THE CASE OF THE GREAT FOOTBALL MATCH BETWEEN BROLIN AND TENOVIA

MEMORIAL SUBMITTED BY BROLIN

(RESPONDENT)

Team 7

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(B) LIST OF ABBREVIATIONS

[ ]	Paragraph/Paragraphs
ARSIWA	Articles on State Responsibility for Internationally Wrongful Acts
Art./Arts.	Article/Articles
BMFA	Brolin's Minister for Foreign Affairs
BMS	Brolin's Minister of Sports
BPF	Brolin's police force
BPM	Brolin's Prime Minister
Case	Case problem 'The Case of the Great Football Match between Brolin and Tenovia'
CERD	Commission on the Elimination of Racial Discrimination
CIL	Customary International Law
Clarifications No.	Clarifications on 'The Case of the Great Football Match between Brolin and Tenovia'
CLAWS	International Convention for Long-distance Athletics and Women's Squash
Diss. Op.	Dissenting Opinion
Doc	Document
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FLC	Falconner
FRY	Federal Republic of Yugoslavia
GFM	Great Football Match
HR	Human Right(s)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
IHRL	International Human Rights Law
ILC	International Law Commission
IT	Inhuman Treatment
No.	Number
PCIJ	Permanent Court of International Justice

PR	Permanent Representative
Sep. Op.	Separate Opinion
TA	Tenovia's Ambassador to Brolin
TMS	Tenovia's Minister of Sports
TMW	Tenovia's Minister for Women
UD	Unilateral declaration
UN	United Nations
UNC	Charter of the United Nations
UNGA	United Nations General Assembly
v	Versus
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

(C) LIST OF SOURCES

1. AWARDS BY INTERNATIONAL COURTS AND TRIBUNALS

1.1. International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment) [2010] ICJ Rep 639. Hereinafter cited as ***Diallo* (ICJ)**.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43. Hereinafter cited as ***Genocide* (ICJ)**.

Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (*Ukraine v Russian Federation*) (Provisional Measures, Order of 19 April 2017) [2017] ICJ Rep 104. Hereinafter cited as ***Ukraine v Russia* (ICJ)**.

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Counter-claims, Judgment) [2005] ICJ Rep 168. Hereinafter cited as ***Armed Activities (Uganda)* (ICJ)**.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Dissenting Opinion of Judge Van den Wyngaert) [2002] ICJ Rep 137. Hereinafter cited as ***Arrest Warrant (Diss. Op. Judge Van den Wyngaert)* (ICJ)**.

Arrest Warrant of 11th April 2000 (Democratic Republic of the Congo v Belgium) (Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal) [2002] ICJ Rep 63. Hereinafter cited as ***Arrest Warrant (Joint Sep. Op.)* (ICJ)**.

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 14. Hereinafter cited as ***Nicaragua* (ICJ)**.

Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/ Malta) (Judgment) [1985] ICJ Rep 13. Hereinafter cited as ***Continental Shelf* (ICJ)**.

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment) [1986] ICJ Rep 554. Hereinafter cited as ***Frontier Dispute* (ICJ)**.

Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3. Hereinafter cited as ***Tehran* (ICJ)**.

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits, Judgment) [1949] ICJ Rep 4. Hereinafter cited as ***Corfu Channel* (ICJ)**.

Gabčíkovo-Nagymaros Project (Hungary/ Slovakia) (Judgment) [1997] ICJ Rep 7. Hereinafter cited as ***Gabčikovo-Nagymaros* (ICJ)**.

Immunities and Criminal Proceedings (Equatorial Guinea v France) (Preliminary Objections: Dissenting Opinion of Judge Donoghue) [2018] <https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-04-EN.pdf> accessed 7 February 2019. Hereinafter cited as ***Immunities (Diss. Op. Judge Donoghue)* (ICJ)**.

Immunities and Criminal Proceedings (Equatorial Guinea v France) (Preliminary Objections of the French Republic) [2017]. Hereinafter cited as ***Immunities (France Preliminary Objections)* (ICJ)**.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16. Hereinafter cited as ***Continued Presence of SA in Namibia* (ICJ)**.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136. Hereinafter cited as ***Construction of a Wall* (ICJ)**.

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal republic of Germany/Netherlands) [1969] ICJ Rep 3. Hereinafter cited as ***North Sea* (ICJ)**.

Nuclear Tests Case (Australia & New Zealand v France) (Judgment) [1974] ICJ Rep 253. Hereinafter cited as ***Nuclear Tests* (ICJ)**.

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile) (Judgment) [2018] General List No. 153 <https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-00-EN.pdf> accessed 1 February 2019. Hereinafter cited as ***Obligation to Negotiate* (ICJ)**.

Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) (Judgment: Separate Opinion of Judge Yusef) [2012] ICJ Rep 422. Hereinafter cited as ***Prosecute or Extradite (Sep. Op. Judge Yusef)* (ICJ)**.

1.2. Permanent Court of International Justice

Case concerning Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits) PCIJ Series A No 7. Hereinafter cited as ***Certain German Interests*** **(PCIJ)**.

Customs Regime between Germany and Austria (Advisory Opinion: Individual Opinion by Judge Anzilotti PCIJ Rep Series A/B No. 41. Hereinafter cited as ***Customs Regime (Op. Judge Anzilotti)*** **(PCIJ)**.

Electricity Company of Sofia and Bulgaria (*Belgium v Bulgaria*) (Preliminary Objections: Separate Opinion Judge Anzilotti) PCIJ Rep Series A/B No. 77. Hereinafter cited as ***Electricity Company (Op. Judge Anzilotti)*** **(PCIJ)**.

Phosphates in Morocco (Preliminary Objections, Judgment) PCIJ Rep Series A/B No. 74. Hereinafter cited as ***Phosphates*** **(PCIJ)**.

The Case of the S.S. "Lotus" (*France v Turkey*) (Judgment) PCIJ Rep Series A No. 10. Hereinafter cited as ***Lotus*** **(PCIJ)**.

1.3. Iran-US Claims Tribunal

Hyatt Corporation International v Iran (Iran-US Claims Tribunal) Award No. ITL 54-134-1 (1985) 9 Iran-US CTR 72. Hereinafter cited as ***Hyatt*** **(Iran-US CTR)**.

Yeager v Islamic Republic of Iran (Iran-US Claims Tribunal) Award No. ITL 324-10199-1 (1987). Hereinafter cited as ***Yeager*** **(Iran-US CTR)**.

1.4. UN Treaty Bodies

1.4.1 Human Rights Committee

Human Rights Committee, *A.W. Mukong v Cameroon*, (Communication No. 458/1991) CCPR/C/51/D/458/1991, UN Doc A/49/40, vol. II at 171 (HRC 1994). Hereinafter cited as ***Mukong v Cameroon*** **(HRC)**.

Human Rights Committee, *Bhinder Singh v Canada*, (Communication No. 208/1986) CCPR/C/37/D/208/1986, UN Doc. A/45/40, vol. II 50 (HRC 1989). Hereinafter cited as ***Bhinder Singh v Canada*** **(HRC)**.

Human Rights Committee, *H. van Alphen v the Netherlands*, (Communication No. 305/1988) CCPR/C/39/D/305/1988, UN Doc A/45/50, vol. II 108 (HRC 1990). Hereinafter cited as ***Van Alphen v the Netherlands* (HRC)**.

Human Rights Committee, *L.T.K. v Finland*, (Communication No. 185/1984) UN Doc. CCPR/C/OP/2 61 (1990). Hereinafter cited as ***L.T.K. v Finland* (HRC)**.

1.4.2 Committee on the Elimination of Racial Discrimination

Committee on the Elimination of Racial Discrimination, *Mr. Dragan Durmic v Serbia and Montenegro*, (Communication No. 29/2003) CERD/C/68/D/29/2003, UN Doc. A/61/18, 112 (2006). Hereinafter cited as ***Durmic v Serbia and Montenegro* (CERD)**.

Committee on the Elimination of Racial Discrimination, *Mr. Emir Sefic v Denmark* (Communication No. 32/2003) CERD/C/66/D/32/2003, UN Doc. A/60/18, 134 (2005). Hereinafter cited as ***Sefic v Denmark* (CERD)**.

Committee on the Elimination of Racial Discrimination, *Ms. L.R. et al. v Slovak Republic* (Communication No. 31/2003) CERD/C/66/D/31/2003, UN Doc. A/60/18, 119 (2005). Hereinafter cited as ***L.R. v Slovak Republic* (CERD)**.

Committee on the Elimination of Racial Discrimination, *P.S.N. v Denmark* (Communication No. 36/2006) CERD/C/71/D/36/2006, UN Doc. A/62/18, 123 (2007). Hereinafter cited as ***P.S.N. v Denmark* (CERD)**.

1.5. European Court of Human Rights

Banković and Others v Belgium and Others (2007) 44 EHRR SE5. Hereinafter cited as ***Banković v Belgium* (ECtHR)**.

Bouyid v Belgium (2016) 62 EHRR 32. Hereinafter cited as ***Bouyid v Belgium* (ECtHR)**.

Ireland v United Kingdom (1979-80) 2 EHRR 25. Hereinafter cited as ***Ireland v UK* (ECtHR)**.

Leander v Sweden (1987) 9 EHRR 433. Hereinafter cited as ***Leander v Sweden* (ECtHR)**.

Leyla Şahin v Turkey (2007) 44 EHRR 5. Hereinafter cited as ***Şahin v Turkey* (ECtHR)**.

Medvedyev and Others v France (2010) 51 EHRR 39. Hereinafter cited as ***Medvedyev v France* (ECtHR)**.

Petrovic v Austria (1998) 33 EHRR 307. Hereinafter cited as ***Petrovic v Austria* (ECtHR).**

S., V. and A. v Denmark (2018) ECHR 856. Hereinafter cited as ***S., V. and A. v Denmark* (ECtHR)**.

Sejdić and Finci v Bosnia and Herzegovina ECHR 2009-VI 273. Hereinafter cited as ***Sejdić and Finci v Bosnia and Herzegovina* (ECtHR)**.

Selmouni v France (2000) 29 EHRR 403. Hereinafter cited as ***Selmouni v France* (ECtHR)**.

Steel and Others v UK (1998) 28 EHRR 603. Hereinafter cited as ***Steel v UK* (ECtHR)**.

1.6. Inter-American Court of Human Rights / Commission on Human Rights

Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 270 (20 November 2013). Hereinafter cited as ***Displaced Communities* (IACtHR)**.

Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 125 (17 June 2005). Hereinafter cited as ***Yakye Axa* (IACtHR)**.

Yatama v Nicaragua (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 127 (23 June 2005). Hereinafter cited as ***Yatama* (IACtHR)**.

Velásquez Rodríguez v Honduras (Judgment) Inter-American Court of Human Rights Series C No. 4 (29 July 1986). Hereinafter cited as ***Velásquez Rodríguez* (IACHR)**.

Inter-American Commission on Human Rights, Report No. 101/99 Case 10.951 *Coard et Al. (United States)* (29 September 1999). Hereinafter cited as ***Coard* (IAComHR)**.

1.7 African Court / Commission on Human and Peoples' Rights

African Commission on Human and People's Rights v Republic of Kenya, (the 'Ogiek case'), Judgment, Application No. 006/2012 (African Court on Human and Peoples' Rights, 26 May 2017). Hereinafter cited as ***Ogiek case* (ACtHPR)**.

Achuthan (on behalf of Aleke Banda) v Malawi, African Commission on Human and Peoples' Rights, Communication No. 64/92, 68/92, 78/92 (27 April 1994), 7th Annual Activity Report (1993-1994). Hereinafter cited as ***Achuthan* (AComHPR)**.

World Organisation Against Torture and Others v Zaire, African Commission on Human and Peoples' Rights, Communication No. 25/89, 47/90, 56/91, 100/93 (March 1996), 19th Ordinary Session for the African Commission. Hereinafter cited as ***Torture case* (AComHPR)**.

1.8 Awards by other international tribunals including arbitral awards

EFD (Services) Limited v Romania, ICSID Case No ARB/05/13, Award (8 October 2009). Hereinafter cited as ***EFD* (ICSID)**.

Rainbow Warrior Affair (New Zealand v France) [1990] 82 ILR 499. Hereinafter cited as ***Rainbow Warrior***.

1.8. National courts / tribunals

Attorney-General of the Government of Israel v Eichmann [1961] 36 ILR 5 (Israeli Supreme Court). Hereinafter cited as ***Eichmann***.

Baumann v Zouroudis, 2018 Sup Ct J Ontario, Court File No. SC-17-00147022-0000. Hereinafter cited as ***Baumann* (SCJO)**.

Reyes v Al-Maliki [2017] UKSC 61 [2017] 3 WLR 923. Hereinafter cited as ***Reyes* (UKSC)**.

Singhal v Babeseil, 1989 Carswell Ont 3213 (Ontario District Court), 16 A.C.W.S (3d) 141. Hereinafter cited as ***Singhal* (DCO)**.

2. TREATIES

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, 145. Hereinafter cited as **UNC**.

Convention against Torture (adopted on 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85. Hereinafter cited as **UNCAT**.

International Convention on the Elimination of All Forms of Racial Discrimination (Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195. Hereinafter cited as **ICERD**.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Hereinafter cited as **ICCPR**.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90. Hereinafter cited as **ICC Statute**.

Vienna Convention on Diplomatic Relations (Adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95. Hereinafter cited as **VCDR**.

Vienna Convention on the Law of Treaties (Adopted 22 May 1969, entered in force 27 January 1980) 1155 UNTS 331. Hereinafter cited as **VCLT**.

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Adopted 14 March 1975, not yet in force). Hereinafter cited as **VCRS**.

3. BOOKS

Alexy R, *A Theory of Constitutional Rights* (OUP 2002). Hereinafter cited as **Alexy (2002)**.

Bassiouni MC, and Wise E M, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995). Hereinafter cited as **Bassiouni (1995)**.

Crawford J, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012). Hereinafter cited as **Brownlie's Principles (2012)**.

Crawford J, *State Responsibility: The General Part* (CUP 2013). Hereinafter cited as **Crawford (2013)**.

De Schutter O, *International Human Rights Law* (CUP 2014). Hereinafter cited as **De Schutter (2014)**.

Denza E, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn, OUP 2016). Hereinafter cited as **Denza (2016)**.

Duffy H, The War on Terror and the Framework of International Law (CUP 2015). Hereinafter cited as **Duffy (2015)**.

Fitzmaurice G, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius 1986). Hereinafter cited as **Fitzmaurice (1986)**.

Kitching K, (ed), *Non-Discrimination in International Law: A Handbook for Practitioners* (Interights 2005). Hereinafter cited as **Kitching (2005)**.

Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011). Hereinafter cited as **Milanovic (2011)**.

Oppenheim L and Lauterpacht H, *International law: a treatise. Vol. 1*: Peace (Longmans 1955). Hereinafter cited as **Oppenheim (1955)**.

Roberts I (ed), *Satow's Guide to Diplomatic Practice* (7th edn, OUP 2016). Hereinafter cited as **Satow (2016)**.

Salmon J (ed), *Dictionnaire De Droit International Public* (Bruylant Brussels 2001). Hereinafter cited as **Salmon (2001)**.

4. JOURNALS AND CONTRIBUTIONS TO EDITED WORKS

Bassiouni MC, 'International Recognition of Victims' Rights' (2006) 6(2) Human Rights Law Review 203. Hereinafter cited as **Bassiouni (2006)**.

Clapham A, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction Before the International Court of Justice' in Mark Lattimer and Philippe Sands (eds) Justice for Crimes Against Humanity (Hart 2003). Hereinafter cited as **Clapham (2003)**.

Crawford J, and Olleson S, 'The Character and forms of International Responsibility' in Evans M (ed) *International Law* (5th edn, OUP 2018). Hereinafter cited as **Crawford and Olleson (2018)**.

Jans J, 'Proportionality Revisited' (2000) 3 Legal Issues of Economic Integration 239. Hereinafter cited as **Jans (2000)**.

Larsaeus N, 'The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection: The Unresolved Issue of Excluded Asylum Seekers' (2004) *73 Nordic Journal of International Law*. Hereinafter cited as **Larsaeus (2004)**.

Möller K, 'Proportionality: Challenging the critics' (2012) 10(3) International Journal of Constitutional Law 709. Hereinafter cited as **Möller (2012)**.

Momtaz D, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (OUP 2010). Hereinafter cited as **Momtaz (2010)**.

Taylor G D S, 'The Content of the Rule Against Abuse of Rights in International Law' (1972-73) 46 British Yearbook of International Law 323. Hereinafter cited **Taylor (1972-73)**.

Wickremasinghe C, 'Immunity of State Officials & International Organisations', in Evans M (ed) *International Law* (5th edn, OUP 2018). Hereinafter cited as **Wickremasinghe (2018).**

5. ONLINE ARTICLES

Asian Football Confederation Safety and Security Regulations, 2017 <http://www.theafc.com/afc/documents/PdfFiles/afc-safety-and-security-regulations-35856> accessed 23/11/2018. Hereinafter cites as **AFC Regulations**.

Amnesty International, 'International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)' (2009) <https://www.amnesty.org/download/Documents/-48000/ior400012009en.pdf> accessed 2/12/18. Hereinafter cited as **Amnesty (2009)**.

Michelle Zilio, 'U.S. embassy worker ordered to pay back Ottawa landlord' (2018) <https://www.theglobeandmail.com/news/politics/us-embassy-worker-ordered-to-pay-back-ottawa-landlord/article37887897/> accessed 2/12/2018. Hereinafter cited as **Globe and Mail article (2018)**.

Mitchell M, 'Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law' Graduate Institute Publications (2011) <https://books.openedition.org/iheid/249?lang=en> accessed 1/12/18. Hereinafter cited as **Mitchell (2011)**.

Kees A, 'Responsibility of States for Private Actors', MPEIL, 2011 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092> accessed 1/12/18. Hereinafter cited as **Kees (2011)**.

Union of European Football Associations, Safety and Security Regulations, 2006 <https://-www.uefa.com/newsfiles/551778.pdf> accessed on 13/12/2018. Hereinafter cited as **UEFA Regulations**.

Zgonec-Rozej M, and Foakes J, 'International Criminal Law: Extradite or Prosecute?' (Chatham House, 2013) <https://www.chathamhouse.org/sites/default/files/public/Research/International-%20Law/0713bp_prosecute.pdf> accessed 2/12/18. Hereinafter cited as **Foakes (2013)**.

6. UN DOCUMENTS

6.1. United Nations General Assembly

UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 December 1970), UNGA RES 2625 (XXV), UN Doc A/RES/25/2625. Hereinafter cited as **Declaration on Friendly Relations (UNGA)**.

6.2. Economic and Social Council

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' in UN Economic and Social Council, 'Commission on Human Rights Forty-first Session' (28 September 1984) UN Doc E/CN.4/1985/4 Annex (1984). Hereinafter cited as **Siracusa Principles**.

6.3. Office of the High Commissioner on Human Rights

OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, 2003) 162. Hereinafter cited as **OHCHR Manual (2003)**.

6.4. Human Rights Committee

Human Rights Committee, 'General Comment No. 27 on Article 12 (Freedom of Movement)' (2 November 1999) UN Doc A/55/40, 128 (2000). Hereinafter cited as **HRC General Comment No. 27**.

Human Rights Committee, 'General Comment No. 34 on Freedom of Opinion and Expression' (12 September 2011) UN Doc A/66/40 Vol. I, 246. Hereinafter cited as **HRC General Comment No. 34**.

6.5. Committee on the Elimination of Racial Discrimination

Committee on the Elimination of Racial Discrimination, 'General Recommendation XIV on Article 1, Paragraph 1, of the Convention' (17 March 1993) UN Doc A/48/18, 115. Hereinafter cited as **CERD General Recommendation XIV**.

Committee on the Elimination of Racial Discrimination, 'General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)' (19 March 2002) UN Doc A/57/18, 111. Hereinafter cited as **CERD General Recommendation XXIX**.

Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX on Discrimination Against Non-Citizens' (2 – 20 August 2004) UN Doc A/59/18, 93. Hereinafter cited as **CERD General Recommendation XXX**.

Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 35 on Combatting Racist Hate Speech' (26 September 2013) UN Doc A/69/18, 169. Hereinafter cited as **CERD General Recommendation No. 35**.

6.6. Committee against Torture

UN Committee Against Torture, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention on the United States of America' (25 July 2006) UN Doc A/61/44, 67. Hereinafter cited as **CAT Report on USA**.

UN Committee Against Torture, 'General Comment No. 2' (24 January 2008) UN Doc A/63/44, 176. Hereinafter cited as **CAT General Comment No. 2**.

6.7. International Law Commission

International Law Commission, 'Documents of the Tenth Session Including the Report of the Commission to the General Assembly (2 May 1958)' (UN Doc A/CN.4/116) in *Yearbook of the International Law Commission* (1958) vol. II, Part Two (A/CN.4/SER.A/1958/Add.1) 89. Hereinafter cited as **Diplomatic Intercourse and Immunities**.

International Law Commission, 'Report of the Commission to the General Assembly on the Work of its Forty-eight Session (6 May - 26 July 1996)' (UN Doc A/51/10) in *Yearbook of the International Law Commission* (1996) vol. II, Part Two (A/CN.4/SER.A/1996/Add.1) 17. Hereinafter cited as **Draft Code of Crimes**.

International Law Commission, 'Report of the ILC on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001)' (UN Doc A/56/10) in *Yearbook of the International*

Law Commission (2001) vol. II, Part Two (A/CN.4/SER.A/2001/Add.1) 26. Hereinafter cited as **ARSIWA**.

International Law Commission, 'Report of the ILC on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001)' (UN Doc A/56/10) in *Yearbook of the International Law Commission* (2001) vol. II, Part Two (A/CN.4/SER.A/2001/Add.1) 31. Hereinafter **ARSIWA Commentary**.

International Law Commission, 'Report of the ILC to the General Assembly on the Work of its Fifty-eighth Session' (UN Doc A/61/10) in *Yearbook of the International Law Commission* (2006) vol. II, Part Two (A/CN.4/SER.A/2006/Add.1) 161. Hereinafter cited as the **Guiding Principles Applicable to UD**.

International Law Commission, 'Documents of the Sixtieth Session' (10 June 2008) (UN Doc A/CN.4/603) in *Yearbook of the International Law Commission* (2008) vol. II, Part One, (A/CN.4/SER.1/2008/Add.1) 117. Hereinafter cited as **ILC Report on *Aut Dedere Aut Judicare* (2008).**

International Law Commission, 'Report of the International Law Commission on the Work of the Sixty Sixth Session (5 May - 6 June and 7 July - 8 August 2014)' (UN Doc A/69/10) in *Yearbook of the International Law Commission* (2014) vol II, Part Two, (A/CN.4/SER.1/2014/Add.1) 139. Hereinafter cited as **Report on the Obligation to Extradite or Prosecute (2014).**

(D) STATEMENT OF RELEVANT FACTS

Tenovia and Brolin are two neighbouring States that share a border along the Tenovian region of Wittson and the Brolinite region of Jaynia. A single road crosses the border, connecting the two states. Tenovia and Brolin are members of CLAWS, which has offices located in Gremont, Brolin's capital. Both States have ratified the CLAWS Convention without reservation, as well as ICERD, the VCDR, and the VCLT.

Each year, Brolin hosts a football match between Tenovia and Brolin. For the 2015 GFM, Brolin delegated security functions to a private security company, FLC. Under the *Falconner security Act (2015),* FLC employees had a limited mandate to do the following for one week prior and two days after the GFM: check tickets on entry to the stadium; provide security within the stadium during the GFM; and control vehicular traffic on Brolin's roads in a fifteen-kilometre radius around the stadium. It also limited FLC's powers to the use of "reasonable force" to complete its tasks.

For the 2017 GFM, FLC employees were empowered to provide security under the *Falconner security Act (2017)*, which was identical to the 2015 Act. Under the agreement between Brolin and FLC, the Brolinite government would provide FLC employees with the equipment necessary to complete their tasks. When FLC had completed the limited set of duties laid out in the 2017 Act, this equipment was to be returned to Brolin.

A few weeks before the GFM, the Brolinite football team's mascot, Coco the dog, escaped from her enclosure in Jaynia and walked over the border into the Wittson region of Tenovia. Coco was later found by Ms. Starman, a Tenovian citizen, and taken to her house in Wittson. A few hours later, Coco's minders in Brolin realised that she had disappeared and immediately alerted the police, mentioning that they saw paw prints in the dirt road leading to Tenovia.

The following day, the front page of Brolin's national newspaper contained a press release on Coco's disappearance which appealed to the public to help find her. The volunteer who found

Coco and brought her back to the Brolinite authorities would be financially rewarded for their services. Additionally, the government held information sessions, further explaining the situation to volunteers. FLC employees were advised by their CEO to attend. Public participation was encouraged, however, the search remained strictly voluntary for all attendees.

During these sessions, participants were given photos of Coco, as well as a map which highlighted the location of Coco's enclosure within the broader context of the Jaynia border region. One of these information sessions was attended by Mr. Zunitte, a FLC employee hired to work at the GFM against Tenovia. At the conclusion of the information session, Mr. Zunitte approached an off-duty police officer outside of the police station. During this conversation the police officer, an avid football fan, shared his excitement that Coco may be located in Tenovia.

Mr. Zunitte used the Brolin security car to search for Coco in Tenovia, contrary to the financial agreement between FLC and Brolin, which confined the use of the car within 15km of the stadium. In Wittson, Mr. Zunitte spotted Coco being walked along the road by Ms. Starman. Mr. Zunitte yelled at Ms. Starman, demanding that she stop walking, and took Coco from her. In doing so, he used his taser on her arm; she then fainted. Mr. Zunitte then dropped the taser, put Coco in the car and returned to Brolin. He proceeded to deliver the dog to FLC's head office where she was collected by Brolinite authorities. That same day, Ms. Starman was found and taken to a hospital. Ms. Starman then made a report to the Tenovian police and identified her assailant as a man wearing an acorn-crested uniform.

In Brolin, Mr. Zunitte was congratulated on television for returning Coco, where he revealed that he found Coco in Tenovia. This was brought to the attention of the Tenovian authorities who, having also recovered the government-issued taser, became convinced that he was the perpetrator behind Ms. Starman's assault. As a result, Tenovia's Ambassador to Brolin called a meeting with BMFA. Having shared her suspicions, she called for Mr. Zunitte's extradition to Tenovia. That evening, BMS hosted a party at Gremont's town hall. Although Mr. Zunitte

was invited, he only stayed for two hours. Having left the party, he fled across the border in his personal car and did not return.

The next day, BPM held a meeting with her advisors in relation to Mr. Zunitte in order to consider the viability of pursuing Mr. Zunitte. Although it was decided that his arrest should remain a long-term goal, it was felt that the importance of this goal was overshadowed by the more immediate need to sustain public morale in order to safeguard national economic stability.

BMS was greatly concerned about the likelihood of violence during the GFM. In the past, footballers have frequently been injured by objects thrown on to the pitch by unruly supporters. This concern was amplified due to the uproar in Tenovia in the days before the GFM, with mass rallies calling for revenge against Brolin. In order to ensure the safety of the footballers and the enjoyment of the spectators, BMS sought to adopt a peaceful solution. The resulting security measures requested all attendees of the GFM to sign a declaration, assuring their good behaviour during the GFM.

A copy of this declaration was sent to TMS in order for this requirement to be publicised to prospective attendees from Tenovia. TMS responded with a note to BMS that Tenovis were not allowed to make promises to strangers on Thursdays. However, on the day of the GFM, when all spectators were asked to sign the publicised declaration, 50% of the ethnic Tenovis did sign the declaration. Those not willing to sign the declaration were still able to watch the GFM on giant screens assembled by Brolin outside the stadium.

After the GFM, ethnic Tenovis were upset that they were required to sign the declaration. In order to promote peace and friendship, BPM engaged Paintgood to paint a commemorative mural on the football stadium. Paintgood received full payment in advance, however Ms. Desmond, the Tenovian director, gambled it away and instead used her personal savings to complete the mural. This caused her to fall behind on her mortgage payments, which led to the mortgage foreclosing, and Ms. Desmond moving into rented accommodation.

Ms. Desmond had already fallen four months behind on her rent by mid-January. She received multiple letters of demand from her landlord's solicitors in relation the unpaid rent. On 11 May 2018, Ms. Desmond's landlord initiated proceedings against her in a domestic court in Brolin claiming $18,500 for five months of rental arrears. Ms. Desmond alleged she was immune to domestic court proceedings because she was appointed as the national envoy of Tenovia accredited to CLAWS on 2 March 2018.

On 3 July 2018, the domestic court judge held that Ms. Desmond could not benefit from immunity in relation to the landlord's claim for rent, and that her appointment as Tenovia's PR to CLAWS was an abuse of privileges and immunities. This judgment was based on Ms. Desmond being well connected in Tenovia, as the official portrait artist for the Tenovian royal family, and the daughter of the current TMW, a leading philanthropist in Tenovia. Brolin's court ordered Ms. Desmond to pay the landlord the $18,500. Ms. Desmond failed to comply with this court order. Brolin's authorities then wrote to Ms. Desmond on 3 August 2018 and set the end of August 2018 as the deadline for compliance.

(E) ISSUES

In the Case of the Great Football Match between Brolin and Tenovia, Brolin requests this honourable Court to adjudge and declare whether:

A. <u>Brolin violated customary international law by the assault on Ms. Starman in Tenovian territory and by failing to apprehend Mr. Zunitte</u>.

I. Did Brolin violate CIL by the assault on Ms. Starman in Tenovian territory?

A. Was the assault on Ms. Starman by Mr. Zunitte attributable to Brolin?

1. Is Falconner a State organ?
2. Was Falconner empowered to exercise elements of governmental authority?
3. Was Mr. Zunitte acting in a personal capacity when he assaulted Ms. Starman?
4. Was Mr. Zunitte's conduct acknowledged or adopted by Brolin as its own?

B. Did the assault constitute a breach of an international obligation?

1. Did Brolin violate Tenovia's sovereignty by exercising its jurisdiction extraterritorially?
2. Did Brolin violate international human rights law?

II. Did Brolin breach international law by failing to apprehend Mr. Zunitte?

A. Did Brolin have an obligation to apprehend Mr. Zunitte?

1. In the absence of an arrest warrant, would Mr. Zunitte's apprehension be arbitrary?
2. Did BMFA's statement create a binding legal obligation on Brolin?

B. Was Brolin under an obligation to extradite or prosecute Mr. Zunitte under CIL?

1. Does the *aut dedere aut judicare* obligation exist in CIL?
2. Did Mr. Zunitte's conduct give rise to an *aut dedere aut judicare* obligation?
3. If *aut dedere aut judicare* amounts to a customary norm, was it reasonable to expect Brolin to apprehend Mr. Zunitte in the circumstances?

B. <u>Brolin violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination by its insistence that attendees at the great football match sign a declaration before being permitted to enter the stadium</u>.

I. Did Brolin engage in racial discrimination?

A. Do the Tenovis constitute a racial group?

B. Was the security requirement a discriminatory policy?

C. Did the security requirement nullify or impair the enjoyment of human rights?

II. Was Brolin's security requirement contrary to the object and purpose of ICERD?

A. Did Brolin's adoption and implementation of the security requirement pursue a legitimate aim?

B. Was Brolin's security requirement suitable to fulfil the aim?

C. Was Brolin's requirement necessary to fulfil the aim?

D. Was Brolin's adoption and implementation of the security requirement proportionate to the interests protected?

C. <u>Brolin violated, and continues to violate, its obligations towards Tenovia under Article 9 of the CLAWS Convention in relation to Ms. Desmond, Tenovia's national envoy accredited to CLAWS, by failing to recognise her immunity from all forms of legal process in Brolin</u>.

I. Is Ms. Desmond considered a diplomatic agent and does she consequently enjoy immunity for the purposes of Article 9 of the CLAWS Convention?

A. Did Brolin's withholding of *agrément* to Tenovia render Ms. Desmond's appointment as CLAWS Permanent Representative void *ab initio*?

B. Did Tenovia's bad faith render Ms. Desmond's appointment as CLAWS Permanent Representative void *ab initio*?

1. Was Ms. Desmond's appointment made in bad faith?

2. Did Tenovia's bad faith appointment of Ms. Desmond render it void *ab initio*?

II. Do the landlord's claims fall under the exceptions set out in the VCDR thereby limiting Ms. Desmond's immunity?

A. Is the claim an exception to Ms. Desmond's immunity from civil jurisdiction?

B. Is the claim an exception to the inviolability of Ms. Desmond's private property?

(F) SUMMARY OF ARGUMENTS

1. Brolin submits that the tasering of Ms. Starman by Mr. Zunitte in Tenovia is not attributable to Brolin because his employer, FLC, is a private security company hence neither a *de jure* nor a *de facto* State organ.

2. Brolin submits that the conduct of Mr. Zunitte is not attributable to Brolin because FLC was not empowered to exercise elements of the governmental authority of Brolin. FLC was granted limited powers with respect to the GFM.

3. Brolin submits that Mr. Zunitte was acting in a purely personal capacity because he was not acting under the instruction of Brolin. Brolin requested assistance by volunteers from the general public, and the suggestion to search for Coco across the border was neither specific enough, nor was it given to him by a state agent in his official capacity.

4. Brolin submits that Mr. Zunitte was acting in a purely private capacity as his *ultra vires* conduct is considered an isolated act, far removed from his official functions.

5. Brolin submits that Mr. Zunitte's conduct was not acknowledged nor adopted by Brolin as its own, because the award ceremony falls below the required standard of the conduct being considered acknowledgment or adoption by the State.

6. Brolin submits that it did not exercise extraterritorial enforcement jurisdiction because Mr. Zunitte's conduct is not deemed to satisfy the high threshold of derogation from Tenovia's sovereignty. Brolin thus did not breach the CIL obligation to respect Tenovia's sovereignty.

7. Brolin submits that it did not violate Ms. Starman's human rights under CIL. Brolin had no extra-territorial human rights obligations to protect Ms. Starman as Brolin did not exercise control over the territory of Tenovia. Further, the use of the taser by Mr. Zunitte was not an infliction of harm of sufficient severity to constitute inhuman treatment. Finally, Brolin

submits that it had no obligation to investigate because it had no reasonable suspicion that a grave breach of human rights had occurred.

8. Brolin submits that it did not have an obligation to apprehend Mr. Zunitte under CIL because his apprehension would have been arbitrary. No arrest warrant had been issued for him and no legal obligation was created by BMFA's declaration.

9. Brolin submits that there was no duty under CIL to extradite or prosecute Mr. Zunitte because *aut dedere aut judicare* is not a norm of CIL. Should the Court find the contrary, Mr. Zunitte's conduct did not amount to a breach of this obligation because *aut dedere aut judicare* is limited to extremely serious crimes. In any case, Brolin did not have the opportunity to apprehend Mr. Zunitte for the purposes of extradition or prosecution.

10. Brolin submits that its security requirement did not violate its obligations under ICERD because Brolin did not engage in acts of racial discrimination. The Tenovis do not amount to a racial group and the security requirement was not a discriminatory policy. Finally, the security requirement did not nullify or impair the equal enjoyment of human rights.

11. Brolin submits that the implementation of the security requirement was justified in light of the object and purpose of ICERD. The policy pursued a legitimate aim, and was suitable, necessary and proportionate *strictu sensu.*

12. Brolin submits that Ms. Desmond's appointment as CLAWS Permanent Representative was void *ab initio* because *agrément* was not sent to Tenovia. The *agrément* of Brolin was required for accreditation of Ms. Desmond as head of mission, and since Tenovia's notification was met with no response, Ms. Desmond's appointment was null.

13. Brolin submits that Ms. Desmond's appointment as CLAWS Representative was made in bad faith, therefore rendered invalid. The purpose of diplomatic privileges and immunities

is not to benefit individuals and Ms. Desmond was appointed in order to defeat the landlord's claims for unpaid rent.

14. Brolin submits that Ms. Desmond does not enjoy immunity under Art. 9 of the CLAWS Convention because the landlord's claim falls under the exceptions set out in Arts. 30 and 31 of the VCDR. The landlord's action for rental arrears is related to a commercial activity, and consequently, Ms. Desmond does not enjoy immunity from Brolin's civil jurisdiction, nor does her property enjoy inviolability.

(G) JURISDICTION OF THE COURT

Brolin and Tenovia are both members of the United Nations and parties to the Statute of the International Court of Justice. They have both accepted the compulsory jurisdiction of the Court by means of respective optional clause declarations under Article 36(2) of the Statute of the ICJ; there are attached no relevant reservations. Neither Brolin, nor Tenovia have raised questions of jurisdiction or admissibility.

(H) ARGUMENTS

A. Brolin did not violate customary international law by the assault on Ms. Starman on Tenovian territory, or by failing to apprehend Mr. Zunitte

I. Brolin did not violate CIL by the assault on Ms. Starman on Tenovian territory

A. The assault on Ms. Starman in Tenovia by Mr. Zunitte is not attributable to Brolin

1. Falconner is not a State organ

To hold a State responsible in international law, it must firstly be demonstrated that the alleged internationally wrongful act or omission is attributable to that State.[1] Any act of a State organ is attributable to that State.[2] Indeed, the status of a *de jure* 'organ of the State' is largely limited to the formal branches of government.[3] An entity possessing legal personality separate and distinct from that of the State under domestic law cannot be classified as a *de jure* organ of that State.[4] As a private company, FLC has a separate legal personality under Brolinite law, and is therefore not a State organ according to the rules of attribution.

For an entity to be classified as a *de facto* organ of the State under the rules of attribution, there must be a relationship of complete dependence, and a high degree of control between the entity and the State.[5] This high threshold has been reaffirmed by the ICJ in *Genocide*, where it rejected the attribution of the acts of genocide to the FRY.[6] The powers granted to FLC under national law allow it to operate without a high degree of dependence on Brolin, as evidenced by their separate financial agreement. Although the financial agreement provides FLC with equipment,

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[1] Art. 2(a) ARSIWA; *Tehran* (ICJ) [56]; *Phosphates* (PCIJ) 28.

[2] Art. 4 ARSIWA.

[3] Crawford (2013) 118.

[4] *EFD* (ICSID) [190]; Momtaz (2010) 239.

[5] *Nicaragua* (ICJ) [109].

[6] *Genocide* (ICJ) [392-4].

they nonetheless operate without a high degree of control by the State over their actions, due to their freedom to implement their mandate as they wish.[7] As such, FLC is neither an organ of Brolin in the traditional sense, nor is it a *de facto* organ of Brolin by virtue of a relationship of dependence and control.

2. Falconner is not an entity empowered to exercise elements of governmental authority

The rule that conduct of an entity empowered to exercise elements of governmental authority is attributable to the State cannot conclusively be declared as CIL.[8] Moreover, international jurisprudence indicates that a high degree of empowerment must exist on the part of the entity in order for its conduct to be attributable to the State.[9] The geographical and temporal limits placed on the powers granted to FLC under the 2017 Act, alongside their limited GFM security mandate, fall short of the standard 'governmental authority' required by international law. In any case, for conduct of an entity exercising elements of governmental authority to be attributable to the State, the relevant conduct must fall within the ambit of such authority.[10] Thus, any act of an entity, which is not in exercise of any governmental authority it may have been vested with, remains a private act. The information sessions held by the government of Brolin were open to all members of the public to attend.[11] As such, any FLC employee who attended the meetings, and took action to recover Coco, did so in their personal capacity. Retrieving Coco falls outside the ambit of Brolinite official authority. Hence, Mr. Zunitte's actions are not attributable to the State.

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[7] *Case* [7].

[8] *Genocide* (ICJ) [414]; Kees (2011) [11].

[9] *Hyatt* (Iran-US CTR) [1-15].

[10] Art. 5 [2] ARSIWA Commentary.

[11] *Case* [11].

3. Mr. Zunitte was acting in a purely personal capacity

i. Mr. Zunitte was not acting under the instruction of Brolin

Mr. Zunitte was not acting on the instructions of Brolin. An act of any individual shall be considered an act of the State if carried out under the instruction of that State.[12] For a person or entity to be acting under the instruction of a State, such instruction must be to the specific operation in which the alleged wrongful conduct took place.[13] The suggestion to search for Coco across the border was given to Mr. Zunitte by an duty police officer,[14] thus, it was not an official State instruction. Moreover, the broad plea for volunteers to assist with the search effort lacked the necessary specificity with regard to Mr. Zunitte's actions. In the absence of a clear instruction from a competent Brolinite official to exercise police-like functions and assault an individual, Mr. Zunitte was acting in a purely personal capacity.

ii. Mr. Zunitte's *ultra vires* conduct was not attributable to Brolin

Additionally, the conduct of an entity empowered to exercise elements of governmental authority is attributable to the State if the organ or person acts in that capacity, even if in excess of authority.[15] Notwithstanding, if an *ultra vires* act is so far removed from the actor's official functions that it should be assimilated to that of a private individual, it is not attributable.[16] If an individual carries out an act in a purely personal capacity, the act is not attributable, even if the means used were placed at the individual's disposal by the State in order to exercise official

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[12] Art. 8 ARSIWA; Crawford and Olleson (2018) 428.

[13] *Genocide* (ICJ) [400].

[14] *Case* [12].

[15] Art. 7 ARSIWA.

[16] Art. 7 [7] ARSIWA Commentary.

functions.[17] A State cannot be held responsible for an isolated instance of outrageous conduct.[18] The tasering of Ms. Starman and the impersonation of a police officer were acts so far removed from FLC's official mandate that they cannot be considered *ultra vires* acts attributable to Brolin. Even if Mr. Zunitte was acting as a State official, the assault was both in excess of authority and was a shocking and outlying act for which Brolin cannot be held responsible.

4. Mr. Zunitte's conduct was not acknowledged and adopted by Brolin as its own

Any act which is not attributable to the State may be considered an act of the State "if and to the extent that the State acknowledges and adopts the conduct as its own".[19] In *Tehran*, the ICJ established a high standard for conduct to be attributed in this way, as Iran had issued a declaration explicitly approving the wrongful conduct.[20] Mere acknowledgement of the factual existence of the conduct and expressions of approval are insufficient.[21] Considering this, the broadcast and award ceremony by Brolin fall far below the required standard of the conduct being adopted as an act of the State. Furthermore, it must be stated that the particular act which was celebrated by Brolin was the recovery of Coco, not the assault on Ms. Starman.

B. The assault did not constitute a breach of an international obligation

1. Brolin did not violate Tenovia's sovereignty

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[17] *Yeager* (Iran-US CTR) [65].

[18] Art. 7 [8] ARSIWA Commentary; Crawford (2013) 139.

[19] Art. 11 ARSIWA.

[20] *Tehran* (ICJ) [74]; Art. 11 [4] ARSIWA Commentary.

[21] Art. 11 [6] ARSIWA Commentary.

State responsibility is contingent on the breach of an international obligation.[22] A State may not exercise its power in the territory of another State in any way.[23] However, not all acts performed by one State in the territory of another involve a violation of sovereignty.[24] Indeed, international jurisprudence has established a high threshold for the types of State acts which constitute extraterritorial exercises of enforcement jurisdiction.[25] Recovering Coco from Tenovia thus falls far short of the standard set by international law to amount to a breach of this obligation and does not derogate from the sovereign authority of Tenovia. Moreover, Brolin was not exercising its enforcement jurisdiction. Mr. Zunitte was not enacting any official mandate to conduct an investigation on Tenovian territory. Thus, Mr. Zunitte's actions did not amount to a violation of Tenovia's sovereignty.

2. **Brolin did not breach international human rights law**

Brolin did not breach any IHRL obligations due to the lack of control over the territory on which the assault took place. CAT unambiguously states that the obligation to prevent acts of IT applies to any territory under a State's jurisdiction.[26] States are only obliged to prevent acts of torture where they exercise *de facto* or *de jure* control on a territory.[27] HR obligations are only binding on States outside of their territory where that State exercises effective control over

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[22] Art. 2(b) ARSIWA; *Tehran* (ICJ) [56];

[23] *Lotus* (PCIJ) 18; *Corfu Channel* (ICJ) 35.

[24] Oppenheim (2008) 385.

[25] *Eichmann*; *Rainbow Warrior*; *Corfu Channel* (ICJ).

[26] CAT General Comment No. 2 [16]; Art. 16(1) UNCAT.

[27] *Ibid* [16]; CAT Report on USA [13]; *Coard* (IAComHR) [37].

that territory.[28] Brolin had neither *de facto* nor *de jure* control over the Tenovian territory on which the assault took place. Thus, Brolin had no obligation to protect Ms. Starman from IT.

Moreover, Brolin did not breach its HR obligations due to the lack of authority and control exercised by Mr. Zunitte over Ms. Starman. States must respect the rights of those who are subject to their authority and control,[29] such as where they hold a person in detention.[30] Indeed, CAT interpreted the territorial requirement in this way in response to the HR abuses committed by US State officials at Guantánamo Bay.[31] The extraterritorial jurisdiction of a State does not arise in the case of an instantaneous act.[32] The assault did not take place whilst Ms. Starman was detained, or in physical custody. Moreover, Mr. Zunitte's use of the taser was an instantaneous act. Accordingly, Mr. Zunitte's conduct was not in breach of Brolin's HR obligations.

Ms. Starman was not subject to inhuman or degrading treatment or punishment. Actual bodily harm is the minimum threshold for treatment to be classified as inhuman.[33] Ms. Starman's injuries resulted from her falling on to the ground.[34] Mr. Zunitte's use of the taser against her arm was not a direct infliction of harm of sufficient severity to reach this threshold. As well as severity, the duration of the infliction of the harm has also been applied as a criterion for establishing whether an individual act qualifies as inhuman.[35] Mr. Zunitte's conduct was a single

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[28] *Banković v Belgium* (ECtHR) [71].

[29] *Coard* (IAComHR) [37].

[30] CAT General Comment No. 2 [16]; *Achuthan* (AComHPR) [7]; Milanovic (2011) 179-87.

[31] CAT Report on USA [14].

[32] *Medvedyev v France* (ECtHR) [64].

[33] *Bouyid v Belgium* (ECtHR) [87].

[34] *Case* [13].

[35] *Selmouni v France* (ECtHR) [100].

shot to the arm with a taser.[36] This act, therefore, lacks the necessary duration to constitute IT. As a result of both the duration and the severity of Mr. Zunitte's assault falling far short of what is required for IT, there was no breach of any CIL HR obligation.

In the absence of a grave breach of HR, Brolin had no positive obligation to investigate Mr. Zunitte. Under international HR law, the obligation to investigate only arises when there is significant suspicion that there has been a grave breach of HR.[37] As Mr. Zunitte's conduct did not meet the threshold of IT, there was no grave breach of a HR. Consequently, Brolin's decision not to investigate that conduct was not in breach of its HR obligations.

II. Brolin did not breach international law by failing to apprehend Mr. Zunitte

A. Brolin had no obligation to apprehend Mr. Zunitte

1. The apprehension of Mr. Zunitte would have been arbitrary

No arrest warrant was issued by Tenovia during the period that Mr. Zunitte was present in either State. Moreover, the TA did not communicate their suspicions to BMFA until Mr. Zunitte had almost left the country.[38] As a result, for the majority of his time in Brolin, there were no reasonable grounds for Brolin to suspect that Mr. Zunitte had committed a crime capable of justifying his detention. States must refrain from detaining individuals when that detention is not consistent with the due process of law, as doing so amounts to arbitrary detention,[39] which the

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[36] *Case* [13].

[37] *Velásquez Rodríguez* (IACtHR) [174]; Duffy (2015) 490; Bassiouni (2006) 226.

[38] *Case* [17-18]

[39] *Mukong v Cameroon* (HRC) [9.8]; *Van Alphen v the Netherlands* (HRC) [5.8]; *Torture case* (AComHPR) [67]; *Steel v UK* (ECtHR) [54].

ICJ has confirmed is inconsistent with the principles of the UNC.[40] Consequently, without reasonable grounds of suspicion, Brolin was prevented from apprehending Mr. Zunitte for the majority of the time that he was in that State under international law.

This position did not change when Tenovia's suspicions were eventually transmitted to BMFA, as no extradition agreement existed between Brolin and Tenovia. In the absence of an international agreement to the contrary, the exercise of jurisdiction remains at the arresting State's discretion, and other States have no ability to coerce them to behave otherwise.[41] Consequently, given that no bilateral or multilateral agreement existed which may have obliged it to do so, Brolin did not violate any obligations owed to Tenovia by not apprehending Mr. Zunitte.

2. BMFA's statement does not constitute a unilateral declaration

BMFA's statement to the TA did not constitute a binding UD. To become binding, a UD must be made by an authority vested with the power to bind the State, with the intention to bind that State in accordance with international law. It must also be made precisely, concerning a specific matter, and be delivered in a public manner.[42] BMFA's statement did not constitute a UD as it was not made with the intention to bind the State and was insufficiently precise.

BMFA did not intend to bind Brolin under international law. Evidencing the intention to bind the State represents one of the most fundamental aspects in establishing the existence of a UD.[43] This intention is to be derived from the factual circumstances surrounding the act, which include whether the formulating State had any means at its disposal to manifest its intention to be bound

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[40] Art. 1(3) UNC; *Tehran* (ICJ) [91]; OHCHR Manual (2003) 162.

[41] Declaration on Friendly Relations (UNGA) 123; Clapham (2003) 308.

[42] *Nuclear Tests* (ICJ) [43]; Guiding Principles Applicable to UD 372.

[43] *Ibid*; *Frontier Dispute* (ICJ) [39]; *Obligation to Negotiate* (ICJ) [146-8].

more clearly, such as a formal agreement based on the on the notion of reciprocity.[44] BMFA's statement was little more than an assurance given orally as part of a private meeting and was not intended to bind Brolin under international law. Had this been BMFA's intention, there was nothing to hinder them phrasing these assurances legally, within a specific agreement containing precise cooperation obligations. The failure to do so evidences the lack of intention to bind Brolin under international law and indeed, the subsequent decision not to pursue Mr. Zunitte in light of more pressing security concerns[45] supports the position that BMFA did not believe that the statement given to the TA had done so.

Moreover, BMFA's statement was insufficiently precise to create international legal obligations. Even where the intention to bind a state can be proven, a UD will only entail enforceable obligations for the formulating State if it can be shown that, subject to a restrictive interpretation, this declaration contains clear and specific terms.[46] BMFA's statement was phrased generally and was not clarified by any later promise to undertake specific actions in order to apprehend Mr. Zunitte.[47] It was therefore insufficiently precise to satisfy the criteria of specificity necessary to establish that statement as a UD. The assurance given in BMFA's statement to the TA therefore entailed no legal responsibility for its non-performance.

B. Brolin was not under a CIL obligation to extradite or prosecute Mr. Zunitte

1. *Aut dedere aut judicare* is not a norm of CIL

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[44] *Frontier Dispute* (ICJ) [40].

[45] *Case* [19].

[46] Guiding Principles Applicable to UD, 372; *Armed Activities* (Uganda) (ICJ) [50-2]; *Nuclear Tests* (ICJ) [44].

[47] *Case* [17].

Brolin had no CIL duty to apprehend Mr. Zunitte, as the obligation to extradite or prosecute (*aut dedere aut judicare*) does not exist outside of certain specific treaty frameworks. In order to identify CIL, it must be proven that a given practice is both "constant and uniform" and that it is carried out because of a belief that it is "rendered obligatory by a rule of law requiring it."[48] Neither of these requirements are met by current practice surrounding the *aut dedere* obligation,[49] as there is no single precise formulation of the obligation. Some conventions have contemplated prosecution as a primary duty, others as a secondary duty, whereas others limit the obligation to circumstances where another state actively requests extradition.[50] Given this variation, it is impossible to identify one formulation of the *aut dedere* principle that a stable majority of states have consistently practiced or consented to as a matter of international law.[51] This undermines both the uniform state practice and opinio juris necessary for that principle to constitute CIL. Additionally, it cannot be inferred that States consider themselves to be bound by *aut dedere aut judicare* in CIL, as adherence to it is most likely due to their treaty obligations.[52] Hence, there is insufficient evidence of *opinio juris*. Moreover, several states otherwise consenting to the *aut dedere* obligation in treaty law, continue to dispute its existence as a CIL norm.[53] Consequently, it is impossible to identify either element necessary to establish the existence of a customary *aut dedere aut judicare* obligation. In the absence of any agreement between Brolin and Tenovia to the contrary, Brolin was therefore not obliged to apprehend Mr. Zunitte.

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[48] *Nuclear Tests* (ICJ) [77]; *Nicaragua* (ICJ) [183]; *Continental Shelf* (ICJ) [27].

[49] Report on the Obligation to Extradite or Prosecute (2014) 144; Mitchell (2011).

[50] *Prosecute or Extradite (Sep. Op. Judge Yusef)* (ICJ) 568; Mitchell (2011).

[51] Bassiouni (1995) 43.

[52] *North Sea* (ICJ) [76]; Larsaeus (2004) 85; Bassiouni (1995) 43.

[53] ILC Report on *Aut Dedere Aut Judicare* (2008) [98].

2. Brolin's conduct did not amount to a breach of an *aut dedere aut judicare* obligation

In the alternative, even if an *aut dedere aut judicare* obligation exists in CIL, Mr. Zunitte's conduct does not invoke such an obligation, because it does not amount to a core international crime. Even where treaty regimes and commentary have contemplated an *aut dedere aut judicare* obligation, this is usually, if not exclusively, premised on the commission of a *core* international crime.[54] Core crimes are considered the most heinous crimes.[55] In the extremely infrequent cases that an obligation is emerging with regard to *non*-core crimes, it is still limited to extremely serious crimes including murder, extermination, deportation, sexual crimes and torture.[56] In comparison, Mr. Zunitte's incidental infliction of bodily harm upon Ms. Starman, does not satisfy the severity,[57] durational,[58] or official capacity requirement under CIL.[59] Consequently, even in light of the broadest constructions of the *aut dedere aut judicare* obligation, Mr. Zunitte's conduct would not reach a threshold capable of imposing such a duty on Brolin.

3. Brolin did not have an opportunity to apprehend Mr. Zunitte in order to prosecute or extradite him

In any case, Brolin had no opportunity to apprehend Mr. Zunitte, as Tenovia's suspicions regarding his conduct were only communicated in a meeting called between BMFA and the TA, where they called for Mr. Zunitte's extradition.[60] At that point, however, he was no longer involved in public activities. On the facts, therefore, not only did Brolinite authorities no longer

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[54] Art. 9 Draft Code of Crimes, 30-1; Foakes (2013) 2.

[55] *Arrest Warrant (Joint Sep. Op.)* (ICJ) [60-1]. See also: ICC Statute (Art. 5).

[56] *Arrest Warrant (Joint Sep. Op.)* (ICJ) [51]; Amnesty (2009) 29.

[57] "Severity" in Art. 1 UNCAT is relative: *Selmouni v France* (ECtHR) [100]; *Ireland v UK* (ECtHR) [167].

[58] *Selmouni v France* (ECtHR) [100].

[59] Art. 1 UNCAT.

[60] *Case* [17].

know of his location, but in the absence of any prior suspicion or formal arrest warrant, could not reasonably have been expected to do so.

B. Brolin did not violate its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination by its insistence that attendees at the football match sign a declaration before being permitted to enter the stadium

I. Brolin did not engage in an act of "racial discrimination"

States who have ratified ICERD are obliged not to engage in acts of racial discrimination.[61] Racial discrimination occurs when a policy or an act distinguishes, excludes, prefers or restricts: (A) a racial group; (B) with a discriminatory purpose or effect; (C) which nullifies or impairs the equal enjoyment of HR.[62] Brolin's security requirement of requiring all spectators to sign a declaration of good behaviour did not amount to "racial discrimination" because it did not fulfil the cumulative definitional requirements under Art. 1 ICERD.

A. The Tenovis are not a "racial group"

A "racial group" is connected by race, colour, decent, or national or ethnic origin.[63] This definition was confirmed by the ICJ.[64] Whilst interpreting HR treaties, the ICJ has ascribed great weight to the interpretations of bodies established to oversee that treaty's interpretation.[65] Consequently, interpretations of ICERD adopted by CERD should be deemed highly authoritative.

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[61] Art. 2(1)(a) ICERD.

[62] Art. 1(1) ICERD.

[63] *Ibid*.

[64] *Continued Presence of SA in Namibia* (ICJ) [131].

[65] *Genocide* (ICJ) [66].

The Tenovis are not a "racial group". To be linked by race or colour, there must be factual evidence that a group is connected through biological, social, and economic characteristics.[66] Tenovis lack any such shared characteristics. 'Descent-based' groups are those discriminated against for their inherited status.[67] Tenovis are not grouped by any such societal stratification. Neither are Tenovis a national group, as they are not inherently linked to Tenovia as a State; in 2015, there were 168,000 Tenovis residing in Brolin, and 87,220 Tenovis located in Tenovia.[68] Finally, Tenovis are not an ethnic group. Ethnicity is distinguishable from race in that it has its origins in shared social and cultural conditions, as opposed to morphological features.[69] However, Tenovi traditions are based on religion. Religion will only be relevant for the establishment of a protected group where it operates in conjunction with another ground under ICERD.[70] No such ground has been established. Accordingly, Tenovis are not an indigenous group for the purposes of ICERD. Courts have suggested that indigenous groups are communities who share characteristics of a socio-cultural nature, such as the same language, customary law, values, and economic and social characteristics.[71] There is neither evidence of clear linguistic differences between the Brolinites and the Tenovis, nor customary law that distinguishes their traditional Tenovi practices from others' in the region. Therefore, the limited cultural similarities amongst the Tenovis are because they share a religion, and are insufficient to find that Tenovis constitute an ethnic group for the purposes of Art. 1 of ICERD.[72] Consequently, the

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[66] Kitching (2005) 166.

[67] CERD General Recommendation XXIX [1(a)].

[68] *Case* [2].

[69] *Sejdić and Finci v Bosnia and Herzegovina* (ECtHR) [43].

[70] *P.S.N. v Denmark* (CERD) [6.3].

[71] *Yakye Axa* (IACtHR) [124, 135, 137]; *Displaced Communities* (IACtHR) [354].

[72] Kitching (2005) 166.

Tenovis were not a protected group under ICERD. Thus, no racial discrimination under Art. 1 ICERD has occurred.

B. The security requirement was not a discriminatory policy

The second element of the definition of racial discrimination under Art. 1(1) ICERD is that a policy have a discriminatory purpose or effect. Direct discrimination occurs when a group is purposefully treated differently than others are in the same circumstances.[73] Brolin applied the security requirement equally, without prejudice to any group. Its purpose was not to nullify or impair the rights of any attendees, but to ensure the safety of all spectators and footballers. Outright non-admittance to a public space resulting in differentiation must be distinguished from non-admittance due to unwillingness to sign and adhere to terms and conditions of a venue.[74] A policy implemented in pursuit of a legitimate aim, applied equally to all individuals, may be perceived as, but is not necessarily, discriminatory.[75] Tenovis attending the GFM were not prohibited from entering the stadium based on their religion, but because of their refusal to sign the security declaration. All Tenovis were able to watch the GFM as those unwilling to sign the declaration watched the GFM on giant screens just outside the stadium.[76]

Indirect discrimination occurs when a neutral legal requirement applies to all persons without distinction, yet has a discriminatory effect.[77] A measure is indirectly discriminatory if it has a disproportionate impact upon a particular group, without a justification.[78] A safety requirement that allegedly discriminates against those of a certain religion, could be regarded as reasonable

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[73] CERD General Recommendation XIV [2]; Kitching (2005) 72.

[74] *Durmic v Serbia and Montenegro* (CERD) [2.2].

[75] *L.T.K. v Finland* (HRC) [5.2].

[76] *Case* [23].

[77] *L.R. v Slovak Republic* (CERD) [10.4]; *Bhinder Singh v Canada* (HRC) [6.1].

[78] CERD General Recommendation XIV [2].

and directed towards objective purposes that are compatible with the ICCPR.[79] Justifications must evidence that a measure is objectively reasonable and proportionate.[80] The security requirement was justified as a reasonable solution to prevent violence after calls for "revenge" on Brolin had led to a heightened security concern.[81] Furthermore, CERD has held that a lack of resources, combined with other elements may be reasonable and objective grounds for a measure.[82] The effect of the security requirement was that those unwilling to promise that they would adhere to good behaviour, were not granted entrance to the stadium. However, the measures were objectively reasonable in light of the security threat combined with Brolin's limited resources and time to implement a different solution. Moreover, with 50% of Tenovis signing the declaration, the requirement did not have an unjustifiable disparate impact upon a group.[83] Hence, the security requirement was not indirectly discriminatory.

C. The security requirement did not nullify or impair the enjoyment of human rights

A measure that nullifies or impairs the equal enjoyment of HR in any field of public life is discriminatory.[84] The neutral security requirement, imposed for the legitimate reason of ensuring the safety and security of the spectators and players, and applied without aiming at any religious group, neither nullified, nor impaired the equal enjoyment of HR. Under Art. 5(e)(vi) ICERD, all individuals have the right to participate in cultural activities. This right was not

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[79] *Bhinder Singh v Canada* (HRC) [6.2].

[80] *Yatama* (IACtHR) [185]; Kitching (2005) 81.

[81] *Case* [20].

[82] *Sefic v Denmark* (CERD) [7].

[83] *Case* [23].

[84] Art. 1(1) ICERD.

denied by the security requirement because those unwilling to sign the declaration were still able to watch the GFM, as Brolin provided giant screens on which to follow the GFM live.[85] Additionally, Art. 5(f) ICERD requires that equal access to any public place must be respected. However, this right is qualified and it is common for entrance to events to be restricted to those adhering to security policies.[86] The security requirement did not breach this right because all who complied with the security requirement were admitted to the stadium, and those unwilling to sign the declaration were admitted to the designated area to watch the GFM. As per Art. 5(d)(vii) ICERD, States must protect freedom of religion. This right may be violated when the religious group "can no longer undertake their religious practices".[87] Tenovis' right to freedom of religion was not impaired because the requirement was justified, and Brolin provided an alternative viewing method that didn't require a declaration to be signed.

II. Brolin's security requirement was not contrary to the object and purpose of ICERD

Should the Court find that the definition of racial discrimination was satisfied, Brolin's adoption and implementation of the security requirement was justified in light of the object and purpose of ICERD.[88] Brolin's actions were proportionate because they protected spectators and participants from a serious security threat. The proportionality test adopted by CERD reflects the general test of proportionality in HR law.[89] According to this test, a policy must: (A) pursue a legitimate aim; (B) be suitable; (C) be necessary; and (D) be proportionate.[90]

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[85] *Case* [23].

[86] Art. 28 UEFA Regulations; Art. 24 AFC Regulations.

[87] *Ogiek case* (ACtHPR) [166].

[88] CERD General Recommendation XXX [4].

[89] De Schutter (2014) 339; Alexy (2002) 66; Möller (2012) 711.

[90] CERD General Recommendation No. 35 [12]; HRC General Comment No. 34 [34].

A. Brolin's security requirement pursued a legitimate aim

In order to be justified, a measure must pursue an objectively legitimate aim.[91] Ensuring public safety is a legitimate aim.[92] Judged against the objectives and purposes of ICERD,[93] a requirement is legitimate if it does not have an unjustifiable disparate impact upon a group distinguished by the criteria in Art. 1.[94] Considering the security threat that the GFM posed after rallies in Tenovia had called for revenge on Brolin,[95] a security requirement had to be adopted to maintain public order and prevent security breaches. Therefore, the security requirement pursued the legitimate aim of ensuring public safety.

B. Brolin's security requirement was suitable

A policy is suitable if it is rationally connected to achievement of a legitimate aim.[96] Considering the rallies in Tenovia calling for revenge on Brolin, Brolin had to balance the safety of the spectators and players against the possibility of disadvantaging some Tenovis. There is a clear nexus between this security concern and the security requirement that sought to prevent violence. Therefore, the means of realising the aim were appropriate as they were rationally connected to the end.

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[91] *Ibid*; De Schutter (2014) 360; Möller (2012) 711-12.

[92] Siracusa Principles [33-4]; *Ukraine v Russia* (ICJ) [93]; Art. 12(3) ICCPR.

[93] CERD General Recommendation XXX [4].

[94] CERD General Recommendation XIV [2].

[95] *Case* [20].

[96] *Petrovic v Austria* (ECtHR) [30]; *Şahin v Turkey* (ECtHR) [159]; Kitching (2005) 21.

C. Brolin's security requirement was necessary

Measures are necessary when there are no less restrictive means of achieving the same result effectively.[97] By requiring all spectators to sign the declaration, Brolin did no more than was necessary to ensure the public safety at the GFM. Furthermore, BMS was under a serious time constraint, and because of the escalation of the rallies in Tenovia, BMS had to create a new security policy three days before the GFM was due to begin. Only two days before the event did TMS request for the procedure not to be adopted,[98] however, this notice was too short for Brolin to create a new policy, and thus they did not have a choice between the security requirement and a different policy that was 'less restrictive'. Consequently, there was no fairer way of achieving this aim adequately because of time constraints. Thus, the security requirement was necessary to safeguard security at the event.

D. Brolin's policy was proportionate *strictu sensu*

The security requirement did not impose a disproportionate burden on the Tenovis. A proportionality test assesses whether measures are "proportionate to the interest to be protected".[99] The alleged interference with Tenovis' rights must be balanced with the need to protect the attendees and football players' right to security of person. The security interests of all should prevail over individual interests.[100] To justify an interference with HR, the State must have adopted a holistic approach, engaging in a proactive dialogue with the public and determining suitable security measures as required.[101] BMS sent a Note to TMS, requesting publication of

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[97] *Construction of a Wall* (ICJ) [136]; HRC General Comment No. 27 [14]; Jans (2000) 240.

[98] *Case* [20-1].

[99] HRC General Comment No. 27 [14]; Möller (2012) 715.

[100] *Leander v Sweden* (ECtHR) [67].

[101] *S., V. and A. v Denmark* (ECtHR) [163-9].

the entrance requirements.[102] Brolinite authorities thus engaged in a proactive dialogue with Tenovian authorities who were expected to broadcast the requirements, so Tenovi attendees would be aware of the measure prior to the GFM. TMS's failure to announce the security requirement does not diminish Brolin's concerted efforts to advertise the requirement. Furthermore, no Tenovis were detained, they were merely not granted entry to the stadium when they would not obey the requirement. No other security measures were required as the GFM went ahead peacefully.[103] The security requirements pursued a legitimate aim, they were suitable, necessary, and in the balance of interests, the policy was not disproportionate to the rights allegedly restricted. They were therefore justified in light of the object and purpose of ICERD.

C. Brolin did not violate its obligations towards Tenovia by failing to recognise Ms. Desmond's immunity from all forms of legal process in Brolin under Article 9 of the CLAWS Convention

I. Ms. Desmond does not enjoy immunity because she is not a diplomatic agent

A. Ms. Desmond's appointment as the CLAWS Permanent representative was void *ab initio* because *agrément* was not sent to Tenovia

The notification sent to Brolin by Tenovia did not amount to the appointment of Ms. Desmond as the CLAWS PR. The *agrément* of the receiving State is required for accreditation of a head of the mission,[104] and constitutes the exception to the general rule which permits the sending State to freely appoint the members of the staff of the mission.[105] On 2 March 2018, Tenovia notified Brolin of Ms. Desmond's appointment and Brolin did not respond to the notification.[106]

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[102] *Case* [21].

[103] *Case* [23].

[104] Art. 4 VCDR; Brownlie's Principles (2012) 400; Wickremasinghe (2018) 354.

[105] Art. 7 VCDR; Denza (2016) 40.

[106] *Case* [30].

A mission comprises of a head and assistants subordinate to him or her,[107] and a PR is equated to a head of mission.[108] As the sole representative to CLAWS, Tenovia's notification was thus an attempt to accredit Ms. Desmond as a head of mission. Considering that no *agrément* was sent to Tenovia following the notification, Tenovia's unilateral accreditation of Ms. Desmond as head of mission was void *ab initio*. As there is no presumption of diplomatic immunity,[109] she is not a diplomat and does not enjoy immunity.

B. Ms. Desmond's appointment was void *ab initio* because it was not made in good faith

1. Ms. Desmond's appointment was made in bad faith

Tenovia's appointment of Ms. Desmond was legally abusive as she was appointed as CLAWS PR in order to defeat the claim for rental arrears. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.[110] It follows that rights must be exercised in good faith,[111] and a State or person acts in bad faith where it abuses its rights knowingly,[112] for instance, when it exercises a power to obtain an undue advantage.[113] Tenovia's appointment of Ms. Desmond was therefore entirely at odds with the object and purpose of the VCDR, which "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States".[114]

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[107] Art. 1 VCDR; Diplomatic Intercourse and Immunities, 91.

[108] A definition of "Permanent Representative" can be found under Art. 1 (17) VCRS.

[109] Denza (2016) 50-5.

[110] Art. 26 VCLT; *Gabčikovo-Nagymaros* (ICJ) [142]; *Nuclear Tests* (ICJ) [46].

[111] Fitzmaurice (1986) 12.

[112] Taylor (1972-73) 333.

[113] Salmon (2001) 3-4.

[114] Preamble VCDR.

In establishing whether an abuse of rights exists, an examination may be undertaken as to whether the circumstances were such that no reasonable State[115] would have appointed the diplomat in question to that position if not to avoid a claim.[116] This can be derived from the surrounding facts.[117] Here, these facts include: the timing of the appointment; the familial link to the appointee; and Ms Desmond's lack of relevant credentials. In light of this, Tenovia would not have appointed Ms. Desmond at that moment if it had not had as one of its objects the avoidance of the rental arrears claim in question.

First, the timing of the appointment of Ms. Desmond shows that Tenovia abused its rights. Although Brolin was notified of Ms. Desmond's appointment on 2 March 2018, before the proceedings were instituted against her, Ms. Desmond was aware of her growing rental arrears before her appointment. Indeed, by mid-January 2018, only two months before her appointment, she received multiple demand letters from her landlord's solicitors in relation to the unpaid rent.[118] These letters clearly troubled Ms. Desmond as made numerous calls to her mother, TMW, asking for advice in relation to them. Consequently, Tenovia unexpectedly appointed Ms. Desmond as CLAWS PR, merely two months after she had fallen behind on her rent.

Secondly, Ms. Desmond's family ties to TMW, and her lack of credentials with no expertise either in women's sports[119] or in diplomacy, denote a calculated appointment by Tenovia. At this point, Tenovia's argument that it is restrained in its selection of candidates due to the size of its country is not a compelling one. As such, causation exists between Ms. Desmond's rental

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[115] Oppenheim (1955) 263.

[116] *Electricity Company (Op. Judge Anzilotti)* (PCIJ) 98; *Customs Regime* (*Op. Judge Anzilotti*) (PCIJ) 68, 70-1.

[117] Taylor (1972-73) 332.

[118] *Case* [27].

[119] *Case* [31-2].

arrears and her subsequent appointment by Tenovia. Accordingly, Tenovia appointed Ms. Desmond in bad faith, with the view to obtaining the undue advantage of defeating the claim against her for rental arrears in Brolin by asserting diplomatic immunity.

2. Appointing Ms. Desmond in bad faith renders her appointment void *ab initio*

Ms. Desmond's appointment was legally abusive. Primarily, abuse of the privileges and immunities granted by international law could lead to the very existence of those rights being called into question, as recently pleaded before the ICJ.[120] Furthermore, an abuse of rights could endow the act with the character of a breach of a treaty.[121] It follows that Tenovia's abuse of its right to diplomatic privileges and immunities for its agents may amount to a breach of its treaty obligations under the VCDR. The preamble of the VCDR states that the purpose of diplomatic privileges and immunities is not to benefit individuals.[122] As Tenovia appointed Ms. Desmond to defeat the rental arrears claim against her, the appointment is rendered ineffective, and she consequently does not enjoy the privileges and immunities accorded to diplomatic agents. Finally, conclusive evidence of an abuse of rights has also been said to be sufficient to render a claim inadmissible.[123] As such, Ms. Desmond does not enjoy immunity as a diplomatic agent for the purposes of Art. 9 of the CLAWS Convention because she is not considered a CLAWS PR. Her appointment was a nullity since Tenovia did not receive *agrément* from Brolin. Conversely, her appointment was rendered invalid because it was made by Tenovia in bad faith.

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[120] *Immunities (France Preliminary Objections)* (ICJ) [78].

[121] *Certain German Interests* (PCIJ) 30.

[122] Preamble VCDR.

[123] *Immunities (Diss. Op. Judge Donoghue)* (ICJ) [18-19].

II. Ms. Desmond does not enjoy immunity because the landlord's claim falls under the exceptions set out in the VCDR

A. The claim is an exception to Ms. Desmond's immunity from civil jurisdiction

Should Ms. Desmond be considered a diplomatic agent, she nevertheless does not enjoy diplomatic immunity Art. 9 of the CLAWS Convention. Under Art. 31(c) VCDR, an action relating to a commercial activity exercised by the diplomatic agent in the receiving State outside her official functions exempts her from immunity from civil jurisdiction. Whilst acknowledging that an agreement to rent accommodation may not itself constitute a 'commercial activity',[124] recent developments in the law call for a broader interpretation of the exception.

Firstly, considering whether employment contracts fall within the definition of a commercial activity, it was noted that a possible expansion of the exception to immunity may be anticipated following decisions of the ECtHR, which have adopted a restrictive interpretation of the immunities.[125] Secondly, the definition of 'commercial activity' has been recently expanded to include contracts of employment. Future iterations of the meaning of the expression 'commercial activity exercised' need to be contemplated in light of desirable developments in the law.[126] Indeed, extending immunity for rental agreements would counter the general trend of fighting impunity: immunity does not signify impunity.[127] Finally, it was found that rental disputes were covered by the exception under the VCDR,[128] as "[t]he underlying activity, being the landlord and tenant relationship between the parties, [is] a commercial activity pursuant to Article

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[124] Denza (2016) 251.

[125] Satow (2016) [14.19].

[126] *Reyes* (UKSC) [67, 69].

[127] *Arrest Warrant (Diss. Op. Judge Van den Wyngaert)* (ICJ) [34-8].

[128] *Singhal* (DCO); *Baumann* (SCJO) 3.

31(1)(c)".[129] Arguably, this represents further practice of courts finding diplomatic immunity to be limited by expanding the exception relating to 'commercial activity'.

Considering these developments, the exception to immunity could be applied in the present case. Under Art. 31(1)(c): (i) the action must relate to a "professional or commercial activity exercised by the diplomatic agent"; and (ii) the exercise of that activity must be "outside his official functions".[130] In the present case, the landlord's claim related to a commercial activity exercised by Ms. Desmond in Brolin: the (non)payment of rent by Ms. Desmond in exchange for him making his property available for her residence. Further, the first condition distinguishes the relevant activity from an 'act' by its duration,[131] and here, the (non)payment of rent constitutes an activity. Additionally, Ms. Desmond's diplomatic functions cannot have extended to her renting out accommodation in Gremont: this was not done for or on behalf of Tenovia. Thus, the claim for rental arrears falls under the exception set out in Art. 31(1)(c) of the VCDR and Ms. Desmond does not enjoy immunity from the civil jurisdiction of Brolin.

B. The claim is an exception to the inviolability of Ms. Desmond's private property

Measures of execution can be taken in respect of Ms. Desmond's private property. As per Arts. 30(2) and 31(3) VCDR, the property of a diplomatic agent is not inviolable if measures of execution are taken in the case of an action relating to a commercial activity, and provided that the measures concerned are taken without infringing the inviolability of the diplomatic agent's person or of her residence. The action with respect to the rental accommodation falls under the 'commercial activity' exception. Further, the impending seizure and sale of Ms. Desmond's private property exterior to the rented accommodation constitute measures which relate to this action. Moreover, the measures do not infringe her inviolability, nor that of her residence. To

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[129] *Baumann* (SCJO) 3. See Globe and Mail article (2018).

[130] *Reyes* (UKSC) [19-21].

[131] *Reyes* (UKSC) [21].

conclude, Ms. Desmond does not enjoy immunity under Art. 9 of the CLAWS Convention because the landlord's claim falls under the exceptions set out in Arts. 30 and 31 of the VCDR.

(I) SUBMISSIONS

For the above reasons, Brolin respectfully requests the Court to adjudge and declare that:

A. Brolin did not violate customary international law by the assault on Ms. Starman in Tenovian territory and Brolin had no obligation under customary international law to apprehend Mr. Zunitte;

B. Brolin's policy requiring all spectators to sign a security declaration was not a violation of its obligations under CERD;

C. Brolin did not violate its obligations towards Tenovia under Article 9 of the CLAWS Convention in relation to Ms. Desmond.

Respectfully submitted,

Agents for the Respondent