The 2000 Philip C. Jessup International Law Moot Court Competition

State of Kuraca

v.

Republic of Senhava

The Case Concerning the Vaccine Trials

BEST OVERALL MEMORIAL - RESPONDENT

First Place
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IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE, THE HAGUE,
THE NETHERLANDS

SPRING TERM 2000

CASE CONCERNING THE VACCINE TRIALS

STATE OF KURACA

Applicant

v.

REPUBLIC OF SENHAVA

Respondent

MEMORIAL FOR THE RESPONDENT

INDEX OF AUTHORITIES

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

STATUTES

CASES

TREATISES, DIGESTS AND RESTATEMENTS

Conduct: An Analysis of Future Experience, in Transnational Corporations, The Legal Effects of Codes of Conduct for MNEs in Transnational Corporations:Codes of Conduct 251 (A. Fatouros ed., 1994). 7

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STATEMENT OF JURISDICTION

The Governments of the State of Kuraca and the Republic of Senhava have recognised as compulsory ipso facto in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2.

Senhava objects to this Court's jurisdiction on several grounds. It observes that Kuraca's declaration restricts this Court's jurisdiction by placing two reservations. Senhava, under the principle of reciprocity, relies on those reservations. Alternatively, Senhava contests the validity of Kuraca's declaration.

Accordingly, Senhava requests that the Court decline jurisdiction.

STATEMENT OF FACTS

Kuraca is a developed country with one of the world's leading biotechnology industries. It is also a foreign assistance donor country [Compromis, ¶ 1].

The Republic of Senhava is a developing country relying on agriculture, primary resources, foreign tourism, and foreign assistance for sustenance. She is an archipelagic state, thousands of miles from Kuraca, with a population of approximately three million people of diverse ethnic and language groups, several of whom live in almost total isolation [id, ¶ 2]. Of this number, over 20% are confirmed to be infected with the MHVD disease as compared to Kuraca's reported cases of a few hundred to date [id, ¶ 7].

The MHVD is a highly infectious and deadly disease [id, ¶ 4 & 5]. It had been declared a worldwide pandemic in as early as 1996 despite having its first symptoms reported only as late as 1988. Biomedical, public health and pharmaceutical organisations worldwide have tried to contain the disease but to no avail. A WHO panel reported in 1997 that the only guard against the disease is natural prevention. They urge scientists to develop a vaccine [id, ¶ 6].

Considering the pervasiveness of the disease, numerous biomedical and pharmaceutical companies in Kuraca have attempted to develop the vaccine, as it would be extraordinarily profitable. The two leading companies in the race for a vaccine are Megaceutical Corporation and K-Biomed Corp [id, ¶ 8].

Recently, Megaceutical Corporation has reported great progress in a vaccine project headed by Dr. Yukawa-Lopez of the Biomedical Faculty of Kuraca Capital University [id, ¶ 12]. Dr. Yukawa Lopez is a Kuracan national [cla., ¶ 1] and a world-leading expert on MHVD [comp., ¶ 12].

Kuraca Capital University is a world-renowned private research institution [id, ¶ 12] but receives funds from the Kuracan Government [cla., ¶ 3].

Since 1998, several small-scale tests of various formulas have been conducted on Senhavans through Megaceutical-Senhava [Comp., ¶ 12], a subsidiary of Megaceutical Corporation incorporated and fully-operated in Senhava [comp., ¶ 9]. Phase I (toxicity) Investigational MHVD 078b research has been conducted with 93.33% success. In view of this, Magaceutical Corp. and Dr. Yukawa-Lopez had decided to accelerate research with a safer variant of 078c. Following this, Phase II (efficacy and dose-response ratio studies) and Phase III (clinical trials in large population) have been planned for proceeding as soon as practicable [id, ¶ 13].

Megaceutical announced that Phase II and Phase III trials would be conducted in Senhava by Megaceutical-Senhava, Ltd., for reasons of cost and availability of test subjects as well as in view of the prevalence of the disease in Senhava [id, ¶ 14].

In June, 1999, Megaceutical-Senhava Ltd. was granted permission by the Senhavan Government to conduct Phase II and Phase III of the trials of Investigational MHVD Vaccine 078c in orphanages, prisons, maternal and child health clinics and outer island villages. The trials are to be carried out at Megaceutical-Senhava's expense. Arrangements have been made for the Senhavan national police to provide transportation to Megaceutical-Senhava personnel supervising the vaccine trials, which were scheduled to commence in September 1999 [id, ¶ 15].

Neither Megaceutical Corporation nor its subsidiary sought Kuracan Government funding in the vaccine development project [id, ¶ 16].

Pursuant to the Kuracan National Health Law 1006, Dr. Yukawa-Lopez submitted a copy of the Megaceutical-Senhava research protocol to the

Kuraca Capital University Biomedical Ethics Review Board, among whose seven members was Dr. Francis Zeaklin, the President of K-Biomed Corporation [id, ¶ 19]. Regrettably, The Board rejected the proposal notwithstanding the seriousness of the MHVD disease. It also warned that any physician who worked on it would face the risk of revocation of their medical licenses [id, ¶ 21].

Meanwhile, George Smith, the independent consultant who provided on-site reporting and advisory services to Kuraca with respect to Megaceutical-Senhava [id, ¶ 11], sent the proposed study protocol and consent form to the Kuracan Medical Product Regulation Agency recommending that the trials not be undertaken [id, ¶ 22].

Subsequently, the Administrator of the Kuracan Medical Product Regulation Agency directed the President of Megaceutical Corporation to stop the project or else drugs and biologics needed for the project will not be readily granted [id, ¶ 23].

Because of these developments, Dr. Yukawa-Lopez withdrew from the project and Megaceutical Corporation directed its subsidiary to terminate it. Thus on August 10 1999, Megaceutical-Senhava notified the Senhavan Ministry of Health that it had halted work [id, ¶ 24].

Following this, the Senhavan National Police arrested George Smith for interfering in Senhavan public health measure by providing documents of the project to the Kuracan government [id, ¶ 25]. Immediately two days later Senhavan Ministry of Foreign Affairs sent a diplomatic note attempting to resolve Kuraca's extraterritorial application of Kuracan health legislation. The actions of the Kuracan Administrator of the Medical Product Regulation Agency amounted to 'a wealthy country's self-indulgence' and 'cultural imperialism'. In the absence of diplomatic improvement, Senhava was prepared to proceed with the project without Kuraca's consent [id, ¶ 26].

In reply, the Kuracan Ministry of Foreign Affairs demanded that George Smith be freed [id, ¶ 27].

Senhava made a reply explaining the domestic character of George Smith's detention and the violation of Senhava's sovereignty through the extraterritorial application of Kuracan health legislation. Kuraca's procurement of the cessation of the project violated Senhava's sovereign rights and international human rights law [id, ¶ 28].

The Kuracan Ministry of Foreign Affairs again cited a list of assertions and an accusation but offered no explanation to the matter [id, ¶ 29].

Having tried and failed diplomatic discussions, Senhava announced publicly its arrangement to proceed with the trials [id, ¶ 30]. However, Megaceutical Corp. continued to hinder the project through its control of Megaceutical-Senhava thereby forcing Senhava to shut down the office of Megaceutical-Senhava and levy substantial fine [id, ¶ 31]. Senhava's Prime Minister again attempted diplomatic discussion with the Kuracan ambassador but to no avail [id, ¶ 32]. Consequently, each country recalled its ambassador and announced a break in diplomatic relations [id, ¶ 33].

In late October 1999, an ad hoc group of 12 Nobel Peace laureates proposed to both Kuraca and Senhava that the dispute be referred to the International Court of Justice [id, ¶ 33].

Hence, Kuraca filed the case before the International Court of Justice with the willing agreement and co-operation of Senhava, although Senhava maintains the view that the court does not have jurisdiction over the matter [id, ¶ 35].

Both Senhava and Kuraca have accepted the Court's compulsory jurisdiction [id, ¶ 34].

QUESTIONS PRESENTED

1. Whether the Court's jurisdiction is precluded when the consent of the parties was negated by Kuraca's Declaration?
2. Whether Megaceutical's action in not continuing with its contemplated vaccine work is justifiable under international law?
3. Whether Kuraca's extraterritorial application of laws infringe international law?
4. Whether Kuraca has standing in the dispute concerning George Smith?
5. Whether Senhava is bound to afford reparation to Kuraca under the principles of state responsibility?

SUMMARY OF PLEADINGS

I. The existence of Kuraca's declaration precludes this court from exercising its jurisdiction. Kuraca's declaration of acceptance under Art. 36 (2) of the ICJ Statute is invalid as it is contrary to the object of Art. 36 (6). This Honorable Court therefore does not have before it a valid declaration of acceptance to take cognizance of the present dispute. Arguendo the declaration is valid, the reciprocity of Kuraca's reservation precludes this Court's jurisdiction. Senhava relies on Kuraca's domestic reservation clause and the multilateral treaty reservation.

II. Megaceutical's action in not continuing with its contemplated vaccine work has no justification under international law. There are no conventional international obligations or customary rules of international law binding on Senhava with regard to the dispute. Therefore, Senhava has the sovereign right to determine the level of protection given to human subjects in the vaccine trials. Even were the Convention on Human Rights and Biomedicine applicable, the conduct of the trial complies with its terms.

III. Kuraca's extra-territorial application of laws infringes international law. Senhava has the right to prescribe jurisdiction over the MHVD vaccine program. Any extra-territorial effect of the Kuracan Health Law 1006 is a breach of customary international law, as such an exercise of jurisdiction is not founded on any valid basis for jurisdiction.

IV. Kuraca has no standing in the dispute concerning George Smith. George Smith has not exhausted local remedies. The absence of an of a breach of an obligation owed by Senhava to Kuraca prevents Kuraca's standing in this dispute. No international instruments or rules of customary international law exist which grant Kuraca standing in this dispute. The treatment of George Smith by Senhava is in any event warranted due to the significant concerns of national security and public order.

V. Kuraca is bound to afford reparation to Senhava under the principles of state responsibility. A breach of international obligation has been committed by Kuraca and therefore it has a duty, under international law, to afford reparation. This Honorable Court must make a declaratory judgment in favour of Senhava. Kuraca has a duty to undo all the consequences of the wrongful act. Arguendo Senhava is not entitled to the above remedies, damages is the appropriate form of reparation.

PLEADINGS AND AUTHORITIES

I. THE EXISTENCE OF KURACA'S DECLARATION PRECLUDES THIS COURT FROM EXERCISING ITS COMPULSORY JURISDICTION.

Senhava objects to the jurisdiction of the Court, firstly, on the ground that the Honorable Court does not have before it a valid declaration of acceptance of the compulsory jurisdiction of the Court, under Article 36(2) of this Court's Statute, to take cognizance of the present application. Secondly, Kuraca's declaration is invocable reciprocally by Senhava by virtue of Art. 36(2). Thus, Senhava is entitled to exempt herself from the compulsory jurisdiction of the Court.

A. Kuraca's Declaration of Acceptance[1] under Art. 36(2) Of This Court's Statute[2] Is Invalid.

States are allowed to enter reservations against this Court's jurisdiction in their declarations under Art. 36(2), but such reservations must conform to the 'object and purpose' of Art. 36.[3] A reservation that attempts to emasculate the power of this Honorable Court to determine its own jurisdiction as conferred by Art. 36(6) is contrary to the object of the Article and therefore is invalid.[4]

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[1] Compromis., Annex D. [hereinafter Comp.]

[2] Statute of the International Court of Justice, 59 Stat. 1055, TS 993 [hereinafter Statute].

[3] Vienna Convention on the Laws of Treaties, opened for signature May 2, 1969, art. 19, 1155 UNTS 331 [hereinafter VCLT]; Certain Norwegian Loans (Fr. V. Nor.), 1957 ICJ 9, 65-6 (sep. op. Judge Lauterpacht); Interhandel (Switz. V. US), 1959 ICJ 6,101-9 (dis. op. Judge Lauterpacht); Advisory Opinion On The Reservation To The Genocide Case 1951 ICJ 15, 24; D. Ende, Comment, Reaccepting the Compulsory Jurisdiction of the International Court of Justice: a Proposal for a New United States Declaration, 61 Wash. LR 1145, 1150 (1986);H. Waldock, Plea of Domestic Jurisdiction Before International Legal Tribunals, 31 BYBIL 96, 132 (1954); H. Lauterpacht, The British Reservation To The Optional Clause, 10 Economica 137, 169 (1930).

[4] Norwegian Loans supra n. 3, at 9, 43-4, 49-50, 67-8 (sep. op. Judge Lauterpacht), 67-8 (sep. op. Judge Guerrero); Interhandel, supra n. 3, at 101 (dis. op. Judge Lauterpacht), 54 (sep. op. Judge Spender); I.

Invalidity of the reservation invalidates the entire declaration it qualifies.[5]

Kuraca's declaration contains a reservation that purport to confer to Kuraca the capacity to determine the jurisdiction of the Court.[6] The reservation breaches the letter of Art. 36(6) and as such, invalidates Kuraca's entire declaration. Kuraca cannot thus invoke the Court's authority, as it is without a valid declaration.

B. Arguendo, The Declaration is Valid, The Reciprocity of Kuraca's Reservation Precludes This Court's Jurisdiction.

Kuraca's automatic reservation precludes from this Court's jurisdiction any dispute that is essentially within Kuraca's domestic jurisdiction as determined by the Kuracan government. Alternatively, the Court has no jurisdiction, if the dispute arises under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court.

The reservation is invocable by Senhava through the well-established principle of reciprocity,[7] as pointed out by this Court[8] and

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Hussain, Dissenting and Separate Opinions At The World Court 139, 151-2(1984); D. Ende, supra n. 3, at 1155; J. Guerrero, La Qualification Unilaterale De La Competence Nationale, in Grundproblems des Internationalen Rechts 207-12 (D. Constantopoulos, et al eds., 1957)

[5] Aegean Sea Continental Shelf (Gre. V. Turk.), 1978 ICJ 1, 33; Norwegian Loans, supra n. 3, at 43-4; R. Jennings, Recent Cases on Automatic Reservations To The Optional Clause, 7 ICLQ 349, 361 (1958); I. Hussain, supra n. 4; F. Wilcox, The United States Accepts Compulsory Jurisdcition, 40 AJIL 699 (1946); L. Preuss, The International Court of Justice, The Senate, And Matters of Domestic Jurisdiction, 40 AJIL 721 (1946); Ende, supra n. 3, at 1115; J. Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, BYBIL 63, 65 (1979).

[6] Crawford, id.

[7] Statute, supra n. 2, art. 36(2); Norwegian Loans, supra n. 3; Leo Gross, Bulgaria Invokes the Connally Amendment, 56 AJIL 357 (1962); Ende, supra n. 3, at 1153, n. 45.

[8] Anglo-Iranian Oil Co. (UK v. Iran), 1952 ICJ 93, 103; Interhandel, supra n. 3, at 23.

its predecessor[9], and by various publicists[10]. By allowing Senhava to rely on Kuraca's reservation, this Court would uphold the principle of sovereign equality, whereby Senhava would not be subjected to a greater scope of judicial scrutiny than that to Kuraca.

1. The Court's jurisdiction is precluded by Kuraca's domestic reservation clause.

The protection of public health and the regulation of internal commerce is within the dominion of Senhava's domestic jurisdiction.[11] In making the determination that the present dispute is essentially within the domain of its domestic jurisdiction, Senhava has adhered to the policy of making the determination in good faith,[12] although Senhava has no legal obligation to do so.[13] Senhava has acted neither arbitrarily[14] nor against the principle of genuine understanding.[15] Stripping Senhavan the right to control these matters would preempt its sovereign right to set its own policies and thus violate the principles

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[9] Phosphates in Morocco, 1938 PCIJ (ser. A/B), no. 74, 22; Electricity Company of Sofia, 1933 PCIJ (ser. A/B) no. 77, 81.

[10] E. Weiss, Reciprocity And the Optional Clause, in The International Court of Justice At A Crossroads 83-5 (L. Damrosh, ed. 1987); S. Rosenne, The Law and Practice at the International Court 386 (1985); L. Gross, Compulsory Jurisdiction Under the Optional Clause: History and Practice, in International Court of Justice At A Crossroads 83-5 (1987, L. Damrosh, ed. 1987).

[11] SS Lotus (Fr. V. Turk.) 1927, PCIJ (ser. A), no. 10.

[12] Norwegian Loans, supra n. 3, at 72 (dis. op. of Judge Basdevant); Guggenheim, Written Observations, Interhandel (Switz. V US), ICJ Pleadings, 579.

[13] Norwegian Loans, supra n. 3, at 52-5 (sep. op. of Judge Lauterpacht), 94-5 (dis. Op. of Judge Read); Interhandel, supra n. 3, at 58-9 (sep. op. Judge Spender), 111-1114 (dis. op. of Judge Lauterpacht).

[14] Norwegian Loans, supra n. 3, at 74-6 (dis. op. of Judge Basdevant), 92-5 (dis. Op. of Judge Read).

[15] Id., at 94-5 (dis. Op. of Judge Read); Interhandel, supra n. 3, at 58ff (sep. op. Judge Spender), 102 (dis. op. of Judge Lauterpacht); R. Jennings, supra, n. 5; J. Crawford, supra n. 5, at 1033.

of state sovereignty.[16] Refusal of Nemin to intervene in the proceedings indicates a tacit recognition of the domestic nature of the dispute.[17] As the determination was made in good faith, it should not be made subject to review by this Court.[18] Senhava is entitled to exempt itself from the compulsory jurisdiction of the court. The present dispute determined by Senhava is essentially within the domain of its national jurisdiction.[19] This Court therefore has no jurisdiction over the subject matter of the dispute.

2. Further, the Court's jurisdiction is also precluded by the multilateral treaty reservation.

The Court's jurisdiction only exists within the limits for which it has been accepted.[20] The multilateral treaty reservation was designed to expressly limit the extent of the Court's jurisdiction and as such should be allowed to serve its purpose.[21] Nemin, which is a party to all of the multilateral treaties and therefore potentially affected by this Court's decision, is not before the Court. The Court's jurisdiction is therefore precluded by the multilateral treaty reservation clause in Kuraca's declaration.

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[16] UN Charter, art. 2, para. 7; I. Brownlie, Principles of Public International Law 719 (4th ed. 1990); Conference on Security and Co-operation in Europe, (Helsinki Accords) Aug. 1, 1975, rep in 14 ILM 1292; V. Leary, When Does the Implementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State?-the Interactions of Art. 2(7), 55 and 56 of the UN Charter, in International Human Rights Law and Practice (James C. Tuttle ed. 1978).

[17] Comp., ¶ 11.

[18] Norwegian Loans, supra n.3, at 94-95 (dis. op. of Judge Read).

[19] Norwegian Loans, id.; J. Crawford, supra n.5, at 11.

[20] Fisheries Jurisdiction (Spa. V. Can.), 1988 ICJ 668; East Timor (Port. V. Aust.) 1995 ICJ 268.

[21] Military and Paramilitary Activities In and Against Nicaragua, (Nicar. V. US), 1986 ICJ 14, 98 (dis. op. Judge Schwebel); Congressional Record, 79th Congress, 2nd Sess., Vol. 92, 10618.

II. MEGACEUTICAL'S ACTION IN NOT CONTINUING WITH ITS CONTEMPLATED VACCINE WORK HAS NO JUSTIFICATION UNDER INTERNATIONAL LAW.

A. There Are No Conventional International Obligations Binding On Senhava Pertaining To The Vaccine Trials.

The pacta tertiis rule protects non-parties to a treaty from having a treaty imposed on them.[22] Senhava is not a party to the ICPR;[23] therefore, Senhava is not bound by its terms. Kuraca may contend that Art. 7 is a 'generally accepted international law', but the provision is not applicable to this dispute since it is not the intention of the provision to exclude genuine medical experiments.[24] Senhava's signature on the Convention on Human Rights and Biomedicine (CHRB) only obligates it to 'refrain from acts calculated to frustrate the objects of the treaty'.[25] The Convention explicitly requires ratification for binding effect.[26] Thus, Senhava's signature to it does not establish Senhava's consent to be bound by it.[27] To bind Senhava without her consent would impose an illegal limitation upon Senhava's rights as a sovereign state.[28]

B. There are No Customary Rules Of International Law Binding On Senhava With Regard To This Dispute.

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[22] VCLT, art. 34, supra n. 3; Free Zones of Upper Savoy and the District of Gex (Switz. v. Fr.), 1932 PCIJ (ser. A/B), no 46; M. Shaw, International Law 652 (4th Ed. 1997).

[23] Comp., ¶ 3.

[24] Z. Nedjati, Human Rights Under the European Convention 63 (1978).

[25] I. Brownlie, supra n. 16; 606-7 (3rd. Ed. 1979); see also VCLT, supra n. 3, at art. 18.

[26] Convention For The Protection Of Human Rights and Dignity of The Human Being With Regard To The Application of Biology and Medicine, opened for signature Apr. 4, 1997, art. 33, ETS No. 164 [hereinafter CHRB].

[27] VCLT, supra n. 3, art. 18; I. Brownlie, supra n. 16, at 606.

[28] Island of Palmas (US v. Neth.), 11 RIAA 829 (1928): SS Lotus, supra n. 11.

1. There is no consistent state practice and opinio juris pertaining to the level of protection for human subject.

Since there is no conventional obligation binding on Senhava with regard to this dispute, this Court must look to customary international law to determine the existence of any international obligation. States may become bound by customary international law if there is evidence of both a common practice among states as well as state's conviction that this practice is rendered obligatory by the existence of law requiring it.[29] According to actual practice of states regarding the protection given to human subjects, Kuraca cannot bear its burden of demonstrating the existence of customary rules of international law in this area.[30]

Legal provisions are not frequently invoked as a source of protection for human subjects in medical experiments, it being widely accepted until today to be largely based on ethical codes of conduct. They are 'recommendations', acting as a 'guide',[31] their observance 'voluntary and not legally enforceable'.[32] This factor poses a formidable obstacle to the transformation of the codes into rules of customary international law.[33] This is because 'voluntary guidelines followed by compromises could not lead to the creation of customary

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[29] Statute, supra n. 2, art. 38 para 1 (b); North Sea Continental Shelf, 1969 ICJ 41 (Feb. 20); Military and Paramilitary Activities in and against Nicaragua, supra n. 21.

[30] Brownlie, supra n. 16, 6-10.

[31] World Medical Association, Declaration of Helsinki, (Comp. Annex B); Nuremberg Code (1947), (Comp. Annex A).

[32] British Medical Association, Medicine Betrayed: The Participation of Doctors in Human Rights Abuses: Report of a Working Party 12 (19xx)

[33] H.W. Baade, The Legal Effects of Codes of Conduct for MNEs in Transnational Corporations: Codes of Conduct 251 (A. Fatouros ed., 1994)

international law as the [Codes] do not purport to be... law by ...states'.[34]

Efforts at national and international levels in this field have remained restricted to a particular geographical area or incomplete because of their focus on a particular topic.[35] Adoption of even the ethical codes of conduct is rare in developing countries.[36] There is no legal framework in the United Kingdom that deals with medical research and experimentation. Instead, there are a number of non-binding guidelines formulated by a variety of bodies covering different aspects of this topic.[37] Similar situation prevails in many other countries.[38] There is also no legal framework for bio-medical research in Thailand, the first country in the world to launch a large-scale AIDS vaccine

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[34] Statement of the Representative of the United States at a Meeting of the OECD Council, July, 1977 reproduced in H.W.Baade, id; see also U.N.Doc.TD/B/C.6/AC.1/3/, at 2 (19750 (Brazil's reply to proposed code of conduct on transfer of technology); A. Fatouros, On the Implementation of International Codes of Conduct: An Analysis of Future Experience, in Transnational Corporations (A. Fatouros, ed. 1994).

[35] Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine:Convention on Human Rights and Biomedicine, reprinted (1998) 5 IHRR 266 [hereinafter the Explanatory Report].

[36] B. Bloom, The Highest Attainable Standard: Ethical Issues in AIDS Vaccines, 279 Science 186.

[37] Royal College of Physicians of London, Research Involving Patients; Medical Research Council, Responsibility in Investigations on Human Participations and Material and on Personal Information (1992).

[38] Canada: Medical Research Council of Canada, Natural Sciences and Engineering Research Council of Canada and Social Sciences and Humanities Research Council of Canada, Code of Ethical Conduct For Research Involving Human Beings; Greece: Code on Deontology and Code on Practice of Medicine; San Marino: Charter of Patients' Rights and Duties; Swiss Academy of Medical Sciences Guidelines; Poland: (1992) Bull Inst. Med. Eth. No. 82, 13.

trial, as well as many other countries where similar trial are currently being conducted.[39]

2. There are no provisions in the CHRB, which have risen to the level of customary international law.[40]

The Biomedicine Convention only recently entered force. Although time is not a bar to the absorption of a treaty into customary international law, a few months hardly allows time for extensive and virtually uniform state practice to develop.[41] Thus, the provisions contained within CHRB are not binding customary international law.

C. Senhava has the sovereign right to determine the level of protection given to human subjects the vaccine trials.

In the absence of international rules or principles governing the Level of protection to be given to human subjects, it must follow that these standards are to be determined solely by reference to Senhava's municipal laws and regulations, under the principle of state sovereignty.[42]

D. Arguendo the CHRB is applicable, the conduct of the vaccine trials complies with its terms.

Art. 26[43] of CHRB provide that restriction may be placed on the exercise of the rights and protective provisions contained in the

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[39] Thailand: From 'Guinea Pig' Fears to Phase III Trial: An Interview With Nath Bhamarapravati, International AIDS Vaccine Initiative Report:Newsletter on International AIDS Vaccine Research,March 1999 <http://www.iavi.org/newpage/ireport.html> [hereinafter IAVI]; Uganda: Long Rocky Path To Africa's First HIV Vaccine Trials: An Interview with Roy Mugerwa, IAVI Sept-Oct 1999; Brazil: The Ebbs and Flows of AIDS Vaccine Trials: An Interview with Dirceau Greco, IAVI March 1999; Suman Ragunathan, India Launches AIDS Vaccine Program, IAVI Apr.-June 1999; Conducting AIDS Research in Kenya: An Interview with Omu Anzak, IAVI Jan.-March 1995.

[40] Vienna Convention, supra n. 3, at art. 38.

[41] North Sea Continental Shelf, supra n. 29

[42] Lotus, supra n. 11.

[43] supra, n. 26

Convention. The protection of public health is specifically mentioned as a ground on which a limitation may validly be imposed.[44] The seriousness of the MHVD disease in Senhava, as evidenced by the declaration of public health emergency by the Senhavan government,[45] justifies the restrictions on the rights guaranteed under the Convention.

The restrictions imposed did not go beyond what is necessary to achieve the purpose of the derogation. The human subject would have incurred minimal risk far outweighed by the potential benefits of the research to the international community.[46] Consent as provided under Art. 5 was to be given expressly, specifically and documented.[47] The human subjects would have been informed of the purpose, nature, consequences and the risks of the trials.[48] The research project has already been approved by the authority responsible for overseeing medical practice in Senhava i.e. the Ministry of Health.[49] Even were the CHRB applicable, the conduct of the vaccine trials would have complied with its terms.

III. KURACA'S EXTRATERRITORIAL APPLICATION OF LAWS INFRINGES INTERNATIONAL LAW.

A. Senhava Has the Right to Prescribe Jurisdiction over the MHVD Vaccine Programme.

Senhava's exertion of jurisdiction on Megaceautical-Senhava accords to the established principles of international law.

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[44] supra, para 1, n. 26

[45] Comp., ¶ 30.

[46] CHRB, art. 16 para. ii, supra n. 26; Comp. ¶ 6, 13.

[47] CHRB, art. 16 para. v, Id n. 26; Comp., ¶ 20.

[48] CHRB, art. 5, id n. 26; Comp., id.

[49] CHRB, art. 16 para. iii, supra n. 26; Comp. ¶ 15.

Megaceutical-Senhava lies within the territorial jurisdiction of Senhava[50] as it is located in Senhava and all of her operations are in Senhava.[51] Furthermore, Megaceutical-Senhava, as a company incorporated in Senhava, acquires Senhavan nationality[52] and thus lies within the national jurisdiction of Senhava.[53] Arguendo there is an absence of legislation regulating medical experiments in Senhava, it does not, of itself allow Kuraca to step in to apply its own laws extraterritorially to that activity.[54] It is for Senhava to decide how far it wishes to legislate with regard to persons within its jurisdiction.[55]

B. Extraterritorial Effects Of Health Law 1006 Is A Breach Of Customary International Law.

Kuraca cannot justify her acts of interference in the domestic matter of Senhava by actions done within her state. Consequences flowing directly from the enforcement of Kuraca's law on Megaceutical Corporation are still considered as the extraterritorial application of the law.[56] Furthermore, the direction from Megaceutical to Megaceutical-

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[50] I. Brownlie, supra n. 16; M. Shaw, supra n. 22; G. Schwartzenberger & E. Brown, A Manual of International Law 72-78 (1976); Schooner Exchange v McFaddon, 11 US (7 Cranch) 116, 136 (1812); A. Lowe, Public International Law And The Conflict Of Laws: The European Response To The United States Export Administration Regulations 33 ICLQ 517 (1984); Barcelona Traction, Light and Power Co. Ltd, 1970 ICJ 4 [hereinafter Barcelona Traction].

[51] Comp., ¶ 7.

[52] Barcelona Traction , supra n. 50

[53] Sumitomo Inc. v Avagliano, 456 US 176 (1982); Compagnie Europeene Des Petroles S. A. v Sensor Nederland B. V. ; (Dist. Ct., The Hague), reprinted in 22 ILM 66 (1983).

[54] A. Lowe, The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution 34 ICLQ 738 (1985).

[55] Note No.187, 25 August 1977, to the US Department of State, rep. in Lowe, Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials 147 (1983).

Senhava is invalid since it is not made in the best interest of the subsidiary.[57] The order from Kuraca through Megaceutical is also nullified by the order of the Senhavan government, as Megaceutical-Senhava is obliged to obey the command of its sovereign.[58]

1. Kuraca's Exercise of Jurisdiction Over Megaceutical-Senhava Through Megaceutical Corp. Is A Breach Of Customary International Law.

The burden is on Kuraca to prove that international law permits the exercise of jurisdiction over foreign companies based on control.[59] The United States' attempt to claim jurisdiction over foreign companies controlled by its nationals under the Export Administration Act and the Trading with the Enemy Act was met with severe criticism from states,[60] municipal courts[61] and publicists.[62] Such exercise of jurisdiction is invalid under international law.

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[56] A. Lowe, supra n. 54; § 418, Comment a, Tentative Draft No. 2 of the Foreign Relations Law of the United States, 585-587, Vol. 1 (1922); A. Lowe, The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and a Search for a Solution, 34 ICLQ 724, 725; Note No. 187, 25 August 1977 to the US Department of the State; A. Lowe, supra n. 55.

[57] Fruehauf v. Massardy, ILM, 476.

[58] Mann, Further Studies in International Law 46 (1990)

[59] Fisheries (UK v. Nor.), 1951 ICJ 116; Nottebohm (Liech. V. Guat.), 1955 ICJ 4; F. Mann, The Doctrine of International Jurisdiction, 189 Hag R 35 (1984, 3); I. Brownlie, supra n. 16, at 307 (1990).

[60] European Communities, Comments on the US Regulation Concerning Trade with USSR, rep. in 21 ILM 851 (1982); European Communities Comments on the Amendments of 22 1982 to the Export Administration Act, (1982) XX ILM 891; Letter by the Congressional Committee, 13 March 1984, rep. in A. Lowe & C. Warbrick, Extraterritorial Jurisdiction and Extradition, 36 ICLQ 339 (1987); A. Lowe, supra n. 50, at 515-529; EC aide memoire on 14 March 1983, rep. in A. Lowe, Extraterritorial Jurisdiction 215 (1983); UK Note to the US dated 18 Oct 1982 53 BYBIL 453 (1982); Note No.187, 25 August 1977, to the US Department of State, supra n. 55; A. Lowe, supra n. 54.

[61] Compagnie Europeene Des Petroles S. A. v Sensor Nederland B. V, supra n. 53.

2. Kuraca's exercise of jurisdiction is not founded on any valid basis for jurisdiction.

In order for Kuraca's exercise of jurisdiction to be valid, it must be founded on at least one of the grounds of prescribing jurisdiction. However, Kuraca cannot exercise territorial jurisdiction over Megaceutical-Senhava as it is located and operates in Senhava[63]. Secondly, the nationality principle is inapplicable as Megaceutical-Senhava is of Senhavan nationality[64]. Thirdly, the MHVD vaccine programme will not affect any Kuracan nationals since the subjects of the experiments are all of Senhavan nationality. Hence, Kuraca cannot claim jurisdiction based on the passive personality[65]. Furthermore, Kuraca cannot exercise jurisdiction based on the effects doctrine as the trials will not have any substantial effect on Kuraca.[66] The protective principle is inapplicable as the conduct of the trials are

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[62] Mann, supra n. 50, at 41-2; Extraterritorial Application of the Export Administration Act 1979 Under American and International Law, 81 Mich. LR, 1318-1336, (1982-83).

[63] Proposed text of the Draft Code of Conduct on Transnational Corporations, art. 56, UNCTC, United Nations Document E/1990/1994, Annex, at 3-18; L. Oppenheim, International Law 286 (H.Lauterpacht ed., 8th ed., 1955); Schooner Exchange v Mcfaddon, supra n. 50; Sec 402(a), American Law Institute, Restatement (Third) of Foreign Relations Law of the United States, § 402(a), (1986) [hereinafter Third Restatement]; O. Schachter, International Law in Theory and Practice 254 (19xx); L. Henkin, International Law: Politics and Values, supra n. 16, 424, (1995);M. Whiteman, Digest of International Law, 183-186 (1965).

[64] Barcelona Traction, supra n. 50; I. Brownlie, supra n. 16, at 380; Compagnie Europeene Des Petroles S. A. v Sensor Nederland B. V., supra n. 53; Sumitomo Inc. v Avagliano, supra n. 53.

[65] M. Shaw, supra n. 22, at 467; L. Henkin, supra n. 63, at 239; W. Levi, Contemporary International Law 145, (1991); Brownlie, supra n. 16, at 303; Starke, International Law 210 (I. Shearer ed., 1994)); O. Schachter, supra n. 63, at 254.

[66] Third Restatement, supra n. 63, § 402(c); M. Shaw, supra n. 22, at 484; L. Henkin, supra n. 63, at 241; U.S v Aluminium Co. of America, 148 F.2d 416 (1945); Timberlane Lumber Co. v Bank of America, 549 F.2d 597 (1976); Mannington Mills v Congoleum Corporation, 595 F.2d 1287 (1979).

not prejudicial to the security of Kuraca.[67] Lastly, the MHVD vaccine trials are not a matter within the universal jurisdiction of all states because they do not constitute any breach of obligations owed erga omnes.[68] Hence, Kuraca's exercise of extra-territorial jurisdiction is not founded on any of the universally accepted or even the more controversial basis of prescribing jurisdiction.[69] It is, therefore, a clear breach of international law.

3. Exercising jurisdiction through ownership or control is against the principle of separate legal entity between parent and subsidiary companies.

As laid down in the Barcelona Traction case[70] and various municipal decisions,[71] Megaceutical-Senhava is an entity entirely separated from its parent company, Megaceutical Corporation. Asserting jurisdiction through ownership or control is a violation of this principle. The treatment of subsidiaries and parent company as one entity has been rejected by state practice,[72] writings of

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[67] W. Levi, supra n. 65, at 146; M. Shaw, supra n. 22, at 468;I Brownlie, supra n. 16, at 300; L. Henkin, supra n. 63, at 238; O. Schachter, supra n. 63, at 254; Third Restatement, supra n. 63, § 402(3); Joyce v. DPP, [1946] AC 347..

[68] O. Schachter, id.; W. Levi, supra n. 65, at 147; L. Henkin, supra n. 63, at 240; Brownlie, supra n. 16, at 304; Yunis V. Yunis (1991) 30 ILM 403; Attorney General of Israel v. Eichmann (1961) 36 ILR 5(Dist. Ct. of Jerusalem); L. Oppenheim, International Law 420-421 (Jennings ed., 9th ed. 1992).

[69] European Communities Comments on the Ammendments of 22 1982 to the Export Administration Act, supra n. 60; A.V.Lowe, Blocking Extraterritorial Jurisdiction-The British Protection of Trading Interests Act 1980 75 AJIL 257 (1982).

[70] Barcelona Traction, supra n. 50.

[71] Salomon v. Salomon Co. Ltd [1897] AC 22; Macaura v. Northern Assurance Co. Ltd [1925] AC 619; Foss v. Harbottle (1843) 2 Hare 461; 67 ER 189; Lee v. Lee's Air Farming Ltd [1961] AC 12.

[72] European Communities: Comments on the US Regulations Concerning Trade with the USSR, supra n. 60; A. Neale, The Antitrust Trust Laws of the

publicists[73] as well as decided cases.[74] Furthermore, there is no evidence from the facts that Megaceutical has exercised any more than policy control to warrant the piercing of the corporate veil.[75]

4. Kuraca's exercise of jurisdiction would be unreasonable.

Arguendo Kuraca has a right to prescribe jurisdiction according to the principle of reasonableness or balance of interest, it should still not exercise as it is unreasonable for it to do so.[76] The unreasonableness occur from the fact that:

a. The experiments are essentially within Senhava's domestic jurisdiction.

United States of America 365-72 (2nd ed., 1970); Note 174, from the UK Government to the US Department of the State, 4 Sept. 1981; Australian Note to the US Department of the State 23 May 1983; A. Lowe, Extraterritorial Jurisdiction 214 (1983).

[73] P. Blumbergh, Multinational Challenge to Corporation Law: The Search for a New Corporate Personality 94 (1993); A. Lowe, supra n. 50, at 528.

[74] Sumitomo Inc. v Avagliano, supra n. 53; Sumitomo Shoji America Inc. v Avagliano XXII ILM 629(1982); Fruhauf case ILM 476 (1966); Compagnie Europeene Des Petroles S. A. v Sensor Nederland B. supra n. 53; Bank of Tokyo Ltd. v Karoon [1981] AC 45; Adams v Cape Industries PLC Ch 433, 532-9 [1990].

[75] P. Muchlinski, Multinational Enterprises and the Law, at 327; P. Blumberg, supra n. 73, at 94, n. 73; United States v Watchmakers of Switz Information Centre Inc, 133 F. Supp. 40 (S.D. N.Y.), Cannon Manufacturing Co v Cudaby Packing Co, 267 US 333, 337 (1925).

[76] Third Restatement, §. 403 (1), supra n. 63; Foreign Non-disclosure Laws and Domestic Discovery Orders in Antitrust Litigation,88 Yale LJ, 612 (1979); In Re Westinghouse Uranium Contracts Litigation, 563 F. 2d 992 (1977); I. Brownlie, supra n. 16; Barcelona Traction, supra n. 4, at 150 (sep. op. Judge Fitzmaurice); H. Maier, Jurisdictional Rules in Customary International Law, in Extraterritorial Jurisdiction in Theory and Practice 72 (1996); Annex 2, OECD Declaration on International Investments and Multinational Enterprises: 1991 Review, 101-120 (1992); O. Schachter, supra n. 63, 258-261; Mann, supra n. 58, at 12-13; L. Henkin, supra n. 63, at 242-246; I. Brownlie, supra n. 16, at 310; A. Lowe, supra n. 54, at 740.

International law prohibits Kuraca from exercising jurisdiction over a matter within another state's essential domestic jurisdiction.[77] Since the vaccine trials are within Senhava's essential domestic jurisdiction, Kuraca could not exercise extraterritorial jurisdiction over it.

b. Kuraca's exercise of jurisdiction would force Megaceutical-Senhava to act against the laws and policies of Senhava.

Kuraca's exercise of jurisdiction is unreasonable, as it would force Megaceutical-Senhava to violate the order of the Senhavan Government under the public health emergency legislation.[78] Moreover, it forces Megaceutical-Senhava to act against the policy of the Senhavan government to find a cure for MHVD.[79]

c. Kuraca has no substantial connection with the experiments.

Customary international law requires that Kuraca has substantial connection over the trials before it could exercise extraterritorial jurisdiction over the trials.[80] Kuraca has to prove more than mere ordinary interest in the trials to establish substantial connection that justifies its interference in Senhava's domestic matter.[81] Kuraca

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[77] I. Brownlie, supra n. 16, at 310; R. Muse, A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act, George Washington JILE 224, (1990); Buck v Attorney General, [1965] Ch 745, 770-2 (per Lord Diplock); British Aide-Memoire to the Commission of European Communities, 20 Oct 1969, rep. in British Practice, 58 (1968).

[78] Brownlie, supra n. 16, at 310; Mann, supra n. 58; Third Restatement, § 414, Comment d, supra n. 63, at 272.

[79] A. Lowe, supra n. 54, at 738. Societe Internationale v Rogers, 357 US 197 (1958); In Re Westinghouse Uranium Contracts Litigation 563, supra n. 76.

[80] Brownlie, supra n. 16; Mann, id. ; Third Restatement, supra n. 63 § 403(2)(a), supra n. 10; F. Mann, supra n. 58; Jennings, 121 Hag R 515 (1967, II);

[81] McDougal III, Codification of Choice of Law 5 Tul. L Rev 114, 131-32 (1980); H. Maier, Interest Balancing and Extraterritorial Jurisdiction 3 Am. JCL 579, 585 (1983); F. Mann, supra n. 58.

has no such connection to justify its assertion of jurisdiction. The experiments are carried out by a Senhavan company on Senhavan subjects wholly within Senhava's territory. Thus, Kuraca cannot exercise extraterritorial jurisdiction over it.

d. Kuraca's claim to jurisdiction constitutes an unreasonable demand of special treatment on Kuracan nationals.

Under the Treaty of Amity and Commerce,[82] Senhava is obliged to treat a Kuracan national upon the same terms and conditions as its own national. However, Kuraca's claim to jurisdiction cannot be reconciled with claims of national treatment of Kuracan investment abroad.[83] If Megaceutical-Senhava is to be subjected to the Kuraca health laws, then the foreign investors in the Megaceutical-Senhava is not being treated as favourably as nationals, whose companies, not being subjected to the Kuracan health laws, are not denied the permission to conduct the trials. Investors of other nationalities in Megaceutical-Senhava will object to the denial of business opportunities, as will Senhava, which is concerned about the effects of such constraints on Megaceutical-Senhava's capacity to act as employer, tax payer and foreign currency earner.[84] Kuraca's claim to jurisdiction would have an adverse effect on investments by Kuracan company in Senhava.[85]

Thus, considering all these factors, Kuraca exercise of jurisdiction over the trials would be unreasonable and therefore unlawful under customary international law.

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[82] Comp., ¶ 3.

[83] EC Aide Memoire on 14 March 1983, supra n. 60; A. Lowe, supra n. 50, at 528; Australian Note to the US Department of States, dated 23 May 1983.

[84] A. Lowe, supra, n. 50.

[85] EC Aide Memoire on 14 March 1983, supra n. 60; Australian Note to the U.S Department of States, dated 23 May 1983, supra n. 72.

IV. KURACA HAS NO STANDING IN THE DISPUTE CONCERNING GEORGE SMITH

A. George Smith has not exhausted local remedies.

It is an 'important principle of customary international law,'[86] that before international proceedings are instituted, the various remedies, 'administrative, arbitral or judicial,'[87] provided by the local state should have been exhausted.[88] Such a provision also appears in all the international and regional human rights instruments.[89] This is to enable the particular state to have an opportunity to redress the wrong that has occurred within its own legal order thereby reducing the number of international claims that can be brought. By not pre-empting the operation of their legal system, respect is thus accorded to the

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[86] Elettronica Sicula S.p.A., (Italy v. US), 1959 ICJ 15, 42.

[87] 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Draft art. 19, 55 AJIL 577 (1961).

[88] ILC Draft Articles on State Responsibility, art. 22, ILC's 1996 Report, GAOR, 51st Sess., Supp. 10, 125; R. Ago, Sixth Report on State Responsibility, 2 YBILC 1, 40-1 [1977]; Mavrommatis Palestine Concessions (Gr. V. UK), 1924 PCIJ (ser. A), No. 2, 12; Interhandel, supra n. 3; Ambatielos (Gre. V. UK) 12 RIAA 83 (1956); Heathrow Airport User Charges Arbitration 102 ILR 215, 277 et seq.; Rules Regarding International Claims (British Foreign and Commonwealth Office), rule VII, 37 ICLQ 1006 (1988); D. Harris, Cases and Materials on International Law 617 et seq. (5th ed. 1998); T. Meron, Human Rights and Humanitarian Norms as Customary Law 171 et seq. (1991); Briggs, Interhandel, The Court's Judgment of March 21, 1959, On The Preliminary Objections of the United States, 53 AJIL 547, 560-3 (1959).

[89] International Covenant on Civil and Political Rights, opened for signature, Dec. 16, 1966, UNGA Res. 2220 (XXI), 21 UN GAOR, Supp. (No. 16) 49, UN Doc. A/6316 (1967),arts. 41(c), 2 [hereinafter ICCPR]; European Convention on Human Rights and Fundamental Freedom opened for signature, Dec. 16, 1966, 999 UNTS 3, art. 26 [hereinafter EHR]; African Charter on Human Rights opened for signature June 26 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, art. 50 [hereinafter AFR]; ECOSOC resolution 1503, UNESCO decision 104 EX/3.3, 1978, para. 14 (IX); AE v. Switzerland, CAT/C/14/D/24/1995; de Zayas, Moller, Opsahl, Application Of The International Covenant of Civil and Political Rights Under The Optional Protocol By The Human Rights Committee 28 Ger. YBIL 9, 24 (1985).

sovereignty and jurisdiction of the foreign state.[90] Logically, reference to this Court must not proceed until the highest Senhavan court has ruled on the matter.[91] Kuraca has not sought a remedy in Senhavan courts.

Neither of the two situations where the insistence on the exhaustion of local remedies is generally excepted; where such exhaustion would be unreasonably prolonged or where local remedies would be ineffective or unavailable,[92] apply. There is no indication that the Senhavan courts would not give full regard to customary international principles in reviewing the needs of George Smith or that the courts would unreasonably prolong such review. If claims could be brought on behalf of individuals after they assert violations and before the state responsible had a chance to rectify it, it would tax the international system as well as proving vexatious. Consequently, the Honorable Court should hold the dispute concerning George Smith to be inadmissible for failure of Kuraca to prove that there are no effective remedies to which recourse can be had.[93]

B. The absence of a breach of an obligation owed by Senhava to Kuraca prevents Kuraca's standing in this dispute.

A state must posses jus standii in order to present a dispute before this Honorable Court, in accordance with art. 37 of the Court's Statute. Generally, this requires a state to have a legal interest in

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[90] M. Shaw, supra n. 22; Karl Doehring, Exhaustion of Local Remedies, in 1 EPIL 137 (R. Bernhardt ed. 1987).

[91] Salem (Egypt v. US) 2 RIAA 1161 (1932); Lawless 4 YBECHR 302, 322 (1961); Retimag 4 YBECHR 385, 400 (1961); Nielsen 4 YBECHR 414, 438 (1959); Electricity Company of Sofia [1939] PCIJ (ser. A/B) no. 77, 81.

[92] Finnish Ships Arbitration (Fin. V. GB) 3 RIAA 1479 (1934); Panevezys-Saldutiskis Railway PCIJ (ser. A/B), no. 78, 18 (1939); Third Restatement, supra n. 63; Whiteman, 5 Digest 82.

[93] Norwegian Loans, supra n. 3, 39 (sep. op. by Judge Lauterpacht).

the dispute.[94] A right to vindicate an act by another state must derive from either a treaty obligation, an interest capable of diplomatic protection, or an obligation erga omnes, none of which are applicable to the present case.

1. No international instruments exist which grant Kuraca standing.

This Court has jurisdiction under art. 36 (1) of it's Statute in all cases referred to it by parties, regarding all matters specially provided for in the UN Charter or in treaties or conventions in force. However, no such treaty between Senhava and Kuraca exists. Although both are members of the UN, Senhava has not breached any obligations found in the Charter. Without a mutual instrument setting out Kuraca's legal interest in this dispute, Kuraca has no standing to art. 36(1).

2. No rules of customary international law exist which grant Kuraca standing in this dispute.

As Kuraca failed to obtain redress through international instruments, it must seek jus standii in more general customary international rules. Only an individual's state of nationality may offer diplomatic protection of that individual's interest[95]. George Smith has not been conferred Kuracan nationality.

The only exception allowing a state to sue another state on behalf of persons who are nationals of neither requires the breach of

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[94] O. Schachter, supra n. 63; L. Henkin et al., International Law: Cases and Materials 526-30 (2nd ed. 1987).

[95] Shaw, supra n. 22, at 563; Harris, supra n. 88; Penevezys-Saldutiskis Railway (Est. V. Lith.) 1939 PCIJ, Ser. A/B, No. 76; Mavrommatis Palestine Concessions, supra n. 88 at 12; L. Oppenheim, International Law 512 (1992); O' Connell, supra n. 68, at 1032, 1033 (1970); Warbrick, UK Rules Applying to International Claims 37 ICLQ 1006; Sinclair, Nationality of Claims: British Practice 27 BYBIL 125-44 (1950); Van Panhuys, The Role of Nationality and Diplomatic Protection 86 (1959); C. Joseph, Nationality and Diplomatic Protection 31 (1969); Hurst, Nationality of Claims 7 BYBIL 182 (1969).

obligatio erga omnes.[96] This Court has never based the standing of an otherwise disinterested state on the enforcement of obligation erga omnes.[97] Kuraca lacks the necessary standing, as it has no rights or interests of its own in this dispute that has been materially affected.[98]

Furthermore, erga omnes obligation implies conduct far different from the facts of this dispute. None of the claims made by Kuraca suggests acts that rise to the level recognized by this Court in Barcelona Traction[99] for example slavery, genocide, etc. Any expanded definition would discourage many states from accepting this Court's compulsory jurisdiction and would be vulnerable to abuse by states capriciously seeking political advantage.

In the absence of an erga omnes obligation, there must be a close link connecting the state attempting to redress for the injury and the allegedly injured individual.[100] Kuraca had no connection with George Smith, other than that he was employed in the Kuracan government

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[96] Barcelona Traction, Light and Power, supra n. 50; Thirlway, Law and Procedure of the ICJ 1960-1989 60 BYBIL 4, 92 ff. (1989); Graefarth, Responsibility and Damages Caused 85 Hag R 19, 52 (1984, 2).

[97] South West Africa (Eth. V. S. Afr.; Lib. V. S. Afr.)1966 ICJ 4,22; Nuclear Tests (Austl. V. Fr.; NZ v. Fr.) 1974 ICJ 253, 424; Barcelona Traction, id., at 327; Schachter, supra n. , 208.

[98] South West Africa (Eth. V. S. Afr.; Lib. V. S. Afr.) 1962 ICJ 6, 104 (dis. op. of Pres. Winiarski), 166 (joint dis. op. Judges Spender and Fitzmaurice)(Dec. 21); Gray, Judicial Remedies in International Law 211-5 (1990).

[99] id. 32; Graefarth, supra n. 96, at 56-7; Meron, supra n. 88, at 5-13; Simma & Alston, The Sources of Human Rights: Custom, Jus Cogens, and General Principles 12 Aust. YBIL 82, 103.

[100] Nottebohm supra n. 59; R. Wallace, International Law; A Student Introduction 170 (1986).

regulatory process, much less one so great that he could be said to have a connection with Kuraca greater than that with Nemin.[101]

The breadth of diplomatic protection must be limited to lessen the chance of its abuse and to strengthen the boundaries of consent, sovereignty, and standing defined by principles of customary international law.[102] An obligation of some sort owed by Senhava must be found to encroach these principles.

C. Senhava's Treatment of George Smith Is Warranted Due To Significant Concerns of National Security and Public Order.

No obligation has been breached by Senhava in this dispute. Human rights documents contain justification for derogation in cases of national security and maintenance of public order.[103] The threatened state has a sovereign right to take whatever measures in its territory necessary to ensure the safety of the community, whenever the safety, security or integrity of a state is threatened.[104] The MHVD epidemic qualifies as an emergency, which if uncontrolled would threaten Senhava's national security and public order.

The detention of George Smith has not been prolonged considering the circumstances. When learning that George Smith had been providing vaccine development documents to the Kuracan Government, Senhavan police detained him, informing him immediately of the reason for his arrest.[105] Senhava's continuous detention is justified, in light of the

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[101] Nottebohm, Id., at 24-6; Barcelona Traction, supra n. 50, 42; Leigh, Nationality and Diplomatic Protection 20 ICLQ 453 (1971); Cordova, 2 YBILC 42 (1954-II); Third Restatement, supra n. 63.

[102] O. Schachter, supra n. 63, at 208.

[103] UDHR, art. 29; EHR, arts. 15, 16, 17, 18; ACR, art. 27; ICPR, art. 4; ECR, art. 4.

[104] Ian Brownlie, International Law and the Use of Force by States 298-300 (1963).

[105] Comp., ¶ 25.

real danger that George Smith might abscond, that he might repeat the offence for which he is detained and that he might attempt to suppress evidence prejudicial to him. No restriction was imposed on his right to have the legality of his detention tested before the Senhavan courts, a right that he has not availed himself to during his detention.

V. KURACA IS BOUND TO AFFORD REPARATION TO SENHAVA UNDER THE PRINCIPLES OF STATE RESPONSIBILITY.

A. Under International Law, State Responsibility Stems From The Breach Of An International Obligation.

In order to establish that a State has committed an internationally wrongful act, the complaining state must show that the former has breached an international obligation and the breach is attributable to it.[106] As established earlier, Kuraca violated international law by promulgating laws and regulations to operate extraterritorially, and by putting obstacles to the conduct of MHVD vaccine trials in Senhava. Under international law, the act of an organ of a State shall be considered as an act of that state, whether the organ belongs to the constituent, legislative, executive or judicial or other power. Therefore, the illegal act of ordering that the vaccine work be halted is attributable to Kuraca although the wrongful act was committed by Its Government official.[107]

B. Kuraca Has A Duty under International Law to Afford Reparation to Senhava.

1. This Honorable Court must make a declaratory judgement in favor of Senhava.

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[106] Draft Articles on State Responsibility, Report of the ILC in the work of its Thirty-Second Session, art. 3, UN Doc. A/35/10 (1981); Amerasinghe, State Responsibility for Injuries to Aliens 39 (1967); E. Arechaga, International Responsibility, in Manual of Public International Law 534 (Sorensen ed., 1968).

[107] Id., art. 5.

It is trite law that declarations are a form of judicial remedy in international law.[108] In this case, this Honorable Court should declare to the effect that Kuraca violated international law by promulgating laws and regulations to operate extraterritorialy, violating Senhava's sovereign rights.

2. Kuraca has a duty to undo all the consequences of the wrongful act.

Since Kuraca has breached her international obligation, the appropriate form of reparation is the immediate cessation of such activities, restoration of the status quo ante, and undoing of all the consequences of the wrongful act.[109] Accordingly, Senhava requests that this Honorable Court order that Kuraca promptly remove all direct and indirect legal and governmental obstacle to the conduct of the MHVD vaccine trials as proposed in the research protocol that led to this controversy.

In the alternative, This Honorable Court should order that Kuraca remove obstacles to the development and trials of MHVD vaccine by Megaceutical-Senhava, Ltd., a Senhavan corporation.

3. Arguendo, Senhava is not entitled to the orders, that damages is the appropriate form of reparation.

The appropriate form of reparation is damages to compensate Senhava for public health expenses reasonably incurred because of failure to conduct vaccine trials in Senhava, including a percentage of the cost of treating future victims of the epidemic.

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[108] SS Lotus, supra n. 11; J. Arechaga, General Course in Public International Law, Hag R 217, 267 (1978, I); C. Gray, supra n. 98.

[109] Draft Articles on State Responsibility, Report of the ILC in the work of its Thirty-Sixth Session, art. 6, 2 YBILC, Part 1 (1984), UN Doc. A/CN. 4/380; Chorzow Factory (Indemnity), 1928 PCIJ (ser. A) no. 17, 47 [hereinafter Chorzow Factory]; US Diplomatic and Consular Staff in Tehran (US v. Iran) 1980 ICJ 3.

VI. CONCLUSION AND PRAYER FOR RELIEF.

Senhava respectfully prays that this Honorable Court:

1. **DECLARE** that this Court has no jurisdiction over the subject-matter of the dispute;
2. **DECLARE** that Kuraca violated international law by promulgating law and regulations to operate extraterritorially;
3. **ORDER** that Kuraca promptly remove all direct and indirect Kuracan legal and governmental obstacles to the conduct of MHVD vaccine trials in Senhava.
4. In the alternative, **AWARD** monetary damages to compensate Senhava for public health expenses reasonably incurred because of failure to conduct vaccine trials in Senhava, including a percentage of the cost of treating future victims of the MHVD epidemic.

Respectfully submitted,

Agents for Senhava

The 2000 Philip C. Jessup International Law Moot Court Competition

State of Kuraca

v.

Republic of Senhava

The Case Concerning the Vaccine Trials

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First Place
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