

THE 2019 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

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

Case Concerning the Kayleff Yak

THE STATE OF AUROK

APPLICANT

V.

THE REPUBLIC OF RAKKAB

RESPONDENT

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

INDEX OF AUTHORITIES..... 6

STATEMENT OF JURISDICTION..... 18

QUESTIONS PRESENTED..... 19

STATEMENT OF FACTS 20

SUMMARY OF PLEADINGS..... 24

PLEADINGS 26

 I. Rakkab is internationally responsible for the wrongful acts of DORTA because DORTA’s actions are attributable to Rakkab, or in the alternative, Rakkab is responsible for its own failure to prevent DORTA from committing these wrongful acts. 26

 A. DORTA’s actions are attributable to Rakkab. 26

 1. DORTA is empowered by the Republic of Rakkab to exercise elements of governmental authority..... 26

 a. DORTA is exercising functions of a public character normally exercised by State organs..... 27

 b. DORTA’s conduct is an exercise of governmental authority..... 28

 2. DORTA is directed or controlled by the Rakkabi government in carrying out the conduct..... 29

 c. There exists a specific factual relationship between DORTA and Rakkab..... 29

 d. Actual control lies with the Board of Directors of DORTA..... 30

 e. Rakkab is equipping, financing and helping DORTA..... 30

 3. Alternatively, lifting the corporate veil entails Rakkab’s responsibility. 31

B. In the alternative, Rakkab is responsible for its own failure to prevent DORTA from committing these wrongful acts. 32

1. Rakkab had an obligation to exercise due diligence. 32

2. Rakkab failed to exercise due diligence. 33

a. Rakkab did not use the available infrastructure. 33

b. Rakkab did not conduct Cultural and Social Impact Assessment. 33

C. The alleged acts constitute ‘internationally wrongful acts’. 34

1. Rakkab’s conduct is inconsistent with its international obligations. 34

2. Damage is caused to Aurok by Rakkab’s non-compliance with its international obligations. 35

D. Rakkab cannot invoke Necessity as a circumstance precluding wrongfulness of these acts. 35

II. The harvesting of the Yak in Rakkab violates Rakkab’s international obligations relating to the protection of Endangered Species and the Environment and thus Rakkab is obligated to end Yak harvesting on its territory. 36

A. DORTA’s harvesting of the wild Yak is in clear contravention of the international obligations of Rakkab to protect endangered species. 36

1. Rakkab has violated its obligations under the Convention on the Conservation of Migratory Species of Wild Animals, 1979 (“CMS”). 37

a. Rakkab has violated Article III of CMS. 37

b. DORTA’s Yak harvest does not fall under Article III exceptions. 37

2. Rakkab has violated its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (“CITES”). 38

3.	Violation of the Convention of Biological Diversity, 1992 (“CBD”).	38
a.	Rakkab has violated its duty to conserve environment and species therein.	38
b.	Rakkab did not comply with the duty of sustainable use of natural resources.	39
B.	Rakkab is under an obligation to end Yak Harvesting on its territory.	39
1.	Rakkab’s conduct contravenes general principles of law.	39
a.	Rakkab’s conduct constitutes an abuse of rights.	39
b.	Rakkab contravened the principle of sustainable development.	40
2.	Rakkab is thus obligated to end Yak harvesting on its territory as the Yak forms a part of shared and common resource of Aurok and Rakkab.	40
III.	Rakkab’s hunting of the Kayleff Yak violates the Right to Self-Determination, Religious and Cultural Rights of the Aurokan people.	41
A.	Rakkab’s hunting of the Kayleff Yak violates the right to self-determination of Aurokan indigenous peoples.	41
1.	The Aurokan people are an indigenous people who have the collective right to self-determination.	41
2.	Rakkab has deprived Aurokan peoples of their means of subsistence.	42
a.	Rakkab has violated its international obligation to respect and protect the right to not be deprived of means of subsistence of Aurokan peoples.	42
b.	Yak harvesting in Rakkab has negatively impacted the way of life of Aurokan people.	43
B.	The Pivzao civilization shares a distinctive connection to the Gaur Highlands and exercise the right to ownership over its natural resources.	44

C. Rakkab has violated its obligations under International Law to respect and protect the right to culture of Aurokan peoples. 45

D. Actions of Rakkab unlawfully limit the freedom of Aurokan people to have and manifest their religion. 46

IV. Rakkab must pay Aurok, a portion (to be determined in subsequent proceedings) of the profits realised from sales of Gallvectra because the appropriation and exploitation of Traditional Knowledge belonging to the Aurokan people without compensation is inconsistent with international law. 47

A. By not taking Aurok’s prior informed consent, Rakkab has breached its obligation under international law. 47

1. Pursuant to the principle of obtaining prior informed consent the appropriation and exploitation of traditional knowledge was in violation of international law. 47

2. Misappropriation of traditional knowledge by Rakkab has breached Aurok’s right to sovereignty over its genetic resources and its right to development. 49

B. Rakkab’s acts amount to inconsistent application of policy underlying Patent Act. 50

1. Rakkab’s acts have disregarded the reward theory under patent law. 50

2. The prerequisites of patent law are not achieved. 51

a. Discoveries are not a subject matter of patent law. 51

b. The patent lacks novelty. 51

c. The patent lacks an inventive step. 52

d. The patent is morally repugnant. 53

C. Rakkab owes Compensation to Aurok for misappropriating and exploiting its Traditional Knowledge. 53

PRAYER FOR RELIEF 55

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STATEMENT OF JURISDICTION

The State of Aurok (“Aurok”) and the Republic of Rakkab (“Rakkab”) have submitted by Special Agreement this present dispute concerning the differences between the parties concerning the Kayleff Yak and other matters to the International Court of Justice (“I.C.J.”), and have transmitted a copy thereof to the Registrar of the Court in accordance with Article 40(1) of the Statute of the I.C.J. (“Statute”). Therefore, both parties have accepted the jurisdiction of the Court pursuant to Article 36(1) of the Statute.

Aurok undertakes to accept the judgment of the Court as final and binding and shall execute it in utmost good faith.

QUESTIONS PRESENTED

-I-

Whether Rakkab is responsible for the internationally wrongful acts as 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;

-II-

Whether the harvesting of the Yak in Rakkab violates Rakkab's international obligations relating to the protection of endangered species and the environment 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 Aurokan people and whether Rakkab must prohibit such hunting forthwith; and

-IV-

Whether Rakkab must pay Aurok a portion of the profits realized from the sales of the drug Gallvectra and whether Rakkab appropriated Aurok's traditional knowledge in manufacturing Gallvectra.

STATEMENT OF FACTS

THE GAUR HIGHLANDS AND THE KAYLEFF YAK

Gaur Highlands have been the exclusive habitat of the Kayleff Yak [**“the Yak”**] for than 250,000 years. The Yak is a migratory species that travels thousands of kilometres seasonally in large herds. Over spring and summer in the Northern hemisphere, young Yak are born and the herd stays in the northern grazing lands of present-day State of Aurok [**“Aurok”**]. Mating season begins after the Yak migrate south to their autumn and winter range, that is, present-day Republic of Rakkab [**“Rakkab”**].

THE PIVZAO CIVILIZATION

The Pivzao civilization arose in 1000 BCE in the Gaur Highlands and has since then relied for their subsistence on the hunting of the Yak for almost every aspect of their lives, including food, medicine, construction materials and clothing. Thereby, the Yak formed a central part of the Pivzao culture and religion. Accordingly, even the Pivzao calendar is based on the animal’s regular migration, and the central festivals of the year are coordinated with the Yak’s movements.

The first outside account of the Yak also emphasized the dependence of indigenous people on the Yak by describing their cultural and religious icon as “immense hairy nightmares”. It stated that the people used every bit of the Yak’s body for different purposes which include consuming it for traditional purposes, making weapons and constructing houses.

STATE OF AUROK

Aurok is a small, landlocked, least developed country with a population of around 1.2 million, composed almost entirely of the descendants of the Pivzao civilization. Nearly all Aurokans as well as Rakkabi adherents to Pivzao traditions, self-identify as indigenous.

Aurokan territory comprises the northern 70 percent of the Gaur Highlands. A 2015 United Nations Development Programme report indicated that the majority of the population is

MEMORIAL FOR THE APPLICANT

rural, living in villages and settlements fewer than 200 people. Even today, most of the Aurokans continue to observe the Pivzao traditions. In particular, participation in successful hunting of the Yak is considered a rite of passage into adulthood for young Aurokans.

REPUBLIC OF RAKKAB

Rakkab lies to the south of Aurok and encompasses 30 percent of the Gaur Highlands. Rakkab is a developed country with a population of 4.5 million out of which there are fewer than 200 adherents to the Pivzao traditions.

PRIVATISATION OF THE DEPARTMENT OF RESEARCH, TECHNOLOGY & APPLICATION

A major component of Rakkab's economic success has been its investment in the area of research and development. The Department of Research, Technology & Application was privatized in 1996 which gave rise to a newly private company, DORTA M/S [**"DORTA"**]. Presently, Rakkab holds approximately 12% of DORTA's stocks.

DORTA is now the world's 8th largest manufacturer of pharmaceuticals and has subsidiaries in over 50 countries (with no subsidiary in Aurok). The government of Rakkab subsidizes DORTA's research and development activities both inside and outside of Rakkab.

GALLVECTRA- THE PRODUCT OF AUROK'S TRADITIONAL KNOWLEDGE

Dr. Isaac Bello, a Rakkabi citizen who works in a DORTA-operated private hospital on the border of Aurok, observed that cases of diabetes and obesity were much lower in his Aurokan patients than his Rakkabi patients. After spending a year investigating Aurokan dietary and cultural practices, he concluded that this discrepancy was because of a never-before-identified enzyme found in the gallbladder of the Yak. This is also a key ingredient used in Tirhinga Nos Lustuk, a traditional soup prepared by Aurokans. He called it "the Lustuk Enzyme" and eventually isolated it to produce a drug, "Gallvectra".

PATENT OF GALLVECTRA

On 11 November 2004, a patent application was filed by DORTA for Gallvectra. In March 2005, Aurok's Minister of Intellectual Property wrote to his Rakkabi counterpart that the

MEMORIAL FOR THE APPLICANT

discovery of Gallvectra, made by Dr. Bello was directly attributable to his study of Aurokan people and their use of Yak gallbladders to promote good health. This letter evidenced the wrong done by the Rakkabi government in granting a patent for a drug that wasn't invented by DORTA. Aurokans protested the grant as there was a long-known use of the same by the indigenous population.

However, in response, Rakkab claimed that it would not preclude traditional use of the enzyme. In May 2011, DORTA began marketing Gallvectra in Rakkab and other countries where it had subsidiaries. By October 2014, worldwide sales of Gallvectra topped €2 billion.

ENDANGERED STATUS OF THE YAK

In October 2015, Aurokan Prime Minister expressed grave concern that demand for Gallvectra would negatively impact Aurok's indigenous culture. However, DORTA responded by saying that it uses only 4 percent of the total Yak population per year and thereby, the same is sustainable.

In 2016, the Yak Life Sciences Academy ["YLSA"], an International Non-Governmental Organization, published a report stating DORTA's hunting of Yaks for the drug has disrupted the delicate equilibrium between Aurokans and the Yak. The report also stated that if hunting by Rakkab continues, the Yak is perilously near extinction by 2040. Prime Minister Sumun in her address to the United Nations General Assembly further stated that the northernmost Aurokan settlements saw so few Yak that young residents had no opportunity to participate in a successful Yak hunt.

Resultantly, the Yak was included in Appendix I of Convention on Conservation of Migratory Species of Wild Animals and Appendix III of Convention on International Trade in Endangered Species of Wild Flora and Fauna.

ENVIRONMENTAL IMPACT ASSESSMENT

Beginning in October 2017, Rakkab conducted a comprehensive environmental impact assessment ["EIA"], focused on the impact of continued hunting of the Yak. The assessment involved consultation with DORTA scientists, YLSA representatives, Rakkabi Pivzao adherents,

MEMORIAL FOR THE APPLICANT

government officials from Aurok, licensed Yak hunters and members of the general public. The assessment concluded that Regulation AG/2017-0300 would be adequate to protect the sustainability of the Yak population.

PROMULGATION OF REGULATION

On 15th November 2017, the Rakkabi Ministry of Agriculture promulgated Regulation AG/2017-0300 under which DORTA applied for a license which was granted on 20th December 2017. The license authorized “DORTA, its employees and agents, in view of the important scientific and medical benefits of the gallbladder of the Yak, to harvest on the territory of Rakkab as many Yak as are required for the development and manufacture of Gallvectra, but in no event more than 30,000 Yak annually, for a period of three years.” In response, Aurokan Ambassador sent a formal note protesting the issuance of the license as “plainly as a violation of CMS”

DENIAL OF REMEDIES BY RAKKAB

In November 2017, three religious leaders from the Rakkabi Pivzao community, together with 20 village leaders from Aurok filed a civil suit in the Rakkabi court against DORTA and the Rakkabi Ministry of Agriculture. Aurokans’ claims regarding violations of their cultural and religious rights due to depletion of the Yak population and misappropriation of Traditional Knowledge [“TK”] were outrightly rejected on the ground that they lacked locus standi. On appeal, the Supreme Court affirmed the judgement of the lower court.

APPLICATION TO THE COURT

Upon urging of the Executive Director of the United Nations Environment Programme in spring 2018, the parties agreed to submit their disputes for resolution by the International Court of Justice. They negotiated and submitted to the Registry the present Special Agreement.

SUMMARY OF PLEADINGS

FIRST PLEADING

DORTA, the privatized Department of Research Technology and Application of Rakkab, incorporated in Rakkab is empowered by Rakkab to exercise governmental or public functions of healthcare. Having been granted a legislatively granted and government enforced monopoly over the sale and manufacture of pharmaceutical products, and with a subsidy granted to it both inside and outside Rakkab.

With a mandate of having certain strategic minority shareholding of the government of Rakkab up to 19.9 percent, and half of the Board of Directors comprised of Rakkabi political persons and former ministers, in addition to the CEO of the company being the former Rakkabi Intellectual Property Minister, the government is directing and controlling the company in its acts.

Alternatively, Rakkab had an obligation to exercise due diligence over the company if its acts violate its international obligations. By not complying with the laws in granting patent to Gallvectra, by not legislating proper laws within the country to regulate the hunting of the endangered species of the Yak and infringing the cultural and social rights of the Aurokans, Rakkab has failed to comply with its international obligations.

SECOND PLEADING

Rakkab has violated its international obligations under the Convention on Biological Diversity, Convention on Migratory Species and Convention on International Trade in Endangered Species of Wild Flora and Fauna by harvesting Yak at unsustainable rates. By failing to provide immediate protection for migratory species i.e. the Yak, Rakkab has failed to prevent, control or reduce factors that are likely to further endanger the species. The issuance of licenses for any taking of Yak by Rakkab is clearly an act in breach of its obligation to protect the species.

Rakkab is in flagrant disregard of its obligation to prevent or restrict exploitation of endangered species as it has harvested Yaks in an unsustainable manner. This has resulted in a marked decline of 10% in the Yak population.

By not conducting cultural and social impact assessment as is required when infringements with indigenous peoples' rights takes place, Rakkab has breached its obligation to exercise human rights due diligence due diligence.

THIRD PLEADING

Rakkab's hunting of the Yak has violated Aurok's right to self-determination as they are being deprived their means of subsistence. The right to self-determination is linked to the right to permanent sovereignty over its resources, a rule of customary international law. This unsustainable hunting has severely impacted the northernmost regions of Aurok.

Rakkab has violated Aurokans' right to participate in cultural life and transmit their culture. By describing the Yak as "immense hairy nightmares" and "hirsute stampeding death", Aurokans have been subjected to cultural discrimination.

Further, their right to manifest their religion has been limited by Rakkab as they have not been assimilated into the mainstream of the society. The interference in accessing the Yak to fulfil their rites has limited their freedom to worship.

FOURTH PLEADING

Pursuant to the principle of obtaining Prior Informed Consent the appropriation and exploitation of Aurok's traditional knowledge is in violation of International law. Rakkab under The Convention on Biological Resources and The Nagoya Protocol was obligated to share benefits from the utilisation of Aurok's resources.

Further, Rakkab has disregarded the underlying policy of patent law i.e. the reward theory by claiming ownership over a drug that it did not invent. Gallvectra does not fulfil the requisites for grant of patent as there has been a long-known use of the Lustuk Enzyme by the indigenous population of Aurok.

Hence, Rakkab must pay Aurok their rightful share of the profits that DORTA has made from the Aurokan people's traditions, and from their ancestor's knowledge of which they are the current custodians.

PLEADINGS

I. RAKKAB IS INTERNATIONALLY RESPONSIBLE FOR THE WRONGFUL ACTS OF DORTA BECAUSE DORTA'S ACTIONS ARE ATTRIBUTABLE TO RAKKAB, OR IN THE ALTERNATIVE, RAKKAB IS RESPONSIBLE FOR ITS OWN FAILURE TO PREVENT DORTA FROM COMMITTING THESE WRONGFUL ACTS.

Every internationally wrongful act of a State entails the international responsibility of that State¹ and exists when: conduct consisting of an act [A] or omission [B] is attributable to a State and constitutes breach of an international obligation owed by that State [C],² in addition to it not being precluded by a circumstance of wrongfulness³ [D].

A. DORTA'S ACTIONS ARE ATTRIBUTABLE TO RAKKAB.

DORTA's acts are attributable to Rakkab by virtue of its exercise of governmental authority [1], or direction or control by the Rakkabi government [2], or *alternatively* by lifting the corporate veil [3].

1. DORTA is empowered by the Republic of Rakkab to exercise elements of governmental authority.

Per the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), relevant portions of which this Court has determined to be customary international law,⁴ when entities are empowered by the law of that

¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 1, U.N. Doc. A/56/10(Nov. 2001) [hereinafter ARSIWA].

² ARSIWA, art. 2.

³ ARSIWA, chap. V.

⁴ ANTONIO CASSESE, *INTERNATIONAL LAW* 244 (2nd ed. 2005); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 138, ¶385 (Feb. 26) [hereinafter *Genocide Case*]; Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶47-49 (Sept. 25) [hereinafter *Gabcikovo-Nagymaros Case*].

State to exercise elements of the governmental authority⁵, conduct of these actors shall be considered an act of the State under international law.⁶

a. DORTA is exercising functions of a public character normally exercised by State organs.

Relevant factors to assess if an act is governmental include the history and traditions of the society⁷, control of the company by the State⁸ and the objectives and functions for which the company was created.⁹ The Maastricht Principles also attribute non-state actor activities to the State, encompassing certain essential public services and traditionally public functions of the State such as health.¹⁰

Rakkab is responsible under international law for the internationally wrongful acts of DORTA M/S since DORTA is the privatised Department of Research, Technology & Application of Rakkab government¹¹ with its seat¹²(*siège social*), centre of control¹³ or principal place of business in Rakkab.¹⁴ It is engaged in healthcare¹⁵ exercising functions of a public

⁵ Hyatt Int'l Corp. v. Iran, 72 Iran-U.S. Cl. Trib. Rep. 88-94 (1985).

⁶ Commentaries on the Draft Articles on Responsibility of States in Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess. Supp. No. 10, chap. V, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA Commentary].

⁷ ARSIWA Commentary, art. 5,

⁸ John Ruggie (Special Representative of the Secretary General), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 11,12, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie Principles].

⁹ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award on the Merits, (Nov. 13, 2000) 5 ICSID Rep. 440 (2002).

¹⁰ ETO Consortium, *Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, principle 12 (Jan., 2013) Principle 12. [hereinafter Maastricht Principles].

¹¹ *Compromis*, ¶10.

¹² Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (May 29-June 23, 2017) ¶26 [hereinafter General Comment 24].

¹³ *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spa.)*, Judgment, 1970 I.C.J. Rep. 3, ¶58 (Feb. 5) [hereinafter *Barcelona Traction Case*].

¹⁴ *Clarifications*, ¶4.

¹⁵ International Covenant on Economic Social and Cultural Rights art. 12, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec.10, 1948) art. 25 [hereinafter UDHR]; Constitution of the World Health Organization preamble, *adopted on July 22, 1946*, 14 U.N.T.S. 185 [hereinafter WHO Constitution].

character normally exercised by state organs¹⁶ and governed by public law.¹⁷ Rakkab, ‘having significant minority ownership’¹⁸ has a controlling interest¹⁹ (up to 19.9 percent shares²⁰) in DORTA which is an entity whose performance is of great importance to broad segments of the population.²¹

b. DORTA’s conduct is an exercise of governmental authority.

For attribution under Article 5 of ARSIWA, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage.²² It would include the delivery of services that may impact upon the enjoyment of human rights.²³

The manufacture and sale of Gallvectra concern the governmental activity of dissemination of scientific discoveries, including new medicines and treatment.²⁴ Therefore, attribution of DORTA’s conduct to Rakkab can be established on the basis of a *de jure* link between them, namely the empowerment of the former by the latter to exercise elements of governmental authority.²⁵

¹⁶ Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT’L LAW 142 (2010).

¹⁷ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 200 (2nd ed. 2008).

¹⁸ OECD Guidelines, at 11.

¹⁹ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529 (Eng.); *Kuwait Airways Corp v. Iraqi Airways Co and Others* [2002] U.K.H.L. 19.

²⁰ *Compromis*, ¶10.

²¹ Organization for Economic Co-operation and Development [OECD], *OECD Guidelines on Corporate Governance of State-owned Enterprises*, at 9, (2015) [hereinafter OECD Guidelines].

²² ARSIWA Commentary art. 5, ¶5.

²³ Ruggie Principles at 8.

²⁴ *Compromis*, ¶9.

²⁵ NON-STATE ACTORS IN INTERNATIONAL LAW 164 (Math Noortmann, August Reinisch & Cedric Ryngaert eds., 2015); ARSIWA, art. 5.

2. DORTA is directed or controlled by the Rakkabi government in carrying out the conduct.

c. There exists a specific factual relationship between DORTA and Rakkab.

The applicable rule of customary international law²⁶ in this regard requires proof of the direction or control²⁷ in relation to the conduct which is said to have amounted to an internationally wrongful act²⁸ in addition to the existence of a *de facto* link²⁹ between the entity and the State.³⁰ A substantial and effective connection between the legal entity and the state must be established,³¹ which in practice includes the existence of a substantial beneficial interest owned by government in the corporation.³²

Additionally, this Court in *Nicaragua*³³, while employing the “effective control” test³⁴ found that a State is liable for internationally wrongful acts committed by another party when the former provides aid or assistance to the latter, even if such acts are not specifically directed by the assisting party.³⁵ In the instant case, DORTA possesses a legislatively-granted and government-enforced monopoly on the sale of prescription medication within Rakkab and actively funds DORTA’s research activities.³⁶

²⁶ ARSIWA, art. 8; *Genocide Case*, at 398-399; Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶115 [hereinafter *Nicaragua Case*]

²⁷ *Genocide Case*, ¶384.

²⁸ ARSIWA, art. 8(7).

²⁹ Ryngaert, *supra* note 25, at 164, ¶2.

³⁰ ARSIWA, art. 8(1).

³¹ IAN BOWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 464 (6th ed., O.U.P. 2003).

³² *Id.*

³³ *Nicaragua Case*, at 64, ¶115.

³⁴ Int’l Law Comm’n, Report on the Work of its Fifty-sixth session, U.N. GAOR, 59th Sess. Supp. No. 10, U.N. Doc. A/59/10 (2004) at 110; *Nicaragua Case*, *supra* note 29 ¶115; see also, Larsen, *Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test*, 19 EUR. J.I.L. 515, 525 (2008); *Al-Jedda Regina v. Secretary of State for Defence* [2007] U.K.H.L. 58.

³⁵ *Nicaragua Case*, ¶292(3); ARSIWA art. 16; U.N. GAOR, 61st Sess., at 252, U.N. Doc. A/61/10 (2009).

³⁶ *Compromis*, ¶11.

d. Actual control lies with the Board of Directors of DORTA.

It is well established that the actual control of a company lies with the Board of Directors,³⁷ which is in charge of the overall strategic planning and direction of a corporation and is answerable to its shareholders, which includes the State.³⁸ Independence and autonomy of the management is compromised where the State, as a controlling owner is in a unique position to nominate and elect the board without the consent of other shareholders.³⁹

This entails that the State can possibly encroach on the Board's functions both as an 'ownership entity'⁴⁰ and also through management.⁴¹ In the present case, DORTA's 15-member Board of Directors includes four former Rakkabi Cabinet Ministers and three former leaders of Rakkab's major political parties⁴², in addition to Ms. Carla Alexander, the former Rakkabi Minister of Intellectual Property as the Chief Executive Officer of DORTA.⁴³ All these factors, therefore, cumulatively entail that DORTA's actions are attributable to Rakkab.

e. Rakkab is equipping, financing and helping DORTA.

As a general principle of international law, the national governments must bear responsibility for, or at least responsibility arising from, actions of private companies that have received their foreign aid or export credit guarantees and operate in a third State, on the basis of complicity.⁴⁴

³⁷ *Barcelona Traction Case*, ¶42; THOMAS CLARKE, *INTERNATIONAL CORPORATE GOVERNANCE: A COMPARATIVE APPROACH* 4-6 (Routledge Publishing 1st ed. 2007).

³⁸ *Id.* at 65-69.

³⁹ OECD Guidelines, at 24-25.

⁴⁰ ARSIWA Commentary, art. 8, ¶6.

⁴¹ John Ruggie (Special Representative of the Secretary General), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 11, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie Principles].

⁴² *Compromis*, ¶11.

⁴³ *Compromis*, ¶21.

⁴⁴ V. Lowe, *Corporations as International Actors and International Law Markets*, 13 *ITALIAN YEARBOOK OF INT'L LAW* 23, 32 (2004).

In the present case, Rakkabi government subsidizes DORTA's research and development activities *inside and outside* Rakkab.⁴⁵ Therefore, Rakkab is not only equipping and financing DORTA but is also coordinating or helping in the general carrying out of its activity.⁴⁶ The regular meetings of the Rakkabi government representatives with the CEO and senior executives of DORTA to discuss its national priorities⁴⁷ depict the same.

In the presence of evidence that DORTA is exercising public powers⁴⁸, and that Rakkab is using its ownership interest in or control⁴⁹ of DORTA specifically in order to achieve a particular result⁵⁰, the conduct in question has to be attributed to Rakkab.

3. Alternatively, lifting the corporate veil entails Rakkab's responsibility.

International law acknowledges the general separateness of corporate entities at the national level, except in those cases where the corporate veil is a mere device or a vehicle for fraud or evasion.⁵¹ The special circumstances⁵² in the present case, *alternatively* warrant "lifting the corporate veil"⁵³ or "disregarding the legal entity" as justified and equitable to prevent the misuse of the privileges of legal personality and evasion of legal requirements and obligations.⁵⁴

For purposes of international responsibility, DORTA is to be equated with Rakkab, of which it is ultimately merely the instrument⁵⁵ and from which it has no real independence or autonomy⁵⁶ and its identity is being used by Rakkab to escape its international responsibility

⁴⁵ *Compromis*, ¶11.

⁴⁶ Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶131 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

⁴⁷ *Clarifications*, ¶4.

⁴⁸ ARSIWA Commentary art. 8, ¶6.

⁴⁹ Ruggie Principles at 11; James Crawford, Max Planck Encyclopaedia of Public International Law, State Responsibility 112,113 (O.U.P. 2011); Peter Muchlinski, Max Planck Encyclopaedia of Public International Law, Corporations in International Law (O.U.P. 2014).

⁵⁰ ARSIWA Commentary art. 8, ¶6.

⁵¹ *Barcelona Traction Case*, at 39, ¶56–58.

⁵² *Tokios Tokels v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶54 (Apr. 29, 2004).

⁵³ *Barcelona Traction Case*, ¶58.

⁵⁴ *Barcelona Traction Case*, ¶56-57.

⁵⁵ *Genocide Case*, ¶392-393.

⁵⁶ *Genocide Case*, ¶394.

merely by changing the provisions of its own domestic law. This is to prevent Rakkab from evading its responsibility by hiding behind the veil of DORTA which is in reality doing the bidding of the state.⁵⁷

B. IN THE ALTERNATIVE, RAKKAB IS RESPONSIBLE FOR ITS OWN FAILURE TO PREVENT DORTA FROM COMMITTING THESE WRONGFUL ACTS.

Article 2 of ARSIWA provides for both acts and omissions as a basis for attribution.⁵⁸ The attribution of private conduct⁵⁹ to a State for the purpose of invoking Rakkab's international responsibility could *alternatively* be argued on the basis of its capacity to influence, prevent and control activities in its territory as 'a guarantor of private conduct'.⁶⁰

1. Rakkab had an obligation to exercise due diligence.

States by virtue of the 'no-harm'⁶¹ rule, part of the corpus of customary international law, are obligated to exercise due diligence concerning activities within their jurisdiction or control where there is a likelihood that those activities will cause damage to areas beyond the limits of national jurisdiction.⁶²

DORTA's Yak harvest is causing reasonably foreseeable and significant damage beyond the Rakkabi territory as there is a significant decline in the size of Yak herds in Aurok, significantly impacting the remote northernmost region of Aurok⁶³ and preventing young Aurokans from formally passing into adulthood.⁶⁴

⁵⁷ Ryngaert, *supra* note 25, at 164.

⁵⁸ ARSIWA, art.2; Ruggie Principles at 8.

⁵⁹ Committee on Civil and Political Rights (CCPR), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (May 2004) ¶8, U.N. Doc. C.C.P.R./C/21/Rev.1/Add. 13 (26 May 2004) [hereinafter General Comment 31].

⁶⁰ PATRICIA BIRNIE, ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 182 (Oxford Univ. Press 3rd ed. 2002).

⁶¹ ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW 40 (2011)

⁶² Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941) [hereinafter *Trail Smelter Case*]; The Corfu Channel Case (U.K. v. Albania), Judgment, (1949) I.C.J. Rep. 4, ¶22 (Apr. 9) [hereinafter *Corfu Channel Case*]; International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep.226, ¶29 (Jul. 8) [hereinafter *Nuclear Weapons Case*]; Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶29 (Apr. 20) [hereinafter *Pulp Mills Case*].

⁶³ *Compromis*, ¶29.

⁶⁴ *Compromis*, ¶41.

2. Rakkab failed to exercise due diligence.**a. Rakkab did not use the available infrastructure.**

At a minimum, to fulfil the obligation to exercise due diligence, Rakkab had to have had the legal and administrative infrastructure necessary requiring business entities to exercise human rights due diligence⁶⁵ to ensure compliance with its international obligations and use that infrastructure with diligence appropriate in the circumstances.⁶⁶ The obligation to protect necessitated direct regulation and intervention.⁶⁷ It also required Rakkab to directly notify and inform⁶⁸ Aurok of the pertinent details⁶⁹ of the DORTA-sponsored harvest.

In view of the credentials possessed by Rakkab in scientific research⁷⁰, the standard of due diligence required increased commensurately. It required Rakkab to use ‘all the means at its disposal’⁷¹ to ensure their acts to produce Gallvectra did not cause significant damage.

b. Rakkab did not conduct Cultural and Social Impact Assessment.

Rakkab’s environmental impact assessment⁷² was not sufficient to satisfy its due diligence obligation.⁷³ The impact assessment should have incorporated the impacts of DORTA’s activities on indigenous peoples’ rights to natural environment, means of subsistence⁷⁴, traditional knowledge and culture. Rakkab was thus obligated to assess the social, cultural and environmental impact on indigenous peoples.⁷⁵

⁶⁵ Guiding Principles on Business and Human Rights, principles 15 and 17.

⁶⁶ *Trail Smelter Case*, at 1965; *Corfu Channel Case*, ¶22; *Nuclear Weapons Case*, ¶29; *Pulp Mills Case*, ¶101.

⁶⁷ General Comment 24, ¶19.

⁶⁸ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, art. 8, U.N. Doc. No. A/56/10.

⁶⁹ *Pulp Mills*, [110].

⁷⁰ *Compromis*, ¶¶ 8-10.

⁷¹ *LaGrand Case* (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. Rep. 9, ¶28 (Mar. 3); see also *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶81 (Jun. 27) [hereinafter *LaGrand Case*].

⁷² *Clarifications*, ¶7.

⁷³ *Pulp Mills*, ¶204.

⁷⁴ *Mahuika v. New Zealand*, U.N. Doc. No. C.C.P.R./C55/D/547/1993.

⁷⁵ G.A. Res. 61/295, United Nations Declaration on Rights of Indigenous Peoples (Dec. 13, 2007), art. 32.

The nature and magnitude of the Yak harvesting were so considerable that non-contemplation of the impact of Yak harvesting on Aurokans rendered impact assessment deficient.

C. THE ALLEGED ACTS CONSTITUTE ‘INTERNATIONALLY WRONGFUL ACTS’.

1. Rakkab’s conduct is inconsistent with its international obligations.

For the conduct of a State to be inconsistent with its international obligations, it must be contrary to an obligation arising for that State from an applicable rule or principle of international law.⁷⁶ Rakkab was obligated to adopt and enforce measures to protect economic, social and cultural rights of Aurokans extraterritorially⁷⁷ as regards DORTA.

Rakkab was obligated to take the necessary steps to give effect to indigenous peoples’ rights in the domestic order⁷⁸ to ensure its conformity with the Covenant,⁷⁹ the requirement being unqualified and immediate.⁸⁰ Rakkab must have provided remedies to the victims⁸¹ by reducing legal barriers that led to a denial of access to remedy.⁸²

The dismissal of Aurokan claims on the grounds of lack of *locus standi* to allege violations of Rakkabi law⁸³ along with the subsequent non-cognizability of Rakkabi Pivzao community’s claims depicts Rakkab’s failure in this regard. Also, since DORTA is controlled by Rakkab and its acts can be attributed to it, an abuse of human rights by DORTA entails a violation⁸⁴ of Rakkab’s own international law obligations,⁸⁵ even though its acts were lawful in internal law.⁸⁶

⁷⁶ ARSIWA, art. 2.

⁷⁷ Maastricht Principles, principle 32; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶109-112 (Jul. 9).

⁷⁸ ANTONIO CASSESE, INTERNATIONAL LAW 253 (2nd ed. O.U.P.) 2005.

⁷⁹ ICESCR art. 2, ¶2; General Comment 31, ¶13.

⁸⁰ General Comment 31, ¶14.

⁸¹ Maastricht Principles, principles 37, 39.

⁸² ICESCR art.2, ¶3; General Comment 31, ¶26.

⁸³ *Clarifications*, ¶3.

⁸⁴ General Comment 31, ¶8.

⁸⁵ Ruggie Principles at 7.

⁸⁶ ARSIWA art. 3.

2. Damage is caused to Aurok by Rakkab's non-compliance with its international obligations.

A legal injury is necessarily inherent in any breach of an international right of a State.⁸⁷ In practice States undertake legal demarches with a view to invoking State responsibility *vis-à-vis* another State only when the action of that State directly affects them in their economic, commercial, diplomatic or political spheres.⁸⁸

DORTA's acts called for international accountability of Rakkab and led Aurokan Prime Minister to present a demarche to her Rakkabi counterpart demanding that the DORTA-sponsored Yak harvest be ceased and that the Rakkabi government should pay Aurokans their rightful share.⁸⁹

D. RAKKAB CANNOT INVOKE NECESSITY AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS OF THESE ACTS.

Necessity is a ground for excluding wrongfulness when there is grave danger either to the essential interests of the State or of the international community as a whole.⁹⁰ Accepted exceptionally⁹¹, it arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other.⁹² The conditions for invoking necessity must be cumulatively satisfied and the State concerned is not the sole judge of whether those conditions have been met.⁹³

Rakkab had available to it the means of responding to the perceived perils other than by harvesting Yak in Rakkab itself. Other lawful, costlier or less convenient means could be

⁸⁷ Roberto Ago (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility*, U.N. Doc. A/CN.4/246 and Add.1-3 (1971), ¶¶73-74.

⁸⁸ Cassese, *supra* note 82, at 253.

⁸⁹ *Compromis*, ¶42.

⁹⁰ *Report of the International Law Commission to the General Assembly*, (2001) 2 Y.B. Int'l L. Comm'n 80, U.N. Doc. A/CN.4/SER.A/2001/Add.1(Part 2) [hereinafter ILC Report].

⁹¹ *Gabcikovo-Nagymaros Case*, ¶¶47-49.

⁹² ILC Report, at 80.

⁹³ *Id.*

resorted to. On the other hand, the protection of natural environment including the danger of extermination of an animals' population by unrestricted hunting has been considered as an absolute necessity of immediate provisional measures in view of the imminence of hunting.

Though the state has an obligation to protect the right to health, it cannot take such measures to the extent that they violate the rights of others. It has been recognised that the vital medicinal animals necessary to the full enjoyment of health of indigenous peoples should be protected.⁹⁴ For Aurokans, consumption of *Tirhinga Nos Lustuk* conferred health benefits and longevity on all who partook in it.⁹⁵ In indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, denying them their sources of nutrition and breaking their symbiotic relationship has a deleterious effect on their health.⁹⁶

Under the available evidence the requirements of establishing Rakkab's international responsibility are met, resulting in the commission of acts in breach of its international obligations.

II. THE HARVESTING OF THE YAK IN RAKKAB VIOLATES RAKKAB'S INTERNATIONAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES AND THE ENVIRONMENT AND THUS RAKKAB IS OBLIGATED TO END YAK HARVESTING ON ITS TERRITORY.

A. DORTA'S HARVESTING OF THE WILD YAK IS IN CLEAR CONTRAVENTION OF THE INTERNATIONAL OBLIGATIONS OF RAKKAB TO PROTECT ENDANGERED SPECIES.

Rakkab is bound by the principle of *pacta sunt servanda*⁹⁷ and is obligated to fulfil in good faith, the obligations assumed by it under treaties to which it is a party.

⁹⁴ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (Aug. 11, 2000) ¶27 [hereinafter General Comment 14].

⁹⁵ *Compromis*, ¶4.

⁹⁶ General Comment 14, ¶27.

⁹⁷ The Vienna Convention on the Law of Treaties, pmb., 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

1. Rakkab has violated its obligations under the Convention on the Conservation of Migratory Species of Wild Animals, 1979 (“CMS”)

a. Rakkab has violated Article III of CMS.

Rakkab has violated its duties to conserve and protect the endangered species. The states are required to provide immediate protection for migratory species included in Appendix I.⁹⁸ The use of the term *shall endeavour*⁹⁹ imposes a clear obligation upon a state¹⁰⁰ to prevent, control or reduce factors that are likely to further endanger the species.¹⁰¹

In the instant case, the Yak was included in Appendix I of the CMS¹⁰² requiring immediate protection. Rakkab, however, did not stop DORTA-sponsored Yak harvest.¹⁰³ Instead, Rakkab started issuing licenses for any taking of Yak authorizing DORTA, its employees and agents to harvest Yak.

b. DORTA’s Yak harvest does not fall under Article III exceptions.

Takings for scientific purposes, traditional subsistence uses and extraordinary circumstances are allowed under CMS. DORTA’s scientific research programme is essentially a commercial activity in disguise¹⁰⁴, where it solely focuses on profits derived. As the worldwide sales of Gallvectra increased, hunters proportionately killed increasingly high number of Yaks in 2015-16.¹⁰⁵

For any exception to apply, the prerequisite is that it should be precise as to content and limited in space and time¹⁰⁶. Also, it should not operate to the disadvantage of the species. Here, the fact that Yaks have been killed by DORTA for more than seven years for the extraction of

⁹⁸ Convention on the Conservation of Migratory Species of Wild Animals, art. II(3)(b), 1651 U.N.T.S. 333 (entered into force Nov. 1, 1983). [hereinafter CMS]

⁹⁹ CMS, art. III(4).

¹⁰⁰ Commonwealth v. Tasmania, 158 C.L.R. 1 (July 1, 1983).

¹⁰¹ CMS, art. III(4)(c).

¹⁰² *Compromis*, ¶43.

¹⁰³ *Compromis*, ¶46.

¹⁰⁴ Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014 I.C.J. Rep. 226.

¹⁰⁵ *Compromis*, ¶¶21 & 24.

¹⁰⁶ CMS, art. III(5).

Gallvectra which would continue until an alternative drug¹⁰⁷ is found makes it clear that this taking is not limited in time and space. Furthermore, even the Regulation¹⁰⁸ issued by the Rakkabi Agriculture Ministry failed to regulate it.

2. Rakkab has violated its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (“CITES”).

Appendix III of the CITES imposes an obligation on the parties to prevent or restrict exploitation of endangered species with co-operation of other party in control of trade.¹⁰⁹ Aurok required Rakkab’s co-operation because of the Yak’s inclusion within Appendix III. In flagrant disregard of its obligation, Rakkab continued cruel and unsustainable hunting which endangered the species so much so as to warrant its inclusion in Appendix I of the CMS.¹¹⁰ Further decline of the species makes it vulnerable to the threats of extinction.¹¹¹

3. Violation of the Convention of Biological Diversity, 1992 (“CBD”).

Biological diversity includes diversity within species, between species and of ecosystems¹¹² and thus also extends to the migratory species.¹¹³

a. Rakkab has violated its duty to conserve environment and species therein.

The fundamental requirement of the CBD is the maintenance and recovery of viable populations of species in their natural surroundings.¹¹⁴ The state parties are also required to provide protected areas for all the species, free from all the risks and dangers to their

¹⁰⁷ *Compromis*, ¶33.

¹⁰⁸ *Compromis*, ¶44.

¹⁰⁹ Convention on International Trade in Endangered Species of Wild Flora and Fauna, art. II, 993 U.N.T.S. 243 (entered into force July 1, 1975). [hereinafter CITES]

¹¹⁰ *Compromis*, ¶43.

¹¹¹ CITES, Res. Conf. 9.24 (Rev. C.o.P.17), Annex 1.

¹¹² Convention on Biological Diversity, art. 2, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993). [hereinafter CBD]

¹¹³ Alexander Proelss, *The Max Planck Encyclopaedia of Public International Law, Migratory Species, International Protection*, 160 (Oxford Univ. Press 2012).

¹¹⁴ CBD, pmb1.

sustainability¹¹⁵ and adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.¹¹⁶

Despite Yak's inclusion in Appendix I of the CMS on the Scientific Council's recommendation,¹¹⁷ the operation and availability of YakTrakker app to the present day¹¹⁸, providing real-time tracking of Yak herds in Rakkab and its use by Yak hunters to follow and hunt the herds efficiently evidences Rakkab's non-compliance with its international obligations.

b. Rakkab did not comply with the duty of sustainable use of natural resources.

States are required to evolve ways for sustainable use of components of biological diversity¹¹⁹ so as to avoid any adverse impacts by protecting and encouraging customary use of biological resources in accordance with traditional cultural practices¹²⁰ that are compatible with conservation or sustainable use requirements.

In the present case, whereas Aurok with its seasonal hunting practice is abiding by its obligation, Rakkab is indiscriminately hunting the Yak population at unsustainable level, thereby, clearly violating its duty of sustainable use of natural resources.

B. RAKKAB IS UNDER AN OBLIGATION TO END YAK HARVESTING ON ITS TERRITORY.

1. Rakkab's conduct contravenes general principles of law.

a. Rakkab's conduct constitutes an abuse of rights.

The doctrine of abuse of rights is a general principle of law¹²¹ and is typically applied in cases of shared resources.¹²² An abuse of rights occurs, *inter alia*, if one State exercises its rights

¹¹⁵ *Id.* art. 8.

¹¹⁶ *Id.* art. 10(b).

¹¹⁷ *Compromis*, ¶43.

¹¹⁸ *Compromis*, ¶35.

¹¹⁹ CBD, art 10.

¹²⁰ *Id.* art. 10(c).

¹²¹ Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. Rep. 7, ¶ 95 (Sep. 25). [hereinafter *Gabcikovo-Nagymaros Case*]

¹²² M. BYERS, THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW, 424 (O.U.P. 2002).

in a way that impairs the capacity of a second State to exercise its rights, and the disadvantages caused to the second State exceed the advantages received by the first State.¹²³

By authorising harvest of Yak, a species of critical cultural and traditional importance to Aurok, Rakkab exercised its rights to exploit the natural resources in a way that impaired the capacity of Aurok to exploit the natural resources.

b. Rakkab contravened the principle of sustainable development.

The principle of sustainable development is a general principle of modern international law¹²⁴ which requires States to balance ‘environmental considerations with developmental considerations’.¹²⁵ It required Rakkab to integrate cultural and traditional considerations of Aurokans into its approval process.¹²⁶ Rakkab’s approval of the EIA, which failed to address the issue of religious and cultural rights of Aurokans, constituted a failure to integrate protection of rights of Aurokans into its approval process.

2. Rakkab is thus obligated to end Yak harvesting on its territory as the Yak forms a part of shared and common resource of Aurok and Rakkab.

States have an obligation to cooperate with a view to the conservation¹²⁷, management and, where applicable, regulation of the harvesting of species which constitute common resources by virtue of their migratory character, or because they inhabit shared habitats, with regard more particularly to migratory species.¹²⁸

In the present case, the Yak forms a part of the environment of its Range States, i.e. Aurok and Rakkab. Thus, Rakkab is responsible for the fulfilment of its international environmental obligations concerning the utilization of shared resource. A failure to comply with the above obligates Rakkab to end Yak harvesting on its territory.

¹²³ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, 345 (Longmans 1955).

¹²⁴ *Gabcikovo-Nagymaros Case*, at 88-95.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Draft Principles of Conduct in the field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by two or more States, prin. 12, U.N.E.P. Doc. I.G.12/2.

¹²⁸ W. BURHENNE, INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES, 55 (Kluwer Law International 1974).

Rakkab's hunting of the Kayleff Yak violates the Right to Self-Determination, Religious and Cultural Rights of the Aurokan people.

III. RAKKAB'S HUNTING OF THE KAYLEFF YAK VIOLATES THE RIGHT TO SELF-DETERMINATION, RELIGIOUS AND CULTURAL RIGHTS OF THE AUROKAN PEOPLE.

A. RAKKAB'S HUNTING OF THE KAYLEFF YAK VIOLATES THE RIGHT TO SELF-DETERMINATION OF AUROKAN INDIGENOUS PEOPLES.

1. The Aurokan people are an indigenous people who have the collective right to self-determination.

The right of self-determination is a human rights norm that exists in international law as customary law¹²⁹ and extends to indigenous peoples.¹³⁰ Aurok is an indigenous nation, composed almost entirely of descendants of the Pivzao civilization.¹³¹ Nearly all Aurokans and Rakkabi adherents to Pivzao traditions, self-identify as indigenous¹³² and share historical continuity of occupation of ancestral lands, culture and common ancestry¹³³ with Pivzao civilization since 1000 BCE.¹³⁴ They are living descendants of pre-invasion inhabitants of Gaur Highlands who still retain their social, cultural and religious systems.¹³⁵

¹²⁹ TED MOSES, OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF DETERMINATION 155, 157 (Pekka Aikio & Martin Scheinin eds., 2000); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 75 (2nd ed. 2004) [hereinafter Anaya Int'l Law].

¹³⁰ G.A. Res. 61/295, 2007 United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) art. 2 [hereinafter UNDRIP]; The Indigenous and Tribal Peoples Convention (No. 169) art. 3, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention 169]; Committee on Civil and Political Rights (CCPR), General Comment No. 23: Rights of Minorities (1994) ¶3.2 [hereinafter General Comment 23].

¹³¹ José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, ¶379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) [hereinafter Cobo Study]; *Compromis*, ¶7.

¹³² ILO Convention 169 art. 1(2); Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶162 (Feb. 4, 2010) [hereinafter *Endorois Case*]; *Clarifications*, ¶1.

¹³³ Cobo Study, ¶380.

¹³⁴ *Compromis*, ¶2.

¹³⁵ *Compromis*, ¶6, 7; Anaya Int'l Law at 75; Lubicon Lake Band v. Canada, Communication 167/1984, Human Rights Committee, ¶2.2 (Mar. 26, 1990).

2. Rakkab has deprived Aurokan peoples of their means of subsistence.

Peoples are entitled to freely dispose of their natural wealth and resources for their own ends¹³⁶ and in no case, may a people be deprived of its own means of subsistence.¹³⁷ This right entails corresponding duties for all States and the international community.¹³⁸

The right to permanent sovereignty over natural wealth and resources¹³⁹ is linked to self-determination¹⁴⁰ and is a rule of customary international law,¹⁴¹ non-derogable as *jus cogens*.¹⁴² It extends to indigenous peoples.¹⁴³ In fulfilling economic, social and cultural rights extra-territorially, Rakkab must observe the right to self-determination of Aurokan people.¹⁴⁴

a. Rakkab has violated its international obligation to respect and protect the right to not be deprived of means of subsistence of Aurokan peoples.

Article 1(2) was written in the context of encouraging under-developed countries in the traditional use of their natural resources.¹⁴⁵ Aurok is a least developed country¹⁴⁶ and its peoples are entitled to the full enjoyment of their natural resources for traditional activities, including

¹³⁶ International Covenant on Civil and Political Rights art. 1(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹³⁷ ICCPR art. 1(2); ICESCR art. 1(2); UNDRIP art. 20.

¹³⁸ General Comment 12, ¶5.

¹³⁹ ICESCR art. 25; G.A. Res. 1803 (XVII), Declaration on Permanent Sovereignty over Natural Resources ¶1.1, 1.2,6,7 (Dec. 14, 1962) [hereinafter Declaration on Permanent Sovereignty over Natural Resources]; G.A. Res. 626 (VII), Right to Exploit Freely Natural Wealth and Resources, ¶47 (Dec. 21, 1952) [hereinafter Declaration on Free Exploitation of Natural Resources].

¹⁴⁰ Declaration on Permanent Sovereignty over Natural Resources, pmb1.

¹⁴¹ Armed Activities on the Territory of the Congo Case (Dem. Rep. of Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶244 (Dec. 19) [hereinafter *Armed Activities Case*].

¹⁴² G.A. Res. 41/128, Declaration on the Right to Development, ¶1.2 (Dec. 4, 1986) [hereinafter Declaration on Development]; Ben Saul et. al., Commentary, *International Covenant on Economic, Social and Cultural rights: Commentary, Cases, and Materials*, 112 (Oxford Univ. Press ed. 2014) [hereinafter ICESCR Commentary].

¹⁴³ Daes Report, ¶32.

¹⁴⁴ Maastricht Principles, ¶32(c).

¹⁴⁵ Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty Over Natural Resources, Comm'n on Human Rights on its Fifty-Sixth Session, ¶39, 42, U.N. Doc.E/CN.4/Sub.2/2004/30 [hereinafter Daes Report].

¹⁴⁶ *Compromis*, ¶7.

Yak hunting.¹⁴⁷ Pivzaons have relied on subsistence hunting of the Yak for virtually every aspect of their lives since time immemorial.¹⁴⁸

Consistent with the right to self-determination and to development, subsistence practices must be accorded priority and not be subordinated to other forms of development that may be initiated by Rakkab or DORTA, without Aurokan consent.¹⁴⁹ Indigenous livelihoods do not necessarily coincide with national boundaries and necessitates being jointly protected across sovereign borders.¹⁵⁰ Since the Gaur Highlands extend across sovereign borders of Aurok and Rakkab, Rakkab owes an international obligation to respect and protect the former's interest in the resource.¹⁵¹

b. Yak harvesting in Rakkab has negatively impacted the way of life of Aurokan people.

Survival of indigenous peoples' particular way of life depends on access and rights to their traditional land and natural resources thereon.¹⁵² The Aurokan people's culture, religion and traditional way of life are intimately intertwined¹⁵³ with their ancestral lands, the Gaur Highlands.¹⁵⁴ The Yak is central to the Aurokan peoples' way of life and identity.¹⁵⁵ Without it, the cultural survival of Aurokans is at stake,¹⁵⁶ with no opportunity for young residents of Aurok in the northernmost settlements to participate in successful Yak hunts.¹⁵⁷ Rakkab has violated its

¹⁴⁷ ILO Convention 169 art. 23; UNDRIP art. 20; *Länsman v. Finland*, Communication 511/1992, Human Rights Committee, ¶9.5 (Oct. 26, 1994) [hereinafter *Länsman Case*].

¹⁴⁸ *Compromis*, ¶2.

¹⁴⁹ Inuit Circumpolar Conference, Principles and Elements for a Comprehensive Arctic Policy 37, ¶8 (1992).

¹⁵⁰ ICESCR Commentary at 92; Nordic Saami Convention art. 42, 43.

¹⁵¹ Maastricht Principles, pmbi., ¶¶3,6.

¹⁵² *Endorois Case*, ¶150.

¹⁵³ *Endorois Case*, ¶156; African Comm'n on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, Afr. Ct. H.P.R., ¶103, 142 (May 26, 2017) [hereinafter *Ogiek Case*].

¹⁵⁴ Case of Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶82, 86 [hereinafter *Saramaka Case*]; *Compromis*, ¶2.

¹⁵⁵ *Compromis*, ¶7; General Comment 21, ¶36-37.

¹⁵⁶ *Yakye Axa Community v. Paraguay* Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No., 125 at 41 (June 17, 2005) [hereinafter *Yakye Axa Case*]; *Saramaka Case*, ¶86, 122.

¹⁵⁷ *Compromis*, ¶41.

international obligation, to refrain from conduct that impairs the enjoyment and exercise of social and cultural rights of persons outside its territories.¹⁵⁸

B. THE PIVZAO CIVILIZATION SHARES A DISTINCTIVE CONNECTION TO THE GAUR HIGHLANDS AND EXERCISE THE RIGHT TO OWNERSHIP OVER ITS NATURAL RESOURCES.

Indigenous peoples have inherent, permanent rights to the lands and resources,¹⁵⁹ traditionally occupied or used by them.¹⁶⁰ Their special attachment to them is integral to their identity.¹⁶¹ The Gaur Highlands form part of a symbolic and religious space with which the history, culture and current dynamics of Pivzao people are linked.¹⁶²

Traditional possession of land by indigenous people has the equivalent effect as that of a state granted full property title.¹⁶³ Their right of collective ownership and possession of the Gaur Highlands should be recognized¹⁶⁴ in light of the historical and spiritual¹⁶⁵ relationship shared between the land and peoples,¹⁶⁶ and traditional knowledge connected to the lands which is sacred to the peoples.¹⁶⁷ Being a party to the ILO Convention No. 169,¹⁶⁸ Rakkab is bound to

¹⁵⁸ Maastricht Principles, ¶20.

¹⁵⁹ UNDRIP pmb1.; Committee on Elimination of all forms of Racial Discrimination (CERD), General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (Sep. 24, 2009) ¶15 [hereinafter General Recommendation 32].

¹⁶⁰ UNDRIP art. 26; ILO Convention 169 art. 14, 15; General Comment 21; *Awes Tingni Case*, ¶153.

¹⁶¹ Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine Distinctive*, 86 WASHINGTON UNIV. L.R. 53, 72 (2008).

¹⁶² *Awes Tingni*, ¶83(d).

¹⁶³ *Endorois Case*; United Nations Declaration on Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, Sep. 13, 2007 at 33 U.N. Doc. A/RES/61/295 [hereinafter UNDRIPs Manual].

¹⁶⁴ ILO Convention 169 art. 13, 14(1), 15; American Convention on Human Rights art. 21, Nov. 26, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; *Awes Tingni Case*, ¶148-153.

¹⁶⁵ UNDRIP art. 25.

¹⁶⁶ Rio Declaration, ¶26.1; PAUL KEATING, MABO: THE HIGH COURT DECISION ON NATIVE TITLE 1 (Aus. Govt. Publishing Ser. 1993).

¹⁶⁷ ILO Manual at 29; *Compromis*, ¶4.

¹⁶⁸ *Compromis*, ¶48.

take special measures to safeguard the right of the Pivzao peoples to use lands that they have traditionally had access to for their subsistence and traditional activities.¹⁶⁹

C. RAKKAB HAS VIOLATED ITS OBLIGATIONS UNDER INTERNATIONAL LAW TO RESPECT AND PROTECT THE RIGHT TO CULTURE OF AUROKAN PEOPLES.

Aurokan population has a distinct culture and way of life centred and dependent on the Yak.¹⁷⁰ Manifestations of their culture include traditional clothes, distinct way of practicing rituals, customs, traditional knowledge, tools and shelter¹⁷¹ which distinguishes them from other communities.¹⁷² Aurokan people have the right to take part in cultural life.¹⁷³ It comprises of the right to *access* and *participate* in the political life of society and engage in one's own cultural practices.¹⁷⁴ These are violated due to scarcity of Yaks, rendering young Aurokans unable to participate in successful Yak hunting. Without formally passing into adulthood through that rite, strong religious tradition discourages them from participating in village governance.¹⁷⁵

Rakkab has violated its international and extra-territorial obligation to *respect* and *protect* the right of every Aurokan to engage in their cultural practices and religion by interfering with their enjoyment of cultural way of life.¹⁷⁶ It has also violated its minimum core obligation¹⁷⁷ to obtain the free and informed prior consent¹⁷⁸ of the Aurokan people when the preservation of the

¹⁶⁹ ILO Convention 169 art. 14(1); Oyvind Ravna, *The Process of Identifying Land Rights in parts of Northern Norway: Does the Finnmark Act Prescribe an Adequate Procedure within the National Law?* 3 YEARBOOK OF POLAR LAW 423, 424 (2011).

¹⁷⁰ *Compromis*, ¶7, 37; *Endorois Case*, ¶6; *Saramaka Case*, ¶82.

¹⁷¹ *Compromis*, ¶4, 5; General Comment 23 ¶7.

¹⁷² *Ogiek Case*, ¶182.

¹⁷³ ICESCR art. 15(1)(a); ICCPR art. 27; UNDRIP art. 5, 8, 27(1); International Convention on Elimination of All forms of Racial Discrimination art. 5(e)(vi), Jan. 4, 1969, 660 U.N.T.S. 195; Convention on Rights of Child art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3; African Charter on Human and Peoples' Rights art. 17(2), June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACPHR]; Convention for the Protection of Human Rights and Political Freedoms art. 8, Nov. 5, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; ILO Convention 169 art. 5; UDHR art. 27(1); U.N. Charter art. 55(b).

¹⁷⁴ *Id.*; *Länsman Case*, ¶9.1; General Recommendation 23 ¶ 41; Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Right to take part in cultural life (article 15 (1) (a) of the Covenant), U.N. Doc. E/C.12/40/12 (May 9., 2008).

¹⁷⁵ *Compromis*, ¶41.

¹⁷⁶ *Id.*; ICESCR art. 15(4); Maastricht Principles ¶3.

¹⁷⁷ ICESCR art. 15(1)(a); International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), ¶9.

¹⁷⁸ General Comment 21, ¶37.

Yak, a cultural resource of Aurokans was at risk of extinction¹⁷⁹ for use in development activities.¹⁸⁰

Indigenous peoples have the right to transmit their cultural traditions and customs.¹⁸¹ Indigenous children are holders of significant cultural knowledge and play a fundamental role as transmitters of cultural values across generations.¹⁸² Rakkab has violated its obligation to facilitate the collective nature of enjoyment of right to culture of indigenous children.¹⁸³

D. ACTIONS OF RAKKAB UNLAWFULLY LIMIT THE FREEDOM OF AUROKAN PEOPLE TO HAVE AND MANIFEST THEIR RELIGION.

Religion serves an important part in the formation of identity¹⁸⁴ and is intertwined with culture of indigenous peoples.¹⁸⁵ Freedom of religion's¹⁸⁶ fundamental character is demonstrable in its non-derogable nature,¹⁸⁷ bestowing the right to have a religion and manifest it in community with others.¹⁸⁸ This freedom of Aurokan people, to hunt and worship the Yak is a central part of Pivzao culture and religion and a complex community event.¹⁸⁹ It is protected unconditionally.¹⁹⁰

¹⁷⁹ *Compromis*, ¶24, 16, 2; General Comment 21, ¶55.

¹⁸⁰ *Id.*; *Compromis*, ¶28, 22.

¹⁸¹ UNDRIP art. 11.

¹⁸² Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, ¶79, HRC Doc. A/HRC/EMRIP/2012/3 (Apr. 30, 2012).

¹⁸³ Committee on the Rights of the Child (CRC), General Comment No. 11: Indigenous children and their rights under the Convention (Feb. 12, 2009); UNDRIP pmb1.

¹⁸⁴ *Ogiek Case*, ¶106.

¹⁸⁵ Daes Report, ¶69.

¹⁸⁶ ICCPR art. 18, 27; G.A. Res. 36/55 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief (Nov. 25, 1981) art. 1, 6; UDHR art. 18; UNDRIP art. 34; ACHR art. 12; ACPHR art. 8; ECHR art. 9.

¹⁸⁷ U.N., Econ. & Soc. Council, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex* (1984) U.N. Doc. E/CN.4/1984/4 (1984), ¶58.

¹⁸⁸ Centre for Civil and Political Rights (CCPR), General Comment No. 22: Article 18 (Freedom of Thought and Conscience) (July 30, 1993) ¶1, 3 [General Comment 22]; O.A.S. Res. AG/RES.2888 (XLVI-O/16), *American Declaration on Rights of Indigenous Peoples* (June 15, 2016) art. 6.

¹⁸⁹ *Compromis*, ¶3,24.

¹⁹⁰ General Comment 22, ¶3.

Freedom to manifest one's religion extends to rituals associated with certain stages of life, ceremonial acts, rites and customs.¹⁹¹ Aurokan peoples' calendar is based upon the Yak's migration and their central festivals are coordinated with the animal's movements and the monthly consumption of *Tirhinga Nos Lustuk* is a solemn, ritualized event that includes a liturgical component of prayers and hymns.¹⁹²

The interference with accessing the Yak caused by unsustainable hunting of the Yak in Rakkab, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship.¹⁹³

IV. RAKKAB MUST PAY AUROK, A PORTION (TO BE DETERMINED IN SUBSEQUENT PROCEEDINGS) OF THE PROFITS REALISED FROM SALES OF GALLVECTRA BECAUSE THE APPROPRIATION AND EXPLOITATION OF TRADITIONAL KNOWLEDGE BELONGING TO THE AUROKAN PEOPLE WITHOUT COMPENSATION IS INCONSISTENT WITH INTERNATIONAL LAW.

A. BY NOT TAKING AUROK'S PRIOR INFORMED CONSENT, RAKKAB HAS BREACHED ITS OBLIGATION UNDER INTERNATIONAL LAW.

1. Pursuant to the principle of obtaining prior informed consent the appropriation and exploitation of traditional knowledge was in violation of international law.

There is clear consensus within international human rights jurisprudence¹⁹⁴ that States must engage in good faith consultations with indigenous people prior to the exploitation of resources that would impact their traditionally used resources.¹⁹⁵ Fair and equitable sharing of benefits arising out of the utilization of the genetic resource is one of the main objectives under international law.¹⁹⁶

¹⁹¹ *Id.* at ¶4.

¹⁹² *Compromis*, ¶4.

¹⁹³ *Ogiek Case*, ¶164.

¹⁹⁴ Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 Nw. J. Hum. Rts. 54 (2011).

¹⁹⁵ UNDRIP art. 32; General Comment 24, ¶17.

¹⁹⁶ Convention on Biological Diversity art. 1, Jun 5, 1992, 1760 U.N.T.S 79[hereinafter CBD]; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the

This makes benefit sharing agreements¹⁹⁷ a fundamental necessity for protecting the world's poor.¹⁹⁸ Prior informed consent over access to resources forms part of an international equitable principle and a safeguard against unfair consequences.¹⁹⁹ Inevitably, equity forms the basis of PIC as an element of international law in itself, becoming one of the 'general principles of law recognised by civilised nations.'²⁰⁰

Any utilisation of genetic resources generating benefits is a ground for benefit sharing.²⁰¹ Utilisation of genetic resources is defined as 'research and development on the genetic composition of genetic resources, including through the application of biotechnology'.²⁰² Consequently, drugs based on extraction of chemical resources are subject to benefit sharing.

Thus, for permitted access, users of genetic resources are obliged to share benefits arising from the utilisation of such resources with the providers,²⁰³ benefits which help providers to develop their own sustainable uses to preserve biodiversity.²⁰⁴ Rakkab under its international obligations²⁰⁵ had to share benefits arising from the utilisation of genetic resources with the resource state i.e. Aurok which included benefits derived from usage of traditional knowledge.²⁰⁶

Rakkab was under an obligation to take appropriate measures with the aim of ensuring that resources accessed involve establishing mutually agreeable terms with the indigenous

Convention on Biological Diversity art. 3,5, Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1 [hereinafter Nagoya Protocol].

¹⁹⁷ *Id.*

¹⁹⁸ Feifei Jiang, *The Problem with Patents*, HARVARD INT'L REV. (Dec. 19, 2008), <http://hir.harvard.edu/article/?a=1795>.

¹⁹⁹ ANTHONY TAUBMAN, *Genetic Resources*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 181, 289 (Silke Von Lewinski ed. 2nd ed. 2008).

²⁰⁰ Statute of International Court of Justice art. 38.

²⁰¹ Evanson Chege Kamau, Bevis Fedder & Gerd Winter, *The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and What are the Implications for Provider and User Countries and the Scientific Community?* 6/3 LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 246, 251 (2010).

²⁰² Nagoya Protocol art. 2(c).

²⁰³ Cynthia M. Ho, *Biopiracy and Beyond: A consideration of socio-cultural conflicts with global patent policies*, 39 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 433, 436 (2006); Addis Ababa Principles and Guidelines For The Sustainable Use Of Biodiversity (2004), U.N. doc A/67/222, Practical Principle 12.

²⁰⁴ *See supra* note 8 at 250.

²⁰⁵ CBD art. 15.7.

²⁰⁶ CBD art. 8 (j).

population.²⁰⁷ Participation and cooperation of people affected is mandatory²⁰⁸ for equitable distribution of profits.

In this case, Aurokans are the first victims of developmental activities, as it is pursued with no regard to the principle of free, prior and informed consent.²⁰⁹ The Aurokans were not involved in any benefit sharing agreement and see no profit from their discovery even though they are in effect the ones who discovered the drug.²¹⁰

2. Misappropriation of traditional knowledge by Rakkab has breached Aurok's right to sovereignty over its genetic resources and its right to development.

There is an acknowledgement at international level that states have sovereign rights over their own resources.²¹¹ The right to permanent sovereignty over natural wealth and resources²¹² is a rule of customary international law²¹³ and is non-derogable as *jus cogens*.²¹⁴

The Convention on Biological Diversity is hard law and forms the chief international legal instrument as it recognizes the sovereign right of each State to exploit their resources in accordance with their own environmental policies.²¹⁵

Article 16(5) lays down that intellectual property rights systems cannot run counter to the objectives of the convention.²¹⁶ While Article 16(2) states that technology transfer process should be consistent with the protection under intellectual property rights, this sanction granted

²⁰⁷ Nagoya Protocol art. 7.

²⁰⁸ ILO Convention 169 art. 5; Maastricht Principles ¶7.

²⁰⁹ United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, Foreword, Sep. 13, 2007, U.N. doc A/RES/61/295, [hereinafter UNDRIPS Manual].

²¹⁰ *Compromis*, ¶37.

²¹¹ Bronwyn H. Arthur, Comment, *A Commentary on the Convention on Biological Diversity*, L.L.M. Research Paper Environment (Laws 539) Law Faculty, Victoria University of Wellington (1993).

²¹² ICESCR art. 25; Declaration on Permanent Sovereignty over Natural Resources art. 1(1), 1(2), 6, 7.

²¹³ *Armed Activities Case* at 244.

²¹⁴ Declaration on Development art. 1(2).

²¹⁵ CBD art. 3.

²¹⁶ CBD art. 16.

to intellectual property rights is limited since it is still subject to the limitations under Article 15 and Article 16(5).²¹⁷

Thus, Aurok has a legal basis to seek a share in the benefits obtained by utilization of their resources. By taking away Aurok's traditional knowledge Rakkab has violated Aurok's right to strengthen their own relationship with their traditionally owned resources.²¹⁸ They have a right to maintain, control, protect and develop their intellectual property over such traditional knowledge.²¹⁹

B. RAKKAB'S ACTS AMOUNT TO INCONSISTENT APPLICATION OF POLICY UNDERLYING PATENT ACT.

1. Rakkab's acts have disregarded the reward theory under patent law.

The underlying policy of patent grant is to reward inventions and encourage development of innovations.²²⁰ The reward theory on patent protection states that such protection is granted to reward the inventor for his labour and expense in creating the invention.²²¹ If the purpose underlying patent law is to reward those who invested time and labour into the invention,²²² then right of the indigenous communities cannot be denied, since they perform all the development steps with respect to the invention other than the isolation of the active substance.²²³

The indigenous people who provided the initial source of knowledge about a medicine cannot be among the least likely to benefit from the resulting drugs. The "*tainted research theory*"²²⁴

²¹⁷ INSTITUTIONAL INTERACTION IN GLOBAL ENVIRONMENTAL GOVERNANCE: SYNERGY AND CONFLICT AMONG INTERNATIONAL AND EU POLICIES (Sebastian Oberthür & Thomas Gehring eds, 2006).

²¹⁸ UNDRIP art. 25.

²¹⁹ UNDRIP art. 26.

²²⁰ World Intellectual Property Org.[WIPO], *Patents: What is a patent?* <https://www.wipo.int/patents/en/>.

²²¹ WILLIAM FISHER, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Cambridge Univ. Press, 2001).

²²² Catherine Saez, *Developing Countries Urged to Beat Biopiracy With Patent Examination, Regulatory Frameworks*, INTELLECTUAL PROPERTY WATCH (Feb. 7, 2014.), <http://www.ip-watch.org/2014/02/07/developing-countries-urged-to-beat-biopiracy-with-patent-examination-regulatory-frameworks/>.

²²³ Lester I. Yano, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 UCLA L. REV. 443, 463 (1993).

²²⁴ *Regents of the University of California v. Eli Lilly and Co.* 119 F.3d. 1559 (Federal Circuit).

stated that a case of fraud can be made against those who seek patents based on stolen research material.

2. The prerequisites of patent law are not achieved.

a. Discoveries are not a subject matter of patent law.

By granting patents to applications based on traditional knowledge, discoveries are being treated as inventions.²²⁵ The drug Gallvectra is nothing more than a refined version of a traditional dish called Tirhinga Nos Lustuk also made from the gallbladder of the Yaks and has the same benefits as the drug.²²⁶

It is common knowledge that Governments grant patents to encourage creativity and novelty, and to protect original inventors. But in this case DORTA seeks protection for a drug it did not actually invent. No one except those who first discovered the health benefits of the gallbladders should be allowed to profit from the Lustuk Enzyme.²²⁷

b. The patent lacks novelty.

Various multilateral²²⁸ and regional²²⁹ treaties have established that a patent is granted on the subject matter only when it is novel, involves an inventive step (to be non-obvious) and is capable of industrial application.²³⁰ An invention (drug) is not novel when Traditional Knowledge (hereinafter TK) already provides a direct relevant hint or constitutes the first step of the inventive process.²³¹ If in a relevant sense the benefit was known without being aware of its

²²⁵ Gavin Stenton, *Biopiracy within the Pharmaceutical Industry: A Stark Illustration of just how Abusive, Manipulative and Perverse the Patenting Process can be towards Countries of the South*, 1(2) HERTFORDSHIRE L.J., 1(2), 30, 36 (2003).

²²⁶ Lesley Benn, *Go yak where you came from and back off our yaks!* COURIER MAIL, Sep. 14, 2018.

²²⁷ *Compromis*, ¶17.

²²⁸ The Paris Convention for the Protection of Industrial Property, Mar 20, 1883, WO020EN [hereinafter Paris Convention]; The Patent Cooperation Treaty, Jun 19, 1970, TRT/PCT/001 [hereinafter PCT]; The Patent Law Treaty, Jun 1, 2000, TRT/PLT/001; The Agreement on Trade-Related Aspects of Intellectual Property Rights, Jan 1, 1995, IP/N/1/-/P/ [hereinafter TRIPs].

²²⁹ The European Convention on Patents, Oct, 5, 1973, EPA/EPO/OEB [hereinafter ECP].

²³⁰ PCT art. 33(1); TRIPs art. 27; ECP art. 54, 56, 57.

²³¹ L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW 476 (4th ed. Oxford, 2001).

chemical composition or identifiable chemical structure,²³² then it will be considered to be part of the state of the art.

Rakkab's claim of novelty is destroyed on the basis of clearly demonstrated prior public use.²³³ The Aurokans consuming the Yak's Gallbladder to promote their health is a long-known use of the Enzyme²³⁴ and is therefore part of prior public use. Further, Professor Cauty's study²³⁵ substantiates the same.

c. The patent lacks an inventive step.

If having regard to the state of the art, it is not obvious to the person skilled in the art then it shall be said to involve an inventive step. This is a test which may include practitioners of this form of TK.²³⁶ A patent shall not involve an inventive step when the general laboratory practice is such that is well-known and takes place in all laboratories, commonly.²³⁷

Any individual skilled in the art can, after the common method of experimentation and isolation, come to the same conclusion²³⁸ as arrived at by Dr. Bello and his team of biologists.²³⁹ A claimed genera being well known to contain hunger suppressant ingredients and preparing an extract with the same quality was obvious for the person skilled in phytochemistry and phytopharmacology.²⁴⁰

²³² Merrel Dow Pharmaceuticals Incorporation v. H.N. Norton & Co. Ltd. R.P.C. 76 (1996).

²³³ Linda Bullard, *Freeing the Free Tree: A Briefing Paper on the First Legal Opposition to a Biopiracy Patent: The Neem Case* NW Resistance Against Genetic Engineering, Mar. 1, 2005 <http://nwrage.org/content/freeing-free-tree-briefing-paper-neem-biopiracy-case>.

²³⁴ *Compromis*, ¶17.

²³⁵ *Compromis*, ¶16.

²³⁶ WIPO Secretariat, *Recognition of Traditional Knowledge Within the Patent System* (2008), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_13/wipo_grtkf_ic_13_7.pdf (last visited Jan 11, 2019).

²³⁷ SILKE VON LEWINSKI, *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 115(2nd ed., Kluwer Law International 2008).

²³⁸ Lester I. Yano, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 UCLAL. REV. 443, 463 (1993).

²³⁹ *Compromis*, ¶14.

²⁴⁰ World Intellectual Property Organization, *Case Study: The Hoodia Plant* (WIPO, 2008) http://www.wipo.int/export/sites/www/academy/en/about/global_network/educational_materials/cs1_hoodia.pdf (last visited 21 September 2018).

d. The patent is morally repugnant.

A patentable invention may be excluded from commercial exploitation when it is necessary to protect morality.²⁴¹ It is Aurokans' right as authors²⁴² of TK to be recognized as the creators of their scientific productions and to object to any modification, distortion or derogatory action,²⁴³ prejudicial to their honour and reputation.²⁴⁴ Rakkab was under an obligation to respect the human right to benefit from the moral and material interests of the Aurokan people as authors,²⁴⁵ by not infringing their right to be recognized as the creators of their scientific productions.²⁴⁶

Dr. Bello's discovery of the Lustuk Enzyme is directly attributable to his study of the Aurokan people's dietary and cultural practices.²⁴⁷ The unauthorised use of Lustuk enzyme by DORTA for 'Gallvectra' is a theft of valuable resources and is described as biopiracy.²⁴⁸ The demand for Gallvectra is immoral to the indigenous community as it negatively impacts the indigenous culture.²⁴⁹

C. RAKKAB OWES COMPENSATION TO AUROK FOR MISAPPROPRIATING AND EXPLOITING ITS TRADITIONAL KNOWLEDGE.

A State responsible for an internationally wrongful act, which damage cannot be made good by restitution, owes compensation for the financially assessable damage caused.²⁵⁰ Rakkab must pay Aurok their rightful share of the profits since DORTA has

²⁴¹ PCT art. 21(6).

²⁴² ICESCR art. 15(1)(c).

²⁴³ Lakshmi Sarma, *Biopiracy: Twentieth Century Imperialism in The Form Of International Agreements*, 13 TEMP. INT'L & COMP. L.J. 107, 113 (1999).

²⁴⁴ ICESCR Commentary at 17.

²⁴⁵ *Compromis*, ¶37.

²⁴⁶ *See Supra* note 39.

²⁴⁷ *Compromis*, ¶13.

²⁴⁸ Grant E. Isaac & William A. Kerr, *Bioprospecting or Biopiracy?*, 7 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 35, 52 (2005).

²⁴⁹ *Compromis*, ¶21.

²⁵⁰ Case Concerning the Factory at Chorzow, 1927 P.C.I.J (ser. A) No. 12, at 49 (Nov.21); *Corfu Channel Case*, at 49; ARSIWA art. 34, 36.

MEMORIAL FOR THE APPLICANT

unjustly benefitted from the Aurokan people's traditions and their ancestor's knowledge of which they are the current custodians.²⁵¹

²⁵¹ *Compromis*, ¶42; Eraldo M. Costa-Neto, *Animal-based Medicines: Biological Prospection and the Sustainable Use of Zootherapeutic Resources*, 77 ANAIS DA ACADEMIA BRASILEIRA DE CIÊNCIAS 33, 40 (2005).

PRAYER FOR RELIEF

For the foregoing reasons, Aurok respectfully requests the Court to adjudge and declare that:

1. Rakkab is responsible for the internationally wrongful acts because DORTA's actions are attributable to Rakkab, or in the alternative, Rakkab is responsible for its own failure to prevent DORTA from committing these 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 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 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,

AGENTS OF THE APPLICANT

