

**INTERNATIONAL COURT OF JUSTICE**



THE PEACE PALACE  
THE HAGUE, THE NETHERLANDS

THE 2019 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

**THE CASE CONCERNING THE KAYLEFF YAK**

**THE STATE OF AUROK**

(APPLICANT)

V

**THE REPUBLIC OF RAKKAB**

(RESPONDENT)

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**MEMORIAL FOR THE RESPONDENT**

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2019

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## **STATEMENT OF JURISDICTION**

The State of Aurok (“Aurok”) and the Republic of Rakkab (“Rakkab”) appear before the International Court of Justice in accordance with Article 40(1) of the Statute of the International Court of Justice (“Statute”) through submission of a Special Agreement for resolution of the differences between them concerning the Kayleff Yak (“Yak”). Aurok and Rakkab have referred the dispute to the Court, granting it jurisdiction under Article 36(1) of the Statute. The Parties concluded the Special Agreement in the Hague, the Netherlands, and jointly notified this Court of their Special Agreement on 14 September 2018.

## **QUESTIONS PRESENTED**

- I.** Whether Rakkab is responsible for any internationally wrongful acts found in Questions (II)–(IV) because DORTA’s actions are attributable to Rakkab or Rakkab is otherwise responsible for its own failure to prevent DORTA’s actions.
  
- II.** Whether the harvesting of the Yak in Rakkab is in violation of Rakkab’s international obligations relating to the protection of endangered species or the environment.
  
- III.** Whether the harvesting of the Yak is in violation of Rakkab’s obligation relating to cultural or religious rights.
  
- IV.** Whether Rakkab is in breach of an international obligation for failing to compensate the Aurokan people for the use of traditional knowledge and whether, if an internationally wrongful act is established, Rakkab must pay Aurok a portion of the Gallvectra profits.

## STATEMENT OF FACTS

### **Aurok, Rakkab, and the Kayleff Yak**

Aurok is a least-developed country populated almost entirely by descendants of the Pivzao civilisation, the original indigenous inhabitants. The traditional religion and culture are still practised extensively across the country. Rakkab is a comparatively developed country with a multi-ethnic population that includes fewer than two hundred adherents of the Pivzao tradition. The region was colonised by the Kingdom of Jeramia in 1730, though Aurok was minimally interfered with. Both countries gained independence in 1961.

The Kayleff Yak (“Yak”) is a migratory species native to the Gaur Highlands, a geographical region 70% within Aurok and 30% within Rakkab. It spends its spring and summer in Aurok’s territory and migrates south to Rakkab to spend autumn and winter. The Yak, in particular the hunting of the Yak, is a key component of the Pivzao traditions still commonly practised in Aurok.

### **DORTA**

Rakkab has invested extensively in scientific research and development. The Department of Research, Technology, and Application was founded in 1965, and had a successful stream of innovations, especially in healthcare, before being privatized in 1996 and renamed DORTA. The government — by legislation — must hold between 9.9% and 19.9% of DORTA’s shares. The government currently holds 12%.

DORTA is now the world’s eighth-largest pharmaceutical manufacturer, and is spread around the world, although not in Aurok. The company has a legislatively-granted and government-enforced monopoly within Rakkab, and the government subsidizes DORTA’s research and development activities. While current Rakkabi officials are prohibited from serving within DORTA, many high-level ex-governmental figures do, including on their Board of Directors.

### **The Discovery of the Lustuk Enzyme**

Since the mid-1900s, Rakkab has suffered an increase in obesity and diabetes. Dr. Bello, a Rakkabi doctor, observed significantly lower rates of these diseases among Aurokan patients. After hunting the Yak, Pivzao people traditionally consumed *Tirhinga Nos Lustuk*, a soup made of the “nasty

bits” of the Yak. The soup was believed to have substantial health benefits and was consumed in a ritualised religious ceremony. After a year living in rural Aurok, Dr. Bello concluded that the reason for the difference in disease rates was a particular enzyme — the Lustuk Enzyme — within the gallbladder of the Yak. Dr. Bello published his findings in the *Lancet* in 2002.

Dr. Bello and a team from DORTA isolated the enzyme and used it to develop an experimental medication in 2003. They then proceeded through clinical trials, demonstrating that the enzyme effectively treated insulin-related diseases. DORTA filed a patent application for the drug, Gallvectra, in 2004.

### **The Patenting of Gallvectra**

In January 2005, an anthropologist expert on rural Aurok published an article noting that observant Aurokans consumed large amounts of the Lustuk Enzyme every year. She also noted that Pivzao civilisation attributed significant health benefits to the gallbladder in particular, and *Tirhinga Nos Lustuk* is still recommended for health purposes.

In March 2005, the Aurokan Minister of Intellectual Property wrote to his Rakkabi counterpart objecting to the pending patent on Gallvectra. He argued that the drug was substantially based on Aurokan indigenous knowledge about the health benefits of the gallbladder. A group of leading biologists agreed with him in a public letter. DORTA rejected the claim, insisting that Aurokan knowledge was too distant from the drug, and arguing that the patent posed no threat to Aurokan traditional use of the Yak. The Rakkabi patent office granted the patent. By 2018, Gallvectra was approved for use and sale in more than eighty-five countries. By 2017 sales exceeded €3.2 billion and Gallvectra was added to the WHO Model List of Essential Medicines.

### **The Decline of the Yak**

In February 2016, a Brisbane-based newspaper revealed that Yak gallbladders for the manufacture of Gallvectra were obtained by private hunters, whom DORTA offered substantial cash rewards. The number of hunting licenses issued by Rakkab had increased tenfold after the rewards were first offered in 2011. These hunters killed nearly 30,000 Yak from October 2015 to February 2016, of 680,000 total Yak. DORTA responded that their take was relatively small, while Aurokans killed hundreds of thousands. Furthermore, they argued that Gallvectra saved lives, justifying the harvesting.

In February 2016, the Aurokan Parliament initiated research into breeding Yak in captivity and issued a five-year moratorium on hunting female Yak of breeding age. After meeting with Aurokan leaders in March to discuss sustainability, Rakkab also began researching breeding Yak in captivity. Neither has seen any success.

The Yak Life Sciences Academy (“YLSA”), an international NGO, reported in June 2016 that the Yak population had declined by more than 5% that year. They reported that while the Aurokans took more Yak than did DORTA — an average of 140,000 per annum, down to 120,000 — DORTA had pushed the Yak over a delicate equilibrium into decline. They furthermore noted that the decline was particularly marked among the young and the female of the species. In the absence of any change, they predicted that the Yak would be extinct or near extinction by 2040. No other independent research into the Yak population trends has been conducted. After the winter of 2017, YLSA reported that the Yak population had now declined by 10% over two years.

A meeting between the Prime Ministers of Rakkab and Aurok, and the CEO of DORTA took place in October. DORTA agreed to cooperate with the Aurokan government and to proceed carefully, but refused to commit to any particular course of action. DORTA also revealed that it was working on a synthetic Lustuk Enzyme. The Rakkabi government developed and released YakTrakker, an app to track Yak herds. YLSA noted anecdotally that it was used by hunters.

### **Aurok’s Response**

In June 2017, Aurok strictly regulated the hunting of the Yak within their borders, and placed sanctions on Rakkab. Within Aurok, Yak could now only be hunted by traditional means for traditional purposes. The Yak was included in Appendix III of CITES in September of that year, and Appendix I of CMS in October. Also in October, Aurok requested that Rakkab halt the hunting of the Yak; Rakkab disclaimed responsibility.

In November, in response to the CMS decision, Rakkab terminated all existing licenses. Rakkab then granted DORTA a licence to take up to 30,000 per year for three years, for the purpose of developing and producing Gallvectra. Aurok lodged a formal protest, and indicated that it would seek the inclusion of the Yak under Appendix I of CITES in May 2019. DORTA took 28,500 Yak in the Winter of 2017/2018.

### **Relevant Conventions**

Aurok and Rakkab are members of the United Nations, and parties to the Vienna Convention on the Law of Treaties, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Paris Convention for the Protection of Industrial Property of 1883 as amended, the Convention on International Trade in Endangered Species of Wild Flora and Fauna of 1973, the Convention on the Conservation of Migratory Species of Wild Animals of 1979, the Indigenous and Tribal Peoples Convention of 1989, and the Convention on Biological Diversity of 1992 and its 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization. Neither State has issued any relevant reservations.

## SUMMARY OF PLEADINGS

### PLEADING I

Accepting *arguendo* that the acts in Pleadings II–IV are internationally wrongful acts, DORTA’s actions are not attributable to Rakkab under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ASR”). First, DORTA is not a State organ, it is a private company under Rakkabi law. Second, DORTA was not exercising governmental authority as the sale of prescription drugs is a private, commercial activity. Third, DORTA was not acting under the instruction, direction or control of Rakkab. As a minority shareholder, Rakkab was unable to exercise decisive influence over DORTA.

Additionally, Rakkab is not responsible for failing to prevent DORTA’s wrongful acts. States have an obligation not to allow its territory to be used for acts contrary to the rights of other States. The obligation requires States to act with due diligence in taking measures to prevent transboundary harm. Rakkab satisfied this obligation *inter alia* by assessing the risk of harm through an Environmental Impact Assessment (“EIA”) and implemented measures to regulate DORTA’s taking of the Yak.

### PLEADING II

Rakkab has an obligation the Convention on Migratory Species (“CMS”) not to take endangered species. However, under Article III(5) the taking of the Yak is justified under because it is for the scientific purpose of developing and distributing Gallvectra, an essential medicine. Alternatively, the taking is justified because extraordinary circumstances, namely the high medical value of the Yak gallbladders required it. Furthermore, Rakkab was not required to obtain an export permit for the Gallvectra under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) because it did not request for the inclusion of the Yak in Appendix III.

Additionally, Rakkab did not breach its customary international law obligations. Rakkab complied with its procedural obligation to prevent significant transboundary harm by assessing the risk, notifying and consulting Aurok, and continuing to monitor the Yak population. Furthermore, obligations relating to the equitable use of shared resources do not apply to terrestrial migratory species. In any case, the use was equitable and sustainable as it was proportionate to Rakkab’s interest.

### **PLEADING III**

Rakkab does not have standing to bring this claim as it is not an injured party, and human rights obligations are neither obligations *erga omnes partes* nor *erga omnes*. Moreover, the hunting of the Yak took place in Rakkab's territory and is protected by state sovereignty. Accordingly, this is not an exceptional circumstance that would justify extraterritorial obligations being imposed.

Alternatively, there has been no breach of any international obligations under the ICCPR and ICESCR. The right to religion does not require positive steps by a State to ensure the availability of resources used in religious rituals. Aurok's obligation in relation to the right to cultural life is only to take "appropriate" steps. Because of the global importance of Gallvectra, there were no steps required of Rakkab. Alternatively, a valid limitation has taken place.

Rakkab has no additional obligations because the Aurokan people identify as indigenous and have a special connection with the Yak. If any further obligations exist, they only amounted to a right to be consulted, which Rakkab has abided with.

### **PLEADING IV**

Rakkab had no obligations to ensure benefit sharing for the utilisation of Aurokan traditional knowledge. The CBD does not impose such an obligation and the Nagoya Protocol cannot apply as this would be contrary to the rule against retroactive treaty application. Additionally, no customary international law obligations exist.

If Rakkab was bound by the Nagoya Protocol, it is not in breach of its requirements. The obligation is on Aurok to establish standards for benefit sharing. Because Aurok has failed to do this, there was no appropriate steps Rakkab could have taken. Alternatively, this is a transboundary situation and Rakkab has satisfied the lower standard of obligations under Article 11.

Finally, if Rakkab breached its benefit sharing obligations, a portion of the profits would be an inappropriate remedy. There is no international norm to do something of this kind. Regardless, there has been no pecuniary loss and any moral damage is insufficient. A declaration of a wrongful act would be more appropriate in this situation.

## PLEADINGS

### I. RAKKAB IS NOT RESPONSIBLE FOR THE INTERNATIONALLY WRONGFUL ACTS DESCRIBED IN PLEADINGS II–IV

#### A. The internationally wrongful acts of DORTA are not attributable to Rakkab

Accepting *arguendo* that the acts in Pleadings II–IV are internationally wrongful acts, DORTA’s actions are not attributable to Rakkab because (1) DORTA is not a State organ; (2) DORTA was not empowered with, or exercising, governmental authority; and (3) DORTA was not acting under the instruction, direction or control of Rakkab.

##### 1. DORTA did not act as a State organ of Rakkab

The conduct of any State organ shall be considered an act of that State under international law.<sup>1</sup> The status of an organ is determined by the State’s internal law.<sup>2</sup> Under Rakkabi legislation, DORTA is a private company.<sup>3</sup>

Further, while a person in authority represents *pro tanto* his government,<sup>4</sup> the DORTA Board members are former government officials acting in a non-governmental capacity.<sup>5</sup> Thus, the Board members cannot be said to represent the government. Nothing else indicates DORTA is a State organ.

##### 2. DORTA was not empowered by the law of Rakkab to exercise, nor did it actually exercise, elements of governmental authority

###### i. ASR Article 5 is not customary international law

Rakkab does not accept that Article 5 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“ASR”) represents international custom. The burden is on Aurok

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<sup>1</sup> ASR, art 4(1).

<sup>2</sup> ASR, art 4(2); *State Responsibility: Comments and Observations from Governments*, Comment from Poland, 48.

<sup>3</sup> *Compromis*, [10].

<sup>4</sup> ASR Commentary, art 4, [3]. See also ASR Commentary, footnotes 107–108.

<sup>5</sup> *Compromis*, [11].

to establish this.<sup>6</sup> The establishment of custom requires sufficient State practice and *opinio juris*.<sup>7</sup> State practice must be “extensive and virtually uniform”.<sup>8</sup> The customary value of each ASR article should be assessed individually as not all ASR articles are codifications of established custom; some articles reflect progressive developments.<sup>9</sup> There is no extensive and uniform State practice regarding the application of Article 5.<sup>10</sup>

**ii. In any event, DORTA was not empowered by Rakkabi law to exercise governmental authority**

There is no international consensus on the definition of “governmental authority”.<sup>11</sup> However, it is a narrow category.<sup>12</sup> The internal law in question must specifically authorise the conduct as involving exercise of public authority.<sup>13</sup> The following factors are relevant to assessing whether the authority is “governmental”: the purposes for which the power is to be exercised; the content of the power; and the extent to which the entity is publicly accountable for their exercise.<sup>14</sup>

First, DORTA is a private pharmaceutical manufacturer. Its monopoly on the sale of prescription drugs in Rakkab is for the purpose of commercial gain; for example, Gallvectra was DORTA’s top-selling drug with gross sales of €3.2 billion worldwide in 2017.<sup>15</sup> Such commercial gain is inconsistent with the purpose of serving a public function. Second, the legislative grant does not indicate any requirement to sell the medicine at affordable costs or at accessible geographical locations, both of which are core elements of the governmental role of ensuring

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<sup>6</sup> Kolb (2013), 935; *Asylum Case*, 276.

<sup>7</sup> *North Sea Continental Shelf*, [77]; Shaw (2017), 54–56.

<sup>8</sup> *North Sea Continental Shelf*, [74].

<sup>9</sup> *Fifty-Fifth Session Topical Summary*, [17].

<sup>10</sup> *State Responsibility: Comments and Observations from Governments*, Comments from Japan, Netherland, United Kingdom, Northern Ireland, 48–49; Moya (2015), 827–828.

<sup>11</sup> ASR Commentary, art 5, [6].

<sup>12</sup> ASR Commentary, art 5, [7].

<sup>13</sup> ASR Commentary, art 5, [7].

<sup>14</sup> ASR Commentary, art 5, [6]; Crawford (2013), 129.

<sup>15</sup> *Compromis*, [11], [21], [38].

equitable access to essential drugs.<sup>16</sup> Third, DORTA is not publicly accountable for the exercise of its sales monopoly; it is only accountable to the Government as a shareholder, and only for its commercial performance, not for public health.

**iii. Alternatively, DORTA was not exercising governmental authority in the particular instance**

DORTA's conduct is attributable to Rakkab only if it was exercising governmental authority "in the particular instance".<sup>17</sup> If DORTA was empowered to exercise governmental authority, that authority is limited to the sale of prescription drugs in Rakkab.<sup>18</sup> It does not extend to the harvesting of Yak gallbladders for Gallvectra, which is a separate private commercial activity.

**3. DORTA was not acting under the instruction, direction or control of Rakkab**

Under ASR Article 8, the acts of private entities are attributable to States where: (i) the entity is acting on the specific instructions of the State; or (ii) the entity is acting under the State's direction or control. In the first situation, it is necessary to show that the conduct was specifically authorised by the State. In the latter situation, attribution derives from the State's control over the private entity in carrying out the conduct.

**i. DORTA was not acting under the specific instruction of Rakkab**

The conduct of a private entity will only be attributed to the State where the State was using its ownership or control of the entity to achieve a particular result.<sup>19</sup> Rakkab is a minority shareholder, holding 12% of DORTA's common voting shares.<sup>20</sup> Therefore, Rakkab was not able to, nor did it in fact, decisively influence DORTA's policies or instruct the taking of Yak.

**ii. DORTA was not acting under direction or effective control of Rakkab**

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<sup>16</sup> WHO *Public-Private Roles in the Pharmaceutical Sector*, [3.4], 30.

<sup>17</sup> ASR Commentary, art 5, [5]; *United Parcels Service Inc v Canada*, [63].

<sup>18</sup> WHO *Public-Private Roles in the Pharmaceutical Sector*, [3.4].

<sup>19</sup> ASR Commentary, art 8, [6]. See generally *Foremost Tehran Inc v Iran*.

<sup>20</sup> *Clarifications*, [4].

The degree of control necessary for attribution of private actions to a State is effective control — actual participation and direction — by a State.<sup>21</sup> A general situation of dependence and support is insufficient to attribute DORTA’s conduct to Rakkab.<sup>22</sup> Rakkab’s subsidisation of DORTA’s research is insufficient to establish effective control. The meetings between DORTA executives and Rakkabi government representatives<sup>23</sup> are also insufficient: first, Rakkab is still only a minority shareholder;<sup>24</sup> second, meetings between private experts and governments are not uncommon;<sup>25</sup> and third, the meetings were regarding Rakkab’s national priorities, not DORTA’s policies.<sup>26</sup>

Additionally, for attribution, the State must have effective control over the private entity when it engages in the particular conduct, namely the taking of Yak.<sup>27</sup> Rakkab did not have control over the independent hunters whom DORTA bought the Yak gallbladders from. Moreover, DORTA’s charter limits Rakkab’s influence by providing that Rakkab can own no more than 19.9% of DORTA’s shares,<sup>28</sup> and that current Rakkabi government officials cannot be appointed onto the Board.<sup>29</sup> Thus, Rakkab could not, in any situation, exercise effective control.

**iii. Additionally, DORTA was not acting under the overall control of Rakkab**

The more flexible “overall control” test in *Prosecutor v Tadić* is not sufficient to attribute the acts of private entities to a State. That case was about individual criminal responsibility, not State

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<sup>21</sup> *Nicaragua*, [62], [64]–[65], [86], [109], [115]; ASR Commentary, art 8, [4].

<sup>22</sup> ASR Commentary, art 8, [4]; *Nicaragua*, [109]–[115].

<sup>23</sup> *Clarifications*, [4].

<sup>24</sup> *Compromis*, [11].

<sup>25</sup> For example, the President of the United States meets with representatives from Silicon Valley: Streitfeld (2016). See also Gude and others (2015); Pennington (2018).

<sup>26</sup> *Clarifications*, [4].

<sup>27</sup> *Genocide Case (Bosnia v Serbia)*, [400]; *Nicaragua*, [109], [115]; *Tadić*, [118]–[119], [141].

<sup>28</sup> *Compromis*, [10].

<sup>29</sup> *Compromis*, [11].

responsibility.<sup>30</sup> Indeed, Judge Shahabuddeen noted that a higher degree of control is required to attribute violations of international law to States.<sup>31</sup>

Even if overall control is sufficient, Rakkab did not exercise this degree of control over DORTA. Overall control does not require direct State involvement in the act being attributed.<sup>32</sup> But dependence is required. In *Tadić*, “forces were almost completely dependent on the supplies [of the State] to carry out ... operations”.<sup>33</sup> However, DORTA, the eighth-largest pharmaceutical manufacturer worldwide, is able to operate independently of Rakkab’s support.

## **B. Alternatively, Rakkab is not responsible for its own failure to prevent DORTA from committing the wrongful acts**

States are obligated to take measures to prevent its territory being used for acts contrary to the rights of other States.<sup>34</sup> This is an obligation of conduct, not result; there is no duty to prevent harm in fact.<sup>35</sup>

### **1. Rakkab complied with its duty of due diligence to prevent non-State actors from causing transboundary harm to the environment of other States**

The prevention principle imposes a duty of due diligence in preventing non-State actors from causing harm to the environment of another State.<sup>36</sup> The due diligence obligation encompasses: (i) the obligation to conduct an Environmental Impact Assessment (“EIA”);<sup>37</sup> (ii) the obligation of

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<sup>30</sup> *Genocide Case (Bosnia v Serbia)*, [403]–[407]; *Tadić* (Separate Opinion of Judge Shahabuddeen), [14], [18]; ASR Commentary, art 8, [5].

<sup>31</sup> *Tadić* (Separate Opinion of Judge Shahabuddenn), [18].

<sup>32</sup> *Tadić*, [131]; Milanović (2009), 13.

<sup>33</sup> *Tadić*, [155].

<sup>34</sup> *Corfu Channel*, 21–22; *Trail Smelter*, 1965; *Lake Lanoux*, [22]; *Nuclear Weapons*, [29]; *Gabčíkovo-Nagymaros*, [140]; *Pulp Mills*, [203]–[205]; Koivurova (2013), [15].

<sup>35</sup> *Genocide Case (Bosnia v Serbia)*, [430]; *Pulp Mills*, [187]; *Alabama Arbitration*; *ILA Study Group*, 952; Pisillo-Mazzeschi (1992), 26; Heathcote (2012), 307–308.

<sup>36</sup> *Trail Smelter*, 641; *Velázquez Rodríguez v Honduras*, [76]; *Gabčíkovo-Nagymaros*, [112]–[113]; *Construction of a Road*, [104]–[105]; *Advisory Opinion OC-23/17*, [95], [97], [101]–[104]; Stockholm Declaration, art 21; CBD, art 3; Birnie, Boyle and Redgwell (2009), 185.

<sup>37</sup> Rio Declaration, art 19; *Construction of a Road*, [104], [153], [161], [168]; *Pulp Mills*, [204]; *Seabed Mining (Opinion)*, [145].

States to adopt appropriate measures and ensure they are reasonably enforced;<sup>38</sup> and (iii) the obligation to apply the precautionary approach.<sup>39</sup>

First, Rakkab conducted a comprehensive EIA, consulting affected parties, including the Aurokan government and YLSA representatives, as required.<sup>40</sup> The EIA concluded that Regulation AG/2017-0300 was adequate to regulate DORTA's hunting and sustain the Yak population. Second, Rakkab implemented the Regulation, limiting the number of Yak DORTA could harvest annually.<sup>41</sup> Rakkab also ensured that DORTA complied with the Regulation.<sup>42</sup> Third, there was no scientific uncertainty as to the Regulation's ability to protect the Yak population, therefore, the precautionary principle does not apply.<sup>43</sup> In any case, the measure adopted satisfied the principle by limiting the number of Yak to be harvested. Therefore, Rakkab satisfied its due diligence obligations.

Rakkab's obligations relating to the environment is discussed further in Pleading II.B.1.

## **2. Rakkab satisfied its duty to prevent transboundary violations of international human rights by non-State actors**

Human rights treaties impose tripartite duties on States parties to protect, respect and fulfil the treaties' substantive obligations.<sup>44</sup> In particular, the duty to protect imposes a positive obligation on States to exercise due diligence to prevent violations of human rights by non-State actors.<sup>45</sup> This requires the adoption of legislative, administrative and other appropriate measures of

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<sup>38</sup> *Seabed Mining (Opinion)*, [115]–[120].

<sup>39</sup> *Seabed Mining (Opinion)*, [131], [135].

<sup>40</sup> *Clarifications*, [7].

<sup>41</sup> *Clarifications*, [7]; *Compromis*, [44]–[45].

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

<sup>43</sup> *Clarifications*, [7]; Rio Declaration, art 15; Nanda and Pring (2013), [2.2.3].

<sup>44</sup> ICCPR, art 2; ICESCR, art 2; Maastricht Principles, [3]–[4]; Pisillo-Mazzeschi (1992), 26.

<sup>45</sup> HRC General Comment 31, [8]; CESCR General Comment 21, [44]–[50]; CESCR General Comment 24, [11], [14]; *Responsibilities of Transnational Corporations*, [1].

prevention.<sup>46</sup> States have discretion in deciding upon the appropriate measures to prevent violations by non-State actors.<sup>47</sup>

Rakkab implemented Regulation AG/2017-0300 to regulate the taking of Yak in Rakkab by imposing (i) criminal and civil sanctions for unlicensed taking and (ii) limiting the number of Yak harvested.<sup>48</sup> Rakkab also ensured that DORTA complied with the Regulation limit.<sup>49</sup> These measures protect the sustainability of the Yak population so that Aurokans can exercise their religious and cultural rights under the ICCPR and ICESCR.

### **3. Rakkab did not have an obligation to regulate benefit sharing for the utilisation of traditional knowledge**

Under Article 16(1) of the Nagoya Protocol, Rakkab, the State where the traditional knowledge is being used, has an obligation to enact appropriate measures to ensure compliance with the regulatory benefit sharing requirements of Aurok, the State where the indigenous population is located. However, Aurok has not implemented any requirements for benefit sharing. Rakkab's obligation was not triggered as there were no applicable standards in Aurok.<sup>50</sup>

Additionally, Rakkab satisfied its obligation “to endeavour to cooperate” with Aurok by negotiating in good faith despite no agreement being reached.<sup>51</sup>

This issue is discussed further in Pleading IV.B.

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<sup>46</sup> HRC General Comment 31, [8]; CESCR General Comment 21, [48]; CESCR General Comment 24, [14]–[16].

<sup>47</sup> CESCR General Comment 21, [66]; *Evaluation of the Obligation to Take Steps to the Maximum of Available Resources*, [2] and [11].

<sup>48</sup> *Compromis*, [44]; *Clarifications*, [8]. The imposition of criminal sanctions and enabling of civil suits is recommended: CESCR General Comment 24, [15].

<sup>49</sup> *Compromis*, [46].

<sup>50</sup> See Pauchard (2017), 5; Tandon, Parasaran, and Luthra (2018), 118; *COP 10 Highlights: 20 October 2010*, 3.

<sup>51</sup> Nagoya Protocol, art 11; *Gabčíkovo-Nagymaros*, [112]; *Interpretation of the Agreement*, [49]; *Southern Bluefin Tuna*, [90].

## II. THE HARVESTING OF THE YAK IN RAKKAB DID NOT VIOLATE RAKKAB'S INTERNATIONAL LEGAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES AND THE ENVIRONMENT

DORTA's harvesting of the Yak in Rakkab did not violate Rakkab's international obligations under (A) treaties or (B) customary international law.

### A. Rakkab did not violate its international treaty obligations

#### 1. Rakkab did not violate its obligations under the Convention on the Conservation of Migratory Species of Wild Animals ("CMS")

The Kayleff Yak are an endangered species under Appendix I of the CMS.<sup>52</sup> Article III(5) requires Rakkab, a Range State, to prohibit the taking of the Yak unless one of the stated exceptions apply.

##### i. The harvesting was for scientific purposes

Article III(5)(a) of the CMS permits taking of the Yak for scientific purposes. While the CMS does not define "scientific purposes", limited guidance can be found in this Court's *Whaling in the Antarctic* decision.<sup>53</sup> The analysis focussed on whether the specific elements of the scientific program's design and implementation were reasonable in relation to achieving its stated scientific objectives.<sup>54</sup> DORTA's historical mandate is "the pursuit and dissemination of scientific discoveries, including ... new medicines and treatments".<sup>55</sup> The use of lethal methods to harvest the Yak gallbladder is necessary as there are no non-lethal alternatives.<sup>56</sup> Moreover, there is significant scientific output in the development and distribution of Gallvectra.

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<sup>52</sup> *Compromis*, [43].

<sup>53</sup> *Whaling in the Antarctic*, [70]–[97]. This Court was required to interpret the words "for purposes of scientific research": International Convention for the Regulation of Whaling ("ICRW"), art VIII. This is different to "for scientific purposes". Therefore, whilst the analysis in the *Whaling in the Antarctic* case is helpful, any analogy is imperfect as the language in the CMS is broader than that in the ICRW.

<sup>54</sup> *Whaling in the Antarctic*, [127]–[227]; Telesetsky, Anton and Koivurova (2014), 333.

<sup>55</sup> *Compromis*, [9].

<sup>56</sup> *Compromis*, [26], [33].

Additionally, the article should be interpreted according to its ordinary meaning, in its context and with regard to its object and purpose.<sup>57</sup> The harvesting of the Yak is for the development of an essential medicine, Gallvectra, which is accordance with the ordinary meaning of “scientific purposes”.<sup>58</sup> The harvesting is also consistent with the object and purpose of the CMS which includes wise utilisation of wild animals, conscious of their value from a scientific point of view.<sup>59</sup>

**ii. Alternatively, extraordinary circumstances required the harvesting**

Taking of the Yak is permitted under Article III(5)(d) if there are extraordinary circumstances. The CMS’s purpose of conservation is not an end in itself; it is “for the good of mankind”.<sup>60</sup> The “extraordinary circumstances” exception should be interpreted in this context. Gallvectra is an essential medicine under the WHO Model List of Essential Medicines.<sup>61</sup> Healthcare and the availability of essential drugs is a fundamental human right.<sup>62</sup> Gallvectra saves countless lives and is particularly relevant to Rakkab where there is a high diabetes rate.<sup>63</sup> Therefore, the medical advantages of the Yak gallbladder are an extraordinary circumstance.

Additionally, the word “require” indicates the need for an absence of reasonable alternatives.<sup>64</sup> There are presently no alternatives to acquiring the Lustuk Enzyme other than the lethal method of harvesting the Yak gallbladder.<sup>65</sup>

**iii. The exception was precise as to content, limited in space and time, and does not operate to the disadvantage of the Yak**

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<sup>57</sup> VCLT, art 31.

<sup>58</sup> *Compromis*, [45].

<sup>59</sup> CMS, preamble. See also Manila Declaration, preamble: “the indispensable contributions of wild animals to sustainable development and the many socioeconomic benefits people derive from them in the form of ... medicinal and genetic resources”.

<sup>60</sup> CMS, preamble.

<sup>61</sup> *Compromis*, [37].

<sup>62</sup> CESCR General Comment 14, [1], [12(a)].

<sup>63</sup> *Compromis*, [12], [43].

<sup>64</sup> VCLT, art 31; Trouwborst (2014), 44.

<sup>65</sup> *Compromis*, [26], [33].

The proviso in Article III(5) requires that the exception, Regulation AG/2017-0300, be precise, limited and not to the disadvantage of the Yak. First, the exception is precise as to content: DORTA may hunt 30,000 Yaks annually for the purpose of developing and manufacturing Gallvectra.<sup>66</sup> Second, the exception is limited in space and time: DORTA's hunting is limited to Yak in the territory of Rakkab and for a period of three years.<sup>67</sup>

Third, the exception is not to the disadvantage of the Yak. The proviso uses the word "disadvantage" rather than "unfavourable", and it does not mention "conservation status". The proviso does not require the Yak population to reach historic abundance which is the threshold for "favourable" conservation status.<sup>68</sup> Rather, in the context of the exception which permits taking, "disadvantage" is better construed as requiring the Yak population to reach the threshold of a sustainably harvestable population.<sup>69</sup> This population threshold requires that the Yak population is sufficiently robust to survive regular depredations from humans.<sup>70</sup> It is the second highest population threshold after historic abundance<sup>71</sup> and is, therefore, consistent with the CMS's purpose of conservation.<sup>72</sup> Regulation AG/2017-0300 is adequate to protect the sustainability of the Yak population.<sup>73</sup> Therefore, the exception does not disadvantage the Yak.

## **2. Rakkab did not violate its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")**

The Kayleff Yak is an Appendix III species under CITES.<sup>74</sup> Article V(2) requires the prior grant and presentation of an export permit for specimens of Appendix III species, Gallvectra.

### **i. An export permit was not required**

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<sup>66</sup> *Compromis*, [45].

<sup>67</sup> *Compromis*, [45].

<sup>68</sup> CMS, art I(1)(c)(4); VCLT, art 31; Fischman and Hyman (2010), 199.

<sup>69</sup> Fischman and Hyman (2010), 195, 198.

<sup>70</sup> Fischman and Hyman (2010), 198.

<sup>71</sup> Fischman and Hyman (2010), 195.

<sup>72</sup> CMS, preamble. As it is consistent with the purpose of the CMS, the suggested interpretation is an appropriate one in the context: VCLT, art 31.

<sup>73</sup> *Clarifications*, [7].

<sup>74</sup> *Compromis*, [40].

An export permit is only required when the Appendix III specimen is being exported from the country that requested the addition of the species to Appendix III.<sup>75</sup> The Kayleff Yak was added to Appendix III at the request of Aurok, not Rakkab.<sup>76</sup> Therefore, an export permit was not required for the export of Gallvectra from Rakkab — only a certificate of origin was required.<sup>77</sup>

**ii. Alternatively, the breach does not require DORTA to cease harvesting**

The purpose of CITES is to regulate international trade, particularly the activities of poachers and illegal traders; it does not prohibit the taking of the Yak *per se*.<sup>78</sup> Whilst DORTA did not obtain an export permit, it satisfied the substantive requirements for obtaining an export permit. First, the Yak were not obtained in contravention of the law, namely Regulation AG/2017-0300.<sup>79</sup> Second, Article V(2)(b) was not triggered as no living specimen was involved. Thus, even if an export permit was required, the violation was technical and does not justify discontinuation of DORTA’s harvesting of the Yak.

**B. The harvesting of the Yak is consistent with customary international law regarding shared resources**

**1. Rakkab complied with its obligation not to cause significant transboundary harm to the environment**

Rakkab had a customary obligation to ensure that any activity within its jurisdiction did not cause significant transboundary harm to Aurok’s territory.<sup>80</sup>

**i. Rakkab complied with its due diligence obligations**

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<sup>75</sup> CITES, art V(2); IUCN CITES Guidelines, 29.

<sup>76</sup> *Compromis*, [40].

<sup>77</sup> *Clarifications*, [6].

<sup>78</sup> CITES, preamble; Lyster (2010), 486. The ceasing of manufacturing derivative products is not a remedy available under CITES and is not referred to in the IUCN CITES Guidelines.

<sup>79</sup> CITES, art V(2)(a); *Compromis*, [44]–[45].

<sup>80</sup> *Trail Smelter*, 641; *Construction of a Road*, [104]–[105]; *Advisory Opinion OC-23/17*, [95], [97]; Stockholm Declaration, art 21; *Prevention Articles*, art 3; Birnie, Boyle and Redgwell (2009), 185.

A State has a sovereign right to exploit its resources pursuant to its own environmental policies.<sup>81</sup> However, States are required to act with due diligence in preventing significant transboundary harm resulting from activities in its territory.<sup>82</sup> This obligation is one of conduct, not result; Rakkab was not required to prevent the harm in fact.<sup>83</sup> For a State to meet its due diligence obligations, it must: (i) conduct an EIA to assess the risk of significant transboundary harm arising from the activity;<sup>84</sup> (ii) notify and consult the potentially affected State;<sup>85</sup> and (iii) continuously monitor the ongoing effects of the activity on the environment throughout its duration.<sup>86</sup>

First, the content and scope of an EIA is to be determined by the State.<sup>87</sup> Rakkab conducted a comprehensive EIA, consulting relevant affected parties such as the Aurokan government and YLSA representatives.<sup>88</sup> The EIA concluded that the Regulation was adequate to sustain the Yak population; no risk of significant transboundary harm was identified.<sup>89</sup>

Second, the obligation to notify and consult only arises where the EIA confirms the risk of significant transboundary harm.<sup>90</sup> As there was no risk, Rakkab was not obliged to notify and consult Aurok.<sup>91</sup> In any case, Aurok was sufficiently notified of Rakkab's activities,<sup>92</sup> and Rakkab adequately consulted and responded to Aurok regarding its activities as evidenced by the exchange

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<sup>81</sup> Stockholm Declaration, art 21; Rio Declaration, art 2; Duvic-Paoli and Viñuales (2015), [2.1.2.2]; *Sovereignty Over Natural Resources*.

<sup>82</sup> *Trail Smelter*, 1965; *Nuclear Weapons*, [29]; *Genocide Case (Bosnia v Serbia)*, [430]; *Pulp Mills*, [187]; *Seabed Mining (Opinion)*, [110]–[111], [223]; *Advisory Opinion OC-23/17*, [103]–[104]; *ILA Study Group*, 974.

<sup>83</sup> *Pulp Mills*, [187]; *Seabed Mining (Opinion)*, [110]; Birnie, Boyle and Redgwell (2009), 218.

<sup>84</sup> Rio Declaration, art 19; *Construction of a Road*, [161].

<sup>85</sup> *Construction of a Road*, [104].

<sup>86</sup> *Pulp Mills*, [205].

<sup>87</sup> *Pulp Mills*, [205]; EIA Convention, art 2.

<sup>88</sup> *Clarifications*, [7].

<sup>89</sup> *Clarifications*, [7]; *Construction of a Road*, [101]–[105].

<sup>90</sup> *Construction of a Road*, [104].

<sup>91</sup> *Clarifications*, [7].

<sup>92</sup> *Compromis*, [17]. Rakkab's activities were publicly announced and Aurok responded, thus, demonstrating that it was aware of Rakkab's activities.

of statements between the two Governments.<sup>93</sup> Importantly, the obligation to notify and consult is not an obligation to reach an agreement<sup>94</sup> or an obligation to cease the activity if an agreement is not reached.<sup>95</sup>

Third, Rakkab continued to monitor the effects of the harvesting by mandating triennial reviews of the Yak population.<sup>96</sup> Moreover, it launched the YakTrakker application to monitor the Yak population in real-time.<sup>97</sup> Therefore, Rakkab complied with its due diligence duties.

**ii. In any event, Rakkab did not cause significant harm**

The threshold of significant harm is determined by balancing the socio-economic utility of an activity against its detrimental effects on the environment.<sup>98</sup> The harvesting has high utility as it is necessary for the manufacture and development of an essential medicine that saves lives.<sup>99</sup> On the other hand, the seriousness of the harm is comparably low: the current Yak population is sustainable even with DORTA's hunting, and Aurok maintains its ability to utilise the Yak.<sup>100</sup>

**iii. Additionally, Aurok has not proven that the hunting of the Yak in Rakkab caused the decrease in Yak population**

The burden of proof is on the Aurok to show DORTA's hunting caused the decrease in the Yak population.<sup>101</sup> The Court must decide the probative value of evidence.<sup>102</sup> The probative value of a

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<sup>93</sup> *Compromis*, [18], [26], [31], [42]; *Clarifications*, [7].

<sup>94</sup> *Lake Lanoux*, 308; *Railway Traffic*, [31]; Boisson de Chazournes and Sangbana (2015), [2.2.3.2].

<sup>95</sup> *Fisheries Jurisdiction* (Declaration by Judge Singh), 41; Nanda and Pring (2013), [2.2.2].

<sup>96</sup> *Compromis*, [45]; *Pulp Mills*, [205]; UNEP EIA Principles, principle 10.

<sup>97</sup> *Compromis*, [34].

<sup>98</sup> Jervan (2014), [3.2.2]; Lefeber (1996), 87–89.

<sup>99</sup> *Compromis*, [12], [37], [43].

<sup>100</sup> *Clarifications*, [7]. In fact, Aurok hunts a significantly larger number of Yak than Rakkab each year: *Compromis*, [27].

<sup>101</sup> *Pulp Mills*, [162]; Kokott (1998); Kolb (2013), 935.

<sup>102</sup> *Armed Activities*, [58]; *Genocide Case (Bosnia v Serbia)*, [213]; *Pulp Mills*, [168]; *Construction of a Road*, [176].

report is diminished if its source is potentially biased.<sup>103</sup> The YLSA report that alleged the hunting of Yak in Rakkab disrupted the Yaks' life cycle equilibrium was prepared by a partisan party with a vested interest in the ceasing of Yak hunting.<sup>104</sup> There has been no independent report corroborating the YLSA report.<sup>105</sup> A *prima facie* cautious approach should be taken as this report is Aurok's only substantial evidence; all subsequent reference derives from YLSA's claims.<sup>106</sup> In light of the probative weakness of the YLSA report, Aurok has not discharged its burden of proof as to causation.

## **2. Rakkab complied with its obligation of equitable and sustainable use of shared natural resources**

States have a customary international law obligation to use shared natural resources in an equitable<sup>107</sup> and sustainable manner.<sup>108</sup>

### **i. Terrestrial migratory species are not a shared natural resource**

The establishment of a rule of customary international law requires the existence of widespread State practice and *opinio juris*.<sup>109</sup> There is no settled definition of "shared resources", but its application has generally been confined to non-living resources.<sup>110</sup>

The CMS, the primary treaty on conservation of migratory species, intentionally does not refer to migratory species as shared resources.<sup>111</sup> The *travaux* shows that early drafts of the CMS

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<sup>103</sup> *Genocide Case (Bosnia v Serbia)*, [227].

<sup>104</sup> *Compromis*, [27], [45].

<sup>105</sup> *Compromis*, [28].

<sup>106</sup> *Nicaragua*, [63]; *Armed Activities*, [61].

<sup>107</sup> UNEP Principles on Shared Natural Resources, principle 1; WCED Final Report, [9]; Birnie, Boyle and Redgwell (2009), 202; Castillo-Laborde (2010), [10]–[15].

<sup>108</sup> Rio Declaration, art 8; CBD, arts 2, 6, 8, 10; Birnie, Boyle and Redgwell (2009), 199.

<sup>109</sup> Shaw (2017), 54–56.

<sup>110</sup> Birnie, Boyle and Redgwell (2009), 193. States were reluctant to recognise even oil and gas as a shared natural resource, commenting that the principles relating to the shared natural resource of groundwater did not equally apply to oil and gas due to different environmental considerations: *Shared Natural Resources Comments: Aquifers*, [A.6.3], [A.7.4], [A.12.5].

<sup>111</sup> De Klemm (1989), 952.

referred to migratory species as a “common resource shared” by Range States.<sup>112</sup> However, this language was omitted from subsequent drafts and the final text at the request of States, thus, indicating a lack of *opinio juris*.<sup>113</sup>

Any treatment of migratory species as a shared resource has generally been limited to marine migratory species, which are governed by a separate regime, UNCLOS.<sup>114</sup> Terrestrial migratory species can be distinguished from marine species because the latter largely exist in the high seas, where there are no concerns of territorial State sovereignty.<sup>115</sup> Further, whilst Article 19(3)(b) of the ASEAN Agreement on the Conservation of Nature and Natural Resources states all migratory species are shared resources, this is an isolated example. It is a regional agreement, not an established rule of international law. In light of the lack of State practice and corresponding *opinio juris*, the conception of terrestrial migratory species as a shared resource does not reflect established custom.<sup>116</sup>

## **ii. Alternatively, the use was equitable and sustainable**

Even if the Yak are a shared resource, the use was equitable and sustainable. Equitable use requires a balance between the State’s sovereign right, the interests of other States in the shared resource, and environmental protection.<sup>117</sup> DORTA only takes approximately 30,000 Yak each year, whereas Aurok takes around 120,000 Yak.<sup>118</sup> DORTA is taking a number of Yak that is proportionate to its interest in the Yak. The Yak inhabit the Gaur Highlands; around 30% of the

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<sup>112</sup> De Klemm (1989), 952, footnote 41. See Article II.1 and the third paragraph of the preamble of the draft originally prepared by the International Union for the Conservation of Nature (“IUCN”) in 1975, at the request of the Federal Republic of Germany.

<sup>113</sup> De Klemm, 952–953.

<sup>114</sup> De Klemm, 951.

<sup>115</sup> The Convention on the Law of the Sea (“UNCLOS”) establishes a requirement for cooperation between coastal States harvesting the same stock, namely a shared natural resource, in or between the high seas and Exclusive Economic Zones: see, for example, UNCLOS, arts 118–119. However, this cooperation requirement does not apply to resources confined to the territorial sea or internal waters due to concerns of territorial sovereignty: De Klemm, 951.

<sup>116</sup> De Klemm, 949–951.

<sup>117</sup> *Pulp Mills*, [175]; Birnie, Boyle and Redgwell (2009), 202; Castillo-Laborde (2010), [25].

<sup>118</sup> *Compromis*, [24], [27]. DORTA takes approximately 4% of the total Yak population.

Highlands are located in Rakkab, with the rest located in Aurok's territory.<sup>119</sup> Further, in light of the great public benefit of DORTA's activities in manufacturing an essential medicine, the use was equitable. Additionally, DORTA complied with Regulation AG/2017-0300 which ensures the sustainability of the Yak population.

### **III. RAKKAB HAS NOT VIOLATED THE AUROKAN CITIZENS' CULTURAL OR RELIGIOUS RIGHTS AND IS NOT REQUIRED TO PROHIBIT THE YAK HARVESTING**

Rakkab is not obliged to prohibit the hunting of the Yak as no internationally wrongful act has occurred. First, (A) in general, Aurok cannot bring a claim against Rakkab for breach of the Aurokan peoples' human rights. In the alternative, (B) there has been no breach of the substantive religious or cultural rights, and (C) Rakkab does not owe further obligations to protect indigenous culture or religion because of the Aurokan people's connection with the Yak.

#### **A. Aurok cannot invoke Rakkab's responsibility for breaching the Aurokan people's human rights**

Regardless of Rakkab's actions, (1) Aurok does not have standing, and (2) Rakkab does not owe human rights obligations extraterritorially.

##### **1. Aurok lacks standing to bring this claim**

Aurok requires a legal interest in the subject matter to invoke responsibility.<sup>120</sup> Aurok cannot claim as an injured State,<sup>121</sup> as human rights obligations are only owed to individuals.<sup>122</sup> Further, the ICCPR and ICESCR do not create obligations *erga omnes partes* between the parties.<sup>123</sup> This is limited to treaties that are intended to protect a collective interest.<sup>124</sup> Comparatively, the broad

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<sup>119</sup> *Compromis*, [1], [7].

<sup>120</sup> *South West Africa*, [49]–[50].

<sup>121</sup> ASR, art 42(a); Crawford, Pellet and Olleson (2010), 942.

<sup>122</sup> HRC General Comment 31, [9]; HRC General Comment 24, [17]; Kotuby and Sobota (2017), 19, 106.

<sup>123</sup> ASR, art 48(1)(a); *Obligation to Prosecute or Extradite*, [68]; *Blaškić*, [26].

<sup>124</sup> *Obligation to Prosecute or Extradite*, [69]; Crawford: Third Report on State Responsibility, [92].

human rights treaties, as mentioned above, focus on States' relationship with individuals.<sup>125</sup> Finally, religious and cultural rights are not *erga omnes* obligations owed to the whole international community.<sup>126</sup> That status only attaches to a narrow category of obligations.<sup>127</sup> There is insufficient State practice or *opinio juris* indicating that religious or cultural rights should be included in this category.<sup>128</sup>

## **2. Rakkab does not owe transboundary obligations to protect the religious and cultural rights of the Aurokan people**

Article 2(1) of the ICCPR limits States' obligations to individuals in their territory or subject to their jurisdiction.<sup>129</sup> While the ICESCR contains no equivalent provision, its scope is similarly limited.<sup>130</sup> 'Jurisdiction' is primarily territorial,<sup>131</sup> and only applies extraterritorially in exceptional circumstances.<sup>132</sup> Under the ICCPR, this has been when a State's agent violates an individual's rights when acting abroad,<sup>133</sup> or when the State has effective control over the other State's territory.<sup>134</sup> These are situations of purposeful action outside the State's territory — a limit consistent with the extraterritorial application of the Convention on Racial Discrimination,<sup>135</sup> and the interpretation of specific rights by the Economic and Social Committee.<sup>136</sup> There is no basis to

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<sup>125</sup> Compared with CAT which creates a regime for the protection of a single right, see *Obligation to Prosecute or Extradite*.

<sup>126</sup> *Barcelona Traction*, [33]; ASR, art 48(1)(b).

<sup>127</sup> Tams (2005), 117. This includes aggression, slavery, racial discrimination (*Barcelona Traction*, [34]), genocide (*Armed Activities (Congo v Rwanda)*, [71]), and self-determination (*East Timor*, [29]).

<sup>128</sup> See Thirlway (2014), 147–148; *North Sea Continental Shelf*, [74].

<sup>129</sup> *The relationship between human rights and the environment*, [69]; HRC General Comment 31, [3].

<sup>130</sup> See also *CESCR Concluding Observations: Israel (2003)*, [31].

<sup>131</sup> *Construction of a Wall*, [109]; *Banković*, [59]; *Al-Skeini*, [131].

<sup>132</sup> *Banković*, [61]; *Advisory Opinion OC-23/17*, [104].

<sup>133</sup> *Lopez v Uruguay*; *Casariago v Uruguay*. See also *Al-Skeini*, [133]–[137].

<sup>134</sup> *Construction of a Wall*, [110]. See also *Loizidou*, [52]; *Banković*, [71]; *Al-Skeini*, [138]–[140].

<sup>135</sup> *Convention on Racial Discrimination (Order)*, [109].

<sup>136</sup> CESCR General Comment 23, [70]; CESCR General Comment 20; CESCR General Comment 19; CESCR General Comment 14, [39].

extend extraterritorial application to the current, incidental transboundary situations. The harvesting of the Yak occurred within Rakkab's borders and is protected by the doctrine of State sovereignty,<sup>137</sup> which extends to natural resources.<sup>138</sup>

## **B. Rakkab has not violated its obligations in respect of religious or cultural rights**

Rakkab has not violated its international obligations as (1) there is insufficient proof of harm. Even if harm could be established, the hunting of the Yak does not amount to a breach of (2) religious or (3) cultural rights. Alternatively, (4) a valid limitation has taken place. Finally, (5) there is no infringement on self-determination.

### **1. Aurok has not proven hunting of the Yak in Rakkab has caused the population decrease**

As substantively discussed in Pleading II.B.1.iii, Aurok has not proven that the hunting in Rakkab caused the decrease in the Yak population. Not only, as explained above, is the probative value of their evidence insufficient, there are relevant contradictory facts. Rakkab has consistently taken fewer Yak than Aurok,<sup>139</sup> and it has issued regulations to comply with its environmental obligations.<sup>140</sup> The blaming of Rakkab is largely fuelled by social media campaigns,<sup>141</sup> and political discord in Aurok.<sup>142</sup>

### **2. Rakkab has not breached its obligation relating to religious rights**

The ICCPR protects the freedom to hold a religion and the freedom to manifest a religion.<sup>143</sup> Religious rituals, such as hunting the Yak,<sup>144</sup> are part of the manifestation of religion.<sup>145</sup> However,

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<sup>137</sup> UN Charter, art 2(1); *Friendly Relations Declaration*.

<sup>138</sup> *Charter of Economic Rights and Duties*, art 2(1); *Armed Activities*, [244].

<sup>139</sup> *Compromis*, [24] and [27].

<sup>140</sup> *Compromis*, [43]–[44]; *Clarifications*, [7]–[8]; Pleading II.A.1.

<sup>141</sup> *Compromis*, [30].

<sup>142</sup> *Compromis*, [32].

<sup>143</sup> ICCPR, art 8(1); HRC General Comment 22, [3]; Special Rapporteur on Freedom of Religion Report (2007), [10]; Bielefeldt, Ghanea-Hercock and Wiener (2016), 22.

<sup>144</sup> *Compromis*, [2]–[4].

<sup>145</sup> HRC General Comment 22, [4].

this right is a “freedom”. It defends individuals from direct interference,<sup>146</sup> but does not impose further positive obligations on the State.<sup>147</sup> This interpretation is supported by the fact that other ICCPR rights, in contrast, expressly require active measures by the State.<sup>148</sup> Rakkab has not directly restricted access to the Yak. While Aurokans have the right to acquire resources such as the Yak for religious worship, Rakkab is not obligated to ensure their availability.<sup>149</sup>

### 3. Rakkab has not breached its obligations relating to cultural rights

The ICESCR recognises the right to cultural life.<sup>150</sup> While States have an obligation to facilitate and fulfil this right,<sup>151</sup> Rakkab is only obligated to take “appropriate” steps.<sup>152</sup> Appropriateness allows consideration of other protected rights.<sup>153</sup> Gallvectra is an essential drug,<sup>154</sup> and providing such drugs is part of a State’s non-derogable minimum obligations.<sup>155</sup> Without a synthetic alternative, the Yak gallbladders are needed for the continued provision of Gallvectra.<sup>156</sup> Stopping Gallvectra’s production will regress the right to health, which there is a strong presumption

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<sup>146</sup> For example, prohibiting prisoners from practising their religion (*Boodoo v Trinidad and Tobago*; *Poltoratskiy*), making manifestations illegal (*Malakhovsky v Belarus*; *Prince v South Africa*; *Leven v Kazakhstan*), or directly interfering with natural resources used in religious rituals (*Ogiek Decision*, [166]).

<sup>147</sup> Nowak (2005), 411; Kotuby and Sobota (2017), 22. See also ICJ Judge Sir Kenneth Keith’s comments in *Mendelsohn v A-G*, [14] and [16].

<sup>148</sup> See ICCPR, arts 6(1), 17(2), 23(1), and 24(1).

<sup>149</sup> *Declaration on the Elimination of Religious Discrimination*, art 6. See also *Special Rapporteur’s Study on Religious Discrimination*, 36: protection of religious dietary practices does not include duty to enact positive measures.

<sup>150</sup> ICESCR, art 15(1)(a).

<sup>151</sup> CESCR General Comment 21, [6], [48].

<sup>152</sup> ICESCR, art 2(1).

<sup>153</sup> CESCR General Comment 21, [17].

<sup>154</sup> *Compromis*, [37].

<sup>155</sup> ICESCR, art 12; CESCR General Comment 14, [43.d]; *Special Rapporteur Report on highest attainable standard of health*, [56]; Hogerzeil and others (2006). Each ICESCR right contains minimum core obligations, see CESCR General Comment 3, [10]; CESCR General Comment 14, [47].

<sup>156</sup> No synthetic alternative has been found, *Compromis*, [33].

against.<sup>157</sup> The impact would be extensive. Gallvectra is used in more than eighty-five countries and countless people depend on it to “protect and extend their lives.”<sup>158</sup> The impairment of cultural rights is comparatively less as it is still possible for Aurokans to hunt the Yak.<sup>159</sup> Rakkab has neither acted unreasonably or discriminatorily, and the Court should respect its policy-making discretion.<sup>160</sup>

#### **4. Alternatively, religious and cultural rights were validly limited**

Freedom to manifest one’s religion and the right to cultural life can be subject to limitations.<sup>161</sup> There are three requirements for justified limitations.<sup>162</sup> First, that limitations must be prescribed by law that is clear and accessible.<sup>163</sup> The hunting of the Yak has always been done under legal licences that were publicly accessible.<sup>164</sup> Second, limitations must be for a legitimate purpose, as prescribed by the relevant treaty. The production of Gallvectra protects health globally. This meets the purpose of ‘public health’ under the ICCPR,<sup>165</sup> and promoting the “general welfare” under the ICESCR.<sup>166</sup> The final requirement is that the limitation is necessary and proportionate.<sup>167</sup> The largescale risk to the health of the public means that Rakkab’s hunting laws meet this criterion.<sup>168</sup>

#### **5. There has been no breach of the cultural aspect of self-determination**

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<sup>157</sup> CESCR General Comment 3, [9].

<sup>158</sup> *Compromis*, [20] and [33].

<sup>159</sup> *Compromis* [39].

<sup>160</sup> CESCR General Comment 21, [66]; *Evaluation of the Obligation to Take Steps to the Maximum of Available Resources*, [2] and [11]; Maastricht Guidelines, [8].

<sup>161</sup> ICCPR, art 18(3); ICESCR, art 4.

<sup>162</sup> Nowak (2005), 425; De Shutter (2014), 339.

<sup>163</sup> Siracusa Principles, [17]; Limburg Principles, [50]; *Metropolitan Church of Bessarabia*, [109].

<sup>164</sup> *Compromis*, [23], [44]–[46]; *Clarifications*, [9]. See also *Apirana Mahuika*, where the Human Rights Committee held fishing regulations were a valid limitation.

<sup>165</sup> Siracusa Principles, [25]–[26].

<sup>166</sup> ICESCR, art 4.

<sup>167</sup> Siracusa Principles, [10]; CESCR General Comment 21, [19]; HRC General Comment 22, [8]; HRC General Comment 31, [8].

<sup>168</sup> See *Prince v South Africa*, [7.3].

Finally, while the Aurokan people's right to self-determination includes the right to freely pursue cultural development,<sup>169</sup> this only means that they must be free from direct external or domestic interference.<sup>170</sup> As discussed above, Rakkab has not directly restricted the Aurokan people's ability to make decisions regarding their culture,<sup>171</sup> or made the hunting of the Yak impossible.

**C. There are no additional obligations in respect to cultural or religious rights because of the Aurokan population's connection with the Yak**

The people of Aurok (1) should not be considered indigenous under international law. Regardless, (2) Rakkab owes no additional obligation to protect indigenous culture or religion. Alternatively, (3) any further protection only amounted to a right to be consulted, which Rakkab satisfied.

**1. The people of Aurok should not be considered indigenous people under international law**

There is no single definition of indigenous peoples at international law.<sup>172</sup> However, proposed definitions consistently include an experience of non-dominance,<sup>173</sup> or marginalisation and discrimination.<sup>174</sup> The Aurokan people lack this vulnerability. The culture and descendants of the Pivzao civilisation are still dominant in Aurok.<sup>175</sup> There is no history of subjugation as there was minimal interference by Jerami colonisers,<sup>176</sup> and the current government clearly represents the population's cultural interests.<sup>177</sup> The policy reasons for giving specific protection for "indigenous populations" do not exist for the people of Aurok, and they should not receive additional human rights protection.

**2. There is no obligation to protect indigenous culture and religion above the standard already discussed**

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<sup>169</sup> ICCPR, art 1(1); ICESCR, art 1(1), UNDRIP, art 3.

<sup>170</sup> Nowak (2005), 24; CERD General Recommendation 21, [4].

<sup>171</sup> They are still capable in participating in Aurokan government's decisions, *Compromis*, [25].

<sup>172</sup> *Ogiek Decision*, [105]; UNDRIP Manual, 6.

<sup>173</sup> *Cobo Report*, [37]; Anaya (2004), 3.

<sup>174</sup> *Daes Report*, [69.d]; *Advisory Opinion of the African Commission: UNDRIP*, [12.c]; *Ogiek Decision*, [107].

<sup>175</sup> *Compromis*, [7].

<sup>176</sup> *Compromis*, [6].

<sup>177</sup> *Compromis*, [25].

ILO Convention No. 169 does not include special protection for indigenous cultural or religious rights.<sup>178</sup> While Article 15 protects the right to natural resources such as the Yak, the Convention's land rights are intended as practical possessory and use rights.<sup>179</sup> These provisions are used for situations of direct interference or misappropriation of traditional lands.<sup>180</sup> Similarly, customary international law has only extended to protecting indigenous land rights.<sup>181</sup> These land rights are not consistent with the content of Question III. The complaints by both the Aurokan public and government have been that the hunting is harming Aurokan culture, with no argument this is interfering with a resource use right.<sup>182</sup>

### **3. If indigenous rights to natural resources are applicable, they only amount to a right to be consulted**

The Aurokan people do not have exclusive use of the Yak as Rakkab also retains sovereign rights to the Yak.<sup>183</sup> Therefore, ILO Convention No. 169 only requires Rakkab to consult indigenous peoples affected by its activities.<sup>184</sup> While consultation must be in good faith,<sup>185</sup> the method of consultation can be flexibly applied.<sup>186</sup> Given that nearly all Aurokans identify as indigenous,<sup>187</sup> the government of Aurok accurately represents their cultural interests — as seen in its interaction with village leaders,<sup>188</sup> advocacy by Ministers against Gallvectra,<sup>189</sup> and its responsiveness to

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<sup>178</sup> Article 23(1) only requires recognition of the importance of hunting, with no substantive obligation.

<sup>179</sup> Anaya (2005), 9; *Revision of ILO Convention No. 107*, 71.

<sup>180</sup> *ILO Convention No. 169 Guide*, 94. For example, situations of deforestation were held in breach of the ILO Convention, see *CEACR Observance, CEACR Observations, Paraguay (2018)*.

<sup>181</sup> Wiessner (2008); *Awes Tingni v Nicaragua*, [71]; *Aurelio Cal v Attorney-General of Belize*.

<sup>182</sup> *Compromis*, [22], [28], [30].

<sup>183</sup> Having undisputedly issued hunting licences since 1950, see *Compromis*, [23].

<sup>184</sup> ILO Convention No. 169, art 15(2). Consistent with self-determination which requires indigenous participation in decisions affecting them, *Special Rapporteur Report (2017)*, [40].

<sup>185</sup> ILO Convention No. 169, art 6(2).

<sup>186</sup> ILO Convention No. 169, art 34.

<sup>187</sup> *Clarifications*, [1].

<sup>188</sup> *Compromis*, [25].

<sup>189</sup> *Compromis*, [17], [37].

domestic protest.<sup>190</sup> Therefore, Rakkab’s two consultations with the Aurokan government in 2016 were sufficient to satisfy Rakkab’s obligations.<sup>191</sup> The consultation was not invalid because no agreement was reached. No bad faith is described.<sup>192</sup> Additionally, indigenous populations must also act in good faith and have no right of denial when the other party is acting in the legitimate public interest.<sup>193</sup> Because of the lifesaving quality of Gallvectra, Rakkab and DORTA’s refusal to stop hunting, while still agreeing to take steps to protect the Yak’s sustainability such as initiating breeding programs, is reasonable.<sup>194</sup>

#### **IV. TRADITIONAL KNOWLEDGE HAS NOT BEEN USED CONTRARY TO INTERNATIONAL LAW AND RAKKAB DOES NOT OWE AUROK A PORTION OF THE PROFITS**

Compensation for the use of traditional knowledge is referred to as benefit sharing. Rakkab was not required to ensure benefit sharing as (A) no international obligations to do so existed at the time of use. Alternatively, (B) Rakkab did not breach any obligations relating to benefit sharing. Finally, (C) even if a breach has occurred a portion of the profits is not an appropriate remedy.

##### **A. There was no international obligation requiring Rakkab to ensure benefit sharing with the Aurok**

(1) The Convention on Biological Diversity (“CBD”) does not require benefit sharing, and (2) the Nagoya Protocol cannot be applied retroactively to the present use. Additionally, (3) there is no applicable customary international law rule.

##### **1. The CBD does not require Rakkab to share benefits from the utilisation of traditional knowledge**

Article 8(j) deals with traditional knowledge. It uses qualified language; States are only required to act “subject to their national legislation” and only to “encourage” benefit sharing.<sup>195</sup>

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<sup>190</sup> *Compromis*, [30]–[31].

<sup>191</sup> *Compromis*, [26], [31].

<sup>192</sup> Lack of good faith exists in situations when a State impacts the ability of the indigenous population to meaningfully participate. See *Report of the Special Rapporteur (2009)*, [50]–[51].

<sup>193</sup> Report of the *Special Rapporteur (2009)*, [49].

<sup>194</sup> *Compromis*, [26].

<sup>195</sup> VCLT, art 31(1).

Accordingly, the provision does not impose substantive benefit sharing obligations for the use of traditional knowledge.<sup>196</sup> No other articles of the CBD impose applicable requirements.<sup>197</sup>

## **2. The Nagoya Protocol does not apply because it was not in force at the time of use**

While the Nagoya Protocol develops clearer obligations than the CBD,<sup>198</sup> a treaty generally does not apply to events that occurred before it entered into force.<sup>199</sup> A treaty will only apply retroactively if an intention to do so appears either in the treaty or is otherwise established.<sup>200</sup>

### **i. Any alleged use of traditional knowledge took place before the Nagoya Protocol came into force**

The Nagoya Protocol requires States to take steps in order that the benefits arising from the “utilization of traditional knowledge” is shared with the indigenous or local communities.<sup>201</sup> Rakkab accepts, for the purposes of this prayer, that there was utilisation of traditional knowledge. That utilisation, however, occurred prior to the Nagoya Protocol’s entry into force in 2014.<sup>202</sup> Dr. Bello’s discovery of the medical properties of the gallbladder, the isolation of the enzyme, the testing process and the patenting of Gallvectra was between 2001 and 2006,<sup>203</sup> and the marketing and global expansion occurred in 2011.<sup>204</sup> Those actions comprise the utilisation.<sup>205</sup> The ordinary meaning of “utilisation” requires actual interaction with the traditional knowledge. Utilisation is

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<sup>196</sup> This interpretation is widely supported by the most highly qualified publicists, see Birnie, Boyle and Redgwell (2009), 627–628; Oguamanam (2006), 81; Bowman and Redgwell (1996), 266; von Lewinski (2008), 133; Francioni (2007), 206; Rourke (2018), 711–712.

<sup>197</sup> Article 15(7) of the CBD only deals with benefit sharing for the use of the genetic resource.

<sup>198</sup> Morgera, Tsioumani and Buck (2014), 29.

<sup>199</sup> VCLT, art 28; *Ambatielos*, 40; *Obligation to Prosecute or Extradite*, [100].

<sup>200</sup> VCLT, art 28; Corten and Klein (2011), 725.

<sup>201</sup> Nagoya Protocol, art 5(5)

<sup>202</sup> Pauchard (2017), 1.

<sup>203</sup> *Compromis*, [13]–[19].

<sup>204</sup> *Compromis*, [20].

<sup>205</sup> See Nagoya Protocol, art 2(c); *Like-Minded Countries Draft Articles on the Protection of Genetic Resources*, art 1(2)(e).

not an ongoing act;<sup>206</sup> it only has continuing effects.<sup>207</sup> While the production and profits of Gallvectra continue,<sup>208</sup> these are effects or consequences of the initial utilisation, after which DORTA has simply been reproducing the drug it developed.<sup>209</sup>

**ii. The Nagoya Protocol should not be applied retroactively as such application was not intended by the parties**

First, there is no express intention in the treaty for it to apply retroactively. Four proposed provisions on retroactive application were abandoned, showing there was no implicit intention either.<sup>210</sup> Second, “otherwise established” applies when retroactivity is required by the nature or object of the treaty.<sup>211</sup> The mandate that led to the Nagoya Protocol was to create a new regime on access and benefit sharing.<sup>212</sup> Its purpose was neither interpretive<sup>213</sup> nor to deal with past situations.<sup>214</sup> Rakkab and DORTA were acting in accordance with the international and domestic obligations at the time, and it would be unjust to impose these obligations retroactively.<sup>215</sup>

**3. There is no customary international law obligation to share benefits**

Customary international law requires “virtually uniform” state practice and *opinio juris*, belief their conduct is rendered obligatory.<sup>216</sup> Developments in benefit sharing norms in the indigenous rights field have been exclusively limited to misappropriated land or physical resources.<sup>217</sup> While

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<sup>206</sup> The rule against retroactivity does not apply to ongoing incidents. See, ILC Commentary on the Law of Treaties, 213.

<sup>207</sup> *Mondev International*, [58]; ASR, art 14(1).

<sup>208</sup> *Compromis*, [21] and [38]; *Clarifications*, [5].

<sup>209</sup> Comparatively, continuing wrongful acts have been found in situation of active continuation, see *Tehran Hostages*, [77].

<sup>210</sup> Kamau, Fedder and Winter (2010), 254–255. See also *Genocide Case (Croatia v Serbia)*, [99].

<sup>211</sup> *Mavrommatis Palestine Concessions*, 34; *Ambatielos*, 40; ILC Commentary on the Law of Treaties, 212–213; Corten and Klein (2011), 726.

<sup>212</sup> *Decision VII/19*, [D.1].

<sup>213</sup> *Chamizal Tract*, 325.

<sup>214</sup> *Mavrommatis Palestine Concessions*, 34.

<sup>215</sup> Sampford (2006), 286.

<sup>216</sup> *North Sea Continental Shelf*, [74] and [77].

<sup>217</sup> *Saramaka People v Suriname*, [138]–[140].

benefit sharing for traditional knowledge has occurred, there is insufficient *opinio juris*. Benefit sharing requirements are established to be in conformity with the CBD regime, not because of a belief that a rule existed beyond this.<sup>218</sup> Examples outside the treaty’s scope are for non-legal reasons, such as media pressure,<sup>219</sup> or as an internal policy decision.<sup>220</sup> Moreover, States that act inconsistently and do not enforce benefit sharing are not considered in breach of international law.<sup>221</sup>

**B. Alternatively, Rakkab was not required under the Nagoya Protocol to ensure compensation for the use of traditional knowledge**

Even if the Nagoya Protocol applies, (1) Aurok’s lack of national standards means Rakkab is not in breach. Alternatively, (2) this was a transboundary situation that should be dealt with under Article 11.

**1. There was no requirement to share benefits as Aurok has not put in place requirements to do so**

Countries where traditional knowledge is used (“user country”) have no “self-standing” obligation to ensure benefit sharing.<sup>222</sup> Article 5(5) imposes obligations on States to ensure benefit sharing for the use of traditional knowledge by implementing domestic standards.<sup>223</sup> However, this requirement must be read in context, specifically in light of Article 16(1).<sup>224</sup> This provision establishes that the obligation on the user country, Rakkab, is only to enact “appropriate” measures to ensure compliance with the benefit sharing requirements of the State where the traditional knowledge is located (“provider country”), Aurok.<sup>225</sup> Aurok had the primary responsibility for

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<sup>218</sup> OAU Model Law, Preamble; Andean Pact, art 5(1); Brazil: Law 13.123, art 5 XIII; IFPMA Guidelines, Objective.

<sup>219</sup> The Hoodia Case (see Secretariat of the CBD (2008), 27).

<sup>220</sup> Natura, Brazil (see, Secretariat of the CBD (2008), 79–82).

<sup>221</sup> *Nicaragua*, [186].

<sup>222</sup> Kamau, Fedder and Winter (2010), 262.

<sup>223</sup> Domestic implementation is the structure through which the Nagoya Protocol achieves its purpose, see Rimmer (2015), 361; Kamau, Fedder and Winter (2010), 252.

<sup>224</sup> VCLT, art 31(1).

<sup>225</sup> See Pauchard (2017), 5; Tandon, Parasaran, and Luthra (2018), 118; *COP 10 Highlights: 20 October 2010*, 3.

establishing standards to protect traditional knowledge, and failed to enact any access of benefit sharing requirements. There was no “appropriate” steps Rakkab could have taken, meaning that they are not in breach of their obligations as a user country.

Under Article 5(5), a provider country may establish benefit sharing requirements through any “policy measures.” However, the Nagoya Protocol aims to create legal certainty.<sup>226</sup> Therefore, any valid domestic measures should articulate user requirements in a clear and accessible manner.<sup>227</sup> The Aurokan Minister of Intellectual Property’s complaint during the patenting process does not meet this standard.<sup>228</sup> The focus of the Minister’s letter was on the validity of the patent: there was no mention of the CBD regime or benefit sharing. Ambiguous denunciation on the part of Aurok is insufficient to discharge its obligations under Article 5(5).

## **2. Alternatively, the traditional knowledge should be dealt with under the express provision regarding transboundary situations**

Article 11 of the Nagoya Protocol deals with transboundary situations.<sup>229</sup> This expressly uses the lesser requirement to “endeavour to cooperate”, meaning there is no obligation for mutually agreed terms on benefit sharing.<sup>230</sup> Any requirement to cooperate through negotiation only requires good faith.<sup>231</sup>

There are still adherents to the Pivzao traditions in Rakkab who share Aurokan traditional knowledge.<sup>232</sup> Rakkab had an inbuilt online mechanism to allow the public to comment on patent applications.<sup>233</sup> Through this, the Aurokan Minister of Intellectual Property and the Aurokan

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<sup>226</sup> Nagoya Protocol, preamble; Morgera, Tsioumani and Buck (2014), 116.

<sup>227</sup> This is supported by subsequent practice of parties (VCLT, art 31(3)), who have used express legislation or regulation to monitor traditional knowledge uses. See Norway Nature Diversity Act, s 61; Nagoya and CBD Implementation Act (Finland); EU Regulation 511/2014.

<sup>228</sup> *Compromis*, [17].

<sup>229</sup> See also Kamau, Fedder and Winter (2010), 253.

<sup>230</sup> Morgera, Tsioumani and Buck (2014), 210.

<sup>231</sup> *Gabčikovo-Nagymaros*, [112]; *Interpretation of the Agreement*, [49]; *Southern Bluefin Tuna*, [90].

<sup>232</sup> This is demonstrated by the civil claim, see *Clarifications*, [3]. See also *Compromis*, [8].

<sup>233</sup> *Compromis*, [16].

society was able to engage,<sup>234</sup> and DORTA responded to their concerns.<sup>235</sup> Even if the people of Aurok disagree with the decision to continue producing Gallvectra,<sup>236</sup> the obligation to negotiate does not require agreement.<sup>237</sup> Rakkab met its obligations, and there was no additional duty of compensation.

**C. Even if there was a breach of Rakkab’s benefit sharing obligations, Aurok is not entitled to a portion of the Gallvectra profits**

An internationally wrongful act creates an obligation to make adequate and appropriate reparation, either in the form of restitution, compensation or satisfaction.<sup>238</sup> However, (1) “profits” are not an appropriate form of reparation. If it were, (2) Aurok has suffered no loss that would justify such an award.

**1. A portion of the profits is not an appropriate form of reparation**

Parties are only required to give reparation in an “adequate” form: what is adequate depends on the particular case.<sup>239</sup> All forms of reparation must be proportionate.<sup>240</sup> The only situation where “profits” have been given concerns lost profits,<sup>241</sup> which are proportionate because the injured party owned or had an interest in the value-producing asset.<sup>242</sup> The Aurokan people have not, and would not have, gained financially from their knowledge of the health benefits of *Tirhinga Nos Lustuk*.<sup>243</sup> The scientifically created drug is what has value.<sup>244</sup> The drug was the result of an

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<sup>234</sup> *Compromis*, [17].

<sup>235</sup> *Compromis*, [18].

<sup>236</sup> *Compromis*, [18]–[21].

<sup>237</sup> *Railway Traffic*, 116.

<sup>238</sup> *Factory at Chorzów (Jurisdiction)*, 21; *Rainbow Warrior*, [75]; ASR, art 30(b).

<sup>239</sup> *Avena and Others*, [119]; ASR Commentary, art 36, [7].

<sup>240</sup> ASR Commentary, art 34, [5].

<sup>241</sup> Typically in investment arbitration context. See for example, *LG&E Energy Corp*, [41]; *Norwegian Shipowners’ Claims*, 336.

<sup>242</sup> Crawford (2013), 522

<sup>243</sup> *Compromis*, [3]–[4].

<sup>244</sup> *Compromis*, [18].

approximately four year research and testing process.<sup>245</sup> To give profits would not be restoring what is owed to the Aurokan people, but be an unjustified disgorgement of profits earned by DORTA. There is no established norm for this in international law, as this Court has never given a share of the profits created by the other party.

## **2. Aurok has suffered no loss that would justify giving a portion of the profits**

If a portion of the profits could be awarded, it would still not be appropriate reparation because (i) Aurok has not proven any pecuniary loss, and (ii) any moral damage is insufficient.

### **i. Aurok cannot factually show it has suffered a pecuniary loss**

A State can only seek compensation for damages if it establishes a loss or injury,<sup>246</sup> and shows that the damage is more than speculative.<sup>247</sup> A pecuniary loss is the difference in their financial position because of the wrongful act.<sup>248</sup> This requires Aurok to prove it would have received a portion of the profits had the benefit sharing obligations been followed.<sup>249</sup>

The Nagoya Protocol does not impose an obligation to share commercial profits.<sup>250</sup> Benefits could be either monetary or non-monetary, so Aurok had no certain claim to any money.<sup>251</sup> Benefit sharing is flexible depending on what would be fair and equitable in each specific case.<sup>252</sup> The Aurokan people only knew *Tirhinga Nos Lustuk* had general health benefits.<sup>253</sup> The financial success of Gallvectra is due to the significant effort of DORTA in studying the cause of Aurokans' lower diabetes and obesity rates, isolating the enzyme, and testing

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<sup>245</sup> *Compromis*, [13]–[14].

<sup>246</sup> ASR, art 36; *Gabčíkovo-Nagymaros*, [152]; *Ahmadou Sadio Diallo (Compensation)*, [14]; Crawford (2013), 523.

<sup>247</sup> ASR Commentary, art 36, [27]; *Ahmadou Sadio Diallo (Compensation)*, [49]; similarly the PCIJ specified that contingent and indeterminate damage cannot be compensated in *Factory at Chorzów (Merits)*, 57.

<sup>248</sup> Crawford, Pellet and Olleson (2010), 601; *Border Area (Compensation)*, [89].

<sup>249</sup> *Ahmadou Sadio Diallo (Compensation)*, [15]; Kotuby and Sobota (2017), 192; Crawford, Pellet and Olleson (2010), 602.

<sup>250</sup> UN Handbook, 96.

<sup>251</sup> Nagoya Protocol, Annex.

<sup>252</sup> Bonn Guidelines, [45]; Morgera, Tsioumani and Buck (2014), 135.

<sup>253</sup> *Compromis*, [4], [16], [17], [37].

the drug.<sup>254</sup> Given the comparably minimal contribution by the Aurokan people, it would be disproportionate and inequitable to give Aurok a portion of the profits.<sup>255</sup> Non-monetary methods of benefit sharing, such as official acknowledgement of the traditional knowledge or sharing Gallvectra with the people of Aurok at a reduced cost, would be more appropriate.

**ii. Any moral damage does not justify financial reparation**

Compensation for “moral” injuries is limited to real mental or psychological suffering,<sup>256</sup> and must be equitable.<sup>257</sup> This includes wrongful death of loved ones,<sup>258</sup> and serious human rights breaches.<sup>259</sup> Using someone’s traditional knowledge without sharing benefits does not meet this high standard as there is no evidence of any psychological harm. Compensation cannot be punitive,<sup>260</sup> which is all an award would be in this context.

Finally, while satisfaction could take monetary form, it is limited to moral injuries which are an affront to a State or its reputation.<sup>261</sup> It is, therefore, inappropriate reparation for a breach of benefit sharing obligations. A more appropriate form of reparation would be satisfaction in the form of a declaration of a breach.<sup>262</sup>

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<sup>254</sup> *Compromis*, [13]–[14].

<sup>255</sup> Examples where royalties are given are situations where the traditional knowledge was largely analogous, see Chennells (2013), 169–170.

<sup>256</sup> ASR art 31(2); *Lusitania Case*, 37; Crawford, Pellet and Olleson (2010), 599; Brownlie (1983), 223.

<sup>257</sup> *Ahmadou Sadio Diallo (Compensation)*, [24].

<sup>258</sup> *Velázquez Rodríguez v Honduras*, [39]; ASR Commentary, art 36, [16].

<sup>259</sup> *Ahmadou Sadio Diallo (Compensation)*, [21].

<sup>260</sup> *Border Area (Compensation)*, [31]; *Velázquez Rodríguez v Honduras*, [38]; ASR Commentary, Chapter III, [3]; Crawford, Pellet and Olleson (2010), 671.

<sup>261</sup> ASR, art 37; ASR Commentary, art 37, [3]; Crawford, Pellet and Olleson (2010), 580; *Rainbow Warrior*, [112].

<sup>262</sup> *Genocide Case (Bosnia v Serbia)*, [463]; *Corfu Channel*, 35.



## CONCLUSION AND PRAYER FOR RELIEF

Rakkab respectfully requests the Court to:

- I. **DECLARE** that DORTA's actions are not attributable to Rakkab and Rakkab is not responsible for failing to prevent DORTA's actions.
- II. **DECLARE** the harvesting of the Yak does not violate Rakkab's international obligations relating to the environment or the protection of endangered species.
- III. **DECLARE** the harvesting of the Yak does not violate Rakkab's obligations to protect cultural or religious rights.
- IV. **DECLARE** Rakkab was not required to ensure benefit sharing for the use of traditional knowledge and is not required to pay a portion of the Gallvectra profits.