

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 APPLICANT

2020

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STATEMENT OF JURISDICTION

The State of Adawa [**Adawa**] submits the present dispute to the International Court of Justice [**ICJ**] and **‘the Court’** in accordance with Article 37 of the Statute of the Court and Article VI of the Treaty of Botega on Armistice and Pacification [**Treaty of Botega**]. After the dissolution of the Adawa-Zeitounia Union [**AZU**] on 1 January 1939, Adawa became a party to the Treaty of Botega, through State succession.

QUESTIONS PRESENTED

A. Whether the Court has jurisdiction over Adawa's claims because Adawa is a party to the 1929 Botega Treaty.

B. Whether the development and deployment of the WALL by Rasasa is legal under relevant bodies of international law, namely international humanitarian law and international human rights.

C. Whether the Court can adjudicate over Adawa's claim that Rasasa's imposition of tariffs violates the CHC Treaty, and whether Adawa is entitled to compensatory damages.

D. Whether Adawa's arrest and detention of Darian Grey are consistent with Adawa's obligations under international law, and whether Adawa may proceed to render her to the ICC.

STATEMENT OF FACTS

ORIGINS AND CREATION OF ADAWA AND RASASA

On 1 November 1929, the Treaty of Botega was signed by the President of Rasasa – on behalf of the recently independent State – and the Queen Goleta representing the newly-established Adawa-Zeitounia Union. Ten years later, Adawa and Zeitounia separated: the Republic of Adawa came into existence. Geographically, the State of Adawa and the Republic of Rasasa share a common border.

The main resource of the Region is the Helian hyacinth, an endemic flower cultivated for its valuable spice ‘Helian’. The farming activities relating to the flower represent a significant part of its GDPs.

On 20 June 1969, the Ministers of Agriculture of the six States signed the Treaty establishing the Crosinian Helian Community [‘**CHC**’]. The Members agreed to ban customs duties on equipment necessary to process and harvest the Helian hyacinth, together with Helian products, with a possible application of necessary measures if essential security interests are at stake. The restriction imposed between CHC Members proved to be in support of the health and development of the Helian commerce. In the 1980s, Rasasa and Adawa followed this spirit when accessing the General Agreement on Tariffs and Trade [‘**GATT 1994**’]: the bound rates applicable regarding Helian bulbs, pollen, plants, spice and equipment were zero, on a most favored nation basis.

DEVELOPMENT OF THE WALL

In July 2012, a disastrous tropical cyclone caused the destruction of large parts of the Helian hyacinth crop plantings, thought essential for Adawa’s economy. Subsequently, unemployment raised drastically within the Region, leading to an unprecedented increase of criminality, mostly committed by Helian farmers.

Rasasan Robotics Corporation [**'RRC'**] is a private company advising and furnishing governments with defense and security technologies. As chief executive officer at the time, Darian Grey offered the knowhow and funds of RRC in order to design an intelligent system: the Weaponized Autonomous Limitation Line [**'WALL'**].

Seeking to return to a pre-storm level of crime and to foster Helian industry's recovery, the revolutionary technology was created to identify and neutralize hooligans. The WALL would use force only in case of extreme necessity with a false positive rate proved to be of less than 0,0001%, according to a RRC report. With the return to the pre-2012 criminality rate, only Rasasa and Adawa remained interested in the project. For two years, the WALL was developed and its conformity with international law was reviewed by advisers of the Rasasan government.

Ms. Grey announced on 6 July 2015 the complete finalization of the WALL, which she described as being fully independent and autonomous from human control. Although all tests and experiments carried out by scientists and experts were highly conclusive, neither Adawan nor Rasasan governments decided to purchase the new technology, relying on economic and political reasons.

While the public order was being restored, the former Adawan farmers organized into larger groups, frequently crossing the border overnight to commit crimes on Rasasan soil. Official reports indicated that cross-border violence was increasing at low yet constant rates. Consequently, the concerned governments set up a joint task force specialized in transnational criminality: so far, no viable solution has been found.

Mr. Pindro, elected new President of Rasasa in early January 2017, submitted a bill to the Parliament, where he invoked solutions for the Rasasa-Adawa border. Moreover, by the end of June 2017, President Pindro sent the Rasasan army against the militia and had the WALL installed on his side of the border, concerned about national security. During presidential exchanges between Adawa and Rasasa, Mr. Moraga, the Adawan President, denounced the non-respect of international law and of the 1929 Treaty of Botega, since the WALL could operate on Adawa's soil.

On 10 January 2018, the WALL was completed and put into operation. The President of Rasasa attempted to reassure the people of both States: the WALL would practically make no mistake,

and therefore innocent people will not be injured. Still, President Moraga relayed the fear and anger of his citizens, condemning the potential disproportionate use of lethal force taken by artificial intelligence, and without human intervention. Nevertheless, according to a note of the joint task force, the WALL has a positive impact: there has been a dwindling by more than 80% of trans-border cases since its implementation.

IMPOSITION OF TARIFFS

In January 2018, Rasasa illegally introduced tariffs of ‘25% *ad valorem* on Helian bulbs, live plants, and pollen imported’, in order to encourage its farmers to purchase from local farms instead of Adawan ones. Adawa objected, together with the CHC Director-General, who argued that the regulation is incompatible with the letter of Article 3 of the CHC Treaty. Rasasa tried to escape its obligations by relaying on the exception of national security, claiming to protect the citizens *via* the welfare of the Helian farmers. Moreover, according to International League for the Support of Agriculture [‘**ILSA**’], the imposition of tariffs caused Adawa a financial harm amounting to 10 million euros.

In October 2018, Adawa tried to settle their dispute amicably, by requesting consultations in front of the Dispute Settlement Body [‘**DSB**’]. Unfortunately, the parties met without reaching an agreement. Pursuant the procedure in front of the DSB, Adawa requested the establishment of a Panel, convinced that the measure is also contrary to the bound rate applicable under the GATT 1994 on Helian goods.

Therefore, Adawa is now aiming for monetary compensation for the violation of the CHC Treaty, and the financial harm it has caused.

MS. GREY’S IMMUNITY ISSUE

Ms. Darian Grey was the founder and chief executive officer of RRC from 1979 to 2016. In January 2017, President Pindro appointed her as Minister of Foreign Affairs, despite the human rights groups’ and the opposition party’s strong criticism.

Back in 2000, she was, together with RRC, allegedly involved in cooperating with totalitarian regimes. Furthermore, the Office of the Prosecutor of the International Criminal Court [‘**ICC**’]

opened an investigation in 2009: the allegations related to war crimes and crimes against humanity, having occurred during the 2007-2009 Garantian civil war – a State not party to this case.

In June 2019, following the Prosecutor's request of 13 April 2019, the ICC issued a warrant of arrest for Ms. Grey. Adawan officers arrested her two days later, during the annual CHC meeting on 22 June 2019, complying with their international obligations. Her counsel argued that she enjoyed diplomatic immunity based on the Rome Statute. However, the argument was rejected in the light of the same Rome Statute. Neither judicial appeal, nor provisional release were granted. For the time being, she is under surveillance in a diplomatic guest house in Adawa.

SUMMARY OF PLEADINGS

A. The International Court of Justice has jurisdiction to adjudicate Adawa's claims pursuant to Article 37 of the Statute and Article VI of the Treaty of Botega on Armistice and Pacification. Adawa must be considered as a successor state, party to the Treaty of Botega after the dissolution of the Adawa-Zeitounia Union in 1939. The Treaty of Botega is still in force *vis-à-vis* Adawa because the principle of automatic succession of treaties, emphasized in Article 34 of the 1978 Vienna Convention, applies in this situation. Alternatively, the Treaty of Botega is binding upon Adawa, based on the principle of continuity that applies to territorial treaties.

In the further alternative, by submitting a counterclaim to the Court in the terms agreed by the Parties in the Statement of Facts, Rasasa must be deemed to have consented to the Court's jurisdiction over Adawa's claims. Indeed, Article 80 (1) of the Rules of the Court provides that a counterclaim must come within the jurisdiction of the Court.

B. The development and deployment of the WALL is illegal and as a mean of reparation, Rasasa must dismantle it. Indeed, the use of an autonomous weapon system without any meaningful human control such as the WALL is illegal under customary international humanitarian law and international human rights.

Customary international law imposes the respect of several key principles, such as the principle of humanity, the principle of distinction, the principle of proportionality and the principle of accountability. Furthermore, international human rights and the law of law enforcements bound Rasasa to comply with the principle of necessity, proportionality and precautions. Compliance with these principles requires a minimum degree of meaningful human control, *quod non*.

C. The Court can adjudicate Adawa's claim regarding Rasasa's violation of the CHC Treaty. Therefore, Adawa is entitled to compensatory damages for the harm it has suffered. The Court has jurisdiction since the Parties consented to it in the Treaty of Botega, regardless the co-existence of jurisdiction with the Dispute Settlement Body of the WTO over trade matters. Furthermore, Adawa's claims are admissible, because the existence of the *lis pendens* principle is doubtful in international law, and its conditions are, in any case, not met.

Moreover, Rasasa failed to respect its international obligations under Article 3 of the CHC Treaty, by imposing tariffs on unprocessed Helian materials. Rasasa cannot justify this measure by invoking national security, because it aims at protecting its economic interests. Therefore, Rasasa engaged its international responsibility, and has to compensate fully Adawa for the financial harm it has suffered.

D. Adawa is under the obligation to comply with the ICC under Part IX of the Rome Statute, which establishes a cooperation regime. Additionally, Article 98 (1) of the Rome Statute is a rule of procedure directed at the Court itself, implying the impossibility for Rasasa to invoke its Minister's immunity.

Secondly, Rasasa violated Article 3 of the CHC Treaty. Therefore, Adawa is not under the obligation to respect Article 32 of the CHC Treaty, as an application of the principle of *inadimplenti non est adimplendum* enshrined by Article 60 of the VCLT.

Finally, through the Parties' agreement, Rasasa consented to the arrest and detention of its Minister, precluding Adawa's internationally wrongful acts *ex tunc*. Alternatively, Rasasa renounced to invoke Adawa's responsibility by acceding the terms of the Parties' agreement. Lastly, Rasasa's consent shall, in any case, be interpreted as putting an end to the continued character of Adawa's internationally wrongful acts.

PLEADINGS

A. THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER ADAWA’S CLAIMS

The International Court of Justice has jurisdiction over Adawa’s claims pursuant to Article 37 of the Statute¹ and Article VI of the Treaty of Botega signed by Rasasa and AZU on 1 November 1929 which remains in force for Rasasa and is binding on Adawa as a matter of State succession (I). Alternatively, by submitting a counterclaim to the Court in the terms agreed by the Parties in the Statement of Facts, Rasasa must be deemed to have consented to the Court’s jurisdiction over Adawa’s claims (II).

I. THE JURISDICTION OF THE COURT UNDER THE TREATY OF BOTEGA

Article VI of the Botega Treaty constitutes a wide compromissory clause similar to Article XXXI of the American Treaty on Pacific Settlement (‘Pact of Bogotá’) of 30 April 1948.² On numerous occasions, the Court has decided disputes on the basis of the Pact.³ It has notably underscored, in the *Border and Transborder Armed Actions* case, that ‘Article XXXI of the Pact of Bogotá thus confers jurisdiction upon the Court to entertain the dispute submitted to it’.⁴

¹ Article 37, United Nations, *Statute of the International Court of Justice*, 18 April 1946.

² Article XXXI, Treaty of Botega.

³ M.T. Infante Caffi, *The Pact of Bogotá: Cases and Practice*, Anuario Colombiano de Derecho Internacional, vol. 10, 2017.

⁴ *Border and Transborder Armed Actions (Nicaragua. v Honduras)*, Judgment, I.C.J. Rep. 1988, para. 48.

The Treaty of Botega was concluded in 1929 and its Article VI refers to the Permanent Court of International Justice. Pursuant to Article 37 of the Statute, and because both Parties to this case are parties to the Statute, such reference to the PCIJ entails consent to the jurisdiction of the ICJ.

Rasasa is an original party to the Treaty of Botega. It has never terminated it nor withdrew from it. When the Adawa-Zeitounia Union was amicably dissolved on 1 January 1939, Rasasa did not notify Adawa and Zeitounia that, in its opinion, the Treaty would have come to an end. In fact, the Treaty of Botega continued to apply as a matter of State succession on the basis of the principle of automatic succession in case of the dissolution of one party to a bilateral treaty (A) or, at least, on the basis of principle of continuity that applies to territorial treaties (B). Therefore, the Treaty continues to apply (C).

A. The Treaty of Botega continues to be binding on the new States that succeeded from AZU

The Treaty of Botega is a bilateral treaty signed between AZU and Rasasa on 1 November 1929. Based on Article 34 of the Vienna Convention on succession of states in relation to treaties [**The Vienna Convention**], the Botega Treaty is unaffected by the dissolution of AZU on 1 January 1939 and it still creates rights and obligations binding upon the successor states, Adawa and Zeitounia.

Article 34 reflects the principle of automatic succession of bilateral treaties in case of the dissolution or the separation of a state where the predecessor state has ceased to exist. In accordance with the fact that Adawa and Zeitounia succeeded the territory of AZU after it has ceased to exist in 1939, the principle of automatic succession applies in this case. Consequently, the Treaty is still in force and continues to produce its effects upon the states of Rasasa and Adawa, as a successor state.

Article 34 of the Vienna Convention must be respected and followed, since it reflects customary international law. Even though the Convention is not applicable in relations between Adawa and Rasasa, the Convention was codified to reflect Customary Law.⁵ This assumption can easily be demonstrated by the Commission's commentaries in the Draft Articles, by state practice and by the succession to Bilateral Investment Treaties [**BIT**].

The International Law Commission stated in the 1974 Draft Articles that state practice was 'sufficiently consistent to support the formulation of a rule which, [...] would provide that treaties in force at the date of the dissolution should remain in force *ipso iure* with respect to each State emerging from a dissolution'.⁶ Delegations at the 1977-1978 conference that supported the view that the principle of automatic succession was based on sufficient state practice.⁷ Moreover, the principle of automatic succession is even more recognized concerning the succession to bilateral treaties, rather than multilateral treaties.

Furthermore, the attitude of successor states in the case of *Yugoslavia* and *Czechoslovakia* asserted the customary nature of Article 34. In those cases, all the successor states have accepted the principle of automatic succession and 'made declarations which indicate that they are willing to abide by the rules of customary law which in their view seem to be largely enshrined in the Vienna Convention on Succession of States in Respect of Treaties and in particular its Article 34'.⁸

Finally, the practice concerning the succession to BIT's is interesting and tends to confirm the principle of automatic succession of treaties, enshrined in Article 34 of the Vienna Convention.

⁵ A. Zimmerman, *Staatennachfolge in völkerrechtliche Verträge*, Springer, Berlin, 2000, p. 832.

⁶ United-Nations Conference on the succession of States in Respect of Treaties, vol. III, Doc. A/Conf. 80/4.

⁷ United Nations Conferences on the Succession of States in respect to Treaties, Vol. II, Doc. A/CONF.80/16/add.1, 40th-42nd and 48th meetings.

⁸ Council of Europe, Ad Hoc Committee of legal advisers on public international law (CAHDI), Preliminary draft reports on the pilot project of the Council of Europe on State practice regarding State succession and issues of recognition, 9 September 1998, p. 44.

The Czech Republic, one successor state of the former Czechoslovakia [**‘CSFR’**], considered itself automatically bound by the BIT’s previously concluded by CSFR.⁹

The exception provided by the second part of Article 34 is not applicable in this situation. The purpose of the Botega Treaty is to ensure peace in the Region of Crosinia, by establishing an Armistice Demarcation Line and an International Zone of Peace.¹⁰ Furthermore, another objective of the Treaty is to preserve and protect the Helian hyacinth, an endemic spice at the heart of the Crosinian culture and economy. Taking into account that the Helian hyacinth still represents the main source of income for most of the Adawan population, the application of the Treaty by Adawa is compatible with its object and purpose.

B. The Treaty of Botega is a territorial treaty and continues to be binding

Alternatively, if the customary character of Article 34 is declined, the Treaty of Botega remains binding on the Parties as a territorial treaty, within in the meaning of Article 12 of the Vienna Convention. This article provides that the rights and obligations granted by this category of treaties are not affected by a state succession.¹¹ Article 12 reflects customary international law and must be respected, as it has been affirmed by the Court in the *Gabčíkovo-Nagymaros Project* case.¹² The Court held the view that the Treaty concluded between Hungary and Czechoslovakia in 1977 was binding upon Slovakia, based on Article 12 of the Vienna Convention.

⁹ ‘Proclamation to all Parliaments and Nations of the World’, 17 December 1992, reproduced in Klabbbers et. al. (n 79), p. 402.

¹⁰ Articles I and III, Treaty of Botega.

¹¹ Article 12, Vienna Convention on succession of States in relation to treaties.

¹² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, I.C.J. Rep. 1997, para. 123 [**‘Gabčíkovo-Nagymaros Project’**].

Article 12 concerns treaties rooted in a specific part of the territory of a contracting party.¹³ A territorial treaty is attached to a determined localized territory. The treaties designated by Article 12 must have a permanent character and according to a very well-known and quoted opinion of O’Connell, the legal effects of these treaties ‘are to impress on a territory a status which is independent of the personality of the State exercising sovereignty’.¹⁴ The Treaty of Botega has to be considered as a territorial treaty since it implemented an Armistice Demarcation Line (a) as well as an International Zone of Peace (b) and it created rights and obligations attached to the territory of the Region (c).

(a) The Botega Treaty established an Armistice Demarcation Line

The Treaty of Botega was signed by AZU and Rasasa in 1929, after the three-year civil war which led to the independence of both states. The main purpose of the Treaty is to realize the importance of maintaining peace and security in the Region of Crosinia. To that end, Article I (2) of the Treaty established an Armistice Demarcation Line in order to reduce the risk of incidents between the armed forces.¹⁵ According to the dictionary of Military and Associated terms, an Armistice Demarcation Line can be defined as ‘a geographically defined line from which disputing of belligerent forces disengage and withdraw from their respective sides following a truce or cease fire agreement’.¹⁶ A treaty providing for such demilitarization is usually accepted as a territorial treaty.¹⁷ Therefore, since a demilitarized zone has been defined as an ‘area from which weapons and military forces have been removed’,¹⁸ the Treaty of Botega is a territorial treaty, within the scope of application of Article 12 of the Convention.

¹³ A. Verdross, B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3e ed., Berlin, 1984.

¹⁴ D.P. O’Connell, *The Law of State Succession*, Cambridge University Press, 1956, p. 49.

¹⁵ Article I (2), Treaty of Botega.

¹⁶ Dictionary of Military and Associated terms, US department of Defense, 2005.

¹⁷ Draft Articles on Succession of States in respect of treaties with commentaries, article 2 (1974) 2, Yearbook of the International Law Commission 203-204.

¹⁸ Merriam-Webster Dictionary.

(b) The Botega Treaty established an International Zone of Peace

Article III of the Treaty of Botega established an International Zone of Peace on the border between AZU and Rasasa, accessible for all citizens of both High Contracting Parties. During the Vienna Conference held in 1978 with all the different delegations, it has been concluded that a Treaty establishing an International Zone of Peace is governed by Article 12 of the Vienna Convention.¹⁹

(c) The Botega Treaty created rights attached to the territory

In addition to the principal purpose of ensuring peace in the Region of Crosinia, another objective of the Treaty is to protect the Helian hyacinth, the endemic spice, essential for the Crosinian culture and economy and threatened with extinction after the civil war. Consequently, the Treaty of Botega was signed to restore peace in the Region but more specifically, to save and preserve the Helian hyacinth in light of its importance for the Crosinian culture and economy. As it was for AZU in 1929, the Helian hyacinth still represents a large part of the Gross Domestic Product of Adawa.

Article 12 refers to treaties with an intention of the parties to settle a territorial situation.²⁰ The purpose of the Treaty of Botega is to preserve the situation of the Helian hyacinth, a spice that only grows and flourishes in this particular Region. This intention of the contracting parties is inexorably attached to this determined territory and must be considered as a permanent indirect obligation erected by the Treaty. Since it can be easily affirmed that the Treaty contains an indirect obligation to preserve the Helian hyacinth, which is deeply linked to the territory of Adawa, the Treaty of Botega is a territorial treaty and is unaffected by the dissolution of AZU.

¹⁹ Duculescu (Romania), *Comptes rendus analytiques des séances de la commission plénière*, 54^e session, 18 August 1978, p. 140, para. 44.

²⁰ G. Distefano, *La convention de Vienne de 1978 sur la succession d'Etats en matière de traités, Commentaire article par article et études thématiques*, Bruylant, Bruxelles, 2016.

II. ALTERNATIVELY, RASASA CONSENTED TO THE JURISDICTION OF THE COURT THROUGH ITS COUNTERCLAIM

In the further alternative, in the event that the Court does not find its jurisdiction on the basis of the compromissory clause in Article VI of the Botega Treaty, Rasasa implicitly consented to the Court's jurisdiction by filing a counterclaim concerning the apprehension of Minister Grey.

According to Article 80 (1) of the Rules of the Court,²¹ two requirements must be satisfied in order for a counterclaim to be declared admissible as such. In the *Jurisdictional Immunities of the State* case, the Court stated that the term 'admissibility must be understood broadly to encompass both the jurisdictional requirement and the direct-connection requirement'.²² The first condition holds in that the counterclaim must come within the jurisdiction of the Court.²³

Since a counterclaim needs to come within the jurisdiction of the Court in order to be admissible, Rasasa has therefore recognized the Court's jurisdiction by introducing its counterclaim.

Secondly, the counterclaim must be 'directly-connected with the subject matter of the claim of the other party'.²⁴ This condition is met in the present case as it has been agreed by the Parties in the preamble of the Statement of facts that 'the counterclaim is directly connected with the subject matter of at least of the claims within the meaning of Article 80 of the Rules of the Court'.²⁵

²¹ Article 80, Rules of the Court.

²² *Jurisdictional Immunities of the State (Germany v. Italy)*, Order on the Counterclaim, I.C.J. Rep. 2010, para. 1.

²³ See *Application of the Genocide Convention (Bosnia)*, Order on the Counter-Claim, I.C.J. Rep. 1977, p. 257, para. 31 ; S. Murphy, *Counter-Claim at the International Court of Justice*, 2012, Georges Washington University Law School, p. 7, para. 16.

²⁴ Article 80 (1), Rules of the Court.

²⁵ *Compromis*, [Preamble].

B. THE DEVELOPMENT AND DEPLOYMENT OF THE WALL IS ILLEGAL AND IT MUST BE DISMANTLED

This Chapter demonstrates that the deployment of the WALL poses a permanent threat to human life and Adawa's citizens. Indeed, the use of an Autonomous Weapons Systems ('AWS') such as the WALL is illegal under the two relevant bodies of international law: international humanitarian law (I) and international human rights (II). As a consequence, Rasasa must dismantle the WALL and, as a mean of reparation, make good any damage suffered as a consequence of its presence and use (III).

I. THE DEVELOPMENT AND THE DEPLOYMENT OF THE WALL VIOLATES CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

Article 22 of the Hague Regulations relating to the laws and customs of war on land recalls that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'²⁶ and must comply, *inter alia*, with customary international law.

The use of the WALL violates the principle of humanity (A), the principle of distinction (B), the principle of proportionality (C) and the principle of accountability (D), all customary principles of international humanitarian law. The threat of the use of such weapon by its deployment on Adawa's border with a capacity to kill within its territory constitutes an ongoing international wrongful act, regardless of the actual existence of an armed conflict.

²⁶ See also: Article 35 (1), International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* ['AP I'], 8 June 1977, 1125 UNTS 3: 'in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.'

A. The principle of humanity

The principle of humanity,²⁷ constitutes an underlying principle of international humanitarian law. In this case, it precludes the idea that, under international humanitarian law, activities that are explicitly not forbidden would be permitted.²⁸

On the contrary, Rasasa's development of a revolutionary weapon system such as the WALL is bound to the respect of humanitarian considerations (*inter alia*, principle of distinction and proportionality), even in the absence of any specific treaties prohibiting their development and use. This Chapter demonstrates how the WALL consistently fails to do so.

B. The principle of distinction

The autonomous nature of the WALL's targeting system automatically violates the principle of distinction in its twofold meaning.

Firstly, such principle requires to distinguish combatants from non-combatants on a contextual basis. According to the customary principle of distinction as reflected in Articles 48 and 51 (2) of Protocol I, parties to a conflict shall at all time direct their operations exclusively against military objectives, distinguishing 'legitimate targets' from peaceful civilian population. The ability to make such distinction requires 'common sense and good faith' and entails a case-by-case legal judgement.²⁹

²⁷ Included in Article 1 paragraph 2 of AP I, and the 4th paragraph of the preamble to AP II. International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* ['**AP II**'], 8 June 1977, 1125 UNTS 609.

²⁸ M. N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance* (May 4, 2010). *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, p. 800.

²⁹ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 2210.

Secondly, and as a consequence, indiscriminate attacks are prohibited, as made clear and reflected by Article 51 (4) of the same Protocol.³⁰ The WALL is equipped with a range of weapons including non-targeted explosions and the ability to disperse disabling chemicals. Those are indiscriminate weapons, meaning that Rasasa's autonomous weapon has the constant ability to commit a war crime without any human supervision.

Such complex legal decisions cannot lawfully be left to the discretionary power of a machine, regardless of its technical advancement. Always contextual and based on numerous qualitative data, these judgements are highly subjective. They cannot be made *a priori* and are therefore impossible to pre-program: it would require taking into account an infinite number of possibilities. Nevertheless, Rasasa delegated them to a machine, disregarding the complexity of the principle of distinction.

C. The principle of proportionality

In the same spirit, Rasasa disregarded the principle of proportionality, which is reflected in numerous provisions of AP I (specifically Articles 51 (5) (b) and 57).

It entails balancing competing goals during each attack: the anticipated direct military advantage and the prevention of excessive civilian casualties. Heavily dependent of the context, it can never be pre-programmed.

It appears that this type of decisions cannot be left ultimately to the discretionary power of a machine such as the WALL. The ICRC Commentary states that the proportionality test is subjective and 'must above all be a question of common sense and good faith for military commanders'.³¹

³⁰ For a definition of 'indiscriminate attacks', see J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005 [**ICRC Customary IHL Study**], Rule 12.

³¹ ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, paras. 2053-2082.

The international community has developed the ‘reasonable military commander’ standard.³² The International Criminal Tribunal for the Former Yugoslavia, for example, wrote:

‘In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack’.³³

D. The principle of accountability

As demonstrated above, the complete autonomy of the WALL impedes its commanders and operators in making legal judgements: it is impossible for the Rasasan official in charge of its activation and its commander to know precisely where and when an attack will take place.

Therefore, the deployment of the WALL on a 200 kilometres border without any human supervision poses a considerable threat of impunity. While international humanitarian law creates obligations for States and parties to armed conflicts, its rules are ultimately implemented by human subjects. Accountability can never be transferred to a machine, computer program or weapon system and some minimum degree of human control over the functioning of an AWS will always be necessary to ensure compliance with IHL, making arguments based on the technical capacity of the WALL irrelevant.

The decision to proceed (or not) with an attack implies a legal judgement following a ‘case-by-case’ approach. Every single attack requires its own human legal judgement (compliance *inter alia* with the principles of distinction, proportionality and precautions in attacks).

³² See, e.g.: Air Force Judge Advocate General’s Department, *Air Force Operations and the Law*, p. 19.’ See also ICRC Customary IHL Study, pp. 331-333.

³³ *Prosecutor v. Stanislav Gali*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY), Case No. IT-98-29-T, Judgment and Opinion, December 5, 2003, para. 58.

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christophe Heyns,

'It is an underlying assumption of most legal, moral and other codes that when the decision to take life or to subject people to other grave consequences is at stake, the decision-making power should be exercised by humans'.³⁴

Following the Guiding Principles developed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems:

'(c) In determining the quality and extent of human-machine interaction, a range of factors should be considered including the operational context, and the characteristics and capabilities of the weapons system as a whole.'³⁵

In this case, the operational context is a 201 km border, permanently monitored by an AWS that has lethal capability without any human supervisions, putting the lives of millions at risk.

³⁴ UN General Assembly, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/23/47, 9 April 2013.

³⁵ Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Draft Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems* (annex IV), CCW/GGE.1/2019/CRP.1/Rev.2, Geneva, 21 August 2019, p. 13.

II. THE DEVELOPMENT AND THE DEPLOYMENT OF THE WALL VIOLATES INTERNATIONAL HUMAN RIGHTS

The development and deployment of the WALL breaches Article 6 (1) of the International Covenant on Civil and Political Rights [**'ICCPR'**],³⁶ which forbids arbitrary deprivation of life. The respect of this requirement is to be determined, following the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, by the applicable *lex specialis*. If an envisaged use of weapons would not meet its requirements, a threat to engage in such use would also be contrary to that law'.³⁷

Additionally, The WALL was initially developed to ensure law enforcement operations³⁸ and must therefore comply with a distinct body of international law derived from a combination of customary rules and general principles of law: the law of law enforcements.

In addition to the prohibition of arbitrary deprivation of life of Article 6 (1) of the ICCPR, Article 3 states that 'everyone has the right to liberty and security of person', while Article 9 prohibits the arbitrary arrest or detention of a person. The right to life and security of a person is also guaranteed by Article 3 of the Universal Declaration of Human Rights. In this regard, the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials [**'UNBPUFF'**]³⁹ were elaborated by the international community aimed to ensure Human Right compliance during law enforcement operations.

³⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

³⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Rep. 226, para. 25.

³⁸ *Compromis*, [19].

³⁹ UN, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990* (1990) [**'UNBUFF'**], UN Doc A/CONF.144/28/Rev.1,112.

It derives from those sources, from which many of key norms are regarded as binding international law,⁴⁰ that the law of law enforcement has three main components: necessity, proportionality, and precautions.

The principle of necessity demands that any use of force by law enforcement officials should be exceptional and that non-violent means should always be preferred. Those include ‘persuasion, negotiation, and mediation, backed by the inherent authority of a law enforcement official who is acting on behalf of the state’.⁴¹ The robotic nature of the WALL precludes it to have access to the full range of the aforementioned means. The respect of this principle necessitates human skills such as empathy, negotiating skills, and the ability to adapt and respond to unpredictable situations.⁴²

Compliance with the proportionality principle requires from law enforcements confronted with potential criminals ‘to assess the seriousness of the offense and the legitimate objective to be achieved’.⁴³ This necessitates a case-by-case approach, as opposed to the pre-programmed nature of the WALL’s decision-making process.

Thirdly, the duty of precautions poses the obligation to take all possible preventive measures to avoid any unnecessary use of force and violations of the principle of proportionality. Because Rasasa did not ensure any form of meaningful human control after the WALL’s activation, it has forfeited all possibility of compliance with those principles, especially considering the unpredictable nature of 201km border. By using the WALL, Rasasa consistently breaches those various international human rights obligations.

⁴⁰ See UN General Assembly, *Extrajudicial, summary or arbitrary executions executions, Note by the Secretary-General*, UN Doc A/61/311, 5 September 2006, para. 35.

⁴¹Principle 4, UNBUFF.

⁴² UN General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, May 2013, A/HRC/23/47, pp. 10-11.

⁴³Principle 5, UNBUFF.

III. THE WALL MUST BE DISMANTLED

The presence of the WALL along the border between the Parties constitutes an ongoing internationally wrongful act for the reasons set out above. In order to bring this ongoing internationally wrongful act to an end, Rasasa must dismantle the WALL and repeal or render ineffective forthwith by means of its own choosing the legislative and regulatory acts relating to its deployment.⁴⁴

Alternatively, if the Court considers that no internationally wrongful act is of continuous character, Rasasa must dismantle the WALL as a matter of reparation in the form of restitution.⁴⁵

In any event, Rasasa is obliged to make reparation for the damage caused to all natural or legal persons affected by development and deployment of the WALL. The amount of compensation to be paid on that account will be determined by the Court at a later stage of the proceedings, should the Parties fail to agree on a settlement.⁴⁶

⁴⁴ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004], I.C.J. Rep 136.

⁴⁵ *Arrest Warrant of 11 April 2002 (D.R.C. v. Belgium)*, Judgment [2002] I.C.J. Rep. 2002, para. 73 [**Arrest Warrant**].

⁴⁶ *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, Judgment [2005], I.C.J. Rep 168, p. 279, para. 344 [**Armed Activities**]; *Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. D.R.C.)*, Merits, Judgment [2010], I.C.J. Rep. 2010, p. 691, paras. 162-164 [**Diallo**].

C. THE COURT HAS JURISDICTION AND CAN EXERCISE IT OVER RASASA’S VIOLATION OF THE CHC TREATY. THEREFORE, ADAWA IS ENTITLED TO COMPENSATION

This Chapter addresses Adawa’s claims relating to Rasasa’s imposition of tariffs on Helian materials. It will demonstrate that those claims fall within the jurisdiction of the Court under Article VI of the Treaty of Botega (I) and are admissible (II), before addressing the specific violations of the CHC Treaty (III) for which Rasasa bears responsibility and must make reparation in the form of compensation (IV).

I. THE COURT HAS JURISDICTION OVER ADAWA’S CLAIMS RELATING TO THE CHC TREATY

As developed in Chapter A, the Treaty of Botega is binding upon the Parties and its Article VI constitutes a legal basis for the Court’s jurisdiction regarding Adawa’s claims under the CHC Treaty (A). Moreover, the Court’s jurisdiction in that regard coexists with the jurisdiction of the DSB of the WTO over the WTO-covered agreements (B).

A. The Court has jurisdiction pursuant to the Treaty of Botega

As made clear in Chapter A, the Treaty of Botega is binding on the Parties and remains in force between them. Under Article VI of the Treaty, any State party to it may submit to the Court ‘all disputes of a juridical nature that arise among them’. The broad consent of the Parties to adjudication by the Court encompasses claims based on any treaty binding between the Parties.

The dispute between the Parties about compliance with the CHC Treaty is unquestionably of a ‘juridical nature’ within the meaning of Article VI. Such is the case irrespective of the invocation by Rasasa of Article 22 (b) of the CHC Treaty according to which: ‘Nothing in this Treaty shall be construed as (...) precluding the application of measures necessary to protect a Member State’s essential security interest’.

The invocation of such national security clause does not defeat the jurisdiction of the Court over Adawa's claims (a). Moreover, the Court has the power to determine if the conditions of Article 22 are met (b).

(a) The invocation of national security clauses does not defeat the jurisdiction of the Court

According to a well-established jurisprudence, the Court made clear that national security clauses are reviewable, and therefore do not bar its jurisdiction.

For the first time in the *Military and Paramilitary Activities* case, the Court adjudicated over a similar provision. The United States of America invoked the exception found in Article XXI of the 1956 Treaty of Friendship, Commerce and Navigation: 'The present Treaty shall not preclude the application of measures: (d) ... necessary to protect its Member's essential security interests', where it questioned the Court's jurisdiction over national security clauses.⁴⁷

More recently in the *Oil Platforms* case, the Court confirmed that such clauses are 'confined to affording the Parties a possible defense on the merits', but that they did not constitute grounds for depriving the Court of its jurisdiction.⁴⁸

Finally, this is in line with the WTO system, where a recent dispute settlement panel confirmed that national security exceptions under Article XXI GATT 1994 can be reviewed.⁴⁹

⁴⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.A.)* (Merits) [1986] I.C.J. Rep. 1986, para. 222 [**Nicaragua**].

⁴⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Rep. 1996, para. 20 [**Oil Platforms**].

⁴⁹ Panel Report, *Russia– Measures Concerning Traffic in Transit*, WT/DS512/R (Adopted April 26, 2019).

(b) The Court can review the conditions required under Article 22

In the cases cited above, not only did the Court affirmed its jurisdiction over national security clauses, it also looked at the conditions to be met in order to invoke such exceptions.

Regarding the *Military and Paramilitary Activities* case, the Court confirmed its jurisdiction to interpret Article XXI on the basis of Article XXIV of the 1956 Treaty: the article gives it jurisdiction over disputes relating to the ‘interpretation or application’ of the Treaty, with no exception for Article XXI.⁵⁰ In the present case, Article VI Treaty of Botega provides the same jurisdiction to the Court.

Underlining the deliberate choice of the Parties to not choose the wording of the GATT 1994, the Court interpreted it *a contrario* as empowering it to interpret such clause.⁵¹ Where Article XXI GATT 1994 refers to ‘any action which it considers necessary for the protection of its essential security interests’, the 1956 Treaty and the CHC Treaty only read ‘necessary measures’. This was in order to avoid a ‘political escape clause’, arguably precluding the Court’s jurisdiction.⁵²

Lately, the Court went further in the *Oil Platforms* case, where it explicitly reviewed the American assertion of security interest, on both the applicable law and the facts.⁵³

B. The jurisdiction of the DSB does not deprive the Court of its jurisdiction

⁵⁰ *Nicaragua*, para. 222.

⁵¹ *Id.*

⁵² See, *a contrario*, *Russia - Measures Concerning Traffic in Transit (DS512)*, Third-Party Oral Statement of the United States of America (n 17) 5-8.

⁵³ *Oil Platforms*, para. 78.

The obligation to not impose tariffs is contained in two different treaties binding upon the Parties: the CHC Treaty and the GATT 1994. Therefore, the imposition of tariffs on Helian products by Rasasa's Parliament constituted a 'double-breach', allowing Adawa to challenge the measure in front of both the DSB and the Court.⁵⁴

The Court's jurisdiction is specific and depends 'on the treaties it is enforcing'⁵⁵: it does not enforce the GATT 1994, covered under the WTO-system.

Moreover, the DSB is exclusively competent to adjudicate over claims only under 'covered agreements', within the meaning of Articles 1 and 2 of the DSU.⁵⁶ The CHC Treaty is a regional trade agreement,⁵⁷ falling outside the scope of these 'covered agreements'.

Put differently, the Court has jurisdiction over the CHC Treaty because it is a treaty it is enforcing, and the DSB does not, since its scope of competence is limited to the so-called 'covered agreements'.

Furthermore, the adjudication by the Court will thus respect the integrity of the WTO system because there is no 'exclusive and compulsory'⁵⁸ jurisdiction of the DSB under Article 23.1 of the DSU, since Adawa seeks the redress of a non-WTO Treaty.⁵⁹

⁵⁴ G. Marceau and J. Wyatt, *Dispute settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), p. 69.

⁵⁵ J. Pauwelyn, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, *Cornell International Law Journal*, Volume 42, 2009, p. 84.

⁵⁶ Article 23 (1), DSU.

⁵⁷ *Clarifications*, [5].

⁵⁸ Mohamed R. Hassanien, *United States Bilateral Free Trade Agreements: Consistencies or Conflicts with Norms in the Middle East?*, *Global trade law series*, Vol. 29, 2010, p. 21.

⁵⁹ 'When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.'

Finally, there is no (exclusive) ‘forum choice’ clause in the Treaty of Botega.⁶⁰ Consequently, the overlapping jurisdiction between the DSB and the Court does not prevent Adawa from submitting a claim to both courts.⁶¹

II. ADAWA’S CLAIMS RELATING TO THE CHC TREATY ARE ADMISSIBLE

Adawa’s claims are admissible, because the present case and the request for the establishment of a Panel in front of the DSB are distinctly different. Not only the existence of the *lis pendens* doctrine is doubtful in international law (A) but its conditions are in any case not met (B).

A. The principle of *lis pendens* does not exist in international law

The existence of a *lis pendens* principle is generally not accepted by international courts and tribunals for two main reasons.⁶² First, because *lis pendens* essentially exists in civil law countries, depriving it to constitute a ‘general principle of law’ within the meaning of Article 38 (1) of the Court’s Statute. Second, the variety and differences between international courts and tribunals render *lis pendens* difficult to transpose in the international legal order.⁶³

⁶⁰ See S. Yang, *The Solution For Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause*, Michigan State International Law Review, Vol. 23.1, p. 116.

⁶¹ See Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/ AB/R, adopted 24 March 2006, and Panel Report, WT/DS308/R, adopted as modified by the Appellate Body Report.

⁶² J. Pauwelyn, *op. cit.*, p. 106.

⁶³ *Id.*

Moreover, unlike the principle of *res judicata* which can be derived from the Statute of the Court,⁶⁴ Rasasa does not explain where, in international law, this principle can be found or what is its content: these elements are crucial in order to apply it.⁶⁵

B. The conditions for *lis pendens* are not met

The fact that there is a parallel dispute before the DSB over the conduct of Rasasa on the basis of the WTO-covered agreements does not create a situation of *lis pendens*. The claims that are the subject-matter of the proceedings before the Court are therefore admissible.

Admitting that the *lis pendens* doctrine were applicable, it would be composed of three cumulative elements: (a) two identical actions, (b) the same parties must be involved and (c) two courts of the same character.⁶⁶

While the proceedings before the Court and the DSB involve the same parties, the two other criteria required are not met. The first flaw in Rasasa's argument is that the actions are not identical: neither the proceedings nor the relief sought are the same. Adawa requested the establishment of a WTO Panel over the 'unjustifiable breach of its commitment to maintain the bound rate of zero on such item',⁶⁷ where the ICJ proceedings concern monetary compensation resulting from the violation of the CHC Treaty, a remedy that the DSB cannot grant.⁶⁸

⁶⁴ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 90-93, paras. 115–120.

⁶⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Oral Proceedings, I.C.J. Rep. 2019, p. 22, para. 30.

⁶⁶ *Certain German Interests in Polish Upper Silesia (Merits) Case*, [1925] P.C.I.J., Series A, No. 6, p.20.

⁶⁷ *Compromis*, [47].

⁶⁸ Article 22, DSU.

Second, the DSB and the Court are not ‘courts of the same character’: the proceedings, historical context, remedies, applicable law and other characteristics are divergent.⁶⁹ With all these differences, it is hard to argue that the two international courts are even ‘comparable’.⁷⁰ This is linked with the non-application of the *lis pendens* doctrine in international law: where in domestic law, courts have the same legitimacy, are hierarchically equal and have the same expertise, this is not the case for international courts.⁷¹

III. RASASA’S IMPOSITION OF TARIFFS VIOLATES THE CHC TREATY

Rasasa’s imposition of tariffs violates Article 3 of the CHC Treaty (A) and is not a measure necessary to preserve Rasasa’s national security (B).

A. Rasasa’s imposition of tariffs violates Article 3 of the CHC Treaty

Article 3 of the CHC Treaty prohibits the imposition of ‘customs duties on Helian products, as well as goods that are primarily or exclusively used in the harvesting or processing of the Helian hyacinth, which originate from the territory of a Member State’. Rasasa failed to comply with such obligation of result by imposing tariffs on unprocessed Helian materials. The imposition of tariffs constitutes an illegal trade barrier having the effect of excluding the Adawan farmers from Rasasa’s market.⁷²

B. Rasasa’s imposition of tariffs is not justified by national security reasons

⁶⁹ C. Todeschini-Marthe, ‘Dispute Settlement Mechanisms Under Free Trade Agreements and the WTO: Stakes, Issues and Practical Considerations: A Question of Choice?’ (2018) 13 Global Trade and Customs Journal, Issue 9, p. 395.

⁷⁰ J. Pauwelyn, *op. cit.*, p. 107.

⁷¹ *Id.*, p. 106.

⁷² See Statement of CHC Director-General, *Compromis* [43].

As indicated in Part I, the Court has jurisdiction over national security clauses and may decide if their conditions are met. Adawa respectfully submits that they are not, and that Rasasa is not entitled to adopt measures in contravention of its obligations under the CHC Treaty.

According to the *Certain Questions of Mutual Assistance in Criminal Matters* case, the Court recalled that the Parties remain under the obligation of good faith when invoking a self-judging clause, such as the national security exception.⁷³ The obligation of good faith limits these provisions, requiring that States do not use it to re-label trade matters.⁷⁴

In order to enlighten WTO Members, a dispute settlement panel issued its first ruling over the notion of national security. It found that national security exception can be objectively observed and that they can be reviewed to determine if there is a plausible link between ‘the measure at issue’ and the ‘proffered essential security interests’.⁷⁵

The WTO dispute settlement panel also underlined the fact that ‘essential security interests’ is a ‘narrower concept than security interests’, which has to be understood to interests relating to ‘quintessential functions of the state’.⁷⁶ The exception can be invoked in situations of war or emergency in international relations⁷⁷: the encouragement of Rasasan farmers does not fit in any of these boxes. When Rasasa used an overly broad interpretation of its ‘national security’, it intentionally blurred the lines between its economic interest and national security. In sum, it did not respect the obligation of good faith, trying to take protectionist measures by calling

⁷³ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 229, para. 145.

⁷⁴ Panel Report, *Russia– Measures Concerning Traffic in Transit*, para. 7.133, WT/DS512/R (Adopted April 26, 2019).

⁷⁵ *Id.*, para. 7.138.

⁷⁶ *Id.*, para. 7.130.

⁷⁷ Article XXI(b)(iii), GATT 1994.

them ‘essential interests’. Consequently, Adawa claims that there is no plausible national security or legitimate rationale for the imposition of tariffs.⁷⁸

⁷⁸ W. Reinsch and J. Caporal, *The WTO’s First Ruling on National Security: What Does It mean for the United States?*, *Center For Strategic & International Studies*, 5 April 2019 (<https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>).

IV. RASASA MUST MAKE REPARATION FOR THE LOSSES OCCURRED BY ADAWA AS A RESULT OF ITS VIOLATIONS OF THE CHC TREATY

Rasasa's imposition of tariffs constitutes an internationally wrongful act that entails its responsibility (A), therefore, Adawa is entitled to full reparation (B).

A. Rasasa's imposition of tariffs entails its responsibility

As established in Part III, Rasasa breached its international obligation when it decided to impose tariffs on unprocessed Helian materials, as stipulated in Article 3 of the CHC Treaty. Therefore, Adawa claims monetary compensation for the direct losses it has suffered. According to the fundamental principle of state responsibility, any internationally wrongful act entails the responsibility of the breaching state, together with a duty of reparation.⁷⁹

B. Adawa is therefore entitled to full reparation

Consequently, Adawa is entitled to reparation under international law. As recalled by Articles 31 and 34 of the ARSIWA, the responsible State is under an obligation to make full reparation for the injury whether material or non-material,⁸⁰ caused by the internationally wrongful act. Reparation shall take the form of restitution, compensation or satisfaction, either singly or in combination.⁸¹

⁷⁹ Article 1, ARSIWA.

⁸⁰ Article 31, ARSIWA.

⁸¹ Article 34, ARISWA.

In the *Avena and Other Mexican Nationals*⁸² and *Gabčíkovo-Nagymaros Project*⁸³ cases, the Court reaffirmed the principle settled in the *Chorzów Factory* case: ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁸⁴

Rasasa is required to compensate Adawa’s direct financial harm. According to the ILSA, the losses exceed 10 million euros for the period between January 2018 and October 2018, due to the sharp declining in sales to Rasasa’s processors (*damnum emergens*).⁸⁵ In addition, compensation must also cover the loss of ‘prospective profits’ which Adawa had suffered (*lucrum cessans*).⁸⁶

Therefore, full reparation in the form of compensation⁸⁷ is thus required, due to Rasasa’s illegal imposition of tariffs on unprocessed Helian materials imported. Adawa believes it would be appropriate to let the Parties negotiate regarding the amount of the pecuniary compensation. If the Parties cannot agree in a reasonable period of time, Adawa commits itself to provide the Court with the necessary elements in order to determine such amount.⁸⁸

⁸² *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Rep. 2004 (I), p. 59, para. 119.

⁸³ *Gabčíkovo-Nagymaros Project*, para. 150.

⁸⁴ *The Factory of Chorzów* [1928] PCIJ, Series A, No.17, paras. 47-48.

⁸⁵ *Compromis*, [46].

⁸⁶ See the United Kingdom Memorial in the *Anglo-Iranian Co.* case, Oral Proceedings, I.C.J. Rep. 1951, pp. 117-118, paras. 41-42.

⁸⁷ Article 34, ARSIWA.

⁸⁸ *Diallo*, paras. 162-164; *Armed Activities*, para. 344.

D. THE ARREST AND DETENTION OF MS. GREY ARE CONSISTENT WITH ADAWA’S OBLIGATIONS UNDER INTERNATIONAL LAW. THEREFORE, ADAWA MAY PROCEED TO RENDER HER TO THE ICC

This Chapter relates to Rasasa’s counterclaim concerning the arrest and detention of its Minister of Foreign Affairs. It will first address the admissibility of Rasasa’s counterclaim (I). Then, it will demonstrate the compliance by Adawa of its obligations under the Rome Statute (II), as well as the irrelevance of Article 32 of the CHC Treaty due to Rasasa’s violation of the said Treaty (III). To conclude, it will set forth the effects deriving from the Parties’ agreement (IV).

I. THE ADMISSIBILITY OF THE COUNTERCLAIM ‘AS SUCH’

As the order of the Court of 20 September 2019 makes clear, Parties have agreed on the existence of the connection requirement under Article 80 of the Rules of Court.⁸⁹ Moreover, the counterclaim falls within the jurisdiction of the Court pursuant to Article VI of the Treaty of Botega, which is binding on both Parties, as established in Chapter A. Hence, the Court also has jurisdiction to entertain Rasasa’s counterclaim.

II. ADAWA COMPLIED WITH ITS OBLIGATIONS TO ARREST AND DETAIN MS. GREY

Adawa, which has been an original Party to the Rome Statute establishing the ICC,⁹⁰ has the obligation to comply with its duty to cooperate with the Court. Indeed, Part IX of the Rome Statute creates a State cooperation regime (A), while Article 98 (1) does not bar Adawa from executing the request for arrest and surrender issued by the Court (B).

⁸⁹ *Compromis*, [52].

⁹⁰ *Compromis*, [13].

A. Adawa is under the obligation to cooperate with the Court under Part IX of the Rome Statute

On 20 June 2019, an ICC Pre-Trial Chamber issued a warrant of arrest and a request for arrest and surrender for Darian Grey under Article 89 of the Rome Statute.⁹¹ When Ms. Grey was on Adawan soil on 22 June 2019, Adawa arrested her and placed her into custody, in accordance with its obligations under the Rome Statute.⁹²

As the Court is not embodied with enforcement mechanism,⁹³ every State party to the Rome Statute is obliged to lend assistance to the Court, and to cooperate fully with it pursuant to Article 86 *et seq.* of the Rome Statute.⁹⁴ The Pre-Trial Chamber II reaffirmed that position in the *Cooperation of the Congo* decision,⁹⁵ in which it recalled that ‘the ICC relies mainly on the States ’cooperation, without which it cannot fulfil its mandate’.

In the *Malawi* and the *Chad* decisions, the Pre-Trial Chambers found that both African States ‘failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the institution from exercising its functions and powers under the Statute’.⁹⁶

⁹¹ *Compromis*, [50]; *Clarifications*, [8].

⁹² *Compromis*, [51].

⁹³ L. E. Carter, M. S. Ellis, C. C. Jalloh, *The International Criminal Court in an Effective Global Justice System* (E. Elgar, 2016), p. 72.

⁹⁴ R. Ionescu-Vraca, ‘L’obligation de coopération des États avec la Cour pénale internationale : une illustration des défis à travers l’affaire Al Bashir et l’Afrique’ (*Rev. dr. pén.*, 2019), p. 19.

⁹⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir’s Arrest and Surrender to the Court) ICC-02/05-01/09 (9 April 2014), para. 33.

⁹⁶ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Corrigendum to the Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (13 December 2011), para. 47 [**‘Malawi Decision’**]; *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Non-

In order to avoid the sanctions enshrined in Article 87 (7) of the Rome Statute, Adawa acceded to the request of the Court, and thus complied with its obligations under Part IX of the Rome Statute.⁹⁷

B. Article 98 (1) of the Rome Statute does not prevent Adawa from executing the Court's request

Article 98 (1) of the Rome Statute applies as a 'conflict-avoidance rule' and ensures 'that States Parties are not placed in a situation where their cooperation obligations require them to breach an obligation owed to a third State'.⁹⁸

Adawa acted consistently with its obligations with respect to Ms. Grey's immunity when acceding to the cooperation request of the Court, as the immunity of Rasasa's Minister of Foreign Affairs cannot be invoked before an international Court (i). Furthermore, Article 98 (1) of the Rome Statute is directed at the Court (ii).

(a) Ms. Grey's immunity cannot be invoked before the ICC

Article 27 (2) of the Rome Statute provides for a well-established⁹⁹ and customary¹⁰⁰ exception to the immunity *ratione personae* enjoyed by senior officials under customary

Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (26 March 2013), para. 23.

⁹⁷ L. E. Carter, M. S. Ellis, C. C. Jalloh, *The International Criminal Court in an Effective Global Justice System* (E. Elgar, 2016), p. 85.

⁹⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 (6 May 2019), para. 131 [**'Jordan Referral Appeal'**].

⁹⁹ *Arrest Warrant*. See also *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172.

¹⁰⁰ *Jordan Referral Appeal*, para. 103.

international law, notably by a Minister of Foreign Affairs.¹⁰¹ Therefore, the exception also applies to Rasasa, even though it is not Party to the Rome Statute.¹⁰²

In this regard, a similar provision can be found in the Nuremberg Charter of the International Military Tribunal at Nuremberg.¹⁰³ Likewise, Article 7 (2) of the International Tribunal for the Former Yugoslavia¹⁰⁴ and Article 6 (2) of the International Tribunal for Rwanda¹⁰⁵ provide for the inapplicability of the official position of an accused person *vis-à-vis* an international Court.

More recently, in the *Jordan Referral* judgment, the Appeals Chamber reaffirmed the customary nature of Article 27 (2) of the Rome Statute.¹⁰⁶ It recalled the conclusion reached by the Pre-Trial Chamber in the *Malawi* decision, according to which ‘international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass’, and that ‘customary international law creates an exception to [Minister of Foreign Affairs] immunity when international courts seek a [Minister of Foreign Affairs]’s arrest for the commission of international crimes’.¹⁰⁷

Consequently, Rasasa is not entitled to claim the respect of its Minister’s immunity. Additionally, no conflict exists between Adawa’s obligations towards the Court and its obligation to respect Ms. Grey’s immunity under customary international law.

¹⁰¹ W. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (Oxford University Press, 2016), p. 599.

¹⁰² *Compromis*, [13].

¹⁰³ Article 7, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (‘London Agreement’), 8 August 1945.

¹⁰⁴ Article 7 (2), Statute for the International Criminal Tribunal for Yugoslavia, UN Security Council (25 May 1993).

¹⁰⁵ Article 6 (2), Statute of the International Criminal Tribunal for Rwanda, UN Security Council (8 November 1994).

¹⁰⁶ *Jordan Referral Appeal*, para. 103.

¹⁰⁷ *Malawi Decision*, paras. 42-43.

(b) Article 98 (1) of the Rome Statute is directed at the Court

Article 98 (1) of the Rome Statute is a procedural requirement addressed to the Court itself.¹⁰⁸ It prescribes that the Court must ‘consider whether a requested State owes an obligation to a ‘third State ’before proceeding with a request for arrest and surrender’.¹⁰⁹ As the Court effectively issued a request for the arrest and surrender of Ms. Grey, it must be assumed that it assessed and concluded that no immunity stood against such a request for cooperation.

In accordance with Article 98 (1) of the Rome Statute, Adawa could not have unilaterally decided not to execute the request of the Court in the event it would have considered that such a request contradicted its obligations with respect to Ms. Grey’s immunity.¹¹⁰ In such circumstances, Adawa would only have had to consult with the Court pursuant to Article 97 of the Rome Statute.

In any case, as third State to the Rome Statute, Rasasa cannot prevail itself of the respect of Article 98 (1). Indeed, the Rome Statute remains *res inter alios acta*,¹¹¹ as Rasasa has never expressly accepted the Rome Statute in writing.¹¹²

III. ARTICLE 32 OF THE CHC TREATY DOES NOT APPLY

As made clear in Chapter C, Rasasa’s imposition of tariffs constitutes a material breach of Article 3 of the CHC Treaty, running against its object and purpose. Pursuant to Article 60 of

¹⁰⁸ *Jordan Referral Appeal*, para. 130.

¹⁰⁹ *Id.*, para. 131.

¹¹⁰ *Id.*, para. 152.

¹¹¹ Article 34, VCLT.

¹¹² Article 35, VCLT.

the VCLT which reflects customary international law (*inadimplenti non est adimplendum*),¹¹³ Adawa is entitled to disregard Article 32 of the CHC Treaty which provides for the immunity to be recognized to Representatives of Member States attending CHC meetings.¹¹⁴

Consequently, Adawa did not breach Article 32 of the CHC Treaty when arresting Darian Grey on 22 June 2019, as it was entitled to suspend the operation of the treaty between itself and Rasasa.¹¹⁵

IV. THE EFFECTS OF THE PARTIES' AGREEMENT

On 9 September 2019, the Parties reached an agreement according to which, pending the Court's disposition of this case, Darian Grey would remain under house of arrest in Adawa.¹¹⁶ In other words, Rasasa consented to both the arrest and the detention of Ms. Grey (A). In the alternative, Adawa submits that this agreement amounts to Rasasa's renunciation to its counterclaim (B). In any case, Rasasa's position necessarily puts an end to the continued character of Adawa's internationally wrongful act (C).

A. Rasasa consented to the arrest and the detention of its Minister

In the event the Court were to consider that Ms. Grey was unlawfully arrested and detained, Adawa respectfully submits that the internationally wrongful acts are precluded by the Parties' agreement. Indeed, Rasasa's consent had been validly given through the agreement, and Ms. Grey's arrest and detention remain within the limits of that consent.¹¹⁷

¹¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, [1971] I.C.J. Rep 3, para. 94.

¹¹⁴ Article 32, CHC Treaty.

¹¹⁵ Article 60 (2) (b), VCLT.

¹¹⁶ *Compromis*, [52].

¹¹⁷ Article 20, ARSIWA.

Consequently, it can be inferred that Rasasa consented to both the conditions of detention of its Minister, as well as to her arrest on 22 June 2019, giving a retroactive scope to its consent.¹¹⁸ The agreement covers Adawa's internationally wrongful acts from 22 June 2019 onwards and precludes the wrongfulness of Adawa's acts *ex tunc*.¹¹⁹

Therefore, Rasasa cannot invoke Adawa's responsibility, as it dispensed Adawa with its obligation to respect Ms. Grey's immunity in this particular occasion.¹²⁰

B. Rasasa waived the right to invoke Adawa's responsibility

In the alternative that the Court were to consider that Adawa's internationally wrongful acts are not precluded by the Parties' agreement, it can nevertheless be assumed that Rasasa renounced to its right to invoke Adawa's responsibility. Indeed, by acceding to the terms of the agreement of 9 September 2019, Rasasa validly waived its claim.¹²¹

Therefore, even though Adawa's acts remain unlawful, Rasasa renounced to invoke Adawa's international responsibility.

C. In any case, Rasasa's consent puts an end to any possible internationally wrongful act

¹¹⁸ C. Tams, 'Waiver, Acquiescence, and Extinctive Prescription', in J. Crawford (ed.), *The Law of International Responsibility* (Oxford University Press, 2010), p. 1041.

¹¹⁹ *Id.*

¹²⁰ R. Kolb, *The International Law of State Responsibility: An Introduction* (E. Elgar, 2017), p. 114.

¹²¹ Article 45 (a), ARSIWA; C. Tams, *op. cit.*, p. 1035.

Finally, the Parties agreement necessarily brings to an end the illegal character of Adawa's internationally wrongful acts, if any. By consenting to its Minister's conditions of detention, Rasasa accepts the detention and no longer contests its legality.

Hence, as Rasasa cannot request the cessation of Adawa's wrongful conduct,¹²² it is only entitled to request the release of Ms. Grey as a matter of reparation in the form of restitution.¹²³ However, the burden of proof relies on Rasasa, and it is doubtful that the conditions set forth in Article 35 of the ARISWA are fulfilled.

¹²² Article 30, ARSIWA.

¹²³ Article 35, ARSIWA.

PRAYER FOR RELIEF

Adawa respectfully requests the Court to find, adjudge and declare that:

A. It has jurisdiction competent to adjudicate Adawa's claims.

B. The development and deployment of the Weaponized Autonomous Limitation Line by Rasasa on the Rasasan-Adawan border constitutes an ongoing internationally wrongful act. As a consequence, the WALL must be dismantled by way of cessation. Alternatively, it must be dismantled by way of reparation in the form of restitution. In any event, Rasasa must compensate any damage or injury resulting from the deployment or use of the WALL. Failing agreement between the Parties, the question of reparation due by Rasasa shall be settled by the Court in subsequent proceedings.

C. Rasasa violated the CHC Treaty by imposing tariffs on Helian products, and that Adawa is entitled to compensatory damages for the financial harm it has suffered to date. Failing agreement between the Parties, the question of reparation due by Rasasa shall be settled by the Court in subsequent proceedings.

D. Reject Rasasa's counterclaim relating to the arrest and detention of Darian Grey.

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

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STATEMENT OF JURISDICTION

The State of Adawa [**Adawa**] has submitted the present dispute to the International Court of Justice [**ICJ** and **the Court**], invoking Article VI of the 1929 Treaty of Botega on Armistice and Pacification [**Treaty of Botega**].

The Republic of Rasasa [**Rasasa**] objects to the Court's jurisdiction, affirming that Adawa is not a party to the Treaty of Botega. The Treaty was signed on 1 November 1929 between Rasasa and the Adawa-Zeitounia Union [**AZU**] and Adawa did not become bound by it after the dissolution of AZU on 1 January 1939.

QUESTIONS PRESENTED

- A.** Whether the Court lacks jurisdiction over Adawa's claims because Adawa did not become bound by the 1929 Treaty of Botega as a matter of State succession.

- B.** Whether the development and deployment of the Weaponized Autonomous Limitation Line on the Rasasa-Adawa border is consistent with international law.

- C.** Whether Adawa's claim that Rasasa violated the CHC Treaty by imposing tariffs on Helian products falls outside the Court's jurisdiction or is inadmissible. In the alternative, whether the imposition of tariffs violated the CHC Treaty.

- D.** Whether Adawa's arrest and detention of Minister Grey constitute internationally wrongful acts, and whether Adawa must proceed to her immediate release to Rasasa.

STATEMENT OF FACTS

ORIGINS AND CREATION OF ADAWA AND RASASA

On 1 November 1929, the Treaty of Botega was signed by the President of Rasasa – on behalf of the recently independent State – and the Queen Goleta representing the newly established Adawa-Zeitounia Union. Ten years later, Adawa and Zeitounia separated: The Republic of Adawa came into existence. Geographically, the State of Adawa and the Republic of Rasasa share a common border.

The main resource of the Region is the Helian hyacinth, an endemic flower cultivated for its valuable spice ‘Helian’. The farming activities relating to the flower represent a significant part of its GDPs.

On 20 June 1969, the Ministers of Agriculture of the six States signed the Treaty establishing the Crosinian Helian Community [‘**CHC**’]. The Members agreed to ban customs duties on equipment necessary to process and harvest the Helian hyacinth, together with Helian products, with a possible application of necessary measures if the essential security interest is at stake. The restriction imposed between CHC Members proved to be in support of the health and development of the Helian commerce. Furthermore, Rasasa and Adawa followed this spirit when accessing the General Agreement on Tariffs and Trade: the bound rates applicable regarding Helian bulbs, pollen, plants, spice and equipment were zero, on a most favored nation basis.

DEVELOPMENT OF THE WALL

During the summer 2012, a disastrous tropical cyclone, the Hurricane Makan, caused the destruction of large parts of the Helian hyacinth crop plantings, thought essential for Adawa’s economy. Subsequently, unemployment raised drastically within the Region, leading to an unprecedented increase of criminality, mostly committed by Helian farmers.

Rasasan Robotics Corporation [‘**RRC**’] is a private company advising and furnishing governments with defense and security technologies. As chief executive officer at the time,

Darian Grey offered the knowhow and funds of RRC in order to design an intelligent system: The Weaponized Autonomous Limitation Line [**WALL**].

Seeking to return to a pre-storm level of crime and to foster Helian industry's recovery, the revolutionary technology was created to identify and neutralize hooligans. The WALL would use force only in case of extreme necessity with a false positive rate proved to be of less than 0,0001%, according to a RRC report. With the return to the pre-2012 criminality rate, only Rasasa and Adawa remained interested in the project. During two years, the WALL was developed and its conformity with international law was reviewed by advisers of the Rasasan government.

Ms. Grey announced on 6 July 2015 the complete finalization of the WALL, which she described as being fully independent and autonomous from human control. Although all tests and experiments carried out by scientists and experts were highly conclusive, neither Adawan nor Rasasan governments decided to purchase the new technology, relying on economic and political reasons.

While the public order was being restored, the former Adawan farmers organized into larger groups, frequently crossing the border overnight to commit crimes on Rasasan soil. Official reports indicated that cross-border violence was increasing at low yet constant rates. Consequently, the concerned governments set up a joint task force specialized in transnational criminality: so far no viable solution has been found. Moreover, the Adawan groups became an organized and trained militia, planning crimes from their campsites located in Rasasa.

Mr. Pindro, elected new President of Rasasa in early January 2017, submitted a bill to the Parliament, where he invokes solutions for the Rasasa-Adawa border. Moreover, by the end of June 2017, President Pindro sent the Rasasan army against the militia and had the WALL installed on his side of the border, concerned about national security. During presidential exchanges between Adawa and Rasasa, Mr. Moraga, the Adawan President, denounced the non-respect of international law and of the 1929 Treaty of Botega, since the WALL could operate on Adawa's soil.

On 10 January 2018, the WALL was completed and put into operation. The President of Rasasa attempted to reassure the people of both States: the WALL would practically make no mistake,

and therefore innocent people will not be injured. Still, President Moraga relayed the fear and anger of his citizens, condemning the potential disproportionate use of lethal force taken by artificial intelligence, and without human intervention. Nevertheless, according to a note of the joint task force, the WALL has a positive impact: there has been a dwindling by more than 80% of trans-border cases since its implementation.

IMPOSITION OF TARIFFS

Due to devastating Hurricane Makan, Rasasa has lost more than 60% of its Helian hyacinth crop plantings, against only 20% for Adawa. Therefore, in January 2018, Rasasa decided to impose tariffs of ‘25% *ad valorem* on Helian bulbs, live plants, and pollen imported’, in order to encourage its farmers to purchase from local farms instead of Adawan ones, since the former are unable to meet their pollen needs.

Moreover, the Rasasan Helian Growers Association [**‘RHGA’**] published an alarming report about the ongoing events, which have a negative impact on the Helian market. In fact, due to their inability to meet their Helian pollen provisions, many Rasasan Helian farms could crumble within the decade.

To avoid such catastrophe, Rasasa decided to impose tariffs and underlined how sensitive the Helian matter is: ensuring the wellbeing of the Helian industry is ensuring the survival of the citizens, who depend on the Helian growers. In other words, the Helian industry falls within the scope of the so-called ‘national security interests’.

In October 2018, Rasasa tried to settle their dispute amicably, by going to consultations in front of the Dispute Settlement Body (‘DSB’) with Adawa. Unfortunately, the parties could not reach an agreement. Pursuant its procedures in front of the DSB, Adawa requested the establishment of a Panel, regarding Rasasa’s same imposition of tariffs on Helian products, but this time on the basis of the General Agreement on Tariffs and Trade [**‘GATT 1994’**].

MINISTER GREY’S IMMUNITY ISSUE

Ms. Darian Grey was the founder and chief executive officer of RRC from 1979 to 2016. In January 2017, President Pindro appointed her as Minister of Foreign Affairs. Her nomination

implied her resignation from her position at RRC and she had to cut all financial link with the company.

Back in 2000, she was, together with RRC, allegedly involved in cooperating with totalitarian regimes. Furthermore, the Office of the Prosecutor of the International Criminal Court [‘ICC’] opened an investigation in 2009: the allegations related to war crimes and crimes against humanity, having occurred during the 2007-2009 Garantian civil war – a State not party to this case.

In June 2019, following the Prosecutor’s request of 13 April 2019, the ICC issued a warrant of arrest for Minister Grey. Adawan officers arrested her two days later, during the annual CHC meeting on 22 June 2019. Her counsel argued that she enjoyed diplomatic immunity. However, the argument was rejected in the light of the Rome Statute. Neither judicial appeal, nor provisional release were granted. For the time being, she is under surveillance in a diplomatic guest house in Adawa.

SUMMARY OF PLEADINGS

A. The Court has no jurisdiction over Adawa's claims. Article VI of the Treaty of Botega on Armistice and Pacification is not applicable to this case since the Treaty was no longer in force after the dissolution of the Adawa-Zeitounia Union on 1 January 1939. Adawa cannot be considered as a successor state party to the Treaty of Botega. First, the principle of automatic succession of treaties in case of the dissolution of a party, emphasized in Article 34 of the 1978 Vienna Convention, is not applicable in the relations between Adawa and Rasasa. Second, the Treaty of Botega is not a territorial treaty within the meaning of Article 12 of the 1978 Vienna Convention.

Furthermore, the counterclaim filed by Rasasa to the Court in the terms agreed by the Parties in the Statement of Facts, cannot be assimilated to a consent to the Court's jurisdiction over Adawa's claims.

B. The development and deployment of the Weaponized Autonomous Limitation Line is consistent with international law. Rasasa has conducted a thorough legal review, going beyond the obligations set by Additional Protocol I to the Geneva Conventions of 12 August 1949. Furthermore, the development of the WALL complies with the requirements set by international humanitarian law, because the WALL is not illegal *per se*.

Additionally, its use complies with the various principles of customary international humanitarian law, such as the principle of distinction, the principle of proportionality, the principle of precautions and the principle of accountability. The technical capacities of the WALL make this system far more reliable and efficient for complying with the objective requirements of international humanitarian law, and a meaningful human control was implemented during its development process. Therefore, Adawa's claim should be rejected. The development and deployment of the WALL is legal under international law and there is no basis for its dismantlement.

C. The Court cannot adjudicate over Adawa's tariffs claim because it falls outside its jurisdiction or is inadmissible. In the alternative, the imposition of tariffs does not violate the CHC Treaty. Firstly, the Treaty of Botega is not binding upon the Parties. Secondly, the DSB has exclusive jurisdiction over tariffs claim. Indeed, according to the *lex posterior* principle,

Article 3 of the CHC Treaty no longer applies between the Parties. Assuming that Article 3 still applies, the DSU constitutes both *lex posterior* and *lex specialis* regarding Article VI of the Treaty of Botega. In addition, Adawa renounced to its right to claim for monetary compensation when it acceded to the GATT 1994. Finally, self-judging clauses defeat the Court's jurisdiction.

Moreover, Adawa's claim is inadmissible, because the establishment of a WTO Panel and the present claim create a situation of *lis pendens*.

In the alternative, Rasasa's imposition of tariffs on Helian products does not violate the CHC Treaty, since it is in accordance with the object and purpose of the Treaty. Furthermore, Rasasa invokes Article 22 (b) of the CHC Treaty, as the measure protects its national security interests.

D. Adawa breached its international obligation to respect the immunity enjoyed by Minister Grey. First, customary international law entitles acting Ministers of Foreign Affairs with immunity *ratione personae*. Second, Article 32 of the CHC Treaty provides for the obligation to grant immunity to Representatives of Member States during CHC meetings. Moreover, Adawa cannot invoke a violation of the CHC Treaty by Rasasa, as its imposition of tariffs respected Article 3 of the CHC Treaty. Additionally, it cannot be inferred from the Parties' agreement that an end was put to the continued character of Adawa's internationally wrongful acts, nor does it amount to a waiver of immunity.

Furthermore, Adawa may not surrender Minister Grey to the ICC, as the cooperation regime sets forth in Part IX of the Rome Statute cannot be opposed to States not parties to the Rome Statute.

Therefore, Rasasa is entitled to the immediate release of Minister Grey as a matter of cessation. Alternatively, in the event its detention was considered as not constituting an ongoing internationally wrongful act, Adawa shall release Minister Grey as a matter of reparation in the form of restitution.

PLEADINGS

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

The International Court of Justice lacks jurisdiction over Adawa’s claim. The Treaty of Botega signed on 1 November 1929 between AZU and Rasasa was terminated after the dissolution of AZU on 1 January 1939 (I). Therefore, Article VI of The Treaty is not applicable and does not produce any legal effects between Adawa and Rasasa. Furthermore, the counterclaim filed by Rasasa to the Court in the terms agreed by the Parties in the Statement of Facts cannot be assimilated to a consent to the Court’s jurisdiction over Adawa’s claims (II).

I. THE TERMINATION OF THE TREATY OF BOTEGA

The Court has no jurisdiction to adjudicate over Adawa’s claims based on Article VI of the Treaty of Botega. Indeed, after the dissolution of AZU on 1 January 1939, the Treaty of Botega was terminated and was no longer in force. As a consequence, the compromissory clause contained in Article VI of the Treaty of Botega has ceased to produce its effects and could no longer constitute a valid consent of the Court’s compulsory jurisdiction.

The Treaty of Botega is no longer in force towards Rasasa and does not bind the successor states, Adawa and Zeitounia. The principle of automatic succession of treaties enshrined in the Vienna Convention on succession of states in relation to treaties [**The Vienna Convention**]¹ does not apply in this case, since neither Adawa nor Rasasa are parties to the Convention (2). Furthermore, the Treaty of Botega could not be considered as a territorial treaty within the meaning of Article 12 of the Vienna Convention (3).²

¹ Article 34, Vienna Convention on Succession of States in relation to Treaties.

² *Id.*, Article 12.

A. The Treaty of Botega was terminated after the dissolution of AZU

The Treaty of Botega signed between Rasasa and AZU was terminated after the disappearance of a High Contracting Party (*i.e.*, AZU) on 1 January 1939. The principle of automatic succession of treaties, promoted by Article 34 of the Vienna Convention, is not applicable to this case, since neither of the states parties to the dispute have ratified the Convention which is not internationally in force.

Furthermore, this Article does not reflect Customary International Law (a). In any case, the application of the Treaty in respect of the successor states would be incompatible with its object and purpose, while such application would also radically change the conditions of its operation because of the dissolution of AZU, as provided by paragraph 2 of Article 34 (b).

(a) Customary International Law

Article 34 of the Vienna Convention promotes the principle of automatic succession of treaties in case of a dissolution or a separation of a state. However, this principle has been widely criticized³ since it does not reflect state practice.⁴ Therefore, it could not be considered as reflecting Customary International Law. There is a general position of scholars against the customary nature of Article 34 of the Vienna Convention.⁵

The practice of Serbia and Montenegro, a successor state of the former Yugoslavia [**SFRY**], illustrates the reluctance of successor states to apply the principle of automatic succession of

³ A. Aust, *Modern Treaty law and practice*, Cambridge University Press, 2007, p. 368.

⁴ P. Dumberry, 'State Succession to Bilateral Treaties: A few observations on the incoherence and unjustifiable solution adopted for secession and dissolution of states under the 1978 Vienna Convention', in *Leiden Journal of International Law* (Vol. 28), 2014, p. 22.

⁵ M.K. Yasseen, 'La Convention de Vienne sur la Succession d'Etats en matière de Traités' in *A.F.D.I.* (Vol. 28), 1978, p.108. See also ILA, Committee on Aspects of the Law of State Succession, *Final Report*, Rio de Janeiro Conference (2008), para. 27, 54. This was also the opinion shared by Crawford and Boyle concerning the situation in Scotland: 'The claims made by the Scottish government, based on the Vienna Convention, are inconclusive'.

treaties. SFRY had concluded seven Bilateral Investment Treaties [**BIT**'s'] at the time of its dissolution in 1991. Afterwards, Serbia and Montenegro agreed to be bound by only three of these BIT's,⁶ after negotiations and agreements with the other parties to the treaties. The other five prior treaties were terminated or renegotiated between the parties.

Concerning the dissolution of Czechoslovakia [**CSFR**'], the two successor states, Czech Republic and Slovakia, have also refused the automatic succession principle. Czech Republic made an official declaration in which it agreed to be bound by 14 of the 16 BIT's concluded by CSFR.⁷

Even though certain successor states decided to continue to be bound by previous treaties,⁸ there has never been an application of the principle of automatic succession of treaties in practice. All successor states have clearly expressed their agreements to be bound by former treaties, through official declarations, or through negotiations. The very fact that such negotiations or official declarations took place is proof that successor states have not accepted the principle enshrined in Article 34 of the Vienna Convention.⁹

(b) Principle of automatic succession

The previous section has demonstrated that Article 34 of the Vienna Convention is not applicable in the relations between Adawa and Rasasa.

In the event that the Court were to consider that Article 34 reflects customary international law, it should take into account the limits sets out in paragraph 2 of that provision, which provides

⁶ C.J. Tams, 'State Succession to investment treaties: mapping the issues' in *ICSID Review: Foreign Investment law journal* (Vol. 31, No 2), 2016, p. 22.

⁷ C.J. Tams, *Id.*, p. 24.

⁸ P. Dumberry, *op. cit.*, p. 30.

⁹ Council of Europe, Ad Hoc Committee of legal advisers on public international law, *Preliminary draft reports on the pilot project of the Council of Europe on State practice regarding State succession and issues of recognition*, 9 September 1998, p. 13.

that the principle of automatic succession of treaties does not apply if the application of the treaty in respect of the successor state would either be incompatible with the object of the treaty or radically change the conditions of its operation.¹⁰

The Treaty of Botega is an armistice treaty, aiming at ensuring peace between the belligerent states, *i.e.* Rasasa and AZU. Moreover, the Treaty established an Armistice Demarcation Line and an International Zone of Peace on the border between the parties. The object of the Treaty is thus the ending of the war that had existed between Rasasa and AZU. The application of the treaty to Adawa is therefore totally incompatible with its very object and purpose, Adawa having not been a party to the conflict between the contracting states.

Additionally, it is self-evident that the dissolution of AZU has radically changed the conditions of the Treaty's operation and the principle of automatic succession cannot apply in such situation.

B. The Treaty of Botega is not a territorial treaty

Article 12 of the Vienna Convention provides that the rights and obligations provided by a territorial treaty continue to produce their effects and are unaffected by the dissolution of a state.¹¹ The customary character of the provision has been recognized by the Court in the case *Gabčíkovo-Nagymaros Project*.¹² However, the Treaty of Botega is not a territorial treaty and was terminated after the dissolution of AZU (a).

In any case, even if the Court were to recognize the territorial character of the Treaty of Botega, article 12 of the Vienna Convention only provides for a succession to the regime and not for a succession to the Treaty (b).

¹⁰ Article 34 (2), Vienna Convention on Succession of States in relation to Treaties.

¹¹ *Id.*, Article 12,

¹² *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I.C.J. Rep. 1997, para. 123 [**'Gabčíkovo-Nagymaros Project'**].

(a) The Treaty of Botega is not a territorial treaty

Article 12 of the Vienna Convention is a very complex and controversial provision, that caused many issues to the International Law Commission.¹³ By the Commission's own admission, state practice and scholar's opinions do not give clear indications on the criteria's for the application of the provision.¹⁴

According to O'Connell, the legal effects of territorial treaties 'are to impress on a territory a status which is independent of the personality of the State exercising sovereignty'.¹⁵ This interpretation was shared by the Court in the *Gabčíkovo-Nagymaros Project* case. The Court recognized the territorial character of the 1977 Treaty signed between Hungary and Slovakia, based on Article 12 of the Vienna Convention. In the opinion of the Court, the 1977 Treaty 'created rights *in rem*, independently of the legal personality of its original signatories'.¹⁶ The case concerned a complex of dams on the Danube river.

In contrast, the Treaty of Botega did not establish anything of the like on the territory of the contracting states; it did not create rights *in rem*. Indeed, the Treaty was signed after a three-years civil war in the Region of Crosinia, which led to the independence of Rasasa and the creation of AZU. The purpose of the Treaty is to ensure peace and prevent future violence between the previous belligerents of the civil war. Consequently, it is undeniable that the identities and the legal personalities of the high contracting Parties are essential to the realization of the Treaty of Botega. Therefore, since a territorial treaty is independent from its signatories, and because the Botega Treaty is deeply dependent of the personality of the contracting parties, the Treaty is not a territorial treaty, within the meaning of Article 12.

¹³ Maresca, *Comptes rendus analytiques des séances de Commissions plénières*, Italia, 21st session, 20 April 1977.

¹⁴ 'Commentaires du droit international, article 30' in *A.C.D.I.* (Vol. 2), 1972, para. 34.

¹⁵ D.P. O'Connell, *The Law of State Succession*, Cambridge, 1956, p. 49.

¹⁶ *Gabčíkovo-Nagymaros Project*, para. 122.

A territorial treaty is a treaty that creates rights and obligations attached to a determined territory.¹⁷ It must have a permanent character and must concern real rights, rooted in the specific territory of a contracting party.¹⁸ The Treaty of Botega is an Armistice Treaty, aiming at ensuring peace between Rasasa and AZU after a civil war. Even though the protection of the Helian hyacinth, the endemic spice at the heart of the Crosinian culture and economy, is mentioned in the Preamble of the Botega Treaty, it doesn't create any direct obligations or rights concerning the protection of the Helian hyacinth. Therefore, the Botega Treaty does not create any real rights, directly attached to the territory and independent from the signatories. It is thus not a territorial treaty in the meaning of Article 12 of the Vienna Convention of 1978.

(b) Article 12 provides for a succession to the regime of a treaty

Even if the territorial character of the Botega Treaty were to be affirmed by the Court, Adawa did not succeed to the Treaty but only to its regime of rights and obligations. This solution was confirmed by the International Law Commission at the Vienna Conference¹⁹ and supported by doctrine and state practice.²⁰ The successor state succeeds to the regime established by the Treaty and does not become a successor state to the Treaty itself.²¹

In other words, even if the Court recognizes the Botega Treaty as a territorial treaty, Adawa would only be bound by the regime created by the Botega Treaty. In practical terms, Adawa would have the obligation to respect the Armistice Demarcation Line or the International Zone of Peace. However, and because Adawa would not be considered as a successor state party to the Treaty, Article VI of the Botega Treaty could not be invoked as a basis of the Court's jurisdiction, as Adawa is not a successor state party to the Botega Treaty.

¹⁷ M. Fitzmaurice, *Third parties and the law of treaties*, Max Planck Yearbook of United Nations Law, 2002, p. 77.

¹⁸ D.P. O'Connell, *op. cit.*, p. 49.

¹⁹ G. Distefano, *La convention de Vienne de 1978 sur la succession d'Etats en matière de traités, Commentaire article par article et études thématiques*, Bruylant, Bruxelles, 2016, p. 450.

²⁰ G. Distefano, *Id.*, p. 451.

²¹ M. K. Yasseen, *op. cit.*, p. 82.

C. In conclusion, the Treaty of Botega is terminated

Article VI of the Treaty of Botega does not constitute a valid basis for the Court's Jurisdiction. The principle of automatic succession of treaties, set out in Article 34 of the Vienna Convention, is not applicable in this case since the Convention is not in force in relations between Adawa and Rasasa. Furthermore, Article 34 does not reflect Customary International Law.

Additionally, the Treaty of Botega does not continue to exist despite the dissolution of AZU, based on Article 12 of the Vienna Convention. The Treaty is not a territorial treaty. In any case, succession occurs only at the level of the regime created by the Treaty. Therefore, Adawa could never be considered as a successor state, party to the Treaty of Botega.

II. THE JURISDICTION OF THE COURT CANNOT BE BASED ON THE COUNTERCLAIM

Rasasa's counterclaim concerning the illegality of the arrest and detention of Minister Grey is presented in the unlikely event the Court decides it has jurisdiction over Adawa's claims. As such, the counterclaim does not amount to any consent to the Court's jurisdiction over the claims.

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

This Chapter demonstrates that the development and deployment of the WALL is complying with its international obligations. Firstly, a legal review of the weapon was conducted in order to insure its compliance with international law (I). Secondly, the WALL is not a type of illegal weapon *per se* and its development is not illegal under international humanitarian law (II). Thirdly, the WALL's technical capacities allow it to be used in compliance with the relevant customary principles of international humanitarian law (III). Therefore, the development and

deployment of the WALL is legal under international humanitarian law and it should not be dismantled (IV).

I. LEGAL REVIEW

The WALL is a ‘defensive systems’, taking the form of a ‘sentry gun’. This type of ground robot is stationary and not suited to launch offensive attacks. The WALL only attacks targets meeting predetermined criteria, developed by human operators. Its area of operation is limited to the Adawan-Rasasan border. However, the WALL qualifies as a fully Autonomous Weapon System [‘AWS’].²² The notion of autonomy refers to the ‘capability to identify, target and attack a person or object without human interface’, and is one of the core features of the WALL.²³

As required by Article 36 of Additional Protocol I [‘API’],²⁴ the WALL enjoyed a meticulous review during the various stages of its development. Normally, reviews are strictly national procedure.²⁵ However, Rasasa went beyond its international obligations to ensure compliance with the relevant bodies of law. Between 2013 and 2015, advisers from the Rasasan government reviewed the WALL’s compliance with International law.²⁶ On 6 July 2015, the WALL’s development was finished. Scientist coming from both Adawa and Rasasa presented a report on the WALL after an extensive peer-review and tests ‘by government and private experts in

²² According to the US Department of Defense, an AWS is “a weapon system that, once activated, can select and engage targets without further intervention by a human operator”. Department of Defense, *Autonomy in weapon systems*, Directive 3000.09, November 21, 2012, pp. 13-14.

²³ *Compromis*, [20] and [24].

²⁴ International Committee of the Red Cross [‘ICRC’], Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [‘API’], 8 June 1977, 1125 UNTS 3.

²⁵ ICRC, *A Guide to the Legal Review of Weapons, Means and Methods of Warfare*, Geneva, 2006, p. 4.

²⁶ *Compromis*, [23].

more than 30 countries.²⁷ The head of the Adawan team declared that the ‘WALL is unimaginably more reliable than human police or soldiers.’²⁸

II. ABSENCE OF PROHIBITIONS OF THE DEVELOPMENT OF AWS UNDER IHL

The WALL is not illegal *per se*, because it does not cause superfluous injury or unnecessary suffering (A), respects the principle of distinction (B) and do not use weapons having ‘uncontrollable effects’ (C).

A. Prohibition of weapons causing ‘superfluous injury/ unnecessary suffering’

Weapons that are ‘of a nature to cause superfluous injury or unnecessary suffering’²⁹ to the targeted individual are illegal. The autonomy of the WALL itself does not cause injuries or suffering since it is merely a manner of engagement. The WALL uses ‘an array of lethal and non-lethal options, ranging from speakers broadcasting audible warnings, all the way to fully automatic .50 caliber machine guns mounted on 360-degree turntables’.³⁰ Those weapons are lawful under international humanitarian law.

B. Principle of distinction (prohibition of indiscriminate weapons)

Weapons ‘that cannot be directed at a specific military objective’ are prohibited under customary international law and Article 51(4)(b) of AP I. The WALL does not qualify as ‘an indiscriminate weapon’: its technical development allows it to target only lawful military objectives. Reliable distinction is possible using sensors collecting data, which an artificial

²⁷ *Compromis*, [24].

²⁸ *Id.*

²⁹ This prohibition reflects customary international law: Art. 35 (2), AP I.

³⁰ *Compromis*, [24].

intelligence analysis. Furthermore, the WALL is confined to a delimited area of operation (geographical restriction) where there are no permanent human settlements.³¹

C. Prohibition of weapons having ‘uncontrollable effects’

Are prohibited under customary international law and Article 51(4)(c) of AP I, weapons having ‘uncontrollable effect’, regardless of the (in)discriminate nature of its targeting process. The WALL does not fall in this category, because of its geographical restriction and the legal nature of its weaponry.

III. ABSENCE OF PROHIBITION OF THE USE OF AWS UNDER INTERNATIONAL HUMANITARIAN LAW

The WALL not only complies with the customary principles of international humanitarian law, namely the principle of distinction (A), the principle of proportionality (B), the principle of military necessity and precautions in attack (C) and the principle of accountability (D), but it also offers new opportunities for compliance. This is due to the objective nature of these various principles and the WALL’s vastly superior technical advancement.

A. Principle of distinction

The principle of distinction³² forbids the targeting of civilians (except those directly participating to hostilities) and civilians objects during an attack. In case of a substantial doubt on the lawful nature of a target and its status, the target benefits from a presumption of immunity, following Article 50(1) of AP I. The WALL’s technological advancement allows it to distinguish lawful from unlawful targets and to take the appropriate measure, always prioritizing non-lethal responses. Its decision is always contextual and offers considerably more protection to civilians than any human based in the same circumstances could.

³¹ *Clarifications*, [3].

³² Articles 51(2) and 52(1), AP I.

Furthermore, the WALL's deployment on a large scale allows it to have access to a considerable quantity of contextual information, every deployed unit sharing data with each other's. The WALL is always aware of the global situation. During its development, under the supervision of human operators, the WALL learned to take into account 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*.³³ The WALL understands when attacking a legitimate target becomes unlawful and takes the appropriate decision, engaging enemy combatant only as a last resort.

B. Principle of proportionality

The customary rule of proportionality³⁴ prohibits attacks, notwithstanding the lawfulness of the target, causing excessive collateral damages 'in relation to the concrete and direct military advantage anticipated'. The ICRC commentary to AP I highlighted the necessity of a 'fairly broad margin of judgement' and the fact that proportionality determinations 'must above all be a question of common sense and good faith for military commanders'. In *Prosecutor v. Galic*, the ICTY established that an attack is disproportionate when a 'reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack'.³⁵ Those different sources do not preclude that an AWS carried on the proportionality test. On the contrary, they affirmed its objective nature.³⁶

³³ *Compromis*, [20].

³⁴ Article 51(5)(b) and 57(2)(ii), AP I.

³⁵ *Prosecutor v. Stanislav Gali*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY), Case No. IT-98-29-T, Judgment and Opinion, December 5, 2003, para. 58.

³⁶ M. Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' in *International Law Studies* (vol. 90, No 308), 2014, p. 335.

The WALL is able to objectively calculate collateral damages and anticipate the military advantage: it can properly assess the proportional nature of any attack. While subjective factors and psychological processes lies at the base of the human's judgement, the WALL takes into account every available quantitative data and can perform a reliable analyze, such as the Collateral Damage Estimate Methodology [**'CDEM'**], which is a procedure to calculate the probable collateral damage.³⁷

Because the WALL systematically prioritizes non-lethal measures, adapts itself to any new situations and, finally, since its decisions are always supported by scientific algorithms, it insures an optimal respect of the proportionality principle. The development of the WALL, through the process of 'supervised learning',³⁸ made it almost infallible

C. Principle of military necessity and precautions in attack

The WALL is not only lawful; its use constitutes a legal requirement, following the principle of military necessity. The WALL constitutes the best choice of means and method of attacks in order to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects, following Article 57(2)(a) of AP I.

The WALL's use allows Rasasa to take additional precautions, unlike humans in the same situations. Indeed, the WALL always prioritizes non-lethal measures and do not take any decisions based on instinct but rather on concrete data. Its effectiveness was acknowledged by the Appellant itself, according to which 'the WALL has without question had a positive impact in reducing and deterring cross-border crime'.³⁹

D. Principle of accountability

³⁷ M. N. Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics' in *Harvard National Security Journal Features*, 2013, p. 19.

³⁸ *Compromis*, [20].

³⁹ *Compromis*, [42].

The use of an AWS does not automatically preclude the respect of the principle of accountability. Autonomous systems are already widely used in various fields without breaking the causal chain allowing attribution and responsibility.

In fact, it represents a formidable opportunity to facilitate accountability. Unlike humans, machine can potentially record their decision-making process, making inquiries on war crimes more precise and reliable.

Indeed, the WALL is subject of a ‘meaningful human control’. According to the Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, human-machine interaction (and meaningful human control) can take various forms and be implemented at various stages of the life cycle of a weapon. In any case, it must ensure that the potential use of an AWS complies ‘with [the] applicable international law, in particular international humanitarian law’.⁴⁰ Relevant factors in this regard are numerous and include ‘the operational context, and the characteristics and capabilities of the weapons system as a whole’.

The WALL operates only according to the limitations and instructions set by its human’s programmers during its development process in a specific and static operational context: an inhabited border. Programmers and supervisors are the subject of the relevant bodies of law (their ‘addresses’). The respect of international law received their special attention, like demonstrated by the successful legal reviews. Therefore, the WALL is always the object of a ‘meaningful human control’ and it ensure a sufficient level of accountability.

IV. THE WALL COMPLIES WITH INTERNATIONAL LAW

The WALL takes its decisions according to the algorithms developed by its human operators and is able to learn from experiences. It takes decisions based on objective factors only, making

⁴⁰ Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Draft Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems* (annex IV), CCW/GGE.1/2019/CRP.1/Rev.2, Geneva, 21 August 2019, p. 13.

it far more reliable than any humans placed in the same situation. It offers new opportunities for increased compliance with international humanitarian law and therefore, it shouldn't be dismantled.

C. ADAWA'S TARIFFS CLAIM FALLS OUTSIDE THE COURT'S JURISDICTION OR IS INADMISSIBLE. IN THE ALTERNATIVE, THE IMPOSITION OF TARIFFS DOES NOT VIOLATE THE CHC TREATY.

This Chapter addresses Rasasa's claim relating to its imposition of tariffs on Helian products. It will demonstrate that Adawa's claim does not fall within the jurisdiction of the Court under Article VI of the Treaty of Botega (I) and is not admissible (II). To conclude, it will address the non-violation of the CHC Treaty by Rasasa (III).

I. ADAWA'S CLAIM DOES NOT FALL WITHIN THE JURISDICTION OF THE COURT

As developed in Chapter A, the Treaty of Botega does not bind Rasasa and Adawa and its Article VI is no basis of jurisdiction for any of Adawa's claims (A). Moreover, since the accession of both Parties to the WTO, the Dispute Settlement Body of the WTO is exclusively competent to adjudicate tariffs claims (B). In any case, self-judging clauses are not reviewable by courts (C).

A. The DSB has exclusive jurisdiction over tariffs claim

The DSB of the WTO has exclusive jurisdiction over tariffs claims that may exist between Parties because Article 3 of the CHC Treaty has been displaced by the later obligations under the GATT 1994 (a). Even if that is not the case, trade disputes between the Parties cannot be entertained by the Court under Article IV of the Botega Treaty because the DSU is both *lex posterior* and *lex specialis* (b). In addition, Adawa implicitly renounced to any monetary compensation over tariff claims when it acceded the GATT 1994 (c).

(a) Application of the principle *lex posterior* to Article 3 of the CHC Treaty

Under Article 3 of the CHC Treaty, Parties agreed ‘to impose no customs duties on Helian products.’. When Parties became original members of the WTO some 26 years later, they committed to a zero-bound rate for the same products. This commitment became protected under Article II of the GATT 1994. As a result, the CHC Treaty ‘applies only to the extent that its provisions are incompatible with those of the later treaty’.⁴¹

In that regard, Article 3 of the CHC Treaty no longer applies between the Parties because its opening sentence (‘To facilitate the development and health of the Helian industry...’), which conditions the obligation not to impose customs duties on Helian products, is incompatible with the unconditioned obligation to respect the bound rates on a MFN basis. In other words, any tariffs claim between the Parties, including about tariffs on Helian products, is governed by the GATT 1994, to the exclusion of Article 3 of the CHC Treaty which does not apply anymore between Adawa and Rasasa.

Therefore, the DSB has an exclusive and compulsory jurisdiction over the subject-matter of the tariffs dispute, as mandated by Article 23 (1) of the DSU. In accordance with this Article, Adawa can bring its claim only before the DSB, as it seeks the redress of a violation of obligations under a covered agreement. The GATT 1994 is indeed a covered agreement, within the meaning of Articles 1 and 2 of the DSU.

*(b) Application of the principles *lex posterior* and *lex specialis* to Article IV of the Botega Treaty*

Assuming that Adawa may avail itself of the Botega Treaty and its compromissory clause as successor state (*quod non*), and that Article 3 of the CHC Treaty continues to apply between the Parties (*quod non*), the compromissory clause of the Botega Treaty does not apply to disputes relating to Article 3 of the CHC Treaty. This is because the DSU constitutes both *lex posterior* and *lex specialis vis-à-vis* Article VI of the Botega Treaty when the ‘disputes of a juridical nature’ are trade claims.

⁴¹ Article 30 (3), VCLT.

As *lex posterior*, the DSU has the effect of limiting the application of the Botega Treaty to the extent that its provisions are compatible with the DSU obligations.⁴² In that regard, recourse to the I.C.J. in relation to trade disputes appears incompatible with the DSU mechanism in so far as the latter provides for prior consultations and negotiations when the latter are not preconditions for ICJ jurisdiction under Article IV of the Botega Treaty.

Moreover, the DSU constitutes the specialized mechanism for the settlement of trade disputes that has been agreed by Parties. Therefore, it constitutes *lex specialis* between the Parties.⁴³ The specificity of the DSU system is to be found in Articles 22 and 23, which provide a complete and more trade-appropriate system. With application to this *lex specialis*, there is no risk of denial of justice if the Court declines, as it should, its jurisdiction, since the WTO system has jurisdiction ‘over the whole dispute’.⁴⁴

(c) Monetary compensation cannot be granted regarding trade disputes

As developed in the Sections above, the matter shall be adjudicated by the DSB, and with regard to the articles found in the GATT 1994. Moreover, when Adawa acceded to the WTO in 1995, it agreed to submit its trade disputes under the ‘compulsory jurisdiction of WTO Panels and the Appellate Body’.⁴⁵ Therefore, it implicitly gave up its right to claim monetary compensation, which is replaced by retaliatory measures under WTO law.⁴⁶

According to Article 22, the Parties can agree on compensation, but it should never be preferred to ‘full implementation of a recommendation to bring a measure into conformity with the

⁴² *Id.*

⁴³ C. Todeschini-Marthe, ‘Dispute Settlement Mechanisms Under Free Trade Agreement and the WTO: Stakes, Issues and Practical Considerations: A Question of Choice?’, in *Global Trade and Customs Journal* (Vol.13, No 9), 2008, p. 397.

⁴⁴ See *Factory at Chorzow (F.R.G. v. Poland)* [1927] PCIJ, Series A, No. 9 (July 26).

⁴⁵ J. Pauwelyn, ‘How to win a World Trade Organization Dispute based on Non-World Trade Organization Law?’ in *Journal of World Trade* (Vol. 37, No. 6), 2003, p. 1005; Article 22 (1), DSU.

⁴⁶ Article 22, DSU.

covered agreements’ and has to be ‘consistent with the covered agreements’.⁴⁷ With such restrictions, compensation was only used in one case.⁴⁸

Moreover, not only Adawa cannot claim monetary compensation due to its later consent given to the GATT 1994, and thus renounced to it, but such compensation is not appropriate under the WTO system.

In fact, the idea to implement financial compensation in the WTO system has been raised but was always rejected.⁴⁹ One of the reasons is that it would not put an end to the ‘WTO inconsistent measure’, and this would violate Articles 3 and 22 of the DSU.⁵⁰

Financial compensation only for Adawa would be in violation of the MFN principle, albeit applicable in case of compensation.⁵¹ Indeed, in light of the MFN principle, if Rasasa grants a special favor to Adawa, such as financial compensation, all other WTO Members must be granted with the same favor.⁵² This would lead to enormous amounts to be paid by Rasasa, and would be difficult to administer.⁵³

In conclusion, although it voluntarily acceded to the WTO system, Adawa is trying to escape the limitations of it, even though it provides consistent solutions when a dispute arises between WTO Members. In addition, if the Court were to grant Adawa with monetary compensation, it would compromise the WTO system, because they are incompatible with its functioning.

⁴⁷ *Id.*

⁴⁸ Panel Report – *United States - Section 110 (5) of US Copyright Act*, WT/DS160/R (adopted 27 July 2000).

⁴⁹ B. Mercurio, *Why compensation cannot replace trade retaliation in the WTO Dispute Settlement Understanding*, *World Trade Review*, 2009, p. 14.

⁵⁰ *Id.*, p. 16.

⁵¹ Appellate Body Report - *EC-Poultry*, WR/DS69/AB/R, at. paras. 96-102.

⁵² Article 1, GATT 1994.

⁵³ B. Mercurio, *op. cit.*, p. 18.

B. Self-judging clauses defeat the Court's jurisdiction

Article 22 (b) of the CHC Treaty provides that ‘nothing in this Treaty shall be construed as (...) precluding the application of measures necessary to protect a Member State’s essential security interest’. Such self-judging clause outsets the Court’s jurisdiction, recognizing that certain circumstances must allow states not to comply with their international obligations.⁵⁴

Focusing on the language used in Article 22 (b) of the CHC Treaty, the text does not allow a review by the other members. In the *Military and Paramilitary Activities* case, the Court referred to the wording used by the parties and concluded that it was purposely different as the one used in the 1994 GATT.⁵⁵ Here again, the parties choose to not permit a review of the member’s determination, although possible under other provisions of the GATT 1994.⁵⁶

Moreover, the rarity of the Helian hyacinth makes it a sensitive matter within the Region. In order to sign the Treaty, Rasasa made sure that its sovereignty⁵⁷ and national security interests⁵⁸ were preserved. It is thus to Rasasa itself to determine if such fundamentals are jeopardized.⁵⁹

Therefore, measures taken under Article 22 outsets the scope of the Treaty, excluding ‘the jurisdiction of the Court to test the lawfulness of such measure’.⁶⁰

⁵⁴ R. Briese and S. Schill, ‘Djibouti v. France: Self-judging Clauses before the International Court of Justice’ in *Melbourne Journal of International Law* (Vol. 10), 200), p. 1.

⁵⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. USA)* (Merits) [1986] I.C.J. Rep. 1986, para. 222 [‘**Nicaragua**’].

⁵⁶ See, for example, Article VIII (2), GATT 1994.

⁵⁷ Article 41, CHC Treaty.

⁵⁸ Article 22 (b), CHC Treaty.

⁵⁹ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Oral Proceedings, Verbatim Record 2008/5, p. 11, para. 12.

⁶⁰ *Oil Platforms (Islamic Republic of Iran v. USA)*, Preliminary Objection, Judgment, I.C.J. Rep. 1996, p. 811.

II. ADAWA'S CLAIM RELATING TO THE CHC TREATY IS INADMISSIBLE

Irrespective of the Court's jurisdiction over the dispute, Adawa's claim is not admissible, because it is identical to its request for the establishment of a WTO Panel. Not only the *lis pendens* principle exists in international law (A), but its conditions are met (B).

A. The *lis pendens* principle is well-established in international law

The existence of the *lis pendens* principle before international courts is supported by two main reasons. First, the principle of *lis pendens* is a 'general principle of law', within the meaning of Article 38 (1) of the Court's Statute.⁶¹ This argument is based on its appearance in various cases before international courts, on 'the widespread use and similarity of the concept of *lis pendens* in the national procedural laws of States of all legal traditions' and its incorporation in many 'bi- and multiparty agreements'.⁶²

Second, since international courts and tribunals are likely to accept the principle of *res judicata*, also deriving from domestic law, it would be illogic not to accept the *lis pendens* doctrine. Rejecting it would lead to situations where the slower court will be facing *res judicata*, preventing it to continue its proceedings.⁶³

⁶¹ A. Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools To Avoid Conflicting Dispute Settlement Outcome', in *Law & Prac. Int'l Cts. & Tribunals* (Vol. 37, No 48), 2004.

⁶² *Id.*

⁶³ *Id.*

Finally, the PCIJ and the Court never excluded the principle of *lis pendens* in their previous decisions but could not apply it since the essential elements were missing.⁶⁴ However, the conditions are met in the present case, as will be demonstrated in Section B.

B. The conditions of *lis pendens* are met

The fact that Adawa requested the establishment of a WTO Panel over the same subject-matter prior to the seizing of the Court in this case creates a situation of *lis pendens*. The later proceedings before the Court are therefore inadmissible.

The PCIJ did not exclude the *lis pendens* principle's existence while it established its cumulative elements: (a) two identical actions, (b) the same parties must be involved and (c) two Courts of the same character.⁶⁵ The 'same parties involved' criterion does not require further development. Regarding the 'identical actions' element, the parties do not seem to disagree that the factual bases for the two claims are identical.⁶⁶ Moreover, Adawa is seeking the same relief in both procedures: the establishment of Rasasa's responsibility regarding its imposition of tariffs. The fact that equal reliefs are sought in front of the two bodies is sufficient to conclude that there are 'identical actions'.⁶⁷

Turning to the third essential element, the WTO Panel and the I.C.J. are courts of the same character. In the *UEA v. Qatar* case, Judge ad hoc Cot argued that 'an adaptive approach should be taken to the doctrine of *lis pendens*' in order to apply it to judicial and quasi-judicial bodies,

⁶⁴ *Certain German Interests in Polish Upper Silesia (Merits) Case*, [1925] PCIJ, Series A, No. 6, p. 20.

⁶⁵ *Id.*

⁶⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE)*, Dissenting Opinion of Judge ad hoc Cot, Order of 14 June 2019, I.C.J., para. 7.

⁶⁷ *Id.*

since the decisions by the CERD Committee are not binding.⁶⁸ *In casu*, the Court does not need to take such ‘adaptive approach’, since both courts are of a judicial nature: the panels reports and the Court’s judgments are binding upon the parties to the dispute.⁶⁹

In conclusion, not only Adawa’s claim in front of the present Court creates a situation of *lis pendens*, but if the Court and the WTO Panel both adjudicate over the same matter, there is a risk of ‘irreconcilable judgments’.⁷⁰ As a matter of fact, there is no supreme court which could settle inconsistent judgments, which could lead to new disputes, or ‘leave the dispute unresolved’.⁷¹

III. THE IMPOSITION OF TARIFFS BY RASASA DID NOT VIOLATE THE CHC TREATY

In any event, Rasasa’s imposition of tariffs did not violate the CHC Treaty because it respected the Treaty in the light of its object and purpose (A) and lawfully protected its national security interests under Article 22 (B).

A. Rasasa respected the Treaty in light of its object and purpose

As indicated in Part I, national security clauses oust the Court’s jurisdiction, because they are self-judging. If the Court were to decide it has competence, its review is limited to the respect of the obligation of good faith.⁷²

⁶⁸ *Id.*, para. 10.

⁶⁹ Appellate Body Report - *Canada – Certain Measures Concerning Periodicals*, WT/DS31/9, fn. 28 to para. 19 (adopted 30 July 1997).

⁷⁰ J.J. Fawcett, *Deciding Jurisdiction in Private International Law*, at. 26.

⁷¹ J. Pauwelyn and L. Eduardo Salles, *Forum Shopping Before International Courts: (Real) Problems, (Im)Possible solutions*, Cornell International Law Journal, Volume 42, Issue 1, 2009, p. 81.

⁷² See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, [2008] I.C.J. Rep. 177, para. 145 [‘**Criminal Matters**’]; Article 31, VCLT.

The purpose of the Crosinian Helian Community is to safeguard a ‘sustainable cultivation of the Helian hyacinth’.⁷³ Due to the Makan hurricane which devastated more than 60% of the hyacinth crop plantings, Rasasa, willing to respect its commitment, decided to impose tariffs on imports. This shows how Rasasa carefully respected the purpose and object of the Treaty: the wellbeing of the Helian industry, which is the core of the Treaty, has a greater value than the obligation to not impose tariffs.

Furthermore, in the event the Court were to consider that the obligations under the GATT 1994 did not have the effect of rendering Article 3 of the CHC Treaty inapplicable between the Parties, it should nevertheless consider that its object is ‘to facilitate the development and health of the Helian industry’.⁷⁴ In other words, the agreement not to impose tariffs on Helian products under the 1969 treaty was not unconditional, but specifically conditioned on the aim and purpose of facilitating the development and health of Helian industry. Article 3 must be read as meaning that the imposition of tariffs is not prohibited when such tariffs aim at protecting the development of the Helian industry in any of the contracting states. It is the case that the Helian industry in Rasasa needs customs duties to protect its development and wellbeing. Not imposing tariffs would, on the contrary, jeopardize its development and health.

B. Rasasa lawfully protected its national security interests

As demonstrated in Section A, Rasasa’s imposition of tariffs is in accordance with the object and purpose of the CHC Treaty. Its customs duties will protect a sustainable cultivation of the plants and assure the development and wellbeing of the Helian industry. Moreover, Article 22 (b) of the CHC Treaty recognizes that national security interests outweigh the obligation not to impose customs duties.

⁷³ Article 1, CHC Treaty.

⁷⁴ Article 3, CHC Treaty.

The Rasasan Helian Growers Association published an alarming report, showing that Rasasa's share on the global market has sharply declined, in comparison to the other CHC Members.⁷⁵ In fact, Rasasan Helian processors are crossing borders to purchase their raw material, because Rasasan suppliers are unable to meet their 'Helian pollen requirements'. If this trend continues, it would lead to the collapsing of Rasasan Helian farms, together with its economy and society.

To avoid such disaster, Rasasa decided to impose tariffs, by carefully outlining the importance of the wellbeing of its Helian growers. In short, assuring the health of the Helian industry is assuring its citizens survival, which is, needless to say, a matter of national security.⁷⁶ Therefore, it is hard to consider that such security interest is frivolous.

Furthermore, the measure is in accordance with the Court's previous jurisprudence, where it acknowledged that notion of essential security interests 'certainly extends beyond the concept of an armed attack and has been subject to very broad interpretations in the past'.⁷⁷

With regard to the necessity of the measure protecting essential security interests, Rasasa's determination must be respected, due to its accepted 'wide discretion'.⁷⁸

Lastly, national security exemptions are broad, including a state's economy. Therefore, there is a plausible link between the measure and national security: not only will Rasasa protect the survival of its citizens who depend directly on the Helian hyacinth as it is a basis of their culture, but the military security also depends on economic security.⁷⁹ The imposition of tariffs protects both.

⁷⁵ *Compromis*, [30].

⁷⁶ *Compromis*, [44].

⁷⁷ *Nicaragua*, para. 224.

⁷⁸ *Criminal Matters*, para. 145.

⁷⁹ See Statement of Commerce Secretary Wilbur Ross (<https://www.cnbc.com/2018/05/24/wilbur-ross-on-auto-import-probe-economic-security-is-military-security.html>).

D. ADAWA’S ARREST AND DETENTION OF MINISTER GREY CONSTITUTE INTERNATIONALLY WRONGFUL ACTS, AND MINISTER GREY MUST BE IMMEDIATELY REPATRIATED TO RASASA

This Chapter establishes the admissibility of Rasasa’s counterclaim relating the unlawful arrest and detention of its Minister of Foreign Affairs by Adawa (I). Then, it addresses Adawa’s violation of Minister Grey’s immunity (II), as well as the scope of the Parties’ agreement (III). It also demonstrates that Adawa may not transfer Minister Grey to the ICC (IV), before requesting the immediate release of Rasasa’s Minister (V).

I. THE COUNTERCLAIM IS ADMISSIBLE ‘AS SUCH’

As made clear in Chapter A, the filing of a counterclaim by Rasasa does not amount to the acceptance of the jurisdiction of the Court. Therefore, this claim must be understood as a subsidiary mean, which must be entertained only if the Court declares it has jurisdiction to entertain the claims submitted by Adawa. If that is the case, the Court would also have jurisdiction to entertain Rasasa’s counterclaim pursuant to Article VI of the Botega Treaty. Parties have agreed on the existence of the connection requirement under Article 80 of the Rules of Court.⁸⁰

II. ADAWA VIOLATED MINISTER GREY’S IMMUNITY

Under customary international law, acting Ministers of Foreign Affairs are entitled to immunity *ratione personae* (A). Moreover, the CHC Treaty forbids arrest and detention of Representatives of Member States attending CHC meetings (B).

A. Minister Grey enjoys immunity *ratione personae*

⁸⁰ *Compromis*, [52].

Immunity *ratione personae* is accorded to incumbent Minister of Foreign Affairs under well settled customary international law.⁸¹ The immunity exists for the time the person is in office and covers all acts of the official, without any distinction between acts performed officially or privately, nor between acts performed before or during the time in office.⁸²

As recalled by the African Union Commission's observation in the *Al Bashir* case,⁸³ no exception for war crimes or crimes against humanity can be deduced from State practice, including domestic court judgments⁸⁴ and States in international forums.⁸⁵ Indeed, the protection of Ms. Grey subsists in the case of the allegations concerning war crimes and crimes against humanity directed against her.⁸⁶ Consequently, arresting Minister Grey is a violation of international law.⁸⁷

B. Minister Grey also enjoys immunity under the CHC Treaty

⁸¹ *Arrest Warrant of 11 April 2000 (D.R.C. v. Belgium)*, Judgment [2002] I.C.J. Rep. 2002 [**'Arrest Warrant'**]. See also the Resolution adopted by the *Institut de droit international* during the Vancouver session (1999), *Immunities from jurisdiction and Execution of Heads of State and of Government in International Law* (rapporteur J. Verhoeven). See also Seventh Report of Special Rapporteur (Concepción Escobar Hernández) on Immunity of State Officials from Foreign Criminal Jurisdiction (A/CN.4/729), para. 49.

⁸² *Arrest Warrant*, paras. 54-55.

⁸³ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (The African Union's Submission 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") ICC-02/05-01/09 (13 July 2018), para. 11 [**'African Union's Submission'**].

⁸⁴ See, for example, House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (N°3), 24 March 1999, 119 *ILR* 136 ; Cour de cassation (France), Chambre criminelle, M. Qadhafi, 13 mars 2001, *Bulletin des arrêts de la Cour de cassation*, 2001, n° 64.

⁸⁵ See, for example, Fifth Report of Special Rapporteur (Concepción Escobar Hernández) on Immunity of State Officials from Foreign Criminal Jurisdiction (A/CN.4/701), para. 20.

⁸⁶ *Arrest Warrant*, para. 58.

⁸⁷ D. Akande and S. Shah, 'Immunities of State officials, International Crimes, and Foreign Domestic Courts' in *EJIL*, 2017, p. 819.

Article 32 of the CHC Treaty sets forth the obligation to grant immunity to Representatives of Member States at CHC meetings (a). Additionally, Adawa cannot deny immunity to Minister Grey because Rasasa did not violate Article 3 of the CHC Treaty (b).

(a) Article 32 of the CHC Treaty recognizes immunity to Representatives of Member States of the CHC Community

Representatives of CHC Member States at meetings are entitled to immunity from personal arrest or detention and from legal process of every kind, while they exercise their functions and during their journeys to and from the place of meeting.⁸⁸

Adawa breached that obligation by arresting Minister Grey on 22 June 2019 and detaining her since⁸⁹, although she was still covered by Article 32 of the CHC Treaty.

Indeed, she was leaving her hotel after attending the four-day session of the regular CHC annual meeting.⁹⁰ She was on her way back to Rasasa from the capital city of Adawa – the place of meeting –, which shall be comprised within the meaning of ‘during her journey from the place of meeting’.

(b) Since Article 3 of the CHC Treaty was not violated by Rasasa, Adawa may not suspend its obligations under the said Treaty

⁸⁸ Article 32, CHC Treaty.

⁸⁹ *Compromis*, [51].

⁹⁰ *Compromis*, [49].

In accordance with Article 60 of the VCLT – which reflects customary international law⁹¹, it is only in case of a material breach by one of the parties to a multilateral treaty that a party specially affected by the breach is entitled to suspend the operation of the treaty in relation between itself and the defaulting State.⁹² However, as demonstrated in Chapter C, Rasasa did not violate Article 3 of the CHC Treaty, and its imposition of tariffs on ‘unprocessed Helian materials’ is lawful. Therefore, Adawa may not invoke a violation by Rasasa as a ground for suspending its obligation under the CHC Treaty.

III. THE AGREEMENT BETWEEN THE PARTIES DOES NOT PUT AN END TO THE ILLEGALITY AND THE VIOLATION IS STILL ONGOING

The agreement of 9 September 2019 between the Parties⁹³ did not put an end to the continued character⁹⁴ of Adawa’s breach of its international obligations. Indeed, Adawa unlawfully detains Minister Grey from 22 June 2019 onwards.⁹⁵

In this respect, Rasasa’s consent to Minister Grey’s conditions of detention is only intended to protect the person of its Minister, as well as to prevent the aggravation of the dispute.

Moreover, the acceptance of the conditions of the Minister’s detention does not, in any case, amount to a waiver of immunity. Rasasa’s Deputy Foreign Minister firmly stated in a *note verbale* delivered to the Adawan Embassy in Rasasa that Rasasa has ‘no intention of trying, rendering, or extraditing her’.⁹⁶

⁹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory Opinion) [1971] I.C.J. Rep. 3, para. 94.

⁹² Article 60 (2) (b), VCLT.

⁹³ *Compromis*, [52].

⁹⁴ As defined by Article 14 (2), ARSIWA.

⁹⁵ *Compromis*, [51].

⁹⁶ *Compromis*, [53].

IV. ADAWA MAY NOT TRANSFER MINISTER GREY TO THE ICC

Adawa's intended transfer of Minister Grey to the ICC is in violation of international law, because Rasasa is not a State party to the Rome Statute (A). Furthermore, the application of the provisions on cooperation of Part IX of the Statute may not result in the violation of an international obligation towards a non-State party (B).

A. Rasasa is not a party to the Rome Statute

Rasasa is not a party to the Rome Statute⁹⁷ which remains *res inter alios acta*⁹⁸: the Rome Statute does not create any obligation for Rasasa without its express and written acceptance.⁹⁹ Rasasa has never made such acceptance and the agreement of 9 September 2019 relating to the conditions of detention of Minister Grey does not constitute such acceptance.

B. The obligation of cooperation enshrined in Article 98 (1) cannot be opposed to officials of non-State party

As established in Part IX of the Rome Statute, Adawa – as a State party – has a general obligation to cooperate with the Court.¹⁰⁰ However, these obligations may conflict with the State party's other obligations vis-à-vis Rasasa.¹⁰¹

⁹⁷ *Compromis*, [13].

⁹⁸ Article 34, VCLT.

⁹⁹ Article 35, VCLT.

¹⁰⁰ Article 86, Rome Statute.

¹⁰¹ P. GAETA, 'Does President Al Bashir Enjoy Immunity from Arrest?' in *J.I.C.J.*, 2009, p. 327.

Article 98 (1) of the Rome Statute addresses this issue by stating that the Court may not proceed with a request for surrender and assistance if compliance with it would require the requested State to act inconsistently with its obligations under international law with respect to immunities of a person or property of a third State, unless the Court can first obtain a waiver of the immunity from the third State.¹⁰²

The Court never requested such waiver from Rasasa in relation to Minister Grey. Therefore, Minister Grey's arrest and detention do not comply with the Rome Statute and Adawa may not avail itself of its provisions. Such coercive acts are inconsistent with Adawa's obligations to respect the personal immunity of a third State's Minister of Foreign Affairs, as established in Section II (a). Additionally, Adawa was not obliged to execute the request to arrest and surrender Minister Grey (b).

(a) Rasasa is a 'third State' within the meaning of Article 98 (1)

Rasasa is covered by the scope of application of Article 98 (1), because the terms 'third State' do not refer to 'State other than the requested State', but are to be interpreted as expressly referring to State non-party to a treaty.¹⁰³ Hence, Adawa should have respected the immunity obligation it owes to Rasasa.¹⁰⁴

Moreover, the Court has not obtained first the cooperation of Rasasa for the waiver of its Minister's immunity.¹⁰⁵ In light of the circumstances, as exposed in Section III, Rasasa certainly did not waive its immunity.¹⁰⁶

¹⁰² Article 98 (1), Rome Statute.

¹⁰³ Article 2 (1) (h), VCLT.

¹⁰⁴ D. AKANDE, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (*J.I.C.J.*, 2009), p. 339.

¹⁰⁵ Article 98 (1), *in fine*, Rome Statute.

¹⁰⁶ *Compromis*, [53-54].

(b) Adawa was not under the obligation to cooperate with the Court

Article 98 (1) of the ICC Statute applies as a ‘without prejudice clause’ in the horizontal application of immunities between States, which are left intact.¹⁰⁷ The provision allows a State party not to comply with the obligation to arrest and surrender a Minister of Foreign Affairs to the extent it conflicts with its obligation to respect the high-ranking official’s immunity.¹⁰⁸

As observed by the African Union, the duty to cooperate in the arrest and surrender ‘does not apply in relation’ to a Minister of Foreign Affairs of a non-State Party by virtue of Article 98.¹⁰⁹ Consequently, Adawa was not under the obligation to execute the request to arrest and surrender Minister Grey.¹¹⁰

V. MINISTER GREY MUST BE RELEASED FORTHWITH

As demonstrated in this chapter, Adawa’s arrest and detention of Ms. Grey are in breach with its obligations under international law. Therefore, Rasasa is entitled to the immediate release of its Minister by way of cessation of its ongoing wrongful conduct (A). In the event that the Court does not recognize the continuing character of Adawa’s internationally wrongful act, Rasasa is entitled to the release of its Minister by way of reparation in form of restitution (B).

A. Adawa shall cease forthwith the unlawful detention of Minister Grey

¹⁰⁷ *African Union’s Submission*, para. 18-19.

¹⁰⁸ W. SCHABAS, ‘The International Criminal Court and Non-Party States’ in *Windsor Yearbook of Access to Justice*, 2010, p. 16.

¹⁰⁹ *African Union’s Submission*, para. 16.

¹¹⁰ *Prosecutor v. Omar Hassan Ahmad 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) ICC-02/05-01/09 OA2 (18 June 2018), pp. 3-4.

In light of the violations set above, and as the first legal consequence of the establishment of Adawa's international responsibility, the latter is under the obligation to cease forthwith and put an end to the unlawful detention of Minister Grey.¹¹¹

As indicated in Section III, the continuing character of Adawa's breach of international law is established. Moreover, the rule according to which Minister Grey enjoys immunity is still in force at the time the Compromis was signed. Therefore, the case at hand meets the condition set forth in the *Rainbow Warrior* arbitration.¹¹²

B. Adawa shall release Minister Grey as a matter of restitution

In the alternative, in the event the Court were to consider that the agreement of 9 September 2019 brought to an end the illegal character of Minister Grey's detention (*quod non*), Rasasa is nevertheless entitled to her release as a matter of reparation in the form of restitution.¹¹³

¹¹¹ Article 30, ARSIWA; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10.

¹¹² *Rainbow Warrior (New Zealand v. France)*, Arbitration Tribunal, 82 ILR 499, 1990, para. 75.

¹¹³ Article 35, ARSIWA ; *Arrest Warrant*, para. 73.

PRAYER RELIEF

Rasasa respectfully requests the Court to find, adjudge and declare that:

A. It lacks jurisdiction over Adawa's claims concerning the WALL or, alternatively, to reject those claims on the merits;

B. Adawa's claim concerning the WALL's development and deployment is rejected;

C. It lacks jurisdiction over Adawa's tariffs claims; alternatively, that those claims are inadmissible. In the further alternative, to reject those claims on the merits;

D. Adawa's arrest and detention of Minister Grey constitute internationally wrongful acts, and that Adawa must immediately release her.