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

THE STATE OF KURACA
APPLICANT

v.

THE REPUBLIC OF SENHAVA
RESPONDENT

On Submission to the International Court of Justice

MEMORIAL FOR THE APPLICANT

Counsel for Applicant

Chrisje M. Aardening Jared Ackley Sebastian I. Buhai

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ARGUMENT

I. Assert jurisdiction over the subject matter of the case

1. There is recognition by both Parties to the conflict that they have been unable to settle the differences between them by negotiation. Any possible and objective alternatives to solving the dispute (which in this case would only be diplomatic negotiation between the two parties concerned, since sanctions from either State on the other are not applicable) have been exhausted, and thus, "in order not to risk rupturing the historic good relations between their nations, with all of the consequences that might entail,"[1] the Presidents of both Kuraca and Senhava agreed to submit the issue to the International Court of Justice (hereafter: ICJ or Court), taking into consideration the reservation of the objection of Senhava to the Court's jurisdiction.

Kuraca requests that the International Court of Justice assert jurisdiction over the subject matter of this case for the following reasons:

2. There is no question as to whether from the point of view of Senhava the Court has jurisdiction, as the President of the Republic of Senhava, Nena Kabua, signed a statement saying that "the Republic of Senhava recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice[2], as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all disputes arising or which may arise after the signature of the present Declaration" (see Annex E to the Special Agreement between Kuraca and Senhava for

[1] Paragraph 33 of the Special Agreement between Kuraca and Senhava for Submission to the International Court of Justice of the Differences between them concerning the Vaccine Trials.

[2] Article 36 (2) of the Statute of the International Court of Justice says: "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation."

submission to the International Court of Justice of the differences between them concerning the vaccine trials). The State of Senhava has not entered any reservations concerning the jurisdiction of the ICJ in the present case. Therefore, Senhava cannot deny jurisdiction of the Court based on their previously stated claim of not recognizing the Court's jurisdiction (see the Preamble to the Special Agreement).

3. Senhava's request to decline the ICJ's jurisdiction based on the claim that the issues at stake are purely internal to Senhava does not hold. Senhava can argue that under its law, foreign corporations may operate only through entities incorporated in Senhava, with a majority of their equity ownership to be in the hands of Senhavans. However, there is no prohibition against maintaining foreign control through such devices as shareholders' agreements. Megaceutical Corporation has effectively controlled its subsidiary Megaceutical- Senhava through this device. Megaceutical Corporation, though based in Kuraca, thus has not violated any national Kuracan, Senhavan or international law in advising its subsidiary in Senhava to stop the MHVD vaccine project because of human rights considerations. Because of the Kuracan Megaceutical Corporation's involvement in the decision, the issue at stake is not a purely Senhavan matter, but a matter of international conflict, and therefore subject to the jurisdiction of the ICJ.

4. Senhava's request to decline the ICJ's jurisdiction is contrary to its statement made in Annex E. It is inconsistent to first sign a statement which expresses recognition of the jurisdiction of the Court and then claim a decline of the jurisdiction of the Court without stating any reservations. The claim for declination cannot be taken seriously in view of Senhava's statement of recognition.

II. Order the immediate release of George Smith and the withdrawal of all charges against him

1. George Smith is a Kuracan government contractor and Kuraca has a right as a state to protect the welfare of its contractors engaged in lawful activities overseas, as it can be inferred from general principles of international customary law regarding contracts between governments

and their direct contractors. Hence, the claim that the arrest and detention of George Smith is a purely domestic matter within Senhava can be overthrown from the start.

2. By retaining Mr. Smith without bail, not presenting any specific formal charges against him and not scheduling any trial date (all facts stated in the Special Agreement), the Republic of Senhava is violating the informal consent between Kuraca and Senhava regarding the presence and activity of George Smith[3] as a Kuracan Government contracting party. Trying to equivocate by presenting a very vague charge of "interference with Senhavan *public health measures*" (emphasis added), public health measures that coincidentally seem to have been ignored in the previous activity of Mr. Smith, and without further details, Senhava ignores and violates the informal activity consent previously approved and in force at the moment of the arrest.

3. Most important, Senhava is not only violating an informal agreement but also de facto violates vital human rights of Mr. Smith as an individual on its territory. In this sense Article 9 of the Universal Declaration contains: "No one shall be subjected to arbitrary arrest, detention or exile", while Article 10 of the Universal Declaration clearly stipulates: "Everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Moreover, Article 11 (1) of the Universal Declaration states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial in which he has had all the guarantees necessary for his defense". At the same time Senhava ignores Article 9, paragraphs 1, 3 and 4, of the International Covenant of Civil and Political Rights[4], treaty signed by the Republic of Senhava. Almost superfluous to be stated,

[3] Paragraph 11 of the Special Agreement submitted to the ICJ contains in this sense: "His job [George Smith's job], **performed with the consent of all concerned**, was to report developments of potential importance to the Kuracan government regulatory process" (emphasis added). It is self-understood that **all concerned** includes the Republic of Senhava.

[4] Art 9 (1). Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law

Art 9 (3). Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It

Article 2 of the Universal Declaration secures that all above mentioned articles are applicable to anyone within Senhava: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”. It is beyond doubt that Senhava violates these rights in a gross and deliberate lack of respect for human rights.

4. In the light of these arguments, the State of Kuraca clearly submits that the International Court of Justice orders the immediate release of its governmental contractor, George Smith and the withdrawal of any Senhavan charges against him.

III. Declare that Kuraca complied with its obligations under international law and in no way violated Senhava’s sovereign rights by promulgating and enforcing its laws and regulations governing foreign as well as domestic use of its Government’s funds in respect of the rights of human subjects in prospective vaccine trials.

1. In promulgating laws concerning use of Government’s funds with respect to issues of human rights, the State of Kuraca acted under the international recognition and implementation of the principles of human rights. To begin with, Article 55(c) of the Charter of the United Nation notices that the United Nations shall promote: “universal respect for, and observance

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shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

Art 9(4). Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. ". As members of the United Nations, both Kuraca and Senhava have to respect these fundamental rights. In complete agreement with these capital obligations, the national Kuracan legislator implemented them in the national law. Thus, as a relevant law for the present case, paragraph 1 from Section 6 of the Kuracan National Health Law 1006 stipulates: "The national legislature recognizes Kuraca's continuing national and international obligations for the protection of the health and rights of all people subject to the actions of the Kuracan Government and its agencies". Furthermore and again in total agreement with its international obligations, paragraph c from Section 6 of the same law states: "No Kuracan Government funds shall be expended contrary to the purposes of this Law".

2. By deciding to withdraw the Government's funds and support, Kuraca acted in conformity with the international law treaties binding on it, notwithstanding any direct or indirect consequences on public health and commerce within Senhava. The decision to stop the vaccine trials was based on grounds of human rights being violated in the alternative. The MHVD project as proposed (see Special Agreement Paragraph 20) clearly does not offer the required protection of the human subjects involved. Corroborated with the vulnerability of the proposed study sample (see paragraph 15 in the Special Agreement), the human rights violations would be wholesale violated. Several international treaties and declaration binding on Kuraca are compelling the state to intervene and stop any eventual action that might provoke such violations. Thus, Paragraph I, line 5 of the World Medical Association of Helsinki stipulates : "Concern for the interests of the subject must always prevail over the interests of science and society". In the same spirit relevant is paragraph 4 from Section 3 of the same Declaration: "In research of man, the interests of science and society should never take precedence over considerations related to the well-being of the subject". We believe that these formulations do not necessitate further clarifications. Next to the Declaration of the World Medical Association, Kuraca finds its reasons to justify the withdrawal of funds and support also in the Nuremberg Code. Paragraph 1 clearly states that the voluntary consent of the human subject is absolutely essential, while paragraph 2 is more than necessary to show

that Kuraca could have in no way agreed to the proposed vaccine trials[5], as most of the measures explicitly required by the Code are not at least attained in the proposal.

3. Not only is Kuraca bound by the human rights principles mentioned above, but Senhava as well should recognize and respect these clearly distinguished laws, as both parties signed the Convention on Human Rights and Biomedicine and their ratification are pending (Special Agreement, paragraph 3). In its own wording, the Convention stipulates the primacy of the human being in Article 2: "The interests and welfare of the human being shall prevail over the sole interest of society or science". Furthermore no possible doubt is left with reference to the consent of the subjects. Article 5 regarding the general rule of consent and Article 16 concerning the protection of the persons undergoing research are clearly justifying the reasons for shutting down the project as the proposal is too loose and too simple to ensure a full and correct consent from the subject[6]. From these provisions we can derive that Kuraca

[5] The Nuremberg Code, Paragraph 2 (excerpt in Annex A of the Special Agreement): "[…] the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment

6 Article 5 – General rule:An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.The person concerned may freely withdraw consent at any time.

Article 16 – Protection of persons undergoing research: Research on a person may only be undertaken if all the following conditions are met:

i. there is no alternative of comparable effectiveness to research on humans;
ii. the risks which may be incurred by that person are not disproportionate to the potential benefits of the research;
iii. the research project has been approved by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of the research, and multidisciplinary review of its ethical acceptability;
iv. the persons undergoing research have been informed of their rights and the safeguards prescribed by law for their protection;
v. the necessary consent as provided for under Article 5 has been given expressly, specifically and is documented. Such consent may be freely withdrawn at any time.

did nothing but comply with its obligations under International Law in deciding to stop the vaccine trials in Senhava.

4. The state of Kuraca did in no way violate Senhava's sovereign rights by enforcing its laws and regulations concerning Government's funds in respect to the MHVD project. The State of Kuraca submits that it did nothing to violate anyone's sovereign rights and it did not interfere with Senhava's domestic jurisdiction. Indirect or direct effects within Senhava of Kuraca's actions in conformity with International Law as proved in our precedent paragraph cannot be, obviously, used to support a Kuracan violation of Senhavian sovereignty. The cessation of the MHVD project by enforcing the National Law 1006 cannot be considered an "unacceptable extraterritorial application of the Kuracan health legislation" as the Law in question implements international obligations as a requirement under the international Law.

IV. DECLARE THAT KURACA DID NOT VIOLATE INTERNATIONAL LAW WHEN ITS GOVERNMENT OFFICIAL ADVISED MEGACEUTICAL THAT HUMAN RIGHTS CONCERNS WARRENTED THE COMPANY'S ACTION TO HAULT ITS CONTEMPLATED VACCINE WORK.

A. THE STATE OF KURACA IS RESPONSIBLE FOR POSSIBLE HUMAN RIGHTS VIOLATIONS COMIMITTED BY MEGACEUTICAL-SENHAVA THROUGH ITS PARENT CORPORATION.

Megaceutical Corporation, based in the State of Kuraca, has a history of effective control over a subsidiary based in the State of Senhava under the name Megaceutical- Senhava Ltd. Control is maintained by the parent company through a shareholder's agreement. International custom and practice concerning multinational corporations dictates that in this type of arrangement, the parent company retains control and responsibility for any such subsidiaries. Further, as non-State

entities do not currently enjoy legal personality under international law, this responsibility falls upon the State to administer.

1. Amended Class Action complaint filed by Bhopal survivors and victims' organisations in U.S. federal district court, Sajida Bano et al. v. Union Carbide et al., 99 Civ. 11329 (JFK).

The arrangement between Megaceutical Corporation and it’s subsidiary, Megaceutical-Senhava is not uncommon in many multinational corporations, as exhibited through the facts presented in Sajida Bano et al. V. Union Carbide et al.

“At the time of the Bhopal Disaster, Union Carbide was a multinational corporation which operated an integrated world-wide empire of business facilities…Because of its structure as a multinational enterprise, Union Carbide was able to design, construct, own, operate, manage and control various undertakings world-wide, including UCIL in Bhopal.”

“Defendant Union Carbide's management principles for controlling its global network are developed in a series of policy manuals that were enforced worldwide. The policies set forth in those manuals apply to all subsidiaries…Pursuant to Union Carbide's internal policies, a subsidiary could not change the substance of any policy without review by the parent corporation.”

2. Multinational Enterprises and Human Rights: The Dutch Branches of Amnesty International and Pax Christi International, Utrecht, November 1998.

As pointed out in the declaration entitled, Multinational Enterprises and Human Rights, States are primarily responsible for the realization of human rights when multinational corporations are involved since there are no direct legal obligations placed upon them. In this situation, the state responsibility falls upon Kuraca since the parent company is incorporated under Kuracan laws and it controls the Senhavan subsidiary. This principle is repeated in many practical examples and studies including the one above.

B. THERE ARE NO SIGNIFICANT LEGAL CHALLENGES AGAINST KURACA ADVISING MEGACEUTICAL THAT HUMAN RIGHTS CONCERNS WARRENTED THE HAULT OF THE VACCINE TRIALS.

Even assuming a violation of the sovereignty of Senhava due to the intervention of a Kuracan Government Official, the advised halt to the contemplated vaccine work served to preserve international human rights treaties which both parties subscribed to and which superceded any national jurisdictions. Ultimately the greater good of society was being preserved in the face of potentially damaging breaches. When it comes to preserving international treaties and/or conventions, no significant challenges are warranted.

1. The Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

The Charter of the United Nations, to which both states are party, places the importance of treaties and other sources of international law in the preamble. This
States that parties are charged, “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”

2. The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force 2 September 1990, in accordance with article 49.

Both Kuraca and Senhava are parties to the Convention on the Rights of the Child. Under this obligation, they are required by Article 23 to, “promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children.” The convention also reminds

parties under Article 41 that, “Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.” In this situation, the advise given by the Kuracan government official was warranted as Kuraca is obligated, rather than restricted from halting contemplated vaccine work.

3. Multinational Enterprises and Human Rights: The Dutch Branches of Amnesty International and Pax Christi International, Utrecht, November 1998.

Further, according to the above study, “When a state does not bring its own laws and policies into line with its international obligations, when it grossly and systematically violates human rights standards, a rigid appeal on the maxim of compliance with national laws and policies cannot be upheld.” This would potentially apply to Senhava if the vaccine trials were forced to proceed. A good example would be South Africa during the 1980’s when some companies made serious efforts to subvert the purpose of Apartheid.

C. THERE EXISTS A STRONG PRECEDENT IN INTERNATIONAL HUMAN RIGHTS LAW FOR KURACA TO BE CONCERNED AND ADVISE MEGACEUTICAL CONCERNING THE PENDING VACCINE TRIALS CONTEMPLATED BY IT’S SUBSIDIARY.

Besides there being no obstacles in place to prevent a Kuracan government official from advising Megaceutical that human rights concerns surrounded the contemplated vaccine work, there did exist strong precedent for such counsel to take place. Kuracan national law concerning biomedical work subscribes to international treaties that place safeguards at the national level against any potential human rights violations.

1. Annex A, excerpt from the Nuremberg Code (1947), from the judgement, in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1949).

The contents of the basic principles observed in this text created concern among the independent regulatory boards in place at the national level in the state of Kuraca. Of primary concern was that, “before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.”

2. Annex B, excerpts from the World Medical Association Declaration of Helsinki, Recommendations guiding physicians in biomedical research involving human subjects, adopted by the 18th World Medical Assembly (Helsinki, Finland, 1964), amended by the 29th (Tokyo, Japan, 1975), the 35th (Venice, Italy, 1983), the 41st (Hong Kong, 1989), and the 48th (Somerset, South Africa, 1996).

The basic principles of this international declaration, which Kuraca subscribes to, is that experiments involving human subjects should be responsible to, “a specially-appointed committee independent of the investigator and the sponsor, provided that this independent committee is in conformity with the laws and regulations of the country in which the research experiment is performed.” The government of Kuraca is only upholding its obligations to these principles by advising Megaceutical of potential violations via the use of this procedure.

3. Annex C, excerpts from Kuracan National Health Law 1006.

Kuracan national law concerning biomedical research involving human subjects recognizes, “Kuraca’s continuing national and international obligations for the protection of the health and rights of all people subject to the actions of the Kuracan Government and its agencies.” In this situation, through the recommendations of independent consultation as prescribed by international principles, the Kuracan governmental official had no other choice but to advise Megaceutical of pending human rights violations.

V. DECLARE THAT KURACA INCURRED NO LIABILITY TO SENHAVA IN THIS MATTER. ORDER SENHAVA TO RESCIND THE ORDER CLOSING THE OFFICES

OF MEGACEUTICAL-SENHAVA, REVOKE THE FINES ASSESSED AGAINST THE COMPANY, AND RETURN THE ADVANCE PAYMENT TO THE MINISTRY OF HEALTH OF 2 MILLION EUROS.

A. SINCE PROCEEDING WITH THE VACCINE TRIALS WOULD HAVE BEEN A VIOLATION OF HUMAN RIGHTS TREATIES, THE PREVENTION OF SUCH SHOULD IN NO CIRCUMSTANCE WARRANT TO A MONETARY PENALTY.

1. Constitution of the World Health Organization, "World Health Organisation: Basic Documents," 26th ed. (Geneva: World Health Organization, 1976), p. 1.

The Constitution for the World Health Organization, which is a subsidiary of the United Nations, holds that the responsibility of the health of all peoples is of primary importance. It states that, " the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States." This would place the preservation of human health as a top priority that should be deemed higher than any monetary consideration. Kuraca did nothing wrong in preventing the breach of international covenants and treaties, thereby it should incur no penalties monetary or otherwise.

B. SENHAVA ACTED UNREASONABLY IN THE FACE OF POTENTIAL HUMAN RIGHTS VIOLATIONS BY BREAKING THE TREATY OF AMITY AND COMMECE BETWEEN THE PARTIES INVOLVED.

1. The Treaty of Amity and Commerce between Kuraca and Senhava.

The Treaty of Amity and Commerce between Kuraca and Senhava reads that, "Natural and juridical persons that are nationals of either Party shall be permitted to carry on trade, and to perform any act incident to or necessary for the conduct of trade, upon the same terms and conditions as similarly situated nationals of the other party, submitting themselves to all laws and regulations applicable." In this situation, Senhava's actions of closing the offices of Megaceutical-Senhava, assessing fines against the company, and not returning advance payment

for services nullified by violation of international treaties is an act against the terms of this bilateral convention. The Kuracan parties which instigated that halt of the vaccine trials were doing so in recognition of international law and by not acknowledging this move reciprocally and according to the terms of the treaty, the Senhavan government is in violation of such. The above stated moves were unwarranted and should thus be rescinded and where necessary, appropriate compensation needs to be made.