

**A CASE CONCERNING
HUMAN RIGHTS IN RELATION TO ENVIRONMENTAL PROTECTION**

**REPUBLIC OF ACQUONOMOL
APPLICANT**

V.

**REPUBLIC OF RASAWAIR
RESPONDENT**

MEMORIAL FOR THE APPLICANT*

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STATEMENT OF FACTS

1. Jimol-Kadass, a national of Acqunomol who specialized in marine biology, met his wife, a national of Rasawair, in the Marine Resources Institute in Acqunomol. When his father-in-law died in 1995, his mother-in-law and his wife asked him to take over the marine products business in the Centreet Bay Area in Rasawair. The Centreet Bay is located 48 miles on the opposite shore of Acqunomol. It is rich in marine resources such as fish, shellfish, and seaweed which are processed into marine products and sold all over Rasawair.
2. Jimol-Kadass accepted the proposal and migrated to Rasawair. Investing his own money, Jimol-Kadass expanded the business and exported the marine products to Acqunomol. Soon, his business in Acqunomol flourished.
3. In 2000, Rasawair embraced a policy of economic development. It formulated a plan to construct an industrial complex in the Centreet Bay Area where Jimol-Kadass's business operated. The construction of the industrial complex prompted the biggest chemical factory in the Area, Centreet Industry Corporation (CIC), to launch an expansion in the complex to occupy a key position in it.
4. CIC is a private conglomerate in Rasawair that runs a chemical factory. It has been discharging industrial wastes into the Bay for almost thirty years of its operation. Specialists in chemistry and medicine suspect that the chemical matter contained in the factory wastes of CIC is causing the *Centreet Disease*, a disease in the central nervous system, similar to that caused by mercury poisoning, found only in the Area. They suspect that the chemical matter contained in the factory wastes have accumulated in fish and other marine resources in the Bay, causing the disease among inhabitants who consume them frequently. Most of those inflicted by the disease, including the Jimol-Kadass' mother-in-law, have lived in the region for over twenty years, eating fish and other marine resources from the Bay.

5. In 2002, convinced that the chemical factory's operations had caused their disease, the patients of the *Centreet Disease* formed an association to sue CIC. They argue that the operation of the chemical factory caused their disease and that there was fault on the part of CIC. The patients lost the suit. The court held that expert opinion shows that causality between the operations of the chemical factory and the inhabitants' disease could not be presently proved with scientific evidence and that the factory has been operating in accordance with all the requirements of Rasawair's industrial pollution laws..
6. The suit for compensation for the *Centreet Disease* was thoroughly reported and attracted nationwide attention. More and more people became afraid of buying and consuming marine products from the Area. Jimol-Kadass and other owners of marine industries in the Area found themselves in a difficult position, as sales of products from the Area slumped. Some of the industries suspended their operation while others ventured into other industries. On the other hand, those marine industries which continued their business were driven into bankruptcy. As these industries closed shop and people lost their jobs, CIC bought the land they owned and employed the people who lost work using the fund specially offered to it by the Rasawair.
7. In 2005, Jimol-Kadass's business also went bankrupt. He lost all of his property, including his house. He became so impoverished that he and his wife had to take on part-time work just to survive. Because of what happened, Jimol-Kadass, together with the other owners of marine industries who lost their properties, brought a suit against the Government of Rasawair. They claimed compensation for all the damages caused by their bankruptcy, including loss of residence, property, profession and healthy life.
8. According to their complaint, the Government of Rasawair is obligated to remove threats to people. Because the operation of the chemical factory is believed to be related with the *Centreet Disease*, the Government of Rasawair should have forced the factory to close, even though no scientific evidence has yet established causality. With Rasawair's inaction and violation of international obligations concerning human rights and

environmental protection, the marine industry owners suffered losses. Consequently, the Government must compensate them.

9. In 2006, the court rejected the complaint and held that the Government of Rasawair acted correctly in accordance with the existing law. The applicants therefore lost the suit. The court of appeals upheld the court of first instance. The following year, motivated by the suit of the marine industries, Rasawair subsidized the treatment of patients with the *Centreet Disease*.
10. In 2008, Acqunomol expressed apprehension about the extension of the pollution of Centreet Bay to the territorial waters of Acqunomol, stating that Rasawair should conform to the principles of environmental protection embodied in the Rio Declaration in executing its development program. Rasawair responded that it is executing its development program in accordance with international law concerning environmental protection at the present stage.
11. Acqunomol replied that international human rights laws which obligate states to protect the life and property of individuals by securing them safe and healthy living conditions were in place even before the development of international environmental law. Furthermore, it pointed out that the present legal system of Rasawair seems to be inadequate in carrying out international obligations concerning both human rights and environmental protection. Rasawair countered that every state has sovereignty which gives it the freedom to decide how international obligations are carried out, without intervention from another state.
12. The situation in the Centreet Bay Area in Rasawair was widely reported in Acqunomol, driving Acqunomol citizens to believe that Rasawair was enforcing a development program which violates human rights and destroys the environment.
13. In 2009, Jimol-Kadass got a job at a firm in Acqunomol. Believing that the natural and living conditions in Rasawair have become miserable, Jimol-Kadass, together with his wife and their two middle school-age children who were born in Rasawair, returned to his home country. His

mother-in-law, however, remained in Rasawair as the study on the *Centreet Disease* continue to advance and medical costs are subsidized by the Government.

14. Upon his return to Acqunomol, Jimol-Kadass asked the Acqunomol to exercise its right of diplomatic protection against the Rasawair and to seek redress for the losses he suffered as a result of the violation of obligations to protect human rights and the environment. Acqunomol accepted his request and sought compensation from the Rasawair, but the latter refused. The two countries engaged in further negotiation but reached an impasse. Eventually, they agreed to refer the dispute to the International Court of Justice (ICJ).

SUMMARY OF PLEADINGS

Quality human environment and the enjoyment of basic human rights are inextricably linked. Thus, Rasawair in (1) failing to prevent substantial pollution of the Bay and its marine resources; (2) doing nothing to control the pollution; and (3) supporting the expansion of CIC, the party most likely responsible for the spread of the *Centreet Disease*, violated fundamental human rights protected under both treaty and customary law. These violations caused injury to Jimol-Kadass. Therefore, Rasawair stands liable to pay for his losses.

It is submitted that Rasawair breached its international obligations under the United Nations Convention on the Law of the Sea (UNCLOS) and environmental law principles that have attained the status of customary international law, as evidenced by the concurrence of (a) state practice and (b) *opinio juris*.

Under the UNCLOS, Rasawair has a duty (1) to protect and preserve the marine environment: (2) to take all measures to prevent, reduce and control pollution; and (3) to ensure that activities under its jurisdiction do not cause pollution or damage to other States or otherwise spread beyond the seas where they exercise sovereign rights.

Also, international environmental law principles require Rasawair to observe the principle of (1) *Sic Utere Tuo Ut Alienum Non Laedas* or the duty not to cause harm to another State and (2) the duty to conduct an Environmental Impact Assessment as well as to monitor the operation of CIC and other chemical factories, in accordance with the precautionary approach. Rasawair did not comply with these obligations.

Rasawair's failure to protect the environment violated fundamental human rights. *First*, it violated its obligation under international law to respect and ensure the right to life of all individuals within its territory. This obligation includes not only a negative duty to refrain from arbitrarily or unlawfully depriving life but also a positive duty to take effective measures to prevent and safeguard against environmental hazards that threaten the lives of human beings. *Second*, it violated its duty under international law to take steps to ensure the realization of the rights to health, as well as the right to food, adequate living conditions, and safe and healthy working conditions. *Lastly*, Rasawair violated its obligation to ensure the right to a healthy environment and the right to the use and enjoyment of property, which are both protected under international customary law.

In this case, when Rasawair: (1) failed to take effective measures to prevent and safeguard against the substantial pollution of the Bay and its marine resources; (2) did not establish adequate and effective monitoring and environmental safeguards; and (3) subsidized the expansion of CIC instead of conducting an investigation and imposing stricter regulations on its operation, the inhabitants of Centreet Bay, including Jimol-Kadass and his family, were exposed to serious health hazards in violation of their right to life, health, adequate standard of living and a healthy environment.

Furthermore, the substantial pollution of the Bay area and its marine resources amounted to an "indirect expropriation" of Jimol-Kadass's property. The contamination effectively took away his property and his only means of subsistence without just compensation.

Jimol-Kadass suffered economic injury because of the internationally wrongful acts committed by Rasawair. Pursuant to Article 31 of the Articles on State Responsibility, any breach of an international obligation involves the duty to make full reparation for the injury *caused* by its wrongful conduct. As restitution is

inadequate to wipe out *all* the legal and material consequences caused by the wrongful act, Rasawair is obligated to compensate any and all financially assessable damage suffered by Jimol-Kadass.

Acqunomol is validly exercising diplomatic protection in behalf of Jimol Kadass. *First*, Jimol-Kadass possesses continuous nationality of Acqunomol. *Second*, he had exhausted local remedies available in Rasawair. *Third*, he suffered economic damages as a result of Rasawair's internationally wrongful acts.

PLEADINGS AND AUTHORITIES

Quality human environment and the enjoyment of basic human rights are inextricably linked.¹ Man's natural and manmade environments 'are essential to his well-being and to the enjoyment of basic human rights.'² As will be shown, Rasawair's violation of its international obligations to protect the environment also constituted a breach of its international obligation to respect and ensure the right to life³ and to undertake steps to realize the rights to an adequate standard of living⁴, health⁵, a healthy environment⁶, and the use and enjoyment of property⁷ of the inhabitants of Centreet Bay, including Jimol-Kadass, a national of Acqunomol.

¹ I Draft Declaration of Principles on Human Rights and the Environment, May 16, 1994.

² Declaration of UN Conference on the Human Environment (hereinafter Stockholm Declaration), June 16, 1972, Preambular, para.1, 2161 UNTS 447; 38 ILM 517 (1999).

³ International Convention on Civil and Political Rights [hereinafter ICCPR], Dec. 16, 1966, art. 6, 999 U.N.T.S. 171.

⁴ International Convention on Economic, Social, and Cultural Rights [hereinafter ICESCR], Jan. 3, 1976, Article 11, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3,

⁵ ICESCR, art. 12.

⁶ Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, November 16, 1999, art.11.

⁷ ICESCR, art. 17.

I. RASAWAIR VIOLATED INTERNATIONAL ENVIRONMENTAL LAW.

Rasawair breached its international obligations under the UNCLOS and environmental law principles that have attained the status of international customary law.

A. RASAWAIR BREACHED ITS OBLIGATIONS UNDER THE UNCLOS.

Under the UNCLOS, States have the duty (1) to protect the marine environment⁸, (2) to take all measures to prevent, reduce and control pollution⁹, and (3) to ensure that activities under its jurisdiction do not cause pollution or damage to other states or otherwise spread beyond the seas where they exercise sovereign rights.¹⁰

Rasawair, as a State party, is bound to perform its obligations under the UNCLOS in good faith following the principle of *pacta sunt servanda*.¹¹

a. There is substantial pollution of the Bay and its marine resources.

Pollution of the marine environment is defined as “the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities”.¹² The industrial wastes discharged by CIC were made of chemical by-products considered to be

⁸ United Nations Convention on the Law of the Sea, Dec. 10, 1982, art 145, 192. 21 I.L.M 1261 (hereinafter “UNCLOS”); *See also* UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT AGENDA 21, chapter 17.

⁹ UNCLOS, art.194.

¹⁰ *Id.*

¹¹ Vienna Convention on the Law of Treaties (hereinafter “VCLT”), May 23, 1969, art. 26, 1155 UNTS 331.

¹² UNCLOS, art 1, para 1(4); *See also* Organisation for Economic Cooperation and Development [OECD] Transfrontier Pollution Group. *See* OECD Res. C(77)28; Convention for the Protection of the Marine Environment and Coastal Area of the South-east Pacific, November 12, 1981.

hazardous substances.¹³ Their release into the Bay clearly amount to pollution of the Bay and its marine resources.

Based on circumstantial evidence¹⁴, the following facts establish that the Bay and its marine resources are seriously polluted by CIC: (1) CIC has been discharging its industrial wastes into the Bay for more than thirty years¹⁵; (2) Only the inhabitants of the Bay Area who have been living there for over twenty years¹⁶ and whose staple food are the fish and marine resources taken from the Bay have the disease¹⁷; (3) No record of the disease exists prior to the operation of CIC; and (4) The disease is similar to mercury poisoning.¹⁸

b. Rasawair's national industrial pollution laws are ineffective.

UNCLOS requires Rasawair to exercise "due diligence" to prevent actual harm - including any possibility of foreseeable and serious harm - in creating and implementing laws and regulations regarding industrial pollution.¹⁹ It must establish and enforce standards for environmental protection,²⁰ as well as for the environmentally sound management of hazardous wastes.²¹ It is not required to prevent all harm, only those which are *appreciable, significant or substantial*.²² In this case, however, Rasawair's national industrial pollution laws do not meet the required standard of due diligence. They fail to control pollution and they do not have environmental safeguards in place despite the serious pollution of the Bay.

¹³ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (hereinafter Basel Convention) March 22, 1989, Annex I.

¹⁴ United Kingdom v. Albania, December 15, 1949, 15 XII 49, International Court of Justice (ICJ).

¹⁵ Clarifs, ¶ 5-7.

¹⁶ *supra* at 19.

¹⁷ Compromis, ¶6, Clarifs, ¶7.

¹⁸ Compromis, ¶6.

¹⁹ PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (2002)

²⁰ Brandt Commissions (1980) available at <http://www.brandt21forum.info/BrandtEquation-19Sept04.pdf> (September 19, 2004).

²¹ Basel Convention, art 2, para. 8.

²² Nuclear Tests Case (Australia v. France) I.C.J. 253 [1974]; (*New Zealand v. France*) I.C.J. 457 (1974).

c. The pollution of the Bay poses serious threats to Acqunomol.

There is an imminent threat that the pollution in the Bay would spread to the waters of Acqunomol considering that the distance between the two countries is merely 48 miles.²³ Rasawair's failure to prevent pollution from spreading poses danger not only to the inhabitants of the Bay but also to Acqunomol and its citizens.

B. RASAWAIR VIOLATED ENVIRONMENTAL LAW PRINCIPLES UNDER CUSTOMARY INTERNATIONAL LAW.

a. Rasawair violated the principle of *Sic Utere Tuo Ut Alienum Non Laedas*, a customary norm.

The principle of *Sic Utere Tuo Ut Alienum Non Laedas*, as embodied in many international instruments²⁴ and upheld in cases such as the *Trail Smelter arbitration*²⁵ and *Corfu Channel Case*,²⁶ prohibits States from conducting or permitting activities within their territories without regard for the rights of other States or for the protection of the environment.²⁷ In a similar vein, general principles of international law impose obligations on States to prevent transboundary pollution²⁸ and to cooperate in matters concerning environmental protection.²⁹ These instruments show State practice and evidence that the principle is held as legally binding.

²³ Problem, ¶2.

²⁴ Stockholm Declaration, 16 June 1972, principle 21, UN Doc A/CONF48/14/Rev1, 11 ILM 1416; United Nations Conference on Environment and Development (hereinafter "Rio Declaration") 14 June 1992 A/CONF151/26 (Vol. I) Chapter I, Annex I.

²⁵ U.S. and Canada (1938/1941) 3 R.I.A.A. 1905.

²⁶ Assessment of Compensation, (United Kingdom v. Albania) 15 XII 49, ICJ, December 15, 1949

²⁷ *supra* at p. 25.

²⁸ Trail Smelter Arbitration (1938/1941) 3 R.I.A.A. 1905.

²⁹ Convention Relative to the Preservation of Fauna and Flora in the Natural State (London), November 8, 1933, art 12(2), 173 LNTS 241; Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, October 12, 1940, art. VI, 56 Stat. 1354, TS 981; Convention on the Protection of the Alps, November 7, 1991, art. 2(1), 31 ILM 767; Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994, 34 ILM 67.

b. Rasawair violated its duty to conduct an Environmental Impact Assessment and to monitor the operation of CIC and other chemical factories in accordance with the precautionary approach.

International instruments³⁰ on environmental protection created since the 1980s have long compelled State parties to proceed on the basis of a “precautionary” approach³¹ in recognition of the State’s duty to protect the environment from harm or prospective harm despite the lack of scientific certainty.³²

c. Environmental Impact Assessment (EIA) is a customary norm.

EIA developed along with the application of the precautionary principle.³³ It is a systematic process that examines the consequences of development actions in advance.³⁴ It produces a written statement to be used as a guide to decision-making, with several related functions: *First*, it should provide decision-makers with information on the environmental consequences of proposed activities, programs or policies; *Second*, it requires that decisions are influenced by the information gathered; And, *third*, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.³⁵

The duty to assess environmental impacts has become part of customary law with more than 150 countries implementing an environmental assessment

³⁰ UNCLOS; *see also* Convention on Biological Diversity (CBD) June 5, 1992, preamble, 31 ILM 818; Rio Declaration on Environment and Development, June 14, 1992, principle 15, UN Doc. A/CONF.151/26 (vol. I); Framework Convention on Climate Change 1992, art. 3.3; UK Biodiversity Action Plan, para. 6.8, 1994; Convention on International Trade in Endangered Species of Wild Fauna and Flora, para. 6.8, Resolution Conf (Rev CoP13); Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000, preamble; Earth Charter, para. 6; *See* Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, Kuwer Law International 64 (2002).

³¹ Owen McIntyre and Thomas Mosedale, *The Precautionary Principle as a norm of customary international law*, available at http://jel.oxfordjournals.org/cgi/pdf_extract/9/2/221 (last visited Dec. 5, 2010).

³² DAVID WILKINSON, ENVIRONMENT AND LAW (2002).

³³ Graham Tucker & Jo Treweek, *The Precautionary Principle in Impact Assessment: An International Review* (2005), *Biodiversity and the Precautionary Principle: Risk and uncertainty in Conservation and Sustainable Use*, (Rosie Cooney & Barney Dickson, eds. 2005).

³⁴ John Glasson, Riki Therivel, & Andrew Chadwick. *Introduction to Environmental Impact Assessment*, 3rd ed. (2005); Munn (1979); UK DOE (1989).

³⁵ PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, (2nd ed. 2003).

program.³⁶ This has also been reinforced through municipal judicial decisions.³⁷ In addition to domestic EIA, States now also recognize the requirement of Transboundary EIA as customary international law.³⁸

i. There is sufficient state practice.

Evidence from state practice supports the view that the conduct of an appropriate EIA or an equivalent mechanism will, in most cases, be an important means of discharging the due diligence obligations imposed on States.³⁹ Numerous treaties⁴⁰ and highly publicized scholars⁴¹ state that Transboundary EIA forms part of the domestic environmental law of nations, including almost all developed and many developing countries.⁴²

ii. Existing state practice is coupled with *opinio juris*.

Environmental impact assessment procedures have been incorporated and required in a very large number of national legal systems⁴³, international conventions⁴⁴ and various non-binding international instruments.⁴⁵ States are also

³⁶ DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAEKE INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (1998).

³⁷ Northern Jamaica Conservation Assoc. v. National Resources Conservation Authority, Jam. Sup. Ct., CI No. HCV 3022 of 2005 (2006); Rodgers Muema Nzioka, et. Al. v. Tiomin Kenya Ltd., Case No. 97 of 2001(High Ct.2001) (Kenya); Mundy vs. Central Environment Authority, et al,SC/Appeal 58/2003 (Sup. Ct. Jan. 20, 2004) (Sri Lanka).

³⁸ See ILC Draft Article on the Prevention of Transboundary Harm from Hazardous Activities (2001), art. 7; UNEP's Principles on Shared Natural Resources (1978), Principle 4.

³⁹ PHOEBE N. OKOWA, STATE RESPONSIBILITY FOR TRANSBOUNDARY AIR POLLUTION IN INTERNATIONAL LAW (2000).

⁴⁰ ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW (1991); Sands, *supra* note 35.

⁴¹ David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?* 29 GA. Rev. 599, 620 (1995); Rudiger Wolfrum, *Purposes and Principles of International Environmental Law*, 1990 GER. Y.B. International L. 308, 310.

⁴² John H. Knox *The Myth and Reality of Transboundary Environmental Impact Assessment*. 96 AM. J. INT'L LAW 291, 291-319 (2002).. MANDY ELLIOTT & IAN THOMAS, ENVIRONMENTAL IMPACT ASSESSMENT IN AUSTRALIA: THEORY AND PRACTICE; Neil Craik,, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, Cambridge Studies in International and Comparative Law (No. 58).

⁴³ See note 89.

⁴⁴ Convention on Environmental Impact Assessment in a Transboundary Context, February 25, 1991, available at <http://www.unece.org/env/eia/> (last visited Dec.23, 2010).

⁴⁵ US National Environmental Protection Act; EC law Council Directive 85/337/EEC; Rio Declaration, principle 17; Commission for environmental Cooperation, available at <http://www.cec.org/english/resources/information/pblindexe.cfm>.

increasingly recognized to be under a general obligation to assess their activities, regardless of where those impacts or activities are located.⁴⁶ The ICJ recognizes EIA as a practice that has become an obligation under general international law.⁴⁷ This pronouncement further proves the legally binding nature of the duty to conduct EIA.

d. Rasawair failed to take measures to prevent environmental degradation.

When Rasawair acquired knowledge of the possible harm of CIC's industrial wastse, it should have immediately undertaken an investigation, as well as suspended or imposed stricter regulations on CIC's waste management.⁴⁸ The absence of scientific proof that CIC was indeed creating serious pollution in the Bay and causing *Centreet Disease* does not justify Rasawair's inaction.⁴⁹ The subsidy for the research of the cause and course of treatment of the *Centreet Disease* cannot be considered an effective measure to prevent environmental degradation.

II. RASAWAIR'S FAILURE TO PROTECT THE ENVIRONMENT VIOLATED FUNDAMENTAL HUMAN RIGHTS.

The UN General Assembly has recognized the relationship between the quality of the human environment and the enjoyment of basic rights as early as 1968.⁵⁰ As the Stockholm Declaration affirmed, there exists an inextricable link between environment and civil and political rights, as well as economic rights⁵¹,

⁴⁶ *Supra* note 36.

⁴⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* 2010 ICJ (April 20) available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=au&case=135&k=88> (April 20, 2010); Case Concerning the Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*) 1997 ICJ Reports 7.

⁴⁸ See Minamata disease case, Supreme Court decision, October 15, 2004, Case number 2001(O) Nos. 1194 and 1196, and 2001(Ju)Nos. 1172 and 1174, Minshu Reporter Vol. 58, No. 7.

⁴⁹ Governing Council Decision 15/27 (1989).

⁵⁰ United Nations General Assembly [hereinafter UNGA] Res. 2398 (XXII) (1968). See also the Proclamation of Tehran, UN Doc. A/CONF.32/41, para. 18, recognizing the dangers posed by scientific discoveries and technological advances for the rights and freedoms of individuals. See also Res. 1988/26 (1988); See also Res. 1989/12 (1989) on the movement and dumping of toxic and dangerous products and waste, declaring in draft terms that "the movement and dumping of toxic and dangerous products endanger basic human rights such as the right to life, the right to live in a sound and healthy environment and consequently the right to health".

⁵¹ Right of the Child to Clean Environment 2000 (Malgosia Fitzmaurice and Agatha Fijalkowski eds. 2000); the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries.

with reference to the right to live under adequate conditions, and in an environment that permits a life of well-being and dignity.⁵²

**A. IT VIOLATED ITS OBLIGATION UNDER INTERNATIONAL LAW
TO RESPECT AND ENSURE THE RIGHT TO LIFE.**

**a. The right to life is protected under international
law.**

**i. Rasawair has a treaty obligation to respect
and ensure the right to life under Article 6 of
the ICCPR.**

Article 6 of the ICCPR guarantees to every human being the inherent right to life. As clarified by the Human Rights Committee, this right has both a negative component, as in the right not to be arbitrarily or unlawfully deprived of life by the State or its agents, and a positive component, in that the State must take positive measures that are conducive for living.⁵³

As a State party to the ICCPR, Rasawair is bound to take effective measures to prevent and safeguard against the occurrence of environmental hazards that threaten the lives of present and future inhabitants⁵⁴ of the Centreet Bay.

⁵² F.Z. Ksentisini, *Human Rights, Environment and Development*, (Sun Lin and Kurukulasuriya L. eds.); United Nations Environment Programme, UNEP's New Way Forward: Environmental Law and Sustainable Development, 51-72 (1996).

⁵³ SARAH JOSEPH, . JENNY SCHULTZ AND MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS CASES MATERIALS AND COMMENTARY*, 155 (2004).

⁵⁴ Rio Declaration on Environment and Development [, principle 3]; *See also* 1994 Draft Declaration of Principles on Human Rights and the Environment, part 1 (4) ; *See also* *Oposa v. Factoran*, G.R. No. 101083, July 30, 1993.

ii. The protection of the right to life is a customary norm and a general principle of international law.

All international human rights instruments⁵⁵ proclaim the right to life. It has been recognized as a fundamental right of “suprapositive character”⁵⁶ in that it is a norm, *erga omnes*⁵⁷ enforceable in respect of all persons. Thus, the right to life takes priority over a State’s pursuit of economic development. Many constitutions⁵⁸ embody the protection of this right evidencing wide state practice and *opinio juris*.

b. Failure to prevent substantial pollution of the Bay and its marine resources violates the right to life.

The release of pollutants that directly affect physical health and the failure of governments to regulate the release of such pollutants are the most common scenarios in which courts have found violations of the right to life.⁵⁹ Similarly, Rasawair failed to regulate the release of such pollutants in the Centreet Bay, resulting in the substantial pollution of the Bay and its marine resources as well as endangering the lives of its inhabitants.

⁵⁵ Universal Declaration of Human Rights [hereinafter UDHR], Dec. 10, 1948, art.3, G.A., Res. 217A, U.N. Doc. A/810 (1948); Inter-American Convention on Human Rights [hereinafter IACHR], July 18, 1978, art.4, 1144 U.N.T.S. 143; See also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art.3, 312 U.N.T.S. 222, 246; African Charter on Human and People’s Rights, June 27, 1981, art. 4, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58.

⁵⁶ General Comment 6, ¶ 1, Human Rights Commission.

⁵⁷ *Supra* note at 36

⁵⁸ Carl Bruch, Wole Coker,, & Chris Vanarsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 133-60 (2001).

⁵⁹ DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAEKE INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (1998.) citing *Joseph d. Kessy v. Dar es Salaam City Council*; *Vellore Citizens Welfare Reform v. Union of India*; *India Council for Enviro-Legal Action v. Union of India*; *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v. Director, Industries and Mineral Development , Punjab, Lahore*; In re: *Human Rights Case (Environmental Pollution in Balochistan)*; *Dr. Mohiuddin Farooque v. Bangladesh*; *LEADERS, Inc. v. Godawari Marble Industries*; *Victor Ramon Castrillon Vega v. Federacion Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar*; *Fundacion Natura v. Petro Ecuador*; *Carlos Roberto Mejia Chacon v. Ministerio de Salud y la Municipalidad de Santa Ana*.

**B. RASAWAIR VIOLATED ITS DUTY TO UNDERTAKE STEPS TO
REALIZE THE RIGHT TO AN ADEQUATE STANDARD OF
LIVING AND THE RIGHT TO HEALTH UNDER
INTERNATIONAL LAW.**

**a. The right to an adequate standard of living and the
right to health are protected under international law.**

**i. Rasawair has a treaty obligation to undertake
steps to realize the right to an adequate
standard of living and the right to health under
Articles 11 and 12 of the ICESCR.**

Closely related to the right to life are the right to an adequate standard of living, the right to food, safe and healthy working conditions and the right to health.⁶⁰ The latter is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.⁶¹ These rights are found in Articles 11 and 12 of the International Covenant on Economic, Social and Civil Rights (ICESCR) to which Rasawair is a party. As a State party, it has a duty not to expose the inhabitants of the Centreet Bay to health hazards. It must also ensure that their source of food is not contaminated.

ii. These rights are customary norms.

The 1948 Universal Declaration of Human Rights considers the right to health as part of the right to an adequate standard of living.⁶² Since then, other international human rights treaties⁶³ have recognized or referred to the right to health or to elements of it. The right to health is relevant to all States: every State has ratified at least one international human rights treaty recognizing the right to health⁶⁴ evidencing wide state practice and *opinio juris*.

⁶⁰ ICESCR, art 12.

⁶¹ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

⁶² UDHR, art. 25.

⁶³ ICESCR, art. 12; European Social Charter, art. 11; African Charter of Human and People's Rights and Duties, art. 16.

⁶⁴ Human Rights Fact Sheet No. 31, Office of the United Nations High Commissioner for Human Rights, United Nations.

b. Rasawair violated these rights when it allowed CIC to discharge industrial wastes into the Bay without adequate and effective environmental safeguards.

Rasawair's policy of allowing CIC to discharge its industrial wastes into the Bay without adequate and effective environmental safeguards resulted in the contamination of the water,⁶⁵ fish and other marine resources that serve as food to the inhabitants of the Centreet Bay. The cleanliness of the water⁶⁶ and the marine resources are necessary to have an adequate standard of living. When Rasawair did not prevent the substantial pollution of the Centreet Bay and its marine resources and when it did not act upon its continuous degradation, it effectively exposed its inhabitants to health hazards such as the *Centreet Disease*.

C. RASAWAIR VIOLATED THE RIGHT TO A HEALTHY ENVIRONMENT AND THE RIGHT TO THE USE AND ENJOYMENT OF PROPERTY WHICH ARE PROTECTED UNDER INTERNATIONAL CUSTOMARY LAW.

a. The right to a healthy environment is an international customary norm.

Accordingly, the abovementioned acts and omissions of Rasawair also violate the right to a healthy environment of the inhabitants of Centreet Bay.

i. There is sufficient state practice.

The duty to ensure the right to a healthy environment is a customary norm. It is a right recognized in the constitutions of about 115 states⁶⁷ and by international bodies such as the United Nations General Assembly⁶⁸ and the

⁶⁵ UN Committee on Economic, Social and Cultural Rights affirms that everyone is entitled to safe and acceptable water for personal and domestic use. E/C.12/2002/11, 26 November 2002.

⁶⁶ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London 17 June 1999), available at <http://www.unece.org/env/documents/2000/wat/mp.wat.2000.1.e.pdf> (last visited Dec. 23, 2010)>

⁶⁷ *Supra* note 5

⁶⁸ UNGA Res. 45/94 (1990)

United Nations Committee on Human Rights⁶⁹. It is also found in many international instruments such as the 1989 Declaration of the Hague on the Environment and in regional human rights treaties.⁷⁰

ii. Existing state practice is coupled with *opinio juris*.

The ICJ stated that the States' consent to and attitude towards the text of a resolution evidence *opinio juris*.⁷¹ The abovementioned covenants and declarations prove that there is already an expectation of compliance among States⁷² which, together with ensuing practice,⁷³ establishes that the right to a healthy environment is already a customary norm.

b. The right to use and enjoyment of property is protected under international customary law.

The right to own property and the correlative right not to be deprived arbitrarily of such are entrenched international human rights found in many global instruments.⁷⁴

⁶⁹ See e.g. Res. 1990/41 (1990).

⁷⁰ 1981 African Charter [hereinafter ACHR], June 27, 1981, art.24, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

⁷¹ Military and Paramilitary Activities (Nicaragua v. USA), 1986 ICJ 14 at 97 (June 27).

⁷² *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

⁷³ Ulrich Fastenrath, *The Legal Significance of CSCE/OSCE Documents*, O.S.C.E. YEARBOOK: 1995/1996 411, 423 (1997).

⁷⁴ UDHR, art 17; American Declaration of the Rights and Duties of Man, art.23; International Covenant on Political and Civil Rights, art. 1, 26,27; Protocol to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1; American Convention on Human Rights, art. 21; African Charter on Human Rights and Peoples' Rights, art. 13,14; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5; Convention on the Elimination of All Forms of Discrimination against Women, art. 15,16; ILO 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries; ILO 169 Concerning Indigenous and Tribal Peoples in Independent Countries; Article 6 Declaration on the Elimination of Discrimination against Women.

i. There was indirect expropriation of Jimol-Kadass's property amounting to an arbitrary taking of such property.

Relevant treaties and draft articles provide for provisions against indirect expropriation.⁷⁵ On this matter there exists a "preference to leave the resolution of the problem to the development of arbitral decisions on a case-by-case basis."⁷⁶ The Iran-United States Claims Tribunal⁷⁷ and decisions arising under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights have been regarded as the two most prominent sources on the subject.⁷⁸

In *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*⁷⁹, the Tribunal stated that when the State interferes with such property right to an extent that the enjoyment of these rights are rendered useless, such act must be deemed an expropriation – *a taking of property*.

This ruling has been reiterated by the European Court of Human Rights⁸⁰ saying that even without direct or formal expropriation, if from the investigation of the realities surrounding the case, there is beyond appearances a situation amounting to such taking, then there may possibly be indirect expropriation.

Moreover, in *Santa Elena v. Costa Rica*⁸¹ and *US v. Causby*⁸², the Tribunal enunciated that there is an expropriation even without direct seizure of property when the effect of the measures taken by a State is to *deprive* the owner of not

⁷⁵ See Bilateral Investment Treaties, Section IV (1);; See also 1992 World Bank Guidelines; 1994 Energy Charter Treaty, art. 13; North American Free Trade Agreement, art. 1110; Protocol No. 1 to the European Convention on Human Rights, art. 1; 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens; 1967 OECD Draft Convention on the Protection of Foreign Property, 23-25, Oct 12, 1967.

⁷⁶ Catherine Yanacca-Small, *Indirect Expropriation and the Right to Regulate in International Investment Law*, Working Papers on International Investment. No. 2004/4, Sept. 2004 at 10.

⁷⁷ George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*. 88 AMJIL 585, 1994.

⁷⁸ *Id.* at 10.

⁷⁹ 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983)

⁸⁰ *Sporrong and Lönnroth v. Sweden*, A52 (1982), European Court of Human Rights; See also *James v. the United Kingdom*, A98 (1986), para. 38; *Hentrich v. France*, A296-A (1994), paras. 34-35.

⁸¹ International Center for Settlement of Investment Dispute (ICSID), Case No. ARB/96/1 (February 17, 2000)

⁸² 328 U.S. 256 (1946)

merely title or possession but also *possession and access to the benefit and economic uses of his property*.

The violation of Jimol-Kadass's right to property is best viewed in terms of an *indirect taking* of such property as discussed in the above-mentioned jurisprudence. There was already *taking* of Jimol-Kadass's business the moment the marine resources, upon which his business depended on, were substantially contaminated by the industrial waste. Because of such contamination, it became inevitable that these resources would be rendered useless.

III. THE STATE OF RASAWAIR INCURRED STATE RESPONSIBILITY WHEN IT COMMITTED INTERNATIONALLY WRONGFUL ACTS.

Under Article 1 of the Articles of State Responsibility,⁸³ "every internationally wrongful act of a State entails the international responsibility of that State." Such State is then put under obligation to cease the commission of the internationally wrongful act if it is continuing; to offer assurances and guarantees of non-repetition;⁸⁴ and to offer full reparations for injuries caused by the wrongful act.⁸⁵

A. RASAWAIR'S ACTS AND OMISSIONS CAUSED THE INJURY SUFFERED BY JIMOL-KADASS.

The injury sustained includes all damage caused by the act,⁸⁶ or all the harm that had naturally resulted from the wrongful act, once causality between the wrongful act and the damage is established.⁸⁷ The establishment of this causal link however is not the same for all breaches of international obligation. Criteria used range from "directness"⁸⁸ to "foreseeability"⁸⁹ or even "proximity."⁹⁰ What is

⁸³ Articles of State Responsibility for Internationally Wrongful Acts [hereinafter ASR], art.1, Report of the 53rd Sess., ILC (2001), G.A.O.R. 56th Sess., Supp. 10.

⁸⁴ ASR, art. 30.

⁸⁵ ASR, art. 31.

⁸⁶ Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter "CDASR"], art.31, 225.

⁸⁷ DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 231 (1999).

⁸⁸ CDASR, art.31, 228, citing Security Council resolution 687 (1991), para. 16.

⁸⁹ *Id.*, citing the Naulilaa case (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa) (Portugal v. Germany), UNRIIAA, vol. II, p. 1011 (1928), at 1031.

sufficient causal link therefore involves only the criterion that it be *not too remote*, without any additional qualifying phrase.⁹¹

The causal link between Rasawair's wrongful acts and the losses suffered by Jimol-Kadass is established by the fact that were it not for Rasawair's breach of international environmental laws which resulted in the substantial pollution of the Bay and the consequent contamination of the marine resources, Jimol-Kadass and his family would not have been exposed to the dangers caused by such pollution. This violated their human rights to life, health and a healthy environment. Also, Jimol-Kadass's business would not have been driven into bankruptcy.

B. RASAWAIR IS LIABLE FOR REPARATIONS

Ceasing to perform the wrongful act, as well as offering assurances and guarantees of non-repetition of a breach of international law is one of two general remedies awarded in cases of an internationally wrongful act, the other being reparation.⁹²

a. Rasawair must offer assurances and guarantees of non-repetition of breach of international law.

Rasawair must make CIC and other chemical factories cease and desist from substantially polluting the Bay. Allowing the continued substantial pollution of the area from whatever source is a continuing breach of international environmental law. Assurances and guarantees of non-repetition are necessary in light of the fact that there exists apprehension of the possible effluence of the pollution in the Centreet Bay to the waters of Acqunomol.⁹³

⁹⁰ *Id.* citing *For comparative reviews of issues of causation and remoteness* see, e.g. H.L.A. Hart & A. M. Honoré, *Causation in the Law* (1985); A. M. Honoré, *Causation and Remoteness of Damage* in *International Encyclopedia of Comparative Law* vol. XI, Part 1, chap. VII, 156 (A. Tunc, ed.); Konrad Zweigert and Heinz Kötz, *Introduction to Comparative Law* 601-627, (3rd edtrans. J.A. Weir) ; B. S. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations. Volume II. The Law of Torts: A Comparative Introduction* 95-108, (3rd ed., 1997).

⁹¹ *Id.*

⁹² Commentaries to the Draft Articles on State Responsibility, Art. 30, p. 217.

⁹³ Compromis, ¶ 14.

b. Rasawair must make reparations for breach of international law by compensation.

When an internationally wrongful act is committed by a State there immediately arises an obligation to make reparations, either in the form of restitution, compensation or satisfaction. These may be done singly or in combination to achieve *full* reparations.⁹⁴ The most desirable goal of such is to re-establish the status quo prior to the commission of the internationally wrongful act following the principle of *restitutio in integrum*.⁹⁵

Since the State of Rasawair would not be able to bring back the *status quo ante*, compensation remains to be the only viable and practicable form of reparation. Jimol-Kadass suffered remunerable harm to his moral and material interest.⁹⁶ For this, Rasawair is under the obligation to pay the sum of the value which restitution in kind would bear.⁹⁷

C. ACQUNOMOL IS VALIDLY EXERCISING DIPLOMATIC PROTECTION.

Acqunomol is validly exercising diplomatic protection. *First*, Jimol-Kadass possessed continuous nationality of Acqunomol.⁹⁸ *Second*, he exhausted local remedies available in Rasawair.⁹⁹

CONCLUSION AND PRAYER FOR RELIEF

Upon the foregoing facts and points of law, Acqunomol respectfully requests this Honorable Court to adjudge and declare as follows:

- 1) *Rasawair breached international environmental law in allowing the substantial pollution of the Centreet Bay and its marine resources and must therefore be required to install adequate environmental safeguards;*

⁹⁴ ASR. Art. 34.

⁹⁵ Corfu Channel Case (United Kingdom of Great Britain v Albania) 1949 ICJ 4 (April 9).

⁹⁶ ICESCR, art 15(1)(b).

⁹⁷ Chorzow Factory Case.(Germany v. Poland), 1928 PCIJ (ser. A) No. 17 at 29 (Nov.21).

⁹⁸ Draft Articles on Diplomatic Protection, art. 2, 4.

⁹⁹ Draft Articles on Diplomatic Protection, art. 14.

- 2) *Rasawair breached international human rights law as a result of the breach above and as the result of which Mr. Jimol-Kadass, a national of Acqunomol, suffered economic damages;*
- 3) *Rasawair must compensate Mr. Jimol-Kadass.*

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