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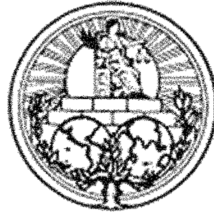

THE 2019 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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 RESPONDENT

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I. RAKKAB IS NOT RESPONSIBLE FOR THE INTERNATIONALLY WRONGFUL ACTS DESCRIBED IN ISSUES II-IV, BECAUSE DORTA'S ACTIONS ARE NOT ATTRIBUTABLE TO RAKKAB, OR IN THE ALTERNATIVE, RAKKAB IS NOT RESPONSIBLE FOR ITS OWN FAILURE TO PREVENT DORTA FROM COMMITTING THOSE WRONGFUL ACTS 1

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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.

<u>Regulation AG/2017-0300</u>

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 should not be held responsible for DORTA's conduct, since, firstly, the customary grounds, which might entail Rakkab's responsibility, are not met, namely DORTA did not act pursuant to instructions or under control of Rakkab, DORTA is not a *de facto* state organ of Rakkab and does not exercise elements of governmental authority.

Secondly, Rakkab's omission neither entails its responsibility, as duty to prevent internationally wrongful acts on state's territory applies only to physical transboundary harm in the field of environment, or, alternatively, Rakkab lacked knowledge of the means and methods of Yak harvesting, necessary for triggering state responsibility, and, in any event, Rakkab acted diligently, trying to prevent possible adverse outcomes of the Yak hunting. Finally, Rakkab cannot be held responsible for alleged violations of human rights of Aurokans, since neither Rakkab nor DORTA exercised effective control over them.

II. Harvesting of the Yak does not violate Rakkab's international obligations related to the protection of the Yak, since, firstly, Rakkab does not violate the Convention on the Conservation of Migratory Species of Wild Animals, as Yak harvesting is required by extraordinary circumstances, or, alternatively, it is carried out for scientific purposes, and such harvesting is precise as to content, limited in space and time and there is no clear and convincing evidence that it is disadvantageous to the Yak.

Secondly, Rakkab does not violate the Convention on Biological Diversity ("**CBD**"), since impact of the Yak harvesting does not exceed a *de minimis* threshold to be qualified as damage to biological diversity.

Finally, Rakkab complies with its obligation not to cause transboundary harm, as causal link between harvesting in Rakkab and reduction of Yak population is lacking, the harm is not significant or, alternatively, is exempted from liability as a diligent actor.

Therefore, such harvesting neither should end in the absence of an internationally wrongful act, nor as a precautionary measure.

III. Harvesting of the Yak does not violate cultural and religious rights of Aurokans, since human rights treaties relied upon by the Applicant do not apply extraterritorially, hence not entailing any obligation of Rakkab towards Aurokans, or, alternatively, such harvesting is consistent with international law, due to, first, absence of obligation to consult with Aurokans as

to such harvesting, and second, being a lawful limitation of cultural and religious rights, since Yak harvesting is regulated by law, pursues legitimate aim, is necessary and proportionate.

In any event, violation of Aurokans' cultural and religious rights cannot lead to prohibition of the Yak harvesting, since, first, failure to consult with Aurokans cannot entail cessation, as Rakkab acted legitimately in the public interest, and, second, the ICJ cannot impose prohibition of hunting, since it will be an inappropriate remedy in the case at hand.

IV. Manufacturing of Gallvectra does not constitute appropriation of Aurokans' traditional knowledge, since, Gallvectra was not derived from Aurokans' traditional knowledge, the use of which, in any event, did not require consent of Aurokans, due to inapplicability of Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("**Nagoya Protocol**") to appropriation of Aurokans' traditional knowledge in 2003, or, alternatively, it was already in public domain.

However, even if Gallvectra derives from Aurokan traditional knowledge, Rakkab is under no obligation to pay Aurok any portion of the profits realized from sales of the drug Gallvectra, since, first, Nagoya Protocol and CBD regulate only traditional knowledge associated with genetic resources, which the Yak's enzyme is not, or, alternatively, benefit sharing prescribed therein, in the absence of special national legislation regulating it in Rakkab, is not a binding obligation, and, secondly, there is no customary rule on benefit sharing, due to inconsistent state practice and absence of *opinio juris*.

PLEADINGS

I. RAKKAB IS NOT RESPONSIBLE FOR THE INTERNATIONALLY WRONGFUL ACTS DESCRIBED IN ISSUES II-IV, BECAUSE DORTA'S ACTIONS ARE NOT ATTRIBUTABLE TO RAKKAB, OR IN THE ALTERNATIVE, RAKKAB IS NOT RESPONSIBLE FOR ITS OWN FAILURE TO PREVENT DORTA FROM COMMITTING THOSE WRONGFUL ACTS

A. Rakkab is not responsible for DORTA's conduct as it is not attributable to Rakkab

1. A state is responsible for an "act […] attributable to [that] State [...] contrary to" international law.[1] An act may be attributable to a state based on the grounds listed in Articles 4 through 11 of the Articles on Responsibility of the States for Internationally Wrongful Acts ("**ARSIWA**").[2]

2. In the present case, DORTA's conduct is not attributable to Rakkab, as (1) it is not directed or controlled by Rakkab, and (2) DORTA does not exercise any elements of governmental authority. Moreover, (3) Rakkab did not adopt or approve DORTA's actions.

1. DORTA does not act pursuant to instructions or under control of Rakkab

3. As emphasized by the International Law Commission ("**ILC**"), "the only conduct attributed to the State [...] is that of its organs or government or of others who have acted under the direction [...] of those organs,"[3] and an approach of linking an actor to a state merely "by habitual residence or incorporation"[4] is avoided. It is presumed that "the conduct of private persons or entities is not attributable to the State under international law."[5]

4. To invoke Rakkab's responsibility Aurok must prove that Rakkab exercised "effective control" over DORTA's actions,[6] which it actually (a) did not. Contrary to Aurok's potential argument, DORTA's actions cannot be attributed to Rakkab based on the overall control test, since (b) it is inapplicable.

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

[2] *ARSIWA,* Arts.4-11.

[3] *Id.*

[4] *Id.*

[5] ILC, *ARSIWA Commentaries,* (2001), p.47(1).

[6] *Nicaragua* (1986), ICJ, ¶¶115, 109.

a. Rakkab does not have effective control over DORTA

5. Pursuant to Article 8 of ARSIWA, Aurok must prove that Rakkab controlled DORTA's activities.[7] As follows from the *Nicaragua* case, effective control constitutes fullest degree of control over the entity[8] and its "every single action or conduct,"[9] which must be proven with clear and convincing evidence.[10] That said, even if the state "financed, trained, equipped […] and organized"[11] the entity, it does not *per se* prove the existence of effective control exercised by that state,[12] neither do "the State's limited involvement" in the governance over the company[13] and "the fact that the State initially establishe[d] a corporate entity," so that its "subsequent conduct" cannot be attributed to the state.[14]

6. Thus, though DORTA operates under Rakkab's jurisdiction,[15] it cannot be a sole basis for attribution,[16] neither can the mere fact that Rakkab established DORTA in the remote past[17] and now "subsidizes" DORTA's "research and development activities,"[18] since it is not enough to establish Rakkab's effective control over DORTA's every single move and action. Moreover, Rakkab willingly excluded itself from governance over DORTA by privatizing it,[19] so that it currently holds merely 12% of the company's stock.[20] Finally, DORTA's "charter prohibits the

[7] ILC, *ARSIWA Commentaries,* (2001), p.48(7).

[8] *Nicaragua* (1986), ICJ, ¶109.

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

[10] *Bosnian Genocide* (2007), ICJ, ¶¶208, 209.

[11] *Nicaragua* (1986), ICJ, ¶108.

[12] *Ibid.,* ¶109.

[13] *Tulsa Prof. Collection Serv., Inc. v. Pope* (1988), US, part III.

[14] ILC, *ARSIWA Commentaries,* (2001), p.48(6).

[15] *Clarifications*, ¶4.

[16] ILC, *ARSIWA Commentaries,* (2001), p.47(1).

[17] *Compromis*, ¶9.

[18] *Compromis*, ¶11.

[19] *Compromis*, ¶10.

[20] *Id.*

employment or appointment to the Board [of Directors] of current Rakkabi government officials."[21]

7. Therefore, there is no evidence showing that Rakkab exercises effective control over DORTA's actions, and therefore, they are not attributable thereto.

b. The overall control test is inapplicable

8. Aurok may allege that "the degree of control may [...] vary according to the factual circumstances of each case."[22], and that overall control, which, as opposed to effective control test, presupposes much lower threshold of attribution based on merely general financial assistance,[23] suffices for the purposes of attribution.

9. However, the ICJ flatly rejected this test in *Bosnian Genocide* as "broadening the scope of state responsibility well beyond governing the law of international responsibility,"[24] noting that "a State is responsible only for […] persons or entities which […] are in a relationship of complete dependence of a State."[25] Thus the ICJ established that "the correct standard of control to be applied under Article 8" is the effective control test.[26]

10. For these reasons, overall control test should not be applied in the case at hand.

c. Rakkab did not transmit any specific directions or instructions to DORTA

11. A state may be held responsible, if it transmitted directions or instructions, which have led to an internationally wrongful act.[27] The existence of these directions or instructions must be proven with clear and persuasive evidence.[28]

12. Though the representatives of the government of Rakkab periodically meet with DORTA's leadership "to discuss national priorities,"[29] there is absolutely no evidence in the

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[21] *Compromis*, ¶11.

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

[23] *Ibid.*, ¶131.

[24] *Bosnian Genocide* (2007), ICJ, ¶406.

[25] *Id.*

[26] Crawford (2013), p.156.

[27] ILC, *ARSIWA Commentaries,* (2001), p.48(7).

[28] *Nicaragua* (1986), ICJ, ¶109. *See also Bosnian Genocide* (2007), ICJ, ¶267.

[29] *Clarifications*, ¶4.

Compromis pointing to the fact that Rakkab issued specific directions or instructions to DORTA with regards to its Yak harvesting program and/or production of Gallvectra.

13. Therefore, DORTA's actions are not attributable to Rakkab, since it did not act under the instructions or direction thereof.

2. DORTA is not an organ of Rakkab, and does not exercise governmental authority

14. Aurok may also allege that DORTA *de facto* acts as a state organ of Rakkab, exercising governmental authority[30] pursuant to Articles 4 and 5 of ARSIWA, under which the actions of state's organs and other entities exercising elements of governmental authority are attributable to a state.[31]

15. However, these potential allegations of Aurok are unavailing, as (a) DORTA cannot be considered *de facto* state organ of Rakkab, and (b) Rakkab never authorized DORTA to exercise governmental authority.

a. DORTA cannot be considered *de facto* state organ of Rakkab

16. For a private entity to be "equated with State's organs even if that status does not follow from internal law," one must establish an exercise of legislative, executive or judicial functions by the entity[32] and particularly great degree of state control over the entity to invoke state responsibility,[33] as a "purely private [act] [...] do[es] not bring rise to state's responsibility."[34]

17. In contrast, DORTA is not governmentally-owned or being led by Rakkab,[35] as the government officials are excluded from DORTA's Board of Directors,[36] and 88% of DORTA's stock belongs to private shareholders.[37] DORTA manufactures pharmaceuticals and sales prescription medication,[38] which does not constitute legislative, judicial or executive functions.

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[30] *Immunity from Legal Process,* Advisory Opinion (1999), ¶62.

[31] *ARSIWA*, Arts.4, 5.

[32] *Ibid.*, Art.4.

[33] *Bosnian Genocide* (2007), ICJ, ¶392.

[34] Townsend (1997), p.639.

[35] *Compromis*, ¶¶10, 11.

[36] *Compromis*, ¶11.

[37] *Compromis*, ¶10.

[38] *Compromis*, ¶11.

18. As follows, DORTA cannot be considered *de facto* organ of Rakkab.

b. Rakkab granted no elements of governmental authority to DORTA

19. In accordance with Article 5 of ARSIWA, a conduct of an entity exercising elements of governmental authority is attributable to a state.[39] The scope of the term generally includes "functions of public character normally exercised by State organs,"[40] such as supply of military goods and services[41] or identification of property for seizure.[42] Further, as stated by the ILC, "to be regarded as an act of a State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity", rather than being "commercial" in nature.[43]

20. In the present case, DORTA's primary area of activity is manufacturing of pharmaceuticals and distribution of prescription medication,[44] as well as research and development[45], all of which does not normally constitute exercise of governmental authority.[46] Moreover, DORTA acts in the capacity of a private publicly traded company[47] and does not pursue governmental interests,[48] which further excludes any allegation that DORTA is a state body of Rakkab.

21. Therefore, DORTA's conduct cannot be attributed to Rakkab.

B. Rakkab is not responsible for its own failure to prevent DORTA from committing internationally wrongful acts

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[39] *ARSIWA*, Art.5.

[40] ILC, *ARSIWA Commentaries,* (2001), p.43, ¶2

[41] *Sandline International Inc. v. Papua New Guinea,* (1998), ¶¶171-194;

[42] *Hyatt International Corporation v. Iran* (1985), Iran-US CTR, pp.88-94.

[43] ILC, *ARSIWA Commentaries,* (2001), p.43, ¶5.

[44] *Compromis*, ¶10.

[45] *Compromis*, ¶11.

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

[47] *Compromis*, ¶10.

[48] *Compromis*, ¶¶10, 11, 32, 42.

22. State responsibility may arise where the state "knowingly allowed" private parties to do harm to the territory or rights of other states.[49]

23. However, contrary to Aurok's position, Rakkab is not responsible for the actions of DORTA due to a failure to prevent them since first and foremost, as demonstrated in ¶¶34 – 135 below they do not constitute internationally wrongful acts, and, in any event, (1) state responsibility for corporate acts may arise only as a consequence of physical transboundary harm. Alternatively, (2) Rakkab could not have been aware of all DORTA's actions and consequences thereof. In any event, Rakkab (3) acted diligently to prevent adverse effects of Yak hunting, and, therefore, should not be held liable.

24. Finally, as further proven in ¶¶77 –80 below, Rakkab cannot be held liable for failure to prevent alleged violations of cultural and religious rights of Aurokans, since neither Rakkab nor DORTA was exercising effective control over any of the Aurokans in the first place.

1. State responsibility for the failure to prevent private acts applies only to physical transboundary harm

25. The rule on state responsibility for the failure to prevent private acts inflicting harm to other states "applies only to hazardous [environmental] activities as well as to the harmful transboundary environmental effects of lawful activities."[50] Hence, state responsibility for corporate acts may arise solely "in the field of environment,"[51] but not in the field of human rights or other areas of international law.

26. In the present case, Aurok requests the ICJ to invoke Rakkab's responsibility for alleged violations of obligations on protection of endangered species, breaches of religious and cultural rights and expropriation of traditional knowledge.[52] However, the doctrine of state responsibility for failure to prevent acts of private companies does not apply to such violations, being limited to environmental breaches and transboundary harm only, which are dealt with in ¶¶65 –69 below.[53]

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[49] *Pulp Mills* (2010), ICJ, ¶101. *See also Corfu Channel* (1949), ICJ, p.22.; *Certain Activities* (2015), ICJ, ¶104; ILC, *ARSIWA Commentaries,* (2001), p.34 ¶8.

[50] Jabbari-Gharabagh (1999), p.82.

[51] ILC, Yearbook, vol. II, (1981), pp.112-122.

[52] *Ibid.*, ¶49.

[53] Jabbari-Gharabagh, (1999), p.82.

27. Accordingly, Rakkab is not responsible for failure to prevent all violations of international law committed by DORTA.

2. Rakkab could not be aware of means and methods of Yak harvesting

28. The ICJ recognized that "it cannot be concluded from the mere fact of control exercised by a state over its territory [...] that it necessarily knew, or should have known, of any unlawful act perpetrated therein."[54] Rakkab's knowledge of such unlawful acts cannot be proven by "indirect evidence,"[55] as the ICJ cannot presume the awareness of state authorities of any wrongful acts committed on its territory.[56]

29. In the present case, Aurok does not argue that the Yak harvesting is *per se* unlawful, but merely complains about the methods, means and the extent of Yak harvesting.[57] However, even though Rakkab has been aware of the Yak harvesting as such, there is no proof that Rakkab was aware of the exact means and methods of Yak harvesting, as well as of its alleged dreadful extent.

30. Since such knowledge cannot be presumed or proven through indirect means, Aurok's claims based on Rakkab's alleged failure to prevent unlawful conduct of DORTA should be rejected.

3. Rakkab has been acting in due diligence to prevent adverse impact of Yak hunting on Aurok

31. It is widely recognized that the general obligation of states "not to allow knowingly its territory to be used for acts contrary to the rights of other State"[58] is an obligation of conduct and not result.[59] Thus, states bear no international liability where they exercised sufficient due diligence to identify and prevent adverse impact of private activity on other states, but such

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

[55] *Corfu Channel* (1949), ICJ, (Judge Winiarski, Dissenting Opinion), p.50.

[56] *Id.*

[57] *Compromis*, ¶41.

[58] *Corfu Channel* (1949), ICJ, p.22.

[59] UNGA, A/HRC/23/49 (2013), p.5. *See also Pulp Mills* (2010), ICJ, ¶204-205.

adverse impact nonetheless occurred.[60] Due diligence obligation a duty to implement prior and continuous assessment of risks, as well as a duty to cooperate.[61]

32. Rakkab's government officials participated in the discussions with Aurok's Prime Minister and other government officials,[62] making them aware of Yak harvesting and reaching the consensus on sustainability of the program.[63] Further, Rakkab has duly conducted "a comprehensive environmental impact assessment"[64] with Aurokan governmental officials supervising it.[65] Finally, Rakkab undertook to "monitor the issue"[66] and reserved such a right for its government while implementing Regulation AG/2017-0300 aimed at protection of the Yak.[67]

33. For all the aforesaid, Rakkab has complied with its obligation of due diligence and therefore bears no international responsibility for the actions of DORTA.

II. THE HARVESTING OF THE YAK IN RAKKAB DOES NOT VIOLATE RAKKAB'S INTERNATIONAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES OR THE ENVIRONMENT, INCLUDING THOSE UNDER RELEVANT CONVENTIONS, AND RAKKAB IS NOT OBLIGATED TO END YAK HARVESTING ON ITS TERRITORY

A. The harvesting of the Yak in Rakkab does not violate Rakkab's international obligations relating to the protection of the Yak as endangered species

34. Contrary to Aurokan allegations, the harvesting of the Yak in Rakkab does not violate Rakkab's obligation relating to protection of the Yak as endangered species either under (1) the CMS or (2) the Convention on Biological Diversity ("**CBD**").

1. Harvesting of the Yak in Rakkab does not violate CMS

35. The Yak is an endangered migratory species enlisted in Appendix I of the Convention on the Conservation of Migratory Species of Wild Animals ("**CMS**").[68]

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[60] Buchan (2016), p.429–453.

[61] *Pulp Mills* (2010), ICJ, ¶204-205.

[62] *Compromis*, ¶31, *Clarifications*, ¶7.

[63] *Clarifications*, ¶7.

[64] *Id.*

[65] *Id.*

[66] *Compromis*, ¶31

[67] *Compromis*, ¶44.

[68] *Compromis*, ¶43.

36. Aurok might argue that the harvesting of the Yak violates Article III(5) of the CMS according to which the taking of "a migratory species listed in Appendix I [of the CMS]" shall be prohibited unless, *inter alia*, (a) "extraordinary circumstances so require"[69] or, alternatively, (b) "the taking is for scientific purposes,"[70] provided that (c) it is "precise as to content and limited in space and time" and (d) does not "operate to the disadvantage of the species."[71]

a. The harvesting of the Yak is required by extraordinary circumstances

37. Pursuant to Article III(5)(d) of CMS, taking of endangered migratory species may occur, "if extraordinary circumstances so require."[72]

38. "Extraordinary circumstances" are not defined in CMS, therefore, it should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty."[73] Its ordinary meaning is described as "an unusual situation, which is not ordinary for a particular place or time."[74] For instance, Convention of European Wildlife and Natural Habitats[75] provides exceptions for "the interests of public health and safety [...] or other overriding public interests."[76]

39. Additionally, there is "considerable degree of [state's] discretion in determining necessary circumstances"[77]. For instance, in 2014 Australia invoked extraordinary circumstances under the CMS to justify the shark culling program[78] claiming that "national interest exemption is warranted to protect public safety."[79]

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

[70] *CMS*, Art.5(a).

[71] *CMS*, Art.5.

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

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

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

[75] Gillespie (2016), p.25.

[76] *Id.*

[77] Trouwborst (2014), p.42.

[78] Australian Exemption from Federal Laws, The Australian (2014).

[79] Australian Exemption for Shark Cull Plan, The Sydney Morning Herald (2014).

40. In the present case, the Lustuk Enzyme found in the gallbladder of the Yak[80] was discovered to be effective in the treatment of diabetes and related disorders[81] that cause millions of deaths worldwide each year.[82] Before the invention of Gallvectra there has been no analogous cure for diabetes,[83] thus, Yak harvesting is the only solution that can serve the interests of public health and safety of the thousands of people using Gallvectra.[84]

41. Therefore, the harvesting of the Yak is lawful, since it is required by extraordinary circumstances.

b. The harvesting of the Yak is carried out for scientific purposes

42. Like in case of "extraordinary circumstances", the term "scientific purposes" is not defined in CMS, therefore it should likewise be interpreted taking into account its ordinary meaning and "subsequent practice in the application."[85] Moreover, as this Court numerously emphasized in its decisions,[86] when state's sovereignty is questioned, in case of doubt interpretation shall be made in favour of such state's sovereignty.

43. The ICJ stated in the *Whaling* case, in the context of the International Whaling Convention, which contains a similar exception for scientific purposes,[87] that "programmes for purposes of scientific research should foster scientific knowledge; they may pursue an aim other than either conservation or sustainable exploitation of"[88] species, e.g. commercial aims.[89].

44. DORTA was established with "the mandate" of "pursuit and dissemination of scientific discoveries, including [...] new medicines and treatments."[90] DORTA has maintained that

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[80] *Compromis,* ¶13.

[81] *Compromis*, ¶14.

[82] WHO *Global report on diabetes*, p.21.

[83] *Id.*

[84] *Compromis,* ¶¶20, 38.

[85] *VCLT*, Art.31(1), 31(3)(b).

[86] *See e.g. Fisheries* (1951), ICJ, Rep 143; *Nuclear Tests* (1974), ICJ, Rep 267; *Continental Shelf* (1984), ICJ, ¶35. *See also Wimbledon* (1923), PCIJ, at 24; *Lotus* (1927), PCIJ, at 18.

[87] *International Whaling Convention*, Art.VIII(1).

[88] *Whaling*, ¶58.

[89] *Ibid.*, ¶86.

[90] *Compromis*, ¶9.

mandate and now pursues "Yak research [...] to develop successful [captive] breeding methods for Yak"[91] and to find "a synthetic alternative to the Lustuk Enzyme."[92] Against this background, the Yak hunting license was issued to DORTA "in view of the important scientific and medical benefits of the gallbladder of the Yak,"[93] and not in view of commercial benefits thereof. Moreover, the "hunting levels" depend not on the consumer demand, as opposed to commercial hunting, but, again, on "scientific and medical benefits" attained.[94]

45. Therefore, the Yak harvesting is exempted by scientific purposes.

c. The harvesting is precise as to content and limited in space and time

46. According to Article 5 of the CMS, exempted taking of protected species must be "precise as to content and limited in space and time."[95]

47. The license issued to DORTA is precise as to content since it sets clear-cut limits of Yak taking by capping the harvest to "no [...] more than 30,000 Yak annually"[96] and establishes uses for which the Yak may be hunted, i.e. "for the development and manufacture of Gallvectra."[97] The license issued to DORTA is also limited in space and time as it applies to the Yak on the Rakkabi territory[98] and is issued "for a period of three years."[99]

d. The harvesting of the Yak in Rakkab does not operate to their disadvantage

48. Though it is not in dispute that there has been some decline in the numbers of the Yak population,[100] however, it is disputable whether DORTA's harvesting is behind it. While Aurok

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[91] *Compromis*, ¶25.

[92] *Compromis*, ¶45.

[93] *Id.*

[94] *Id.*

[95] *CMS*, Art.5.

[96] *Compromis*, ¶45.

[97] *Id.*

[98] *Compromis*, ¶44.

[99] *Compromis*, ¶45.

[100] *Compromis*, ¶¶40, 43.

may claim that the harvesting is the sole cause,[101] however, the standard of proof in environmental harm disputes is "clear and convincing evidence,"[102] which it has failed to meet.

49. In the present case, there is no clear and convincing evidence since (i) YLSA's report is not sufficient to establish Rakkab's responsibility and (ii) climate change is another factor affecting the Yak.

i. YLSA's report is not sufficient to establish Rakkab's responsibility

50. To be clear and convincing, the evidence must be taken from various sources, all of which lead to an unequivocal conclusion.[103] It must, let alone, be independent.[104]

51. In contrast, YLSA's report is the sole evidence Aurok employs to attribute the Yak degradation to DORTA's harvesting as "no other independent research of Yak population trends has been conducted."[105]

52. Additionally, YLSA's report does not lead to an unequivocal conclusion that DORTA's harvesting is the reason for decline in the population, in their own view there are other "for reasons unknown [they] have observed particularly high rates of decline among the young and female species," which according to YLSA "will particularly worrisome repercussion for future generations".[106] In other words the main cause of the decline in the Yak population remains unknown.

53. Finally, YLSA has expressed its endorsement favorable to Aurok's position in the present case, when it "agreed to take charge of Aurok's presentation" at the CITES Conference of the Parties.[107]

54. For the reasons stated above, YLSA's report does not represent clear and convincing evidence.

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[101] *Compromis*, ¶27.

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

[103] *Trail Smelter* (1941), Arbitral Tribunal, p.1921.

[104] *Nicaragua* (1986), ICJ, ¶¶64, 70; *Aerial Herbicide Spraying (Memorial of Colombia)* (2010), ¶¶7.109, 7.127, 7.151.

[105] *Compromis,* ¶28.

[106] *Compromis*, ¶27.

[107] *Compromis*, ¶45.

ii. Climate change is another factor affecting the Yak

55. In the *Road Construction Costa Rica* case, this Court did not find the evidence to be convincing due to the existence of other factors that could have caused alleged harm.[108]

56. The CMS Conference of the Parties recognizes that climate change severely impacts endangered species[109] and creates "climate-induced range shifts."[110] Moreover, "changes in distribution [range] are seen as a consequence of climate change."[111]

57. Similarly, in the present case there was a range shift with the Yak numbers growing small "in the remote northernmost region of Aurok."[112] Moreover, YLSA's report, to which Aurok may refer to rebut attribution to natural causes, itself recognizes that "the effects are not evenly distributed across the Yak population [f]or reasons unknown."[113]

58. Thus, considering the widely-recognized effects of climate change on endangered species and given that the pattern of the Yak's degradation in the present case is similar to climate-induced degradation, the climate change is, therefore, another factor that could be affecting the Yak.

59. For all the aforesaid reasons, there is no evidence that the Yak harvesting in Rakkab operates to the disadvantage of the Yak, and thus there is no breach of CMS.

2. Rakkab does not violate CBD

60. Aurok may potentially argue that even if the Court finds that Rakkab does not violate 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."[114] However, this is not the case.

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[108] *Road Construction Costa Rica* (2015), ICJ, ¶119.

[109] CMS Conference, Resolution 8.13 (2005), Preamble ¶1.

[110] CMS Conference, Resolution 11.26 (2014), ¶7.

[111] CMS Conference, Resolution 8.13 (2005), ¶1(c).

[112] *Compromis,* ¶29.

[113] *Compromis*, ¶27.

[114] *CBD*, Art.22.

61. According to CBD Conference of the Parties, to qualify as damage to biodiversity, change must be "adverse or negative,"[115] "exceed a *de minimis* threshold"[116] and be in the form of "long-term or permanent […] reduction in components of biodiversity,"[117] which "cannot be addressed through natural recovery within a reasonable period of time."[118]

62. In the present case, as it was shown in ¶¶48 – 59 above the harvesting of the Yak in Rakkab does not adversely or negatively impact the Yak population. Even if it did, then the impact would qualify as *de minimis* since the number of Yak harvested in Rakkab for the production of Gallvectra is "only about 4 [to 5] percent"[119] of the entire population annually. In addition, there is no long-term or permanent reduction in the Yak population since first complaints have given voice only two years ago[120] – after five years of successful and serene harvesting.[121]

63. Finally, there is no evidence in the *Compromis* suggesting that the Yak population is non-renewable and can no longer be recovered by natural reproduction. Rather, in 2016 Aurok asked DORTA to stop the harvesting for "2016-2017 winter months"[122] to allow "the herds to recover,"[123] therefore, it is not in dispute, that the Yak reduction can be addressed by natural recovery within just a couple of months.

64. For these reasons the impact of the Yak harvesting program implemented by DORTA does not qualify as damage to biodiversity and, therefore, Rakkab is not in breach of the CBD.

B. Harvesting of the Yak in Rakkab does not violate Rakkab's obligation relating to protection of the environment

1. Harvesting of the Yak in Rakkab does not cause transboundary harm to Aurok

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

[116] UNEP/CBD/COP/9/20/Add.1, ¶17.

[117] *Ibid.*, ¶12.

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

[119] *Compromis,* ¶¶24, 36.

[120] *Compromis,* ¶¶27, 29.

[121] *Compromis*, ¶23.

[122] *Compromis*, ¶31.

[123] *Id.*

65. Under customary international law, states are obliged to "avoid activities […] causing significant damage to the environment of another state."[124]

66. In the present case, for the reasons mentioned in ¶¶48 – 59 above there is a lack of causal link between harvesting of the Yak in Rakkab and reduction of the Yak population. Moreover, as described in ¶62 above, DORTA's impact on the Yak is *de minimis*, and not significant.

67. Therefore, Rakkab does not cause significant transboundary harm to Aurok.

2. In any event, Rakkab has complied with its due diligence obligations

68. The obligation not to cause significant harm[125] is "the obligation of conduct [not of] result," which means that if a state has taken all measures to prevent harm (due diligence obligation), it is exempted from liability if the harm occurs.[126] The due diligence obligation encompasses (a) the duty to carry out an environmental impact assessment[127] and the (b) duty to cooperate.[128]

69. As described in ¶¶31 – 33 above, Rakkab has duly discharged these duties and is, therefore, not liable for the alleged harm.

C. The harvesting of the Yak should not end

70. Yak harvesting in Rakkab should not end either (1) under law on state responsibility or (2) under precautionary approach.

1. The Yak harvesting should not end under the law on state responsibility as no wrongful act occurred

71. Under customary international law, the state responsible for a continuing internationally wrongful act[129] must cease it.[130]

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[124] *Pulp Mills* (2010), ICJ, ¶101.

[125] *Draft Articles on Transboundary Aquifers (Commentaries)*, Art.6.

[126] *ILC Yearbook* (2006), Vol. II, Part Two, p.101; *Pulp Mills* (2010), ICJ, ¶101.

[127] *Pulp Mills* (2010), ICJ, ¶204.

[128] *Road Construction Costa Rica* (2013), ICJ, ¶106.

[129] *ARSIWA*, Art.2.

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

72. As demonstrated in ¶¶34 – 69 above, Yak harvesting does not violate Rakkab's international obligations related to the protection of the Yak either under CMS or CBD or the environment, the Yak harvesting must not cease.

2. The Yak harvesting should not end as a precautionary measure

73. Aurok may refer to precautionary principle[131] to claim that the Yak harvesting should end despite "lack of full scientific certainty"[132] as to the causes of the Yak degradation. However, precautionary measure must "be proportionate to the risk,"[133] "be reasonable and cost-effective in the circumstances" and be based on "the best available and independent science."[134]

74. In contrast, as earlier established in ¶¶50 – 54 above, the YLSA's report relied on by Aurok as support to its claims is far from best and independent. More importantly, cessation of the harvesting of the Yak in Rakkab, which is necessary for production of the drug Gallvecta that "saves human lives" [135] on the grounds of unjustified and unsupported fears of the risk of extinction of the Yak allegedly posed by harvesting of the Yak in Rakkab is outrageously disproportionate.

75. For these reasons, DORTA's harvesting of the Yak should not end.

III. THE HARVESTING OF THE YAK IN RAKKAB DOES NOT VIOLATE EITHER CULTURAL OR RELIGIOUS RIGHTS OF AUROKANS, NOR SHALL RAKKAB PROHIBIT SUCH HUNTING FORTHWITH

A. The harvesting of the Yak in Rakkab does not violate either cultural or religious rights of Aurokans

76. Aurok may invoke provisions of the International Covenant on Civil and Political Rights ("**ICCPR**"), International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") or the Indigenous and Tribal Peoples Convention No. 169 ("**ILO Convention**"), binding on both Aurok and Rakkab,[136] in claiming that the harvesting of the Yak in Rakkab violates cultural and religious rights of Aurokans. However, (1) no violations of the

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

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

[133] *Commission v Denmark* (2003), ECJ, ¶45.

[134] Queensland University Report, p. 12.

[135] *Compromis*, ¶24.

[136] *Compromis*, ¶48.

abovementioned human rights conventions may be invoked against Rakkab, since in the absence of Rakkabi jurisdiction over the Aurokans these conventions do not apply extraterritorially, and (2) in any event, potential limitations of the cultural or religious rights of Aurokans that may have been caused by the harvesting of the Yak in Rakkab do not violate international law.

1. No violations of the ICCPR, ICESCR or the ILO Convention may be invoked by Aurok against Rakkab

77. It is generally accepted under international law that a state is only under an obligation to comply with its human rights obligations vis-à-vis individuals that are subject to its jurisdiction,[137] as expressly follows from Article 2(1) of the ICCPR. The same applies to the ICESCR, as was confirmed by the ICJ in the *Wall Advisory Opinion*,[138] and the ILO Convention,[139] even though they do not contain such express jurisdictional clause as in Article 2(1) of the ICCPR.

78. The ICJ in the *Wall Advisory Opinion*[140] and the ECtHR in, among others, the *Bankovic* case[141] have recognized that jurisdiction of a state is "primarily territorial," which can be deemed to have been exercised outside a state's territory only in "exceptional cases"[142] and "must be examined restrictively."[143]

79. As further follows from the jurisprudence of the ICJ, namely the *Armed Activities* case as well as from practice of human rights bodies, such exceptional cases of extraterritorial jurisdiction include exercise of (i) effective control over the territory as a result of military occupation,[144] which is primarily determined by "the strength of military presence" or "economic and political support";[145] (ii) certain public powers on the territory of another state;[146] (iii) "physical power and control" over person such as in the case of taking a person in custody.[147]

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[137] *See* ICCPR, Art.2(1); ECHR, Art.1; ACHR, Art.1.

[138] *Wall*, Advisory Opinion (2004), ICJ, ¶112.

[139] Penovic (2005), p.97.

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

[141] *Bankovic v Belgium* (2001), ECtHR, ¶¶59-61; *Al-Skeini v. the UK* (2011), ECtHR, ¶131.

[142] *Bankovic v Belgium* (2001), ECtHR, ¶67; *Al-Skeini v. the UK* (2011), ECtHR, ¶131.

[143] *Advisory Opinion* (2017), IACtHR, p.3.

[144] *Armed Activities* (2005), ICJ, ¶216; *Wall*, Advisory Opinion (2004), ICJ, ¶112.

[145] *Al-Skeini v. the UK* (2011), ECtHR, ¶139.

80. Rakkab has never exercised jurisdiction over Aurokans, whose cultural and religious rights have allegedly been violated by harvesting of the Yak in Rakkab either by way of exercise of (i) effective control over any part of the territory of Aurok; (ii) any public powers at Aurok; or (iii) any physical power or control over any Aurokans. Thus, in the absence of Rakkabi jurisdiction over Aurokans, Aurok may not invoke violations of any of the ICCPR, ICSECR or the ILO Convention against Rakkab.

2. In any event, limitations of cultural and religious rights experienced by Aurokans due to harvesting of the Yak in Rakkab do not violate international law

81. Even if the court finds that Rakkab shall respect human rights of Aurokans under the ICCPR, ICESCR or the ILO Convention, harvesting of the Yak does not violate either religious or cultural rights of Aurokans, since (a) Rakkab was under no obligation to consult with Aurokans and (b) limitations of religious and cultural rights that have been experienced by Aurokans are lawful.

a. Rakkab is under no obligation to consult with Aurokans in respect of harvesting of the Yak in Rakkab

82. Under Article 15(2) of the ILO Convention, states shall consult with indigenous peoples, such as Aurokans,[148] before disposing of the natural resources "pertaining to their lands."[149] Likewise, the *travaux preparatoires* to the ILO Convention provide that indigenous people only have a right to take part "in decision-making process in the countries in which they live."[150] The ILO Governing Body has further affirmed that the consultations are required "in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy."[151]

83. In the present case, Rakkab harvested the Yak solely on its own territory,[152] hence Rakkab bears no duty to consult with Aurokans in respect thereof.

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[146] *Ibid.*, ¶135.

[147] *Ibid.*, ¶136.

[148] *Clarifications*, ¶1.

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

[150] ILC, 75th session (1988), p.30.

[151] *Maya*, ILO Governing Body (2007), ¶48.

[152] *Compromis*, ¶24.

b. Harvesting of the Yak in Rakkab does not violate cultural or religious rights of Aurokans

84. Contrary to Aurokan allegations harvesting of the Yak in Rakkab does not violate cultural or religious rights, because it constitutes a lawful limitation thereto. As follows form the UN Committee on Economic Social and Cultural Rights *General Comment No. 21* in respect of the right to participate in cultural life and the UN Human Rights Committee ("**HRC**") *General Comment No. 22* in respect of freedom of religion for any limitation imposed thereto to be lawful it shall comply with the following cumulative[153] criteria: (i) be regulated by law, (ii) pursues legitimate aims, (iii) be necessary and (iv) proportionate.[154]

85. Additionally, contrary to potential allegation of Aurok, status of Aurokans as indigenous people does not disentitle Rakkab from imposing lawful limitations to their cultural or religious rights as "none of the rights of the indigenous communities is absolute."[155] Tellingly, the US Supreme Court permitted construction of a road in an indigenous religious place, concluding that "whatever rights the Indians may have to the use of the area, [...] those rights do not divest the Government of its right to use what is, after all, its land," due to the social importance of the road.[156]

86. Since as demonstrated in ¶¶87 – 100 below harvesting of the Yak in Rakkab meets all the above-mentioned criteria for a lawful limitation, it does not violate either cultural or religious rights of Aurokans.

i. Harvesting of the Yak in Rakkab is regulated by law

87. It is widely accepted that the term "law" includes not only statutory law, but also "regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament, and unwritten law."[157]

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[153] EU Guidelines on Freedom of Expression (2014), ¶20.

[154] *Belyatsky v. Belarus* (2007), HRC, ¶7.3; CESCR, *General Comment 21*, ¶19; CCPR, *General Comment 22*, ¶8.

[155] *IPUC v. Arhuaca* (1998), Colombia, ¶57.

[156] *Lyng v. Northwest* (1988), U.S., p.453.

[157] *Gülcü v. Turkey* (2016), ECtHR, ¶104.

88. Harvesting of the Yak in Rakkab has always been subject to licensing,[158] including under Regulation AG/2017-0300.[159] Therefore, harvesting of the Yak in Rakkab was regulated by law.

ii. Harvesting of the Yak in Rakkab pursues a legitimate aim

89. Protection of public health, a "science and art of promoting health, preventing disease, and prolonging life,"[160] is a well-recognized legitimate aim under international law.[161] In particular, the HRC in its *General Comment No. 22* affirmed that limitations to religious rights are permitted if they "are necessary to protect public safety, order, health."[162] Similarly, the ECtHR in *Solomakhin v. Ukraine* case held that a limitation of rights may "be justified by the public health considerations."[163]

90. Harvesting of the Yak in Rakkab is carried out for the purposes of manufacturing Gallvectra,[164] a "life-saving medicine"[165] which is crucial for protection of public health of not only Rakkabi citizens,[166] but "countless people worldwide."[167] Following ICJ's reasoning in the *Wailing in Antarctica* case[168] the fact that sale of Gallvectra generates high revenue for DORTA does not undermine legitimacy of the harvesting of the Yak in Rakkab for the purpose of protection of public health.

91. Thus, harvesting of the Yak in Rakkab pursued a legitimate aim of protecting public health.

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[158] *Compromis*, ¶23.

[159] *Ibid.*, ¶44.

[160] *WHO World Report* (2004), p.77.

[161] *Siracusa Principles*, ¶25.

[162] CCPR, *General Comment 22*, ¶8.

[163] *Solomakhin v. Ukraine* (2012), ECtHR, ¶36.

[164] *Compromis*, ¶33.

[165] *Id.*

[166] *Compromis*, ¶12.

[167] *Compromis*, ¶33.

[168] *Whaling* (2014), ICJ, ¶97.

iii. Harvesting of the Yak in Rakkab is necessary

92. Necessity of a limitation is determined based on the "nature and extent" of the risk to "public health."[169] The ECtHR in the *Sunday Times Case* also held that limitations on human rights must be necessary for safeguarding a "pressing social need."[170] In addition, where public health is invoked as the aim of human rights limitations, in assessing their necessity "due regard shall be had to the international health regulations of the World Health Organization."[171]

93. Through harvesting of the Yak Rakkab manufactures Gallvectra a "highly effective drug in the treatment of diabetes and related disorders"[172] the number of which had a "significant increase" in the 20th century.[173] Likewise, according to the World Health Organization, the number of people in the world with diabetes has quadrupled since 1980.[174] More importantly, diabetes and related diseases [yearly] cause 3.7 million deaths.[175]

94. Against this background, tellingly and unsurprisingly Gallvectra was added to the WHO Model List of Essential Medicines,[176] which is indicative of the fact that Gallvectra satisfies the "priority health care needs of the population" as well as fulfills "clinical efficacy, safety and […] cost effectiveness" criteria.[177]

95. Thus, harvesting of the Yak is necessary for safeguarding a pressing social need for an effective cure for diabetes and related deceases that have become increasingly widespread.

iv. Harvesting of the Yak in Rakkab is a proportionate limitation to cultural and religious rights of Aurokans

96. The requirement of proportionality "calls for the balancing of different interests," i.e. interest of individuals whose rights are limited and "demands of general interest."[178] In

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[169] *Keun-Tae Kim v. Korea* (1999), HRC, ¶12.2.

[170] *The Sunday Times v. the UK* (1979), ECtHR, ¶59.

[171] *Siracusa principles*, ¶31.

[172] *Compromis*, ¶14.

[173] *Compromis*, ¶12.

[174] WHO *Report on Diabetes* (2016), p.31.

[175] *Id.*

[176] *Compromis*, ¶37.

[177] Briggs (2018), p.6.

[178] *Tanganyika v. Tanzania* (2013), ACtHPR, ¶106.4.

particular, in attempt to strike the relevant balance the "efficacy" of limitation and the possibility to achieve the result through "less damaging" means is assessed.[179]

97. The Yak are harvested in Rakkab for the gallbladders from which the key ingredient of Gallvectra – the Lustuk Enzyme is isolated.[180] As of today, Rakkabi scientists from "world's best"[181] universities and scientific research facilities are "researching a synthetic alternative for the Lustuk Enzyme,"[182] but have not succeed in finding one yet. Nor did either Aurok or Rakkab manage to domesticate or breed the Yak in captivity,[183] meaning that harvesting of the Yak in Rakkab remains to be the only possible way to ensure continuous manufacturing of a "life-saving medicine".[184]

98. Notably, harvesting of the Yak in Rakkab accounts for mere 5% of the whole Yak population, which is "a drop in the ocean" compared to thousands of killings carried out by Aurok.[185] Cultural or religious rights of the Aurokans may have been affected by a small reduction of the Yak harvesting in Aurok,[186] but Aurokans still managed to harvest almost a hundred thousand of Yak in summer 2016 for their traditional purposes, while Rakkab by harvesting "about one-third of the number of Yak harvested by Aurokans" contributes to saving and extending lives of "countless people worldwide."[187]

99. Against this background, the harvesting of the Yak for the purposes of manufacturing of Gallvectra is the only, least damaging and efficient measure to save human lives from diabetes and related diseases and is, thus, a proportionate limitation to cultural and religious rights of Aurokans.

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[179] *South Africa v. Makwanyane*, (1995), South Africa, ¶104; *See also* CCPR, *General Comment 22*, ¶8.

[180] *Compromis*, ¶13.

[181] *Compromis*, ¶9.

[182] *Compromis*, ¶33.

[183] *Compromis*, ¶1.

[184] *Compromis*, ¶33.

[185] *Compromis*, ¶36.

[186] *Compromis*, ¶7.

[187] *Compromis*, ¶33.

100. Therefore, since harvesting of the Yak in Rakkab complies with all relevant criteria for a lawful limitation, it does not violate cultural or religious rights of Aurokans.

B. Even if the Court finds that harvesting of the Yak in Rakkab violates cultural or religious rights of Aurokans, it shall not order prohibition thereof

101. Even if the Court finds that (1) Rakkab has failed to consult with Aurokans as indigenous people, it shall not order prohibition of the harvesting of the Yak in Rakkab, as requested by Aurok,[188] since failure to comply with obligation to consult with Aurokans as indigenous people does entitle them with the right to veto such harvesting. Likewise, (2) even if the harvesting of the Yak in Rakkab violates Aurokans cultural or religious rights, prohibition thereof would be an inappropriate remedy.

1. Failure to comply with obligation to consult with Aurokans shall not entail prohibition of the Yak harvesting in Rakkab

102. Even if the Court finds that Rakkab was under an obligation to consult with Aurokans prior to initiating Yak harvesting in Rakkab, which Rakkab has failed to comply with, such failure would not bestow on indigenous peoples a right to unilaterally impose their will on states when the latter acts legitimately in the public interest.[189]

103. Accordingly, national courts of such states as Bolivia,[190] Columbia,[191] Brazil,[192] and Ecuador[193] on numerous occasions have emphasized that indigenous people "have no right to veto" state decisions that are otherwise legitimate.[194] The consultation procedure is only aimed at achieving community's "full understanding" of the projects, to instruct people on possible effects, and to hear "the questions [...] that may arise."[195]

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[188] *Ibid.*, ¶49.

[189] *UN GA Protection of all human rights, 20 July 2009,* ¶48; *Bulgaria Committee on the Rights of Indigenous Peoples* (2012), p.7.

[190] *Bolivia Constitutional Judgment* (2006); *See also* Application of Convention No.169 (2009), pp.57-59.

[191] *U'wa v. Ministry* (1997), Colombia; *See also* Application of Convention No.169 (2009), pp.69-72.

[192] *See generally Augusto Affonso* (2014), Brazil.

[193] *Kichwa v. Ecuador* (2012), IACtHR, ¶129.

[194] *See supra* note 189.

[195] *See supra* note 190.

104. Therefore, since as demonstrated in ¶¶87–100 above, harvesting of the Yak in Rakkab is legitimate, Rakkab's failure to consult with Aurokans prior to initiation of the Yak harvesting in Rakkab shall not entail cessation, let alone prohibition thereof.

2. Prohibition of the Yak harvesting in Rakkab is an inappropriate remedy

105. The ICJ has never granted a remedy, which would require a state to prohibit certain actions, even if they constitute an internationally wrongful act.[196] From state responsibility perspective such a request for prohibition of certain acts is essentially a form of requesting guarantees of non-repetition.[197] However, as the International Law Commission has stated such measure is of an "exceptional character," which depends on "the circumstances of the case" and "will not always be appropriate, even if demanded."[198] Tellingly in *LaGrand* case, where Germany has requested the ICJ to grant assurances that "the United States will ensure in law and practice the effective exercise of [certain] rights"[199] by German nationals, the ICJ has concluded that "the choice of means shall be left to the United States."[200] In the *Whaling* case, which is similar to ours, where Japan was held responsible for unlawful whale hunting, the ICJ prohibited the program itself, but not the hunting of whales *per se*.[201]

106. In the present case, taking into account the "fundamental importance"[202] of Gallvectra worldwide, the fact that "there is no credible reason to believe that the Yak will be extinct in any of our lifetimes"[203] and Rakkab's continuous search for "a synthetic alternative to the Lustuk Enzyme"[204] ordering prohibition of the harvesting of the Yak in Rakkab would be inappropriate.

IV. TRADITIONAL KNOWLEDGE OF AUROKANS WAS NOT APPROPRIATED IN DEVELOPMENT OF THE DRUG GALLVECTRA, IN ANY EVENT RAKKAB IS UNDER NO OBLIGATION TO PAY TO AUROK ANY PORTION OF THE

[196] Application of Convention No.169 (2009), p.71.

[197] ILC, *ARSIWA Commentaries,* (2001), p.90.

[198] *Ibid.*, p.91.

[199] *LaGrand* (2001), ICJ, ¶125.

[200] *Id.*

[201] *Whaling* (2014), ICJ, ¶247.

[202] *Compromis*, ¶37.

[203] *Compromis*, ¶43.

[204] *Compromis*, ¶33.

PROFITS REALIZED FROM SALES THEREOF FOR EXPLOITATION OF THEIR TRADITIONAL KNOWLEDGE

A. Manufacturing of the drug Gallvectra does not constitute appropriation of the traditional knowledge of Aurokans

107. Contrary to Aurokan allegations, traditional knowledge of Aurokans was not appropriated in development of the drug Gallvectra, since (1) Gallvectra was not derived from Aurokans' traditional knowledge; (2) even if it was, use of such traditional knowledge did not require consent of Aurokans and (3) alternatively, it was already in public domain.

1. Gallvectra was not derived from Aurokans' traditional knowledge

108. Customarily, traditional knowledge is defined as "the result of intellectual activity and insight in a traditional context."[205] Furthermore, traditional knowledge concerning "medicinal knowledge"[206] should refer to the ways of "treatment of physical and mental illnesses".[207] In addition for an invention to be considered derived from the traditional knowledge there shall be a direct proximate link between such traditional knowledge and the invention developed therefrom.[208]

109. Even though Aurokans did attribute certain health benefits to the Yak gallbladder[209], its consumption via traditional soup *Tirhinga Nos Lustuk*, was merely seen as a "promoter of well-being",[210] rather than a medicine against a particular disease like Gallvectra. Aurokans have never been aware of the medicinal value of the "never-before identified"[211] Lustuk Enzyme, nor were they aware of its efficacy against diabetes or other insulin related diseases, which was a pure discovery of Dr. Bello that laid ground for development of a "reliable, consistent prescription drug for human use" – Gallvectra.[212]

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[205] WIPO *Recommendations on the Recognition of Traditional Knowledge* (2008), ¶15; See also Draft Articles on Traditional Knowledge (2018), p.7.

[206] *Id.*

[207] Traditional Medicine: Definitions, WHO (2000).

[208] Andrzejewski (2010), p.104.

[209] *Compromis*, ¶16.

[210] *Id.*

[211] *Compromis*, ¶13.

[212] *Compromis*, ¶18.

110. Notably, development of Gallvectra took years of fieldwork, subsequent laboratory studies,[213] and testing[214] using one of the world's best scientific and research facilities.[215] It was invented by Rakkab's medical scientists and has been granted patent protection in Rakkab and more than 50 other countries,[216] which confirms novelty and non-obviousness of Gallvectra as opposed to the Aurokans' general beliefs in health benefits of consumption of the traditional soup.

111. For the aforesaid, even if Gallvectra "may have been inspired by the traditional beliefs of Aurokans in the heath-protecting properties of the Yak gallbladders",[217] it was not, as described above, derived from such traditional beliefs and constitutes an independent invention of DORTA's scientists.

2. In any event, prior consent of Aurokans for the use of their traditional knowledge was not required

112. Appropriation of traditional knowledge implies that any use of such knowledge is subject to obtainment of a prior consent from its owner.[218] However, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization ("**Nagoya Protocol**") to which both Rakkab and Aurok are parties[219] and which requires states to take domestic measures to ensure that traditional knowledge is "accessed with the prior and informed consent" of indigenous people[220] is not applicable to our case as it only entered into force in October 2014 and has no specific retroactive provisions, while alleged appropriation of the traditional knowledge of Aurokans took place as early as 2003.[221]

113. Tellingly, even if the Nagoya Protocol was applicable retroactively, use of Aurokans traditional knowledge concerning health benefits of the Yak gallbladder, would still not

[213] *Compromis*, ¶12.

[214] *Compromis*, ¶14.

[215] *Compromis*, ¶9.

[216] *Compromis*, ¶¶11, 20.

[217] *Compromis*, ¶17.

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

[219] *Compromis*, ¶48.

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

[221] *Compromis*, ¶14.

constitute appropriation thereof, as there are no facts on Aurok's adoption of relevant legislation as required under the Nagoya Protocol. Since obtainment of a prior consent is purely a "domestic legislation or regulatory requirement,"[222] if a state fails to adopt domestic measures, then "no prior informed consent can be required" and such obligation "cannot be invoked."[223] For this reason, WIPO provided that "[t]here is no specific international requirement that patent applicants should […] disclose information on prior informed consent and equitable benefit sharing" (emphasis added).[224]

114. Therefore, in the absence of relevant national legislation, Rakkab was not required to obtain prior consent from Aurokans for using their traditional knowledge about health benefits of the Yak gallbladder in manufacturing Gallvectra.

3. Alternatively, Aurokans' traditional knowledge is in public domain and may therefore be used without consent

115. In cases where traditional knowledge is "already in the public domain," international law provides no proprietary rights to traditional communities, thus requiring no prior consent for the use of such traditional knowledge.[225] For this reason, it is accepted that using "quinine from the cinchona tree to treat malarial fever," which was once associated with an indigenous group in South America" is "so well known," that this "traditional knowledge should be afforded no rights."[226] For the same reason, 4479 patents were granted for Traditional Chinese Medicine in 2002 in China.[227]

116. Likewise, in the present case, Aurokans' traditional knowledge on using the Yak has long been well known to the public,[228] by, among others, showing "videos of various traditional ceremonies and practices" on the website for the Tourism Board.[229] In addition it has been

[222] Chiarolla (2012), p.20.

[223] Nijar (2011), p.16.

[224] WIPO, *Gap analysis* (2018), ¶99.

[225] Boyle (2008), p.38.

[226] Ruth (2018), p.14; *See also*: Achan (2011) p.1.

[227] Mpazi and Ramcharan (2005), p.20.

[228] *Compromis*, ¶5.

[229] *Compromis*, ¶7.

known since the 15th century, it is publicly known that Aurokans use the Yak in every sphere of their lives.[230]

117. Thus, since Aurokans' traditional knowledge was in public domain it could be used freely without their consent.

B. In any event, Rakkab is under no obligation to pay to Aurok any portion of the profits realized from sales of the drug Gallvectra

118. Even if this Court finds that, contrary to Rakkab's argumentation in ¶¶108 – 111 above, Gallvectra derives from Aurokan traditional knowledge neither (1) treaty nor (2) customary international law requires Rakkab to share any benefits arising from sales of the drug Gallvectra with Aurok.

1. Rakkab is under no treaty obligation to share profits from sales of Gallvectra with Aurok

119. The Nagoya Protocol and the Convention on Biological Diversity ("**CBD**"),[231] both of which are binding on Rakkab and Aurok,[232] provide for benefit sharing obligations.[233] However, Rakkab is still not obliged to share any profits from the sales of Gallvectra, since (a) traditional knowledge about health benefits of the Lustuk Enzyme from the Yak's gallbladder is not covered by either Nagoya Protocol or CBD, (b) in any event, neither Aurok, nor Rakkab adopted special domestic legislation.

a. Lustuk Enzyme is outside the scope of either Nagoya Protocol or CBD

120. The Nagoya Protocol and the CBD deal only with traditional knowledge "associated with genetic resource,"[234] which does not include derivatives: such as "RNA, proteins and enzymes"[235] and any benefit sharing obligations arise in respect of use of traditional knowledge associated with genetic resource and not derivatives thereof.[236]

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[230] *Compromis*, ¶5.

[231] Morgera *et al.* (2015), p.2.

[232] *Compromis*, ¶48.

[233] *Nagoya Protocol*, Art.5(5); *Convention on Biological Diversity*, Art.8(j).

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

[235] Morgera *et al.* (2015), p.71.

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

121. In the present case, Gallvectra was made by isolating "enzyme found in the gallbladder of the Yak,"[237] which was called "Lustuk Enzyme,"[238] hence even if the Court decides that Aurokan traditional knowledge did relate to the enzyme found in the Yak gallbladder and was appropriated by Rakkab, it was associated with a derivate of a genetic resources, not regulated by the Nagoya Protocol or CBD. Thus, no compensation is due to Aurokans.

b. Neither Aurok, nor Rakkab implemented domestic benefit-sharing legislation

122. The Nagoya Protocol and the CBD, do not impose a directly enforceable obligation on states to share benefits with traditional knowledge holders, but merely require to "as appropriate" take domestic "legislative, administrative or policy measures" in order to decide on the scope and extent of such benefit sharing.[239] Where a treaty makes a broader international obligation conditional upon adoption of domestic legislation to implement this obligation, the absence of any domestic legislation "would deprive" other states from "trigger[ing] (…) international obligations concerning users' compliance" with such treaties.[240]

123. In the absence of such legislative measures, various courts find benefit sharing, generally declared in the CBD and the Nagoya Protocol, to be merely an aspirational aim, rather than a legally enforceable obligation.[241] For instance, in *Milpurrurru v. Indofurn Pty Ltd,* the court rejected the claimants' claim for compensation on unauthorized copying of Aboriginal artists' designs, finding that "the statutory remedies do not recogni[z]e the infringement of ownership rights" based on traditional knowledge.[242]

124. In filing a lawsuit, Aurok is asking for the benefits "to be determined in subsequent proceedings,"[243] not in accordance with Rakkab's or Aurok's laws. The *Compromis* provides no evidence that Aurok and Rakkab implemented steps to give legally binding effect to the

[237] *Compromis*, ¶13.

[238] *Id.*

[239] *Nagoya Protocol*, Arts.5, 7, 16.

[240] Morgera *et al.* (2015), p.267.

[241] Morgera (2016), p.356.

[242] *Milpurrurru v. Indofurn Pty. Ltd* (1994), Australia, ¶277.

[243] *Compromis*, ¶49(d).

obligation of benefit sharing, and Aurok cannot directly refer to the provisions of the CBD and the Nagoya Protocol to claim compensation, as they are not directly enforceable.

125. Thus, neither the Nagoya Protocol nor the CBD require Rakkab to share any profits from sales of Gallvectra with Aurok or otherwise compensate Aurok for exploitation of the Aurokan traditional knowledge in manufacturing of Gallvectra.

2. Rakkab is under no customary obligation to share profits from sale of Gallvectra with Aurok

126. The ICJ in the *North Sea Continental Shelf* case held that a rule of customary international law consists of state practice, which is accepted as law (*opinio juris*).[244]

127. The alleged obligation to share benefits or otherwise pay compensation for exploiting traditional knowledge of Aurokans does not satisfy either of the elements, since (a) state practice is not consistent, and (b) in any event, it is not accepted as law.

a. State practice is inconsistent

128. As follows from well-established jurisprudence of the ICJ, in order to form a custom, state practice must be "extensive and virtually uniform."[245]

129. The countries have "sovereignty in determining the domestic sharing of benefits."[246] In particular, in *Saramaka v. Suriname* the court was unable to order benefit distribution to indigenous population for exploiting their land due to the absence of domestic legislation.[247] Instead, the court merely required the state "to adopt legislative, administrative and other measures necessary to [...] share the benefits."[248] Unlike using shared recourses, there are no cases on sharing benefits arising from using traditional knowledge.[249]

130. Thus, no state practice exists on sharing benefits from exploiting traditional knowledge.

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[244] *North Sea Continental Shelf* (1969), ICJ, ¶77.

[245] *Ibid.*, ¶74. *See also Jurisdictional Immunities* (2012), ICJ, ¶55.

[246] Morgera *et al.* (2015), p.134.

[247] *Saramaka v Suriname* (2007), IACtHR.

[248] *Ibid.*, ¶194(f).

[249] Pozarowska (2011), p.29.

b. There is no *opinio juris*

131. Even where sufficiently extensive state practice exists, in order to qualify as a custom, there must be evidence that the state practice is accompanied by state's belief in "existence of a rule of law" (*opinio juris*), rather than moral duty or goodwill.[250]

132. These requirements are not met in this case, as any benefit sharing that occurs in the world is made out of goodwill considerations only, rather than a legal obligation.[251] For this reason, the UN Special Rapporteur James Anaya concluded that "there is no specific international rule that guarantees benefit sharing for indigenous peoples."[252] Likewise, it is recognized that the Nagoya Protocol, which refers to benefit sharing as an aspirational aim, has "limited implementation by developing countries."[253] Similarly, WIPO emphasizes "the absence of appropriate institutional frameworks for managing and sharing benefits."[254]

133. In practice, benefit sharing is subject to "private, contractual negotiations," rather than legal commitments based on public international law.[255] For instance, specially affected countries with indigenous population, like the USA and India, do not oblige patent applicants to enter into benefit-sharing agreement on using the traditional knowledge.[256]

134. Therefore, there is no *opinio juris* on sharing benefits in international law, as benefit sharing is not viewed by the states as a legal duty, but only as an act of moral goodwill.

135. Hence in the absence of either consistent state practice or *opinio juris*, Rakkab is under no obligation to share profits from sales of the drug Gallvectra with Aurok or otherwise compensate Aurok for exploitation of their traditional knowledge when manufacturing Gallvectra.

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[250] *Nicaragua* (1986), ICJ, ¶190.

[251] Report of the British Commission on IPR (2002) pp.74, 77; Sarma (1999), p.116.

[252] Report of the Special Rapporteur on Indigenous Peoples' Rights (2010), ¶¶67, 76–78.

[253] Morgera *et al.* (2015), p.325.

[254] WIPO, *Gap analysis* (2018), ¶117.

[255] Morgera (2015), p.19.

[256] The Patents Act (1970), India; U.S. Patent Law (2007).

CONCLUSION AND PRAYER FOR RELIEF

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

1. Rakkab is not responsible for the internationally wrongful acts described in paragraphs 2 – 4, *infra*, because DORTA's actions are not attributable to Rakkab, and, in any event, Rakkab is not responsible for its own failure to prevent DORTA from committing those wrongful acts;

2. The harvesting of the Yak in Rakkab does not violate Rakkab's international obligations relating to the protection of endangered species and the environment, including those under relevant conventions, and Rakkab is not obligated to end Yak harvesting on its territory;

3. The harvesting of the yak in Rakkab does not violate either cultural or religious rights of Aurokans, nor shall Rakkab prohibit such hunting; and

4. Manufacturing of the drug Gallvectra does not constitute appropriation of traditional knowledge of Aurokans, and, in any event, Rakkab is under no obligation to pay any portion of the profits realized from sales thereof.

Respectfully submitted,

Team 305R