by special rules of international law.[144] Since the DSU contains a special regime of remedies,[145] the application of compensation,[146] such as that in ARSIWA, is precluded.

The language of the DSU indicates that only the remedies contained therein are to be applied.[147] Likewise, the DSU excludes financial compensation because it is inconsistent

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[141] *SAF*, ¶35.

[142] *CHCT*, Article 22.b; *Nicaragua*, ¶282.

[143] CHCT, Article 22.a; GATT, Article XXI.a.

[144] This is also a "widely accepted maxim of legal interpretation". See: *ILC Fragmentation*, ¶56.

[145] *DSU*, Article 22.

[146] *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW (21 January 2000).

[147] *Korea – Measures Affecting Government* Procurement, WT/DS163/R (19 June 2000) ¶7.96; *Commentaries ARSIWA*, 140, ¶3.

with principles of international trade law, such as Most Favoured Nation and the centrality of liberalization of trade though discontinuation of measures.[148]

3.4.2 This claim does not fulfil the requisites for compensation

The requirements for compensation are not met, as (3.4.2.1) compensation for loss of profits requires standing based on diplomatic protection; and (3.4.2.2) this case does not fulfil the standard for compensation.

3.4.2.1 Compensation for loss of profits of private individuals requires diplomatic protection

As the loss of profits was not of the State of Adawa, but of its farmers,[149] Adawa must invoke diplomatic protection in order to have *ius standi* before this Court.[150] However, its requisites are not met in the present case as local remedies have not been exhausted.[151] Hence, Adawa does not have standing to request compensation in the name of its nationals.

3.4.2.2 This case does not fulfill the standard for compensation for loss of profits

For compensation for loss of profits to be awarded, the loss of profits must be "established"[152] or "reasonably anticipated".[153] This standard is not met in the present case because of a multiplicity of reasons that could account for Adawan farmer's loss of profits:[154] the considerable losses of hyacinth after Hurricane Makan,[155] the illegal trafficking of Helian products,[156] the uncertainty in the region produced by the rise in crime

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[148] B. Mercurio, *Why compensation cannot replace trade retaliation in the WTO Dispute Settlement Understanding*, 8 WORLD TRADE REVIEW 16 – 17 (2009).

[149] *SAF*, ¶46.

[150] *Commentaries ARSIWA*, 99, ¶5.

[151] United Nations, Draft articles on Diplomatic Protection, 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), Article 14.

[152] ARSIWA, Article 36.2.

[153] Asian Agricultural Products v. Sri Lanka, (1990) 4 ICSID Reports 250.

[154] *SAF*, ¶46.

[155] *SAF*, ¶16.

[156] *SAF*, ¶28.

rates,[157] among others, could account for this commercial downturn. Thus, the necessary causal link[158] between Rasasa's tariffs and the loss of profits is flawed. Moreover, the State of Adawa has contributed to the injury[159] by not effectively preventing the illegal trafficking and rise in crime rates produced by its nationals.

For all the foregoing reasons, compensation should not be awarded.

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[157] *SAF*, ¶17.

[158] J. CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 523 (2013).

[159] *ARSIWA*, Article 39.

4 IF THE COURT WERE TO FIND THAT ADAWA'S CLAIMS COME WITHIN THE JURISDICTION OF THE COURT, RASASA SUBMITS THAT ADAWA'S ARREST AND DETENTION OF DARIAN GREY CONSTITUTE INTERNATIONALLY WRONGFUL ACTS, AND THAT SHE MUST BE IMMEDIATELY REPATRIATED TO RASASA

Rasasa respectfully submits that (4.1) its counterclaim may be deemed admissible, (4.2) the arrest and detention of Darian Grey by Adawa breaches international law, and (4.3) Darian Grey must be immediately repatriated to Rasasa.

4.1 The counterclaim asserted by Rasasa is admissible

Under Article 80 of the Rules of the Court, for a counterclaim to be admissible,[160] it must come within the jurisdiction of the Court and be directly connected with the subject-matter of the claim of the other party.

If the Court were to find that it has jurisdiction in the present case under Article VI of the TOB,[161] the same basis fulfills the jurisdictional requirement.[162] On the contrary, if it declares that it lacks jurisdiction on that basis, this counter-claim shall be considered withdrawn.[163]

Additionally, the agents of the Parties have agreed that the counterclaim is directly connected with the subject matter of at least one of the main claims.[164]

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[160] Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, ¶33.

[161] *TOB*, Article VI.

[162] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, ¶32.

[163] S. Murphy, *Counter-Claims in The Statute of the International Court of Justice - A Commentary*, in A. ZIMMERMAN AND C.TAMS (EDS), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1104-1134, ¶72, 73 (2019) **["Murphy"]**.

[164] *SAF*, ¶9.

4.2 The arrest and detention of Darian Grey by Adawa breaches international law

The arrest and detention of Darian Grey breaches international law because (4.2.1) Adawan national courts cannot exercise jurisdiction over Minister Grey under CIL, and (4.2.2) her immunities must be respected under the Rome Statute

4.2.1 Adawan national courts cannot exercise jurisdiction over Minister Grey under CIL

Adawan national courts cannot exercise jurisdiction over Minister Grey because (4.2.1.1) Ministers of Foreign Affairs enjoy absolute immunity before national courts, and (4.2.1.2) the involvement of the ICC does not affect the application of such immunities before national courts.

4.2.1.1 Ministers of Foreign Affairs enjoy absolute immunity ratione personae before national courts

Under CIL, Ministers of Foreign Affairs enjoy absolute immunity *ratione personae* from criminal jurisdiction and full inviolability before national courts of other States.[165] The absolute nature of this immunity means that it bars the exercise of criminal jurisdiction in relation to any acts performed by an individual[166] as long as it remains in office. Accordingly, this type of immunity extends to all actions performed by the minister, whether they were performed prior or while in office.[167]

Immunity *ratione personae* is based on the principle of sovereign equality, so as to enable State agents to perform their functions without harassment by other States.[168] Therefore, in determining the existence of immunities *ratione personae*, the decisive issue

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[165] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, I.C.J. Reports 2002, ¶54 **["Arrest Warrant"]**.

[166] D. Akande and S. Shah, *Immunities of State Officials, International Crimes and Foreign Domestic Courts*, 21 EJIL 819 (2011). **["Akande & Shah"]**.

[167] *Arrest Warrant*, para. 54 & 55 ; ILC, Document No. A/CN.4/661, 4 April 2013, ¶¶72, 75.

[168] *Arrest Warrant*, ¶53; Certain Questions of Mutual Assistance in Criminal Matters, (Djibouti v. France), Judgment, I.C.J. Reports 2008, ¶170; *Akande & Shah*, 818.

is not the nature of the alleged activity or when it was carried out, but rather whether the State agent concerned is in office.[169]

Consequently, the arrest and detention of Minister Grey, by the Adawan courts,[170] constitutes a violation of the immunity *ratione personae* to which she is entitled.

4.2.1.2 The involvement of the ICC does not affect the application of personal immunities before national courts

Given that Rasasa is not a party to the Rome Statute[171] it is not bound by its provisions.[172] Therefore, Article 27(2) – which asserts the irrelevance of official capacity before the ICC – does not apply to Rasasan nationals.

It has been argued that customary immunities are not applicable before national courts when acting in cooperation with international tribunals.[173] The current state of practice shows that such a customary rule does not exist.

The determination of a rule of CIL requires the existence of general practice and *opinio juris*.[174] In the *Asylum* case, considering the alleged existence of a customary rule, the Court stated that: "*so much uncertainty and contradiction, so much fluctuation and*

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[169] *Akande & Shah*, 819.

[170] *SAF*, ¶¶51, 52.

[171] *SAF*, ¶13.

[172] *VCLT*, Article 34.

[173] International Criminal Court ["**ICC**"], The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09 OA2, 6 May 2019, para. 103 **["Jordan's Appeal"]**; 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, STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW, FICHL PUBLICATION SERIES (2012).; H. Van der Wilt, *The continuing story of the International Criminal Court and personal immunities*. in: Z. BURIĆ ET AL. LIBER AMICORUM FOR MIRJAN DAMAŠKA (PROVISIONAL TITLE) 2015 – 2048 (2016).

[174] ILC Rep. Official Records of the General Assembly, 70th Sess., Supp. No 10., UN Doc A/73/10, 124 **["ILC Report 70th"]**; North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, 20 February 1969, I.C.J. Reports 1969, ¶77.

discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions" made it impossible to discern a uniform practice accepted as law.[175]

In this subject-matter, the legislative practice of States[176] concerning the implementation of the Rome Statute into their national legislation is wide-ranging and diverse. Several countries only render immunities inapplicable when cooperating with the ICC in respect of officials of States parties to the Rome Statute and not in respect of officials of non-State parties.[177] Numerous others have established systems of consultations with the ICC, applicable before cooperating with it, regarding eventual conflicts of obligations with immunities before national courts.[178] Finally, some leave the decision to their respective national authorities.[179]

The ICC's own jurisprudence has been unstable on this matter. In the Malawi and Chad decisions the ICC adopted the view that "*customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest*" applicable to any act of cooperation by States.[180] This argument was later disregarded in the Democratic Republic of the Congo Decision, where the ICC relied on Resolution 1593 (2005) of the UN Security Council and not on custom for the exception to immunity.[181] In the South Africa decision, the ICC stated that it was: "*unable to identify a rule in customary international law that would exclude immunity for Heads of State [...]*

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[175] Asylum (Colombia v. Peru), Judgment, 20 November 1950, ICJ Reports 1950, 277.

[176] *ILC Report 70th*, 132.

[177] Ireland: 2006, ICC Act No. 30, art. 6.1; Iceland: 2003, Act on the ICC, art. 20.1; Malta: Extradition Act, art. 26S; United Kingdom: ICC Act, 2001 c. 17, Part 2, Supplementary provisions, Section 23.

[178] Australia: Act No. 41, 13 August 2002, art. 12.4; Liechtenstein: Act of 20 October 2004, art. 10.1 (b) and (c); Austria: Federal Act No. 135, 13 August 2002, Arts. 9.1, 9.3;

[179] Australia: International Criminal Court Act No. 41 of 13 August 2002, Art. 12.4; Denmark: Act of 16 May 2001 on the ICC, Art. 2.

[180] *ICC*, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-139-Corr, 13 December 2011, para. 43 & 44; ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-140-tENG, 13 December 2011, ¶13

[181] *ICC*, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-195, 9 April 2014, ¶29.

even when the arrest is sought on behalf of an international court, including, specifically, this Court."[182] In its May 2019 Judgment, the Court asserted that it agreed with the Malawi Decision.[183] This inconsistent jurisprudence highlights that the uniform practice required to establish a customary exception to immunities *ratione personae* before national courts does not exist.

Furthermore, the *obiter dictum* contained in the *Arrest Warrant* Case,[184] is often raised as an argument in favor of such an exception. Nonetheless, the latter would be subject to two conditions: first, that the instruments creating those tribunals expressly or implicitly remove the relevant immunity; and, second, that the State of the official concerned is bound by the instrument removing the immunity,[185] a condition which is not met in the present case.

Moreover, even publicists that support[186] this alleged customary exception have asserted that it is "not (yet) firmly entrenched and fortified."[187]

It is clear from the previous analysis that the practice is divergent to the extent that no uniform pattern of behavior can be observed, and thus, no corresponding rule of CIL can be said to exist.[188]

4.2.2 The immunities of Minister Grey must be respected under the Rome Statute

Adawa, as a party to the Rome Statute,[189] was obliged to respect the immunities of Minister Grey under (4.2.2.1) Article 98, and (4.2.2.2) Article 97(c) of the said Statute.

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[182] *ICC*, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision No. ICC-02/05-01/09-302, 6 July 2017, ¶68.

[183] *Jordan's Appeal*, ¶113.

[184] *Arrest Warrant*, ¶61.

[185] D. Akande, "International Law Immunities and the International Criminal Court," *The American Journal of International Law* 98, no. 3 (2004): 407–33.

[186] *ILC Report 70th*, 150 – 151.

[187] *ICC*, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Document No. ICC-02/05-01/09-359, 18 June 2018, ¶8.

[188] Fisheries (United Kingdom v. Norway), Judgment, 18 December 1951, I.C.J. Reports 1951, 131.

4.2.2.1 *Minister Grey cannot be surrendered to the Court without a waiver of immunity by Rasasa*

Under Article 98 of the Rome Statute, the ICC is called to determine the existence of an international law obligation relating to immunities and request the respective waiver of immunity if necessary. It is not entitled to resolve a conflict arising between two opposing obligations[190] and cannot put a cooperating State in the position of having to violate its international obligations with respect to immunities.[191] Additionally, according to Rule 195(1) of the Rules of the ICC, Adawa was under the obligation to provide that Court with any relevant information regarding the conflict of immunities.

This reasoning is consistent with the interpretative principle of effectiveness, under which all applicable provisions of a treaty must be read in a way which gives them meaning.[192] As such, Article 98 stands as protection to the rights of States non-parties to the Rome Statute in regards to their immunities.

The ICC should have noted that Adawa was obliged to respect the immunity of Ms. Grey before national courts and the immunities and inviolability owed to Rasasa under article 32 of the CHCT.[193] Consequently, before issuing an arrest and surrender request, the ICC would have had to obtain the waiver of immunity from Rasasa.

4.2.2.2 *In the alternative, Adawa was obliged to consult the Court in regard to the arrest of Ms. Grey*

Under Article 97(c) of the Rome Statute, Adawa was under the obligation to consult with the Court on how to proceed with the cooperation request, given that it required

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[189] *SAF*, ¶13

[190] D. Jacobs, *The Frog that Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation. Forthcoming*, in C. STAHN, THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 21 (2014).

[191] O. TRIFFTERER, & K.AMBOS (EDS.), ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 2120 (2016).

[192] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment, I.C.J. Reports 1949, 24.

[193] *CHCT*, Article 32.

Adawa to breach the pre-existing treaty obligation contained in Article 32 of the CHCT.[194] That provision must be interpreted broadly as to encompass the entire period of presence in the hosting State for reasons of the annual meeting.[195]

4.3 Darian Grey must be immediately repatriated to Rasasa

The arrest and detention of Darian Grey constitutes an internationally wrongful act.[196] Those actions are attributable to Adawa[197] as they were performed by the Novazora police and judicial organs of that State,[198] and, they amount to a breach of the aforementioned obligations.

Hence, Rasasa respectfully requests this Court to declare that Adawa must immediately release Ms. Grey, and repatriate her to Rasasa.[199]

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[194] *SAF*, ¶49; *CHCT*, Article 32.

[195] United Nations Juridical Yearbook 2007, UN. Doc. ST/LEG/SER.C/45, Part II, Chapter VI, 403.

[196] *ARSIWA*, Article 2; United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, ¶90. ["**Consular Staff**"].

[197] *ARSIWA*, Article 4; *Commentaries ARSIWA*, 40; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, 87, ¶62.

[198] *SAF*, ¶51.

[199] *ARSIWA*, Article 35; *Commentaries ARSIWA*, 96; *Consular Staff*, ¶¶93, 95. ,

PRAYER FOR RELIEF

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

1. That the ICJ lacks jurisdiction over Adawa's claims, given that Adawa is not a party to the 1929 Treaty of Botega.
2. That Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is consistent with international law.
3. That Adawa's claim that Rasasa's Helian tariffs violate the CHC Treaty falls outside the ICJ's jurisdiction or is inadmissible. In the alternative, whether the imposition of the tariffs did not violate the CHC Treaty.
4. That Adawa's arrest and detention of Darian Grey constitutes an internationally wrongful act, and whether she must be immediately repatriated to Rasasa.