

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS



THE 2020 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE HELIAN HYACINTH

STATE OF ADAWA

(APPLICANT)

v.

REPUBLIC OF RASASA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

By virtue of the Joint Notification and the Statement of Agreed Facts [**“Compromis”**], including the Corrections and Clarifications [**“Clarifications”**], concluded on 9 September 2019, and in accordance with Article 40(1) of the Statute of the International Court of Justice [**“ICJ”**], the Republic of Rasasa [**“Rasasa”**] and the State of Adawa [**“Adawa”**] hereby refer to this Honourable Court their dispute concerning the Helian Hyacinth.

Both parties have agreed that all claims and counterclaims will be heard together in a single set of proceedings and that all issues of jurisdiction and admissibility would be determined alongside the merits. The *Compromis* constitutes a statement of agreed facts and is without prejudice to Rasasa's objection regarding the Court's jurisdiction and the admissibility of Adawa's claims.

QUESTIONS PRESENTED

- I. WHETHER THE COURT HAS JURISDICTION OVER ADAWA'S CLAIMS BECAUSE ADAWA IS NOT A PARTY TO THE 1929 TREATY OF BOTEGA.
- II. WHETHER RASASA'S DEVELOPMENT AND DEPLOYMENT OF THE WALL ALONG THE BORDER BETWEEN ADAWA AND RASASA IS CONSISTENT WITH INTERNATIONAL LAW.
- III. WHETHER ADAWA'S CLAIM THAT RASASA'S HELIAN TARIFFS VIOLATE THE CHC TREATY FALLS OUTSIDE THE COURT'S JURISDICTION OR IS INADMISSIBLE, OR IN THE ALTERNATIVE, THE IMPOSITION OF THE TARIFFS VIOLATES THE CHC TREATY.
- IV. WHETHER ADAWA'S ARREST AND DETENTION OF MS. GREY CONSTITUTE INTERNATIONALLY WRONGFUL ACTS, AND SHE MUST BE REPATRIATED IMMEDIATELY TO RASASA.

STATEMENT OF FACTS

BACKGROUND

Adawa and Rasasa are neighbouring countries in the Region of Crosinia [**“the Region”**]. They share a border that is 201 kilometers long. There are four other States in the Region. The Region is the only place on Earth where Helian hyacinth is cultivated. Helian Hyacinth is used in the production of the flavoring spice Helian.

THE ADAWA-ZEITOUNIA UNION

Until 1928, all six Crosinian States were provinces of the Kingdom of Crosinia. When the last king died, the provinces divided over competing claimants to the throne. Rasasa backed the late monarch’s brother while Zeitounia and Adawa – his eldest daughter which ultimately led to a civil war. On 29 October 1929, the belligerents – Adawa, Zeitounia, and Rasasa – met in Botega to end the bloodshed. Rasasa declared itself independent while the provinces of Adawa and Zeitounia united to form the Adawa-Zeitounia Union [**“AZU”**]. Rasasa and AZU concluded the Treaty of Botega on Armistice and Pacification [**“Botega Treaty”**]. During the 1930s, the AZU encountered significant economic and social stresses. On 1 January 1939, Adawa and Zeitounia amicably agreed to dissolve their Union, and each declared its independence as of that date.

HURRICANE MAKAN

On 14 July 2012, hurricane Makan struck the Region. More than 60% of the Helian hyacinths in Rasasa were destroyed, which also resulted in unemployment rising. In the months following the storm, crime rates skyrocketed throughout the Region. Armed gangs roamed the countryside, stealing salvageable Helian plants and harvesting and processing equipment from the devastated farms.

THE ADAWAN GANGS

In September 2016, the Rasasan and Adawan governments established a high-level task force to consider joint responses to the increase in cross-border crimes. The joint task force met several

times but was unable to formulate a comprehensive plan to suppress the gangs. By February 2017, the disorganized gangs had become a well-armed and organized militia. The Adawan nationals had established permanent and well-defended encampments within Rasasan territory, used as bases for international trafficking in illegal drugs. On 1 June 2017, the militia simultaneously attacked nine Rasasan Border Police stations, killing 21 officers. The militia was heavily armed with military-grade weapons and equipment, and the attacks indicated a high level of prior planning and training. On 25 June 2017, the Rasasan President authorized the deployment of the Rasasan Army against the militia camps within Rasasa.

THE WALL

In October 2012, the President of Rasasa 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. Darian Grey, former chief executive officer of Rasasan Robotics Corporation [“**RRC**”], offered the development of a “Weaponized Autonomous Limitation Line” [“**WALL**”] to suppress the criminal activities in the region. In January 2013, the President signed a contract with RRC and invited the other five States in the Region to take part in the development and research of the WALL. All six States devoted funds and provided leading government and private sector scientists and engineers, as well as materials, to the research and development phase of the project. By August 2013, only Rasasa and Adawa continued to participate in the development of the venture.

The WALL consists of 10-meter-tall towers, each topped with an advanced surveillance and response unit. With 360-degree motion-sensing, high-definition, and infrared cameras, each surveillance unit can closely monitor all ground and aerial activity within a 130,000 square meter area around the base of its tower. To respond to threats, each unit is equipped with an array of lethal and non-lethal options, ranging from speakers broadcasting audible warnings to non-targeted explosions, and machine guns. Using advanced artificial intelligence, the WALL can instantaneously and appropriately decide whether and how to respond to any given threat, without any intervention by human actors. Although it carries lethal potential as a last resort, the WALL is unimaginably more reliable than human police or soldiers. During testing whether the WALL might deploy deadly force when the situation does not warrant such a response, it demonstrated a “*false positives*” rate of less than 0.0001%. With embedded rules instructing its software to favor

non-lethal deterrence, the testing indicated that the WALL would mistakenly use excessive force no more than once in two hundred million encounters. Following the attacks upon Rasasan Border Police stations, Rasasa authorized the purchase of the WALL from RRC and its installation along the Rasasa-Adawa border. Because of the WALL crime rates have been reduced by 80% and no injuries are known to have occurred since its deployment.

THE HELIAN TARIFFS

In 1964, the six Crosinian States concluded the Treaty Establishing the Crosinian Helian Community [**“CHC Treaty”**] in order to share their agronomic, scientific, and economic data on cultivation of Helian Hyacinth. They agreed to impose no tariffs on Helian spice and the equipment and materials used to harvest or process the Helian hyacinth. In 1982 and 1985, respectively, Rasasa and Adawa acceded to the General Agreement on Tariffs and Trade [**“GATT”**] and submitted tariff schedules with zero bound rates on Helian products. In 1995, the two States became parties to the World Trade Organisation [**“WTO”**].

In 2017, the President of Rasasa submitted a bill to Parliament for the introduction of 25% *ad valorem* tariffs on unprocessed Helian in an effort to encourage Rasasa’s domestic processors to return to local farms for their feedstock. The Parliament adopted his proposal in January 2018. Adawa protested to the decision and requested consultations pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes [**“DSU”**] of the WTO. The consultations proved unsuccessful. In February 2019, Adawa requested the establishment of a panel pursuant to Article 6.2 of the DSU, alleging that Rasasa’s tariffs on Helian products were an unjustifiable breach of its commitment to maintain the zero bound rate.

THE ARREST AND DETENTION OF DARIAN GREY

In 1998, Adawa became party to the Rome Statute of the International Criminal Court [**“Rome Statute”**]. Rasasa is not a party to the Rome Statute. In 2009, Garantia, a State party to the Rome Statute, referred a situation that occurred on its territory to the Prosecutor of the International Criminal Court [**“ICC”**]. The referral specifically mentioned RRC as one of the accused foreign contractors, and cited Ms. Grey as having being personally responsible for war crimes. The Prosecutor opened an investigation in August 2009. In 2017, Ms. Grey became the Minister of Foreign Affairs of Rasasa. On 18 June 2019, the CHC welcomed representatives of its Member

States to Novazora, the Adawan capital, for its annual meeting. Minister Grey, representing Rasasa, arrived on 18 June 2019 for the four-day session. On 20 June 2019, a Pre-Trial Chamber of the ICC issued a warrant of arrest for Minister Grey. On 22 June 2019, Ms. Grey was arrested while leaving her hotel by Adawan officers.

SUMMARY OF PLEADINGS

-I-

This Court lacks jurisdiction as Adawa is not a party to the Botega Treaty. Adawa has not automatically succeeded to the Botega Treaty. Such a rule does not exist under customary international law or alternatively, the intertemporal rule precludes its application. Furthermore, Adawa did not succeed to the Botega Treaty by virtue of a territorial regime as there is no such regime between Rasasa and Adawa - Adawa does not succeed to the Botega Treaty by virtue of Article 1(2) or Article 3(1). Alternatively, Adawa succeeded only to the treaty provisions which establish territorial regimes and not to the jurisdiction clause of the Treaty. Additionally, Adawa failed to obtain Rasasa's consent to become a party to the Botega Treaty and Rasasa has not tacitly consented to Adawa's succession to the Botega Treaty. Thus, the jurisdiction clause in Article 6 Botega Treaty cannot be invoked as a ground for jurisdiction.

-II-

Rasasa's deployment of the WALL is consistent with international law. The WALL's deployment does not violate the rules of international humanitarian law applicable during a non-international armed conflict - the principles of distinction, precaution, proportionality, and the Martens Clause. Furthermore, Rasasa does not violate human rights law as Adawa does not have standing to bring a claim regarding the WALL's deployment. Alternatively, Rasasa has no extraterritorial obligations towards Adawans. Alternatively, alleged violations of the right to life are determined by IHL during an armed conflict. In any case, the WALL does not violate the right to life. Moreover, there is no requirement for meaningful human control over the WALL and its deployment does not violate the object and purpose of the Botega Treaty. Additionally, Adawa is barred to object to the development of the WALL under the clean hands doctrine.

-III-

The ICJ lacks jurisdiction over this dispute as the WTO panels have exclusive jurisdiction over disputes regarding Helian tariffs. Additionally, the jurisdiction of the WTO panels is *lex specialis* and *lex posterior* to the jurisdiction of this Court. Alternatively, the ongoing proceedings before

the WTO panel are a bar for the admissibility of the claim pursuant to the principle of *lis pendens* and the principle of comity. Additionally, the submission of the claim constitutes an abuse of process. In any event, the tariffs do not breach the CHC Treaty as they are necessary to protect Rasasa's essential security interests and, consequently, Adawa is not entitled to compensation.

-IV-

Ms. Grey enjoys personal immunity from arrest and detention under the CHC Treaty. As a Minister of Foreign Affairs Ms. Grey has immunity under customary law. Adawa violated Ms. Grey's immunities by exercising domestic jurisdiction over her. Adawa cannot arrest Ms. Grey pursuant to the ICC's arrest warrant since ICC does not have jurisdiction over nationals of non-State parties. Alternatively, Ms. Grey's immunities bar the jurisdiction of the ICC. In any event, Adawa is bound to respect Ms. Grey's immunities even when it cooperates with the ICC. Additionally, there is no customary rule rendering immunities inapplicable in cases of cooperation with ICC. Ms. Grey must be immediately repatriated back to Rasasa.

PLEADINGS

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

The jurisdiction clause in Article 6 Botega Treaty is invalid as Adawa is not a party to the Botega Treaty. **(A.)** Adawa has not automatically succeeded to the Treaty. Moreover, **(B.)** Adawa has not succeeded to the Treaty by virtue of a territorial regime. Additionally, **(C.)** Adawa failed to obtain Rasasa's consent to become a party to the Botega Treaty. Thus, **(D.)** the jurisdiction clause in Article 6 Botega Treaty cannot be invoked as a ground for jurisdiction.

A. Adawa has not automatically succeeded to the Botega Treaty

Generally, the successor State does not inherit obligations and rights of the predecessor.¹ The Applicant cannot claim that it has automatically succeeded to the Botega Treaty after the dissolution of the AZU² since **(1.)** no such customary rule exists. Alternatively, even if such custom exists presently, **(2.)** the intertemporal rule precludes its application. In any case, the automatic succession rule is intended to cover only multilateral human rights treaties and not bilateral relations such as those between Rasasa and Adawa,³ hence it is inapplicable.

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, ICJ Rep 2007, p. 595, [**"Bosnian Genocide, Preliminary Objections"**], Separate Opinion, Judge Weeramantry, pp. 643-644; *Bosnian Genocide*, Preliminary Objections, Dissenting Opinion, Judge Kreća, p. 777; ILC, Fifth report on succession in respect of treaties, Special Rapporteur, Sir Humphrey Waldock, Yearbook of the International Law Commission 1972, vol. II, A/CN.4/256 and Add.1-4, p. 44, commentary 1; James Crawford (ed.), *Brownlie's Principles of Public International Law* (9th ed., Oxford University Press, 2019), [**"Brownlie"**], p. 423;

² *Case Concerning the Helian Hyacinth (State of Adawa v. Republic of Rasasa)*, [**"Compromis"**], ¶7;

³ *Bosnian Genocide*, Preliminary Objections, Separate Opinion, Judge Weeramantry, p. 645; Patrick Dumberry, *State Succession to Bilateral Treaties: A Few Observations on the Incoherent*

1. Automatic succession is not part of customary international law

As Adawa and Rasasa are not parties to the Vienna Convention on Succession of States with respect to treaties [“VCSST”],⁴ Adawa cannot rely on Article 34 of the Convention which regulates automatic succession to treaties in cases of union dissolution.⁵

Adawa might claim that automatic succession is representative of international custom. However, it is consistently affirmed that this norm is merely progressive development of law.⁶ Hence, the Applicant has the burden to establish that the rule has acquired a customary status.⁷ The requirement for emergence of custom from a treaty provision is “*extensive and virtually uniform*” State practice and *opinio juris*.⁸ The International Law Commission [“ILC”] regards the State practice for automatic succession as insufficient since “*the precedents [...] are few*”⁹ and “*far from*

and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention, 28 Leiden Journal of International Law, [“Dumberry”], p. 22;

⁴ *Compromis*, ¶60; *Clarifications*, (e.);

⁵ Vienna Convention on Succession of States in respect of treaties, 1978, UNTS 1946, p. 3, [“VCSST”], Art. 34;

⁶ *Bosnian Genocide*, Preliminary Objections, Dissenting Opinion, Judge Kreća, p. 779; UN, Conference on Succession of States in Respect of Treaties, Committee of the Whole, 48th Meeting, A/CONF.80/C.1/SR.48, p. 105, [“**Conference on State Succession**”], ¶10; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep 1997, [“**Gabčíkovo-Nagymaros**”], Memorial of the Republic of Hungary, p. 323, ¶10.112; Council of Europe, Preliminary Draft Report on the Pilot Project of The Council on Europe on State Practice Regarding State Succession and Issues of Recognition, 16th Meeting, 1998, p. 43; Christian Tams and James Sloan, *The Development of International Law by the International Court of Justice* (1st ed., Oxford University Press, 2013), p. 61; Malcolm N. Shaw, *International Law* (7th ed., Cambridge University Press, 2014), [“**Shaw**”], p. 710; Brownlie, p. 423;

⁷ *Asylum Case (Colombia v. Peru)*, Judgment, ICJ Rep 1950, p. 276;

⁸ *North Sea Continental Shelf (Germany v. Denmark, Germany v. Netherlands)*, Judgment, ICJ Rep 1969, p. 3, [“**North Sea**”], ¶74;

⁹ ILC, First report on succession of States in respect of treaties, Special Rapporteur, Sir Francis Vallat, Yearbook of the International Law Commission 1974, vol. II(1), A/CN.4/278, Add.1–5, Add.5/Corr.1 and Add.6, p. 1, [“**First report on State Succession**”], ¶399;

conclusive".¹⁰ Furthermore, attempts to codify the rule received disapproval from numerous States.¹¹ Consequently, the threshold for custom is not met.

2. Alternatively, the intertemporal rule precludes the application of automatic succession

Even if automatic succession has recently acquired the status of a customary norm, it cannot be invoked by Adawa due to the intertemporal rule. The intertemporal rule, reaffirmed by the ICJ,¹² provides that "*a juridical fact must be appreciated in the light of the law contemporary with it*".¹³ Automatic succession was declared as progressive development of law in 1978.¹⁴ Thus, it could not have been part of customary international law at the time of the dissolution of the AZU in 1939.¹⁵

B. Adawa did not succeed to the Botega Treaty by virtue of a territorial regime

¹⁰ First report on State Succession, ¶399;

¹¹ First report on State Succession, ¶391;

¹² *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgement, ICJ Rep 1952, p. 189; *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)*, Second Phase, Judgement, ICJ Rep 1966, ¶16;

¹³ *Island of Palmas Case (Netherlands v. United States of America)*, Reports of International Arbitration Awards 1928, vol. II, p. 829, [**Island of Palmas**], p. 845; Taslim Elias, *Doctrine of Intertemporal Law*, American Journal of International Law, vol. 74, No. 2, p. 288;

¹⁴ Conference on State Succession, p. 105, ¶10; *Bosnian Genocide*, Preliminary Objections, Dissenting Opinion, Judge Kreća, p. 779;

¹⁵ *Compromis*, ¶7;

Under Article 12 VCSST, which is reflective of customary law,¹⁶ territorial regimes and boundaries¹⁷ are not affected by State succession.¹⁸ However, Adawa cannot succeed to the Botega Treaty under this rule as **(1.)** the Treaty does not establish a territorial regime between Adawa and Rasasa. Alternatively, **(2.)** Adawa succeeds only to the Treaty provisions which establish the territorial regime.

1. The Botega Treaty does not establish a territorial regime between Adawa and Rasasa

i. Adawa does not succeed to the Botega Treaty by virtue of Article 1(2)

Territorial regimes are impressed with a status intended to be permanent.¹⁹ The demarcation lines established by Article 1(2) Botega Treaty do not meet the requirement for permanency as they are “*without prejudice to the ultimate settlement*”.²⁰ Generally, demarcation lines are not recognized as establishing permanent regimes.²¹ Additionally, territorial regimes must be “*independent of the*

¹⁶ *Gabčíkovo-Nagymaros*, ¶123;

¹⁷ ILC, Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II(1), p. 174, [**“Draft Articles VCSST”**], Art. 12, commentary 2;

¹⁸ VCSST, Art. 12; Robert Jennings and Arthur Watts (eds.), *Oppenheim’s International Law*, (9th ed., vol. 1, Oxford University Press, 2008), [**“Oppenheim”**], p. 238; Lord McNair, *Law of Treaties* (1st ed., Oxford University Press, 1986), p. 590;

¹⁹ *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, ICJ Rep 1994, p. 6, [**“Territorial Dispute”**], ¶¶72-73; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Rep 2007, p. 624, [**“Territorial and Maritime Dispute”**], ¶89; D. P. O’Connell, *The Law On State Succession* (1st ed., Cambridge University Press, 2015), [**“O’Connell”**], p. 49;

²⁰ Botega Treaty, Art. 1(2);

²¹ Frauke Lachenmann and Rüdiger Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st ed., Oxford University Press, 2017), p. 325, ¶¶1, 7;

personality of the State”²² and the political context.²³ However, the demarcation lines were tied to the personalities of the former AZU and Rasasa as they were aimed at “*separating their armed forces*”²⁴ to end the conflict.²⁵ Consequently, the demarcation lines do not establish a territorial regime.

ii. Adawa does not succeed to the Botega Treaty by virtue of Article 3(1)

The peace zone established by Article 3(1) Botega Treaty may be recognized as a territorial regime.²⁶ However, Adawa cannot succeed to it as the provision refers to a peace zone situated exclusively on the border between Zeitounia and Rasasa.²⁷

Furthermore, Adawa does not succeed to the right of free passage enshrined in the provision as it is conferred upon the individuals and not to the States.²⁸ Under the territorial regime rule, States do not succeed to rights of individuals.²⁹ Thus, Adawa does not succeed to any rights or obligations deriving from the peace zone³⁰ and respectively to the Botega Treaty.

2. Alternatively, Adawa succeeds only to the treaty provisions which establish territorial regimes

²² O’Connell, p. 49;

²³ Shaw, p. 703;

²⁴ Botega Treaty, Art. 1(2);

²⁵ *Compromis*, ¶5;

²⁶ Draft Articles VCSST, Art. 12, commentary 1;

²⁷ Botega Treaty, Art. 3(1);

²⁸ Botega Treaty, Art. 3(1);

²⁹ Draft Articles VCSST, Art. 12, commentary 29;

³⁰ VCSST, Art. 12(2);

In any case, under Article 12 VCSST States succeed only to the provisions which establish territorial regimes - not to the treaty as a whole.³¹ Accordingly, the ICJ has declared that only the territorial regime enjoys permanence and not the entire treaty itself.³² This is the case of succession to peace treaties where there are other provisions which are not related to the establishment of the regime.³³ Hence, States do not succeed to supplementary provisions to the regime,³⁴ such as jurisdiction clauses.

In any event, a jurisdiction clause may be invoked only for a dispute related to the established regime³⁵ which, however, is not subject to the present proceedings. Consequently, Adawa cannot rely on the jurisdiction clause enshrined in Article 6 Botega Treaty to establish the jurisdiction of the Court.

C. Adawa failed to obtain Rasasa's consent to become party to the Botega Treaty

States have maintained the application of the “*clean slate*” principle in cases of dissolution of unions.³⁶ The “*clean slate*” principle stipulates that a successor State cannot claim any right or become party to any of its predecessor's bilateral treaties.³⁷ For this reason, in cases of bilateral treaties, not falling under Article 12 VCSST,³⁸ the successor State has to obtain the consent of the

³¹ *Gabčíkovo-Nagymaros*, Reply of the Republic of Hungary, vol. 1, ¶¶3.141, 3.149; *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)* (Second Phase) (1930), PCIJ Ser A No 24, p. 17; Draft Articles VCSST, Arts. 11, 12, commentary 36; Brownlie, p. 425; Oppenheim, p. 213;

³² *Territorial Dispute*, ¶¶72-73; *Territorial and Maritime Dispute*, ¶89;

³³ First report on State Succession, ¶444;

³⁴ First report on State Succession, ¶444; UN, Materials on Succession of States, UN Doc ST/LEG/SER.B/14, p. 187;

³⁵ Draft Articles VCSST, Art. 12, commentary 7;

³⁶ *Bosnian Genocide*, Preliminary Objections of the Federal Republic of Yugoslavia, p. 126, ¶B.1.4.10; First report on State Succession, ¶98; Dumberry, p. 27;

³⁷ Draft Articles VCSST, Art. 23, commentary 2; Oppenheim, pp. 238-239;

³⁸ VCSST, Art. 24;

other party in order to become a party to the treaty.³⁹ Consent should be clearly expressed⁴⁰ by a subsequent notification⁴¹ or agreement,⁴² however no such are present. As a result, Adawa did not succeed to the Treaty.

1. Rasasa has not tacitly consented to Adawa's succession to the Botega Treaty

A State may tacitly consent to be bound by a legal situation through its unilateral conduct under the doctrine of acquiescence.⁴³ The concept of acquiescence is applicable only when the circumstances require a response by the consenting State.⁴⁴ Correspondingly, after the invocation of alleged violations of the Botega Treaty by Adawa,⁴⁵ Rasasa explicitly objected the purported succession of Adawa to the Treaty.⁴⁶ Thus, Rasasa has not acquiesced to the succession of Adawa to the Botega Treaty.

D. The jurisdiction clause in Article 6 Botega Treaty cannot be invoked as a ground for jurisdiction

³⁹ Draft Articles VCSST, Art. 23, commentary 12;

⁴⁰ Draft Articles VCSST, Art. 23, commentaries 14, 15;

⁴¹ *Bosnian Genocide*, Preliminary Objections, ¶18; Nasila Rembe, *The Vienna Convention on State Succession in respect of Treaties: an African perspective on its applicability and limitations*, *Comparative and International Law Journal of Southern Africa*, vol. 17, No. 2, pp. 134-135;

⁴² Draft Articles VCSST, Arts. 33, 34, commentary 6; International Conference on the Former Yugoslavia (the Badinter Commission), 16 July 1993, pp. 1495-1496, (e.); European Political Cooperation, Declaration of the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, *European Political Cooperation Documentation Bulletin*, vol. 7, 1991, p. 770;

⁴³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgement, ICJ Rep 1984, ¶130;

⁴⁴ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgement, ICJ Rep 2008, ¶121;

⁴⁵ *Compromis*, ¶38;

⁴⁶ *Compromis*, ¶55;

Treaties contain rights only for the contracting parties.⁴⁷ As Adawa is not a successor and respectively - not a party to the Botega Treaty,⁴⁸ the jurisdiction clause embodied in Article 6 Botega Treaty is not in force between Adawa and Rasasa. Thus, Adawa cannot invoke Article 6 as a ground for this Court's jurisdiction.⁴⁹

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

Rasasa's (A.) deployment of the WALL is consistent with international law. Furthermore, (B.) Adawa is barred from objecting to the development of the WALL.

A. The deployment of the WALL is consistent with international law

The WALL's deployment does not violate (1.) international humanitarian law ["IHL"] and (2.) human rights law ["HRL"]. Moreover, (3.) there is no requirement for meaningful human control over the WALL. Additionally, (4.) the deployment does not violate the object and purpose of the Botega Treaty.

1. The WALL's deployment does not violate IHL

i. Rasasa has to observe IHL due to the non-international armed conflict

The Respondent is in a state of non-international armed conflict since 2017.⁵⁰ Such conflict exists when dissident armed groups capable of carrying out military operations and having permanent camps within a State's territory fight military forces of that State.⁵¹ The standard is met as Rasasa's

⁴⁷ Vienna Convention on the Law of Treaties, 1969, UNTS 1155, p. 331, ["VCLT"], Arts. 26, 34;

⁴⁸ Pleadings, (I)(A.)-(C.);

⁴⁹ Statute of the International Court of Justice, 1945, UNTS 1055, ["ICJ Statute"], Art. 37;

⁵⁰ *Compromis*, ¶¶ 34-35, 37;

⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts, 1977, UNTS 1125, p. 609, Art. 1(1); *Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (2

military force was deployed against the “*heavily armed*”⁵² and organized Adawan militia which had established permanent encampments within Rasasan territory.⁵³ The conflict is governed by the rules applicable to non-international conflicts, expressed in the Geneva Conventions⁵⁴ to which Rasasa is a party,⁵⁵ and customary IHL.⁵⁶ Rasasa is bound to respect the IHL regime until a peaceful settlement is reached.⁵⁷

ii. The WALL complies with the rules of IHL

IHL rules govern the use of weapons during an armed conflict.⁵⁸ Accordingly, Rasasa submits that the WALL complies with the IHL principles of (a.) distinction, (b.) precaution, and (c.) proportionality. Additionally, (d.) the Martens Clause cannot render the WALL prohibited.

a. The WALL complies with the principle of distinction

October 1995), IT-94-1-A, ICTY, [“**Tadić**”], ¶70; *Juan Carlos Abella v. Argentina*, 11.137 (1997), IACHR, Report N° 55/97, p. 271, [“**Abella**”], ¶152;

⁵² *Compromis*, ¶36;

⁵³ *Compromis*, ¶¶34-35;

⁵⁴ Geneva Convention relative to the protection of civilian persons in time of war, 1949, UNTS 75, p. 287, common Art. 3;

⁵⁵ *Compromis*, ¶60;

⁵⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, ICJ Rep 1986, [“**Nicaragua**”], p.114, ¶¶218-219; *Tadić*, ¶¶67-70;

⁵⁷ *Tadić*, ¶70; *Prosecutor v. Haradinaj*, IT-04-84-T, Judgment (Trial Chamber) (3 April 2008), ICTY, ¶100; Marko Milanovic, *End of application of international humanitarian law*, International Review of the Red Cross, 2014, 96 , p. 179;

⁵⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, p. 226, [“**Nuclear Weapons**”], ¶86; CCW, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, Report of the 2019 session, CCW/GGE.1/2019/3, [“**LAWs Report**”], ¶17(a), (c);

The principle of distinction requires that a weapon must be able to distinguish between civilians, *hors de combat* individuals, and militants.⁵⁹ The WALL draws such distinction using data, acquired by military and police officials which included millions of images, video footage, and computer models.⁶⁰ Consequently, the WALL can successfully distinguish between armed threats and *hors de combat* individuals,⁶¹ and the chance of the WALL targeting civilian individuals is virtually zero.⁶² Thus, the WALL complies with the principle of distinction.

b. The WALL complies with the principle of precaution

Under the principle of precaution belligerents must take all feasible care to spare civilian life when using lethal weapons.⁶³ Feasibility is determined by what is practical in the specific circumstances.⁶⁴ In particular, the WALL must verify lawful targets,⁶⁵ minimise civilian loss of life,⁶⁶ and cancel unlawful attacks.⁶⁷ Respectively, the WALL's surveillance units ensure continuous verification of targets through motion-sensing, infrared cameras⁶⁸ and can instantaneously and appropriately decide whether and how to respond to any given threat.⁶⁹ Since

⁵⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, UNTS 1125, p. 3, [**“Protocol I”**], Arts. 48, 51(2), 52(2); *Nuclear Weapons*, ¶78; *Tadić*, ¶110;

⁶⁰ *Compromis*, ¶20;

⁶¹ *Compromis*, ¶20;

⁶² *Compromis*, ¶¶18, 25;

⁶³ Protocol I, Art. 57(1); *Prosecutor v. Kupreškić*, IT-95-16-T, Judgment (Trial Chamber) (14 January 2000), ICTY, [**“Kupreškić”**], ¶535;

⁶⁴ Eritrea-Ethiopia Claims Commission, *Western Front, Aerial Bombardment and Related Claims*, Eritrea's Claim, Partial Award, 19 December 2005, ¶27;

⁶⁵ Protocol I, Art. 57(2)(a)(i);

⁶⁶ Protocol I, Art. 57(2)(a)(ii);

⁶⁷ Protocol I, Art. 57(2)(b);

⁶⁸ *Compromis*, ¶24;

⁶⁹ *Compromis*, ¶24;

the WALL is able to verify targets in the first place,⁷⁰ it is equally able to sense changes in a given situation and cancel an attack if information indicates that it would be unlawful.⁷¹ Thus, the WALL complies with the principle of precaution.

c. The WALL complies with the principle of proportionality

Under the proportionality principle the WALL cannot deploy an attack expected to cause incidental loss of civilian life which would be excessive in relation to the direct military advantage.⁷² Respectively, the WALL has engaged in approximately 105 operations⁷³ without causing any civilian injuries.⁷⁴ Each of these operations provided significant military advantage by ultimately reducing 80% of the hostilities.⁷⁵ Thus, the WALL complies with the principle of proportionality.

d. The Martens Clause cannot render the WALL prohibited

The Martens clause is a mere guideline regarding the applicability of weapons not regulated by IHL.⁷⁶ It entails that the rules of IHL regarding weapons should be construed in a manner consistent with the dictates of public conscience and the principles of humanity.⁷⁷ However, the

⁷⁰ Pleadings, (II.)(A.)(2.)(ii.)(a.);

⁷¹ Marco Sassoli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, US Naval War College, vol. 90, p. 337;

⁷² Protocol I, Arts. 51(5)(b), 57(2)(a)(iii); *Kupreškić*, ¶535;

⁷³ *Clarifications*, ¶4;

⁷⁴ *Compromis*, ¶42; *Clarifications*, ¶4;

⁷⁵ *Compromis*, ¶41;

⁷⁶ *Nuclear Weapons*, ¶78;

⁷⁷ Protocol I, Art. 1(2);

clause cannot prohibit autonomous systems as it depends on the existence of a prohibitory rule of customary international law.⁷⁸ However, such a rule does not exist presently.

Alternatively, the WALL does not violate the principles of humanity and the dictates of public conscience. First, the principles of humanity encompass only IHL rules⁷⁹ which the WALL observes.⁸⁰ Second, the public conscience is to be deduced from authoritative sources such as General Assembly resolutions and law-making treaties.⁸¹ Presently, there are no such authoritative sources prohibiting lethal autonomous systems, rather States are in preliminary stages of exploring the capabilities of such systems.⁸²

2. The WALL does not violate HRL

i. Adawa does not have standing to bring a claim regarding the WALL's deployment

Rasasa and Adawa are parties to the International Covenant on Civil and Political Rights ["ICCPR"].⁸³ The ICCPR concerns rights of individuals⁸⁴ and does not confer standing on States except in cases of diplomatic protection. Absent any direct injury, Adawa does not have standing

⁷⁸ *Nuclear Weapons*, Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, ¶3.58;

⁷⁹ *Nicaragua*, ¶218; Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, *American Journal of International Law*, vol. 94, No. 1, p. 82;

⁸⁰ Pleadings, (II).(A).(1.);

⁸¹ *Nuclear Weapons*, Dissenting Opinion, Judge Shahabuddeen, pp. 410-411;

⁸² CCW, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, Russian Federation, UN Doc CCW/GGE.1/2017/WP.8, ¶6; CCW, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, United States of America, UN Doc CCW/GGE.1/2017/WP.7, ¶¶4-5;

⁸³ *Compromis*, ¶60;

⁸⁴ HRC, General Comment 24, UN Doc CCPR/C/21/Rev.1/Add.6, ["GC 24"], ¶17;

in respect of the deployment of the WALL as it cannot identify any victim upon whom it can exercise diplomatic protection.⁸⁵

ii. Rasasa does not have extraterritorial obligations towards Adawans

The ICCPR limits human rights obligations of States to individuals within their territory or under their jurisdiction.⁸⁶ As jurisdiction is primarily territorial,⁸⁷ Rasasa has no obligation to protect rights of Adawans as they are outside its territory. Jurisdiction applies extraterritorially in exceptional circumstances.⁸⁸ Such instances occur when the State exercises control⁸⁹ over the other State's territory through administrative organs⁹⁰ or conduct of its agents abroad.⁹¹ Considering that Rasasa does not exercise such control over Adawa's territory, it has no extraterritorial jurisdiction over Adawan citizens.

iii. Alleged violations of the right to life are determined by IHL during an armed conflict

Article 6 ICCPR prohibits arbitrary deprivation of life.⁹² Although this prohibition continues to exist for Rasasa during armed conflicts,⁹³ what is "arbitrary" is determined in accordance with

⁸⁵ *Mavrommatis Palestine Concessions Case (Greece v. UK) (Jurisdiction)* (1924), PCIJ Ser A No 2, ["**Mavrommatis**"], p. 12;

⁸⁶ International Covenant on Civil and Political Rights, UNTS 999, p. 171, ["**ICCPR**"], Art. 2(1); HRC, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13, ["**GC 31**"], ¶3;

⁸⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 136, ["**Wall Advisory**"], ¶109;

⁸⁸ *Banković v. Belgium*, No. 52207/99, [2001], ECtHR, ¶61;

⁸⁹ *Wall Advisory*, ¶110; *Loizidou v. Turkey*, No. 15318/89, [1996], ECtHR, ¶52;

⁹⁰ *Cyprus v. Turkey*, No. 25781/94, [2001], ECtHR, ¶76;

⁹¹ *Pad v. Turkey*, No. 60167/00, [2007], ECtHR, ¶53;

⁹² ICCPR, Art. 6(1);

⁹³ HRC, General Comment 36, UN Doc CCPR/C/GC/36, ["**GC 36**"], ¶64;

IHL which regulates the use of lethal force in times of armed conflicts.⁹⁴ Accordingly, as the WALL complies with IHL,⁹⁵ there is no violation of Article 6 ICCPR.

iv. In any case, the WALL does not violate the right to life

The right to life can be violated either by arbitrary depriving life⁹⁶ or by putting an individual's life at stake.⁹⁷ Presently, neither deprivation of life nor lethal threat to civilians has taken place.⁹⁸ Although the WALL possesses lethal capacity,⁹⁹ there are no binding rules regarding preemptive regulation of lethal force, rather existing guidelines are considered as soft-law.¹⁰⁰ Alternatively, the WALL complies with the requirements for lawful use of lethal force - the principles of strict necessity and proportionality.¹⁰¹

First, strict necessity entails that the use of lethal force is only permissible as a last resort in the face of a grave threat to another person's life.¹⁰² Presently, even Adawa declared that the WALL

⁹⁴ *Nuclear Weapons*, ¶25; *Abella*, ¶161; *Coard et Al. v. United States*, Case 10.951 (1999), IACHR, Report No. 109/99, ¶42; *Case of the Santo Domingo Massacre v. Colombia* (Preliminary objections, merits and reparations) (2012), IACtHR, ¶211; *Hassan v. UK*, No. 29750/09, [2011], ECtHR, ¶102; ACHPR, General Comment No. 3, ¶32;

⁹⁵ Pleadings, (II).(A).(1.);

⁹⁶ ICCPR, Art. 6(1);

⁹⁷ *Öneryildiz v. Turkey*, No. 48939/99, [2004], ECtHR, ¶71; GC 36, ¶¶6-7;

⁹⁸ *Compromis*, ¶42; *Clarifications*, ¶4;

⁹⁹ *Compromis*, ¶¶24-25;

¹⁰⁰ UN, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns 2014, UN Doc A/HRC/26/36, [“**Christof Heyns**”], ¶43;

¹⁰¹ GC 31, ¶6; Christof Heyns, *Human Rights and the use of Autonomous Weapons Systems (AWS) During Domestic Law Enforcement*, Human Rights Quarterly, vol. 38, no. 2, pp. 363-364;

¹⁰² GC 36, ¶12; *McCann v. the United Kingdom*, No. 18984/91, [1995], ECtHR, ¶149; *Nachova v. Bulgaria*, No 43577/98, [2005], ECtHR, ¶95; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Doc A/CONF.144/28/Rev.1, pp. 113-114, [“**Basic Principles**”], principle 9;

would not deploy lethal force when the situation does not warrant such response.¹⁰³ Accordingly, the WALL has issued only verbal signals and non-lethal warning shots.¹⁰⁴ Thus, the WALL complies with the principle of strict necessity.

Second, proportionality stipulates that the force employed shall correspond to the threat posed.¹⁰⁵ Hence, measures ensuring graduation of force must be implemented.¹⁰⁶ Respectively, the WALL has an array of non-lethal options for incapacitation¹⁰⁷ and favours non-lethal deterrence.¹⁰⁸ Thus, the WALL complies with the principles of proportionality.

3. There is no requirement for meaningful human control over the WALL

Although the WALL acts independently of human control,¹⁰⁹ this is not a violation since further research of the human element in LAWs is required.¹¹⁰ As technology has only recently reached a level where some systems could be considered fully autonomous,¹¹¹ neither settled State practice, nor *opinio juris* have been expressed.¹¹² Although NGOs have raised ethical considerations for

¹⁰³ *Compromis*, ¶25;

¹⁰⁴ *Clarifications*, ¶4;

¹⁰⁵ Basic Principles, principle 5(a);

¹⁰⁶ Basic Principles, principle 4; Christof Heyns, ¶66;

¹⁰⁷ *Compromis*, ¶¶24, 37;

¹⁰⁸ *Compromis*, ¶25;

¹⁰⁹ *Compromis*, ¶24;

¹¹⁰ LAWs Report, ¶22(a);

¹¹¹ UN, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 2013, UN Doc A/HRC/23/47, ¶45;

¹¹² *North Sea*, ¶77;

such a requirement,¹¹³ such considerations do not render a general obligation for States,¹¹⁴ and cannot be considered reflective of State practice. Thus, there is no requirement for meaningful human control over the WALL. In any case, such requirement would exist in order to ensure compliance of autonomous systems with IHL.¹¹⁵ Presently, the WALL complies with the rules of IHL without human control.¹¹⁶

4. The object and purpose of the Botega Treaty are not violated

The Botega Treaty must be interpreted from its text, including its preamble,¹¹⁷ and in light of its object and purpose.¹¹⁸ The Botega Treaty is an armistice agreement which aims at restoration of regional peace and security.¹¹⁹ Such agreements establish temporal suspension of hostilities between States and do not entail demilitarization if that is not explicitly provided.¹²⁰ Thus, the militarization of the border through the WALL¹²¹ does not violate the object and purpose of the

¹¹³ CCW, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, Statement of Human Rights Watch, Bonnie Docherty, 2018;

¹¹⁴ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, ICJ Rep 1966, ¶¶49-50;

¹¹⁵ LAWs Report, ¶17(e);

¹¹⁶ Pleadings, (II.)(A.)(2.);

¹¹⁷ VCLT, Art. 31(2);

¹¹⁸ VCLT, Art. 31(1); *LaGrand (Germany v. United States of America)*, Judgement, ICJ Rep 2001, ¶99; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Preliminary Objections, ICJ Rep 2004, p. 429, [“**Legality of Use of Force**”], ¶98;

¹¹⁹ Botega Treaty, Preamble, ¶¶3, 5-6;

¹²⁰ Suzanne Bastid, *The Cease-Fire*, General Report of the International Society of Military Law and the Law of War, 1973, pp. 37-38; Convention with respect to the Laws and Customs of War on Land, 36 STAT. 2277, Treaty Series 539, p. 631, Art. 36;

¹²¹ *Compromis*, ¶37;

Botega Treaty. Additionally, as the regional peace was threatened by the Adawan militia,¹²² the WALL preserved the object and purpose of the Botega Treaty by reducing 80% of the hostilities.¹²³

B. Adawa is barred from objecting to the development of the WALL under the clean hands doctrine

Under the clean hands doctrine, consistently reaffirmed by judges on the PCIJ¹²⁴ and ICJ,¹²⁵ a State engaged in non-performance of obligations lacks standing to challenge non-performance of corresponding obligations by another State.¹²⁶ Adawa was involved throughout the whole development of the WALL¹²⁷ by devoting funding, scientists, engineers,¹²⁸ and military experts.¹²⁹ Thus, under the clean hands doctrine Adawa is barred from objecting to the development of the WALL.

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

¹²² *Compromis*, ¶¶34-36;

¹²³ *Compromis*, ¶41;

¹²⁴ *Diversion of Water from the Meuse (Netherlands v Belgium)* (1937), PCIJ Ser A/B No 17, Individual Opinion, Judge Hudson, p. 77;

¹²⁵ *Nicaragua*, Dissenting Opinion, Judge Schwebel, ¶268; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Rep 2002, p. 3, [“**Arrest Warrant**”], Dissenting Opinion, Judge Van den Wyngaert, ¶35;

¹²⁶ *Factory at Chorzów (Germany v. Poland) (Jurisdiction)* (1927), PCIJ Ser A No 9, [“**Chorzów Factory**”], p. 31; *Gabčíkovo-Nagymaros*, ¶110; ILC, Report of the International Law Commission, 57th Session, UN Doc A/60/10, ¶236;

¹²⁷ *Compromis*, ¶22;

¹²⁸ *Compromis*, ¶21

¹²⁹ *Compromis*, ¶20;

Rasasa submits that **(A.)** the Court does not have jurisdiction over this claim. Alternatively, **(B.)** the claim is inadmissible. In any event, **(C.)** the imposition of tariffs does not breach the CHC Treaty.

A. The Court does not have jurisdiction to examine this claim

The ICJ lacks jurisdiction over this dispute as **(1.)** the WTO panels have exclusive jurisdiction over disputes regarding Helian tariffs. Additionally, the jurisdiction of the WTO panels is **(2.)** *lex specialis* and **(3.)** *lex posterior* to the jurisdiction of this Court.

1. The WTO panels have exclusive jurisdiction over disputes regarding Helian tariffs

The dispute between the parties concerns the imposition of tariffs - a matter within the exclusive jurisdiction of WTO panels.¹³⁰ The PCIJ¹³¹ and the ICJ¹³² have declared that the Court does not have jurisdiction where another body has exclusive jurisdiction over the matter.¹³³ Adawa and Rasasa have identical obligations to impose no tariffs on Helian products under both the WTO regime¹³⁴ and CHC Treaty.¹³⁵ To distinguish two disputes arising under the same obligations

¹³⁰ WTO Agreement, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, 1994, UNTS 1869, p. 401, [“**DSU**”], Art. 23; Marrakesh Agreement Establishing the World Trade Organization, 1994, UNTS 1867, p. 154, [“**WTO Agreement**”], Art. 2(4); General Agreement on Tariffs and Trade, Annex 1A, 1994, UNTS 64, p. 187, [“**GATT**”], Art. 2;

¹³¹ *Rights of Minorities in Upper Silesia (Germany v. Poland)* (1928), PCIJ Ser A No 15, [“**Upper Silesia**”], p. 23;

¹³² *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Order of 3 October 2018, ¶39;

¹³³ Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and possible solutions*, Max Planck Yearbook of United Nations Law, vol. 5, p. 88;

¹³⁴ *Compromis*, ¶12;

¹³⁵ CHC Treaty, Art. 3;

“*would be artificial*”.¹³⁶ Thus, violation of identical obligations constitutes “*a single dispute*”.¹³⁷ Consequently, the WTO panels have exclusive jurisdiction over the present dispute.

2. The WTO panels' jurisdiction is *lex specialis* to the ICJ's jurisdiction

The Botega Treaty¹³⁸ and the WTO Agreement¹³⁹ confer jurisdiction over this dispute to two separate forums which creates a jurisdictional conflict.¹⁴⁰ Such conflict is resolved through the principle of *lex specialis*.¹⁴¹ This principle, affirmed by the ICJ,¹⁴² PCIJ,¹⁴³ and international

¹³⁶ *Southern Bluefin Tuna case (New Zealand-Japan, Australia-Japan)*, Jurisdiction and Admissibility, Reports of International Arbitral Awards 2000, vol. XXIII, pp. 1-57, [“**Southern Bluefin Tuna**”], ¶54; *MOX Plant case (Ireland v. United Kingdom)*, Order No. 3, PCA, 2003, [“**MOX Plant**”], ¶26;

¹³⁷ *Southern Bluefin Tuna*, ¶54; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2004), [“**Shany**”], p. 8, 154;

¹³⁸ Botega Treaty, Art. 6;

¹³⁹ DSU, Art. 23;

¹⁴⁰ ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, (A/61/10, ¶251), [“**Report on Fragmentation**”], ¶¶2, 26; Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 Australian Yearbook of International Law 191, [“**Lowe**”], p. 194; Tim Graewert, *Conflicting laws and jurisdictions in the dispute settlement process of Regional Trade Agreements and the WTO*, Contemporary Asia Arbitration Journal, vol. 1(2), [“**Graewert**”], p. 290;

¹⁴¹ Report on Fragmentation, ¶¶6, 9;

¹⁴² *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgement, ICJ Rep 1960, p. 40; *Ambatielos case (Greece v. United Kingdom)*, Preliminary Objections, ICJ Rep 1952, p. 44;

¹⁴³ *Mavrommatis*, pp. 31-32; *Chorzów Factory*, p. 30; *Jurisdiction of European Commission of Danube Between Galatz and Braila (Advisory Opinion)* (1927), PCIJ Ser B No 14, p. 64;

tribunals¹⁴⁴ provides that special jurisdiction prevails over the general.¹⁴⁵ The jurisdiction of the WTO panels covers specifically trade disputes¹⁴⁶ while the jurisdiction of the ICJ is general.¹⁴⁷ Thus, the WTO panels' jurisdiction prevails over this Court's jurisdiction.

3. The WTO agreement is *lex posterior* to the Botega Treaty

A treaty establishing jurisdiction applies only to the extent it is not superseded by a later treaty which provides different jurisdiction over the matter.¹⁴⁸ Even if initially the ICJ had jurisdiction over disputes regarding Helian tariffs,¹⁴⁹ when the two States concluded the WTO Agreement in 1995¹⁵⁰ they excluded this Court's jurisdiction.¹⁵¹ Therefore, the WTO panel's jurisdiction prevails over this Court's jurisdiction.

B. Alternatively, Adawa's claim is inadmissible

The ongoing proceedings before the WTO panel¹⁵² are a bar for the admissibility of the claim due to **(1.)** the principle of *lis pendens* and **(2.)** the principle of comity. Additionally, **(3.)** the submission of the claim constitutes an abuse of process.

¹⁴⁴ *Southern Bluefin Tuna*, ¶¶64-65; *European Communities - Regime for The Importation, Sale and Distribution of Bananas*, WTO, Appellate Body Report, 1997, WT/DS27/AB/R, ¶204;

¹⁴⁵ Songling Yang, *WTO and RTAs: The Forum Choice Clause*, Michigan State International Law Review, vol. 23.1, p. 135;

¹⁴⁶ DSU, Art. 23;

¹⁴⁷ Botega Treaty, Art. 6; Report of the ICJ 1 August 2017–31 July 2018 GA Official Records Seventy-third Session, Supplement No. 4 A/73/4, ¶7; ICJ, Press Release, No. 2019/9, 25 February 2019, p. 6; Jacob Cogan (eds.), *The Oxford Handbook of International Organizations*, (Oxford University Press, 2016), p. 885;

¹⁴⁸ *Mavrommatis*, p. 31; VCLT, Art. 30(3); Brownlie, p. 364;

¹⁴⁹ Botega Treaty, Art. 6;

¹⁵⁰ *Compromis*, ¶12;

¹⁵¹ WTO Agreement, Art. 3(3); DSU, Art. 23;

¹⁵² *Compromis*, ¶47;

1. The claim is inadmissible due to the principle of *lis pendens*

Lis pendens is a general principle of law forbidding parallel proceedings,¹⁵³ which prevents conflicting judgements.¹⁵⁴ This principle is universally accepted by States,¹⁵⁵ enshrined in international conventions,¹⁵⁶ and has been applied by international tribunals.¹⁵⁷ *Lis pendens* can be invoked when identical disputes are adjudicated before bodies of the same character.¹⁵⁸

First, the disputes before the WTO panels and the ICJ are identical as they concern the same factual basis¹⁵⁹ and complained injury¹⁶⁰ - the imposition of tariffs which impede free trade of Helian

¹⁵³ Shany, p. 22; Lowe, pp. 202-203; North American Free Trade Agreement, U.S-Canada-Mexico, 1994, 32 ILM 289, Art. 2005(6); Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), p. 1021;

¹⁵⁴ *Upper Silesia*, p. 20; *MOX Plant*, ¶28; Gabrielle Marceau, *The primacy of the WTO dispute settlement system*, Questions of International Law, vol. 2, p. 10;

¹⁵⁵ GC 24, ¶14; Shany, pp. 155, 162; France, New Code of Civil Procedure, Art. 100; Italy, Code of Civil Procedure, Art. 39(2); Germany, Code of Civil Procedure, Section 261(3)(1); Reservations to the Optional protocol to the ICCPR, 1966, UNTS 999, p. 171, made by Croatia, Denmark, El Salvador, Iceland, Poland, Russia, Sri Lanka, Turkey, Uganda;

¹⁵⁶ Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters, 1968, Art. 21; Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, UNTS 213, p. 221, Art. 35(2)(b); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UNTS vol. 1465, p. 85, Art. 22(5);

¹⁵⁷ *Pey Casado and Foundation President Allende v. Chile*, ICSID, ARB/98/2, IIC 1347, Decision on the request for the stay of enforcement of the award, 15 March 2018, ¶79; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, ICJ Rep 2003, p. 102, Dissenting Opinion, Judge de Cara, p. 121;

¹⁵⁸ *Upper Silesia*, p. 20; *Busta and Busta v. Czech Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, V 2015/014, IIC 928, 2017, ¶210;

¹⁵⁹ HRC, *Trébutien v. France*, Application 421/1990, ¶¶6.3-6.4; *Baena Ricardo and others v. Panama*, IACHR, Series C 61, IHRL 1444, 1999. [“**Ricardo v. Panama**”], ¶55; Mexico - Tax Measures on Soft Drinks and Other Beverages, WTO, Amicus Curiae Brief by Camara Nacional de las Industrias Azucarera y Alcoholera-Mexico, 2006, ¶12;

¹⁶⁰ *Pauger v. Austria*, European Commission of Human Rights, Application 16717/90, 1995, p. 7; *Ricardo v. Panama*, ¶56;

products. *Lis pendens* is applicable even if parties rely on different treaties¹⁶¹ or part of the claim is not the same.¹⁶² Thus, the fact that Adawa invokes the CHC Treaty before the ICJ and requests relief¹⁶³ which is not identical to the one in the WTO proceedings, does not preclude the application of *lis pendens*.

Second, the WTO panel and the ICJ are of the same character regardless of the quasi-judicial character of the WTO panels.¹⁶⁴ Both forums regard inter-state disputes,¹⁶⁵ their decisions are binding on the parties,¹⁶⁶ and both the ICJ¹⁶⁷ and WTO¹⁶⁸ adjudicate on forms of compensation. Therefore, the Court should dismiss the claim as inadmissible.

2. The claim is inadmissible due to the principle of comity

The ICJ has declared that it has the discretion to refrain from giving a judgement in order to preserve “*judicial integrity*”.¹⁶⁹ Accordingly, under the principle of comity a tribunal can decline

¹⁶¹ *Southern Bluefin Tuna*, ¶54;

¹⁶² *Application of the International Convention on the elimination of all forms of racial discrimination (Qatar v. United Arab Emirates)*, Order of 14 June 2019, ICJ Rep 2019, [“**Qatar v. United Arab Emirates**”], Dissenting Opinion, Judge Cot, ¶7; Robert Kolb, *The International Court of Justice* (A&C Black, 2014), [“**Kolb**”], p. 1202;

¹⁶³ *Compromis*, ¶57;

¹⁶⁴ *Qatar v. United Arab Emirates*, Dissenting Opinion, Judge Cot, ¶¶9-11;

¹⁶⁵ DSU, Art. 1(1);

¹⁶⁶ DSU, Arts. 21-22, ICJ Statute, Art. 59; Peter-Tobias Stoll, *World Trade Organization, Dispute Settlement*, Max Planck Encyclopedia of Public International Law, 2014, ¶67;

¹⁶⁷ *Corfu Channel case (United Kingdom v. Albania)*, Judgment, ICJ Rep 1949, p. 23;

¹⁶⁸ DSU, Art. 22(2); United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WTO, Decision by the Arbitrator, 2017, WT/DS381/ARB, ¶7.1; Dispute Settlement Body, Minutes of Meeting, 22 May 2017, WT/DSB/M/397, ¶7.24;

¹⁶⁹ *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Rep 1963, p. 15, [“**Northern Cameroons**”], p. 29;

to adjudge a dispute where that would be unreasonable¹⁷⁰ or inappropriate.¹⁷¹ Parallel proceedings before two forums is contrary to judicial propriety,¹⁷² since it might result in contradictory judgements,¹⁷³ unreasonable cost of proceedings,¹⁷⁴ and the finality of the judgements being questioned.¹⁷⁵ The WTO panel currently examines the dispute between the parties,¹⁷⁶ thus the Court should declare the claim inadmissible.

3. The claim is inadmissible due to an abuse of process

Adawa's claim before the Court constitutes an abuse of process. Abuse of process arises in situations where a State initiates proceedings in an arbitrary manner.¹⁷⁷ The rule could be applied in exceptional circumstances,¹⁷⁸ such as parallel proceedings before two international tribunals.¹⁷⁹

¹⁷⁰ *Northern Cameroons*, p. 37; *Legality of Use of Force*, Separate opinion of Judge Higgins, ¶12;

¹⁷¹ Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO*, *European Journal of International Law*, vol. 19, no. 3, p. 584; *MOX Plant*, ¶28;

¹⁷² Andreas Zimmermann and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed., Oxford University Press, 2019), [**“ICJ Statute Commentary”**], p. 656;

¹⁷³ *MOX Plant*, ¶28; ICJ Statute Commentary, p. 654;

¹⁷⁴ Graewert, p. 311;

¹⁷⁵ Judge Gilbert Guillaume, Speech to the Sixth Committee of the UNGA, 27 October 2000, p. 3; Kolb, pp. 946-947;

¹⁷⁶ *Compromis*, ¶47;

¹⁷⁷ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO, Appellate Body Report, 1998, WT/DS58/AB/R, ¶160; Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, *Canadian Yearbook of International Law* 2003, p. 100;

¹⁷⁸ *Immunities and criminal proceedings (Equatorial Guinea v. France)*, Preliminary Objections, ICJ Rep 2018, ¶150; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, ICJ Rep 2019, ¶113;

¹⁷⁹ *Qatar v. United Arab Emirates*, Request for the indication of provisional measures by the United Arab Emirates, ¶34; Graewert, p. 324; Joost Pauwelyn and Luiz Eduardo Salles, *Forum*

The Applicant initially commenced proceedings before the WTO.¹⁸⁰ By the subsequent submission to the ICJ the Applicant seeks to obtain an “*illicit advantage*”¹⁸¹ through a favourable judgement from either fora. Therefore, the Court should declare the claim inadmissible due to abuse of process.

C. The imposition of tariffs does not breach the CHC Treaty

1. The tariffs are justified as necessary to protect Rasasa’s essential security interests

Article 22(b) CHC Treaty allows Rasasa to adopt measures necessary to protect its essential security interests.¹⁸² Essential security interests of the State encompass armed attack,¹⁸³ public disorder,¹⁸⁴ and economic crisis.¹⁸⁵ After hurricane Makan destroyed 60% of Rasasa’s Helian

Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions, Cornell International Law Journal, vol. 42, p. 105;

¹⁸⁰ *Compromis*, ¶47;

¹⁸¹ *Upper Silesia*, pp. 37-38;

¹⁸² CHC Treaty, Art. 22(b);

¹⁸³ *Nicaragua*, ¶224;

¹⁸⁴ *Russia - measures concerning traffic in transit case (Ukraine v. Russia)*, WTO, Panel Report, 2019, ¶7.130; *Enron Corporation Ponderosa Assets, L. P. v. Argentine Republic*, ICSID, ARB/01/3, Award, 2007, ¶331;

¹⁸⁵ *LG&E Energy Corp., L&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID, ARB/02/1, Decision on Liability, 3 October 2006, ¶238; *CMS Gas Transmission Company v. Argentine Republic*, ICSID, ARB/01/8, Award 12 May 2005, ¶359; *Sempra Energy International & Camuzzi International, S.A. v. Argentina*, ICSID, ARB/03/02, Opinion of Anne-Marie Slaughter and William Burke-White, ¶30;

industry crime rates and unemployment in Rasasa skyrocketed.¹⁸⁶ Rasasa's devastated Helian industry¹⁸⁷ as a significant sector of its economy,¹⁸⁸ constitutes an essential security interest.

Furthermore, the tariffs are justified as there was a nexus of necessity between the threat and the measures imposed.¹⁸⁹ Rasasa's Helian industry was facing a threat of total collapse due to the fact that Rasasan processors of Helian hyacinth increasingly began to purchase materials from Adawan farmers.¹⁹⁰ The Respondent imposed the tariffs in order to stabilize its economy.¹⁹¹ Thus, the tariffs are consistent with the CHC Treaty.

2. Consequently, Adawa is not entitled to compensation

A State would be bound to pay compensation only as a consequence of an internationally wrongful act.¹⁹² As Rasasa's tariffs were in compliance with its obligations under the CHC Treaty, Adawa is not entitled to compensation.¹⁹³

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

¹⁸⁶ *Compromis*, ¶¶16-17, 27-28;

¹⁸⁷ *Compromis*, ¶30;

¹⁸⁸ *Compromis*, ¶2;

¹⁸⁹ *Nicaragua*, ¶¶224, 282; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Rep 2003, ¶43;

¹⁹⁰ *Compromis*, ¶30;

¹⁹¹ *Compromis*, ¶¶33, 44;

¹⁹² ILC, Responsibility of States for Internationally Wrongful Acts, 2001, Supplement No. 10, UN Doc A/56/10, [“**ARSIWA**”], Arts. 12, 31, 36;

¹⁹³ ARSIWA, Arts. 35, 36(2);

Rasasa submits that **(A.)** Adawa’s arrest and detention of Ms. Grey violate her immunities. Furthermore, **(B.)** this conduct cannot be justified by Adawa’s obligations to cooperate with the ICC. Thus, **(C.)** Darian Grey must be repatriated to Rasasa.

A. Adawa violated Ms. Grey’s immunities by arresting and detaining her

1. Ms. Grey enjoys personal immunity from arrest and detention under the CHC Treaty and customary law

i. Ms. Grey enjoys immunity under the CHC Treaty

Ms. Darian Grey enjoys immunity from enforcement actions, such as arrest and detention,¹⁹⁴ while exercising her functions¹⁹⁵ as a State representative to CHC meetings.¹⁹⁶ Representatives to international organisations enjoy personal immunity,¹⁹⁷ which safeguards the independent exercise of their functions.¹⁹⁸ Personal immunity covers both official and private acts,¹⁹⁹ committed prior

¹⁹⁴ CHC Treaty, Art. 32;

¹⁹⁵ CHC Treaty, Art. 32;

¹⁹⁶ *Compromis*, ¶49;

¹⁹⁷ ILC, Seventh report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Concepción Escobar Hernández, Yearbook of the International Law Commission 2019, A/CN.4/729, ¶45; Dapo Akande, *International Law Immunities and the International Criminal Court*, American Journal of International Law, vol. 98, No. 3, [“Akande”], p. 412; Roger O’Keefe, *International Criminal Law* (Oxford University Press, 2015), [“O’Keefe”], p. 416;

¹⁹⁸ Charter of the United Nations, 1945, 1, UNTS XVI, Art. 105(2); *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Rep 1989, ¶50; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975, A/CONF.67/16, [“VCRS”], Preamble, ¶6; Convention on the Privileges and Immunities of the United Nations, 1946, UNTC 1, p. 15, and 90, p. 327, [“CPIUN”], Art. 4, Section 14;

¹⁹⁹ Brownlie, p. 393; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), p. 585; ILC, Draft Articles on Special Missions with commentaries, Yearbook of the International Law Commission, 1967, vol. II, A/6709/Rev.1 and Rev.1/Corr.1, p. 361;

and during the officials' mandate.²⁰⁰ Furthermore, Ms. Grey's immunity applies during journeys to and from the places of meeting,²⁰¹ hence, it covers "*the entire period of presence in the State*".²⁰² Therefore, Adawa is barred from arresting and detaining Ms. Grey during her official visit in Adawa.

ii. Ms. Grey has immunity under customary law

Under customary law sitting Ministers of Foreign Affairs enjoy personal immunity²⁰³ granted to them to ensure the proper functioning of inter-state relations.²⁰⁴ By virtue of her official capacity,²⁰⁵ Ms. Grey enjoys immunity from foreign criminal jurisdiction,²⁰⁶ equal to that of

²⁰⁰ ILC, Immunity of State officials from foreign criminal jurisdiction, Yearbook of the International Law Commission 2013, vol. II, A/68/10, p. 49, commentary 6;

²⁰¹ CHC Treaty, Art. 32;

²⁰² ILC, The practice of the UN, the specialized agencies and the IAEA concerning their status, privileges and immunities, Yearbook of the International Law Commission, 1967, vol. II, A/CN.4/SER.A/1967/Add.I, p. 176, ¶87; *Tachiona v. United States*, United States, Court of Appeals, Second Circuit, 2004, 386 F.3d 205, ¶60;

²⁰³ *Arrest Warrant*, ¶58; ILC, Sixth report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Concepción Escobar Hernández, Yearbook of the International Law Commission 2018, A/CN.4/722, [**Sixth report on immunity**], Draft Article 3; Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, EJIL vol. 21, 2011, [**Shah**], p. 818; *Pinochet case*, United Kingdom, House of Lords, Appeal, 1999, [**Pinochet**], ¶44;

²⁰⁴ *Arrest Warrant*, Separate Opinion of Judges Higgins, Kooijmans, Buergenthal, ¶75; Shah, p. 818;

²⁰⁵ *Compromis*, ¶32;

²⁰⁶ *Arrest Warrant*, ¶54; *Sharon & Yaron case*, Belgium, Court of Cassation, 12 February 2003, P.02.1139.F, p. 7; *Pinochet*, ¶75;

diplomatic agents,²⁰⁷ which covers both private and official acts,²⁰⁸ committed prior and during her time in office.²⁰⁹ This immunity extends to enforcement actions undertaken by another State, such as arrest and detention.²¹⁰ Thus, Adawa cannot arrest and detain Ms. Grey.

2. Adawa violated Ms. Grey’s immunities by exercising domestic jurisdiction over her

Ms. Grey’s personal immunities as a Minister of Foreign Affairs²¹¹ and a State representative,²¹² bar Adawa from exercising domestic criminal jurisdiction over her including in cases of war crimes.²¹³ Thus, Adawa cannot exercise any “*constraining act of authority*”²¹⁴ such as arrest and detention²¹⁵ over Ms. Grey. Consequently, the Adawan authorities violated Ms. Grey’s immunities by arresting and detaining her.

²⁰⁷ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Rep 2008, p. 177, [“**Criminal Matters**”], ¶174; Arrest Warrant, ¶51;

²⁰⁸ *Arrest Warrant*, ¶55; Sixth report on immunity, Draft Article 4(2); Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, Developments in International Law, vol. 69, Brill Nijhoff, 2015, [“**Pedretti**”], p. 25;

²⁰⁹ *Arrest Warrant*, ¶55;

²¹⁰ ILC, Immunity of State officials from foreign criminal jurisdiction, Yearbook of the International Law Commission on the work of its seventieth session, 2018, A/73/10, [“**Report 2018**”], ¶¶307, 309; Vienna Convention on Diplomatic Relations, 1961, UNTS 500, p. 91, Art. 29;

²¹¹ *Arrest Warrant*, ¶¶51, 58; *Prosecutor v. Al Bashir*, South Africa Decision, 2017, ICC-02/05-01/09-302, [“**South Africa Decision**”], ¶68;

²¹² CHC Treaty, Art. 32; VCRS, Arts. 28, 30; CPIUN, Art. 6, Section 11(a);

²¹³ *Arrest Warrant*, ¶58; *Gaddafi case*, France, Court of Cassation, Criminal Chamber, 13 March 2001, ILR, vol. 125, p. 508, ¶10; Institut de Droit International, Third Commission, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, 2009, Art. 3(1); O’Keefe, p. 422;

²¹⁴ *Criminal Matters*, ¶174; *Arrest Warrant*, ¶54;

²¹⁵ *South Africa Decision*, ¶68; *Application for Arrest Warrant Against General Shaul Mofaz*, First instance, UK, Bow Street Magistrates’ Court, 2004, ¶15;

B. Adawa’s violation of Ms. Grey’s immunities cannot be justified with its cooperation with the ICC

Adawa cannot arrest Mr. Grey pursuant to the ICC’s arrest warrant since **(1.)** ICC does not have jurisdiction over her. In any event, **(2.)** Adawa is bound to respect Ms. Grey’s immunities even when it cooperates with the ICC. Additionally, **(3.)** there is no customary rule rendering immunities inapplicable in cases of cooperation with ICC.

1. The ICC does not have jurisdiction over Ms. Grey

i. The ICC does not have jurisdiction over nationals of non-parties

Adawa cannot arrest Mr. Grey pursuant to the ICC’s arrest warrant as ICC lacks jurisdiction over her. ICC's jurisdiction does not extend to nationals of non-parties to the Rome Statute,²¹⁶ such as Rasasa.²¹⁷ Treaties cannot establish²¹⁸ or modify²¹⁹ rights or obligations of non-State parties without their consent. Furthermore, all international criminal tribunals operate on the basis of consent.²²⁰ Hence, absent Rasasa’s consent, its sovereign right to exercise jurisdiction over its

²¹⁶ Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States, Law and Contemporary Problems*, Duke Law Journal, vol. 61, No. 1, [“**Morris**”], pp. 26-27, 45, 58; David Scheffer, *International Criminal Court: The Challenge of Jurisdiction*, Annual Meeting of the American Society of International Law, 1999, [“**Scheffer**”], p. 8; UN, Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, 1998, A/CONF.183/13, vol. 2, [“**Rome Conference**”], Seventh meeting, ¶60; Rome Conference, Eight meeting, ¶¶21, 48; Rome Conference, Ninth meeting, ¶¶23-24, 40; Rome Conference, Twenty ninth meeting, ¶42; Rome Conference, Thirty third meeting, ¶41;

²¹⁷ *Compromis*, ¶13;

²¹⁸ VCLT, Art. 34;

²¹⁹ ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.I, p. 226; *Island of Palmas*, p. 870; *Status of Eastern Carelia (Advisory Opinion)* (1923), PCIJ Ser B No 5, pp. 27-28;

²²⁰ Brownlie, p. 431; Morris, p. 37; Scheffer, p. 7;

nationals cannot be abrogated by the ICC.²²¹ Thus, the ICC does not have jurisdiction to request the arrest and detention of Ms. Grey's.

ii. Alternatively, Ms. Grey's immunities are a bar for the jurisdiction of the ICC

State officials may be deprived of their immunity by the ICC,²²² when this is established by the Rome Statute²²³ or Security Council ["SC"] resolutions.²²⁴ However, neither Rasasa is a party to the Rome Statute,²²⁵ nor has a SC resolution been issued. Furthermore, there is no rule under customary law which deprives State officials of their personal immunity before international criminal tribunals.²²⁶ Consequently, Ms. Grey's immunities bar criminal proceedings before the ICC and arrest by Adawa.

2. Adawa is bound to respect Ms. Grey's immunities even when it cooperates with the ICC

Even if Ms. Grey's immunities are not a bar for the jurisdiction of the ICC, they remain opposable to Adawa.²²⁷ Adawa's obligation to cooperate with the ICC does not exempt it from the obligation

²²¹ Rome Statute, Preamble, ¶10, Art. 1; Brownlie, p. 432;

²²² *Arrest warrant*, ¶61;

²²³ Rome Statute, Art. 27(2);

²²⁴ SC Resolution 1970, 2011, S/RES/1970, ["**SC Resolution on Libya**"], ¶¶4-6; SC Resolution 1953, 2005, S/RES/1953, ["**SC Resolution on Sudan**"], ¶¶2, 6;

²²⁵ *Compromis*, ¶13;

²²⁶ Pedretti, p. 436; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014), ["**Foakes**"], pp. 197-198; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, 2016), ["**Schabas**"], p. 600; Akande, p. 421;

²²⁷ *Prosecutor v. Al Bashir*, Request by Professor Paola Gaeta to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the Jordan Decision, 2018, ICC-02/05-01/09-349, ¶5;

to respect Ms. Grey's immunity.²²⁸ When cooperating with the ICC, States use domestic enforcement mechanisms.²²⁹ Thus, by executing the international arrest warrant,²³⁰ Adawa exercised its domestic jurisdiction²³¹ which is strictly prohibited.²³²

Moreover, Article 98(1) Rome Statute provides that in cases of conflict between the obligations to cooperate with the ICC and to respect immunity of foreign officials, the obligation to respect immunity shall prevail.²³³ Numerous States²³⁴ and scholars²³⁵ recognized that pursuant to this rule a State party cannot arrest officials of non-State parties. Thus, Adawa was under an obligation to respect Ms. Grey's immunity.

²²⁸ *South Africa Decision*, ¶68; Guénaél Mettraux, John Dugard and Max du Plessis, *Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa*, *International Criminal Law Review*, vol. 18, [“**Mettraux, Dugard and Plessis**”], p. 603;

²²⁹ Implementation of the Rome Statute of the International Criminal Court Act, South Africa, 2002, Section 9(3); Valerie Oosterveld, Mike Perry and John McManus, *The Cooperation of States With the International Criminal Court*, *Fordham International Law Journal*, vol. 25, issue 3, 2001, pp. 770, 772; Mettraux, Dugard and Plessis, p. 607;

²³⁰ *Compromis*, ¶¶50-51;

²³¹ Report 2018, ¶¶287, 309;

²³² Pleadings, (IV).(A).(2.);

²³³ Rome Statute of the International Criminal Court, UNTS 2187, p. 3, [“**Rome Statute**”], Art. 98(1);

²³⁴ United Kingdom, International Criminal Court Act, 2001, Chapter 17, Part 2 - Arrest and Detention, Section 23(2); Republic of Malta, Extradition Act, 1978, Art. 26S(2); Independent State of Samoa, Act No. 26 on the International Criminal Court, 2007, Art. 32(2); *Attorney General et al. v. The Kenya Section of the International Commission of Jurists*, Kenya, Court of Appeal at Nairobi, 2018, pp. 17-18;

²³⁵ Mettraux, Dugard and Plessis, pp. 611-612; Pedretti, pp. 123-124; Foakes, pp. 200, 202; Schabas, p. 604;

Additionally, Adawa was under an obligation to consult with the ICC regarding its conflicting obligations.²³⁶ This would have relieved the Applicant from its duty to cooperate with the ICC.²³⁷ However, no such consultation was requested from Adawa.

3. There is no customary rule rendering immunity inapplicable in cases of cooperation with ICC

A State can cooperate with the ICC in the arrest of foreign State officials only when both States have waived the immunity of their officials by ratifying the Rome Statute²³⁸ or are bound by SC resolutions.²³⁹ Neither of these conditions are present.²⁴⁰ Thus, a rule rendering Ms. Grey's immunity inapplicable in cases of cooperation can become binding upon Rasasa only under customary law.²⁴¹ Although the ICC declared the existence of such customary rule in its *2019 Al Bashir judgment*,²⁴² the State practice and *opinio juris* are insufficient to support this assertion. Both States parties²⁴³ and non-parties²⁴⁴ to the Rome Statute have rejected that such customary rule exists. Accordingly, States parties have always refused to arrest indictees of non-State parties

²³⁶ Rome Statute, Art. 86; Schabas, p. 1340;

²³⁷ Rome Statute, Art. 97; Assembly of States Parties to the Rome Statute of the ICC, Official Records of the Assembly, First session, Part II.A, Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 2002, Rule 195;

²³⁸ Rome Statute, Art. 27(1);

²³⁹ SC Resolution on Libya, ¶¶4-6; SC Resolution on Sudan, ¶¶2, 6;

²⁴⁰ *Compromis*, ¶13;

²⁴¹ VCLT, Art. 38;

²⁴² *Prosecutor v. Al Bashir*, Jordan Appeal, 2019, ICC-02/05-01/09-397, [“**Jordan Appeal**”], ¶2;

²⁴³ *Prosecutor v. Al Bashir*, Jordan's Response to observations, ICC-02/05-01/09-368, ¶9; *Prosecutor v. Al Bashir*, DRC Observations, Annex 2, 2014, ICC-02/05-01/09-190-AnxII-tENG, p. 7;

²⁴⁴ AU, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal, 2009, Assembly/AU/Dec.245(XIII), ¶10;

regardless of requests for cooperation.²⁴⁵ Therefore, Ms. Grey's immunities are applicable to Adawa, rendering her arrest and detention unlawful.

C. Therefore, Ms. Grey must be immediately repatriated back to Rasasa

By detaining Ms. Grey,²⁴⁶ Adawa is in a continuous violation of international law.²⁴⁷ Thus, Adawa is under an obligation to cease its wrongful conduct²⁴⁸ and to make reparation.²⁴⁹ Presently, the reparation sought is in the form of restitution, which requires the re-establishment of the situation which existed before occurrence of the wrongful act.²⁵⁰ Accordingly, Adawa is under an obligation to immediately repatriate Ms. Grey back to Rasasa.

²⁴⁵ *Jordan Appeal*, ¶4; *Prosecutor v. Al Bashir*, Djibouti Decision, 2016, ICC-02/05-01/09-266, ¶6; *Prosecutor v. Al Bashir*, Malawi Decision, 2011, ICC-02/05-01/09-139-Corr, ¶8;

²⁴⁶ *Compromis*, ¶¶51-52;

²⁴⁷ ARSIWA, Art. 30;

²⁴⁸ *Wall Advisory*, ¶151; *Nicaragua*, ¶292(12); *United States Diplomatic and Consular Staff in Tehran (Iran v. United States of America)*, Judgement, ICJ Rep 1980, ¶95(3)(A); *Case concerning the Rainbow Warrior (New Zealand v. France)*, Report of International Arbitration Awards 1990, vol. XX (Sales No. E/F.93.V.3), p. 266;

²⁴⁹ ARSIWA, Art. 31(1); *Nicaragua*, ¶149;

²⁵⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Rep 2010, ¶273; ARSIWA, Art. 35.

PRAYER FOR RELIEF

Rasasa respectfully requests this 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.

Respectfully submitted,

AGENTS FOR THE RESPONDENT