THE 2017 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE

INTERNATION AL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE

CASE CONCERNING THE SISTERS OF THE SUN

FEDERATION OF THE CLANS OF THE ATAN
Applicant

v.

THE KINGDOM OF RAHAD
Respondent

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR APPLICANT

FEDERATION OF THE CL ANS OF THE ATAN

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INTERNATIONAL CASES AND ARBITRAL DECISIONS

INTERNATIONAL CONVEN TIONS

Articles on Responsibility of States for Internationally Wrongful A

REGIONAL CONVENTIONS

U.N. DOCUMENTS

ARTICLES

STATEMENT OF JURISDI CTION

The Federation of the Clans of the Atan (ñAtaniaò) and the Kingdom of Rahad (ñRahadò) hereby respectfully submit the present dispute to the International Court of Justice (ñThe Courtò), in accordance with Article 36(1) and Article 40(1) of the Statute of the Court, by way of *Compromis* transmitted to the Register on 12 September 2016. Atania and Rahad agree to accept the Courtôs decision as final and binding on them and commit to comply with it in its entirety and in good faith.

STATEMENT OF FACTS

Background

On 4 Februrary 2011, a panel of geologists reported that the subsidence due to the Operations caused structural degradation of the Canyons and Stronghold in the Complex. A

international refugee regime has not attained customary status. And its existing mechanism does not pose any duty on State of origin to compensate.

PLEADINGS AND AUTHORITIES

I. EXTRACTION OF WATER FROM THE AQUIFER VIO LATES INTERNATIONAL OBLIGA TIONS UNDERTAKEN BY RAHAD AND CONSTITUTES AN INEQU ITABLE USE OF A SHAR ED RESOURCE.

of other States to use the shared resource is prohibited.[11] And the rule of protecting existing use is continuously outlined by State practice when a State initiates new use of the shared water resource.[12] In doing so, Rahad is obliged to protect Ataniaôs existing use, which requires the injury caused by the new use [i] to be necessary; [ii] cannot be overweighed by the benefit; [iii] and can be remedied.[13]

First, the Ataniaôs injury is not necessary for Rahadôs extraction of water. Necessity test requires the injury caused by the water extraction is indispensable for its sustainable operations.[14] Rahad fails to prove that the permanent lowering of the water table and infertility of the farming land was inevitable for Rahadôs water extraction. Even assuming lowering of water table occurred inevitably,[15] Rahad failed to undertake preventive measures, making injury sustained by Atania unnecessary.

Second, Rahad cannot prove the benefits can overweigh the Ataniaôs injury. The injury is justifiable insofar as the benefit overweighs the injury to Atania.[16] However,

---

River Oder, PCIJ Reports, Series A, No.16, ¶27 (1929) [*River Oder*].

[11] *Gabčíkovo-Nagymaros*, ¶85.

[12] *Colorado*, ¶186; WCC, Annex I, art.7(2); Draft Articles on the Law of Transboundary Aquifers, Official Records of the General Assembly, Supplement No. 10 (A/63/10), art.6 (2008) [Draft Articles of TBA]; *Indus Water*, Partial Award, ¶233.

[13] *Colorado*, ¶186 (1982); STEPHEN, 396.

[14]

2. Extraction of water violates s obligation to protect the Aquifer.

A Stateôs obligation to protect the water resource in its utilization is emphasized by this Court,[22] requiring State to reasonably use the resource.[23] Hence Rahad is obliged to preserve the shared Aquifer[24] and the ecosystem relying on it.

Given the non-renewable nature of the Aquifer, utilization of it should be conducted in a non-exhaustive manner in pursuit to its maximum use.[25] Rahadôs current rate of pumping

Kasikili-Sedudu Island, this Court stressed that local communityôs continuing agricultural activities related to

Aquifer in non

position is detrimental to Atania.[52] As outlined above, Atania relied on Rahadôs the statement and converse of the position rendered Atania suffer prejudice.

C. RAHAD CANNOT RELY ON STATE OF NECESSITY TO JUSTIFY ITS NON-COMPLIANCE WITH EQUITABLE USE OBLIGATION S.

Extraction of the Aquifer was driven by the need of alternative water supply, not the alleged shortage of water since Rahad *per se* admitted the extraction was intended to end the reliance on imported water and re-establish self-sufficiency.[53]

In any event, Rahad cannot make out a case for state of necessity inasmuch as [1] no imminent and grave peril necessitates extraction of the Aquifer; [2] extracting water is not the only means in response to alleged shortage of water; [3] extraction of the Aquifer illegally impairs the essential interests of Atania.[54]

1. No imminent and graveperil necessitates extraction of the Aquifer.

To comply with necessity, the peril must be objectively established. Mere apprehension of the possible risk is not sufficient.[55] Alleged shortage of water cannot be judged by the subjective concerns from head of the Service,[56] or Queen Teresa.[57]

Additionally, the peril must be proximate or immediate.[58] First, construction of

---

[52] *Case concerning the Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction of the Court, (2000) I.C.J. ¶45.

[53] *Compromis*, ¶21.

[54] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART, 307-311 (2013).

[55] *Gabčíkovo-Nagymaros*, ¶54; Commentaries to the Daft Aticles on Responsibility of States for Iternationally Wrongful Acts, U.N. Doc. A/56/10, art.25, ¶14 (2001) [ARSIWA Commentaries].

[56] *Compromis*, ¶19.

[57] *Compormis*, ¶20.

[58] *Gabčíkovo-Nagymaros*, ¶54.

Pipelines lasted for 7 years which indicated the peril was not proximate. Second, temperature increase was long-term process. Although this Court does not preclude the long-term risk to be imminent, it is not thereby any less certain or inevitable.[59] Accordingly, the alleged shortage of water is not imminent and grave.

2. Extracting water is not the only means in response to alleged shortage of water.

Necessity requires that non-compliance with the obligation must be the only means in response to the peril. And the alternative to the non-compliance does not necessarily have to be less expensive or more convenient.

A. THE SAVALI PIPELINE OPERATIONS VIOLATE RAHAD S OBLI GATION TO PREVENT TRANSBOUNDARY HARM TO KIN CANYON COMPLEX UNDER CUSTOMARY INTERNATIONAL LAW.

Under customary international law,[64] no-harm rule requires a State has responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or areas beyond national jurisdiction.[65]

1. Rahad had an obligation to prevent transboundary harmto Atania.

State practice[66]

In judging significant harm, the affected State is the sole judge of whether its interests have been damaged.[71] Thus, the threshold of significant harm refers to whether the affected State is justified to make a necessary response to initiating State.[72] The persisting threat to the Complex confirmed by the panel made it necessary for Atania to respond to Rahad.[73] Hence, transboundary harm has been caused.

Every State is obliged to exercise due diligence to prevent transboundary harm, as this Court notes in *San Juan River*.[74] Due diligence is an obligation of conduct,[75] requiring Rahad to ñtake necessary means at its disposal to carry out its obligations.ò[76] The due diligence obligation customarily takes the form of procedural obligations:[77] [1] to carry out a competent environment impact assessment; [2] to inform and consult the Atania of proposed activity; [3] to conduct environmental monitoring.

2. Rahad violates its obligation to prevent transboundary harm because

reflect the nature and magnitude of the proposed activity;[80] [d] include alternative measures in the EIA;[81] [e] conduct a continuing EIA.[82]

Rahad failed to comply with all these requirements because the EIA was not notified and provided to Atania,[83] and lacked evaluation of the nature and magnitude of the Savali Pipeline operations. Moreover, no evidence shows that the EIA was inserted with any alternative measure or it was conducted continuously. Accordingly, Rahad violates its obligation to prevent transboundary harm by carrying out a deficient EIA.

3. Rahad violates its

notify.[87]

4. Rahad violates its

of the 1972 Convention, Rahad is obliged not to take deliberate measures which might directly or indirectly damage the Complex.

in form and content.[98]

illicitly exported from Atania. Accordingly, [2] Rahad shall return it to Atania in compliance with its obligation of restitution.

1. Ruby Sipar was stolen and illicitly exported from Atania under Article 6(i) of the 1970 Convention.

Ruby Sipar, raised by Teppa in 500 CE[102] and excavated after centuries in Atania,[103] falls into the definition of cultural property subject to Article 1 of the 1970 Convention.[104] It was stolen[105] and removed to Rahad without any export license,[106] which could be categorized as a stolen and illicitly exported cultural property under Article 6(i) of the 1970 Convention.[107]

2. Rahad is obliged to return Ruby Sipar to Atania under the 1970 Convention according to Article 11 and 18 of VCLT.

The importing State is obliged to facilitate the recovery and repatriation of stolen or illicitly exported cultural properties back to the country of origin according to the 1970 Convention.[108]

according to Article 11 of VCLT.[109] An interval before entering into force of the convention does not indulge States who have ratified the convention to disregard their treaty obligations.[110] Rahad therefore was bound by the 1970 Convention because of its ratification, although at the time of illegal export of Ruby Sipar,[111] the 1970 convention has not entered into force in Rahad.

international custom during the third meeting of States Parties of the 1970 Convention.[115] General acceptance of the obligation of restitution[116] is evidenced by numerous State practice [117] and judicial decisions [118] since its adoption. [119] Accordingly, Rahad shall return Ruby Sipar to Atania even if the 1970 Convention is not applicable.

B. RAHAD MUST IMMEDIATELY RETURN RUBY SIPAR BECAUSE IT IS ATANIA S STATE PROPERTY.

Ruby Sipar is state property of Atania because of [1] acquisitive prescription principle on property and [2] Ataniaôs status as origin country.

1. Atania owns Ruby Sipar because of acquisitive prescription principle.

The acquisitive prescription principle stipulates that a State may obtain entitlement to property when it exercises its ñauthority in a continuous, uninterrupted, and peaceful manner for a sufficient period of time provided that all other interested and affected States acquiesce in this exercise of authority.ò[120] It is recognized by this

---

[115] 1970 Operational Guidelines, 48.

[116] G.A. Res. 64/78, U.N. Doc. A/RES/64/78 (Dec. 7, 2009); G.A. Res. 61/52, U.N. Doc. A/RES/61/52 (Dec. 4, 2006).

[117] Katarzyna Januszkiewicz, *Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia*, 41 Brook. J. Int'l L. 329, 372 (2015).

[118] *Italia Nostra v. Ministry of Cultural Heritage and Libyan Arab Jamahiriya*, 3154/2008, ILDC 1138 (IT 2008) [*Italia*]; *Allgemeine Versicherungsgessellschaft v. E. K.*, BGHZ 59, 83 (1972).

[119] Nafziger, *The New International Framework For The Return, Restitution or Forfeiture of Cultural Property*, 15 Intl Law & Politics 789, 799-811, 840-846 (1983).

[120] Johnson, *Acquisitive Prescription in International Law*, 27 Brit. Y.B. Int'l L. 332, 353 (1950) [Johnson].

Court in *Kasikili-sedudu Island*,[121] and applies with equal force to chattel.[122]

First, since the conduct executed or functioned under the effective control of State is attributed to the State,[123] the discovery of Ruby Sipar by the archaeologist from the public university under Ataniaôs effective control[124] constituted an act of a State. Further, the display of Ruby Sipar in public university was also conducted by Ataniaôs authority.[125]

Second, sufficient time[126] has elapsed since Atania excavated Ruby Sipar during which Atania was ñexercising its authorityò over it by publicly displaying it in government institution.[127]

Ultimately, Rahad and Kinôs lack oa uvf

prior ownership,[130] according to the 1970 Operational Guidelines which is a highly authoritative international instrument made by UNESCO[131] and widely accepted by State practice.[132] Since Ruby Sipar was discovered within Ataniaôs territory and no one claimed prior ownership during Ataniaôs possession,[133] Atania owns it as the origin country.

A State is prohibited from depriving another State of its properties,[134] as observed by this Court.[135] Accordingly, Rahad is obliged to return Ruby Sipar to its lawful owner, Atania.[136]

Alternatively, in any event, it is more appropriate for Atania to retain the cultural property of

other entities exercising elements of governmental authority,[145] or by entities within the Stateôs direction or control.[146] Ultimately, Atania never subsequently ñadopted or acknowledgedò the migration as its own plan.

a. Kin mi s effective control.

Under Article 8 of ARSIWA, attribution on the basis of ñeffective controlòrequires Ataniaôs control over Kin migrants in respect of each operation when the alleged violation occurred.[147] As Kin migrants retained absolute discretion and disconnected from Atania government during the process of migration,[148] Atania cannot exercise effective control over them.[149]

b. Atania has never acknowledged the s migration.

Acknowledgment means a formal, unambiguous and long-standing endorsement of the conduct in public official statements, as noted in *Tehran Hostage* case.[150] Atania has never made such statement regarding activities of Kin migrants, thus acts of the Kin migrants in Rahad cannot be attributed to Atania.

2. Atania does not violate its obligations on human rights protection.

---

[144] *Id*, art.4.

[145] *Id*, art.5.

[146] *Id*, art.8.

[147] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, (2007) I.C.J. 400; *Military and Paramilitary Activities*, Merits, 65.

[148] *Compromis*, ¶47; *Al Skeini v. United Kingdom*, Judgment, ECtHR App. no. 55721/07 (2001), ¶¶133-137,138-140.

[149] *Hirsi Jamaa and others v. Italy*, Judgment, ECtHR App. no. 27765/09 (2012), ¶¶81-82.

[150] *Tehran*, 3, 33-35.

a. Rahad lacks legal standing to claim for compensation either via diplomatic protection or erga omnes.

Exhaustion of local remedies is a prerequisite for diplomatic protection.[151]

guarantees right to peaceful assembly but not violent assembly[158] where the organizers and participants suggest violent intentions[159] that will result in public disorder[160] and physically or psychologically negative impact to other citizens.[161] The Kinôs protest was a violent assembly because defacement of public property, arbitrary occupation of major roads into the city, and attempt to disturb municipal

Atania permissibly limited the Kinôs right to water, food and health under Article 15, 11 and 14 of ICESCR[179] by prescribing its restrictive measures in law.[180]

First, legitimacy of Ataniaôs inhibition on over-consumption of water was underlined by unprecedented drought condition.[181]

Second, proportionality was accordingly met when social needs for water resource management appeared to be necessary to reinforce general welfare.[182]

Third, when applying limitations, Ataniaôs obligation to provide minimum standards for individualôs survival[183] only prohibits prevention or pollution to the equal access of its citizens to living[184] but does not extend to confer specific ways of living.[185] Since Ataniaôs termination of water supply to the Kinôs farmlands did not deny their access to living with a variety of opportunities to find alternatives of water, the minimum standards were not undermined.[186]

d. Atania does not violate its obligation to prevent forced displacement because Kin migrants cannot claim upon the refugee

---

[179] ICESCR, art.11; General Comment No. 15, CESCR, U.N. Doc. E/C.12/2002/11, 23 (2003); General Comment No. 14, CESCR, U.N. Doc. E/C.12/2000/4, 43(c) (2000).

[180]

threshold of intervention is considerably high, thus vast majority of state action within another Stateôs territory does not violate this obligation.[196] Here, this criterion was not satisfied because Atania never challenged Rahadôs existing[197] border control[198] and whether to accept the Kin migrants was fully at Rahadô

alia, development of the domestic economy [205] for the national interest. [206] Experiencing increasing losses of farmland, efficient reallocation of water to agriculture, its major sources of revenues,[207] is necessary for Ataniaôs national interest.

In drought conditions,[208] minority[209] or indigenous peopleôs[210] right to freely utilize natural resources is limited to general interest of the whole nation.[211] Attempts to seek additional rights for them lack acceptance on international plane.[212] Thus the WRAP Act is manifestly legitimate. Since the Kin stuck to abusing the life-giving water, Ataniaôs further treatment of the Kin based on domestic legislation is lawful.

5. The WRAP Act can be justified by plea of necessity.

Any assertion of Ataniaôs wron (en)] TJETQ EMC /P <</MCID t11 0 0 1 EMC /P <</MCIang

necessity.[214]

Suffering from lasting drought and unrecoverable shortage of water, Ataniaôs essential interest[215] namely survival of its citizens is threatened.[216] Also, it is the only way for Atania to save water and promote national welfare[217] since extraction of water done by Rahad will deprive future generationsô use, which is manifestly forbidden. The necessary test of proportionality[218] and reasonableness[219] of the WRAP Act is also met via fulfilling its peremptory obligation[220] of right to life,[221] whic

injuries caused by it and the causation must be normal and proximate.[225] Unlawful measure resulting in no injury gives rise to no compensation.[226] And the test of due diligence[227]

Thus, Rahad *per se* shall bear the burden of their costs incurred for its negligent contribution to the Kinôs migration.

CONCLUSION AND PRAYE R FOR RELIEF

Atania respectfully requests the Court to adjudge and declare that: