2000 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM

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I. INTRODUCTION

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with a basic outline of the factual and legal issues relevant to the 2000 Compromis. This memorandum is not intended to be an exhaustive or detailed discussion of the Compromis. It is primarily directed to those judges that have little or no experience with the substantive areas of law that are the subject of the Compromis. It is intended to give those judges a sufficient level of comprehension of the issues to allow them to evaluate the basic issues raised in a memorial (brief), and to ask relevant legal and factual questions of the competitors during oral argument.

As the memorandum is intended to give only a basic outline of the issues, it should not be surprising that a judge, in evaluating either a memorial or an oral argument, will encounter arguments and authorities that are not discussed in this memorandum. Obviously, the omission of those arguments and authorities from this memorandum does not make such arguments and authorities irrelevant *per se*. This memorandum is divided into two main sections – the competitors, however, may not argue the issues in this manner. The competitors should not be penalized if they choose to divide the issues different from this memorandum.

While there are a number of sub-issues which might be raised on these facts, the following questions **must** be addressed by the teams:

(1) Whether the Court lacks jurisdiction, and if so with respect to which issues?

(2) What are Kuraca's obligations under international law with respect to protection of human subjects of medical experimentation?

(3) Whether Kuraca's course of conduct breaches any of her international obligations with respect to Senhava?

(4) What are Senhava's obligations under international law with respect to protection of human subjects of medical experimentation?

(5) Whether Senhava's course of conduct breaches any of her international obligations, and, if so, is Senhava's conduct excusable on the grounds of conflicting obligations or public emergency?

The problem includes tangential issues, some of which are discussed *infra*. The teams should not be penalized for missing them or credited unduly for noticing them. Judges should regard unfavorably any issues raised by competitors that are remote from the fact pattern in the Compromis.

Citations: Some teams inevitably are at a disadvantage, as are some countries, with respect to access to well equipped law libraries. The issues in this Compromis are addressable with generally available materials and careful reading of the facts. The issues for the Court are legal, not medical. Although reference to bioethics literature may be useful, it is not essential in this context. References are of interest to the Court if they shed light on international law, international norms, or pertinent state practice. Each team should be familiar with the literature that it cites and with its relevance and strength as legal authority. The teams should not be rewarded merely for citing literature or penalized merely for not citing it. The teams should be candid about the existence of apparently adverse, significant authority.

The parties to this controversy share an interest in (a) resolving legal issues, and (b) addressing public health problems in light of human rights law. This is not a problem of balancing health against human rights; rather, the facts leave room for crafting creative approaches that reconcile health measures with human rights law.

II. JUDGING THE JESSUP COMPETITION

There are differing opinions as to the judge's role in a moot court competition. On the one hand, there are those who believe that a judge should do whatever is necessary to ensure that the competitors complete their entire presentation. At the other extreme are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions. There is no "correct" position on this issue. However, when judges ask questions sufficient to prevent the competitors from merely giving a rehearsed speech, many of those involved with the competition in the past agree that such an approach works well. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy passive benches – each judge must balance these two extremes.

Judges in the Jessup Competition play a different role than those in the real world. They do not indicate the determinations they have made in the form of opinions, but rather are there to assess the validity of the participant's arguments, the persuasiveness of their presentation and the thoroughness of their preparation. Judges are encouraged, however, to review the Statute of the Court prior to the competition to re-familiarize themselves with the basic jurisdictional and theoretical nature of that body.

The substantive rules of judging the Jessup Competition are set forth in the rules promulgated by the International Law Students Association, and, as they are available to judges through the ILSA office, shall not be repeated here. Judges must be familiar with these rules to avoid controversy during the competition. Judges are also asked to review these rules and the instructions provided with the Memorial Scoresheets or Oral Argument Scoresheets, as these contain an abbreviated list of general judging criteria upon which judges should formulate their opinions.

Judges are expected primarily to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition. Once the participants submit their memorials, the memorials may not be revised. As they advance through the competition, however, participants are sure to revise their argumentative style and legal presentation. It is important that judges in the oral rounds keep this fact in mind, as their questions and responses to the participants should be formulated so as to encourage that learning process.

There are certain tactics judges in the oral rounds can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. In these ways, a judge can make a meaningful contribution to a performance without being unduly intrusive.

A judge should refrain as much as possible from insisting upon an answer to a question when it appears as if a competitor has already made a good faith effort to respond. In the final analysis, however, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors. Just as there is no truly "correct" judging style in a courtroom there is no correct judging style in a moot court competition.

As concerns the legal arguments to be made by the competitors, it is important to keep in mind that the competitors choose neither the problem nor the side of the issue that they argue. In spite of every attempt to make the Compromis factually and legally equal between the parties, inevitably international law favors one side or the other. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, mis-cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

It appears that, in the past, judges who do not have a strong background in international law have hesitated to ask questions during the oral rounds for fear that such questions are too fundamental. It is important, however, to have those questions asked to ensure the competitors have an understanding of the fundamental issues and are not merely regurgitating memorized details. Further, in a real courtroom, it is often the case that a judge is not expert in the substantive law at issue. Pertinent fundamental questions are as appropriate as the more complex questions.

The following are some specific suggestions for questioning:

- Frequently utilize questions that call for a "yes" or "no" answer. The questions test a competitor's ability to answer directly, and the questions themselves tend to be shorter and more concise.

- Avoid asking rhetorical questions or making statements.

- Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.

- Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.

- Avoid detailed questioning about a co-counsel's argument. Each competitor should, at the beginning of their presentation, outline the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

- Avoid extensive questioning after time has expired, which requires in part being cognitive of the time elapsed for a particular presentation (which will be constantly updated by the courtroom bailiff).

- If there is a competitor in the round who is not a native English speaker, it is important to word questions carefully. It is especially important in these instances to avoid asking questions with overly complex sentence structures.

III. SOURCES OF INTERNATIONAL LAW

A. General

The International Court of Justice ("ICJ") may consider the following sources of international law in order to decide disputes before it:

> (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (2) international custom, as evidence of a general practice accepted as law;
>
> (3) the general principles of law recognized by civilized nations;
>
> (4) subject to the provisions of Article 59,[1] judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE ("ICJ Statute"), Art. 38(1)(a)-(d). There is some dispute among commentators as to whether these four sources of international law are listed in order of importance.

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[1] Article 59 provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case." ICJ Statute, Art. 59.

B. Treaties

Kuraca and Senhava both are parties to the Vienna Convention on the Law of Treaties. The Court must look to the Vienna Convention in considering their obligations under (a) treaties to which Kuraca, Senhava, or both are parties and which are in force; (b) treaties to which Kuraca, Senhava, or both are parties and which are pending entry into force; and (c) treaties to which neither Kuraca nor Senhava is a party. Kuraca and Senhava both are members of the United Nations; the U.N. Charter is binding upon them both. Similarly, both are members of the World Health Organization; ordinarily, any obligation flowing from W.H.O. membership and regulation is binding upon them both. Kuraca and Senhava are bound by their bilateral treaty of amity and commerce. Both are parties to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, which are all in force and potentially touch on substantive and procedural issues in this case.

Generally, treaties are not binding on non-parties. VIENNA CONVENTION ON THE LAW OF TREATIES, Art. 34. This is not necessarily dispositive, however; a treaty may become binding as customary international law. Id., Art. 38. With respect to treaties pending entry into force, the Vienna Convention provides, at Art. 18, that unless entry into force is "unduly delayed" a state "is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty." Thus both Kuraca and Senhava, having signed although not yet having ratified the recently developed Convention on Human Rights and Biomedicine, are obliged not to act in a way that would defeat its purposes--even though it is not in force. Of the several treaties involved here, the Convention on Human Rights and Biomedicine is the most directly and comprehensively on point with respect to the core controversy here. At the same time, the obligations under this treaty in these circumstances are to avoid acts contrary to the general intent, not necessarily the letter, of the law. Kuraca is a signatory, not yet a full party, and Senhava is a full party to the International Covenant and Economic, Social and Cultural Rights. Thus Kuraca is obliged to refrain from conduct contrary to its purposes. Kuraca is a party to the International Covenant on Civil and Political Rights, which Senhava has not signed. These instruments may be relevant not as treaties memorializing firm, formal obligations but insofar as they reflect customary international law or have jurisdictional implications.

C. Customary International Law

International custom is comprised of two elements–state practice and *opinio juris*. Military and Paramilitary Activities (*Nicar. v. U. S.*), 1986 I.C.J. ¶ 183 (June 27) (*citing* Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. ¶ 27). International custom may include *jus cogens*, peremptory norms of international law. Evidence of international custom may be in the form of "treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations." Mark E. Villiger, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985) (citation omitted).

State practice simply means that a sufficient number of states behave in a regular and repeated manner that establishes a customary norm. In this respect, the party asserting the existance of a rule of customary international law bears the burden of showing common and widespread practice among many developed and less-developed states that have adopted and enforce pertinent domestic legislation. *See North Seas Cases*, 1969 I.C.J. ¶ 75. State practice may also be evidenced by a sufficient number of States signing, ratifying, and acceding to a convention. CUSTOMARY INTERNATIONAL LAW AND TREATIES, *supra*, at 10. Similar provisions appearing in a variety of treaties might also evidence a customary norm.

The second element of customary international law, *opinio juris*, requires that the subject state action be taken out of a sense of *legal obligation*, as opposed to domestic expediency. Put another way, *opinio juris* is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." *Id.* at 26. By way of contrast, many nations have domestic taxation laws. However, it is clear that such laws were not adopted out of a sense of legal obligation. In other words, these laws would not evidence a customary norm requiring a nation to tax its citizenry.

In the *North Seas Cases,* the ICJ stated:

> There is no evidence that [the Parties] so acted because they felt legally compelled to draw [the boundary lines] in this way by reason of a rule of customary law – especially considering that they might have been motivated by other obvious factors.

North Seas Cases at ¶ 78.

IV. SYNOPSIS

Multivector Hepatic Viral Disease (MHVD) is a worldwide pandemic. It is present in Kuraca, an advanced industrial country, and is spreading at an alarming rate in Senhava, a less developed country. Megaceutical Corporation, a multinational entity headquartered in Kuraca, is the 49% owner of a subsidiary, Megaceutical-Senhava, Ltd., which operates entirely in Senhava.

Megaceutical has reported great progress in developing a vaccine against MHVD and through the Senhava subsidiary has conducted small-scale trials on people in Senhava. Megaceutical's principal scientific consultant for the vaccine program is Kuracan physician-scientist Maria Lopez-Yukawa. An early trial of one vaccine version showed substantial improvement and no ill effects in 28 of 30 MHVD-positive subjects but an unusual, disabling asthma developed in the other 2. She and Megaceutical proposed to accelerate the trials with a different variant of the experimental vaccine, the effects of which were not yet known. The trials would be conducted in Senhava, for reasons of cost and easy availability of test subjects. In return for Senhavan government permission, Megaceutical paid Euros 2,000,000 to the Senhavan Health Ministry. The Ministry agreed to permit the trials where they would reach persons believed to be at the greatest risk: in orphanages, prisons, maternal and child health clinics, and outer island villages. Senhavan national police were commissioned to provide transportation to the Megaceutical-Senhava personnel supervising the vaccine trials.

On ethical grounds, the ethics review board at Dr. Yukawa-Lopez's university, in Kuraca, ruled against the vaccine testing project. Ethical issues included vulnerability of the proposed study populations, the small likelihood that any "voluntary consent" would be fully informed, the use of placebos in areas where there was active disease, and the absence of an indigenous credible and reliable biomedical ethics review function in Senhava. Dr. Yukawa-Lopez thus withdrew from the project. As it had for all foreign subsidiaries of Kuracan drug companies, the Kuracan Medical Product Regulation Agency had contracted with a private, independent consultant to provide on-site reporting and advisory services with respect to Megaceutical-Senhava. In this case the consultant was a third-country citizen, George Smith, who reported to the agency that from an ethical point of view the study plan was flawed. A Kuracan government official warned Megaceutical against allowing the trials, and Megaceutical withdrew. Senhava arrested George Smith and took steps, including heavy fines, to compel Megaceutical-Senhava to proceed with the vaccine trials. Megaceutical-Senhava, controlled by its parent company, resisted.

V. JURISDICTION

A. Standing of Kuraca to Bring Claims on Behalf of George Smith and Megaceutical-Senhava, LTD.

1. Does Kuraca have standing to espouse the claims of George Smith?

According to para. 25 of the Compromis, George Smith has been taken into custody by Senhava without specific charges, without possibility of release on bail, and without the setting of a trial date. Kuraca has requested an order from the ICJ for his immediate release and the dropping of all charges against him.

a. Does Kuraca have a "genuine link" with George Smith?

Generally, a State can espouse the claim of an individual against a foreign state only where the former has a "genuine link" with the individual. The International Court of Justice (ICJ) has recognized that a State has sufficient links to its citizens provided they were born in, reside in, or pay taxes to the State. A State also has sufficient links with individuals who are members of the armed services or diplomatic agents of the State.

The leading ICJ decision on point is the 1955 *Nottebohm Case*, in which the Court denied Liechtenstein's attempt to espouse the claim of a German national who had been made a naturalized citizen of Liechtenstein because there was no "genuine connection of existence" or "bond of attachment" between Nottebohm and Liechtenstein in that he was not born in Liechtenstein, he did not reside nor intend to reside in Liechtenstein, he had no business interests or activities in Liechtenstein, and he did not pay taxes to the government of Liechtenstein.

George Smith is a contract employee of the Government of Kuraca, but he is a citizen of the Republic of Nemin, which has declined to intervene in this case. The question is whether Smith's

links to Kuraca (i.e., his government employment status) are sufficient for it to exercise diplomatic protection in this case.

b. In the Alternative, were the rights allegedly violated of an erga omnes nature, thereby giving rise to universal standing?

In *Barcelona Traction* (1970), the ICJ indicated that a State was entitled to espouse the claims of non-nationals amounting to the most serious violations of human rights. The ICJ listed as among the violations which would trigger this right of universal standing: crimes against peace, war crimes, crimes against humanity, piracy, and slavery.

The question is whether Smith's human rights claims are sufficient to trigger universal standing. It may be relevant in this context that all of the international human rights treaties permit derogation from due process rights in times of public emergency, but not from more important rights such as freedom from torture, extrajudicial execution, or discrimination.

The 1966 *South West Africa cases* may provide some guidance on the question of what rights rise to the level of erga omnes. In those cases, the ICJ held that Ethiopia and Liberia lacked standing to bring a claim against South Africa for its apartheid practices (including prolonged detention without due process) in South West Africa (now Namibia) which South Africa administered under a League of Nations mandate. On the other hand, this precedent may have been overtaken by a series of resolutions subsequently adopted by the U.N. General Assembly equating apartheid practices with crimes against humanity, which would therefore be subject to universal standing under the dicta of *Barcelona Traction.*

2. Does Kuraca have standing to espouse the claims of Megaceutical-Senhava, LTD?

Kuraca is seeking to espouse the claims of Megaceutical-Senhava, Ltd. In particular, according to Correction #4 to the Compromis, Kuraca seeks an order from the ICJ requiring Senhava (1) to rescind its order closing the offices of Megaceutical-Senhava, (2) to revoke the $50,000 per day fines it has assessed against the company, and (3) to return the 2 million (euro) advance payment Megaceutical made to the Senhava Ministry of Health.

As with individuals, a State has standing to espouse the claims of a corporation to which it has a "genuine link." Factors establishing a genuine link include the State where the company is incorporated, where the company has its registered office, where the company is listed as having paid taxes, where the company's board meetings are held, and the domicile of corporate management.

The leading ICJ case on point is *Barcelona Traction* (1970), in which the ICJ rejected Belgium's attempt to bring suit against Spain to recover damages for injuries suffered by Belgian nationals who were stockholders of a Corporation that was incorporated in Canada.

In the case at bar, Kuraca is attempting to bring claims on behalf of Megaceutical-Senhava, Ltd., a subsidiary of Megaceutical Corporation. Megaceutical-Senhava is incorporated in Senhava,

has its corporate office in Senhava, and the majority of its stockholders are Senhavan nationals. On the other hand, the nationality of those controlling Megaceutical-Senhava are Kuracan, and the parent corporation is incorporated and located in Kuraca.

B. Are Kuraca's Claims Ripe for ICJ Disposition?

1. Must the injured parties first exhaust local remedies?

Before proceedings may be instituted before the ICJ involving injury to a State's nationals in another State, the injured parties must show that they have exhausted local remedies. The ICJ has characterized this exhaustion requirement as an important principle of customary international law. The principle is related to the domestic concept of ripeness, since in theory no international wrong has occurred until the actions complained of have been affirmed by the State's courts.

The leading ICJ case on point is the *Interhandel Case* (1959), in which Switzerland had brought a claim before the ICJ on behalf of a Swiss corporation, whose assets in the U.S. had been confiscated by the U.S. Government in 1942 as German assets pursuant to the Trading with the Enemy Act. The U.S. District Court had dismissed the corporation's complaint, and the U.S. Court of Appeals affirmed the dismissal. While a writ of certiorari was pending before the U.S. Supreme Court, Switzerland espoused Interhandel's claim before the International Court of Justice. The ICJ dismissed the case on the ground that the injured party had failed to exhaust all of its local remedies since adjudication by the U.S. Supreme Court was still a possibility.

2. Does the futility exception to the exhaustion rule apply?

There is an exception to the exhaustion requirement where resort to local judicial remedies would be futile because such remedies do not exist, would be inadequate, would result in unreasonable delay, or would be unlikely to be awarded because of bias or lack of independence in the judiciary. Several international arbitration cases have established that the burden of proof is upon the party asserting the non-exhaustion rule (in this case Senhava) to show the availability of effective local remedies. See e.g. *Ambatielos Claim* (Greek v. Britain) of 1956.

The Compromis is silent as to whether Megaceutical-Senhava has filed a domestic suit to test the legality of the office closing, the fines, or the refusal to return the advance payment. Further, the Compromis does not indicate whether George Smith has attempted to pursue any domestic remedies, such as a writ of habeas corpus, to challenge the legality of his detention. On the other hand, the compromis does not stipulate that any such proceedings or remedies are available to Megaceutical-Senhava or George Smith in Senhava. It might be relevant in this regard that Senhava has not signed the Covenant on Civil and Political Rights, which would require such proceedings.

C. Application of the Compulsory Jurisdiction of the International Court of Justice

Kuraca brings this case under Article 36(2) of the Statute of the ICJ by virtue of the fact that both Kuraca and Senhava have deposited declarations agreeing to the ICJ's compulsory jurisdiction under Article 36(2). Kuraca's declaration contained two reservations, however, which Senhava seeks to assert via reciprocity as a basis for dismissal of the case.

1. May Senhava assert Kuraca's reservations via reciprocity?

Under the principle of reciprocity, a state may invoke the reservations contained in the declaration of the opposing party to prevent the ICJ from exercising jurisdiction in a case filed under Article 36(2) of the ICJ Statute. The leading ICJ case on point is *Certain Norwegian Loans* (Fr. v. Nor.) of 1957. There, Norway sought to invoke the French reservation, which stated:

> On behalf of the Government of the French Republic, and subject to ratification, I declare that I recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the said Court.... This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.

The ICJ, basing its jurisdiction on the "common will of the parties," concluded that Norway was entitled to invoke the French domestic jurisdiction reservation to bar the case brought by France.

The instant case may be distinguishable from *Norwegian Loans* because both the Kuracan and Senhava declarations accepting the compulsory jurisdiction of the ICJ leave out the words "on condition of reciprocity" which was present in the Norwegian and French declarations. Kuraca may argue that reciprocity should not be presumed where it has not clearly been expressed as a condition in the declarations of acceptance. Senhava may argue that reciprocity is a general principle of international law applicable to all treaties, even where not expressly provided.

2. Does the domestic jurisdiction reservation bar Kuraca's complaint?

Kuraca's domestic jurisdiction reservation, which Senhava seeks to assert via reciprocity, is a self-judging clause. The question, then, is whether the ICJ should defer to Senhava's conclusion that this dispute involves matters which are essentially within Senhava's national jurisdiction, or whether the ICJ should make the determination for itself based on the facts.

In the *Norwegian Loans case*, the ICJ deferred to Norway's judgment that the issue of the type of payment for Norwegian bonds was a matter of domestic, not international law. On the other hand, commentators have argued that the ICJ is entitled to decide whether a self-judging reservation is being asserted in good faith, since good faith is a general principle of international law recognized by the ICJ. Under the principle of good faith, the ICJ could second-guess Senhava's invocation of the domestic jurisdiction reservation where it is manifestly incompatible with the facts. The ICJ could conclude, for example, that the reservation does not apply because the issues involved in this case involve interpretation/application of several international treaties and principles of customary international law.

3. Does the multilateral treaty reservation bar Kuraca's complaint?

Senhava asserts, via reciprocity, Kuraca's multilateral treaty reservation, which exempts "disputes arising under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the court." Kuraca may argue that Senhava's treatment of George Smith violates the Covenant on Civil and Political Rights, and perhaps even the Torture Convention. George Smith is a national of the Republic of Nemin, a State which is party to these two treaties, and which might therefore be affected by the Court's decision in this case. Nemin has declined, however to intervene in this Case.

The ICJ faced this question in the 1984 *Military and Paramilitary Activities case* (Nicar. v. U.S.). In that case, the United States invoked its multilateral treaty reservation, which was worded identically to Kuraca's reservation in this case. The United States argued that the countries of Costa Rica, El Salvador, and Honduras would be legally and practically "affected" by the adjudication of the claims before the Court, which involved breaches of a treaty to which they were party (Article 2(4) of the U.N. Charter). The ICJ found that these three states would in fact be affected by the decision, and therefore applied the reservation to bar consideration from the case of the provisions of the U.N. Charter which prohibit use of force in violation of a country's territorial integrity or political independence. However, the ICJ also found that the use of force prohibition existed independent of the U.N. Charter in customary international law, and therefore could still be applied in the case notwithstanding the multilateral treaty reservation.

As applied to the instant case, the precedent of the *Military and Paramilitary Activities case* suggests that the claims involving George Smith must be dismissed unless Kuraca can prove that the rights allegedly violated are protected by existing customary international law. In the 1949 *Korfu Channel Case* (U.K. v. Albania), the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving its existence (by widespread state practice out of a sense of legal obligation).

It is important to keep in mind that no matter the outcome of this inquiry, the application of the multilateral treaty reservation would not affect the claims involving Megaceutical-Senhava, Inc.

D. Jurisdiction Under the Compromisory Clauses of Various Treaties

1. Do the compromisory clauses of any treaties provide an alternative basis for the ICJ's jurisdiction over this matter?

Under Article 36 (1) of the Statute of the ICJ, the Court has jurisdiction over any claims arising out of treaties that have compromisory clauses that expressly provide that any disputes about the interpretation or application of the treaty shall be brought before the ICJ. Three of the Treaties relevant to the instant case have such compromisory clauses: Article 30 of the Torture Convention, Article 29 of the Convention on Discrimination Against Women, and Article 66 of the Vienna Convention on the Law of Treaties.

In the instant case, there may be a dispute over whether Senhava has breached the Torture Convention by virtue of its treatment of George Smith. There may also be a dispute over whether Kuraca has breached the Convention on Discrimination Against Women by virtue of its termination of the MHVD drug trials. Finally, there may be a dispute over the application of Article 18 of the

Vienna Convention on the Law of Treaties, which obligates signatory states not to defeat the object and purpose of a treaty pending ratification. According to para. 4 of the Compromis, both Kuraca and Senhava have signed but not yet ratified the Biomedicine Convention, and Kuraca has signed but not yet ratified the International Covenant on Economic, Social and Cultural Rights. Therefore, the ICJ may have jurisdiction to consider claims involving these three treaties, notwithstanding the application of the reservations to the Court's compulsory jurisdiction which are discussed above.

2. Is the arbitration prerequisite required by these treaties applicable to this case?

The compromisory clauses of these three treaties require the complaining Party to attempt to resolve the dispute through arbitration or other forms of alternate dispute resolution, prior to filing a case with the ICJ. Article 30 of the Torture Convention and Article 29 of the Convention on Discrimination Against Women provide that the parties cannot file a case with the ICJ unless attempts to resolve the matter through arbitration have failed for a period of six months from the date of the request for arbitration. Article 66 of the Vienna Convention on the Law of Treaties, in turn, provides that the complaining party must attempt to resolve the dispute by negotiation, enquiry, mediation, conciliation, or arbitration, and may file a case with the ICJ only if "no solution has been reached within a period of 12 months following the date on which the objection was raised."

In this case, Senhava may argue that Kuraca's claims are not ripe for the ICJ to consider because Kuraca did not request arbitration/alternative dispute resolution as required by the compromisory clauses of the three relevant treaties. Kuraca may argue that the meeting of the presidents of the two countries with a group of 12 Nobel Peace laureates was a form of arbitration/alternative dispute resolution. Senhava may respond that any attempted resolution through that process was abandoned prior to the required period of time when the group recommended that the matter be referred to the ICJ.

On the other hand, the ICJ has applied a futility exception to the application of the arbitration perquisite contained in analogous treaties. Thus, in the 1992 *Aerial Incident at Lockerbie Case* (Libya v. U.S./U.K), the Court said that it would be "too legalistic" to require Libya to comply with the six-month arbitration clause of the Montreal Sabotage Convention before resorting to the ICJ. In the instant case, Kuraca may argue that resort to arbitration would be futile in light of the fact that the two countries had recalled their ambassadors and were at the verge of breaking diplomatic relations when Kuraca referred this case to the ICJ (Compromis at Para. 33).

VI. OBLIGATIONS UNDER INTERNATIONAL LAW WITH RESPECT TO PROTECTION OF HUMAN SUBJECTS OF MEDICAL EXPERIMENTATION

A. Sources of Law

The organized practice of medicine has an ancient tradition of self-regulation, stemming from realization of professional responsibility in view of the vulnerability of patients and the frequently invasive nature of the physician's work. *See* Edmund D. Pellegrino, *The Virtuous Physician and the Ethics of Medicine, in* CONTEMPORARY ISSUES IN BIOETHICS (Tom L. Beauchamp & LeRoy Walters, eds., 5th ed., 1999). That tradition continues, although since

early in the Twentieth Century--partly because of increased concerns both about abuses and about adequacy of access to health protection--the organized practice of medicine and the development and testing of drugs have been the subject of increasing external legal scrutiny from the standpoints of consumer protection, patient protection, public health, regulation of commerce, and regulation of research. International non-governmental and governmental organizations and instruments now regularly address all these aspects of organized medicine, including human rights from the standpoints both of access to care and protection from exploitation. *See* Gudmundur Alfredsson & Katarina Tomacevski, eds., THEMATIC GUIDE TO DOCUMENTS ON HEALTH AND HUMAN RIGHTS (Raoul Wallenberg Institute on Human Rights Guides, v. 2, Martinus Nijhoff, 1998), at xiii.

In the aftermath of World War II came a series of major statements on protection of human subjects of medical research. The judgment against Nazi doctors for experimenting upon unwilling concentration camp inmates asserted minimum ethical standards for any medical experiment on human beings. NUREMBERG CODE, excerpted, Annex A, Compromis. *See* George J. Annas & Michael A. Grodin, THE NAZI DOCTORS AND THE NUREMBERG CODE (Oxford Univ. Press, 1992). The World Medical Association later adopted recommendations on the same issues. Declaration of Helsinki, excerpted, Annex B, Compromis. Similar "guidelines" came from others in the biomedical research community. Council for International Organizations of Medical Sciences, INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS, *reprinted in* Beauchamp & Walters at 436. Although these documents vary significantly in their details, bioethicist LeRoy Walters maintains that these expressions "illustrate a gradual evolution in standards for the proper conduct of research involving human . . . subjects." *Research Involving Human and Animal Subjects, in* Beauchamp & Walters, at 431. Central elements include voluntary, informed consent; absence of coercion or coercive circumstances; and external review. Whether these precepts represent international law is not clear.

1. Treaties

Kuraca and Senhava both are parties to the Vienna Convention on the Law of Treaties, which is pertinent here with respect to treaties to which either but not both are parties and to treaties not yet in force. Both are members of the United Nations and bound by the U.N. Charter. Both are members of the World Health Organization. The W.H.O. constitution does not deal with issues in this case, and W.H.O. has long declined to act in any general regulatory capacity. International drug-testing arrangements in the U.N. AIDS program are conducted in cooperation with W.H.O. and expressly deal with Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome only. Agreements in the forum of the International Conferences on Harmonization deal with pertinent issues but are not treaties within the meaning of the Vienna Convention; rather, they are informal agreements among some regulatory agencies.

The Convention on the Rights of the Child, which touches directly on issues in this case, deals with obligations of states to their children; it does not address disputes between or among states as to the subject matter. Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women arguably touches issues in this case but does not deal with obligations of states to each other in this regard. The Convention against Torture and other

Cruel, Inhuman or Degrading Treatment is not directed toward the medical subject matter of this case.

The Convention on Human Rights and Biomedicine applies indirectly here, because it is not yet in force. As signatories, Kuraca and Senhava must refrain from conduct counter to its principles. The Convention requires, *inter alia*: protections against coerced consent or other coercion of patients and other human subjects of medical research; independent scientific review of proposed experimentation on human subjects; and no experimentation on persons incapable of giving consent unless they will benefit directly and do not object. A provision covering public health emergencies expressly bars bypassing requirements of voluntary, knowing, informed consent. The Convention further provides: "Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards." CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE, Art. 4. Moreover: "The interests and welfare of the human being shall prevail over the sole interest of society or science." Id., Art. 2.

As a signatory to the International Covenant on Economic, Social and Cultural Rights, Kuraca is obliged to take no acts counter to its purposes. Senhava, as a party, is obligated by Article 12(2)(b) of that instrument to take steps necessary for "prevention, treatment and control of epidemic, endemic, . . . and other diseases."

As a party to the International Covenant on Civil and Political Rights, Kuraca is obliged under Article 7 of that instrument to adhere to the principle, "In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

2. Customary International Law

The "principles and rules concerning the basic rights of the human person" are an example of peremptory norms, *jus cogens*. *Barcelona Traction* (Second Phase) (ICJ Reports 1970), 3 at 32, quoted, Ian Brownlie, Principles of Public International Law (Clarendon Press, 4th ed., 1995) at 513. Whether law concerning protection of human subjects of medical experimentation falls into that category is not clear. Humanitarian law (which if applicable during time of armed conflict) might suggest that it does, particularly insofar as populations vulnerable to coercion may be involved. Article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and Article 12 of the counterpart Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea bar subjection of sick and wounded persons "to biological experiments." Article 13 of the Geneva Convention relative to the Treatment of Prisoners of War bars "medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest." Article 32 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War bars "medical or scientific experiments not necessitated by the medical treatment of a protected person . . . ."

It may be argued that the physician's duty to the patient is an ancient peremptory norm. "Then . . . no physician, in so far as he is a physician, considers his own good in what he prescribes, but the good of his patient . . . ." PLATO, THE REPUBLIC (B. Jowett trans., Tudor

Publishing, undated) at 24. In various translations and varying versions, the taking of the Hippocratic "Oath" is a critical rite of initiation for physicians in most of the world. It is one of medicine's oldest, most deeply cherished ethical statements, even if no longer taken literally. Edmund D. Pellegrino, *Traditional Medical Ethics--A Reminder,* 1999 REPORT OF THE AMERICAN BOARD OF INTERNAL MEDICINE, at 17. The "Oath" declares in pertinent part, "Into whatsoever houses I enter, I will enter to help the sick, and I will abstain from all intentional wrong-doing and harm . . . ." HIPPOCRATES, OATH (W.H.S. Jones trans., Loeb Classical Lib., Harvard Univ. Press 1923). Senhava may argue that there is a customary international norm but that it differs from the principles invoked by Kuraca. Senhava may contend that the Hippocratic "Oath" constitutes the whole and sole relevant customary international norm.

a. State Practice

Provisions against unrestricted medical experimentation appear in supported, multilateral treaties, most notably the Geneva Conventions and the International Covenant on Civil and Political Rights. Notwithstanding their frequent violation, these instruments are often cited as customary international law.

A generalized limitation, not directed specifically to medical experimentation, appears in the Convention on the Rights of the Child. Article 12 requires States Parties to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." One commentator has explained, "Children should be able to express their views in 'all matters affecting the child', i.e. also in issues not broached by the Convention like biomedical experiments . . . ." Marie-Franhoise Lucker-Babel, *The Right of the child to express views and to be heard: An attempt to interpret Article 12 of the Convention on the Rights of the Child,* 3 ITL. J. CHILDREN'S RIGHTS 391, 395 (1995).

While encouraging the availability of health care and public health measures, neither the Convention on the Rights of the Child nor the Covenant on Economic, Social and Cultural Rights implies exemptions from human rights considerations.

As noted *supra*, whether the Nuremberg Code and the Declaration of Helsinki can be considered binding international norms (to the extent that they are consistent) is not clear. The World Medical Association, which promulgated the Declaration of Helsinki, draws its membership from physicians in more than 70 countries. Considered together with positive international law, they support the argument for customary norms as to minimum standards for ethical conduct of medical experimentation on human subjects. It may be argued, however, that if the World Health Organization, which represents countries, wanted to regulate this area, it could have done so.

b. Opinio juris

In order to establish a customary norm regarding protection of human subjects of medical experimentation, Kuraca will need to establish that relevant domestic legislation has been adopted out of a sense of legal obligation. As an example, it can point to states that have acceded

to relevant international conventions in addition to implementing domestic legislation on the same subjects. Senhava may argue in opposition, for example, that nations have adopted relevant domestic legislation for their own reasons and not out of a sense of international legal obligations and that the requisite *opinio juris* therefore does not exist.

United States research regulations binds U.S. Government research-support agencies to comply with ethical precepts of the Helsinki type and requires as a condition of research support foreign institutions comply with comparable guidelines. *See* 45 C.F.R. §46.101(h), the "Common Rule" for U.S. Government research agencies. More than 100 non-U.S. institutions have complied.

No major court decision addresses these issues directly. However, a special committee appointed by the President of the United States to investigate U.S. Government radiation experiments found that experimentation on persons without their consent had violated the Hippocratic principle, long-established medical ethics, the Nuremburg Code, and principles that later went into the Declaration of Helsinki and International Covenant on Civil and Political Rights. FINAL REPORT [OF THE] ADVISORY COMMITTEE ON HUMAN RADIATION EXPERIMENTS (1995).

B. Applying the law to the facts

1. Whether Kuraca's course of conduct breaches any of her obligations under international law with respect to protection of human subjects of medical experimentation

Kuraca may argue in regard to the proposed vaccine trials that she had no obligation to Senhava other than her obligation to the world at large. At least under the Convention on Human Rights and Biomedicine, Kuraca must refrain from approving or cooperating with experimentation on persons without their voluntary, knowing, informed consent, or in coercive circumstances, or with previously untested substances, or where there is no independent scientific review of the study. The research plan anticipated: (a) subjects drawn from largely isolated populations and for whom consent forms would have to be translated by individuals not specified; (b) no effort to transcend likely cultural differences; (c) police presence; and (d) lack of independent review. Kuraca clearly has an obligation--under the Convention on Human Rights and Biomedicine and possibly under customary law and the International Covenant on Civil and Political Rights--to discourage its agencies and its nationals from experimentation on human subjects in these circumstances.

Kuraca may argue that the use of isolated populations as proposed could not possibly be done with informed consent, because of cultural differences in understanding. Senhava could reply that translation would be sufficient. Kuraca may argue that tests on prisoners are inherently coercive and that the Geneva Convention norms concerning prisoners of war and civilians in war areas should apply as *jus cogens* to a State's own prisoners. Senhava could reply that these Geneva Convention norms are inapplicable during peace times and that prisoners are used widely as medical test subjects without much more protection than is provided here. Kuraca may argue that using maternal and child health clinics discriminates against women. Senhava could reply

that men, too, would be used. Kuraca may argue that children in orphanages are in inherently coercive situations. Senhava could reply that children in orphanages are used elsewhere in medical tests. The teams should be able to explain the legal significance of such arguments.

Senhava may argue that: (a) Kurace had options other than abrupt application of political power against Megaceutical to block the proposed trials, (b) while rationalized as international compliance Kuraca's conduct was no more than an economic measure, and (c) for lack of adequate support in the world community, the law requisite to find that Kuraca responded to a legal obligation simply does not exist. Potentially relevant to argument (b), is the fact that Kuraca's opposition to the MHVD vaccine trials began when the Kuracan Capital University Biomedicine Ethics Review Board voted 4-3 against the trials. According to paragraphs 8, 19 and Clarification 5, Francis Zeaklin, the President of a competing company trying to develop the profitable MHVD vaccine, was one of the members of the seven-person Board. He would have had a strong economic motive to vote against Megaceutical's proposed vaccine trials. Senhava would have to argue the legal relevance of these facts.

2. *Whether Senhava's course of conduct breaches any of her international obligations with respect to protection of human subjects of medical experimentation, and, if so, whether Senhava's conduct is excusable on grounds of conflicting obligations or public emergency?*

Senhava may maintain that relevant international law, if any, therefore could not have been violated, inasmuch as only Senhavans in Senhava would be test subjects and therefore her course of conduct infringes or would infringe no international bioethics obligations. To win this point, Senhava would have to show that she has no relevant international obligations. But, notwithstanding any other point of international law, as a signatory to the Convention on Human Rights and Biomedicine she is obliged not to act in a way that would defeat its purposes. For reasons noted *supra*, to conduct the vaccine trials as originally planned would have contravened the intent of this instrument to safeguard prospective and actual human subjects of human experimentation from any coercion or abuse and to ensure that protective measures are in place.

Senhava may argue that the tests were not conducted as proposed, that the Compromis is silent on conditions under which Senhava now would have the tests conducted, that Senhava therefore has not violated or proposed to violate the rights of any test subject, and that Senhava's dispute with Kuraca turns on Kuraca's conduct, not on law protecting human subjects of medical experiments. This probably is one of the best arguments open to Senhava and is hard to refute. Kuraca would have to reply that Senhava's conduct clearly implied intent to conduct the tests as originally planned and that Senhava disputes Kuraca's position that the plan was unsustainable under international bioethics law. This, too, is hard to refute. The Compromis leaves room for creative problem-solving. In her memorial as well as in oral argument, Senhava may note that the conditions for under which the tests would be conducted are not predisposed. However, Senhava cannot disavow facts of record.

Senhava may maintain that her legal requirement of "the Hippocratic Oath" amounts to a peremptory international norm and that as a Senhavan legal requirement it fulfills any Senhavan international obligation concerning the protection of human subjects of medical experimentation.

This assertion is likely to be based on the widely known precept, "do no harm." However, this specific language, which appears elsewhere in writings of the Hippocratic school, does not appear in the "Oath." Nor does the "Oath" contemplate formal medical experimentation on several subjects.

Senhava may argue that her position and conduct are excused on the grounds of *force majeure,* a public emergency otherwise beyond its control, and that she therefore is not liable for actions taken in these circumstances. To carry this argument, Senhava would have to prove that the proposed vaccine trials would be the most effective way to combat the MVHD pandemic. The disease is an undeniably serious problem. However, the proposed vaccine is an untested variant, with unknown efficacy but a possibility of adverse effects in perhaps as much as 7 percent of the test population. MVHD is a multivector disease. Senhava would have to show that it could not address the problem in party by relatively standard public health measures, such as sanitation, pest control, water and sewage treatment, and campaigns against unprotected sexual contact. Senhava might be able to show that as an archipelagic state with remote settlements and gross domestic product per capita amounting to a little over than $U.S. 330 per year even an untested vaccine was her only hope. Even then, while perhaps relevant to other aspects of Senhava's conduct, the *force majeure* defense does not address the issues of consent and coercive circumstances.

3. Did Senhava's measures of "self-help" violate international law?

In response to Kuraca's actions which compelled Megaceutical to terminate the MHVD vaccine project in Senhava, the government of Senhava incarcerated George Smith, closed down the office of Megaceutical-Senhava, and imposed a $50,000 per day on the company. Kuraca will claim these were retaliatory actions in breach of international law. Senhava will respond that these are lawful measures of self-help and internal regulation.

a. The treatment of George Smith

With respect to George Smith, Kuraca may argue that his incarceration without charge or possibility of bail violates Article 9(4) of the Covenant on Civil and Political Rights, which provides: "Anyone who is deprived or his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Senhava is likely to respond that it has not ratified nor signed the Covenant on Civil and Political Rights, and thus is not bound by the Treaty. Further, even if the Treaty reflects customary international law (and is therefore binding on Senhava), Senhava may argue that Article 4 of the treaty allows for derogation of certain rights (including those involving due process) in times of public emergency that threatens the life of the nation. Senhava would have to demonstrate that this is such an emergency. In the 1961 *Lawless case*, the European Court of Human Rights affirmed the United Kingdom's right to derogate from the similarly worded European Convention on Human Rights in the context of the United Kingdom's detention of members of the IRA in Northern Ireland. But a government must declare an emergency prior to derogating and the derogation must be only to the extent strictly required by the exigencies of the situation.

Kuraca may also argue that, because Senhava has incarcerated Smith in retaliation for the government of Kuraca's actions and to compel Kuraca to permit the MHVD vaccine test, that Smith's incarceration violates Article 1 of the Torture Convention, which prohibits the imposition of physical or mental suffering for such purposes as "punishing him for an act a third person has committed" or "to intimidate or coerce a third person." Senhava is likely to contest that a six-month period of incarceration, without proof of other abuses, rises to the level of "mental suffering."

b. The treatment of Megaceutical-Senhava

Kuraca may argue that Senhava has committed an unlawful "taking" by closing down the offices of Megaceutical-Senhava, and by refusing to return the 2 million euro payment Megaceutical made to the Senhava Government. In the alternative, Kuraca may argue the retention of the money constitutes unjust enrichment and bad faith. Senhava may respond that it has a sovereign right to regulate domestic companies, which are incorporated in Senhava, and that its actions are justified in light of the public emergency facing the nation. In addition, Senhava might argue that it is entitled to keep the 2 million euros as remedy for Megaceutical's breach of contract, or as monetary damages to compensate for public health expenses incurred because of the failure to conduct the vaccine trials.