275 R

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE 2020 PHILIP C. JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

THE CASE CONCERNING THE HELIAN HYACINTH

THE STATE OF ADAWA

(APPLICANT)

v.

THE REPUBLIC OF RASASA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

2020

TABLE OF CONTENTS

INDEX OF AUTHORITIES ... iv

STATEMENT OF JURISDICTION ... xiii

QUESTIONS PRESENTED ... xiv

STATAMENT OF FACTS ... xv

SUMMARY OF PLEADINGS ... xxi

PLEADINGS ... 1

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

A) Adawa is not a party to the Treaty of Botega ... 1

1) Bilateral treaties are not automatically succeeded ... 1

2) Additionally, the rule of automatic continuity of treaties establishing a territorial regime is not applicable ... 2

B) Rasasa did not acquiesce Adawa's claim of succession ... 4

C) The Court lacks jurisdiction over Adawa's claims ... 5

II) RASASA'S DEVELOPMENT AND DEPLOYMENT OF THE WALL ALONG THE BORDER BETWEEN ADAWA AND RASASA IS CONSISTENT WITH INTERNATIONAL LAW ... 5

A) The development of the WALL is not attributable to Rasasa ... 5

B) In any event, the development did not violate international law ... 6

1) No weapons review obligation exists under customary law ... 6

2) In any event, Adawa is barred from bringing this claim due to unclean hands 7

C) The deployment of the WALL is consistent with international law ... 7

1) The deployment is not a threat of use of force ... 7

2) In any event, it was an act of self-defense ... 8

D) The deployment is consistent with international humanitarian law ... 10

1) International humanitarian law is applicable ... 10

2) Rasasa complies with the principle of distinction, proportionality and precaution in attack ... 11

E) In any event, the WALL is consistent with human rights law ... 12

1) The ICCPR is not applicable ... 12

2) In any event, Rasasa did not violate the right to life ... 13

III) ADAWA'S CLAIM THAT RASASA'S HELIAN TARIFFS VIOLATE CHC TREATY FALLS OUTSIDE THE COURT'S JURISDICTION OR IS INADMISSIBLE; IN THE ALTERNATIVE, THE IMPOSITION OF THE TARIFFS DID NOT VIOLATE THE CHC TREATY ... 14

A) Adawa's claim falls outside the Court's jurisdiction ... 14

1) The WTO Dispute Settlement Understanding is *lex specialis* ... 14

2) Additionally, the WTO DSU is *lex posteriori* ... 15

3) The ICJ lacks jurisdiction over GATT disputes ... 16

B) Adawa's claim is inadmissible ... 16

1) Adawa's claim is inadmissible due to the principle of abuse of process ... 16

2) Additionally, Adawa's claim is inadmissible due to the principle of *lis pendens* 17

C) In the alternative, the imposition of Helian tariffs did not violate the CHC Treaty ... 18

D) Alternatively, the imposition of tariffs was a lawful countermeasure ... 20

1) Adawa violated international law ... 20

2) The course of action is reversible ... 20

3) The measure is proportional ... 20

4) Rasasa fulfilled its good faith obligations ... 21

IV) ADAWA'S ARREST AND DETENTION OF DARIAN GREY CONSTITUTE INTERNATIONALLY WRONGFUL ACTS, AND SHE MUST BE IMMEDIATELY REPATRIATED TO RASASA ... 21

A) Ms. Grey enjoys personal immunity ... 21

1) Adawa cannot rely on the Rome Statute to lift Ms. Grey immunity ... 22

2) There is no customary exception to immunity with respect to prosecution by international tribunals ... 23

3) There is no conflict between the *jus cogens* prohibition of war crimes and personal immunity ... 25

4) Rasasa's appointment of Ms. Grey did not constitute an abuse of rights ... 25

B) In any event, Adawa's arrest was inconsistent with international law ... 26

1) Adawa did not have jurisdiction to arrest Ms. Grey ... 26

2) Compliance with an arrest warrant does not preclude the attribution of responsibility ... 27

C) Ms. Grey must be immediately repatriated to Rasasa ... 28

V) PRAYER FOR RELIEF ... 28

INDEX OF AUTHORITIES

Multilateral Treaties

- Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Jun. 16, 2002. 2178 U.N.T.S. 137..........24
- Charter of the United Nations, 1945, 1 U.N.T.S. XVI. 8, 9
- European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222. 27
- Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, 1949, 75 U.N.T.S. 31. 26
- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949, 75 U.N.T.S. 85. .26
- Geneva Convention relative to the protection of civilian persons in time of war 1949, 75 U.N.T.S. 287. 26
- Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135. 26
- International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907..........3
- Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. ....14, 16, 18
- Protocol Relating to the Protection of Victims of International Armed Conflicts (Jun. 8, 1977), 1125 U.N.T.S. 3..........12
- Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331....15, 22

United Nations Documents

- Articles on Responsibility of States for Internationally Wrongful Act with commentaries, adopted by the ILC at its 53rd Sess., U.N. Doc. A/56/10 (2001). 19, 20, 27
- Draft articles on Succession of States in respect of Treaties with commentaries, adopted by the ILC at its 26º session, Yearbook of the International Law Commission, 1974, vol. II (part one). 3
- Draft Articles on the Law of treaties with Commentaries adopted by the ILC at its 18th Sess. Yearbook of the International Law Commission, 1966, vol. II.14,15
- G.A., A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004). 9
- Human Rights Committee, Casafranca v. Peru, U.N. Doc. CCPR/C/78/D/981/2001 (2003). 27
- Human Rights Committee, Consideration of State Reports, U.S., Doc. U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005)..........12
- Human Rights Committee, General comment No. 36, U.N. Doc CCPR/C/GC/36 (Oct. 30, 2018). 12, 13
- Int'l Law Comm'n, Draft conclusions on identification of customary international law with commentaries, A/73/10, (2018). 6, 21
- Int'l Law Comm'n, Rep. of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, (2006)..........14
- Int'l Law Comm'n, Yearbook of the ILC (1967), A/CN.4/L.118Add.1, 2 (Vol II).......... 21

- Int'I Law Comm'n, Yearbook of the ILC (1970), UN.Doc. A/CN.4/SER.A/1970Add.l (vol. II). 1
- Int'I Law Comm'n, Yearbook of the ILC (1971), UN.Doc. A/CN.4/SER.A/1971/Add.l (vol. II) (Part 2). 1
- J. Crawford (Special Rapporteur on State Responsibility), *Third Report on State Responsibility*, U.N. Doc A/CN.4/507/Add.3 (Aug. 4, 2000). 14
- J. Dugard (Special Rapporteur on Diplomatic Protection), Sixth Report on Diplomatic Protection, U.N. Doc A/CN.4/546 (Aug. 11, 2004)....................7
- lnt'I Law Comm'n, Rep. on the Work of Its Sixty-Sitxth Session, U.N. Doc. A/69/10 (2012). 26
- R. A. Kolodkin (Special Rapporteur on immunity of State officials from foreign criminal jurisdiction), *Second report on immunity of State officials from foreign criminal jurisdiction*, U.N. Doc. A/CN.4/631 (Jun. 10, 2010). 24
- S.C., Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/928 (2015). 8
- S.C., Letter dated 7 October 2001, U.N.Doc.S/2001/946 (Oct. 7, 2001). 9
- S.G., Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary General, UN Doc. S/2014/695 (2014). 9
- S.G., Letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/745 (2015). 9
- U.N. Office of the High Commissioner on Human Rights, United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, (1990). 13

United Nations General Assembly Resolutions

- G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988)....................27

United Nations Security Council Resolutions

- S.C. Res. 1593 (2005). 24
- S.C. Res. 827 (1993). 24
- S.C. Res. 1368 (Sep. 12, 2001). 9
- S.C. Res. 1373 (Sept. 28, 2001). 9

International Court of Justice Cases & Advisory Opinions

- Ambiatelos Case, (Greece. v. U.K.) 1952 I.C.J 89 (Jul. 1) (Dissenting Opinion of Judge Hsu Mo). 14
- Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E) 2019 I.C.J (Jun. 14) (Dissenting opinion of Judge ad-hoc Cot)....................17
- Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)1960 I.C.J. 192 (Dec. 23). 4
- Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).7, 21, 22
- Asylum (Colom. v. Peru) 1950 I.C.J. 266 (Nov. 20). 1

- Certain Iranian Assets (Iran v. U.S.) Preliminary Objections Judgment 2019 I.C.J. (Feb.13)..........16
- Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9)..........20
- Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.) 1984 I.C.J. 246 (Jan. 20)..........5
- Fisheries (United Kingdom v. Norway) 1951 I.C.J. 116 (Dec. 18)..........4
- Gabčíkovo-Nagymaros Project (Hung. v. Slo) 1997 I.C.J. 7 (Sep. 25)..........3, 4, 14, 19, 20, 27
- Immunities and Criminal Proceedings (Eq. Guinea v. Fr.) Preliminary Objections 2018 I.C.J. 292 (Jun. 6)..........16
- Jadhav Case (India v. Pak.) 2019 I.C.J. (Jul. 17)..........16
- Jurisdictional immunities of the State (Ger. v. Ita.), 2012 I.C.J 99 (Feb. 3) ..25
- Land, Island and Maritime Frontier Dispute (El Sal. v. Hond., Nicar. intervening) 1992 I.C.J. 331 (Sep.11)..........4
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. (Jul. 9) (Separate Opinion of Judge Higgins)..........8
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. (Jul. 9) (Separate Opinion of Judge Kooijmans)..........8
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. (Jul. 9) (Declaration of Judge Buergenthal)..........8
- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8)..........8, 11
- Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14 (Jun. 27)... 6, 7, 9, 10, 14, 19,
- North Sea Continental Shelf (Ger. v. Neth.), 1968 I.C.J. 3 (Apr. 26)..........6, 22
- Pulp Mills (Arg. v. Uru), 2010 I.C.J. 14 (Apr. 20)..........20
- Right of Passage over Indian Territory (Port. v. India) 1960 I.C.J. 6 (Apr. 12).1
- United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), 1980 I.C.J. 3 (May. 24)..........9, 20

Permanent Court of International Justice

- Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25)..........17
- Factory at Chorzow (Germ. v. Pol.), 1928, P.C.I.J. (Ser. A) No. 9 (Sept. 13).27
- Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26)..........15

Arbitral Awards

- Air Services Agreement (U.S. v. Fr.), 18 R.I.A.A. 416 (1946)..........20
- Bosh International, Inc. and B&P Ltd. Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award, (Oct. 25) 2012..........5
- CEMEX Caracas Investments B.V. and others v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, (Dec. 30) 2010..........22
- CME Czech Republic B.V. v. The Czech Republic, Partial Award, UNCITRAL arbitration proceedings, (Sep. 13) 2001..........17

- CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, (May. 12) 2005...18
- Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9 (Sep.5) 2008..18, 19
- Deutsche Telekom AG v. The Republic of India, Interim Award, UNCITRAL PCA Case No. 2014-10 (Dec. 13) 2017. 19
- Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, (Jun. 18) 2010. 5
- I.P. Busta & J.P. Busta v. The Czech Republic, Final Award, Arbitration institute of the Stockholm Chamber of Commerce, Case V 2015/014 (Mar. 10) 2017....17
- LG&E Energy Corp., LG&E Capital Corp., LG&E International INC. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on liability, (Oct.3) 2006. ..18
- S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, Award, ICSID Case No. ARB/77/2 (Dec. 15) 1977. 17
- SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the tribunal on objections to jurisdiction, ICSD Case No. ARB/01/13 (Aug. 3) 2003...17
- Naulilaa (Por. v. Ger.) 2 R.I.A.A. 1011 (1928). 19, 20
- Ampal-american Israel Corp., EGI-fund (08-10) Investors LLC, EGI-series Investments LLC, BSS-EMG Investors LLC, And Mr. David Fischer V. Arab Republic Of Egypt, ICSID Case No. ARB/12/11, Award (Feb. 1) 2016. 16

<u>International Human Rights Bodies and Tribunals</u>

- Al-Skeini & Others v. U.K., E.Ct.H.R. No. 55721/07 (Jul. 7, 2011). 12
- Banković v. Bulgaria, E.Ct.H.R. No. 52207/99 (Dec. 12, 2001)....................12
- Case of Al-Adsani v. The United Kingdom, Judgment, No. 35763/97 E.Ct.H.R. (Nov. 21, 2001). 24, 25
- Nadege Dorzema *et al* v. Dominican Republic, Merits, Reparations and Cost, Judgment, Inter-Am, Ct. H.R., (Ser. C) No. 251, (Oct. 24, 2012).................13

<u>Other International Tribunals</u>

- The Prosecutor v. Al-Bashir, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, The Pre-Trial Chamber II I.C.C., Jun. 13, 2015, ICC-02/05-01/09-242. 23
- The Prosecutor v. Al-Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, The Pre-Trial Chamber I I.C.C., Aug. 27, 2010, ICC-02/05-01/09-107...23
- The Prosecutor v. Al-Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, The Pre-Trial Chamber I I.C.C., May 13, 2011, ICC-02/05-01/09-129. 23
- The Prosecutor v. Al-Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, The Pre-Trial Chamber II I.C.C., Apr. 9, 2014, ICC-02/05-01/09. 24

- The Prosecutor v. Al-Bashir, Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, The Pre-Trial Chamber I I.C.C., Jul. 15, 2013, ICC-02/05-01/09-157...23
- The Prosecutor v. Al-Bashir, Decision regarding Omar Al-Bashir's visit to the Democratic Republic of the Congo, The Pre-Trial Chamber II I.C.C., Feb. 26, 2014, ICC-02/05-01/09-186...23
- The Prosecutor v. Al-Bashir, Decision Regarding Omar Hassan Ahmad A1 Bashir's Travel to the Arab Republic of Egypt, The Pre-Trial Chamber II I.C.C., Mar. 24, 2015, ICC-02/05-01/09-232...23
- The Prosecutor v. Al-Bashir, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, The Pre-Trial Chamber II I.C.C., Apr. 29, 2014, ICC-02/05-01/09-199...23
- The Prosecutor v. Al-Bashir, Decision requesting observations about Omar Al-Bashir's recent visit to Malawi, The Pre-Trial Chamber I I.C.C., Sep. 19, 2011, ICC-02/05-01/09-137...23
- The Prosecutor v. Al-Bashir, Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad, The Pre-Trial Chamber I I.C.C., Feb. 22, 2013, ICC-02/05-01/09-147...23
- The Prosecutor v. Al-Bashir, Decision requesting the Republic of Uganda to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court, The Pre-Trial Chamber II I.C.C., May 17, 2016, ICC-02/05-01/09-262.................. 23
- The Prosecutor v. Al-Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, The Pre-Trial Chamber II I.C.C., Dec. 11, 2017, ICC-02/05-01/09-309. 23
- The Prosecutor v. Al-Bashir, Demande de coopération et d'informations adressée à la République Centrafricaine, The Pre-Trial Chamber I I.C.C., Dec. 1, 2010, ICC-02/05-01/09-121. 23
- The Prosecutor v. Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, The Appeals Chamber I.C.C., May 6, 2019, ICC-02/05-01/09 OA2. 21,
- The Prosecutor v. Al-Bashir, Second Decision on the Prosecution's Application for a Warrant of Arrest, The Pre-Trial Chamber I I.C.C., Jul. 12, 2010, ICC-02/05-01/09. 22
- The Prosecutor v. Al-Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, The Pre-Trial Chamber I I.C.C., Mar. 4, 2009, ICC-02/05-01/09..................22
- The Prosecutor v. Galić, Judgement and Opinion, Trial Chamber I I.C.T.Y., Case No.IT-98-29-T, Dec. 5, 2003. 11
- The Prosecutor v. Halilović, Judgement, Trial Chamber I I.C.T.Y, Case No. IT-01-48-T, (Nov.16, 2005)..10
- The Prosecutor v. Krstić, Dissenting Opinion of Judge Shahabuddeen on Decision on Application for Subpoenas, Appeals Chamber I.C.T.Y. Case No. IT-98-33 (Jul. 1, 2003). 24
- The Prosecutor v. Tadić, Judgement and Opinion, Trial Chamber I.C.T.Y., Case No. IT-94-1-T (May. 7 1997). 10

WTO

- Appellate Body Report, *Brazil – Measures Affecting Imports on Retreaded Tyres,* WTO Doc. WT/DS332/AB/R (Dec. 3, 2007)...19

- Appellate Body Report, *Korea – Measures Affecting Imports on Fresh, Chilled and Frozen Beef,* WTO Doc. WT/DS169/AB/R (Dec. 11, 2000). 19
- Panel Report, *EC – Measures Affecting Trade in Commercial Vessels*, WTO Doc. WT/DS301/R (Apr. 22, 2005). 15
- Panel Report, *Russia – Measures concerning traffic in transit,* WTO Doc. WT/DS512/R (Apr. 5, 2019). 18
- Panel Report, *U.S. – Sections 301-310 of the Trade Act of 1974,* WTO Doc. WT/DS152/R (Dec. 22, 1999). 15

Treatises, Digests and Books

- A. DI STEFANO, *Article 24*, in G. DISTEFANO *et al*. (ED.), LA CONVENTION DE VIENNE DE 1978 SUR LA SUCCESSION D'ETATS EN MATIÈRE DE TRAITÉS (2016). 1
- A. Zimmermann, *Secession and The Law of State Succession* in M. KOHEN (ED), SECESSION: INTERNATIONAL LAW PERSPECTIVES (2006).............................2, 3
- B. SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (2002). 7
- BANTEKAS, S. NASH, INTERNATIONAL CRIMINAL LAW (2009). 26
- C. AMERASINGHE, DIPLOMATIC PROTECTION (2008). 7
- C. F. AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS (2009)........ 17
- C. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2004). 8
- C. GREENWOOD, *Scope of Application of Humanitarian Law* in D. FLECK (ED.) HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT (1995)........... 7
- CLAPHAM ET. AL (EDS.), THE 1949 GENEVA CONVENTIONS: A COMMENTARY (2015). 26
- D. BAILEY & S. DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL (1998). 10
- G. GAJA, *Ch.I Organization Of The Court, Relationship Of The ICJ With Other International Courts and Tribunals*, in A. ZIMMERMANN (EDS.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd Edition) (2019) 15
- I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963) 9
- J. COMBACAU, *The Exception of Self-Defence* in U.N. PRACTICE IN A. CASSESE (ED.), THE CURRENT LEGAL REGULATION OF THE USE OF FORCE (1986).................... 10
- J. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2012) 4
- J. CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW (2014)............................. 14
- J. HENCKAERTS, L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL I: (2009). 11
- J. PAWELYN, *Conflict of Norms in Public International Law,* HOW THE WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003). 14
- K. KITTICHAISAREE, THE OBLIGATION TO EXTRADITE OR PROSECUTE (2018).... 25
- M. SHAW, INTERNATIONAL LAW (2008)... 6
- N. LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010). 8
- NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS (2005) 12
- P. DUMBERRY, A GUIDE TO STATE SUCCESSION IN INTERNATIONAL INVESTMENT LAW (2018)... 1
- R. KOLB, *General Principles of Procedural Law* in A. ZIMMERMANN ET AL. (EDS), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (2006). 16
- S. SIVAKUMARAN, INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS (2012)...10

- T. FRANCK, RECOURSE TO FORCE. STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002)....................8
- W. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT (2016)........8, 11
- Y. DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004). 12
- Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (2011). 8, 9, 10
- Y. SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003)....................16, 17

Encyclopaedia and Dictionary Entries

- A. Kiss, *Abuse of Rights*, Max Planck Encyclopedias of International Law (2006). 25
- Bernstorff, *Demarcation Line*, Max Planck Encyclopedia of Public International Law (2011)....................3
- S. Marchisio, *Servitudes*, Max Planck Encyclopedia of Public International Law (2011)....................3
- Y. Dinstein, *Armistice*, Max Planck Encyclopedia of Public International Law (2011). 3

Recueil des Cours

- BAXTER, *Treaties and Custom*, 129 R.C.A.D.I. 27 (1970). 6
- FITZMAURICE, *The General Principles of International Law considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1 (1957). 7
- THÜRER, *International Humanitarian Law: Theory, Practice, Context,* 338 R.C.A.D.I 9, 74 (2008)....................11

Articles

- A. Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUROPEAN JOURNAL OF INT'L LAW 141 (2003).........1, 2
- A. Shapovalov, *Should a Requirement of "Clean Hands" be a Prerequisite to the Exercise of Diplomatic Protection?* 20 AM. U. INTL L. REV 829 (2005)..........7
- A. Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens - Some Critical Remarks*, 16.2 MICHIGAN JOURNAL OF INTERNATIONAL LAW 433 (1995)....................25
- B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17.3 EJIL 483 (2006). 14
- C. Greenwood, International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq, 4 SAN DIEGO INT'L.L.J. 7 (2003). 9
- C. Tams, Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case, 16 EUR.J.INT'L.L. 963 (2005)....................8
- D. Akande, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21.4 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 816 (2010). 25
- D. Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009) 22
- D. Greig, *Self-Defence And The Security Council: What Does Article 51 Require?* 40 I.C.L.Q. 366, (1991)....................10
- H. King, *Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statue*, 4 NZJPIL 269 (2006). 22
- H. Koh, *The Spirit of the Laws,* 43 HARV. INT'L. L.J. 23 (2002). 9

- J. Mervyn Jones, *State Succession in the Matter of Treaties*, 24 BRIT. Y.B. INT'L L. 360 (1947). 1
- M. Dennis, "*Non-Application of Civil and Political Rights Extraterritorially During Times of International Armed Conflict*" 40 ISR.L.REV. 453 (2007). 12
- M. Sassòli, *Transnational Armed Groups and International Humanitarian Law*, 6 HARVARD, OCCASIONAL PAPER SERIES 1 (2006). 10
- M. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BYBIL 75 (1996). 3
- N. Jevglevskaja, *Weapons Review Obligation under Customary International Law,* 94 INT'L L. STUD. 186 (2018). 6
- 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 LEIDEN JOURNAL OF INTERNATIONAL LAW 13 (2015). 2
- R. Sadurska, *Threats of force*, 82 AMERICAN JOURNAL OF INTL LAW 239 (1988). 7
- S. Murphy, *Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?* 99 AM.J.INT'L.L. 62 (2005). 8
- T. Franck, *Terrorism and the Right to Self-Defence* 95 AM.J.INT'L.L. 839 (2001).9
- T. Krupiy, *of souls, spirits and ghosts Transposing the application of the rules of targeting to lethal autonomous robots*, 16 MELBOURNE JOURNAL OF INTERNATIONAL LAW 140 (2015). 11

National Laws

- Argentina – Code of Civil and Commercial Procedure 17
- England – Supreme Court Act 1981 17
- France – Code of Civil Procedure..........17
- Germany – Code of Civil Procedure..........17
- Greece – Code of Civil Procedure 17
- Japan – Code of Civil Procedure 17

Miscellaneous

- COUNCIL OF EUROPE, Draft report on the Pilot Project of the Council of Europe on State practice relating to State succession and issues of recognition, 16th meeting. Doc. CAHDI (98) 13 (1998)..........2
- European Council, Conclusions and Plan of Action of the Extraordinary European Council Meeting U.N.Doc. A/56/407–S/2001/909 (Sept. 21, 2001)..........9
- Press release, African Union, Press release N° 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant To Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (9 Jan. 2012)..........22, 24
- Press Release, NATO, Press Release 124, Sept. 12, 2001..........9
- The Office of the Prosecutor, I.C.C., Report on Preliminary Examination Activities 2014, (Dec. 2) 3
- The Prosecutor v. Al-Bashir, Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the 'Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of]

Omar Al-Bashir' of 12 March 2018, The Appeals Chamber I.C.C., Jun. 18, 2018, ICC-02/05-01/09 OA2 24

- The Prosecutor v. Al-Bashir, Observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', The Appeals Chamber I.C.C., 18 June 2018, ICC-02/05-01/09 OA2 22

STATEMENT OF JURISDICTION

The State of Adawa has, by application pursuant to Article 31(1) of this Court's Statute, instituted proceedings against the Republic of Rasasa with regard to the dispute concerning violations of international law by the Republic of Rasasa and invoked the compromissory clause of the 1929 Treaty of Botega. On 9 September 2019, the Parties have jointly notified to the Court a Statement of Agreed Facts. The State of Rasasa reserves the right to challenge the Court's jurisdiction.

QUESTIONS PRESENTED

Rasasa respectfully asks this Court:

a. Whether or not the Court lacks jurisdiction over Adawa's claims and if Adawa is not a party to the 1929 Treaty of Botega;

b. Whether or not Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is consistent with international law;

c. Whether or not Adawa's claim that Rasasa's Helian tariffs violate the CHC Treaty falls outside the Court's jurisdiction or is inadmissible; and, in the alternative, if the imposition of the tariffs violates the CHC Treaty; and

d. Whether or not Adawa's arrest and detention of Darian Grey constitute internationally wrongful acts, and if she must be immediately repatriated to Rasasa.

STATAMENT OF FACTS

The State of Adawa and the Republic of Rasasa are neighboring countries in the Region of Crosinia. Crosinia is the only place on Earth where the Helian hyacinth (*Hyacinthus solaris*) is cultivated. Exports of Helian spice contribute significantly to the GDPs of all Crosinian States.

All six Crosinian States were provinces of the Kingdom of Crosinia until 1928, when they divided. Rasasa declared its independence, and the provinces of Adawa and Zeitounia united to form the Adawa-Zeitounia Union (AZU).

In 1929 the President of Rasasa and Queen of the AZU, signed the Treaty of Botega on Armistice and Pacification ("the Treaty of Botega"). On 1 January 1939, the Adawa and Zeitounia amicably agreed to dissolve their Union, and each declared its independence as of that date. On 1 January 1939, the Adawa and Zeitounia amicably agreed to dissolve their Union, and each declared its independence as of that date.

In 1964 the Agriculture Ministries of the six Crosinian States formed an unofficial roundtable, meeting biannually to discuss technical and economic issues specific to the Helian industry. Five years later, that arrangement was formalized in a treaty, signed on 20 June 1969 and promptly ratified by all six Member States, declaring the formation of the Crosinian Helian Community (CHC). The parties to the CHC agreed to impose no customs duties within the CHC on Helian spice or the equipment and materials used to harvest or process the Helian hyacinth.

For the next ten years, the Helian exports flourished in all CHC Member States. Until the 14 July 2012, when an unprecedented and catastrophic tropical cyclone, Hurricane Makan, struck the entire Region. A great amount of Helian hyacinths were destroyed. As a consequence, unemployment began to increase, and crime rates skyrocketed throughout the

Region. Armed gangs roamed the countryside, stealing salvageable Helian plants and harvesting and processing equipment from the devastated farms.

In October 2012, the President of Rasasa, Beta Tihmar, convened a meeting of major Rasasan corporate executives to elicit ideas on how to address the increasingly serious crime wave that the police had been unable to staunch.

In that meeting, Ms. Grey, the chief executive officer of the Rasasan Robotics Corporation ["RRC"], proposed the development of a ground-breaking autonomous security system to suppress criminal activities in Rasasa and throughout the Region. She called it "Weaponized Autonomous Limitation Line" ["the 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.

All six CHC Member States got involved with the research and development phase of the project. In January 2013 the President notified the other five CHC Member States that Rasasa had contracted with RRC to undertake research and development of the WALL.

On 2 February 2013, 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 10 other States, in order to identify threats. The training data included millions of images, video footage, computer models, and other information derived from prior instances of armed conflict, civil unrest, and criminal activities during peacetime. According to RRC, the WALL featured an advanced form of "supervised learning," in which the training data had been meticulously "tagged" by teams of software engineers from RRC working in cooperation with Rasasan police officers and military officials. The tagging

highlighted aspects of the training data that indicated armed threats, as well as indicators of retreat, surrender, incapacity, and other factors that would render an individual effectively hors de combat.

All six CHC Member States got involved with the research and development phase of the project. Each State gradually withdrew from the WALL project and, by August 2013, only Rasasa and Adawa continued to participate in the development of the venture.

On 6 July 2015, Ms. Grey announced the completion of the project. Both Adawa and Rasasa announced their satisfaction with having been involved in the development of the WALL but stated that it was neither economically feasible nor politically desirable to go further with the project.

Violent and property crime rates continued to dwindle in both Adawa and Rasasa. However, in August 2016, relying upon arrest records and eyewitness accounts, the Rasasan Border Police reported what they termed "an alarming new trend" along the border: "The small Adawan gangs that arose in the wake of Hurricane Makan have apparently organized themselves into larger armed groups, and have turned the resources, personnel, and weapons they previously used for localized crimes towards cross-border crime into Rasasa."

Adawan criminal gangs regularly entered Rasasa under cover of night and attacked small villages, assaulting and even killing villagers, returning to Adawa with Helian bulbs, growing and processing equipment, and virtually anything else of value. The Rasasan Border Police observed that there had been a marginal but constant increase in the frequency of such raids every month since January 2016.

According to a report published by the Rasasan Helian Growers Association (RHGA), since October 2016 Rasasa's share of the global Helian market had declined sharply relative to that of other States in the Region. The report concluded, "if current trends continue, many

Rasasan Helian farms will collapse in five to ten years, with catastrophic effects for the Rasasan economy and Rasasan society in general."

Mr. Pindro was elected president of Rasasa and took office in January 2017. He appointed Darian Grey as Minister of Foreign Affairs. Even though in 2009 the Prosecutor of the ICC had started an investigation of crimes committed in Garantia in which was alleged that Ms. Grey was involved, when she was appointed, she had not been charged with crimes in any domestic or international tribunal. Her appointment was confirmed by parliament on 15 January 2017.

Shortly after taking office, President Pindro submitted two bills for legislative approval. The first invoked essential security interests and provided for the introduction of tariffs of 25% ad valorem unnprocessed Helian materials imported into Rasasa, in order to encourage Rasasa's domestic processors. The second called for expedited review of options for the hardening of the Adawan-Rasasan border.

Shortly after taking office, President Pindro submitted two bills for legislative approval. The first invoked "essential security interests" and provided for the introduction of tariffs of 25% ad valorem on Helian bulbs, live plants, and pollen imported into Rasasa, in an effort to encourage Rasasa's domestic processors to return to local farms for their feedstock. The second called for expedited review of options for the hardening of the Adawa-Rasasa border.

On 25 June 2017, President Pindro authorized the purchase of the WALL from RRC and its installation along the Rasasa-Adawa border. President Pindro announced the completed installation of the WALL on 10 January 2018. The task force reviewed reports from both States' national police forces, which indicated that, in the four months following the deployment of the WALL, reports of trans-border incidents decreased more than 80 percent.

Since January 2018, the WALL has never deployed lethal force. It has on approximately 100 occasions issued verbal warnings and in five instances non-lethal "warning shots." No injuries are known to have occurred as a result of these measures.

In January 2018, Rasasa's Parliament adopted President Pindro's proposal to impose tariffs on unprocessed Helian materials imported into Rasasa.

In October 2018, Adawa formally requested consultations with Rasasa in the WTO. Government officials from both Adawa and Rasasa met, but were unable to resolve the dispute amicably.

In October 2018, Adawa formally requested consultations with Rasasa pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO. Government officials from both Adawa and Rasasa met, but were unable to resolve the dispute amicably.

In January 2019, the International League for the Support of Agriculture (ILSA) published a study that presented comprehensive and detailed evidence that, as a direct result of the tariffs imposed by Rasasa in January 2018, Adawan farmers were estimated to have lost more than €10 million in revenue through the end of the studied period in October 2018 as a result of declining sales to processors in Rasasa.

In February 2019, Adawa requested the establishment of a panel in the WTO, regarding the imposition of tariffs on Helian products. On 13 April 2019, the Prosecutor of the International Criminal Court announced that, pursuant to Article 58 of the Rome Statute, she was requesting the issuance of a warrant for the arrest of Minister Grey, assigning to her criminal responsibility for certain alleged activities of RRC in Garantia between 2007 and 2009.

On 18 June 2019, there was a CHC meeting in Adawa. Minister Grey, representing Rasasa, arrived on the 18 June 2019 for the four-day session. On 20 June 2019, a Pre-Trial

Chamber of the ICC granted the Prosecutor's 13 April 2019 request and issued a warrant of arrest for Minister Grey.

Two days later, on 22 June 2019, police officers approached Minister Grey as she was leaving her hotel and took her into custody.She informed them of the immunity she enjoyed under international law.

On 18 June 2019, the CHC welcomed representatives of its Member States to Novazora, the capital city of Adawa, for its regular annual meeting, which coincided with the 50th anniversary of the founding of the Community. Minister Grey, representing Rasasa, arrived late in the morning of 18 June 2019 for the four-day session.

On 20 June 2019, a Pre-Trial Chamber of the ICC granted the Prosecutor's 13 April 2019 request and issued a warrant of arrest for Minister Grey. Two days later, on 22 June 2019, officers of the Adawan police approached Minister Grey as she was leaving her hotel. After ascertaining her identity, they took her into custody.

SUMMARY OF PLEADINGS

I

This Court lacks jurisdiction over Adawa's claims because Adawa is not a party to the 1929 Treaty of Botega.

First, bilateral treaties are not automatically succeeded. Second, the rule of automatic continuity of treaties establishing a territorial regime is not applicable because the Treaty of Botega is neither a boundary treaty nor a localized treaty. In any event, the succession of a territorial regime does not imply the succession of the compromissory clause. Third, Rasasa did not acquiesce Adawa's claim of succession.

II

Rasasa's development and deployment of the wall along the border between Adawa and Rasasa is consistent with international law.

The development of the WALL is not attributable to Rasasa as the RRC did not exercise governmental authority nor acted under Rasasa's instructions, direction or control. In any event, the development did not violate international law because States are not bound under customary law to conduct a review on the new means and methods of warfare. In any event, Adawa is barred from bringing the claim due to unclean hands -since Adawa and Rasasa were equally involved in the development of the WALL.

The deployment of the WALL it is not a threat of use of force, hence it does not violate the UN Charter or Article 2(4). It is also in compliance with humanitarian law principles -namely, distinction, proportionality and precaution in the attack. In any event, -and were the ICCPR to be considered applicable- the deployment of the WALL is also consistent with human rights law. Neither the right to privacy nor the right to remedy are violated.

III

With regard to Adawa's claim concerning the imposition of tariffs, it is submitted that it falls outside the Court's jurisdiction since (i) the WTO law is more specific and posterior than the CHC Treaty and, accordingly, the first should prevail; and (ii) this Court lacks jurisdiction over disputes regulated by WTO law.

Should the Court find that it has jurisdiction, it is submitted that Adawa's claim is inadmissible in two grounds. First, because it constitutes an abuse of process (inasmuch as Adawa is pursuing this claim before the Court to circumvent the DSB's exclusive jurisdiction). Second, the rule of *lis pendens* mandates that this Court refrain from adjudicating the claim for there is a parallel proceeding before the WTO. In the alternative, the imposition of Helian tariffs was a lawful measure permitted by Article 22 of the CHC Treaty. Economic crises threatened Rasasa's essential security interests, and the imposition of Helian tariffs was necessary to protect them. In the further alternative, Rasasa's measures were a lawful countermeasure against Adawa's failure to prevent its territory from being used for acts contrary to Rasasa's rights -*i.e.* operation of criminal bandits that regularly attacked Helian production in Rasasa.

IV

Finally, it is submitted that the arrest and detention of Minister Darian Grey constitute internationally wrongful acts, and she must be immediately repatriated to Rasasa. Ms. Grey enjoys personal immunity under the CHC Treaty and customary law. Adawa cannot rely on the Rome Statute to lift Ms. Grey's immunity since Rasasa is a third party to it -this conclusion is further supported by a reasonable interpretation of Articles 27 and 98 of the Rome Statute itself. Further, there is no customary exception to immunity with respect to prosecution by international tribunals. Moreover, the jus cogens nature of the crimes

allegedly committed by Minister Grey does not lift her immunity. Finally, it is contended that Rasasa's appointment of Ms. Grey did not constitute an abuse of rights.

Minister Grey's arrest was inconsistent with international law because Adawa did not have jurisdiction to arrest Ms. Grey. Moreover, compliance with an arrest warrant does not preclude the attribution of responsibility. Thus Ms. Grey must be immediately repatriated to Rasasa.

PLEADINGS

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

A) Adawa is not a party to the Treaty of Botega

1) Bilateral treaties are not automatically succeeded

Applicant cannot argue that automatic succession to all bilateral treaties is customary law. There is no constant and uniform State practice necessary for a customary rule to emerge,[1] as shown by the lack of automatic succession by Poland,[2] Czechoslovakia,[3] Austria[4] and Rhodesia[5] of their predecessors' treaties.

On the contrary, when States intend to succeed to bilateral treaties, they notify their intent of succession to the other party to the Treaty,[6] as in the case of Denmark,[7] Norway,[8] Sweden,[9] Hungary,[10] Slovenia,[11] and Bosnia-Herzegovina.[12]

Notifications of succession have a constitutive character[13] and they show that States do not consider themselves automatically bound by the obligations assumed by their

---

[1] Asylum (Colom. v. Peru) 1950 I.C.J. 266 (Nov. 20) ["Asylum"], ¶¶276, 277; Right of Passage over Indian Territory (Port. v. India) 1960 I.C.J. 6 (Apr. 12) ["Passage"] ¶9.
[2] Int'I Law Comm'n, Yearbook of the ILC (1970), UN.Doc. A/CN.4/SER.A/1970Add.l (vol. II), ["ILC Yearbook 1970"]124.
[3] ILC Yearbook 1970, *supra* note 2, 124.
[4] ILC Yearbook 1970, *supra* note 2, 123.
[5] ILC Yearbook 1970, *supra* note 2, 127.
[6] P. DUMBERRY, A GUIDE TO STATE SUCCESSION IN INTERNATIONAL INVESTMENT LAW 46 (2018).
[7] Int'I Law Comm'n, Yearbook of the ILC (1971), UN.Doc. A/CN.4/SER.A/1971/Add.l (vol. II) (Part 2), 172.
[8] J. Mervyn Jones, *State Succession in the Matter of Treaties*, 24 BRIT. Y.B. INT'L L. 360 (1947) ["Mervyn Jones"] 368.
[9] *Id.*
[10] ILC Yearbook 1970, *supra* note 2, 123.
[11] A. Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUROPEAN JOURNAL OF INT'L LAW 141 (2003), ["Rasulov"]158.
[12] Rasulov, *supra* note 11, 158.

predecessors. Further, they have the purpose of clarifying which treaties are and which are not subject to succession.[14] For instance, all the successor States of the USSR announced the lists of treaties they intended to succeed, reflecting they did not consider themselves automatically bound by the treaties signed by the USSR.[15]

The absence of a customary rule is further supported by the fact that Article 34 of the Vienna Convention on State Succession with Respect to Treaties, which establishes the rule of automatic succession, was not perceived as a codification of customary law,[16] but merely as a "*progressive development of law.*"[17]

Since automatic succession is not a customary rule and Adawa failed to notify its intent to succeed to any of the AZU's treaties, Adawa is not a party to the Treaty of Botega.

2) Additionally, the rule of automatic continuity of treaties establishing a territorial regime is not applicable

Adawa cannot argue that the Treaty of Botega was succeeded by virtue of the rule of automatic continuity of treaties of a territorial character since it does not fall under this category. Thus, Adawa has not succeeded to it.

i. The Treaty of Botega is not a boundary treaty

---

[13] A. DI STEFANO, *Article 24*, in G. DISTEFANO *et al.* (ED.), LA CONVENTION DE VIENNE DE 1978 SUR LA SUCCESSION D'ETATS EN MATIÈRE DE TRAITÉS, 833 (2016) 864.

[14] A. ZIMMERMANN, *Secession and the law of State succession* in M. KOHEN (ED), SECESSION: INTERNATIONAL LAW PERSPECTIVES, 215 (2006) ["ZIMMERMANN"]; COUNCIL OF EUROPE, Draft report on the Pilot Project of the Council of Europe on State practice relating to State succession and issues of recognition, 16th meeting. Doc. CAHDI (98) 13 (1998), 48.

[15] Rasulov, *supra* note 11, 158.

[16] Rasulov, *supra* note 11, 149.

[17] 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 LEIDEN JOURNAL OF INTERNATIONAL LAW 13 (2015), 22.

State boundaries delineate territory with a permanent character.[18] Contrarily, demarcation lines are provisional and temporary in nature[19] and thus often agreed "*without prejudice*" to their ultimate settlement.[20]

Demarcation lines may be based on an armistice treaty,[21] which is also of a provisional character, since it constitutes a temporary suspension of military operations between belligerent parties.[22] For instance, the 1953 Korean Armistice Agreement has been regarded as a "*mere[ly] ceasefire agreement*" of a temporary character.[23]

Consequently, the demarcation lines established under the Treaty of Botega[24] are provisional lines that do not render the latter a boundary treaty.

ii. <u>The Treaty of Botega is not a localized treaty</u>

Localized treaties, which regulate the conduct of States in regard to a specific part of the territory,[25] remain in force only with respect to the successor State whose territory the Treaty regulates.[26] As opposed to local armistices, general armistices cannot be considered as

---

[18] M. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BYBIL 75 (1996) 93.

[19] J. Bernstorff, Demarcation Line, Max Planck Encyclopedia of Public International Law (2011) ["Bernstoff"], ¶1.

[20] Y. Dinstein, Armistice, Max Planck Encyclopedia of Public International Law (2011) ["Dinstein"], ¶**8.**

[21] Bernstorff, *supra* note 19, ¶1.

[22] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Article 36.

[23] The Office of the Prosecutor, I.C.C., Report on Preliminary Examination Activities 2014, (Dec. 2, 2014), ¶225.

[24] Botega Treaty, Article I.

[25] Gabčíkovo-Nagymaros Project (Hung. v. Slo) 1997 I.C.J. 7 (Sep. 25) ["Gabčíkovo"], ¶123; S. Marchisio, *Servitudes*, Max Planck Encyclopedia of Public International Law (2011), ¶19;; ZIMMERMANN, *supra* note 14, 216.

[26] Draft articles on Succession of States in respect of Treaties with commentaries, adopted by the ILC at its 26º session, Yearbook of the International Law Commission, 1974, vol. II (part one) 174, 264.

localized treaties, since they purport to suspend the war on all fronts and embrace all locations.[27]

The Treaty of Botega is a general armistice intended to separate the parties' armed forces in land, sea and air,[28] hence it cannot be considered a localized treaty. In any event, only Article III refers to a specific territory where the International Zone of Peace was created, but it attached only the Rasasan-Zeitounian frontier.[29]

iii. <u>In any event, succession does not attach the compromissory clause</u>

Even if this Court considers the Treaty of Botega to be a territorial treaty, succession of such treaties only attaches the obligations and rights relating to the territorial regime.[30]

Therefore, Adawa succeeded the territorial situation resulting from the execution of the treaty –*i.e.*, the armistice demarcation lines–[31] but not the treaty itself. In conclusion, Adawa cannot invoke the Treaty of Botega's compromissory clause to bring any claim forward before this Court.[32]

B) <u>Rasasa did not acquiesce Adawa's claim of succession</u>

For silence or inaction to be interpreted as acquiescence, there must be tolerance or inaction by a State for a prolonged period of time.[33] For instance, this Court has only found acquiescence after the 137 years of silence by Honduras in the *Maritime Frontier Dispute* case,[34] the more than 60 years of silence by the United Kingdom in the *Fisheries* case[35] and

---

[27] Dinstein, *supra* note 20, ¶27.
[28] Botega Treaty, Article I.
[29] Botega Treaty, Article III.
[30] Gabčíkovo, *supra* nota 25, ¶123.
[31] Botega Treaty, Article I.
[32] Botega Treaty, Article IV.
[33] Fisheries (United Kingdom v. Norway) 1951 I.C.J. 116 (Dec. 18) ["Fisheries"] ¶139; J. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 419 (2012).
[34] Land, Island and Maritime Frontier Dispute (El Sal. v. Hond. Nicar. intervening) 1992 I.C.J. 331 (Sep.11) ¶355.
[35] Fisheries, *supra* note 33, ¶138.

the 53 years of silence by Nicaragua in the *Arbitral Award* case.[36] Conversely, the 5-year inaction of the United States in the *Gulf of Maine* case were not deemed sufficient to constitute acquiescence.[37]

Here, only 2 years elapsed between Moraga's claim of continuity,[38] which is not prolonged enough to be interpreted as acquiescence.

C) <u>The Court lacks jurisdiction over Adawa's claims</u>

Since Adawa is not a party to the Treaty of Botega and Rasasa has not acquiesced Adawa's claim of succession, this Court lacks jurisdiction over Adawa's claims.

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

A) <u>The development of the WALL is not attributable to Rasasa</u>

1) RRC did not exercise governmental authority

The conduct of private persons empowered by law to exercise elements of governmental authority might be attributable to the State. However, commercial activities are excluded from the scope of this rule.[39] Manufacturing of weapons is considered a purely commercial activity.

---

[36] Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)1960 I.C.J. 192 (Dec. 23) ¶195.
[37] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.) 1984 I.C.J. 246 (Jan. 20) ¶¶142, 144.
[38] SAF ¶38.
[39] Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, (Jun. 18) 2010 ¶193; Bosh International, Inc. and B&P Ltd. Foreign Investments Enterprise *v.* Ukraine, ICSID Case No. ARB/08/11, Award, (Oct. 25) 2012 ¶176; Articles on Responsibility of States for Internationally Wrongful Act with commentaries, adopted by the ILC at its 53rd Sess., U.N. Doc. A/56/10 (2001) ["ARSIWA commentaries"], 43.

Here, the Rasasan Robotics Corporation ["RRC"] is a privately-held company that was merely recruited to develop the WALL.[40] The contract between Rasasa and RRC does not invest the company with governmental functions. Hence, RCC's action cannot be attributed to Rasasa.

2) RRC did not act under Rasasa's instructions, direction or control

Private actions can only be attributed when a State exercises effective control over every stage of the unlawful act.[41] Neither the mere financing and support nor a general situation of dependence is sufficient to justify attribution. [42]

Here, the WALL was exclusively developed by RRC.[43] The fact that Rasasa —as well as other States, including Adawa— provided funds and governmental scientists does not amount to effective control over the development of the WALL.[44]

B) <u>In any event, the development did not violate international law</u>

1) No weapons review obligation exists under customary law

Applicant cannot argue that Article 36 of Additional Protocol I ["API"] reflects customary law, because there is neither state practice nor *opinio juris*.[45] Several militarily powerful States non-parties to the API are not known to conduct weapons review[46] or conduct weapons review but rejecting its customary status.[47] Further, the practice of States parties to

---

[40] SAF ¶14.
[41] Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14 (Jun. 27) ["Nicaragua"], ¶115; ARSIWA commentaries, *supra* note 39, 47.
[42] Nicaragua, *supra* note 41, ¶109; ARSIWA commentaries, *supra* note 39, 47; M. SHAW, INTERNATIONAL LAW 790 (2008).
[43] SAF ¶18.
[44] SAF ¶¶20-21.
[45] N. Jevglevskaja, *Weapons Review Obligation under Customary International Law,* 94 INT'L L. STUD. 186 (2018) ["Jevglevskaja"], 213.
[46] Jevglevskaja, *supra* note 45, 213.
[47] *Id.*

the API cannot be submitted as evidence, because compliance with a rule does not prove the elements of custom if this is done by virtue of a Treaty provision.[48]

Even if Article 36 of API is deemed to reflect customary law, Rasasa complied with it, since it performed a review for compliance with international law[49] and conducted simulated and field tests.[50]

2) In any event, Adawa is barred from bringing this claim due to unclean hands

According to the clean hands doctrine, States are barred from bringing claims if their conduct regarding the subject-matter of the litigation has contributed to create the situation for which they complain.[51]

Both Adawa and Rasasa were involved to the same extent in the development of the WALL.[52] Therefore, Adawa is barred from bringing a claim questioning this weapon's legality.

C) <u>The deployment of the WALL is consistent with international law</u>

1) The deployment is not a threat of use of force

Resort to threat or use of force under an armistice is governed by Article 2(4) of the UN Charter.[53] To qualify as a "threat" prohibited under this Article, demonstrations of force must be intended to coerce another State into a specific conduct.[54]

---

[48] North Sea Continental Shelf (Ger. v. Neth.) 1968 I.C.J. 3 (Apr. 26), ["Continental Shelf"] ¶76; Int'l Law Comm'n, Draft conclusions on identification of customary international law with commentaries, A/73/10, (2018), 139; R. BAXTER, *Treaties and Custom*, 129 R.C.A.D.I. 27 (1970), 64-65.
[49] SAF ¶23.
[50] SAF ¶25.
[51] G. FITZMAURICE, *The General Principles of International Law considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1, (1957) 119; Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), ["Arrest Warrant"], ¶35; C. AMERASINGHE, DIPLOMATIC PROTECTION 212 (2008); A. Shapovalov, *Should a Requirement of "Clean Hands" be a Prerequisite to the Exercise of Diplomatic Protection?* 20 AM. U. INTL L. REV 829 (2005) 834, 836; J. Dugard (Special Rapporteur on Diplomatic Protection), *Sixth Report on Diplomatic Protection*, U.N. Doc A/CN.4/546 (Aug. 11, 2004), ¶2.
[52] SAF ¶21.

This Court did not consider US's military maneuvers not crossing into Nicaragua's territory as a threat of force.[55] Similarly, border security measures are not threats of force, since they derive from State's inherent right to maintain peace within the territory[56] and are not aimed at exercising coercion on the bordering State.

The deployment of the WALL is not intended to coerce Adawa into adopting a specific behavior. Its sole purpose is to control the borders from illegal-crossing and criminal activities. Hence, it is not a prohibited threat of force.

2) In any event, it was an act of self-defense

Article 51 of the U.N. Charter recognizes States' inherent right of self-defence.[57] Here, Rasasa complied with all the requirements to exercise such right.

First, Rasasa is entitled to exercise self-defence against the militia's acts, since —unlike other articles in the Charter—[58] article 51 does not mention the nature of the aggressor.[59] Besides, self-defence against non-State actors is customary international law. Many States

---

[53] C. Greenwood, *Scope of application of Humanitarian Law* in D. FLECK (ED.) HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT (1995) 68.
[54] B. SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 124 (2002); R. Sadurska, *Threats of force*, 82 AMERICAN JOURNAL OF INTL LAW 239 (1988), 241.
[55] Nicaragua, *supra* note 41, ¶227.
[56] W. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT, 302 (2016) ["BOOTHBY"].
[57] Charter of the United Nations, 1945, 1 U.N.T.S. XVI, ["U.N. Charter"], Article 51; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, (July 8) ["Nuclear Weapons"] ¶96; Y. DINSTEIN WAR, AGGRESSION AND SELF-DEFENCE 175 (2011) ["Y. DINSTEIN"].
[58] U.N. Charter, *supra* note 57, Articles 2(4), 2(5), 50.
[59] U.N. Charter, *supra* note 57, Article 51; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. (Jul. 9) (Separate Opinion of Judge Higgins), ¶33; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. (Jul. 9) (Separate Opinion of Judge Kooijmans), ¶35; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. (Jul. 9) (Declaration of Judge Buergenthal), ¶6.

exercised this right: Great Britain,[60] Russia,[61] Senegal,[62] Tajikistan,[63] Thailand,[64] Turkey,[65] the US,[66] France.[67] *Opinio iuris* is reflected by unanimous Security Council Resolutions 1368[68] and 1373,[69] United Nations Reports,[70] NATO,[71] the EU,[72] and several scholars.[73]

Second, States' right of self-defence is triggered if an armed attack against them occurs.[74] An armed attack is an assault of substantial scale and effect[75] which involves the

[60] Y. DINSTEIN, *supra* note 57, 248; Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/928 (2015).
[61] C. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR.J.INT'L.L. 963 (2005) 972.
[62] T. FRANCK, RECOURSE TO FORCE. STATE ACTION AGAINST THREATS AND ARMED ATTACKS 64 (2002).
[63] S. Murphy, *Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?* 99 AM.J.INT'L.L. 62 (2005) 69.
[64] C. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 103 (2004).
[65] N. LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 31 (2010) ["LUBELL"].
[66] S.C., Letter dated 7 October 2001, U.N.Doc.S/2001/946 (Oct. 7, 2001); S.G., Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695 (2014).
[67] S.G., Letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/745 (2015).
[68] S.C. Res.1368 (Sept. 12, 2001); LUBELL, *supra* note 65, 34.
[69] S.C.Res.1373, (Sept. 28, 2001); N LUBELL, *supra* note 65, 34.
[70] G.A., A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004). ¶159
[71] Press Release, NATO, Press Release 124, Sept. 12, 2001.
[72] European Council, Conclusions and Plan of Action of the Extraordinary European Council Meeting U.N.Doc. A/56/407–S/2001/909 (Sept. 21, 2001) section 1 ¶1.
[73] I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 279 (1963); T. Franck, *Terrorism and the Right to Self-Defence* 95 AM.J.INT'L.L. 839 (2001) 840; C. Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L.L.J. 7 (2003) 16; H. KOH, *The Spirit of the Laws* 43 HARV. INT'L. L.J. 23 (2002) 28.
[74] U.N. Charter, *supra* note 57, Article 51.
[75] Nicaragua, *supra* note 41, ¶195.

loss of human lives and the destruction of property.[76] Here, this standard is met by the attacks against Rasasan Border Police stations where 21 officers were killed.[77]

Further, an act of self-defense needs to comply with customary requirements of proportionality and necessity.[78] These requirements were fulfilled as the WALL did not cause damage[79] and proved to be necessary to reduce cross-border crime.[80]

Finally, reporting the exercise of self-defence to the Security Council has been understood by this Court,[81] state practice[82] and scholars[83] only as an expectation, not as a duty.

D) <u>The deployment is consistent with international humanitarian law</u>

1) International humanitarian law is applicable

Protracted armed violence between States and non-State actors amounts to an non-international armed conflict ["NIAC"] when the non-State actor is an "organized armed group" and the fighting reaches a certain threshold of intensity.[84] To qualify as a NIAC, the violence does not need to be purely internal and confined within the borders of a State, as

---

[76] United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), 1980 I.C.J. 3 (May 24) ¶¶14, 57, 64; Y. DINSTEIN, *supra* note 57, 174.
[77] SAF ¶35.
[78] Y. DINSTEIN, *supra* note 57,110-111.
[79] SAF ¶42.
[80] SAF ¶42.
[81] Nicaragua, *supra* note 41, ¶200.
[82] S. D. BAILEY & S. DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 103-105 (1998); Y. DINSTEIN, *supra* note 57, 216; J.COMBACAU, *The Exception of Self-Defence in U.N. Practice* in A.CASSESE (ED), THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 14 (1986).
[83] Y. DINSTEIN, *supra* note 57, 217-218; D. Greig, *Self-defence and the Security Council: What does Article 51 require?,* 40 I.C.L.Q. 366 (1991) 369, 379-387.
[84] The Prosecutor v. Tadić, Judgement and Opinion, Trial Chamber I.C.T.Y., Case No. IT-94-1-T (May. 7 1997), ¶562; Prosecutor v. Halilović, Judgement, Trial Chamber I, Case No. IT-01-48-T, (Nov.16, 2005) ¶24.

transnationality is not mutually exclusive with it.[85] The existence of a NIAC triggers the applicability of international humanitarian law ["IHL"].

Here, the Adawan militia are well-organized and headquartered for their globalized drug trafficking enterprise in Rasasan territory.[86] Police forces were ineffective in combating them.[87] In June 2017 the bandits attacked 9 Rasasan border police stations and killed 21 officers,[88] reaching the required intensity threshold. Hence, the conflict qualifies as a NIAC, triggering the application of IHL.

2) Rasasa complies with the principle of distinction, proportionality and precaution in attack.

First, the principle of distinction prohibits attacks when it is not reasonable to believe that the proposed target is a combatant or a military objective.[89] A weapon's ability to comply with this principle can be translated into a numerical value.[90] In particular, Autonomous Weapons Systems ["AWS"] must be able to identify individuals who take direct part in hostilities and military objectives in 99.9% of cases.[91] In this case, the chance of the WALL targeting innocents is virtually zero,[92] thus complying with the distinction principle.

---

[85] S. SIVAKUMARAN, INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS 229 (2012); M. Sassòli, *Transnational Armed Groups and International Humanitarian Law*, 6 Harvard, Occasional Paper Series 1 (2006) 9.
[86] SAF ¶35.
[87] SAF ¶35.
[88] SAF ¶36.
[89] The Prosecutor v. Galić, Judgement and Opinion, Trial Chamber I I.C.T.Y., Case No.IT-98-29-T, (Dec. 5 2003), ¶51; Nuclear Weapons, *supra* note 57, ¶78; J. HENCKAERTS, L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL I: 3, 25, 37, 40, 244 (2009) ["HENCKAERTS & L. DOSWALD-BECK"].
[90] T. Krupiy, *Of souls, spirits and ghosts Transposing the application of the rules of targeting to lethal autonomous robots*, 16 MELBOURNE JOURNAL OF INTERNATIONAL LAW 140 (2015), 184.
[91] *Id.*
[92] SAF ¶18.

Second, the proportionality principle requires to strike a balance between military necessity and the expected injury or suffering inflicted on a person.[93] Proportionality must be assessed with regard to a specific attack.[94] Here, the proportionality principle is not applicable since no attack has taken place.[95] In any event, the WALL counts with monitoring equipment to detect armed threats and both lethal and non-lethal options for any given scenario.[96]

Third, under the precaution principle, all feasible safeguards must be taken to avoid, and in any event, to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects.[97] Moreover, when civilians might be affected, the State must give an effective advance warning.[98] The WALL counts with broadcasting audible warnings and progressively increments its non-lethal deterrent options in its effort to take all precatory measures to protect civilians.[99] Hence, the WALL complies with the principle of precaution.

E) <u>In any event, the WALL is consistent with human rights law</u>

1) The ICCPR is not applicable

The International Covenant on Civil and Political Rights ["ICCPR"] obliges States to ensure the rights therein enshrined to individuals "*within its territory and subject to its jurisdiction*".[100] These requirements apply cumulatively, limiting extraterritorial

[93] D. THÜRER, *International Humanitarian Law: Theory, Practice, Context,* 338 R.C.A.D.I 9, 74 (2008)
[94] BOOTHBY, *supra* note 56, ¶42
[95] SAF Clarification 4.
[96] SAF ¶24.
[97] HENCKAERTS & L. DOSWALD-BECK, *supra* note 89, 51 (2009).
[98] Protocol Relating to the Protection of Victims of International Armed Conflicts (Jun. 8,1977), 1125 U.N.T.S. 3 ["Protocol I"], Arts. 51(5)(b), 57 (2)(a)(iii); Y. DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 126 (2004)
[99] SAF ¶24.
[100] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ["ICCPR"], Article 2(1).

applicability.[101] Alternatively, extraterritorial application of human rights is limited to militarily occupied territories.[102]

Adawa's nationals reached by the WALL are not within Rasasa's territory, jurisdiction or military occupation. Therefore, Rasasa is not obliged by the ICCPR towards individuals in the territory of Adawa.

2) In any event, Rasasa did not violate the right to life

In law enforcement situations, States may use lethal force as long as it is not arbitrary, *i.e.* necessary and proportional.[103] Necessity means that lethal force must be used as last resort,[104] only after other non-violent means have been exhausted or deemed inadequate.[105] Proportionality requires that the force used does not exceed what is strictly required to respond to the threat,[106] applying differentiated and progressive force.[107]

Here, the WALL may only use lethal force as a last resort,[108] after a progressive sequencing of non-lethal deterrent methods, including alarms and audible warnings,[109] thus complying with the principles of necessity and proportionality. This is further evidenced by

---

[101] Human Rights Committee, Consideration of State Reports, U.S., Doc. U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) ¶469; M. NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS 43 (2005); M. Dennis, "*Non-Application of Civil and Political Rights Extraterritorially During Times of International Armed Conflict*" 40 ISR.L.REV. 453 (2007), 461.
[102] Banković v. Bulgaria, E.Ct.H.R. No. 52207/99 (Dec. 12, 2001), ¶70; Al-Skeini & Others v. U.K., E.Ct.H.R. No. 55721/07 (Jul. 7, 2011), ¶¶138, 139.
[103] ICCPR, *supra* note 100, Article 6; Human Rights Committee, General Comment No. 36, U.N. Doc CCPR/C/GC/36 (Oct. 30, 2018) ["General Comment No. 36"], ¶7.
[104] General Comment No. 36, *supra* note 103, ¶12
[105] U.N. Office of the High Commisioner on Human Rights, United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, (1990), Principle 4.
[106] General Comment No. 36, *supra* note 103, ¶12
[107] Nadege Dorzema *et al* v. Dominican Republic, Merits, Reparations and Cost, Judgment, Inter-Am, Ct. H.R., (Ser. C) No. 251, (Oct. 24, 2012), ¶85.
[108] SAF ¶¶25, 37.
[109] SAF ¶24.

the fact that the WALL significantly reduced cross-border crime[110] without deploying lethal force.[111]

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

A) Adawa's claim falls outside the Court's jurisdiction

The dispute concerning tariffs on Helian products is regulated by the General Agreement on Tariffs and Trade ["GATT"], since the GATT prevails over the Crosinian Helian Community Treaty ["CHC Treaty"] for being a more specific and posterior agreement.

Since the Dispute Settlement Body ["DSB"] has exclusive jurisdiction over disputes arising from the GATT, Adawa's claim falls outside this Court's jurisdiction.

1) The WTO Dispute Settlement Understanding is *lex specialis*

The principle of *lex specialis derogat lege generali* is a general principle of law establishing that in the event of conflict, the more special norm prevails over the more general one.[112] Accordingly, a special set of secondary rules –*i.e.*, remedies– excludes the application of the secondary rules in the customary law of State responsibility.[113]

---

[110] SAF ¶37.
[111] SAF Clarification 4.
[112] Int'l Law Comm'n, Rep. of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, (2006), 56; J. PAWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW, HOW THE WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 385 (2003); ARSIWA commentaries, *supra* note 39, 140; Nicaragua, *supra* note 41, ¶274; Gabčíkovo, *supra* note 25, ¶132; Ambiatelos Case, (Greece. v. U.K.) 1952 I.C.J 89 (Jul. 1) (Dissenting Opinion of Judge Hsu Mo) ¶87.
[113] Int'l Law Comm'n, Rep. of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, (2006), 124.

World Trade Organization ["WTO"] law is a strong form of *lex specialis* concerning secondary rules.[114] As WTO Members, Rasasa and Adawa have agreed on a special regime of remedies[115] under the Dispute Settlement Understanding ["DSU"][116] whenever there is a breach of any of the "*covered agreements*"[117] included in Appendix 1.[118]

WTO law conflicts with and must prevail over the customary law remedies implicitly available under the CHC Treaty. Thus, by virtue of the principle of *lex specialis,* the dispute concerning tariffs on Helian products is regulated by WTO covered agreements.

2) Additionally, the WTO DSU is *lex posteriori*

According to the general principle of *lex posteriori derogat legi priori*, whenever there is a conflict between successive treaties over the same subject-matter, provisions of the later treaty prevail over those of the earlier one.[119] This implies that a later expression of consent is presumed to prevail over a prior one.[120]

Here, there is a conflict between available remedies under WTO law and the CHC Treaty.[121] By virtue of the *lex posteriori* principle, the latest expression of consent -that is, the WTO agreements- must prevail.[122]

---

[114] J. Crawford (Special Rapporteur on State Responsibility), Third Report on State Responsibility, U.N. Doc A/CN.4/507/Add. 3 (Aug. 4, 2000) ¶¶157, 420; B. SIMMA, D. PULKOWSKI, *Of Planets and the Universe: Self-Contained Regimes in International Law*, Vol. 17 No. 3 EJIL 483 (2006) 488; Draft Articles on the Law of treaties with Commentaries adopted by the ILC at its 18th Sess. Yearbook of the International Law Commission, 1966, vol. II 140 ¶3.
[115] J. CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 305 (2014).
[116] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, ["DSU"], Article 3(7), 22.
[117] DSU, *supra* note 116, Article 1.
[118] DSU, *supra* note 116, Appendix 1.
[119] Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331 ["VCLT"], Article 30(3).
[120] Draft Articles on the Law of treaties with Commentaries adopted by the ILC at its 18th Sess. Yearbook of the International Law Commission, 1966, vol. II., 216.
[121] See *supra* §III(1)(A).

3) The ICJ lacks jurisdiction over GATT disputes

Pursuant to article 23(1) of the DSU, the WTO DSB has exclusive jurisdiction over all disputes arising from the covered agreements.[123] Moreover, this Court's predecessor decided it could not adjudicate a claim that falls within the exclusive jurisdiction reserved to another authority.[124]

By virtue of the *lex specialis* and *lex posteriori* principles, WTO covered agreements constitute the applicable law for settling the dispute concerning tariff on Helian products. Since GATT is one of the covered agreements,[125] the WTO DSB is the sole adjudicative body with jurisdiction over the dispute.

B) <u>Adawa's claim is inadmissible</u>

1) Adawa's claim is inadmissible due to the principle of abuse of process

The principle of abuse of process[126] consists of the use of procedural instruments or rights for purposes other than those for which they were established,[127] such as circumventing an exclusive jurisdiction clause[128] or obtaining an undue advantage.[129]

---

[122] SAF ¶12.

[123] Panel Report, *U.S. – Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (22 Dec. 1999) ¶7.43; Panel Report, *EC – Measures Affecting Trade in Commercial Vessels*, WTO Doc. WT/DS301/R (22 Apr. 2005) ¶7.195.

[124] Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26) ¶62; G. GAJA, *Ch. I Organization of the Court, Relationship of the ICJ with Other International Courts and Tribunals*, in A. ZIMMERMANN (EDS.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd Edition) 651 (2019).

[125] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226, Appendix 1.

[126] Ampal-american Israel Corp., EGI-fund (08-10) Investors LLC, EGI-series Investments LLC, BSS-EMG Investors LLC, And Mr. David Fischer V. Arab Republic Of Egypt, ICSID Case No. ARB/12/11, Award (Feb. 1) 2016 ¶331; Immunities and Criminal Proceedings (Eq. Guinea v. Fr.) Preliminary Objections 2018 I.C.J. 292 (Jun. 6) ¶150; Certain Iranian Assets (Iran v. U.S.) Preliminary Objections Judgment 2019 I.C.J. (Feb. 13) ¶113; Jadhav Case (India V. Pakistan) 2019 I.C.J. (Jul. 17) ¶49.

[127] R. KOLB, *General Principles of Procedural Law* in A. ZIMMERMANN ET AL. (EDS), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, Oxford University Press 831 (2006) ["Kolb"].

As explained *supra,* article 23(1) of the WTO DSU establishes the exclusive jurisdiction of the WTO DSB over all disputes arising from the covered agreements. Therefore, by invoking Article VI of the Treaty of Botega to bring this dispute before this Court, Adawa is trying to circumvent the exclusive jurisdiction of the WTO DSB. Further, should Adawan claims succeed in the two proceedings, Adawa would obtain double recovery from the same alleged wrongful act.

Since Adawa's decision to bring the same claim before the WTO and this Court constitute an abuse of process, this claim is inadmissible.

2) Additionally, Adawa's claim is inadmissible due to the principle of *lis pendens*

According to the principle of *lis pendens,* courts cannot accept jurisdiction over a case already pending before another court.[130] This is a general principle of law recognized by most legal systems around the world[131] and international tribunals,[132] aimed at avoiding parallel proceedings and contradictory decisions over the same dispute.[133]

---

[128] Y. SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 258 (2003) ["SHANY"].
[129] Kolb, *supra* note 127, 831.
[130] SHANY, *supra* note 128, 157.
[131] England – Supreme Court Act 1981, § 49(2); France – Code of Civil Procedure, Article 100; Japan – Code of Civil Procedure, Article 231; Greece – Code of Civil Procedure, Article 222; Argentina – Code of Civil and Commercial Procedure, Article 347(4); Germany – Code of Civil Procedure, Art 261(3).
[132] S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, Award, ICSID Case No. ARB/77/2 (Dec. 15) 1977 ¶1.14; I.P. Busta & J.P. Busta v. The Czech Republic, Final Award, Arbitration institute of the Stockholm Chamber of Commerce, Case V 2015/014 (Mar. 10) 2017 ¶¶210-211; CME Czech Republic B.V v. The Czech Republic, Partial Award, UNCITRAL arbitration proceedings, (Sep. 13) 2001 ¶¶309-310; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E) 2019 I.C.J (Jun. 14) (Dissenting opinion of Judge ad-hoc Cot) ¶¶5-11; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the tribunal on objections to jurisdiction, ICSD Case No. ARB/01/13 (Aug. 3) 2003 ¶182.
[133] SHANY, *supra* note 128, 155.

Lis pendens can be invoked when (i) the parties are the same, and (ii) there are two actions with the same object, (iii) pending before two tribunals of the same character.[134]

The present case fulfills these requirements. Firstly, Adawa and Rasasa are both parties to the same dispute regarding the imposition of Helian tariffs.[135] Secondly, the object of Adawa's claims is the same: challenging the consistency of those tariffs under international law. Thirdly, the WTO DSB and the ICJ have the same character, since both are dispute settlement bodies that adopt legally binding decisions.[136] Therefore, the claim is inadmissible under the *lis pendens* principle.

C) <u>In the alternative, the imposition of Helian tariffs did not violate the CHC Treaty</u>

In any event, Rasasa's imposition of Helian tariffs is still a lawful measure aimed at safeguarding an essential security interest ["ESI"] of the State, permitted under Article 22 of the CHC Treaty.[137]

1) Economic crises constitute a threat to an essential security interest

Tribunals interpreting similar ESI clauses have considered economic crises as a major threat to State security,[138] since they compromise the internal and external integrity of the

[134] Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25) 20.
[135] SAF ¶58.
[136] Statute of the International Court of Justice, Oct. 24, 1945, 1 U.N.T.S. XVI, Article 59; DSU, *supra* note 116, Article 3(7); C. F. AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 555 (2009).
[137] CHC Treaty, Article 22.
[138] Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9 (Sep.5) 2008 ¶¶175, 178; CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, (May. 12) 2005 ¶360; LG&E Energy Corp., LG&E Capital Corp., LG&E International INC. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on liability, (Oct.3) 2006 ["LG&E "] ¶238.

State.[139] Interests susceptible of protection under ESI clauses depend on the particular situation and perceptions of the State in question.[140]

The local production of Helian Hyacinth was rapidly deteriorating, which forced Rasasan processors to purchase raw Helian materials from Adawa.[141] Since the export of Helian spice contributes significantly to Rasasan GDP,[142] a collapse of the Helian sector would have resulted in a catastrophic social and economic crisis.[143] Thus, the protection of the Helian production was imperative to safeguarding Rasasa's ESI.

2) The imposition of Helian tariffs is necessary to protect an essential security interest

States have a high degree of deference in determining whether a measure is "necessary" to protect ESI, given its proximity to the situation, expertise and competence.[144] In addition, a measure is considered necessary when it is apt to make a substantial contribution to the achievement of its objective.[145]

Rasasa's measures were aimed at protecting the wellbeing of the Helian growers, and to ensure their survival and that of the citizens who depend on them.[146] Since the continuation of trends deteriorating Helian production would produce a substantial harm, the imposition of tariffs on Helian products was a necessary measure to protect the ESI.

---

[139] LG&E, *supra* note 138, ¶251.
[140] Panel Report, *Russia – Measures concerning traffic in transit*, WTO Doc. WT/DS512/R (Apr. 5, 2019) ¶7. 131.
[141] SAF ¶¶28,30.
[142] SAF ¶2.
[143] SAF ¶30.
[144] Deutsche Telekom AG v. The Republic of India, Interim Award, UNCITRAL PCA Case No. 2014-10 (Dec. 13) 2017 ¶238; Nicaragua, *supra* note 41, ¶282.
[145] Appellate Body Report, *Brazil – Measures Affecting Imports on Retreaded Tyres,* WTO Doc. WT/DS332/AB/R (Dec. 3, 2007) ¶150; Appellate Body Report, *Korea – Measures Affecting Imports on Fresh, Chilled and Frozen Beef,* WTO Doc. WT/DS169/AB/R (Dec. 11, 2000) ¶163; Continental Casualty Company V. Argentine Republic, ICSID Case No. ARB/03/9 (Sep.5) 2008 ¶169.
[146] SAF ¶44.

D) **Alternatively, the imposition of tariffs was a lawful countermeasure**

A State injured by an internationally wrongful act of another State can take countermeasures against the wrongdoer to induce compliance with its obligations.[147] Countermeasures must be directed only at the responsible State.[148] However, collateral effects affecting third parties do not render the countermeasure unlawful.[149]

1) Adawa violated international law

Under international law, State's failure to prevent the use of its territory for acts that adversely affect other States constitute an internationally wrongful act.[150] Here, Adawa failed to take effective measures to prevent its nationals from conducting illegal activities that affected Rasasa's Helian production.

2) The course of action is reversible

Countermeasures must be reversible, to permit resumption of performance of the suspended obligation.[151] Here, Rasasa's measures are reversible since tariffs can be easily lifted.

3) The measure is proportional

Countermeasures must commensurate with the injury suffered.[152] This has been

---

[147] Articles on Responsibility of States for Internationally Wrongful Act adopted by the ILC at its 53rd Sess., annexed to G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) ["ARSIWA"], Article 49.1; Gabcíkovo, *supra* note 25, ¶83; Naulilaa (Portugal v. Germany), 2 R.I.A.A. 1011 (1928), 1027.
[148] ARSIWA, *supra* note 147, Article 49.1; ARSIWA commentaries, *supra* note, 130.
[149] ARSIWA commentaries, *supra* note 39, 130.
[150] Corfu Channel (UK v. Alb.), 1949 I.C.J. 4 (Apr. 9), 22; United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1980 I.C.J. 3 (May 24), ¶¶67-68; Pulp Mills (Arg. v. Uru.), 2010 I.C.J. 14 (Apr. 20), ¶101.
[151] ARSIWA, *supra* note 147, Article 49.3; Gabcíkovo, *supra* note 25, ¶87.
[152] ARSIWA, *supra* note 147, Article 51; Naulilaa (Portugal v. Germany), 2 R.I.A.A. 1011 (1928), 1027.

understood as "*having some degree of equivalence with the alleged breach*".[153]

Here, the imposition of tariffs was proportionate to the sharp declination of Rasasa's global Helian market caused by Adawa's failure to prevent Adawan criminal bands operating in its territory.

4) Rasasa fulfilled its good faith obligations

An injured State deciding to take countermeasures must call upon the responsible State to fulfil its obligations and notify the countermeasure.[154] Here, Rasasa called Adawa to take effective measures to quash the criminal gangs. Facing completely silence from its Adawan counterparts, President Pindro informed his intention to impose the tariffs.

IV) ADAWA'S ARREST AND DETENTION OF DARIAN GREY CONSTITUTE INTERNATIONALLY WRONGFUL ACTS, AND SHE MUST BE IMMEDIATELY REPATRIATED TO RASASA

A) Ms. Grey enjoys personal immunity

Article 32 of the CHC Treaty grants full personal immunity from arrest or detention to Representatives of Member States at meetings convened by the Community and during their journeys to and from the place of meeting.[155] The terms "journey" and "to and from" contained in Article 32 must be interpreted broadly, applying during the whole time the public official is in a foreign State.[156]

Even more, under international customary law, incumbent Ministers of Foreign Affairs enjoy full immunity from criminal jurisdiction.[157]

---

[153] Air Services Agreement (United States v. France), 18 R.I.A.A. 416 (1946), 443.
[154] ARSIWA, *supra* note 147, Article 52; ARSIWA commentaries, *supra* note 39, 136.
[155] CHC Treaty, Article 32.
[156] Int'I Law Comm'n, Yearbook of the ILC (1967), A/CN.4/L.118Add.1, 2 (Vol II), ¶176.
[157] Arrest Warrant, *supra* note 51, ¶54; The Prosecutor v. Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, The Appeals Chamber I.C.C., May 6, 2019, ICC-02/05-01/09 OA2, ¶101.

Here, Minister Grey was in the territory of Adawa as representative of Rasasa for the CHC annual meeting.[158] Hence, she enjoyed immunity under Article 32 of the CHC Treaty and customary international law.

1) Adawa cannot rely on the Rome Statute to lift Ms. Grey immunity

Under Article 34 of the VCLT, treaties do not create obligations for third States without their consent. In the case of the Rome Statute, this is further supported by the interplay between Articles 27(2) and 98(1).[159] While the former lifts immunities from persons of State parties,[160] the latter deals with the immunity of a person from a third State and mandates the ICC to obtain a waiver of immunity from that third State.[161] A different reading would be contrary to the *effet utile* principle,[162] because it would render article 98(1) of Rome Statute meaningless.[163]

Since Rasasa is not a party to the Rome Statute,[164] its provisions are not opposable. In any event, Rasasa has not waived Ms. Grey's immunity. Therefore, Adawa cannot rely on the Rome Statute to justify her arrest.

---

[158] SAF ¶49.

[159] H. King, *Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statue*, 4 NZJPIL 269 (2006) 277.

[160] D. Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009) ["Akande"] 339.

[161] The Prosecutor v. Al-Bashir, Observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', The Appeals Chamber I.C.C., 18 June 2018, ICC-02/05-01/09 OA2, ¶9; Press release, African Union, Press release Nº 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant To Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (9 Jan. 2012) ["AU Press Release"] 2.

[162] VCLT, *supra* note 119, 219; CEMEX Caracas Investments B.V. and others v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, (Dec. 30) 2010 ¶114.

[163] Akande, *supra* note 160, 338.

[164] SAF ¶13.

2) **There is no customary exception to immunity with respect to prosecution by international tribunals**

Applicant may argue that there is a customary exception to immunity of public officials when prosecuted by international tribunals. However, there is neither State practice nor *opinio juris* to ascertain that such customary rule exists.[165]

Regarding State practice, none of the States Al-Bashir visited executed the ICC's arrest warrant[166] against him since Al-Bashir enjoyed immunity as an incumbent Head of State: Kenya,[167] Central African Republic,[168] Djibouti,[169] Malawi,[170] Chad,[171] Nigeria,[172] Congo,[173] Ethiopia,[174] Saudi Arabia, Egypt,[175] Uganda,[176] Jordan[177] and South Africa.[178] Joint

---

[165] Continental Shelf, *supra* note 48, ¶81; Arrest Warrant, *supra* note 51, ¶58.
[166] The Prosecutor v. Al-Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, The Pre-Trial Chamber I I.C.C., Mar. 4, 2009, ICC-02/05-01/09; The Prosecutor v. Al-Bashir, Second Decision on the Prosecution's Application for a Warrant of Arrest, The Pre-Trial Chamber I I.C.C., Jul. 12, 2010, ICC-02/05-01/09.
[167] The Prosecutor v. Al-Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, The Pre-Trial Chamber I I.C.C., Aug. 27, 2010, ICC-02/05-01/09-107.
[168] The Prosecutor v. Al-Bashir, Demande de coopération et d'informations adressée à la République Centrafricaine, The Pre-Trial Chamber I I.C.C., Dec. 1, 2010, ICC-02/05-01/09-121.
[169] The Prosecutor v. Al-Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, The Pre-Trial Chamber I I.C.C., May 13, 2011, ICC-02/05-01/09-129.
[170] The Prosecutor v. Al-Bashir, Decision requesting observations about Omar Al-Bashir's recent visit to Malawi, The Pre-Trial Chamber I I.C.C., Sep. 19, 2011, ICC-02/05-01/09-137.
[171] The Prosecutor v. Al-Bashir, Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad, The Pre-Trial Chamber I I.C.C., Feb. 22, 2013, ICC-02/05-01/09-147.
[172] The Prosecutor v. Al-Bashir, Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, The Pre-Trial Chamber I I.C.C., Jul. 15, 2013, ICC-02/05-01/09-157.
[173] The Prosecutor v. Al-Bashir, Decision regarding Omar Al-Bashir's visit to the Democratic Republic of the Congo, The Pre-Trial Chamber II I.C.C., Feb. 26, 2014, ICC-02/05-01/09-186.
[174] The Prosecutor v. Al-Bashir, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, The Pre-Trial Chamber II I.C.C., Apr. 29, 2014, ICC-02/05-01/09-199.

declarations from States opposing the purported arrest of Al-Bashir evidence the non-existence of *opinio iuris*.[179]

Highly qualified scholars have also rejected the existence of this alleged customary rule.[180]

The present case must be distinguished from other cases where immunity of public officials was deemed inapplicable. First, ICC's case against Al Bashir was referred by Security Council Resolution 1593,[181] which was interpreted as a waiver of immunity.[182] Second, the rulings of the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone cannot be taken into consideration for they were created by a

---

[175] The Prosecutor v. Al-Bashir, Decision Regarding Omar Hassan Ahmad A1 Bashir's Travel to the Republic of Egypt, The Pre-Trial Chamber II I.C.C., Mar. 24, 2015, ICC-02/05-01/09-232.

[176] The Prosecutor v. Al-Bashir, Decision requesting the Republic of Uganda to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court, The Pre-Trial Chamber II I.C.C., May 17, 2016, ICC-02/05-01/09-262.

[177] Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, The Pre-Trial Chamber II I.C.C., Dec. 11, 2017, ICC-02/05-01/09-309.

[178] The Prosecutor v. Al-Bashir, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, The Pre-Trial Chamber II I.C.C., Jun. 13, 2015, ICC-02/05-01/09-242.

[179] AU Press Release, supra note 103.

[180] The Prosecutor v. Krstić, Dissenting Opinion of Judge Shahabuddeen on Decision on Application for Subpoenas, Appeals Chamber I.C.T.Y., Jul. 1 2003 ¶11-12; The Prosecutor v. Al-Bashir, Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the 'Decision under Article 87 (7) of the Rome Statute on the non- compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir' of 12 March 2018, The Appeals Chamber I.C.C., Jun. 18, 2018, ICC-02/05-01/09 OA2, ¶10/6.

[181] S.C. Res. 1593 (2005).

[182] The Prosecutor v. Al-Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, The Pre-Trial Chamber II I.C.C., Apr. 9, 2014, ICC-02/05-01/09, ¶29.

treaty[183] or Security Council resolutions,[184] binding upon the States whose officials were under prosecution.

Thus, Ms. Grey's arrest cannot be justified by a customary exception to the personal immunity of public officers, since there is no such rule in international law.

3) There is no conflict between the *jus cogens* prohibition of war crimes and personal immunity

There is no conflict between a *jus cogens* prohibition of an international crime and the rules on immunity.[185] This is due to the fact that while peremptory norms are substantive, immunities are procedural,[186] and therefore they do not interact with each other.[187] Consequently, immunities are not affected by the *jus cogens* prohibition of war crimes.[188]

Therefore, Adawa cannot invoke the nature of the prohibition of war crimes in order to arrest Ms. Grey.

4) Rasasa's appointment of Ms. Grey did not constitute an abuse of rights

Applicant cannot argue that the appointment of Ms. Grey as Minister of Foreign Affairs constituted an abuse of rights.

---

[183] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Jun. 16, 2002.
[184] S.C. Res. 827 (1993)
[185] Jurisdictional immunities of the State (Ger. v. Ita.), 2012 I.C.J (Feb. 3) ¶93.
[186] R. A. Kolodkin (Special Rapporteur on immunity of State officials from foreign criminal jurisdiction), *Second report on immunity of State officials from foreign criminal jurisdiction*, U.N. Doc. A/CN.4/631 (Jun. 10, 2010) ¶64.
[187] A. Zimmerman, *Sovereign Immunity and Violations of International Jus Cogens - Some Critical Remarks*, 16.2 MICHIGAN JOURNAL OF INTERNATIONAL LAW 433 (1995) 483.
[188] Jurisdictional immunities of the State (Ger. v. Ita.), 2012 I.C.J (Feb. 3) ¶97; Case of Al-Adsani v. The United Kingdom, Judgment, No. 35763/97 E.Ct.H.R. (Nov. 21, 2001) ¶66; D. Akande, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21.4 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 816 (2010) 835.

Firstly, the appointment of a State official constitutes a prerogative of the State that derives from the concept of sovereignty.[189] Moreover, the presumption of innocence prevails over any person until declared guilty of a crime.[190] In any case, an abusive exercise of a right would only result in State responsibility,[191] not lifting immunities under any circumstance.

Here, Ms. Grey had not been charged with any crime at the moment of her appointment,[192] and there are no elements to consider her appointment as an abusive exercise of rights.

B) <u>In any event, Adawa's arrest was inconsistent with international law</u>

1) Adawa did not have jurisdiction to arrest Ms. Grey

States can exercise criminal jurisdiction over alleged offenders based on territorial, passive personality, active personality or protective principles.[193]

Further, under the *aut dedere aut judicare* principle, States have jurisdiction to prosecute or extradite offenders of certain crimes established solely by treaty.[194] The Geneva Conventions of 1949 determine the obligation to prosecute or extradite alleged perpetrators of

---

[189] Case of Al-Adsani v. The United Kingdom, Judgment, No. 35763/97 E.Ct.H.R. (Nov. 21, 2001) ¶54.
[190] ICCPR, *supra* note 100, Article 6(2).
[191] A. Kiss, *Abuse of Rights*, Max Planck Encyclopedias of International Law (2006) ¶32.
[192] SAF ¶32.
[193] K. KITTICHAISAREE, THE OBLIGATION TO EXTRADITE OR PROSECUTE 4 (2018).
[194] I. BANTEKAS, S. NASH, INTERNATIONAL CRIMINAL LAW 91 (2009).

grave breaches of the Conventions.[195] However, this obligation only applies for the protection of persons and property in the context of international armed conflicts.[196]

In this case, Adawa did not have jurisdiction under neither of these principles. The alleged crimes were not committed in its territory, neither the accused nor the victims are its nationals and the consequences of the crime did not have any effect on Adawa.[197] Moreover, Applicant cannot argue it acted under the *aut dedere aut judicare* principle since Ms. Grey is accused of crimes committed during a non-international armed conflict.[198]

Therefore, Adawa had no jurisdiction to execute the arrest warrant against Ms. Grey.

2) Compliance with an arrest warrant does not preclude the attribution of responsibility

Under customary law, the conduct of State's organs is attributable to the State and entails its international responsibility. The fact that Adawa arrested Ms. Grey pursuant to an ICC's arrest warrant does not hinder attribution for such internationally wrongful act.

---

[195] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, 1949, 75 U.N.T.S. 31, Article 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949, 75 U.N.T.S. 85, Article 50; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, Article 129; Geneva Convention relative to the protection of civilian persons in time of war 1949, 75 U.N.T.S. 287, Article 146.

[196] A. CLAPHAM, ET. AL (EDS.), THE 1949 GENEVA CONVENTIONS: A COMMENTARY, 643 (2015); lnt'I Law Comm'n, Rep. on the Work of Its Sixty-Sitxth Session, U.N. Doc. A/69/10 (2012), 157.

[197] SAF ¶15.

[198] *Id.*

C) <u>Ms. Grey must be immediately repatriated to Rasasa</u>

States responsible for internationally wrongful acts must fully repair the injury caused,[199] re-establishing the previous *status quo*.[200] In case of wrongful arrest, this implies releasing the detainee.[201] Thus, Ms. Grey must be repatriated to Rasasa.

V) PRAYER FOR RELIEF

Therefore, it may please the Court to adjudge and declare that:

(I) The Court lacks jurisdiction over Adawa's claims because Adawa is not a party to the 1929 Treaty of Botega;

(II) Rasasa's development and deployment of the WALL along the border between Adawa and Rasasa is consistent with international law;

(III) Adawa's claim that Rasasa's Helian tariffs violate the CHC Treaty falls outside the Court's jurisdiction or is inadmissible; in the alternative, the imposition of the tariffs did not violate the CHC Treaty; and

(IV) Adawa's arrest and detention of Darian Grey constitute internationally wrongful acts, and that she must be immediately repatriated to Rasasa.

---

[199] Factory at Chorzow (Germ. v. Pol.), 1928, P.C.I.J. (Ser. A) No. 9 (Sept. 13) ¶29; Gabcíkovo, *supra* note 25, ¶152; ARSIWA, *supra* note 147 Articles 31.

[200] ARSIWA, *supra* note 147, Articles 31; ARSIWA Commentaries, *supra* note 39.

[201] ICCPR, *supra* note 100, Article 9(4); ARSIWA Commentaries, *supra* note 39; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Article 5(4); G.A. Res. 43/173 U.N. Doc. A/RES/43/173 (Dec. 9, 1988), Principle 32; Human Rights Committee, Casafranca v. Peru, U.N. Doc. CCPR/C/78/D/981/2001 (2003), ¶9.