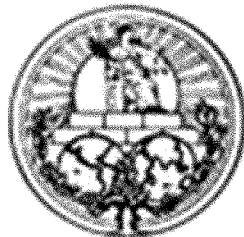


**IN THE INTERNATIONAL COURT OF JUSTICE  
AT THE PEACE PALACE,  
THE HAGUE, THE NETHERLANDS**

**THE 2017 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT  
COMPETITION**



**THE CASE CONCERNING THE SISTERS OF THE SUN**

**FEDERATION OF THE CLANS OF THE ATAN**

**APPLICANT**

**V.**

**KINGDOM OF RAHAD**

**RESPONDENT**

---

**MEMORIAL FOR THE APPLICANT**

---

## TABLE OF CONTENTS

---

INDEX OF AUTHORITIES.....	V
STATEMENT OF JURISDICTION.....	XVII
QUESTIONS PRESENTED .....	XVIII
STATEMENT OF FACTS.....	XIX
SUMMARY OF PLEADINGS .....	XXIV
PLEADINGS .....	1
<b>I. THE EXTRACTION OF WATER FROM THE AQUIFER VIOLATES INTERNATIONAL OBLIGATIONS UNDERTAKEN BY RAHAD AND CONSTITUTES AN INEQUITABLE USE OF A SHARED RESOURCE .....</b>	<b>1</b>
<b>A. Rahad violated its obligation of equitable and reasonable utilisation .....</b>	<b>1</b>
1. Rahad unilaterally assumed an obligation of equitable and reasonable utilisation in relation to the Aquifer.....	1
a. The declaration was publicly made and manifested an intention to be bound .....	2
b. The Minister was vested with power to bind Rahad.....	3
c. Any purported revocation was invalid.....	3
d. The unilateral declaration imposes an obligation of equitable and reasonable utilisation of the Aquifer.....	4
2. Rahad had a discrete customary obligation of equitable and reasonable utilisation.....	5
3. Rahad violated its obligation of equitable and reasonable utilisation, both unilaterally assumed and at custom.....	6
a. Rahad’s utilisation did not result in the equitable and reasonable accrual of benefits to Atania.....	7
b. Rahad’s utilisation did not maximise the long-term benefits derived from utilisation of the Aquifer.....	8
<b>B. Rahad violated its ICESCR obligations extraterritorially by interfering with the enjoyment of the right to water in Atania .....</b>	<b>8</b>
<b>C. Rahad violated its customary obligation not to cause transboundary harm .....</b>	<b>9</b>

1.	Rahad violated its procedural due diligence obligations .....	10
a.	Rahad’s EIA was not sufficient .....	10
b.	Rahad failed to cooperate with Atania.....	11
2.	Rahad violated its substantive obligation not to cause transboundary harm .....	12
<b>D.</b>	<b>Rahad’s extraction of water from the Aquifer is an abuse of rights.....</b>	<b>13</b>
<b>E.</b>	<b>Rahad cannot rely on the defence of necessity .....</b>	<b>13</b>
<b>II.</b>	<b>THE SAVALI PIPELINE OPERATIONS VIOLATE RAHAD’S INTERNATIONAL OBLIGATIONS WITH RESPECT TO THE KIN CANYON COMPLEX AND THEREFORE MUST CEASE .....</b>	<b>14</b>
<b>A.</b>	<b>Rahad violated article 6.3 of the 1972 <i>World Heritage Convention</i> .....</b>	<b>14</b>
1.	Rahad has an obligation not to take any deliberate measures which might damage the Complex .....	14
2.	Rahad violated Article 6.3 .....	15
<b>B.</b>	<b>Rahad’s Savali Pipeline operations contravened its customary obligation not to cause transboundary harm .....</b>	<b>16</b>
1.	Rahad violated its procedural due diligence obligations .....	16
a.	Rahad did not notify and consult with Atania .....	16
b.	Rahad failed to do all that was reasonable in the circumstances .....	17
2.	Rahad violated its substantive due diligence obligation .....	17
<b>C.</b>	<b>Rahad has abused its rights .....</b>	<b>17</b>
<b>D.</b>	<b>Rahad cannot rely on the defence of necessity .....</b>	<b>18</b>
<b>E.</b>	<b>Rahad’s Savali Pipeline operations must cease.....</b>	<b>18</b>
<b>III.</b>	<b>RAHAD MUST IMMEDIATELY RETURN THE RUBY SIPAR TO ATANIA, ITS LAWFUL OWNER .....</b>	<b>19</b>
<b>A.</b>	<b>Atania is the lawful owner of the Ruby Sipar .....</b>	<b>19</b>
1.	There is sufficient evidence on the <i>Compromis</i> to conclude that Atania owns the Ruby Sipar .....	19
2.	In the alternative, Atania has expropriated the Ruby Sipar .....	20
<b>B.</b>	<b>Rahad has violated its customary obligations with respect to the Ruby Sipar .....</b>	<b>20</b>
1.	Rahad has violated its customary obligation not to defeat the object and purpose of the <i>1970 Convention</i> .....	21

2.	Rahad violated its customary obligation to return illegally obtained cultural property	22
<b>C.</b>	<b>Rahad cannot justify its continued retention of the Ruby Sipar</b>	<b>23</b>
1.	Atania has not committed any internationally wrongful act	24
a.	Atania has validly limited the right to take part in cultural life	24
b.	Atania has not violated the right of minorities to enjoy their culture	25
2.	Rahad cannot justify retention of the Ruby Sipar as a countermeasure	25
<b>D.</b>	<b>Rahad must immediately return the ruby sipar to Atania</b>	<b>26</b>
<b>IV.</b>	<b>ATANIA OWES NO COMPENSATION TO RAHAD FOR ANY COSTS</b>	
	<b>INCURRED RELATED TO THE KIN MIGRANTS</b>	<b>26</b>
<b>A.</b>	<b>Rahad cannot make claims in relation to the Kin migrants as it comes to this Court with unclean hands</b>	<b>26</b>
<b>B.</b>	<b>Atania has committed no internationally wrongful act regarding the Kin migrants</b>	<b>27</b>
1.	Atania has not violated its human rights obligations	27
a.	Rahad’s claim in respect of human rights violations is inadmissible	27
b.	The WRAP Act complies with human rights obligations	28
c.	Atania’s management of the Atanagrad plaza protests complies with Atania’s human rights obligations	30
2.	There is no discrete customary obligation not to create refugees	31
3.	The doctrine of transboundary harm cannot apply to refugee flows or human migration	32
4.	Atania has not abused its rights	33
<b>C.</b>	<b>Atania owes no compensation to Rahad or, alternatively, Rahad’s claim for compensation is excessive</b>	<b>33</b>
1.	Atania owes no compensation by way of reparation	33
2.	Alternatively, Rahad’s claims are too remote	34
	<b>PRAYER FOR RELIEF</b>	<b>36</b>

## INDEX OF AUTHORITIES

---

### International Cases and Arbitral Decisions

<i>Al-Skeini and Others v United Kingdom</i> (ECtHR, Grand Chamber, Application No 55721/07, 7 July 2011).....	8
<i>Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)</i> [1991] ICJ Rep 53 .....	15
<i>Arrest Warrant of 11 April 2000 (DRC v Belgium) (Judgment)</i> [2002] ICJ Rep 137 .....	26
<i>Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Merits)</i> , International Court of Justice, General List Nos 150 and 152, 16 December 2015 (' <i>Costa Rica v Nicaragua</i> ') .....	10, 16, 17
<i>Chorzów Factory (Jurisdiction)</i> [1927] PCIJ (ser A) no 9 .....	26
<i>Chorzów Factory (Merits)</i> [1928] PCIJ (ser A) no 17.....	26
<i>Cyprus v Turkey</i> (ECtHR, Grand Chamber, Application No 25781/94, 12 May 2014).....	34
<i>Eletronica Sicula S.p.A (ELSI)</i> [1989] ICJ Rep 15.....	27
<i>Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction)</i> [1998] ICJ Rep 432, [46]. .....	3
<i>Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)</i> [1997] ICJ Rep 7 3, 4, 6, 13, 18	
<i>James v UK</i> (ECtHR, Plenary, Application No 8793/79, 21 February 1986) .....	20
<i>Lake Lanoux Arbitration (France v Spain)</i> (1957) 24 ILR 101.....	11, 12
<i>Legal Status of Eastern Greenland (Judgment)</i> [1933] PCIJ (ser A/B) No. 53 .....	26
<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)</i> [1986] ICJ Rep 14.....	26
<i>North Sea Continental Shelf (Federal Republic of Germany v Denmark/Federal Republic of Germany v Netherlands)</i> [1969] ICJ Rep 4 .....	23

<i>Peter Pázmány University (Judgment)</i> [1933] PCIJ (Ser A/B) No 61, 208 .....	19
<i>Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)</i> [2010] ICJ Rep 14 ....	10, 11
<i>Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)</i> [2012] ICJ Rep 422.....	5
<i>Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)</i> [2014] ICJ Rep 147, [44] (‘ <i>Timor-Leste v Australia</i> ’).....	3
<i>Report and Recommendations made by the Panel of Commissioners concerning the Egyptian Workers’ Claims (Jurisdiction)</i> (1995) 117 ILR 195 .....	34
<i>Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Judgment)</i> [2013] ICJ Rep 281 .....	14
<i>Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)</i> [1951] ICJ Rep 15.....	21
<i>Responsibilities and Obligations of States with Respect to Activities in the Area (Advisory Opinion)</i> [2011] ITLOS Rep 10.....	16
<i>Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)</i> (1999) 38 ILM 1624.....	16
<i>Temple of Preah Vihear (Cambodia v Thailand) (Merits)</i> [1962] ICJ Rep 6, 23 (‘ <i>Temple of Preah Vihear (Merits)</i> ’) .....	2
<i>The Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)</i> <i>(Judgment)</i> [1929] PCIJ (ser A) No 15, 94.....	19
<i>Trail Smelter case (United States, Canada)</i> (1938-41) RIAA 1905.....	9, 32, 33

## **Treaties and Covenants**

<i>Convention for the Protection of Human Rights and Fundamental Freedoms</i> , opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).....	27
<i>Convention for the Protection of the World Cultural and Natural Heritage</i> , opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).....	14, 15
<i>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970</i> , opened for signature 14 November 1970, 823 UNTS 232 (entered into force 24 April 1972) .....	20, 21, 22, 23
<i>Convention relating to the Status of Refugees</i> , opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) .....	32
Department of International Law, <i>Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (16 June 1976)</i> , Organisation of American States .....	22
ILC, <i>Convention on the Law of the Non-navigational Uses of International Watercourses</i> , GA Res 51/229, UN Doc A/RES/51/229 (8 July 1997) annex ( <i>‘Watercourses Convention’</i> ).....	4, 5
<i>International Covenant on Cultural, Economic and Social Rights</i> , opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) .....	24, 28, 30
Memorandum of Understanding Relating to Setting up of a Consultative Mechanism for the management of the Iullemeden Aquifer System (Bamako, 20 June 2009) .....	11
<i>UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects</i> opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998) .....	22
<i>Vienna Convention on the Law of Treaties</i> , opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ( <i>‘VCLT’</i> ) .....	3, 4, 21

**Other Authorities**

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, States Parties (2016) < <a href="http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/">http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/</a> > .....	22
Doc No 1999/27 .....	26
Doc No 1999/34 .....	26
Doc No 1999/35 .....	26
Doc No CR1999/16.....	26
Doc No CR1999/21.....	26
Doc No CR1999/24.....	26
Doc No CR1999/29.....	26
No CR1999/23 .....	26
UNESCO, <i>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property</i> , (2016), Legal Instruments, < <a href="http://www.unesco.org/eri/la/convention.asp?KO=13039&amp;language=E#1">http://www.unesco.org/eri/la/convention.asp?KO=13039&amp;language=E#1</a> > .....	22
<b>Decisions of National Courts</b>	
<i>Zolfagharkhani v Minister for Employment and Immigration</i> [1993] 3 FC 540 .....	28
<b>Books</b>	
Ben Saul, David Kinley and Jacqueline Mowbray, <i>The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases and Materials</i> (OUP, 2014) .....	29
Bin Cheng, <i>General Principles of Law as Applied by International Courts and Tribunals</i> (Stevens & Sons, 1953).....	13, 33

Christian Tomuschat, ‘State Responsibility and the Country of Origin’ in Gowlland-Debbas (ed), <i>The Problem of Refugees in the Light of Contemporary International Law Issues</i> (Martinus Nijhoff, 1994) vol 12 .....	32
Christina Leb, <i>Cooperation in the Law of Transboundary Water Resources</i> (CUP, 2013) ...	11, 12
Edith Brown Weiss, <i>In Fairness to Future Generations</i> (UN University, 1989).....	8
Elisabeth Zoller, <i>La Bonne Foi en Droit International Public</i> (Pedone, 1977) .....	26
Francesco Francioni, ‘The Evolving Framework for the Protection of Cultural Heritage in International law’ in Borelli and Lenzerini (eds), <i>Studies in Intercultural Human Rights: Cultural Heritage, Cultural Rights, Cultural Diversity</i> (Brill 2012).....	22
Georg Schwarzenberger, <i>International Courts and Tribunals</i> (Stevens & Sons, 1957) vol 1 .....	19
Guido Carducci, ‘Articles 4-7 National and International Protection of the Culture Heritage’ in Francioni (ed), <i>The 1972 World Heritage Convention: A Commentary</i> (OUP, 2008).....	15
Guy Goodwin-Gill and Jane McAdam, <i>The Refugee in International Law</i> (OUP, 3rd ed, 2007)31, 32	
Guy Goodwin-Gill and Jane McAdam, <i>The Refugee in International Law</i> (Oxford University Press, 3rd ed, 2007).....	31, 33
Ian Brownlie, <i>System of the Law of Nations: State Responsibility, part I</i> (Clarendon, 1983).....	34
Joseph Dellapenna, ‘International Law Applicable to Water Resources Generally’ in Kelly (ed) <i>Waters and Water Rights</i> (LexisNexis, 3 <sup>rd</sup> ed, 2016) vol 3 .....	5, 7
Laurence Boisson de Chazournes et al., ‘Article 18 Convention of 1969’ in Corten and Klein (eds), <i>The Vienna Convention on the Law of Treaties: A Commentary</i> (OUP, 2011) vol 1.....	21
Lyndel Prott and Patrick O’Keefe, <i>Law and the Cultural Heritage</i> (Professional Books, 1984) vol 1 .....	19

Mark E. Villiger, <i>Commentary on the 1969 Vienna Convention on the Law of Treaties</i> (Martinus Nijhoff, 2009) .....	21
Sarah Joseph, Jenny Schultz and Melissa Castan, <i>The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary</i> (OUP, 2013).....	31
Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of non-refoulement: Opinion’ in Erika Feller, Volker Turk and Frances Nicholson (eds) <i>Refugee Protection in International Law</i> (2003 Cambridge University Press), 89.....	32
Sir Robert Jennings and Sir Arthur Watts (eds), <i>Oppenheim’s International Law: Peace</i> (Longman, 9 <sup>th</sup> ed, 1992) vol 1 407.....	13, 20, 33
Stephen McCaffrey, <i>The Law of International Watercourses</i> (OUP, 2 <sup>nd</sup> ed, 2007).....	6
Takele Bulto, <i>The Extraterritorial Application of the Human Right to Water in Africa</i> (CUP, 2014).....	9
William Lipe, ‘Value and Meaning in Cultural Resources’ in Henry Cleere (ed), <i>Approaches to the Archaeological Heritage</i> (CUP, 1984) .....	23
Xue Hanqin, <i>Transboundary Damage in International Law</i> (CUP, 2003) .....	5, 12, 13
<b>Journal Articles</b>	
Albert Utton, ‘The Development of International Groundwater Law’ (1982) 22 <i>Natural Resources Journal</i> 95, 112-3 .....	6
C. Wilfred Jenks, ‘The Interpretation and Application of Municipal Law by the Permanent Court of International Justice’ (1938) 19 <i>British Yearbook of International Law</i> 67.....	20
Christopher Staker, ‘Public International Law and the <i>Lex Situs</i> Rule in Property Conflicts and Foreign Expropriations’ (1988) 58 <i>British Yearbook of International Law</i> 151 .....	19

Flavia Giustiniani, ‘The Obligations of the State of Origin of Refugees: An Appraisal of a Traditionally Neglected Issue’ (2015) 30 <i>Connecticut Journal of International Law</i> 171 .....	32
Gabriel Eckstein and Yoram Eckstein, ‘A Hydrogeological Approach to Transboundary Ground Water Resources and International Law’ (2003) 19(2) <i>American University International Law Review</i> 201 (‘Eckstein and Eckstein (2003’).....	6
Gabriel Eckstein, ‘Buried Treasure or Buried Hope? The Status of Mexico-U.S. Transboundary Aquifers under International Law’ (2011) 13(3) <i>International Community Law Review</i> 273 .	12
Georges Sauser-Hall, ‘L’ utilisation industrielle des fleuves internationaux’ (1953) 83 <i>Recueil des Cours</i> 465.....	11
Gerald Fitzmaurice, ‘The General Principles of International Law, Considered from the Standpoint of the Rule of Law’ (1957) 92 <i>Recueil des cours</i> 2, 119 (‘Fitzmaurice (1957’)...	26
Hannah Garry, ‘The Right to Compensation and Refugee Flows: A Preventative Mechanism in International Law’ 10 (1998) <i>International Journal of Refugee Law</i> 97.....	31, 32
Jeanette Greenfield, ‘The Return of Cultural Property’ (1986) <i>Antiquity LX</i> 29.....	22, 23
Julio Barberis, ‘The Development of International Law of Transboundary Groundwater’ (1991) 31 <i>Natural Resources Journal</i> 167 .....	12
L.V. Prott, ‘Problems of Private International Law for the Protection of Cultural Heritage’ (1989) 217 <i>Recueil des Cours</i> 215 .....	19
Luke T. Lee, ‘The Right to Compensation: Refugees and Countries of Asylum’ (1986) 80 <i>American Journal of International Law</i> 532 .....	32
Owen McIntyre, ‘The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Water Resources’ (2006) 46 <i>Natural Resources Journal</i> 157 .....	11

<i>Report of the International Law Commission</i> , UN GAOR, 60 <sup>th</sup> sess, UN Doc A/63/10 (5 May-6 June and 7 July-8 August 2008) ch IV, 27, 46 ( <i>‘Commentary to the Draft Articles’</i> ) .....	7
Robert Hayton and Albert Utton, <i>‘Transboundary Groundwaters: The Bellagio Draft Treaty’</i> (1989) 29 <i>Natural Resources Journal</i> 663, 682-3 .....	4, 5
Sir Gerald Fitzmaurice, <i>‘The General Principles of International Law, Considered from the Standpoint of the Rule of Law’</i> (1957) 92 <i>Recueil des cours</i> 2.....	26
Sir Gerald Fitzmaurice, <i>‘The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points’</i> (1958) 33 <i>British Yearbook of International Law</i> 203.....	2

**United Nations Documents**

CESCR, <i>General Comment No 12: The Right to Adequate Food (Article 11)</i> , UN Doc E/C.12/1999/5 (12 May 1999) .....	28
CESCR, <i>General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)</i> , UN Doc E/C.12/2002/11 (20 January 2003) .....	28, 29
CESCR, <i>General Comment No 20: Non-discrimination in economic, social and cultural rights (Art. 2, para 2 of the Covenant)</i> , UN Doc E/C.12/GC/20 (2 July 2009) .....	28
CESCR, <i>General Comment No 21, Right of Everyone to take part in cultural life (Article 15)</i> , UN Doc E/C.12/GC/21 (21 December 2009) [17] .....	24
Committee on Economic, Social and Cultural Rights ( <i>‘CESCR’</i> ), <i>General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)</i> , UN Doc E/C.12/2002/11 (20 January 2003) .....	9

Committee on Economic, Social and Cultural Rights, <i>General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)</i> , 29 <sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) [31] ('CESCR General Comment 15') .....	9, 28
<i>Convention on the Protection and Use of Transboundary Watercourses and International Lakes</i> (Helsinki, 17 March 1992) 31 ILM 1313.....	4
Decision 29 COM7A.4, adopted at the 29 <sup>th</sup> Session (Durban, 2005) WHC-05/29.COM/22 .....	10-12 15
Decision 35 COM 7B.3 (Lake Turkana National Parks (Kenya)) adopted by the 35 <sup>th</sup> Session of the World Heritage Committee (Paris, 2011) WHC-11/35.COM/20 .....	15
Decision 35 COM7B.3, adopted by the 35 <sup>th</sup> Session (Paris, 2011) WHC-11/35.COM/20 .....	15
Decision 36 COM5C, adopted by the 36 <sup>th</sup> session (Saint Petersburg, 2012) WHC-12/36.COM/19 .....	18
Decision 40 COM 7A.41 (Virunga National Park (Democratic Republic of the Congo)) adopted by the 40 <sup>th</sup> Session of the World Heritage Committee (Istanbul, 2016) WHC/16/40.COM/19 .....	15
Decision 40 COM7A.41, adopted by the 40 <sup>th</sup> Session (Istanbul, 2016) WHC/16/40.COM/19 ...	15
Decision 40 COM7B.96, adopted by the 40 <sup>th</sup> Session (Istanbul, 2016) WHC/16/40.COM/19 ...	15
HRC, <i>Concluding Observations of the Human Rights Committee on the Third Periodic Report of Denmark</i> , UN Doc CCPR/C/79/Add.68, (18 November 1996).....	31
HRC, <i>General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant</i> , UN Doc CCPR/C/21/REV.1/Add.1326 (24 May 2004) .....	34
HRC, <i>General Comment No 34: Freedom of Opinion and Expression (Article 19)</i> , UN Doc CCPR/C/GC/34 (12 September 2011).....	30

ILC, <i>Eighth report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur</i> , UN Doc A/CN.4/557 (26 May 2005).....	2
ILC, <i>Fourth report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur</i> , UN Doc A/CN.4/519 (30 May 2001).....	2
ILC, <i>Law of Treaties, Second report by G. Fitzmaurice, Special Rapporteur</i> , UN Doc A/CN.4/107 (15 March 1957).....	4
ILC, <i>Ninth Report on Unilateral Acts of States by Mr Victor Rodríguez Cedeño, Special Rapporteur</i> , UN Doc A/CN.4/569 (6 April 2006) 166.....	3
ILC, <i>Seventh Report on unilateral acts of States by Mr. Victor Rodríguez Cedeño, Special Rapporteur</i> , UN Doc A/CN.4/542 (22 April 2004) 249.....	2
ILC, <i>Third report on shared natural resources: transboundary groundwaters, by Mr Chusei Yamada, Special Rapporteur</i> , UN Doc A/CN.4/551 and Add.1 (11 February and 9 March 2005).....	5
<i>Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation</i> 16 <sup>th</sup> Session, Paris, UNESCO Headquarters, 21-23 September 2010, CLT-2010/CONF.203/COM.16/2 REV .....	22
<i>Intergovernmental Committee for Promoting the Return of Cultural Property</i> , 16 <sup>th</sup> Session (Paris, 21-23 September 2010) CLT-2010/CONF.203/COM.16/2 REV .....	22
International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') .....	25, 27, 29, 30, 31
International Law Commission ('ILC'), <i>Report of the Working Group – Conclusions of the International Law Commission Relating to Unilateral Acts of States</i> , UN Doc A/CN.4/L.703 (20 July 2006).....	2, 3

Oliver Martin and Giovanni Piatti (eds), <i>World Heritage and Buffer Zones: International Expert Meeting</i> (UNESCO, 2008).....	17
<i>Permanent Sovereignty over Natural Resources</i> , GA Res 1803 (XVII), UN Doc A/5217 (14 December 1962).....	13, 18
<i>Report of the ILC</i> , UN Doc A/56/10 (23 April-1 June and 2 July-10 August 2001)..	10, 14, 17, 32
<i>Report of the ILC</i> , UN Doc A/61/10 (1 May-9 June and 3 July-11 August 2006) ( <i>‘Articles on Diplomatic Protection’</i> ) .....	34
<i>Report of the ILC</i> , UN Doc A/63/10 (5 May-6 June and 7 July-8 August 2008).....	7, 8
<i>Report of the ILC</i> , UN Doc A/63/10 (5 May-6 June and 7 July-8 August 2008) ( <i>‘Draft Articles’</i> ) .....	5, 6, 7, 8, 10, 12
<i>Report of the ILC</i> , UN GAOR, UN Doc A/61/10 (1 May- 9 June and 3 July-11 August 2006)2, 3, 4	
<i>Responsibility of States for Internationally Wrongful Acts</i> , GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002) annex.....	13, 14, 18, 25, 26, 33, 34
Stefano Burchi and Kerstin Mechlem, <i>Groundwater in International Law: Compilation of Treaties and Other Legal Instruments</i> (FAO/UNESCO, 2005) .....	5
UN ESCOR Commission on Human Rights, <i>The Limburg Principles on Implementation the ICESCR</i> , UN Doc E/CN.4/1987/17 (8 January 1987).....	24, 30
UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property, <i>Return and Restitution of Cultural Property – a brief résumé</i> , UNESCO doc CLT/CH/4.82 (11 June 1982) .....	23
UNESCO, <i>Information Kit: The Return or Restitution of Cultural Property</i> ( <i>‘Some examples of Return or Restitution’</i> ) .....	23

## Soft Law Instruments

<i>Convention on the Protection and Use of Transboundary Watercourses and International Lakes</i> (Helsinki, 17 March 1992) 31 ILM 1313 ( <i>'Helsinki Convention'</i> ) art 2 .....	4
<i>Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State</i> [1993] OJ L 74/74.....	22
ILA, <i>Report of the Seventy-First Conference</i> , Berlin, 16-21 August 2004 (2004) 71 ILA 337, 385 ( <i>'Berlin Rules'</i> ) arts 12, 13.....	4, 5
ILA, <i>Report of the Sixty-Second Conference held at Seoul, 24—30 August 1986</i> (London, 1987) 251 ( <i>'Seoul Rules'</i> ) .....	4, 5
International Commission of Jurists, <i>Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights</i> (28 September 2011).....	8, 9
International Law Association ( <i>'ILA'</i> ), <i>Report of the Fifty-Second Conference</i> , Helsinki, 14-20 August 1966 (London, 1967) 484 ( <i>'Helsinki Rules'</i> ) .....	4, 5
Rio Declaration on Environment and Development, UN Doc A/CONF.151/26/Rev.1 (1992), principle 4 .....	18

## **STATEMENT OF JURISDICTION**

---

The Federation of the Clans of Atan (“Atania”) and the Kingdom of Rahad (“Rahad”) have consented to submit this dispute to the International Court of Justice (“this Court”), in accordance with Article 36(1) of the Statute of the International Court of Justice (“the Statute”). Pursuant to Article 40(1) of the Statute, this dispute was transmitted to the Registrar on 12 September 2016. Atania and Rahad have undertaken to accept the Court’s decision as final and binding on them and also commit to comply with it in its entirety and in good faith.

## **QUESTIONS PRESENTED**

---

- I. Whether extraction of water from the Aquifer violates international obligations undertaken by Rahad and constitutes an inequitable use of a shared resource.**
- II. Whether the Savali Pipeline operations violate Rahad's international obligations with respect to the Kin Canyon Complex and should cease.**
- III. Whether Rahad must immediately return the Ruby Sipar to Atania, its lawful owner.**
- IV. Whether Atania owes compensation to Rahad for any costs incurred related to the Kin migrants.**

## **STATEMENT OF FACTS**

---

### **BACKGROUND**

Atania is a newly-industrializing State with a population of approximately 22 million. Its GDP, based primarily on tourism and the exportation of hydrocarbon and grain, has fallen by US\$22 billion since January 2010. Atania occupies the eastern two-thirds of the arid and semi-arid lands of the Nomad Coast, while its neighbour, Rahad, is located in its western third. In response to drought conditions from 1983 to 1988, both Atania and Rahad began importing water. Drought conditions returned to the region in 1999 and were continuing at the date of the Special Agreement. The two nations share a common heritage, having both descended from the Atan clans, and have historically united in times of crisis.

### **THE GREATER INATA AQUIFER**

The Nomad Coast's largest underground source of fresh water is the Greater Inata Aquifer ('the Aquifer'), an unconfined fossil aquifer. The people of the region have relied upon the Aquifer's discharge for many generations. A 1990 Report concluded that 35% of the Aquifer was located in Atania, and 65% in Rahad. The follow-up report found that the Aquifer contained approximately 35 cubic kilometres of extractable fresh water, deposited over 10,000 years ago, and that the Aquifer's negligible recharge rate meant that any extracted water would not be replenished for many generations.

### **WORLD WATER DAY 1993**

On the first UN World Water Day, in 1993, President Vhen and Queen Teresa, the Heads of State of Atania and Rahad respectively, appeared together at a joint ceremony to recognise and celebrate the importance of water to all peoples. The Rahadi Minister of Water and Agriculture promised, in a nationally televised address, “to make every reasonable effort to preserve and protect the shared freshwater resources of the Nomad Coast and to ensure their equitable use.” The Minister’s Atanian counterpart responded with a message of appreciation. The UN Secretary General affirmed Rahad’s commitment and encouraged the rest of the world to emulate this commitment.

### **THE SAVALI PIPELINE**

In 2002, Queen Teresa formally directed the Inata Logistic and Scientific Association (‘ILSA’), a Rahadi government-funded organisation, to study the feasibility and long-term effects of tapping the Aquifer to meet Rahad’s water needs. The report concluded that to be self-sufficient Rahad would need to extract water at a rate of  $1.2\text{km}^3$  per year. This would deplete the Aquifer in approximately 30 years. On 2 February 2003, Queen Teresa announced that Rahad would tap the Aquifer for ‘so long as drought conditions continue’. President Vhen reminded Rahad of its 1993 commitment and expressed serious concerns that the proposed unilateral action would negatively affect Atania’s use of the shared resource. Rahad began pumping in 2006, and was still doing so at the date of the Special Agreement, at a rate of  $1.2\text{km}^3$  per year. Rahad has used 70% of extracted water for agriculture, 22% for its natural gas industry and the remaining 8% for a variety of other uses.

In 2010, an international panel of experts, commissioned in response to reports of loss of Atanian farmland due to insufficient water, concluded that Rahad's Savali Pipeline operations had caused a permanent lowering of the water table in the region. Consequently, discharge from the Aquifer could no longer provide sufficient water for Atanian agriculture. The study found that 20% of Atanian farmland could no longer be farmed, and that within 10 years an additional 30% would be lost. President Vhen identified Atania's resulting costs as having exceeded US\$300 million annually.

### **THE KIN CANYON COMPLEX**

The border between Atania and Rahad is straddled by the Kin Canyon Complex ('the Complex'), a group of three canyons cut by long-extinct rivers. The Canyons are venerated by the Kin as the birthplace of their ancestors and have been recognised as a source of 'some of the most fascinating insights into early human civilisations.' A walled fortress ('the Stronghold') and the Sunrise Mesa are among the historic sites within the Complex. The Complex, after being jointly proposed by Atania and Rahad, was listed on 2 May 1994 as a mixed World Heritage site.

In 2003, ILSA noted that care would need to be taken to avoid harm to the Complex in any plans to tap the water of the Aquifer. Rahad submitted the Pipeline plan to the World Heritage Committee ('the Committee') in 2004. The Committee expressed concern regarding potential damage to the Complex. In 2010, images on social media exposed damage to the Complex. A panel of geologists attributed this degradation to the Pipeline. The Complex was closed to tourists due to safety concerns. In 2012, UNESCO listed the Complex on the List of World Heritage in Danger.

## **THE RUBY SIPAR**

The Ruby Sipar ('the Sipar') is a ceremonial shield laden with jewels. According to legend, it was raised by Teppa, a warrior of the Clan Kin, following the defeat of Ifan the Desert Fox in 500C.E. The Sisters of the Sun, an order dedicated to protecting and preserving the culture and traditions of the Kin, wear replicas of the Sipar in loyalty to Teppa. Believed to have been lost for centuries, the Sipar was discovered by Dr. Gena Logres, an archaeologist from the University of Atanagrad, in 1903. In 1996, the Sipar was placed in Atania's Kin Canyon Complex Cultural Centre. The Centre draws approximately 350,000 visitors annually.

During 2014 protests, the Sipar became a symbol of protests and unrest. Due to escalating unrest, President When issued an order for all publically worn Sipar pendants to be confiscated and destroyed. Atania had the Sipar removed from display and placed in storage. In October 2014, Carla Dugo, under the cover of darkness, took the Sipar and delivered it to Rahadi border patrol agents. The Rahadi Minister for Culture declared on 3 November 2014 that Rahad would retain possession of the Sipar.

## **THE WRAP ACT**

Following Rahad's rejections of Atania's requests to suspend the Pipeline, the Atanian Parliament enacted the 2012 Water Resource Allocation Program Act ('WRAP Act'). The WRAP Act set a water quota for every Atanian household, farm, and business and required farming operations to purchase licences to utilise public water, with exemptions for profit-generating farms. The Bureau of Agriculture was empowered to prosecute anyone who used water over-quota or failed to obtain licences for farming. Less than 5% of Kin farmers

applied for licences before the end of 2012, and more than 80% of Kin households and farms used water over-quota. The Atanian Parliament amended the WRAP Act, mandating the termination of State-controlled water to those in violation of the Act. Due to non-compliance, State-controlled water was cut off to the majority of Kin farms.

### **THE KIN MIGRANTS**

There were reports that Kin affected by the termination of water for non-compliance could not secure sufficient food. The Sisters of the Sun led subsequent protests. In response to ‘chaotic, unsanitary, dangerous, and entirely unsustainable’ conditions, Atania cleared the plaza of protesters and arrested demonstrators who refused to disperse.

As at the date of the Special Agreement, 800,000 Kin had crossed the border into Rahad. A newspaper cited starvation and fear of arrest as the motivations for leaving. The Rahadi Parliament deemed the Sisters of the Sun and their families to have refugee status. Applications remain pending for the other migrants.

## SUMMARY OF PLEADINGS

---

### PLEADING I

Rahad has violated its obligations relating to the utilisation of the Aquifer. The declaration made by the Rahadi Minister for Water and Agriculture on 22 March 1993 created legally binding obligations that required Rahad to equitably and reasonably utilise the Aquifer. Any purported revocation of this obligation was invalid. Rahad also had an identical customary obligation to utilise the Aquifer equitably and reasonably. Rahad violated this obligation by utilising the Aquifer in a way that deprived Atania of the equitable and reasonable accrual of benefits and did not maximise the long-term benefits of use from the water.

As a party to *ICESCR* Rahad's extraction of water from the Aquifer, which lowered the water table and destroyed Atanian farmland, also violated its extraterritorial obligation not to interfere with the people of Atania's right to water. That same destruction of farmland also constitutes a violation of the customary rule against transboundary harm. Finally, Rahad's extraction of water constitutes an abuse of its right to exploit its own natural resources. The wrongfulness of these acts cannot be precluded on the basis of necessity.

### PLEADING II

Rahad has violated its international obligations with respect to the Complex, a World Heritage site. Rahad violated its obligation not to intentionally undertake acts which might cause harm to the Complex. Further, Rahad has caused transboundary harm to Atania. In so doing, it failed to exercise due diligence as required. Atania has abused its right to exploit its natural resources at the expense of the World Heritage site. Rahad cannot rely on necessity to preclude the

wrongfulness of its acts. As these internationally wrongful acts are of a continuing character, the appropriate reparation is the cessation of Rahad's Savali Pipeline operations.

### **PLEADING III**

Atania is the lawful owner of the Ruby Sipar. In refusing to return the Ruby Sipar, Rahad has, in between its signature of the *1970 Convention* and its entry into force for Rahad, defeated the object and purpose of the *1970 Convention*. This is a violation of customary international law. Alternatively, Rahad has violated the customary rule that unlawfully removed cultural property is to be returned to its country of origin.

Atania has not committed any internationally wrongful acts which might justify Rahad retaining possession of the Sipar. Atania validly limited the Kin's cultural rights under Article 15(1)(a) of *ICESCR*, and did not violate Article 27 of *ICCPR*. Even if this Court finds that Atania did violate the Kin's cultural rights, this does not give rise to an entitlement of Rahad to retain possession of the Sipar. Rahad has not satisfied the requirements to characterise its retention as a lawful countermeasure. Therefore, Rahad is required to make reparation to Atania in the form of the Ruby Sipar's immediate return.

### **PLEADING IV**

Rahad is barred from advancing any claim for compensation for its acceptance of the Kin migrants as it has not come to the Court with 'clean hands.' Rahad's destruction of Atanian farmland necessitated the WRAP Act, the enforcement of which Rahad alleges constitutes an internationally wrongful act. If the Court decides to admit Rahad's claim, Atania has nonetheless

complied with all of its human rights obligations. Further Atania has not violated customary international law as there is no customary obligation not to create refugee flows and the customary prohibition on transboundary harm does not apply to mass migration. Atania has not abused its rights as both the WRAP Act and Atania's measures to disperse the protests were undertaken in the general interest of society.

In any event, Rahad will be unable to claim compensation for any violations of human rights attributed to Atania as it was not the beneficiary of those obligations. Any damage associated with absorbing a migration flow is not a natural consequence of Atania's conduct and is therefore too remote.

## PLEADINGS

---

### I. THE EXTRACTION OF WATER FROM THE AQUIFER VIOLATES INTERNATIONAL OBLIGATIONS UNDERTAKEN BY RAHAD AND CONSTITUTES AN INEQUITABLE USE OF A SHARED RESOURCE

#### A. RAHAD VIOLATED ITS OBLIGATION OF EQUITABLE AND REASONABLE UTILISATION

Rahad was under an obligation to utilise the Aquifer equitably and reasonably. This obligation arose by way of its unilateral declaration of 22 March 1993, and as a discrete customary obligation.

##### 1. **Rahad unilaterally assumed an obligation of equitable and reasonable utilisation in relation to the Aquifer**

The unilateral declaration made on 22 March 1993 by the Rahadi Minister of Water and Agriculture ('the Minister') created binding obligations to 'make every reasonable effort to preserve and protect the shared freshwater resources of [the] Nomad Coast and to ensure their equitable use.'<sup>1</sup>

Unilateral declarations are a source of legally binding obligations.<sup>2</sup> The Rahadi Minister's declaration had the effect of creating such obligations, as: *first*, the declaration was publicly

---

<sup>1</sup> *Compromis*, [16].

<sup>2</sup> *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, [43] ('*Nuclear Tests*').

made and manifested the will to be bound;<sup>3</sup> *second*, the Minister was vested with the power to bind Rahad internationally;<sup>4</sup> and *third*, any purported revocation was invalid.<sup>5</sup>

**a. The declaration was publicly made and manifested an intention to be bound**

The Minister's declaration was expressly addressed to Atania and the international community in a nationally-televised address.<sup>6</sup> Whether the declaration manifested an intention to be bound requires a consideration of the text of the declaration and all of the factual circumstances.<sup>7</sup> Cumulatively, the Minister's use of the word 'promise',<sup>8</sup> the occasion of the first UN World Water Day, the presence of Heads of State and the public nature<sup>9</sup> of the declaration indicate Rahad's intent to be legally bound by its undertaking.<sup>10</sup> Kofi Annan's 1998 speech affirmed the commitments undertaken by Rahad.<sup>11</sup> Rahad's absence of protest to the UN Secretary General's speech constitutes acquiescence as to the existence of such commitments.<sup>12</sup>

---

<sup>3</sup> International Law Commission ('ILC'), *Report of the Working Group – Conclusions of the International Law Commission Relating to Unilateral Acts of States*, UN Doc A/CN.4/L.703 (20 July 2006) principle 1 ('*Guiding Principles*').

<sup>4</sup> *Guiding Principles* 4.

<sup>5</sup> *Guiding Principles* 10.

<sup>6</sup> *Compromis*, [16]; *Guiding Principles* 6; ILC, *Eighth report on unilateral acts of States*, by Mr. Victor Rodríguez Cedeño, *Special Rapporteur*, UN Doc A/CN.4/557 (26 May 2005) 126-7.

<sup>7</sup> *Guiding Principles* 3; Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1958) 33 *British Yearbook of International Law* 203, 230.

<sup>8</sup> *Compromis*, [16]; ILC, *Fourth report on unilateral acts of States*, by Mr. Victor Rodríguez Cedeño, *Special Rapporteur*, UN Doc A/CN.4/519 (30 May 2001) 126.

<sup>9</sup> *Report of the ILC*, UN Doc A/61/10 (1 May-9 June and 3 July-11 August 2006) 370 ('*Guiding Principles Commentary*').

<sup>10</sup> *Guiding Principles* 3; *Guiding Principles Commentary*, 371; *Nuclear Tests*, [43].

<sup>11</sup> *Compromis*, [17].

<sup>12</sup> *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 23 ('*Temple of Preah Vihear (Merits)*'); ILC, *Seventh Report on unilateral acts of States* by Mr. Victor Rodríguez Cedeño, *Special Rapporteur*, UN Doc A/CN.4/542 (22 April 2004) 249.

**b. The Minister was vested with power to bind Rahad**

A declaration made by a State official in an area within the official's competence can bind the State internationally.<sup>13</sup> A statement regarding the usage of a shared water resource falls within the competence of the Minister of Water and Agriculture. Therefore, the Minister was vested with the power to bind Rahad in relation to the Aquifer.<sup>14</sup>

**c. Any purported revocation was invalid**

A unilateral declaration cannot be revoked arbitrarily.<sup>15</sup> Queen Teresa made statements inconsistent with the unilateral declaration on 16 June 2002 and 2 February 2003, prompting protest by Atania.<sup>16</sup> In the absence of express or implied terms relating to revocation,<sup>17</sup> Rahad must adhere to its obligation unless there has been a fundamental change in circumstances warranting revocation.<sup>18</sup> The customary rules permitting treaties to be terminated on the ground of fundamental change<sup>19</sup> apply *mutatis mutandis* to unilateral declarations.<sup>20</sup>

---

<sup>13</sup> *Guiding Principles 4; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2014] ICJ Rep 147, [44] ('*Timor-Leste v Australia*').

<sup>14</sup> *Compromis*, [16].

<sup>15</sup> *Guiding Principles 10; ILC, Ninth Report on Unilateral Acts of States by Mr Victor Rodriguez Cedeño, Special Rapporteur*, UN Doc A/CN.4/569 (6 April 2006) 166 [92] ('*Cedeño, Ninth Report (2006)*').

<sup>16</sup> *Compromis*, [20]-[23].

<sup>17</sup> *Compromis*, [16]; *Guiding Principles Commentary*, 380-1.

<sup>18</sup> *Guiding Principles 10*.

<sup>19</sup> *Vienna Convention on the Law of Treaties*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 62 ('*VCLT*'); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, [104] ('*Gabčíkovo-Nagymaros*').

<sup>20</sup> *Cedeño, Ninth Report (2006)* 170; *Guiding Principles Commentary*, 381; *Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction)* [1998] ICJ Rep 432, [46].

Rahad cannot rely on the return of drought as a fundamental change in circumstances. The absence of drought did not constitute an essential basis<sup>21</sup> of Rahad's undertaking and its recurrence did not radically transform the extent of its obligation.<sup>22</sup> In any event, the return of drought must have been foreseen by Rahad<sup>23</sup> and indeed, the scarcity of water was the *raison d'être* of the unilateral declaration.<sup>24</sup>

**d. The unilateral declaration imposes an obligation of equitable and reasonable utilisation of the Aquifer**

The interpretation of a unilateral declaration requires a consideration of its text and the circumstances in which it was made.<sup>25</sup> The Minister's express reference to 'reasonable' and 'equitable use' incorporated the established corpus of international water law regarding equitable and reasonable utilisation. This principle has been present in an international context since the *Helsinki Rules* (1966),<sup>26</sup> which were extended to groundwater and aquifers in the *Seoul Rules* (1986),<sup>27</sup> and has since featured in multiple international instruments.<sup>28</sup>

---

<sup>21</sup> *VCLT* art 62(1)(a); *Gabčíkovo-Nagymaros*, [104]; ILC, *Law of Treaties, Second report by Gerald Fitzmaurice, Special Rapporteur*, UN Doc A/CN.4/107 (15 March 1957) 61.

<sup>22</sup> *VCLT* art 62(1)(b); *Fisheries Jurisdiction Case (Germany v Iceland) (Jurisdiction)* [1973] ICJ Rep 49, [43].

<sup>23</sup> *Compromis*, [14], [18]-[19]; *VCLT* art 62(1); *Gabčíkovo-Nagymaros*, [104].

<sup>24</sup> *Compromis*, [16].

<sup>25</sup> *VCLT* art 31; *Guiding Principles* 3.

<sup>26</sup> International Law Association ('ILA'), *Report of the Fifty-Second Conference*, Helsinki, 14-20 August 1966 (London, 1967) 484 ('*Helsinki Rules*').

<sup>27</sup> ILA, *Report of the Sixty-Second Conference held at Seoul, 24-30 August 1986* (London, 1987) 251 ('*Seoul Rules*').

<sup>28</sup> ILA, *Report of the Seventy-First Conference*, Berlin, 16-21 August 2004 (2004) 71 ILA 337 ('*Berlin Rules*'); Robert Hayton and Albert Utton, 'Transboundary Groundwaters: The Bellagio Draft Treaty' (1989) 29 *Natural Resources Journal* 663, 682-3; *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Helsinki, 17 March 1992) 31 ILM 1313 ('*Helsinki Convention*'); ILC, *Convention on the Law of the Non-navigational Uses of International Watercourses*, GA Res 51/229, UN Doc A/RES/51/229 (8 July 1997) annex ('*Watercourses Convention*') arts 5, 6.

This established principle finds modern application in the *2008 Draft Articles on the Law of Transboundary Aquifers* ('the *Draft Articles*'), which specifically consider the application of the principle of equitable and reasonable utilisation to transboundary aquifers in Articles 4 and 5.<sup>29</sup> Interpreting the Minister's statement as incorporating this principle as enunciated in the *Draft Articles* is also consistent with an evolutionary interpretation of the statement.<sup>30</sup>

## **2. Rahad had a discrete customary obligation of equitable and reasonable utilisation**

In addition to the obligation assumed by unilateral declaration, Rahad is bound by a parallel customary obligation to utilise the Aquifer equitably and reasonably. Obligations of equitable and reasonable utilisation are supported by 'widespread international practice' and 'the *opinio juris* of States'.<sup>31</sup> This principle, described by Her Excellency Judge Xue Hanqin as a 'fundamental principle of international water law',<sup>32</sup> is further evidenced by treaties,<sup>33</sup> international instruments<sup>34</sup> and national court decisions.<sup>35</sup> In *Gabčíkovo-Nagymaros*, this Court

---

<sup>29</sup> *Report of the ILC*, UN Doc A/63/10 (5 May-6 June and 7 July-8 August 2008) arts 4, 5 ('Draft Articles').

<sup>30</sup> *Gabčíkovo-Nagymaros*, [140].

<sup>31</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)* [2012] ICJ Rep 422 [99] ('*Belgium v Senegal*').

<sup>32</sup> Xue Hanqin, *Transboundary Damage in International Law* (CUP, 2003) 155 ('Xue (2003)').

<sup>33</sup> See, eg, Stefano Burchi and Kerstin Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments* (FAO/UNESCO, 2005) 262-5; ILC, *Third report on shared natural resources: transboundary groundwaters, by Mr Chusei Yamada, Special Rapporteur*, UN Doc A/CN.4/551 and Add.1 (11 February and 9 March 2005) 76-9.

<sup>34</sup> *Helsinki Rules* arts IV, V; *Seoul Rules* arts I, II; *Berlin Rules* arts 12, 13; *Bellagio Draft Treaty* art II; *Helsinki Convention* art 2; *Watercourses Convention* arts 5, 6; *Draft Articles* arts 4, 5.

<sup>35</sup> Joseph Dellapenna, 'International Law Applicable to Water Resources Generally' in Kelly (ed) *Waters and Water Rights* (LexisNexis, 3<sup>rd</sup> ed, 2016) vol 3, 49.04(b)-49.04(c) ('Dellapenna (2016)').

recognised Hungary's 'right to an equitable and reasonable share of the natural resources of the Danube', which it shared with Czechoslovakia.<sup>36</sup>

The customary principle applicable to surface water also applies to groundwater and aquifers. As recognised by Eckstein and Eckstein, because ground and surface water are 'part and parcel' of the same hydrologic cycle, it would be inappropriate 'to bifurcate the management and regulation of ground and surface water resources.'<sup>37</sup> The fact that the Aquifer is a fossil aquifer calls for the principle of equitable and reasonable utilisation to apply 'with even greater force.'<sup>38</sup>

### **3. Rahad violated its obligation of equitable and reasonable utilisation, both unilaterally assumed and at custom**

In 2006, Rahad began extracting water from the Aquifer at a rate of 1.2 km<sup>3</sup> per year. Continued extraction at this rate would exhaust the Aquifer's extractable freshwater in approximately 30 years.<sup>39</sup> Rahad has violated the principle of equitable and reasonable utilisation as articulated in Articles 4 and 5 of the *Draft Articles* as: *first*, Rahad's utilisation did not result in the equitable and reasonable accrual of benefits;<sup>40</sup> and *second*, the extraction did not maximise the long-term benefits derived from the use of water contained therein.<sup>41</sup>

---

<sup>36</sup> *Gabčikovo-Nagymaros*, [85].

<sup>37</sup> Gabriel Eckstein and Yoram Eckstein, 'A Hydrogeological Approach to Transboundary Ground Water Resources and International Law' (2003) 19(2) *American University International Law Review* 201; Albert Utton, 'The Development of International Groundwater Law' (1982) 22 *Natural Resources Journal* 95, 112-3.

<sup>38</sup> Stephen McCaffrey, *The Law of International Watercourses* (OUP, 2<sup>nd</sup> ed, 2007) 499-500 ('McCaffrey, (2007)').

<sup>39</sup> *Compromis*, [21].

<sup>40</sup> *Draft Articles* art 4(a).

<sup>41</sup> *Draft Articles* art 4(b)-(d).

**a. Rahad’s utilisation did not result in the equitable and reasonable accrual of benefits to Atania**

Rahad’s utilisation prevented the equitable and reasonable accrual of benefits from the Aquifer to Atania.<sup>42</sup> The extent and rate of Rahad’s water extraction caused a ‘permanent’ lowering of the region’s water table such that discharge from the Aquifer ‘could no longer provide a sufficient natural source of water for Atanian agriculture’.<sup>43</sup> This deprived Atania of benefits essential to the satisfaction of the ‘vital human needs’ of members of its population including water for the production of food ‘to sustain human life’ and ‘prevent starvation.’<sup>44</sup>

Rahad’s conduct is not justifiable by it possessing any greater need for water than Atania.<sup>45</sup> Atania’s population is more than six times greater than Rahad’s.<sup>46</sup> Atania has also suffered drought and climate changes.<sup>47</sup> While Rahad is ‘a developing nation,’<sup>48</sup> its GDP per capita is similar to Atania’s.<sup>49</sup> Therefore, Rahad’s social and economic needs<sup>50</sup> provide no basis for depriving Atania of the Aquifer’s benefits.

---

<sup>42</sup> *Draft Articles* art 4(a); see also McCaffrey (2007) 388-9; Dellapenna (2016) 49.05(a)1.01, 110.9.

<sup>43</sup> *Compromis*, [28].

<sup>44</sup> *Draft Articles* art 5(2); *Report of the ILC*, UN Doc A/63/10 (5 May-6 June and 7 July-8 August 2008) 45-6 (‘*Draft Articles Commentary*’).

<sup>45</sup> *Draft Articles Commentary*, 45-6.

<sup>46</sup> *Compromis*, [2]-[3]; *Draft Articles* art 5(a).

<sup>47</sup> *Compromis*, [19].

<sup>48</sup> *Compromis*, [20].

<sup>49</sup> *Compromis*, [2]-[3].

<sup>50</sup> *Draft Articles* art 5(b).

**b. Rahad’s utilisation did not maximise the long-term benefits derived from utilisation of the Aquifer**

Reasonable utilisation requires ‘sustainable utilisation’, aimed at the maximisation of the ‘long-term benefits derived from the use of such waters’.<sup>51</sup> This requirement encapsulates the concept of sustainable development, which includes intergenerational equity.<sup>52</sup> Moreover, Rahad’s declaration expressly included a commitment to ‘preserve and protect’ the Aquifer for ‘future generations’.<sup>53</sup> Rahad’s current rate of extraction would exhaust the Aquifer within approximately 30 years.<sup>54</sup> Queen Teresa acknowledged that the plan was unsustainable, characterising it as a ‘short-term solution’ which risked ‘bankrupting ... future generations’.<sup>55</sup> Therefore, Rahad’s exploitation of the Aquifer disregards the future water needs of both States.<sup>56</sup>

**B. RAHAD VIOLATED ITS *ICESCR* OBLIGATIONS EXTRATERRITORIALLY BY INTERFERING WITH THE ENJOYMENT OF THE RIGHT TO WATER IN ATANIA**

Under *ICESCR*, to which both States are parties,<sup>57</sup> Rahad has ‘obligations to respect, protect and fulfil human rights’ both in its territory and ‘extraterritorially’.<sup>58</sup> The Committee on Economic, Social and Cultural Rights (‘CESCR’) has stressed that State parties must refrain from actions

---

<sup>51</sup> *Draft Articles Commentary*, 42.

<sup>52</sup> *Draft Articles* Preamble para 7; see Edith Brown Weiss, *In Fairness to Future Generations* (UN University, 1989) 236.

<sup>53</sup> *Compromis*, [16].

<sup>54</sup> *Compromis*, [21], [26].

<sup>55</sup> *Compromis*, [22].

<sup>56</sup> *Draft Articles* art 4(c); *Draft Articles Commentary*, 28.

<sup>57</sup> *Compromis*, [59]; *Clarifications*, [10].

<sup>58</sup> International Commission of Jurists, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (28 September 2011) principle 3 (‘*Maastricht Principles*’); *Al-Skeini and Others v United Kingdom* (ECtHR, Grand Chamber, Application No 55721/07, 7 July 2011) [133].

that might foreseeably interfere, directly or indirectly, with the enjoyment of the right to water in other States.<sup>59</sup>

Rahad's extraction of water from the Aquifer in its own territory brought about foreseeable effects for Atania's enjoyment of the right to water.<sup>60</sup> The Pipeline has directly led to the lowering of Atania's water table and the loss of at least 20% of arable land,<sup>61</sup> depriving members of Atania's population of sufficient water to sustain farming activities.<sup>62</sup> This constituted violations of Rahad's extraterritorial human rights obligations in relation to the right to water in Atania.

### **C. RAHAD VIOLATED ITS CUSTOMARY OBLIGATION NOT TO CAUSE TRANSBOUNDARY HARM**

As recognised in *Trail Smelter*, '[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury...to the territory of another or the properties...therein.'<sup>63</sup> This 'no-harm' rule requires States to exercise due diligence where proposed activities carry a 'risk'

---

<sup>59</sup> Committee on Economic, Social and Cultural Rights ('CESCR'), *General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc E/C.12/2002/11 (20 January 2003) [31] ('CESCR General Comment 15'); *Maastricht Principles* 9(b).

<sup>60</sup> *Maastricht Principles* 9; Takele Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (CUP, 2014) 152-3.

<sup>61</sup> *Compromis*, [28].

<sup>62</sup> CESCR General Comment 15, [7].

<sup>63</sup> *Trail Smelter case (United States, Canada)* (1938-41) RIAA 1905, 1965-6 ('*Trail Smelter*').

of ‘significant’ transboundary harm.<sup>64</sup> ‘Risk’ requires consideration of the project’s ‘nature’, ‘magnitude’ and ‘context’.<sup>65</sup> Significant harm requires ‘a real detrimental effect’.<sup>66</sup>

The scale of proposed extraction was significant: a network of 30 wells extracting at 1.2km<sup>3</sup> per year, exhausting the Aquifer within 30 years.<sup>67</sup> The foreseeability of significant harm to Atania is evidenced by the warning from the Inata Logistic and Scientific Association (‘ILSA’), the World Heritage Committee’s (‘the Committee’) concerns about subsidence, and the proximity of Atanian farmland to the Aquifer.<sup>68</sup> The risk of significant transboundary harm enlivened procedural due diligence obligations to conduct a transboundary environmental impact assessment (‘EIA’) and to cooperate with Atania, as well as the substantive obligation to not cause transboundary harm.

## **1. Rahad violated its procedural due diligence obligations**

### **a. Rahad’s EIA was not sufficient**

While Rahad conducted an EIA,<sup>69</sup> there is no evidence that it evaluated the transboundary impact of the Pipeline on Atanian farmland.<sup>70</sup> Further, the obligation to carry out an EIA is a continuous

---

<sup>64</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Merits)* ICJ, General List Nos 150 and 152, 16 December 2015, [104] (‘*Costa Rica v Nicaragua*’); *Draft Articles* art 6.

<sup>65</sup> *Costa Rica v Nicaragua*, [155]; *Report of the ILC*, UN Doc A/56/10 (23 April-1 June and 2 July-10 August 2001) 387 (‘*Prevention of Transboundary Harm Draft Articles Commentary*’).

<sup>66</sup> *Prevention of Transboundary Harm Draft Articles Commentary*, 388.

<sup>67</sup> *Compromis*, [21], [26].

<sup>68</sup> *Compromis*, [21], [25].

<sup>69</sup> *Clarifications*, [3]; *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 [205] (‘*Pulp Mills*’).

<sup>70</sup> *Costa Rica v Nicaragua*, [102]-[104].

one, requiring ongoing monitoring of the project.<sup>71</sup> There is no evidence that Rahad undertook continuous monitoring in the six years prior to Rahad's commitment in July 2012 to undertake regular studies of long term impact and no indication of what monitoring has occurred subsequent to its commitment.<sup>72</sup>

**b. Rahad failed to cooperate with Atania**

Cooperation is one of the 'cornerstone principles' governing the management of shared water resources.<sup>73</sup> Cooperation regarding transboundary aquifers is realised through the observance of the procedural duties to notify, consult, negotiate and regularly exchange data and information.<sup>74</sup>

**i. Rahad failed to notify Atania**

Rahad was required to notify Atania of its proposed Pipeline activities to allow Atania to evaluate the potential effects of the Pipeline.<sup>75</sup> Notification is particularly important in the context of transboundary aquifers, as evidenced by its inclusion in agreements governing some of the world's largest aquifers.<sup>76</sup> Queen Teresa's televised speech and the proposal's submission to the Committee<sup>77</sup> are insufficient to discharge Rahad's notification duty as: neither was

---

<sup>71</sup> *Pulp Mills*, [205].

<sup>72</sup> *Compromis*, [26], [33].

<sup>73</sup> Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (CUP, 2013) 10 ('Leb (2013)'). This is also a discrete obligation in customary international law: *Lake Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101, 133 ('*Lake Lanoux*').

<sup>74</sup> Owen McIntyre, 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Water Resources' (2006) 46 *Natural Resources Journal* 157, 159.

<sup>75</sup> Georges Sauser-Hall, 'L'utilisation industrielle des fleuves internationaux' (1953) 83 *Recueil des Cours* 465, 568-9.

<sup>76</sup> Eg, Memorandum of Understanding Relating to Setting up of a Consultative Mechanism for the management of the Iullemeden Aquifer System (Bamako, 20 June 2009) art 24.

<sup>77</sup> *Compromis*, [13], [22].

specifically addressed to Atania and the speech lacked technical details; and there is no evidence that the Committee submission considered risk to Atanian arable land.<sup>78</sup>

**ii. Rahad failed to consult and negotiate with Atania**

There is no evidence that Rahad consulted and negotiated<sup>79</sup> with Atania before construction commenced. To the contrary, Rahad failed to address President Vhen's concerns,<sup>80</sup> and expressly refused his request for a meeting.<sup>81</sup>

**iii. Rahad failed to exchange data and information**

In planning to tap the Aquifer, Rahad had an obligation to share information and data with Atania regarding the Aquifer's natural characteristics.<sup>82</sup> Without such exchange, 'a meaningful assessment on whether a specific water use is equitable, reasonable or optimal cannot be carried out.'<sup>83</sup> There is no evidence that Rahad engaged in such information exchange.

**2. Rahad violated its substantive obligation not to cause transboundary harm**

Rahad has violated the 'no-harm' rule as it caused actual transboundary harm to Atania. The significance of the harm is evidenced by the international panel of experts' conclusion that Rahad's extraction had caused 'a permanent lowering of the water table in the region'.<sup>84</sup>

---

<sup>78</sup> Julio Barberis, 'The Development of International Law of Transboundary Groundwater' (1991) 31 *Natural Resources Journal* 167, 178-9.

<sup>79</sup> *Lake Lanoux*, 133; Xue (2003) 173-4.

<sup>80</sup> *Compromis*, [23].

<sup>81</sup> *Compromis*, [33].

<sup>82</sup> *Draft Articles* art 8; Gabriel Eckstein, 'Buried Treasure or Buried Hope? The Status of Mexico-U.S. Transboundary Aquifers under International Law' (2011) 13(3) *International Community Law Review* 273, 280.

<sup>83</sup> Leb (2013) 115.

<sup>84</sup> *Compromis*, [27]-[28].

Consequently, arable land in Atania was destroyed.<sup>85</sup> This harm, including damage in excess of US\$300 million annually,<sup>86</sup> far exceeds the ‘mere nuisance’ a State is expected to tolerate.<sup>87</sup>

#### **D. RAHAD’S EXTRACTION OF WATER FROM THE AQUIFER IS AN ABUSE OF RIGHTS**

The doctrine of abuse of rights<sup>88</sup> is particularly applicable in cases of shared resources.<sup>89</sup> An abuse of rights occurs where a State’s arbitrary exercise of a right causes harm to another State that cannot be justified by the first State’s own advantage.<sup>90</sup> While Rahad has a right to utilise the Aquifer,<sup>91</sup> it exercised that right in a way that caused detriment to Atania by destroying at least 20% of its farmland.<sup>92</sup> This was not justified: Atania and Rahad had similar water needs.<sup>93</sup> Accordingly, the Pipeline caused unjustifiable detriment to Atania and is an abuse of rights.

#### **E. RAHAD CANNOT RELY ON THE DEFENCE OF NECESSITY**

Necessity cannot be invoked to preclude wrongfulness unless ‘certain strictly defined conditions [are] cumulatively satisfied.’<sup>94</sup> Rahad is unable to rely on necessity as there was another lawful way (i.e. importing water)<sup>95</sup> to safeguard its essential interest, even if ‘more costly or less

---

<sup>85</sup> *Compromis*, [28].

<sup>86</sup> *Compromis*, [29].

<sup>87</sup> Xue (2003) 8.

<sup>88</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, 1953) 121 (‘Cheng (1953)’).

<sup>89</sup> *Gabčíkovo-Nagymaros*, 95 (Separate Opinion, Vice-President Weeramantry).

<sup>90</sup> Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law: Peace* (Longman, 9<sup>th</sup> ed, 2008) vol 1, 407 (‘Oppenheim (2008)’).

<sup>91</sup> *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN Doc A/5217 (14 December 1962) (‘Permanent Sovereignty Declaration’).

<sup>92</sup> *Compromis*, [28].

<sup>93</sup> *Compromis*, [19], [23].

<sup>94</sup> *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002) annex, art 25 (‘ASR’); *Gabčíkovo-Nagymaros*, [40].

<sup>95</sup> *Clarifications*, [9].

convenient'.<sup>96</sup> Furthermore, Rahad's extraction of water from the Aquifer 'seriously impaired' Atania's 'essential interest' in the arability of farmland.<sup>97</sup>

## **II. THE SAVALI PIPELINE OPERATIONS VIOLATE RAHAD'S INTERNATIONAL OBLIGATIONS WITH RESPECT TO THE KIN CANYON COMPLEX AND THEREFORE MUST CEASE**

### **A. RAHAD VIOLATED ARTICLE 6.3 OF THE 1972 *WORLD HERITAGE CONVENTION***

The Kin Canyon Complex ('the Complex) and its 'sacred canyons' are 'venerated as the birth place of' Atanian culture.<sup>98</sup> The Complex is a jointly listed mixed heritage site under the *World Heritage Convention* ('*WHC*')<sup>99</sup> to which Atania and Rahad are both parties.<sup>100</sup>

#### **1. Rahad has an obligation not to take any deliberate measures which might damage the Complex**

Rahad has an obligation under Article 6.3 of the *WHC* 'not to take any deliberate measures which might damage directly or indirectly' the Complex.<sup>101</sup> The term 'deliberate measures' in Article 6.3 is not defined in the *WHC*. Article 31 of the Vienna Convention on the Law of

---

<sup>96</sup> *Report of the ILC*, UN Doc A/56/10 (23 April-1 June and 2 July-10 August 2001) 203 ('*ASR Commentary*').

<sup>97</sup> *ASR* art 25(1)(b); *Compromis*, [27]-[29].

<sup>98</sup> *Compromis*, [7]-[9].

<sup>99</sup> *Compromis*, [13]; *Clarifications*, [10]; *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*WHC*').

<sup>100</sup> *Compromis*, [59].

<sup>101</sup> *WHC* art 6.3; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Judgment)* [2013] ICJ Rep 281, [106].

Treaties (*VCLT*) codifies the customary rule that a treaty is to be interpreted in good faith, according to its ordinary meaning in its context and in light of the Treaty's object and purpose.<sup>102</sup>

The adjective 'deliberate' in Article 6.3 is used in relation to 'measures' taken, not the *consequences* caused by those measures. Therefore, 'deliberate measures' include those not intended to destroy world heritage, but which nonetheless have that consequence.<sup>103</sup> The Committee has interpreted Article 6.3 as an obligation on States to take no action that 'threatens the value or integrity of a property located on the territory of another State Party to the Convention',<sup>104</sup> and has applied the Article to the construction of oil pipelines,<sup>105</sup> dams,<sup>106</sup> and the extraction of natural resources.<sup>107</sup>

## 2. Rahad violated Article 6.3

States violate Article 6.3 where they take deliberate measures which 'might' cause 'direct or indirect damage'.<sup>108</sup> Rahad was put on notice by the ILSA Study and the Committee's decision that the Pipeline might cause damage to the Complex.<sup>109</sup> In accordance with the customary precautionary principle, Rahad cannot rely on scientific uncertainty to justify failing to take

---

<sup>102</sup> *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53, [48].

<sup>103</sup> Guido Carducci, 'Articles 4-7 National and International Protection of the Culture Heritage' in Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (OUP, 2008) 130 ('Carducci (2008)').

<sup>104</sup> Decision 29 COM7A.4, adopted at the 29<sup>th</sup> Session (Durban, 2005) WHC-05/29.COM/22 10-12; Carducci (2008) 126.

<sup>105</sup> Decision 40 COM7B.96, adopted by the 40<sup>th</sup> Session (Istanbul, 2016) WHC/16/40.COM/19, 169-70.

<sup>106</sup> Decision 35 COM7B.3, adopted by the 35<sup>th</sup> Session (Paris, 2011) WHC-11/35.COM/20, 48-9.

<sup>107</sup> Decision 40 COM7A.41, adopted by the 40<sup>th</sup> Session (Istanbul, 2016) WHC/16/40.COM/19, 58.

<sup>108</sup> *WHC* art 6.3.

<sup>109</sup> *Compromis*, [21], [25].

measures to prevent degradation to the Complex.<sup>110</sup> In violation of Article 6.3, Rahad's deliberate construction of the Pipeline caused 'structural degradation' to the Canyons and the Stronghold, requiring closure of sections of the Complex.<sup>111</sup>

**B. RAHAD'S SAVALI PIPELINE OPERATIONS CONTRAVENED ITS CUSTOMARY OBLIGATION NOT TO CAUSE TRANSBOUNDARY HARM**

The transboundary harm to the Complex is factually related to, but legally distinct from, the transboundary harm to Atanian farmland, addressed in Section I.C. Rahad's Pipeline operations carried a risk of significant transboundary harm to the Complex. Rahad knew that its extraction proposal would exhaust the Aquifer in approximately 30 years and was warned by ILSA and the Committee to take care to avoid harm.<sup>112</sup> Accordingly, it was foreseeable that significant harm might result to the Complex if care was not taken. This risk of significant harm to the Complex enlivened Rahad's obligation to exercise due diligence to prevent transboundary harm.<sup>113</sup>

**1. Rahad violated its procedural due diligence obligations**

**a. Rahad did not notify and consult with Atania**

Conducting an EIA does not in itself fulfil Rahad's procedural 'no-harm' obligations.<sup>114</sup> In *Costa Rica v Nicaragua*, this Court stressed that where an EIA confirms a risk of significant transboundary harm, the State planning the activity is required to 'notify and consult in good

---

<sup>110</sup> Rio Declaration on Environment and Development, UN Doc A/CONF.151/26/Rev.1 (1992), Principle 15 ('Rio Declaration'); *Responsibilities and Obligations of States with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Rep 10, [128], [135]; *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624, 1650 (Separate Opinion, Judge Ad Hoc Shearer).

<sup>111</sup> *Compromis*, [30].

<sup>112</sup> *Compromis*, [21], [25]-[26].

<sup>113</sup> *Costa Rica v Nicaragua*, [104].

<sup>114</sup> *Clarifications*, [3].

faith with the potentially affected State'.<sup>115</sup> There is no evidence that Rahad took the necessary steps to notify and consult with Atania in light of the risk identified in the EIA. Compounding this failure, Rahad did not consult with Atania after the Committee confirmed the need for steps to be taken to prevent harm to the Complex.<sup>116</sup>

**b. Rahad failed to do all that was reasonable in the circumstances**

Due diligence requires a State to take 'all measures...that it can reasonably be expected to take.'<sup>117</sup> Rahad limited the Savali Pipeline operations to areas more than 17km from the Complex in an effort to comply with the Committee's recommendations.<sup>118</sup> However, given the hydrogeological connection between the Aquifer and the Complex,<sup>119</sup> it was for Rahad to adduce evidence that the buffer zone was adequate to prevent the risk flowing from this connection.

**2. Rahad violated its substantive due diligence obligation**

Atania suffered harm of a 'real detrimental' effect.<sup>120</sup> This harm manifested itself in the form of 'clear structural degradation of the Canyons and the Stronghold' within Atania'.<sup>121</sup> This harm is particularly significant considering the Complex's World Heritage status.<sup>122</sup>

**C. RAHAD HAS ABUSED ITS RIGHTS**

Rahad is under an obligation not to abuse its rights, as set out at Section I.D. In pursuing its right to exploit its natural resources,<sup>123</sup> Rahad acted in an arbitrary manner that caused unjustified

---

<sup>115</sup> *Costa Rica v Nicaragua*, [104].

<sup>116</sup> *Compromis*, [25].

<sup>117</sup> Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart, 2011) 42.

<sup>118</sup> Oliver Martin and Giovanni Piatti (eds), *World Heritage and Buffer Zones: International Expert Meeting* (UNESCO, 2008) 59-60.

<sup>119</sup> *Compromis*, [30].

<sup>120</sup> *Transboundary Harm Draft Articles Commentary*, 388.

<sup>121</sup> *Compromis*, [30].

<sup>122</sup> *WHC Preamble* para 2.

harm to Atania. The arbitrariness of Rahad's conduct is evident in its violation of the principle of sustainable development, which requires a weighing of 'considerations of development against environmental considerations'.<sup>124</sup> Despite the Committee's strong recommendation, there is no evidence that Rahad developed 'plans, policies, and proposals' to implement targets for improving conservation of the Complex.<sup>125</sup> Rahad created a buffer zone but adduced no evidence that this would improve conservation of the Complex. Rahad's inadequate consideration of environmental impacts renders its Pipeline operations an arbitrary and unjustifiable exercise of its rights.

#### **D. RAHAD CANNOT RELY ON THE DEFENCE OF NECESSITY**

As set out in Section I.E., the wrongfulness of a State's conduct may be precluded where it is established that it was necessary.<sup>126</sup> However, for the reasons set out in Section I.E., foremost, that Rahad had viable alternative means available to it, Rahad is unable to rely on a plea of necessity.

#### **E. RAHAD'S SAVALI PIPELINE OPERATIONS MUST CEASE**

Rahad's violations of Article 6.3 of *WHC*, its obligation not to cause transboundary harm and its duty not to abuse its rights are all of a continuing character, requiring the remedy of cessation.<sup>127</sup>

---

<sup>123</sup> Permanent Sovereignty Declaration.

<sup>124</sup> *Gabčíkovo-Nagymaros*, 95 (Separate Opinion, Vice-President Weeramantry); Rio Declaration, principle 4; Decision 36 COM5C, adopted by the 36<sup>th</sup> session (Saint Petersburg, 2012) WHC-12/36.COM/19, 6.

<sup>125</sup> *Compromis*, [25].

<sup>126</sup> *ASR* art 25.

<sup>127</sup> *Compromis*, [26]; *ASR* arts 14(3), 30; *ASR Commentary*, 217.

### III. RAHAD MUST IMMEDIATELY RETURN THE RUBY SIPAR TO ATANIA, ITS LAWFUL OWNER

#### A. ATANIA IS THE LAWFUL OWNER OF THE RUBY SIPAR

##### 1. There is sufficient evidence on the *Compromis* to conclude that Atania owns the Ruby Sipar

Under international law, the ownership of moveable property is determined by the relevant municipal law, in this case, Atanian municipal law.<sup>128</sup> Notwithstanding some ambiguity on the *Compromis* regarding the Sipar's ownership, there is sufficient evidence of Atania's ownership pursuant to its municipal law.<sup>129</sup> *First*, the Sipar was excavated on public Atanian land, by an employee of a public educational institution.<sup>130</sup> *Second*, the Sipar has been on public display since 1996 in a facility owned and managed by the Atanian Ministry of Culture.<sup>131</sup> *Third*, Carla Dugo did not assert ownership when she gave the stolen Sipar to Rahadi border patrol agents.<sup>132</sup> *Finally*, Atania has formally claimed ownership of the Sipar, which this Court can accept as reflecting the position in Atanian law.<sup>133</sup> This Court should declare Atania the lawful owner of the Sipar.

---

<sup>128</sup> Christopher Staker, 'Public International Law and the *Lex Situs* Rule in Property Conflicts and Foreign Expropriations' (1988) 58 *British Yearbook of International Law* 151, 154; L.V. Prott, 'Problems of Private International Law for the Protection of Cultural Heritage' (1989) 217 *Recueil des Cours* 215, 280-1; Georg Schwarzenberger, *International Courts and Tribunals* (Stevens & Sons, 1957) vol 1, 76.

<sup>129</sup> *The Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil) (Judgment)* [1929] PCIJ (ser A) No 15, 94, 124.

<sup>130</sup> *Compromis*, [12]; cf Lyndel Prott and Patrick O'Keefe, *Law and the Cultural Heritage* (Professional Books, 1984) vol 1, 189.

<sup>131</sup> *Compromis*, [13]; *Clarifications*, [5].

<sup>132</sup> *Compromis*, [50].

<sup>133</sup> *Compromis*, [51], [61]; *Peter Pázmány University (Judgment)* [1933] PCIJ (ser A/B) No 61, 208, 230; C. Wilfred Jenks, 'The Interpretation and Application of Municipal Law by the

## 2. In the alternative, Atania has expropriated the Ruby Sipar

The Sipar was identified as being “on loan” from the University of Atanagrad to an Atania’s Cultural Centre.<sup>134</sup> If it can be implied from this that the University owned the Sipar at that time, Atania subsequently became the owner by way of expropriation on 5 August 2014.<sup>135</sup>

It is well accepted that a State has sovereign authority to expropriate the property of its nationals.<sup>136</sup> In contrast to the position regarding foreign nationals, general international law does not impose any requirements on a State taking property from its own nationals; rather this is an issue of municipal law.<sup>137</sup> President Vhen ordered the banning of the Sipar and its removal from public display.<sup>138</sup> The effect of this order was to divest the University, a national of Atania, of any ownership right it had in the Sipar and vest it in Atania.

### B. RAHAD HAS VIOLATED ITS CUSTOMARY OBLIGATIONS WITH RESPECT TO THE RUBY SIPAR

The *1970 Convention*,<sup>139</sup> which compels the return of illicitly exported or imported cultural property upon request, entered into force for Rahad on 30 December 2014, three months after it deposited its instrument of ratification.<sup>140</sup> As the *1970 Convention* does not apply

---

Permanent Court of International Justice’ (1938) 19 *British Yearbook of International Law* 67, 91.

<sup>134</sup> *Compromis*, [13].

<sup>135</sup> *Compromis*, [43].

<sup>136</sup> *James v UK* (ECtHR, Plenary, Application No 8793/79, 21 February 1986) [59], [62] (‘*James v UK*’); Oppenheim (2008) 918.

<sup>137</sup> *James v UK*, [59].

<sup>138</sup> *Compromis*, [43]-[44].

<sup>139</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, opened for signature 14 November 1970, 823 UNTS 232 (entered into force 24 April 1972) (‘*1970 Convention*’).

<sup>140</sup> *Corrections*, [3]; *1970 Convention* art 21.

retrospectively,<sup>141</sup> Rahad was not bound by it when the Sipar was brought into Rahad on 3 October 2014.<sup>142</sup> Rahad is nonetheless bound by obligations under customary international law: *first*, not to undertake acts which defeat the object and purpose of the *1970 Convention*; and *second*, to return unlawfully obtained cultural property.

**1. Rahad has violated its customary obligation not to defeat the object and purpose of the *1970 Convention***

Rahad has a customary<sup>143</sup> obligation not to defeat the object and purpose of treaties that it has signed but where its ratification has not yet come into effect.<sup>144</sup> Accordingly, Rahad had an obligation not to defeat the object and purpose of the *1970 Convention*. A treaty's object and purpose will be 'defeated' when a State's act renders subsequent performance of the treaty obligations 'meaningless'.<sup>145</sup>

The object and purpose of the *1970 Convention* is to prohibit and prevent illicit import, export and transfer of ownership of cultural property.<sup>146</sup> Rahad's acceptance of the stolen Sipar and its explicit refusal to return it is not only 'a blatant disregard for the cooperative relationship'<sup>147</sup> envisaged by the *1970 Convention*, but would also violate critical provisions of the *1970*

---

<sup>141</sup> *VCLT* art 28.

<sup>142</sup> *Compromis*, [50].

<sup>143</sup> Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009) 252 ('Villiger (2009)'); Laurence Boisson de Chazournes et al., 'Article 18 Convention of 1969' in Corten and Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, 2011) vol 1 369, 380-2.

<sup>144</sup> *VCLT* art 4.

<sup>145</sup> Villiger (2009) 249; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 26-7.

<sup>146</sup> *1970 Convention* art 2, Preamble para 8.

<sup>147</sup> *Compromis*, [50], [52].

*Convention*.<sup>148</sup> The import of the Sipar, three days after Rahad's deposit of its instrument of ratification, is particularly deplorable considering it is property of immense cultural value to Atania.<sup>149</sup>

## **2. Rahad violated its customary obligation to return illegally obtained cultural property**

A rule of customary international law that unlawfully obtained cultural property is to be returned to its country of origin has emerged since WWII.<sup>150</sup> This is reflected by 'widespread international practice'<sup>151</sup> including that of specially affected States (significant market and source States for antiquities)<sup>152</sup> and State support for international instruments.<sup>153</sup> Most notably, the *1970 Convention* has widespread support, with 131 State parties as at January 2016.<sup>154</sup> The existence

---

<sup>148</sup> Eg, *1970 Convention*, arts 2, 7(b)(ii), 13(d).

<sup>149</sup> *Compromis*, [7]-[10].

<sup>150</sup> Francesco Francioni, 'The Evolving Framework for the Protection of Cultural Heritage in International law' in Borelli and Lenzerini (eds), *Studies in Intercultural Human Rights: Cultural Heritage, Cultural Rights, Cultural Diversity* (Brill 2012) 3, 16.

<sup>151</sup> *Belgium v Senegal*, [99].

<sup>152</sup> Eg, *Intergovernmental Committee for Promoting the Return of Cultural Property*, 16<sup>th</sup> Session (Paris, 21-23 September 2010) CLT-2010/CONF.203/COM.16/2 REV 9-10; Jeanette Greenfield, 'The Return of Cultural Property' (1986) *Antiquity LX* 29 ('Greenfield (1986)').

<sup>153</sup> Eg, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* opened for signature 24 June 1995, 2421 UNTS 457 (entered into force 1 July 1998) art 3; *Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* [1993] OJ L 74/74, art 2; Department of International Law, *Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations* (16 June 1976), Organisation of American States.

<sup>154</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, States Parties (2016) <<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/>>.

of *opinio juris*<sup>155</sup> is evidenced by instances of return of cultural property by States who were not parties to the *1970 Convention* at the time of return.<sup>156</sup>

Atania, where the Sipar was discovered, is the Sipar's country of 'origin'.<sup>157</sup> Atania's declaration pursuant to the *1970 Convention* reinforces that the Sipar is Atania's cultural property.<sup>158</sup> As the homeland of 16 of the 17 Clans of Atan,<sup>159</sup> the Sipar has a tangible link to Atania's cultural heritage.<sup>160</sup> The Sipar was stolen from Atania and subsequently transported into Rahad,<sup>161</sup> which accepted it and expressly refused its return.<sup>162</sup> Rahad has therefore violated the customary rule on return of unlawfully obtained cultural property.

### C. RAHAD CANNOT JUSTIFY ITS CONTINUED RETENTION OF THE RUBY SIPAR

Rahad has claimed that return of the Sipar would be 'inappropriate' as Atania has removed the Sipar from 'public display'.<sup>163</sup> However, Atania has not committed any internationally wrongful acts and, even if it had, those acts do not entitle Rahad to retain possession of the Sipar.

---

<sup>155</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark/Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 4 [77].

<sup>156</sup> UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property, *Return and Restitution of Cultural Property – a brief résumé*, UNESCO doc CLT/CH/4.82 (11 June 1982) 4-6; UNESCO, *Information Kit: The Return or Restitution of Cultural Property* ('Some examples of Return or Restitution'); Greenfield (1986) 30.

<sup>157</sup> *1970 Convention* arts 2(1), 4(b), 7(b)(ii).

<sup>158</sup> *Compromis*, [60].

<sup>159</sup> *Compromis*, [10].

<sup>160</sup> William Lipe, 'Value and Meaning in Cultural Resources' in Henry Cleere (ed), *Approaches to the Archaeological Heritage* (CUP, 1984) 2; *1970 Convention* Preamble para 3.

<sup>161</sup> *Compromis*, [50].

<sup>162</sup> *Compromis*, [51]-[52].

<sup>163</sup> *Compromis*, [52].

**1. Atania has not committed any internationally wrongful act**

**a. Atania has validly limited the right to take part in cultural life**

Atania validly limited the Article 15 *ICESCR* right ‘to take part in cultural life’,<sup>164</sup> in particular, the availability of the Sipar to the public.<sup>165</sup> Atania was entitled to do so under Article 4 for the purpose of ‘promoting the general welfare’ of society in accordance with non-discriminatory domestic law.<sup>166</sup>

President Vhen’s order requiring removal of the Sipar from public display was a ‘law of general application’ that was ‘clear and accessible to everyone.’<sup>167</sup> The limitation was warranted because the Sipar became a symbol used to incite ‘ongoing unrest’ and ‘seditious protest’.<sup>168</sup> Atania’s limitation of access to the Sipar was to ‘preserve law and order for all...citizens.’<sup>169</sup> This promotes ‘the general welfare’ of society.<sup>170</sup>

---

<sup>164</sup> *International Covenant on Cultural, Economic and Social Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 15 (*ICESCR*).

<sup>165</sup> CESCR, *General Comment No 21, Right of Everyone to take part in cultural life (Article 15)*, UN Doc E/C.12/GC/21 (21 December 2009) [17] (‘CESCR General Comment 21’).

<sup>166</sup> CESCR General Comment 21 [16].

<sup>167</sup> UN ESCOR Commission on Human Rights, *The Limburg Principles on Implementation the ICESCR*, UN Doc E/CN.4/1987/17 (8 January 1987) [48], [50] (‘Limburg Principles’); *Compromis*, [43].

<sup>168</sup> Limburg Principles [49]; *Compromis*, [42].

<sup>169</sup> *Compromis*, [43].

<sup>170</sup> Limburg Principles [52].

**b. Atania has not violated the right of minorities to enjoy their culture**

Atania has an obligation under Article 27 of the *ICCPR* to ensure that minorities are not denied the right to enjoy their own culture.<sup>171</sup> The Human Rights Committee ('HRC') has recognised that measures which have minimal impacts on the enjoyment of culture by a minority do not violate Article 27.<sup>172</sup>

The removal of the Sipar from public display is not 'so substantial'<sup>173</sup> as to deny the Clan the right to enjoyment of their culture. The purpose of the order by President Vhen was to end its public use as a 'symbol of sedition' and means to 'provoke disruptive elements within Atania.'<sup>174</sup> The ability for the Kin to enjoy their culture remained substantially available, albeit not through the public display of the Sipar while it was in storage.<sup>175</sup>

**2. Rahad cannot justify retention of the Ruby Sipar as a countermeasure**

Even if the Court finds that Atania has committed an internationally wrongful act, Rahad cannot justify its retention of the Sipar as a countermeasure. Rahad never called upon Atania to fulfil any particular obligation,<sup>176</sup> nor is there evidence that Rahad acted to induce Atania's compliance, or intended to return the Sipar in the event of such compliance.<sup>177</sup>

---

<sup>171</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27 ('*ICCPR*').

<sup>172</sup> HRC, *Views: Communication No. 511/1992*, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [9.4] ('*Länsman et al v Finland*'), ('*Länsman (1994)*').

<sup>173</sup> HRC, *Views: Communication No. 779/197*, UN Doc CCPR/C/73/D/779/1997 (4 February 1997) [4.3] ('*Äärelä and Näkkäljärvi v Finland*'); *Länsman (1994)*, [9.4];.

<sup>174</sup> *Compromis*, [43].

<sup>175</sup> *Compromis*, [44].

<sup>176</sup> *ASR* art 52(1)(a).

<sup>177</sup> *ASR* art 52(1)(b).

**D. RAHAD MUST IMMEDIATELY RETURN THE RUBY SIPAR TO ATANIA**

Rahad is under an obligation to make full reparation for the injury caused to Atania by its internationally wrongful acts.<sup>178</sup> Here, full reparation requires material restitution by return of the Sipar to Atania, its lawful owner.<sup>179</sup>

**IV. ATANIA OWES NO COMPENSATION TO RAHAD FOR ANY COSTS INCURRED RELATED TO THE KIN MIGRANTS**

**A. RAHAD CANNOT MAKE CLAIMS IN RELATION TO THE KIN MIGRANTS AS IT COMES TO THIS COURT WITH UNCLEAN HANDS**

Rahad has not come to the Court with clean hands. As recognised by judges of this Court<sup>180</sup> and its predecessor,<sup>181</sup> eminent publicists<sup>182</sup> and the practice of States,<sup>183</sup> a State that is guilty of wrongful conduct cannot enforce the ‘corresponding illegalities’ of other States, especially those it has ‘provoked’.<sup>184</sup> Rahad’s Savali Pipeline operation and its effects, established as wrongful in Sections I and II, depleted Atania’s water resources and destroyed its destroyed its farmland,

---

<sup>178</sup> ASR arts 30, 31, 34; *Chorzów Factory (Jurisdiction)* [1927] PCIJ (ser A) no 9, 21 (‘*Chorzów (Jurisdiction)*’).

<sup>179</sup> ASR arts 31, 35; *Chorzów Factory (Merits)* [1928] PCIJ (ser A) no 17, 47; *Temple of Preah Vihear (Merits)*, 36.

<sup>180</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 392 (Dissenting Opinion, Judge Schwebel); *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Judgment)* [2002] ICJ Rep 137, 160 (Dissenting Opinion, Judge ad hoc Van den Wyngaert).

<sup>181</sup> *Chorzów Factory (Jurisdiction)*, 31; *Legal Status of Eastern Greenland (Judgment)* [1933] PCIJ (ser A/B) No 53, 95 (Dissenting Opinion, Judge Anzilotti).

<sup>182</sup> Sir Gerald Fitzmaurice, ‘The General Principles of International Law, Considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des cours* 2, 119 (‘Fitzmaurice (1957)’); Elisabeth Zoller, *La Bonne Foi en Droit International Public* (Pedone, 1977) 298.

<sup>183</sup> See the oral submissions of Canada (Doc No CR1999/16, 7;1999/27, 6); Germany (Doc No CR1999/29, 7); Portugal (Doc No CR1999/21, 11); United Kingdom (Doc No CR1999/23, 16, 24;1999/34, 10, 13); United States of America (Doc No CR1999/24, 23;1999/35, 10) in the *Legality of the Use of Force* proceedings.

<sup>184</sup> Fitzmaurice (1957) 119.

which provoked the WRAP Act and subsequent events.<sup>185</sup> Even if Atania's conduct violated international obligations, those violations were consequential on, and corresponded to, Rahad's initial illegality. To that extent, Rahad's claim must fail.

**B. ATANIA HAS COMMITTED NO INTERNATIONALLY WRONGFUL ACT REGARDING THE KIN MIGRANTS**

**1. Atania has not violated its human rights obligations**

Atania cannot bear responsibility for the influx of migrants to Rahad on the basis of any alleged human rights violations. *First*, Rahad's claim is inadmissible as local remedies have not been exhausted. *Second*, in any event, Atania's conduct in relation to the WRAP Act and the plaza protests is in compliance with its obligations under *ICESCR* and *ICCPR*.

**a. Rahad's claim in respect of human rights violations is inadmissible**

The requirement to exhaust local remedies is a rule of customary international law.<sup>186</sup> It applies where a State seeks to invoke the responsibility of another State under human rights treaties.<sup>187</sup> Any claim by Rahad is inadmissible as there is no evidence that any Kin migrants exhausted local remedies in relation to alleged violations of *ICESCR* or *ICCPR*.

---

<sup>185</sup> Eg *Compromis*, [27]-[29], [34], [39]-[40], [46].

<sup>186</sup> *Eletronica Sicula S.p.A (ELSI)* [1989] ICJ Rep 15, [50].

<sup>187</sup> *ICCPR* art 41(c); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 35.

**b. The WRAP Act complies with human rights obligations**

**i. Atania has complied with its obligation to provide an adequate standard of living**

Atania is obliged under Article 11(1) of *ICESCR* to provide its nationals with an adequate standard of living, including, *inter alia*, a right to adequate food and water.<sup>188</sup> Atania complied with its core obligation<sup>189</sup> and undertook the ‘necessary and feasible steps towards the realisation of this right’<sup>190</sup> by adopting ‘a national water strategy...addressing the whole population’.<sup>191</sup>

The WRAP Act was a necessary step to counteract loss of farmable land caused by Rahad’s operation of the Savali Pipeline.<sup>192</sup> The quota scheme was not discriminatory as it applied to ‘every household, farm and business.’<sup>193</sup> Atania justifiably granted an exemption from the purchase of licences to profit generating farms, which as the primary contributors to Atania’s agricultural production, furthered the realisation of the object of the WRAP Act.<sup>194</sup> Therefore, any alleged indirect discrimination towards the Kin was proportionate to the purpose of the Act.<sup>195</sup>

---

<sup>188</sup> *ICESCR* art 11(1); CESCR, *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)*, UN Doc E/C.12/2002/11 (20 January 2003) [3] (‘CESCR General Comment 15’).

<sup>189</sup> CESCR General Comment 15, [37]; CESCR, *General Comment No 12: The Right to Adequate Food (Article 11)*, UN Doc E/C.12/1999/5 (12 May 1999) [14] (‘CESCR General Comment 12’).

<sup>190</sup> CESCR General Comment 15, [40].

<sup>191</sup> CESCR General Comment 15, [37].

<sup>192</sup> *Compromis*, [29].

<sup>193</sup> *Compromis*, [34]; *Zolfagharkhani v Minister for Employment and Immigration* [1993] 3 FC 540, 541.

<sup>194</sup> *Compromis*, [35].

<sup>195</sup> CESCR, *General Comment No 20: Non-discrimination in economic, social and cultural rights (Art. 2, para 2 of the Covenant)*, UN Doc E/C.12/GC/20 (2 July 2009) [13].

The obligations imposed by the WRAP Act and the penalties for noncompliance were clear and publicly accessible.<sup>196</sup> Atania encouraged compliance by issuing notices to comply to those in violation of the Act<sup>197</sup> and by publicising the results of prosecutions.<sup>198</sup> Any decision by individuals to use water in excess of the quota, or not to purchase a licence, must be balanced against the expectation inherent in Article 11 that individuals will ‘meet their own needs through their own efforts and using their own resources’.<sup>199</sup> All Atanians, including the Kin, were entitled to use water within quota for non-farming purposes without the need to acquire a licence.<sup>200</sup> Although two Kin farmers raised concerns regarding the affordability of licences, some Kin did purchase licences indicating the cost was not prohibitive.<sup>201</sup> Atania only resorted to the disconnection of the water supply after consistent noncompliance necessitated the implementation of stronger enforcement mechanisms.<sup>202</sup>

**ii. The WRAP Act has not denied the Kin of their cultural rights**

As stated at Section III.C.1, Atania respects the right of a minority to enjoy its own culture under Article 27 of *ICCPR*.<sup>203</sup> The Kin are not ‘substantially deprived’ of any cultural right to subsistence farm because they could have complied with the WRAP Act.<sup>204</sup> The claim that the Kin’s culture prevented them from ‘seeking permission from the State to make use of natural

---

<sup>196</sup> *Compromis*, [34]-[37].

<sup>197</sup> *Compromis*, [37].

<sup>198</sup> CESCR General Comment 15 [19].

<sup>199</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases and Materials* (OUP, 2014) 869.

<sup>200</sup> *Compromis*, [34]-[35].

<sup>201</sup> *Compromis*, [36]-[37].

<sup>202</sup> *Compromis*, [36]-[37]; CESCR General Comment 15 [19], [44(a)]

<sup>203</sup> *ICCPR* art 27.

<sup>204</sup> *Länsman* (1994) [9.5].

resources’<sup>205</sup> has no support under Article 27. The HRC has recognised that collective interests of a State’s population may take precedence over minorities’ ability to enjoy their own culture.<sup>206</sup>

Further, the Kin’s right to take part in cultural life under Article 15 of *ICESCR* has been validly limited through Article 4. The WRAP Act, as established above, was in accordance with domestic law<sup>207</sup> and for the purpose of agricultural production to ensure adequate sustenance, thereby ‘promoting the general welfare’ of society.<sup>208</sup>

**c. Atania’s management of the Atanagrad plaza protests complies with Atania’s human rights obligations**

Under the *ICCPR*, States are entitled to limit the enjoyment of civil and political rights.<sup>209</sup> In response to ‘chaotic’ and ‘dangerous’ conditions in its nation’s capital,<sup>210</sup> Atania undertook valid measures to restore public order.

*First*, in compliance with the requirement of Article 19 to respect the right to freedom of expression, the confiscation of Sipar pendants was a ‘necessary’ and proportionate response<sup>211</sup> to the use of the Sipar as a symbol to ‘provoke disruptive elements’ and ‘seditious protests’.<sup>212</sup>

---

<sup>205</sup> *Compromis*, [37].

<sup>206</sup> *Länsman* (1994).

<sup>207</sup> *ICESCR* art 4; CESCR General Comment 21, [19]; Limburg Principles [48]-[50].

<sup>208</sup> Limburg Principles [52]; *Compromis*, [43].

<sup>209</sup> *ICCPR* arts 19, 21, 9.

<sup>210</sup> *Compromis*, [42].

<sup>211</sup> See *ICCPR* art 19(3); HRC, *General Comment No 34: Freedom of Opinion and Expression (Article 19)*, UN Doc CCPR/C/GC/34 (12 September 2011) [33].

<sup>212</sup> *Compromis*, [33]-[34], [43].

*Second*, in compliance with its obligation to protect peaceful assembly under Article 21, Atania issued orders to disperse, and arrested protesters refusing to comply with such orders, in accordance its domestic law.<sup>213</sup> These measures, as well as the use of crowd control,<sup>214</sup> were necessary<sup>215</sup> to disband the protests which included human chains and demonstrations that blocked access to and interfered with municipal offices, roads and local businesses.<sup>216</sup>

*Third*, in compliance with Article 9, the right to liberty, the arrested protesters were provided with court-appointed counsel and had an initial court appearance.<sup>217</sup> A longer period of pre-trial detention is justified because of the seriousness of the offence, riot being a felony under Atanian law.<sup>218</sup>

## **2. There is no discrete customary obligation not to create refugees**

There is no general rule of customary international law that ‘States shall not create refugees.’<sup>219</sup> International refugee law is only concerned with the obligations of asylum States, and not with the attribution of responsibility to States of origin.<sup>220</sup> Any State responsibility can arise only

---

<sup>213</sup> See ICCPR art 21; *Compromis*, [42]-[45].

<sup>214</sup> *Compromis*, [45]; HRC, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Denmark*, UN Doc CCPR/C/79/Add.68, (18 November 1996) [14], [21].

<sup>215</sup> ICCPR art 21; HRC, *Views: Communication No 412/1990*, UN Doc CCPR/C/50/D/412/1990 (9 June 1994) (*Kivenmaa v Finland*) [7.2].

<sup>216</sup> *Compromis*, [42], [46].

<sup>217</sup> *Clarifications*, [7]; see ICCPR art 9.

<sup>218</sup> *Clarifications*, [7]; see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP, 2013) 370.

<sup>219</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP, 3rd ed, 2007) 3 (‘Goodwin-Gill and McAdam (2007)’); Hannah Garry, ‘The Right to Compensation and Refugee Flows: A Preventative Mechanism in International Law’ 10 (1998) *International Journal of Refugee Law* 97, 103 (‘Garry (1998)’).

<sup>220</sup> Jack Garvey, ‘Toward a Reformulation of International Refugee Law’ (1985) 26(2) *Harvard International Law Journal* 483, 495.

regarding specific human rights violations, rather than the violation of a discrete customary prohibition on the creation of refugees.

### **3. The doctrine of transboundary harm cannot apply to refugee flows or human migration**

Rahad is unable to establish that an influx of refugees or migrants can constitute transboundary harm as this is both unsupported in State practice and inconsistent with the existing corpus of refugee law.<sup>221</sup> In principle, the application of such a rule would ‘contravene the humanitarian premise of refugee law.’<sup>222</sup> Refugee law, through the obligation of *non-refoulement*,<sup>223</sup> requires a State to permit the limitation of its sovereignty,<sup>224</sup> whereas the doctrine of transboundary harm considers that very limitation to be wrongful.<sup>225</sup>

In the alternative, if the doctrine is capable of applying to human migration,<sup>226</sup> Atania’s conduct complies with the ‘no-harm’ rule.<sup>227</sup> States are only required to take due diligence measures where there is a risk that an activity will cause significant damage.<sup>228</sup> Atania could not have foreseen that the enforcement of penalties, following non-compliance with the WRAP Act, and

---

<sup>221</sup> Christian Tomuschat, ‘State Responsibility and the Country of Origin’ in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff, 1994) vol 12, 78; Garry (1998) 105.

<sup>222</sup> Flavia Giustiniani, ‘The Obligations of the State of Origin of Refugees: An Appraisal of a Traditionally Neglected Issue’ (2015) 30 *Connecticut Journal of International Law* 171, 175.

<sup>223</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 31 (‘*Refugee Convention*’).

<sup>224</sup> Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of non-refoulement: Opinion’ in Feller, Turk and Nicholson (eds), *Refugee Protection in International Law* (CUP, 2003) 89, 113 (‘Lauterpacht and Bethlehem (2003)’); Goodwin-Gill and McAdam (2007) 208.

<sup>225</sup> *Trail Smelter*, 1965.

<sup>226</sup> Luke T. Lee, ‘The Right to Compensation: Refugees and Countries of Asylum’ (1986) 80 *American Journal of International Law* 532, 553.

<sup>227</sup> As set out in Section I.C.

<sup>228</sup> *Transboundary Harm Draft Articles Commentary*, 387-8.

the subsequent protests that ensued, would cause ‘significant harm’ to Rahad. Further, there is no ‘clear and convincing’ evidence of a causal link between Atania’s domestic enforcement measures and any damage to Rahad.<sup>229</sup>

#### **4. Atania has not abused its rights**

The principles relating to abuse of rights are as set out in Section I.D. Atania’s ‘reasonable and bona fide’ exercise of its legislative right<sup>230</sup> in implementing the WRAP Act, and its enforcement of domestic laws in the management of the plaza protests,<sup>231</sup> cannot be considered arbitrary.<sup>232</sup> Atania’s conduct was ‘genuinely in pursuit’ of the maintenance of public order and allocation of water resources.<sup>233</sup> It cannot be shown that this right was exercised in a way that was ‘calculated to cause any unfair prejudice’ to Rahad.<sup>234</sup>

### **C. ATANIA OWES NO COMPENSATION TO RAHAD OR, ALTERNATIVELY, RAHAD’S CLAIM FOR COMPENSATION IS EXCESSIVE**

#### **1. Atania owes no compensation by way of reparation**

As Atania has complied with its human rights obligations, has not abused its rights and has not committed any other form of wrongful act in relation to the Kin migrants, Rahad has no right to reparation, including compensation.<sup>235</sup>

---

<sup>229</sup> *Trail Smelter*, 1964.

<sup>230</sup> Cheng (1953) 121.

<sup>231</sup> Goodwin-Gill and McAdam (2007) 103.

<sup>232</sup> See Oppenheim (1992) 407.

<sup>233</sup> Cheng (1953) 943-4.

<sup>234</sup> Cheng (1953) 943-4.

<sup>235</sup> *ASR* art 36.

If the Court finds Atania has violated its human rights obligations, Rahad cannot claim for its expenditures because it was not the beneficiary of the human rights obligations owed by Atania. Rights under *ICESCR* and *ICCPR* are owed toward individuals.<sup>236</sup> Where those rights have been violated, it is the individual and not the State that is ‘injured’.<sup>237</sup> Similarly, the ILC has outlined reasons why receiving States should be unable to bring claims on behalf of refugees ‘in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee’ as to do so would ‘open the flood gates’ to international claims.<sup>238</sup> The ILC also raised concerns that it might potentially ‘deter States from accepting refugees’ for fear of demands to bring such claims.<sup>239</sup>

## 2. Alternatively, Rahad’s claims are too remote

Even if the Court finds Rahad entitled to compensation, Atania is only liable to compensate for results that are the ‘natural consequence’ of its acts.<sup>240</sup> The damages alleged to be associated with absorbing a migration flow are not a natural consequence<sup>241</sup> of Atania’s internal implementation of the WRAP Act or its quelling of protests.<sup>242</sup> This is particularly so in relation to migrants accepted by Rahad, whose flight from Atania was caused by climate changes, drought or the lowering of Atania’s water table due to Rahad’s Savali Pipeline.

---

<sup>236</sup> HRC, *General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/REV.1/Add.1326 (24 May 2004) [2].

<sup>237</sup> *Cyprus v Turkey* (ECtHR, Grand Chamber, Application No 25781/94, 12 May 2014) [46].

<sup>238</sup> *Report of the ILC*, UN Doc A/61/10 (1 May-9 June and 3 July-11 August 2006) 51 (‘*Articles on Diplomatic Protection*’).

<sup>239</sup> *Articles on Diplomatic Protection* 51.

<sup>240</sup> *ASR* art 31; Ian Brownlie, *System of the Law of Nations: State Responsibility, part I* (Clarendon, 1983) 224 (‘Brownlie (1983)’).

<sup>241</sup> Brownlie (1983) 224; *Report and Recommendations made by the Panel of Commissioners concerning the Egyptian Workers’ Claims (Jurisdiction)* (1995) 117 ILR 195, 248-9.

<sup>242</sup> *Compromis*, [34], [45].

Atania considers it to be inconceivable that Queen Teresa could speak of the ‘sharing of humanitarian burdens’ in relation to the Kin,<sup>243</sup> when it was Rahad’s failure to share the fresh water resources of the Aquifer that exacerbated the water crisis, and ultimately led to the Kin’s migration.

---

<sup>243</sup> *Compromis*, [56].

## **PRAYER FOR RELIEF**

---

The Federation of the Clans of the Atan respectfully requests that this Court DECLARE that:

1. The extraction of water from the Aquifer violates international obligations undertaken by Rahad and constitutes an inequitable use of a shared resource;
2. The Savali Pipeline operations violate Rahad's international obligations with respect to the Kin Canyon Complex and therefore must cease;
3. Rahad must immediately return the Ruby Sipar to Atania, its lawful owner; and
4. Atania owes no compensation to Rahad for any costs incurred relating to the Kin migrants.