THE 2019 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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

THE CASE CONCERNING THE KAYLEFF YAK

THE STATE OF AUROK
(APPLICANT)
V.
THE REPUBLIC OF RAKKAB
(RESPONDENT)

On Submission to the International Court of Justice

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Treaties and Conventions

ICJ & PCIJ Cases

Human Rights Committee
Committee on Economic Social and Cultural Rights

European Court of Human Rights

Other International Cases

National Cases

United Nations and Other Documents

WHO, *The growing crisis of noncommunicable* diseases in the South-East Asia Region (2011)	WHO, *The growing crisis of noncommunicable diseases in the South-East Asia Region*, Department of Sustainable Development and Healthy Environments, June 2011	21
WIPO ICG, *Draft Articles on Traditional Knowledge* (2018)	IGC The Protection of Traditional Knowledge: Draft Articles, No. WIPO/GRTKF/IC/37/FACILITATORS TEXT TK REV. 2 (September 5, 2018)	23, 24
Swakopmund Protocol	Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization (ARIPO) Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010	23, 25, 26, 29
WIPO *Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge*	WIPO Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge, No. UNEP/CBD/COP/7/INF/17 (2002)	24
CBD Working Group on ABS, Report of the First Part of the Ninth Meeting	Resumed Ninth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (WG ABS 9 Resumed) 10-16 July 2010, Montreal, Canada	26
Cancun Declaration of Like-Minded Megadiversity Countries (2002).	Cancún Declaration of Like-Minded Megadiverse Countries, Mexico, February 18, 2002.	27
WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015)	WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015)	28

UNGA, *Formation and evidence of customary international law* (2018)	UNGA, *Identification of customary international law Ways and means for making the evidence of customary international law more readily available, No.* A/CN.4/710, 12 January 2018	28
Bonn Guidelines	Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002	29

Books and Treatises

Crawford (2013)	J. Crawford, *State responsibility: the general part.* Cambridge: Cambridge University Press (2013)	2, 4
Cameron, Chetail (2013)	Lindsey Cameron, Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law*. Cambridge: Cambridge University Press (2013)	2
J. Crawford *et al*, *The Law of International Responsibility* (2010)	Crawford, J., Pellet, A., Olleson, S., *The law of international responsibility* (Oxford University Press, 2010)	22
Chaturvedi (2009)	S. Chaturvedi, *The role of scientists and the state in benefit sharing: Comparing institutional support for the San and Kani* (Springer Science, 2009)	28

Articles

Explanatory guide to Nagoya Protocol on Access and Benefit-sharing	Thomas Greiber *et al. Explanatory guide to Nagoya Protocol on Access and Benefit-sharing*, IUCN Environmental Policy and Law Paper No. 83	26
Aman Gebru (2017)	Aman Gebru, *Intellectual Property, Traditional Knowledge, and Bioprospecting: Searching for Efficient Balance of Rights* (University of Toronto, 2017)	27
MacClellan (2001)	MacClellan, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples (*Wisconsin International Law Journal, 2001)	27
Haider (2016)	Ameera Haider, *Reconciling Patent Law and Traditional Knowledge: Strategies for Countries with Traditional*	28

Miscellaneous

STATEMENT OF JURISDICTION

The State of Aurok (Aurok) and the Republic of Rakkab (Rakkab) have agreed to submit their dispute on the differences concerning the Kayleff Yak to the International Court of Justice, in accordance with Article 40 (1) of the Statute of the International Court of Justice ("**Court**", "**ICJ**"). Thereby, both parties have accepted the jurisdiction of the Court pursuant to Article 36 (1) of the Statute of the Court. Both parties have agreed to execute the Judgment of the Court in its entirety and in good faith.

QUESTIONS PRESENTED

I. Whether Rakkab is responsible for the internationally wrongful acts described in issues II-IV below, as DORTA's actions are attributable to it, and if not, whether Rakkab is responsible for its own failure to prevent DORTA from committing those wrongful acts;

II. Whether the harvesting of the Yak in Rakkab violates Rakkab's international obligations relating to the protection of endangered species and the environment, including those under relevant conventions, and whether Rakkab is obligated to end Yak harvesting on its territory;

III. Whether the harvesting of the Yak in Rakkab violates the cultural and religious rights of the people of Aurok, and whether Rakkab must prohibit such hunting forthwith; and

IV. Whether manufacturing of the drug Gallvectra constitutes an unlawful appropriation of traditional knowledge of the people of Aurok, and whether Rakkab must pay Aurok a portion (to be determined in subsequent proceedings) of the profits realized from sales of the drug Gallvectra.

STATEMENT OF FACTS

Rakkab and Aurok

Aurok is a small, least-developed country with population of around 1.2 million, that borders Rakkab to the north. Aurok's population is predominantly rural, living in villages and tiny settlement. Many Aurokans still observe traditions, beliefs and tribal practices of their ancestors.

Rakkab is a developed state with diversified economy and 4.5 million citizens. Rakkab became a regional power in the 1970s, relying primarily on its investments in research and development.

Both states are partially situated on the Gaur Highlands, Aurok's territory comprising 70% of it, and Rakkab encompassing the other 30% of the Gaur Highlands.

Pivzao civilization

The Gaur Highlands were previously inhabited by the Pivzao civilization, arising in the region in 1000 BCE. Although the civilization disappeared, Aurok's population is almost entirely composed of descendants of the Pivzao civilization, who follow its religious and cultural practices. Almost 200 adherents to the Pivzao traditions live in Rakkab.

The Kayleff Yak

The Gaur Highlands have been inhabited by the Kayleff Yak ("**Yak**") for more than 250,000 years. Herds of Yak seasonally migrate between the northern and southern parts of the Gaur Highlands, with mating season occurring in Rakkab, and young Yak being born in Aurok. Yak population is estimated at 750,000 species.

Yak hunting has been one of traditional practices conducted by the Pivzao civilization and is still conducted by Aurokans. Yak's entrails are used to prepare a traditional soup called *Tirhinga Nos Lustuk*, which is believed to have health benefits.

DORTA

The Department of Research, Technology & Application ("**DORTA**"), an entity, established by Rakkab in the 1970s and being privatized in 1996, has pursued scientific discoveries including new medicines and treatments. Until 1990s, DORTA was granted numerous patents in the health-care sector, receiving assistance and financial support from Rakkab. According to DORTA's private charter, Rakkab should own no less than 9.9% and no

more than 19.9% of the company's shares. Currently, 88% of DORTA's shares belong to private shareholders.

DORTA is the world's largest manufacturer of pharmaceuticals, with subsidiaries in over 50 countries, and possesses legislatively-granted monopoly on the sale of prescription medication within Rakkab. Rakkab financially assists DORTA's scientific initiatives. Several former governmental officials of Rakkab are members of DORTA's Board of Directors. The employment of current Rakkabi governmental officials to the Board is prohibited under the charter.

The Lustuk Enzyme

Dr. Isaac Bello, Rakkabi medical doctor and DORTA's employee, spent a year in Aurok in 2001, paying attention to dietary and cultural practices of Aurokans. Having examined the *Tirhinga Nos Lustuk*, Dr. Bello identified a previously unknown enzyme found in the Yak's gallbladder, which he referred to as "the Lustuk Enzyme."

In 2003, DORTA's biologists isolated the Lustuk Enzyme and used it to create an experimental medication, which after clinical trials was proved to be highly effective in the treatment of diabetes and related disorders.

Gallvectra

On 11 November 2004, DORTA filed a patent application for the medication created from the Lustuk Enzyme, named "Gallvectra," with Dr. Bello listed as its inventor. Rakkab's newspapers received protesting letters from Aurokans, claiming to know the positive effects of the Lustuk Enzyme prior to its discovery. Gallvectra's patent has been criticized by the Aurokan Minister of Intellectual Property and several biologists. Patent attorneys for DORTA ensured that the isolation of Lustuk Enzyme, and, accordingly, creation of Gallvectra, was conducted solely by DORTA's scientists, since Aurokans have never created a drug appropriate for human use.

In October 2005, the patent was granted to DORTA. After that, DORTA continued to pursue intellectual property protection for Gallvectra in other countries with its subsidiaries. In May 2011, DORTA began distributing Gallvectra in countries, where it has been approved for prescription use. Global demand for Gallvectra turned out to be unprecedented, with worldwide sales of the drug amounting to billions of dollars.

Yak hunting

The Yak hunting required a hunting license in Rakkab. Since 2011 DORTA has been offering a cash reward for Yak's gallbladder, needed to produce Gallvectra, through local magazines, what resulted in granting around 300 licenses in 2011 with this number increasing every year. Over time, the number of the harvested Yak in Rakkab increased, reaching 30,000 during the winter of 2015-2016 (about 4% of the population) and staying at the same level during the winter of 2016-2017.

Yak harvesting in Aurok amounts to hundreds of thousands. However, in 2016 a five-year moratorium on the hunting of female Yak of breeding age was introduced.

In both states captive breeding programs were initiated, meeting no success to date.

YLSA's report

The Yak Life Sciences Academy ("**YLSA**") is an international non-governmental organization, pointed at study and preservation of all species of Yak. In 2016, it published a report addressing the changes in the Yak population over the past years. As stated therein, Aurok and Rakkab harvested 120,000 and 30,000 Yak respectively. As stated by YLSA, the Yak population decreased by more than 5% since 2015, and the only possible conclusion might be that it is a consequence of Yak harvesting occurring in Rakkab. The particularly high decline in the population of young and female species of the Yak occurs for unknown reasons, if this trend continues, the Yak will be extinct by 2040. No other independent research of this issue has been conducted.

YakTrakker

On 16 November 2016, the Rakkabi Ministry of Agriculture released an application called "YakTrakker," which provides real-time tracking of Yak herds in Rakkab. YLSA, being concerned that it might be used to hunt the herds more efficiently, called upon Rakkab to remove the application, what remained unanswered.

Controversy following Gallvectra's success

Aurokan villagers described a decline in the size of the Yak herds, especially in northernmost regions. After several demonstrations of Aurokans, Aurok prohibited the export of Yak products and imposed sanctions on Rakkab.

The number of the Yak hunted in Aurok decreased, while DORTA's hunters harvested around 30,000 of Yak during the winter of 2016-2017, which is about one-third of the Yak harvesting in Aurok. As stated by YLSA's scientists, the Yak population experienced nearly 10% decline over the last two years, with female Yak being heavily affected.

In September 2017, the Yak has been included in Appendix III of the Convention on International Trade in Endangered Species of Wild Flora and Fauna. In October 2017, the Yak was included in Appendix I of the Convention on Migratory Species ("**CMS**").

On 19 September 2017, Aurok's Prime Minister addressed the United Nations General Assembly, expressing her concern over the Yak hunting. She noted that DORTA unlawfully benefits from the distribution of Gallvectra, and that the extinction of the Yak would negatively affect Aurok's culture.

Regulation AG/2017-0300

Following the CMS decision, Rakkab implemented the Regulation AG/2017-0300, which changed the licensing procedure with respect to the Yak hunting and terminated previously issued licenses. On 22 November 2017 new license was granted to DORTA and authorized the company, its employees and agents to harvest Yak in Rakkab. By 31 January 2018, more than 200 Rakkabi hunters signed contracts with DORTA committed to pay for the delivered gallbladders.

SUMMARY OF PLEADINGS

I. Rakkab is responsible for internationally wrongful acts committed by DORTA, since, first, DORTA's acts are attributable to Rakkab under customary rules of attribution, as DORTA exercises elements of governmental authority while manufacturing and distributing Gallvectra, or, alternatively, the harvesting occurs under the instruction of Rakkab that exercises overall or, alternatively, effective control over DORTA. Not holding Rakkab for DORTA's violations would allow it to escape from international responsibility and would create a negative precedent.

Secondly, under customary international law Rakkab, being aware of dire consequences of the Yak harvesting, should be held responsible for DORTA's conduct based on Rakkab's failure to prevent internationally wrongful acts perpetrated by DORTA, the responsibility for which is not limited only to physical transboundary harm and is applied to any violations of international law.

II. The harvesting of the Yak implemented by DORTA on the territory of Rakkab is in breach of Rakkab's international obligations related to the protection of the Yak as endangered species, since, first, such harvesting is prohibited under the Conservation of Migratory Species of Wild Animals as the harvesting of the Yak is not effected out of scientific purposes or in extraordinary circumstances and is disadvantageous to the Yak.

Secondly, Rakkab violated Convention on Biological Diversity ("**CBD**"), since Yak harvesting, exceeding a *de minimis* threshold, causes serious damage to biological diversity.

Finally, Rakkab violates its customary obligation not to cause transboundary environmental harm, since there is a casual link between harvesting in Rakkab and reduction of Yak population and Rakkab has failed to comply with its due diligence obligation by not properly carrying out an environmental impact assessment.

Therefore, the harvesting of the Yak must end either as a remedy to internationally wrongful act or as a measure of precaution.

III. Rakkab violated cultural and religious rights of Aurokans, guaranteed, first, under the International Labor Organization Convention on Indigenous and Tribal People, by, *inter alia*, failing to obtain prior informed consent from the Aurokans as indigenous people for Yak harvesting in Rakkab, second, under the International Covenant on Economic, Social and Cultural Rights, and finally, under the International Covenant on Civil and Political Rights.

Despite Rakkab's potential allegations to the contrary all these human rights instruments apply extraterritorially, since Rakkab by exercising effective control over the Yak, being intimately tied to Aurokan traditions and practices, subjects Aurokans to its jurisdiction.

Moreover, harvesting of the Yak in Rakkab does not constitute a lawful limitation to cultural and religious rights of the people of Aurok, since such harvesting is not prescribed by law, does not pursue legitimate aim, is not necessary and proportionate. Finally, there are no circumstances precluding wrongfulness of Rakkabi actions since such as necessity or distress, since Rakkab has less restrictive options to achieve the aim of promotion of public health and treatment of diabetes.

Based on the above, Rakkab shall prohibit harvesting of the Yak as guarantee of non-repetition of violations of cultural and religious rights of Aurok.

IV. First, Rakkab appropriated traditional knowledge belonging to the Aurokans, which was used for the purposes of manufacturing Gallvectra, by falling to receive Aurokans' prior informed consent for such use.

Second, Rakkab unlawfully exploited traditional knowledge of Aurokans by not paying compensation to Aurokans, required under either the CBD and Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("**Nagoya Protocol**"), applicable to continuing use of the traditional knowledge acquired even before Nagoya Protocol's entrance into force, or under the customary international law.

Hence, Rakkab must pay compensation to Aurok as a remedy for the internationally wrongful act committed thereby.

PLEADINGS

I. RAKKAB IS RESPONSIBLE FOR THE INTERNATIONALLY WRONGFUL ACTS DESCRIBED IN ISSUES II-IV, BECAUSE DORTA'S ACTIONS ARE ATTRIBUTABLE TO RAKKAB, OR IN THE ALTERNATIVE, RAKKAB IS RESPONSIBLE FOR ITS OWN FAILURE TO PREVENT DORTA FROM COMMITTING THOSE WRONGFUL ACTS

A. Rakkab is responsible for the wrongful acts committed by DORTA and its agents, since DORTA's conduct is attributable to Rakkab

1. Each state shall be held responsible for an act "attributable" to it and contrary to international law.[1]

2. As demonstrated in issues II-IV below, the Yak harvesting program implemented by DORTA violates international law. These illegalities are directly attributable to Rakkab and thus trigger its international responsibility, as (1) DORTA exercises elements of governmental authority while manufacturing and distributing Gallvectra, or, (2) alternatively, the harvesting occurs under the instruction of Rakkab. Additionally, (3) if the ICJ finds that DORTA's conduct is not attributable to Rakkab it will create an adverse precedent.

1. DORTA is empowered to exercise elements of governmental authority under the national legislation of Rakkab

3. Under Article 5 of Articles on Responsibility of the States for Internationally Wrongful Acts ("**ARSIWA**"), the conduct of an entity "empowered by the law of the State to exercise elements of the governmental authority shall be considered an act of the State."[2] This rule is "well established in customary international law."[3]

4. Pursuant to Article 5 of the ARSIWA an entity's actions are attributable to a state, irrespective of whether the state in fact controls the entity's activities,[4] when three criteria are met: the entity's conduct "amount[s] to an exercise of governmental authority,"[5] the entity is

---

[1] *Phosphates in Morocco* (1938), PCIJ, p.28.

[2] *ARSIWA*, Art.5.

[3] *Noble Ventures, Inc. v. Romania* (2005) ICSID (Award), ¶70.

[4] ILC, *ARSIWA Commentaries,* (2001), p.43(3). See also: Maddocks (2018), p.7.

[5] Maddocks (2018), p.9. See also: ILC, *ARSIWA Commentaries,* (2001), p.43(2).

"empowered by the domestic law of the State to exercise such authority,"[6] and the entity is "acting in the exercise of governmental authority, as opposed to in a purely private capacity."[7]

5. The content of governmental authority may include "a broad [...] range of functions, such as education or the postal service,"[8] and other functions "performed in the public interest."[9] For instance, ensuring a state's compliance with its treaty obligations, such as the obligation to "provide the highest attainable standard of health,"[10] is deemed to be in the public interest.[11] If a state delegates such powers to private parties, this indicates "a governmental nexus," crucial to attribute the conduct of such parties to the state itself.[12]

6. In the present case, DORTA "possesses a legislatively granted and government-enforced monopoly on the sale of prescription medication,"[13] thus serving public, and not only private, interests and meeting demands of the society[14] by combating diabetes and other insulin-related diseases.[15] In doing so, DORTA ensures Rakkab's compliance with its duty to provide the highest attainable standard of health under Article 12 of ICESCR.

7. Thus, for the reasons stated above, DORTA exercises elements of governmental authority and, therefore, its actions are attributable to Rakkab.

2. In the alternative, DORTA's conduct is attributed to Rakkab, as DORTA acted pursuant to the instructions and under control of Rakkab

8. Under Article 8 of ARSIWA, the conduct of a private entity is attributable to a state, if an entity is "acting on the instructions of, or under the direction or control of, that State in carrying out

---

[6] *Id.*

[7] *Id.*

[8] Cameron, Chetail (2013), p.174.

[9] Maddocks (2018), p.10.

[10] *ICESCR*, Art.12.

[11] Crawford (2013), p.130.

[12] *Id.*

[13] *Compromis*, ¶11.

[14] *Compromis*, ¶¶11, 20.

[15] *Compromis*, ¶15.

the conduct."[16] In the case at hand, (a) DORTA's conduct is under overall control of Rakkab, or, (b) alternatively, Rakkab has effective control over DORTA.[17]

a. DORTA's conduct is under the overall control of Rakkab

9. As stated by the ICTY Appeals Chamber in *Tadic*, "the requirement [...] for attribution to States of acts performed by private individuals is that the State exercises [overall] control over the individuals."[18] Overall control consists of financial assistance[19] and "coordination and help in the entity's activity,"[20] and "it is not necessary that [...] the State should also issue [...] instructions for the commission of specific acts contrary to international law."[21]

10. In the present case, Rakkab financially assists DORTA "subsidiz[ing] DORTA's research and development activities inside and outside Rakkab,"[22] and coordinates DORTA's activities by holding regular meetings between Rakkab's governmental representatives and DORTA's CEO and senior executives.[23] Further, governmental support is crucial to maintain DORTA's monopolistic status on Rakkab's market.[24] Hence, DORTA is under overall control of Rakkab.

b. In any event, Rakkab has effective control over DORTA based on their specific factual relationship

11. As follows from *Nicaragua* case, if an entity is under the effective control of a state its actions are attributable to that state.[25] Effective control requires the conduct of the private entity to be dependent on "instructions or directions [...] [of governmental] authority,"[26] to the extent that such assistance is "crucial to the pursuit of [entity's] activities."[27] At the same time, in cases where

---

[16] *ARSIWA*, Art.8.

[17] Foster (2010), p.60.

[18] *Prosecutor v. Tadic* (1999), ICTY, ¶108-109.

[19] *Ibid.*, ¶131.

[20] *Id.*

[21] *Id.*

[22] *Compromis*, ¶11.

[23] *Clarifications*, ¶4.

[24] *Compromis*, ¶11.

[25] *Nicaragua* (1986), ICJ, ¶109.

[26] Cassese (2007), p.667.

[27] *Nicaragua* (1986), ICJ, ¶110.

there exists a "more general instruction [of the state to the private entity], which leaves it open as a method of fulfilling the directive,"[28] the effective control test is also triggered.[29]

12. In cases where it is impossible to "furnish direct proof of facts giving rise to responsibility [of a state],"[30] as relevant evidence is within the control of the respondent state, the ICJ recognizes that the applicant state "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[31]

13. Based on this rationale, considering that it is impossible for Aurok to collect direct evidence of DORTA's dependence on Rakkab, given that DORTA is established in Rakkab and has Rakkab involved as a shareholder, Aurok must avail itself of inferences of known facts.

14. First, it is known that "representatives of the government of Rakkab regularly meet with the CEO and senior executives of DORTA to discuss Rakkab's national priorities,"[32] including the Yak harvesting implemented by DORTA, which has been consistently supported by Rakkab.[33] It can be inferred from these facts that Rakkab issued a general instruction to fulfill and proceed with the Yak harvesting program, which suffices to invoke attribution under Article 8 of ARSIWA pursuant to the effective control test.

15. Second, DORTA has its headquarters in Rakkab,[34] Rakkab legislatively supports DORTA's monopoly and subsidizes it,[35] DORTA's CEO and members of its Board of Directors are former governmental officials.[36] These facts combined also prove the strength of the ties between DORTA and Rakkabi government.

16. For all the aforesaid, DORTA's conduct is attributable to Rakkab.

---

[28] Crawford (2013), p.145.

[29] *Id.*

[30] *Corfu Channel* (1949), ICJ, p.18.

[31] *Id.*

[32] *Clarifications*, ¶4.

[33] *Compromis*, ¶¶11, 15, 19, 31, 34.

[34] *Clarifications*, ¶4.

[35] *Compromis*, ¶11.

[36] *Id.*

3. Rejecting Aurok's claims would create an adverse precedent

17. As governmental functions are often delegated to private entities, states may "escap[e] international responsibility by having private individuals carry out tasks that may not or should not be performed by state."[37] In such cases, states are often able to rely only on circumstantial evidence, as the corporate control and inner interactions of a company are not subject to disclosure.

18. For the reasons stated in ¶¶9 – 16, Rakkab acted *de facto* through DORTA, thus, the ICJ should avoid rejecting Aurok's claims based on the lack of direct evidence, as it would allow Rakkab to escape from international responsibility and would create a negative precedent.

B. Alternatively, Rakkab should be held responsible for DORTA's conduct based on Rakkab's failure to prevent DORTA's unlawful activities

19. Should the ICJ consider DORTA's conduct to be independent from Rakkab as a state, Rakkab is nonetheless responsible for DORTA's violations of international law, (1) as it violated its customary obligation to prevent internationally wrongful acts on its territory, and (2) contrary to Rakkab's possible objections, responsibility of a State for the failure to prevent illegal activities of private parties is applied to any violations of international law, and is not limited only to transboundary harm as Rakkab may allege.

1. Rakkab has breached its obligation to prevent internationally wrongful acts on its territory

20. Even where private conduct is not directly attributable to a state, under customary international law, the State may still be held responsible for the failure to prevent such unlawful conduct of private parties,[38] "because of the lack of due diligence to prevent the violation or to respond to it."[39]

21. As stated by the ICJ in *Pulp Mills,* "the principle of prevention, as a customary rule [...] is every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[40] Hence, "States may be held responsible if they fail to act with due diligence to

---

[37] *Prosecutor v. Tadic* (1999), ICTY, ¶117.

[38] *ARSIWA*, Art.2.

[39] *Velasquez Rodriguez v. Honduras* (1988), US, ¶172.

[40] *Pulp Mills* (2010), ICJ, ¶101. *See also Corfu Channel* (1949), ICJ, p.22.; *Certain Activities* (2015), ICJ, ¶104.

prevent violations of rights or to investigate and punish [such] acts."[41] Thus, if a State shows "general pattern of negligence and lack of effective action by the State,"[42] it may be held liable for its omission.

22. In this case, Rakkab did not implement any measures related to investigation or temporary cessation of Yak harvesting, to the contrary Rakkab has on numerous occasions expressed its complete disregard for its obligations to protect endangered species and the environment as well as respect cultural and religious rights of the people of Aurok, in particular, despite (i) the Yak being added in Appendix 1 to the CMS and (ii) Rakkabi alleged understanding of the "fragility of the situation" as well as assurance that they "will proceed [with harvesting of the Yak] carefully"[43] and (iii) drastic impact harvesting of the Yak in Rakkab had on cultural and religious rights, Rakkab issued DORTA with a new license for hunting 30,000 Yak annually.[44] Tellingly, DORTA's hunting of around the same number of Yak annually has led to inclusion of the Yak in Appendix 1 to the CMS in the first place.[45]

23. Likewise, despite numerous protests and letters addressed to Rakkabi state authorities against granting a patent to DORTA in relation to a drug Gallvectra, which as described in ¶¶95–100 was a result of an outright appropriation of traditional knowledge of Aurokans without their consent, Rakkab granted the patent.[46] Furthermore, as also explained in detail in ¶¶ 102 – 106, Rakkab has filed to prevent DORTA's unlawful exploitation of traditional knowledge of Aurokans through sale of Gallvectra without compensation, since it has failed to adopt appropriate measures in respect of benefit sharing as explicitly required by the CBD[47] and the *Nagoya Protocol*,[48] both of which are binding Rakkab.[49]

---

[41] *A.T. v. Hungary* (2003) CEDAW, p.11.

[42] *Maria da Penha v. Brazil* (2001), US, ¶56.

[43] *Compromis*. ¶31.

[44] *Compromis*, ¶¶45, 46

[45] *Compromis*, ¶¶36, 43.

[46] *Compromis*, ¶¶17, 19.

[47] *CBD*, Art.8(j).

[48] *Nagoya Protocol*, Art.5(5)

[49] *Compromis*, ¶48.

2. Rakkab is responsible for all internationally wrongful acts implemented by DORTA, including violations cultural and religious and appropriation of traditional knowledge

24. Rakkab may allege that state responsibility for internationally wrongful acts of corporate entities is applied merely to transboundary environmental harm.

25. However, it is recognized by the International Law Commission ("**ILC**") that every internationally wrongful act of an entity, which should have been prevented by the state, should "entail international responsibility of that State."[50] The same follows from *Velasquez Rodriguez v. Honduras,* where it was stated that any "illegal act which violates" international law, including "human rights", and "which is initially not directly imputable to a State [...] can lead to international responsibility of the State."[51]

26. Thus, the scope of application of the customary duty to prevent internationally wrongful acts is not limited to environmental law, as Rakkab may argue, and applies to all of the violations of international law committed by Rakkab and implemented by DORTA.

II. THE HARVESTING OF THE YAK IN RAKKAB VIOLATES RAKKAB'S INTERNATIONAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES AND THE ENVIRONMENT, INCLUDING THOSE UNDER RELEVANT CONVENTIONS, AND RAKKAB IS OBLIGATED TO END YAK HARVESTING ON ITS TERRITORY

27. The Yak is an endangered migratory species enlisted in Appendix I of the CMS[52] and Appendix III of the CITES,[53] both binding on Aurok and Rakkab.[54] Forming part of the environment,[55] the Yak are, therefore, subject to conventional, as well as customary, protection.

28. The harvesting of the Yak in Rakkab (A) violates Rakkab's obligation to protect the Yak as endangered species under CMS. In any event, (B) the harvesting violates CBD, to which Aurok

---

[50] ILC, *ARSIWA Commentaries,* (2001), p.33(3).

[51] *Velasquez Rodriguez v. Honduras* (1988), US, ¶172.

[52] *Compromis*, ¶43.

[53] *Compromis*, ¶40.

[54] *Compromis,* ¶48.

[55] *See* CMS Preamble; Directive 2004/35/CE (2004).

and Rakkab are states parties.[56] Additionally, (C) Rakkab violates its obligation not to cause transboundary environmental harm. Therefore, (D) the harvesting must end.

A. Rakkab violates its obligation to protect the Yak as endangered species

1. Rakkab violates CMS

29. Article III(5) of the CMS provides that the taking of "a migratory species listed in Appendix I [of the CMS]" shall be prohibited unless, *inter alia*, "the taking is for scientific purposes" or "extraordinary circumstances so require," provided that it does not "operate to the disadvantage of the species."[57]

30. Contrary to Rakkab's potential argument, the harvesting of the Yak is not exempted either by (a) scientific purposes pursued or by (b) extraordinary circumstances. In any event, (c) the taking of the Yak operates to the disadvantage of the Yak.

a. The harvesting of the Yak is not exempted by scientific purposes

31. "Scientific purposes" is not defined in CMS, therefore it should be interpreted "in [its] context and in the light of [the treaty's] object and purpose,"[58] taking into account "subsequent practice in the application."[59]

32. CMS is aimed at protection and conservation of endangered species.[60] "Viewing Article III(5) in this light thus requires a narrow interpretation of its exception clauses,"[61] meaning that any doubts have to be resolved "in favor of the protected species."[62] Similar rationale was followed by the ICJ in the *Whaling* case when the Court noted that the "test of whether a programme is for purposes of scientific research [turns] on whether the [...] implementation of a programme [is] reasonable in relation to achieving the stated research objectives." The Court also held that states

---

[56] *Compromis*, ¶48.

[57] *CMS*, Art.V.

[58] *VCLT*, Art.31(1).

[59] *Id.*, Art.31(3)(b).

[60] Official Website of CMS, https://www.cms.int/en.

[61] Trouwborst (2014), p.44.

[62] *Id.*

"have a duty [...] to asses[s] the feasibility of non-lethal alternatives,"[63] such as, for instance, biopsy sampling.

33. Rakkab may claim that DORTA's harvesting qualifies as an exception since it is conducted for "scientific and medical"[64] purposes. However, Rakkab, despite being a major innovative and scientific center,[65] has failed to consider any other non-lethal alternatives, including biopsy sampling, to produce and develop Gallvectra. Instead, it has been engaged in a major "kill-the-Yak" advertisement campaign[66] creating incentives other than protection or conservation of the species.

34. Tellingly, the license issued by Rakkab to DORTA following inclusion of the Yak in Appendix 1 to the CMS expressly authorized DORTA "to harvest as many Yak as are required for the development and manufacture of Gallvectra",[67] - "the most successful pharmaceutical product in history of DORTA",[68] without mentioning any scientific purposes.

35. Therefore, under the facts of the present case DORTA's harvesting cannot be considered reasonable in relation to achieving alleged scientific and medical purposes.

b. The harvesting of the Yak is not required by extraordinary circumstances

36. Pursuant to Article III(5)(d) of CMS, taking of endangered migratory species may occur, "if extraordinary circumstances so require."[69]

37. "Extraordinary circumstances" also is not defined in CMS, therefore, it should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty [...] in the light of [the treaty's] object and purpose."[70] It ordinarily means "an unusual situation, which is not ordinary for a particular place or time."[71] Considering the conservative aims of the CMS,[72] a

---

[63] *Whaling* (2014), ICJ, ¶83.

[64] *Compromis*, ¶45.

[65] *Compromis*, ¶9.

[66] *Compromis*, ¶23.

[67] *Compromis*, ¶45.

[68] *Compromis*, ¶21.

[69] *CMS*, Art.5(d).

[70] *VCLT*, Art.31(1).

[71] Government of Western Australia, *Building Services*, p.1.

restrictive interpretation of the term should be applied to conclude that the exception at hand "indicate[s] a complete absence of reasonable alternatives, in the sense that the taking of Appendix I species is the only existing option available to respond to the extraordinary circumstances."[73]

38. In the present case, though Gallvectra is a "vital medicine"[74] and many "people worldwide […] have come to depend"[75] on it, there is no evidence of imminent or severe threat to human lives in the *Compromis*, which would otherwise suffice it to trigger extraordinary circumstances exception.[76] In addition, as demonstrated in ¶¶32 –33 above there might have been other reasonable alternatives to hunting of the Yak, but Rakkab has just failed to examine them before embarking on a massive Yak slaughter.

39. Therefore, the Yak harvesting is not exempted by extraordinary circumstances.

c. The taking of the Yak operates to their disadvantage

40. Even if taking of the Yak occurs in compliance with the exceptional clauses under Article III(5) of CMS, such taking shall not contribute to the disadvantage of the species.[77] Taking is regarded as disadvantageous, when it contributes to the extinction of the species, or causes any other adverse impact on the population.[78]

41. Contrary to Rakkab's potential argument, the burden of proof of disadvantageous impact of Yak harvesting on its population is on Rakkab, due to the "strong presumption against killing [of] protected species," under CMS.[79]

42. As follows form YLSA's report the downturn in the population of the Kayleff Yak is connected with the drop in population of female and young species.[80] Although Aurok legislatively

---

[72] *Supra* note 61.

[73] Trouwborst (2014), p.44.

[74] *Compromis,* ¶43.

[75] *Compromis,* ¶33.

[76] Trouwborst (2014), p.43.

[77] *CMS*, Art.III(5)

[78] Tennessee Valley Auth. v. Hill, (437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117, 1978 U.S. LEXIS 33, 8 ELR 20513, 11 ERC (BNA) 1705.

[79] Trouwborst (2014), p.44.

[80] Compromis ¶27.

prohibited the killing of such species,[81] the downturn of the population continued, leading to inscription of the Yak to Appendix I of CMS[82] and III of CITES[83] thereafter. It is, therefore, Rakkab's burden to show that the harvesting implemented by DORTA is not the cause for the Yak degradation and to rebut YLSA's repeated conclusions that "[t]he only possible conclusion is that it is a consequence of the DORTA-sponsored harvesting of the herd within Rakkab." So far there is no evidence in the *Compromis* to the contrary.

43. Therefore the Yak harvesting operates to the disadvantage of the protected species, and, for all the reasons stated above, Rakkab is in breach of its obligations under CMS.

B. The harvesting of the Yak violates CBD

44. Even if the Court finds that Rakkab complies with CMS, still the Yak harvesting is contrary to Article 22 of CBD, which provides that a state may avail itself of its rights under "any existing international agreement, except where the exercise of those rights [...] would cause a serious damage or threat to biological diversity."[84]

45. According to CBD Conference of the Parties, damage to biodiversity is described as an "adverse or negative"[85] change that "exceed[s] a *de minimis* threshold"[86] (is significant) and is in the form of "reduction in components of biodiversity."[87] It was further elaborated that there is a "significant adverse effect" when the protected object has an "[un]favourable conservation status,"[88] e.g. is enlisted in Appendix I or II of CMS.[89]

46. Similarly in the present case the Yak is enlisted in Appendix I of CMS,[90] and, therefore, as a component of biological diversity, it is severely affected. Its population is constantly

---

[81] *Compromis*, ¶39.

[82] *Compromis*, ¶43.

[83] *Compromis*, ¶40.

[84] CBD, Art.22.

[85] UNEP/CBD/COP/8/27/Add.3, annex, ¶6(b)(ii).

[86] UNEP/CBD/COP/9/20/Add.1, ¶17.

[87] *Ibid.*, ¶12.

[88] UNEP/CBD/COP/8/27/Add.3, ¶21.

[89] CMS, Art.IV.

[90] Compromis ¶43.

diminishing[91] and by 2040 it faces the risk of extinction[92] due to DORTA's industrial-scale hunting.

47. For these reasons, harvesting of the Yak in Rakkab violates CBD.

C. Rakkab violates its obligation not to cause transboundary environmental harm

1. Rakkab causes transboundary harm to Aurok

48. Under customary international law, states are obliged to "avoid activities [...] causing significant damage to the environment of another state."[93]

49. Contrary to Rakkab's potential argument that the standard for environmental harm claims is clear and convincing evidence,[94] in the present case the Yak are subject to both conventional and customary protection with the convention (CMS) being the *lex specialis*. CMS, in turn, shifts the burned of proof on Rakkab to show that its activities do not cause harm to protected and vulnerable species.[95]

50. For the reasons mentioned in ¶¶40 – 43 above Aurok has established causal link between harvesting in Rakkab and reduction of Yak population, and Rakkab has failed to rebut it. Moreover, as described in in ¶¶ 45 – 46 above, DORTA's impact on the Yak is significant.

51. Therefore, Rakkab causes significant environmental harm to Aurok.

2. Rakkab has failed to comply with its due diligence obligation

52. As follows from the *Pulp Mills* and *Construction of a Road* cases adjudicated by the ICJ, the due diligence obligation[96] in the field of environmental protection encompasses the duty to carry out an environmental impact assessment,[97] which has to be implemented by a state's "domestic legislation."[98]

---

[91] *Compromis*, ¶¶27, 43.

[92] *Compromis*, ¶¶27, 28.

[93] *Pulp Mills* (2010), ICJ, ¶101.

[94] *Trail Smelter* (1941), Arbitral Tribunal, p.1965; *Road Construction Costa Rica* (2015), ICJ, ¶119.

[95] *See* ¶41 above.

[96] *Pulp Mills* (2010), ICJ, ¶197.

[97] *Ibid*, ¶204.

[98] *Road Construction Costa Rica* (2015), ICJ, ¶157.

53. However, in the present case, the environmental impact assessment carried out by Rakkab was a "part of the administrative rule-making,"[99] and therefore it cannot be considered as a proper compliance with the due diligence obligation.

D. The harvesting of the Yak must end

54. The Yak harvesting in Rakkab should end either (1) under law on state responsibility or (2) under precautionary approach.

1. The Yak harvesting should end under the law on state responsibility as a remedy to committed wrongful acts

55. Under customary international law, the state responsible for a continuing internationally wrongful act[100] must cease it.[101]

56. As demonstrated in ¶¶29 – 53 above, Yak harvesting violates Rakkab's international obligations related to the protection of the Yak and the environment under CMS, CBD and customary international law. Therefore, the Yak harvesting must cease.

2. The Yak harvesting should end as a precautionary measure

57. According to precautionary principles, which has been widely and explicitly adopted among CMS and CBD states,[102] that the Yak harvesting should end despite "lack of full scientific certainty"[103] as to the causes of the Yak degradation.

58. In the present case, despite Rakkab's potential argument that YLSA's report does not suffice it to warrant suspension of the Yak harvesting, in line with the precautionary principle, the state is obliged to end potentially harmful activities so that to prevent further damage.

59. Thus, the harvesting should end as a measure of precaution.

III. THE HARVESTING OF THE YAK IN RAKKAB VIOLATES THE CULTURAL AND RELIGIOUS RIGHTS OF THE PEOPLE OF AUROK, AND RAKKAB MUST PROHIBIT SUCH HUNTING FORTHWITH

A. Harvesting of the Yak in Rakkab violates the cultural and religious rights of the people of Aurok

---

[99] *Clarifications,* ¶7.

[100] *ARSIWA,* Art.2.

[101] *Ibid.*, Art.30(a).

[102] *See* CBD Preamble; UNEP/CMS/COP11/Doc.23.2.4.

[103] *International liability for injurious consequences, ILC Yearbook (2001)*, p.162.

60. Harvesting of the Yak in Rakkab violates the cultural and religious rights of the people of Aurok guaranteed under (1) the International Labor Organization Convention on Indigenous and Tribal People ("**ILO Convention**"); (2) the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"); and (3) the International Covenant on Civil and Political Rights ("**ICCPR**") to all of which Rakkab is a party.[104]

61. Despite Rakkab's potential allegations to the contrary (4) all of these human rights instruments apply extraterritorially; (5) harvesting of the Yak in Rakkab does not constitute a lawful limitation to cultural and religious rights of the people of Aurok and (6) there are no circumstances precluding wrongfulness of Rakkabi actions.

1. Harvesting of the Yak in Rakkab violates the ILO Convention

62. Harvesting of the Yak in Rakkab violates the ILO Convention (a) applicable to Aurokans, as Rakkab has failed to (b) obtain prior informed consent from the Aurokans as indigenous people for harvesting of the Yak in Rakkab and (c) respect cultural and religious rights of the Aurokans.

a. The ILO Convention applies to Aurokan people

63. ILO Convention, to which both states are parties,[105] applies to indigenous people, i.e. people descending from original inhabitants of the geographic area, retaining some "of their own social, cultural or other institutions,"[106] and self-identifying as indigenous.[107]

64. The people of Aurok descend from the Pivzao civilization,[108] that previously inhabited Aurok,[109] self-identify themselves as indigenous[110] and "continue to observe the Pivzao traditions."[111] Thus, Aurokan people are indigenous and hence the ILO Convention is applicable to them.

---

[104] *Compromis*, ¶48.

[105] *Id.*

[106] *ILO Convention*, Art.2(1).

[107] *ILO Convention*, Art.2(2).

[108] *Compromis*, ¶7.

[109] *Compromis*, ¶6.

[110] *Compromis*, ¶21.

[111] *Compromis*, ¶¶7, 3, 41, 4.

b. Rakkab has failed to obtain Aurokan prior informed consent before harvesting of the Yak in Rakkab

65. Under Article 6 of the ILO Convention indigenous people have the right to be consulted with respect to the projects on "exploitation of natural resources[, including animals[112]] pertaining to their lands",[113] which implies a requirement to obtain a prior informed consent[114] for such projects, that may have a negative impact[115] on indigenous people's rights.

66. The right of indigenous people to be consulted and corresponding obligation to obtain prior informed consent has been upheld, *inter alia*, in the *Maya Indigenous Community of Toledo* case, where consent was required for logging and oil concession, that negatively affected environment, and, thus, impaired indigenous people cultural rights.[116] This approach was also supported by the HRC in *Poma Poma v. Peru* case, where state failed to obtain consent with respect to water diversion, which had "substantive negative impact on the [complainant's] enjoyment of her right to enjoy the cultural life", specifically, llama-raising.[117]

c. Rakkab violated obligation to respect cultural and religious rights under the ILO Convention

67. The ILO Convention provides for an obligation to safeguard "cultures and environment",[118] to protect the "social, cultural, religious and spiritual values" of indigenous people,[119] to respect "the special importance for the cultures and spiritual values of the indigenous people of their relationship with the lands,"[120] and connection therewith.[121]

---

[112] *Whaling* (2014), ICJ, ¶56.

[113] *ILO Convention*, Art.15(2).

[114] *UNDRIP* (2007), Art.32; *ILO Convention*, Arts.6, 15; *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), IACtHR, ¶287.

[115] *Saramaka People v. Suriname* (2007), IACtHR, ¶134.

[116] *Maya Indigenous Community of Toledo v. Belize* (2004), IACHR, ¶150.

[117] *Poma Poma v. Peru* (2009), HRC, ¶7.5.

[118] *ILO Convention*, Art.4.

[119] *Ibid.*, Art.5.

[120] *Ibid.*, Art.13.

[121] *San Juan river* (2009), ICJ, ¶137.

68. Rakkab has failed to give consideration to harmful impacts of its "cruel and unsustainable"[122] hunting of the Yak on the culture and lifestyle of Aurokans[123] resulting from the decrease in population of the sacred animals[124] - a "centerpiece of [their] religion, culture and lifestyle".[125]

2. Rakkab violated Aurokans' cultural rights under the ICESCR

69. Pursuant to Article 15 of the ICESCR everyone has the right to take part in cultural life[126], which implies "engaging in one's own cultural practices"[127] and "requires respect for, and protection of, [...] cultural heritage essential to the group's identity."[128] In particular, as follows from the *Yakye Axa Indigenous Community* case "[t]he right to culture includes [...] hunting,"[129] unique importance of which to cultural identity of indigenous communities has been recognized by several national,[130] as well as international tribunals.[131]

70. Due to the enormous decrease of the Yak population attributable to Rakkab's actions[132], part of the Aurokan people now is completely deprived of the possibility to participate in sacred Yak hunt[133], which "discourage[s] them from starting a family, owning a home, or participating in village governance"[134], eradicating their cultural heritage and violating respective rights under the ICESCR.

---

[122] *Compromis*, ¶41.

[123] *Id.*

[124] *Compromis*, ¶¶36, 41.

[125] *Compromis*, ¶37.

[126] *ICESCR*, Art.15.

[127] CESCR, General Comment 21, ¶15(a).

[128] *ACHPR v. Republic of Kenya* (2017), IACtHR, ¶179.

[129] *Yakye Axa Indigenous Community v. Paraguay* (2005), IACtHR, ¶140.

[130] *Metcalf v. Daley* (2000), US; *Roy Sesana v. the Attorney General* (2006), Botswana.

[131] *Lubicon Lake Band v. Canada* (1990), HRC.

[132] *Compromis*, ¶27.

[133] *Compromis*, ¶41.

[134] *Id.*

3. Rakkab violated Aurokan' religious rights under the ICCPR

71. Under Article 18 of the ICCPR everyone shall enjoy "freedom to manifest the religion or belief in worship, observance, practice and teaching."[135] As follows from HRC's *General Comment No. 22* "[w]orship extends to [...] such customs as the observance of dietary regulations [and] participation in rituals associated with certain stages of life."[136] More specifically with respect to indigenous people "any interference with accessing the natural environment", with which "the practice and profession of religion are [...] inextricably linked",[137] "severely constraints [indigenous people's] ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship."[138]

72. For Aurokans the Yak "remains of prime religious [...] significance."[139] Consumption of the flesh of the Yak represents a "part of [Aurokans] sacred tradition"[140] and constitutes a "religious rite" known for ages.[141] Extermination of the Yak by Rakkab unjustifiably interferes with the Aurokans essential religious practices,[142] and, thus, violates their respective rights under the ICCPR.

4. ILO Convention, ICCPR and ICESCR apply extraterritorially

73. The UN Human Rights Committee ("**HRC**") has emphasized that no state can commit human rights violations on the territory of another state, "which violations it could not perpetrate on its own territory."[143] The ICJ[144] and numerous human right bodies[145] have likewise recognized that application of the human rights instruments is not limited to a state's territory. In particular, the

---

[135] *ICCPR*, Art.18.

[136] CCPR, *General Comment 22*, ¶4.

[137] *ACHPR v. Republic of Kenya* (2017), IACtHR, ¶103.

[138] *Id.*, ¶164.

[139] *Compromis*, ¶7.

[140] *Compromis*, ¶36.

[141] *Compromis*, ¶13.

[142] *Compromis*, ¶41.

[143] *Delia Saldias de Lopez v. Uruguay* (1979), HRC, ¶12.

[144] *Wall*, Advisory Opinion (2004), ICJ, ¶109.

[145] *Saldano v. Argentina* (1999), IACtHR, ¶17; *Andreou v. Turkey* (2009), ECtHR, ¶25; *Al-Skeini and Others v. UK* (2011), ECtHR, ¶131.

responsibility of states can be invoked when the state exercises its jurisdiction through "acts of [its] authorities [...], which produce effects outside their own territory."[146] Contrary to Rakkab's potential allegations the jurisdiction of a state is deemed to have been exercised extraterritorially not only when a state exercises effective control over (i) the territory through military occupation[147]; or (ii) the individuals such as in case of arrest[148], but also when a state exercises effective control over the objects, which constitute part and parcel of the right in question, as is the case with personal data and the right to privacy.[149]

74. Additionally, a person will be subject to the jurisdiction of a state "if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory."[150] A causal connection is established when actions of a state "have sufficiently proximate repercussions"[151] on human rights provided for by the respective conventions.

75. Rakkab exercises effective control over the Yak, which are "intimately tied and essential to [Aurokan] traditional and religious practices"[152] when they migrate to Rakkabi territory,[153] thus it shall comply with its obligation to respect cultural and religious rights of Aurok guaranteed under relevant human rights instruments binding on Rakkab. In addition, as has been demonstrated in ¶¶40 – 43, 69 – 72 there is sufficient proximity between the harvesting of the Yak in Rakkab and violation of the cultural and religious rights of the people of Aurok, hence Rakkab cannot justify violations of Aurokans human rights by alleged lack of jurisdiction over them.

---

[146] *Drozd and Janousek v. France and Spain* (1992), ECtHR, ¶91.

[147] *Wall*, Advisory Opinion (2004), ICJ, ¶¶107-113; *Armed Activities* (2005), ICJ, ¶216.

[148] *Al-Skeini and Others v. UK* (2011), ECtHR, ¶136.

[149] Report of the Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age,* ¶34.

[150] IACtHR, Official Summary of the Advisory Opinion OC-23/17, (2017), II(h).

[151] *Ilaşcu and Others v. Moldova and Russia* (2004), ECtHR, ¶317.

[152] *Compromis*, ¶41.

[153] *Compromis*, ¶1.

5. Harvesting of the Yak in Rakkab does not constitute a lawful limitation to cultural or religious rights of Aurokans

76. Although both cultural and religious rights are not absolute, they can be limited only if such limitations comply with the following cumulative criteria: limitations are (a) prescribed by law,[154] (b) pursue legitimate aim,[155] (c) are necessary[156] and (d) proportionate.[157] Limitations to Aurokan cultural and religious rights caused by harvesting of the Yak in Rakkab do not comply with at least three of the above criteria as demonstrated below.

a. Harvesting of the Yak in Rakkab does not pursue a legitimate aim

77. Contrary to possible Rakkab's contention, public health may not be invoked as a justification for human rights violations, when those are not "specifically aimed at preventing [serious] disease or injury or providing care for the sick and injured."[158] In particular, public health limitation can only be legitimate when "the precise nature of the threat"[159] is shown.

78. The aim of protection of public health has only been recognised as a justification for human rights limitations in cases where a person, whose rights are subject to the limitation, is a threat to himself[160] or to society.[161] Moreover, public health aim is not deemed to be legitimate when "commercial [...], private gains or revenue-raising objective" is the ultimate purpose of the limitation.[162]

79. In the present case, Rakkab's develops drug, which does not deal with an imminent threat to life, but rather "promote[s] right to health"[163], which does not reach the threshold for public

---

[154] *ICESCR*, Art.4; *ICCPR*, Art.18.

[155] *ICCPR*, Art.4; CESCR *General Comment 21*, ¶19.

[156] CCPR, *General Comment 22*, ¶18; CESCR, *General Comment 21*, ¶19.

[157] CCPR, *General Comment 22*, ¶26; *ICESCR*, Art.5, *Wall*, Advisory Opinion, (2004), ICJ, ¶136; CESCR, *General Comment 14*, ¶29; CCPR, *General comment 27*, ¶14.

[158] *Siracusa Principles*, ¶25.

[159] *Mr. Jeong-Eun Lee v. Republic of Korea* (2005), HRC, ¶7.3.

[160] *X v. UK* (1978), ECtHR, ¶5.

[161] *Peter Stutter v. Switzerland* (1979), ECtHR, ¶66; *Laskey, Jaggard and Brown v. UK* (1997), ECtHR, ¶45.

[162] Human Rights Council, *Draft study on Free, Prior and Informed Consent: A human rights based approach* (2018), ¶36.

[163] *Compromis*, ¶43.

health justification. In addition, the Chief Executive Officer of DORTA reported that Galvectra is "the most successful pharmaceutical product in the history of this company". As of June 2017 "DORTA reported gross sales of Gallvectra of more than €3.2 billion worldwide". Therefore, harvesting of the Yak in Rakkab, which is driven by desire to generate revenue and does not meet the threshold of public health justification, does not pursue a legitimate aim.

b. Limitations to Aurokan cultural and religious rights are unnecessary

80. Limitations of the rights must be truly necessary to achieve desired aim.[164] In particular, limitations will be necessary when it answers a "pressing social need"[165]. For instance, limitation of cultural rights is necessary "in the case of negative practices, including those attributed to customs and traditions that infringe upon other human rights."[166]

81. DORTA's drug was aimed to cure diabetes, a chronic, non-epidemic lifestyle[167] disease[168], which, thus, cannot constitute a pressing social need. Furthermore, Aurokans cultural and religious practices do not interfere with human rights of other individuals, and thus shall not be limited.

82. Hence, limitation of Aurokans' human rights is unnecessary.[169]

c. Limitations to Aurokan cultural and religious rights are disproportionate

83. Any limitations to human rights shall be "proportionate, meaning that the least restrictive measures must be taken".[170] Additionally, as emphasized by Special Rapporteur on rights and freedoms of indigenous people if a measure "is likely to have a *significant, direct impact*, on their

---

[164] CCPR, *General Comment 27*, ¶14.

[165] *Handyside v. UK* (1976), ECtHR, ¶48.

[166] CESCR, *General Comment 21*, ¶19.

[167] *Compromis*, ¶12.

[168] WHO, *Global Report on Diabetes* (2016), p.6.

[169] *Silver v. UK* (1980), ECtHR, ¶97; CCPR, *General Comment 22*, ¶8; CCPR *General comment 31*, ¶6.

[170] CESCR *General comment 21*, ¶19.

lives [...] or resources" their consent is required"[171] and in the absence thereof such measure cannot be deemed proportionate.[172]

84. In this respect, we note that hunting of the Yak was not the least restrictive measure to promote public health. In particular, other animals' gallbladders have also proven to be useful at treating diabetes.[173] Moreover, gallbladders of the Yak could have been purchased from Aurokan's instead of killing the Yak in the mating season, where animals are most vulnerable.[174] Additionally, since diabetes represent a "lifestyle" disease,[175] promotion of healthy lifestyle could have assisted Rakkab at the advancement of (public health, as it can prevent 80% of the instance of diabetes.[176]

85. Given the negative impact harvesting of the Yak in Rakkab has on cultural and religious rights of Aurok[177], availability of alternatives to hunting of the Yak for treating of diabetes and absence of the prior informed consent of the Aurokans harvesting of the Yak in Rakkab constitutes a disproportionate limitation to Aurokan cultural and religious rights.

6. There are no circumstances precluding wrongfulness

86. Rakkab cannot rely on circumstances precluding wrongfulness such as necessity or distress in order to justify its violations of Aurokan human rights, since both of these concepts imply that actions of the states taken with the legitimate aim of "saving a life"[178] or safeguarding "an essential interest against a grave and imminent peril"[179] and that no other means to achieve the

---

[171] HRC, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right to Development*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, ¶47.

[172] Human Rights Council, *Draft study on Free, Prior and Informed Consent: A human rights based approach*, ¶33.

[173] Grens, *Bile Compound Prevents Diabetes in Mice*.

[174] *Compromis,* ¶1.

[175] *Compromis*, ¶12.

[176] WHO, The growing crisis of noncommunicable diseases in the South-East Asia Region (2011), p. 2.

[177] *See supra* ¶¶ 9-14.

[178] *ARSIWA,* Art.24.

[179] *ARSIWA*, Art.25.

purpose exist. However, as follows from ¶26 above, Rakkab has less restrictive options to hunting of the Yak to achieve the aim of promotion of public health and treatment of diabetes.

B. Rakkab shall prohibit its harvesting of the Yak as guarantee of non-repetition of violations of cultural and religious rights of Aurok

87. Under the ARSIWA, reflecting customary international law,[180] the state, which committed an internationally wrongful act must cease it and "offer appropriate assurances and guarantees of non-repetition".[181] As follows from International Law Commission's Commentaries to ARSIWA injured states may require "specific instructions to be given or other specific conduct to be taken"[182] as a guarantee of non-repetition of an internationally wrongful act. Whether such requests are granted will depend "on the circumstances of the case".[183]

88. Circumstances of the present case indeed require that hunting of the Yak in Rakkab be prohibited, since Rakkab has on numerous occasions has expressed its blatant disregard for cultural and religious rights of Aurok, in particular, despite (i) the Yak being added in Appendix 1 to the CMS and (ii) Rakkabi alleged understanding of the "fragility of the situation" as well as assurance that they "will proceed carefully"[184] Rakkab continued harvesting of the Yak at the same level of around 30,000 animals yearly. [185]

89. Contrary to Rakkabi potential allegation, ICJ can order prohibition of the Yak hunting in Rakkab as it has previously done in the *Whaling* case, ordering Japan to revoke any license already provided for whales killing, and to refrain from granting any further permits therefor.[186]

90. For the reasons mentioned above, harvesting of the Yak in Rakkab violates cultural and religious rights of the people of Aurok and Rakkab must prohibit such hunting forthwith.

IV. RAKKAB MUST PAY AUROK A PORTION (TO BE DETERMINED IN SUBSEQUENT PROCEEDINGS) OF THE PROFITS REALIZED FROM SALES OF THE DRUG GALLVECTRA, BECAUSE THE APPROPRIATION AND EXPLOITATION OF TRADITIONAL KNOWLEDGE BELONGING TO THE

---

[180] J. Crawford *et al*, p.1151.

[181] *ARSIWA*, Art.30.

[182] ILC Commentaries to ARSIWA, pp.90-91.

[183] *Id.*

[184] *Compromis*. ¶31.

[185] *Compromis*, ¶36.

[186] *Whaling* (2014), ICJ, ¶247.

AUROKAN PEOPLE WITHOUT COMPENSATION IS INCONSISTENT WITH INTERNATIONAL LAW

A. Appropriation of the traditional knowledge of the people of Aurok is inconsistent with international law

91. Health benefits of the Yak gallbladder (1) constitute traditional knowledge of Aurokans, which (2) was used for the purposes of manufacturing Gallvectra and since (3) Aurokans did not give their prior informed without consent for such use of their traditional knowledge it constitutes an unlawful appropriation thereof.

1. Health benefits of the Yak gallbladder constitute traditional knowledge of Aurokans

92. Traditional knowledge is knowledge "that is created, maintained, and developed by indigenous peoples,"[187] which forms "an integral part" of indigenous peoples' cultural heritage and identity.[188] Traditional knowledge, including medical knowledge[189], may exist in the form of practices.[190]

93. Pivzao people first discovered the gallbladder health benefits.[191] Throughout the history, Aurokans "attributed significant health benefits in particular to the [Yak] gallbladder."[192] This knowledge is embodied in practice of consumption of a traditional soup *Tirhinga Nos Lustuk,* the key ingredient of which is the Yak gallbladder,[193]which was perceived by Aurokans as conferring "health benefits and longevity on all who partook in it"[194] for centuries.[195]

94. Thus, Yak gallbladder health benefits constitute traditional knowledge of the Aurokans.

---

[187] WIPO ICG, *Draft Articles on Traditional Knowledge* (2018), Art.1.

[188] WIPO, *Intellectual Property and Traditional Knowledge* (2005), p.6

[189] *Swakopmund Protocol*, Section 2.

[190] WIPO ICG, *Draft Articles on Traditional Knowledge* (2018), Art.1.

[191] *Compromis*, ¶17.

[192] *Compromis*, ¶16.

[193] *Compromis*, ¶13.

[194] *Compromis*, ¶3.

[195] *Compromis*, ¶13.

2. Aurokan traditional knowledge was used for manufacturing Gallvectra

95. Traditional knowledge is used in the invention, and, thus, constitute a part thereof, if it "may have directly contributed to the inventive concept."[196] The contribution is found if holder of the traditional knowledge has communicated to a researcher an undisclosed medicinal property of an object, "when this property is central to the invention."[197]

96. Gallvectra "derived from the Lustuk Enzyme,"[198] discovery of which was made by Dr. Bello through direct investigation of Aurokan dietary and cultural practices.[199] Using Aurokans' traditional knowledge of health benefits of the Yak gallbladder, DORTA merely isolated an enzyme therefrom[200] (the Lustuk Enzyme) and patented it in the form of a drug as their own discovery.[201] "A group of leading biologists" also confirmed that Gallvectra "appears to have been inspired by the traditional beliefs of Aurokans in the health protecting properties of the Yak gallbladders"[202].

97. Thus, traditional knowledge of Aurokans about health benefits of the Yak gallbladder was used in development of Gallvectra as it is central to discovery of the Lustuk Enzyme and would have never been created without it

3. Use of the Aurokans traditional knowledge without consent constitutes unlawful appropriation thereof

98. Any use of the traditional knowledge "without free, prior and informed consent",[203] constitutes misappropriation,[204] i.e. unlawful appropriation.[205] Under Article 8(j) of the Convention on Biological Diversity ("**CBD**") states shall promote "application [of the traditional knowledge]

---

[196] WIPO *Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge* (2002), p.37.

[197] *Id.*

[198] *Compromis*, ¶15.

[199] *Compromis*, ¶13.

[200] *Compromis*, ¶19.

[201] *Compromis*, ¶14.

[202] *Compromis*, ¶17.

[203] WIPO ICG, *Draft Articles on Traditional Knowledge* (2018), Art.1.

[204] *Id.*

[205] Merriam Webster Dictionary.

with the approval and involvement of the holders [thereof]."[206] Obligation to obtain consent also stems from Article 7 of the Nagoya Protocol to CBD.[207] Despite Rakkab's potential contention to the contrary, these provisions shall be viewed conjunctively with "existing international arrangements for the conservation of biological diversity and sustainable use of its components."[208] Such "international arrangements" include ILO Convention[209] and United Nations Declaration on Indigenous Peoples Rights ("**UNDRIP**").[210]

99. The ILO Conventions provides for the right of the Aurokans to be consulted regarding use of their traditional knowledge.[211] The UNDRIP establishes that indigenous peoples are entitled to control their traditional knowledge "of the properties of fauna,"[212] implying that indigenous people enjoy "exclusive right to authorize the exploitation of their traditional knowledge."[213]

100. Therefore, Rakkab was obliged to obtain prior informed consent for use of the Aurokan people's traditional knowledge and its subsequent commercialization by patenting and selling Gallvectra.[214] Since this duty was not complied with, Rakkab violated international law.

B. Exploitation of traditional knowledge belonging to the people of Aurok without compensation is inconsistent with international law

101. Exploitation of Aurokan traditional knowledge without compensation is inconsistent with benefit-sharing provisions enshrined in (1) the CBD and the Nagoya Protocol or, alternatively (3) customary international law.

1. Rakkab was obliged to provide compensation for exploitation of traditional knowledge of Aurokans under the CBD and Nagoya Protocol

102. Article 8(j) of the CBD states that parties shall "encourage the equitable sharing of the benefits arising from the utilization of [traditional] knowledge."[215] The Nagoya Protocol further

---

[206] *CBD*, Art.8(j).

[207] *Nagoya Protocol*, Art.7.

[208] *CBD*, preamble.

[209] *ILO Convention*, Arts. 6, 15.

[210] *UNDRIP*, Art.31; *Nagoya Protocol*, preamble.

[211] *ILO Convention*, Art.15.

[212] *UNDRIP*, Art.31.

[213] *Swakopmund Protocol*, section 7.

[214] *Compromis*, ¶20.

reiterates that states must take measures "in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities"[216] owning such knowledge. Utilisation or exploitation of traditional knowledge includes "manufacturing, offering for sale, selling or using beyond the traditional context the product", as well as "being in possession of the product" for the above purposes, where "a product is a direct result of the use of the [traditional knowledge]".[217]

103. Despite potential Rakkab's allegation to the contrary, the benefit-sharing obligation applies to continuing use of the traditional knowledge acquired after CBD's entry into force but before Nagoya Protocol's entrance into force.[218]

104. In addition, although, both CBD and the Nagoya Protocol provide that benefit-sharing mechanism is "subject to [state's] national legislation", such qualified language creates a substantial obligation,[219] and cannot be interpreted as allowing states to abstain from fulfillment thereof.[220] Furthermore, as follows from the ICJ judgement in *Belgium v. Senegal* in relation to Senegal's failure to adopt national legislation as required by the Convention Against Torture based on the "Vienna Convention on the Law of Treaties, which reflects customary law, [state] cannot justify its breach of the obligation … by invoking provisions of its internal law … or the fact that it did not adopt the necessary legislation pursuant [provisions of] that Convention."[221]

105. As demonstrated in ¶¶95 – 97 above, traditional knowledge of Aurok was used in manufacturing of the drug Gallvectra and continues to be exploited through sales thereof, which in June 2017 generated "more than EUR 3.2 billion worldwide."[222] However, as of today, Aurok has seen absolutely "no profit"[223] from these sales.

---

[215] *CBD*, Art.8(j).

[216] *Nagoya Protocol*, Art.5(5).

[217] *Swakopmund Protocol*, section 9.

[218] CBD Working Group on ABS, Report of the First Part of the Ninth Meeting, ¶119.

[219] *Commonwealth v. Tasmania* (1983), Australia (analogous provisions of the World Heritage Convention).

[220] *Explanatory guide to Nagoya Protocol on Access and Benefit-sharing*, p.112.

[221] *Belgium v. Senegal* (2012), ICJ, ¶113.

[222] *Compromis*, ¶38.

[223] *Compromis*, ¶37.

106. Hence, Rakkab failed to comply with its benefit sharing obligations for use and exploitation of traditional knowledge of the people of Aurok.

2. Rakkab was obliged to pay compensation for exploitation of traditional knowledge of Aurokans under customary international law

107. Even if the Court decides that provisions of the CBD and the Nagoya Protocol in relation to benefit-sharing are not applicable in the absence of relevant Rakkabi legislation, Rakkab is still bound to provide compensation for exploitation of the Aurokan traditional knowledge under customary international law, which is (a) reflected in relevant state practice[224] and (b) accompanied by *opinio juris*.[225]

a. State practice

108. The customary nature of the obligation to pay compensation for exploitation of traditional knowledge is supported by practice of states "whose interests are specially affected",[226] which is determinative for establishment of a custom.[227] For establishing the custom on benefit-sharing, members of the Like-minded Megadiverse Countries Group,[228] which "hold approximately 70% of the world's biodiversity,"[229] can be treated as specially affected.

109. For instance, in 1999 the Tropical Botanical Garden and Research Institute in India compensated Kani tribe for commercialization of their traditional knowledge related to revitalizing properties of the berries of the plant arogyapacha,[230] even despite the fact that traditional knowledge used therein only hinted to the essence of the further patented anti-stress drug,[231] as subsequent research revealed that leaves were more beneficial than the berries.[232]

---

[224] *North Sea Continental Shelf* (1969), ICJ, ¶74.

[225] *Ibid.*, ¶77.

[226] *Ibid.*, ¶74.

[227] *Id.*

[228] *Cancun Declaration of Like-Minded Megadiversity Countries* (2002).

[229] Aman Gebru, p.81.

[230] MacClellan, p. 261.

[231] WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015).

[232] Turvedi, (2009), pp.261–270.

110. In 2002 the South African Council for Scientific and Industrial Research provided compensation to San people for exploitation of their traditional knowledge regarding beneficial hunger suppressing properties of Hoodia cactus, utilized by the Council as a basis for creating treatment against obesity, which has been subsequently successfully commercialized thereby.[233]

111. Moreover, even predominantly user-countries like France uphold benefit-sharing obligations. Specifically, in 2016 France entered into negotiations with representatives of the indigenous people of French Guiana on sharing benefits derived from patent of a compound and drug for malaria treatment based on traditional knowledge[234] concerning *Quassia Amara* plant. Notably, even though "the compound did not come [directly] from traditional Guianese methods and was discovered by the scientists,"[235] France still initiated benefit-sharing negotiations since "it was the local Guianans and their plant knowledge that led the scientists to examine *Quassia amara* and not thousands of others plants."[236]

112. Hence, compensation for exploitation of traditional knowledge of indigenous people is reflected in state practice.

b. Opinio *juris*

113. *Opinio* juris, i.e. acceptance of a rule as law,[237] can, *inter alia*, be deduced from certain international instruments.[238] In particular, obligation to share benefits accrued from exploitation of the indigenous people's traditional knowledge, including in the monetary form, can be deduced from numerous international conventions,[239] declarations,[240] and guidelines.[241]

114. Furthermore, 39 countries, including those, which are not parties to the Nagoya Protocol such as Australia, Brazil and Colombia,[242] adopted measures aimed at benefit-sharing.[243]

---

[233] Haider, (2016), p. 364.

[234] Bourdya, (2017), p. 290–297.

[235] Rose (, p.115.

[236] *Id.*

[237] ILC, *Draft conclusions on identification of customary international law* (2018), p. 139.

[238] UNGA, *Formation and evidence of customary international law* (2018), ¶48.

[239] *CBD*, Art.15; *Nagoya Protocol*, Art.5.

[240] *UNDRIP*, Art.31; *Swakopmund Protocol*, Section 9.

[241] *Bonn Guidelines*, Agenda 21, Chapter 15.

[242] ABS Clearing House Database, available at: https://absch.cbd.int/countries.

115. Thus, an obligation to share benefits accrued through exploitation of traditional knowledge of indigenous people is accepted as law.

116. For the reasons stated above, since there is state practice on payment of compensation to indigenous people for exploitation of their traditional knowledge, which is accompanied by *opinion juris*, it constitutes a rule of customary international law binding on Rakkab, which Rakkab failed to comply with.[244]

C. Rakkab must pay Aurok a compensation for its unlawful appropriation and exploitation of traditional knowledge of Aurokans

117. In accordance with Article 31 of ARSIWA, a responsible state shall "make full reparation for the injury caused by the internationally wrongful act,"[245] which may take form of compensation,[246] to the extent that the injury caused "is not made good by restitution".[247] Notably, as follows from Article 36 of the ARSIWA compensation shall also cover "any financially accessible damage including loss of profits."[248]

118. Accordingly, Rakkab must make full reparation to Aurok for unlawful appropriation and exploitation of their traditional knowledge without compensation as demonstrated in paragraphs ¶¶101– 116 above. In the present case, due to the nature of traditional knowledge, restitution is neither available nor appropriate. Hence, Rakkab shall pay compensation equal to a portion (to be determined in subsequent proceedings) of the profits realised from sales of the drug Gallvectra, as clearly the damage suffered by Aurok is financially accessible[249], who despite their discovery of the health benefits of the Yak gallbladder, "see no profit"[250] from the drug derived therefrom.

---

[243] Pauchard (2007), p. 74.

[244] *See* ¶¶ 105 – 106 above.

[245] *ARSIWA*, Art.31.

[246] *Ibid.*, Art.34.

[247] *Ibid.*, Art.36(2).

[248] *Ibid.*, Art.36.

[249] *Compromis*, ¶¶21, 38.

[250] *Compromis*, ¶37.

CONCLUSION AND PRAYER FOR RELIEF

For all the aforesaid in this Memorial reasons, Aurok respectfully requests that the Court adjudge and declare that:

1. Rakkab is responsible for the internationally wrongful acts described in paragraphs (2)-(4), *infra*, because DORTA's actions are attributable to Rakkab, or in the alternative, Rakkab is responsible for its own failure to prevent DORTA from committing those wrongful acts;

2. The harvesting of the Yak in Rakkab violates Rakkab's international obligations relating to the protection of endangered species and the environment, including those under relevant conventions, and Rakkab is obligated to end Yak harvesting on its territory;

3. The harvesting of the Yak in Rakkab violates the cultural and religious rights of the people of Aurok, and Rakkab must prohibit such hunting forthwith; and

4. Rakkab must pay Aurok a portion (to be determined in subsequent proceedings) of the profits realized from sales of the drug Gallvectra, because the appropriation and exploitation of traditional knowledge belonging to the Aurokan people without compensation is inconsistent with international law.

Respectfully submitted,

Team 305A