

D.M. HARISH MEMORIAL INTERNATIONAL LAW MOOT COURT COMPETITION 2007

**CASE CONCERNING THE USE OF GENETIC MATERIAL OF ZUSHIS FOR THE CURE OF
RAPID EROSION OF WHITE BLOOD CELLS.**

**IN THE INTERNATIONAL COURT OF JUSTICE
LA COUR INTERNATIONALE DE JUSTICE**

**Peace Palace, The Hague
Netherlands**

**The Republic of Attandra
Claimant**

v.

**The Republic of Zarica
Respondent**

**La Republique De Attandra
Requerant**

v.

**Le Republique De Zarica
Repondant**

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

JOINTLY NOTIFIED TO THE COURT ON 13TH OCTOBER, 2006

**MEMORIAL FOR THE CLAIMANT
ATTANDRA**

MEMORIAL FOR THE APPLICANT

INDEX

CONTENTS	PAGE
INDEX OF AUTHORITIES	2
STATEMENT OF JURISDICTION	11
SYNOPSIS OF FACTS	12
SUMMARY OF ARGUMENTS	14
BODY OF ARGUMENTS:	16
I. ATTANDRA HAS THE <i>JUS STANDI</i> TO PRESENT THE CLAIM.	16
II. THE ACTIONS OF RCRI ARE ATTRIBUTABLE TO THE REPUBLIC OF ZARICA.	20
III. THE STATE OF ZARICA HAS FLAGRANTLY VIOLATED ITS CUSTOMARY INTERNATIONAL LAW OBLIGATIONS.	21
IV. THE REPUBLIC OF ZARICA HAS VIOLATED THE RIGHTS OF THE ZUSHIS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR).	23
V. THE BLOOD AND TISSUE SAMPLES OF THE ZUSHIS IS PROPERTY.	29
VI. THE BILATERAL TRADE AGREEMENT ENTERED INTO BETWEEN THE REPUBLIC OF ATTANDRA AND THE REPUBLIC OF ZARICA HAS BEEN VIOLATED.	31
VII. THE REPUBLIC OF ATTANDRA’S NATIONALIZATION OF ZUSHI MEDICAL LTD. IS IN CONFORMITY WITH ITS INTERNATIONAL OBLIGATIONS.	33
VIII. THE DEFENCE OF ‘ STATE OF NECESSITY’ DOES NOT APPLY IN THE PRESENT CASE	35
CONCLUSION/PRAYER	37

MEMORIAL FOR THE APPLICANT

INDEX OF AUTHORITIES

ARTICLES	REFERENCE(PAGE) IN THE BODY OF ARGUMENTS
1. “The status of rebels under the 1977 Geneva protocols on non international armed conflict”, 30 <i>Int’l and Comp. L. Q.</i> , (1981) 416.	7
2. Almond, 13 <i>Int’l & Comp. L.Q.</i> (1964).	20
3. C.F. Amarsinghe, “Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice”, 41 <i>Int’l & Comp. L.Q.</i> , 22 (1992).	3
4. Cavaglieri, 38 <i>RGDIP</i> (1931), 257-96.	20
5. David P Fidler “Geographic Morality Revisited: Intl Relns, Intl Law and the controversy over Placebo Controlled HIV Clinical Trials in Developing Countries”, 42 <i>Harv. Intl LJ</i> 299, 296 (2001).	7
6. Dunn, 28 <i>Col. LR</i> (1928), 166-80.	20
7. E. Jimenez de Arechaga, “General Course in Public International Law”, 159 <i>Recueil des Cours</i> , 1 (1978-I).	21
8. Emily Sherwin, “Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud”, 36 <i>Loy. L.A. L. Rev.</i> 1017.	10
9. Fischer Williams, 9 <i>BY</i> (1928), 28-9.	20
10. Garcia Amador, Yearbook, <i>ILC</i> (1959), 16-24.	20
11. Herz, 35 <i>AJ</i> (1928), 404.	20
12. I. Brownlie, “General Course in Public International Law”, 255 <i>Recueil des Cours</i> , 11 (1995).	1

MEMORIAL FOR THE APPLICANT

13. J.E.S. Fawcett, “The Exhaustion of Local Remedies: Substance or Procedure?”, 80 <i>Brit. Y.B. Int’l L.</i> , 452 (1954).	1
14. Jay Katz, “Human Experimentation and Human Rights”, 38 <i>St Louis University L. J.</i> 22 (93).	7
15. Julia D. Mahoney, “The Market for Human Tissue”, 86 <i>Va. L. Rev.</i> 163.	18
16. Kevin M King, “A proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects”, 34 <i>Stan. J. of Int’l L.</i> 163.	8
17. Larry George, “Expropriation”, <i>I.E.L.T.R</i> 2002, 3, 46-52.	19, 20
18. Larry I Palmer, “Disease Management and liability in the Human Genome Era”, 47 <i>Vill. L. Rev.</i> , 24-28 (2002).	7
19. Mendelson, 57 <i>BY</i> (1986), 33-76.	21
20. R.Y.Jennings, “General Course in International Law”, 121 <i>Recueil des Cours</i> , 323 (1967-II).	1
21. S. James Anaya and Robert A. Williams, Jr., “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the Inter-American Human Rights System”, <i>Harv. Human Rights J.</i> , Vol. 14, (2001).	14
22. T. Meron, “The Incidence of the Rule of Exhaustion of Local Remedies”, 35 <i>Brit. Y.B. Int’l L.</i> , 83 (1959).	1
23. Victoria Orłowski, “Promising Protection through Internationally Derived Duties”, 36 <i>Cornell Int’l LJ</i> 381.	7

MEMORIAL FOR THE APPLICANT

BOOKS	REFERENCE(PAGE) IN THE BODY OF ARGUMENTS
1. A. Gentili, <i>De jure belli, libri tres, Vol. II</i> (1612, repr. Oxford, Clarendon Press, 1933).	21
2. A. McNair, <i>International Law Opinions Vol. II</i> , (Cambridge: Cambridge University Press, 1996).	20
3. B. Ayala, <i>De jure et officiis bellicis et disciplina militari, libri tres Vol. II</i> , (1582, repr. Washington, Carnegie Institution, 1912).	21
4. Blacks Law Dictionary, (Fifth Ed.).	10, 19
5. C. Wolff, <i>Jus gentium methodo scientifica pertractatum, Vol. II</i> , (1764, repr. Oxford, Clarendon Press, 1934).	21
6. D. P. O'Connell, <i>International Law</i> , (2 nd edition, London: Stevens & Sons, 1970).	1
7. D.J. Harris, <i>Cases and Materials on International Law</i> , (5 th edn., London: Sweet & Maxwell, 1998).	1
8. David Getches et al., <i>Federal Indian Law: Cases and Materials</i> .	13
9. E. de Vattel, <i>Le droit des gens ou principes de la loi naturelle, Vol. III</i> , (1758, repr. Washington, Carnegie Institution, 1916).	21
10. George Annas, <i>The Changing Landscape of Human Experimentation: Nuremberg , Helinski and Beyond</i> .	7
11. H. Grotius, <i>De jure belli ac pacis, libri tres, Vol. II</i> , (1646, repr. Oxford, Clarendon Press, 1925).	1
12. I. Brownlie, <i>Principles of Public International Law</i> (6 th edn., Oxford: Oxford University Press, 2003).	1, 2, 20, 21
13. M. N. Shaw, <i>International Law</i> (5 th edn., Cambridge: Cambridge	20

MEMORIAL FOR THE APPLICANT

University Press, 2003).	
14. <i>Oppenheim's International Law</i> (9 th edn., R. Jennings ed., Essex: Longman Group UK Ltd., 1992).	1
15. S. Pufendorf, <i>De jure naturae et gentium, libri octo, Vol. II</i> , (1688, repr. Oxford, Clarendon Press, 1934).	21
16. W.M. Reisman et al., <i>International Law in Contemporary Perspective</i> , (New York: Foundation Press, 2004).	1

MEMORIAL FOR THE APPLICANT

CASES CITED	REFERENCE(PAGE) IN THE BODY OF ARGUMENTS
1. <i>(Navajo 1991)</i> , 19 Indian L. Rep. 6021, 6022.	14
2. 176/56, <i>First Cyprus</i> , 299/57, <i>Second Cyprus</i> , 2 YB ECHR, 184, 190.	4
3. 3321/67, <i>Greek</i> , 11 YB ECHR, 726.	4
4. 4448/70, <i>Second Greek</i> , 13 YB ECHR, 134.	4
5. 5310/71, <i>Ireland v. UK</i> , 15 YB ECHR, 120.	4
6. 9940–44/82, <i>Turkish case</i> (admissibility), 4 HRLJ, 550.	4
7. <i>Aerial Incident of July 27, 1955 (Israel v. Bulgaria)</i> , ICJ Pleadings (1955) 530.	1, 3
8. <i>Aerial incident of July 27, 1955 Case</i> (Preliminary Objections), ICJ Reports 1959 127.	2
9. <i>Air Services Agreement of 27 March 1946 Case</i> , (<i>United States/France</i>), 54 ILR 306.	2
10. <i>Ambatelios Claim (Greece v. United Kingdom)</i> , 23 ILR p. 306.	5
11. <i>American Bell International Inc. v. Islamic Republic of Iran</i> , (1986) 12 Iran-U.S.C.T.R. 170.	5
12. <i>Anglo Iranian Oil Co. Case (United Kingdom v. Iran)</i> .	20
13. <i>Baruch Ivcher Bronstein v. Peru</i> , Inter-American Court of Human Rights, Judgment of February 6, 2001.	17
14. <i>C.M.S. Gas Transmission Company v. The Argentine Republic</i> , 44 I.L.M. 1205 (2005).	21
15. <i>Canevaro case PCA (1912)</i> , Hague Court Reports, 285.	20
16. <i>Case concerning armed activities on the territory of the Congo</i>	21

MEMORIAL FOR THE APPLICANT

<i>(Democratic Republic of the Congo v. Rwanda)</i> , 45 ILM 562 (2006).	
17. <i>Case Concerning Electronica Sicula S.P.A. (ELSI) (United States of America v. Italy)</i> , 1989 I.C.J. 15.	1
18. <i>Case concerning the Gabcikovo-Nagymaros Project</i> , 1997 I.C.J. Reports 40.	21
19. <i>Case of Certain Norwegian Loans (France v. Norway)</i> , 1957 I.C.J. 9.	1, 3, 4
20. <i>Corfu Channel Case (Merits)</i> , I.C. J. 1949.	1
21. <i>Finnish Ships Arbitration</i> , 3 RIAA p.1484.	5
22. <i>Fisheries Jurisdiction (Spain v. Canada)</i> , ICJ Reports 1998 432.	1, 4
23. <i>Foremost Tehran, Inc. v. Islamic Republic of Iran</i> (1986) 10 Iran-U.S.C.T.R. 228.	5
24. <i>Greenberg v. Miami Children's Hospital Research Institute Inc</i> (ND Ill Oct 30, 2000 No 00-CO-6779).	7
25. <i>Heathrow Airport User Charges Arbitration</i> , 102 ILR 215.	2
26. <i>Hertzberg et al. v. Finland</i> , (Communication No. R.14/61), (1982), A/37/40.	5
27. <i>Hostages Case United States Diplomatic and Consular Staff in Teheran Case (USA v. Iran)</i> , ICJ Reports 1980 3.	2
28. <i>Hyatt International Corporation v. Government of the Islamic Republic of Iran</i> (1985) 9; Iran-United States Claims Tribunal.	5
29. <i>INA Corporation v. Government of the Islamic Republic of Iran</i> , ILR 75, 595.	21
30. <i>Ireland v. UK</i> , 19 YB ECHR, 762, 768.	4
31. <i>Lane v. Candura</i> , 6 Mass. App. Ct. 377, 385, 376 N.E.2d 1232, 1236 (1978).	11

MEMORIAL FOR THE APPLICANT

32. <i>Maffeizini v. Kingdom of Spain.</i>	6
33. <i>Moore v. Regents of the University of California</i> , 51 Cal. 3d 120.	7, 11
34. <i>Norwegian Loans case</i> , 1957 I.C.J. Pleadings, vol. 1, p. 408.	1, 3, 4
35. <i>Osborne</i> , 294 A.2d 372, 375 (D.C. 1972).	11
36. <i>Phosphates in Morocco</i> , PCIJ Ser.A./B., No. 74, 1938.	1
37. <i>Rainbow Warrior (New Zealand v. France)</i> , 20 UNRIAA 217 (1990).	2, 6
38. <i>Royal Holland Lloyd v. United States</i> , 73 Ct. Cl. 722 (1931).	6
39. <i>Salem case (Egypt v. United States)</i> , 6 Ann. Dig. 188.	3
40. <i>Salini v. Kingdom of Morocco.</i>	7
41. <i>Standard Oil Co. Tankers case (1926)</i> , RIAA 781, 794.	20
42. <i>The Interhandel Case (Switzerland v. U.S.A.)</i> , (1959) I.C.J. 6.	20
43. <i>The James Case</i> , Judgment of 21 Feb. 1986.	21
44. <i>The Mexican Eagle Oil Company Dispute</i> , Grotius Socy. (1957).	2
45. <i>The Panevezys Saldustiskis Railway Case (Estonia v. Lithuania)</i> , (1939) PCIJ Rep, Series A/B, No. 76.	2, 5
46. <i>United States v. Great Britain American and British claims arbitration</i> , 6 Int. Arb. Awards 123.	21
47. <i>X v. Ireland</i> , (App. 4125/69), (1971) 14 Yearbook E.C.H.R. 198.	6
48. <i>Yazzie v. Jumbo (Navajo 1986)</i> , 5 Navajo Rptr. 75, 77.	14
49. <i>Young, James and Webster v. United Kingdom</i> , E.C.H.R., Series A, No. 44 (1981).	5

MEMORIAL FOR THE APPLICANT

MISCELLANEOUS (TREATIES/REPORTS/DECLARATIONS)	REFERENCE(PAGE) IN THE BODY OF ARGUMENTS
1. American Convention on Human Rights.	20
2. Anglo Japanese Commercial Treaty of 1963.	20
3. Charter of Fundamental Rights of the European Union.	20
4. Genome Convention.	7
5. I.C.J.'s Opinion in, Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory, 43 <i>I.L.M.</i> 1009 (2004).	21
6. Indian Contract Act, 1872.	10
7. International Declaration on Human Genetic Data (2003).	11
8. International Law Commission's Draft Articles and Commentary on Responsibility of States for Internationally Wrongfully Acts, 2001.	4, 5
9. League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: Responsibility.	6
10. Louisiana Civil Code, Art. 1819 (1870).	10
11. Nuremburg Code.	21
12. Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights at its 133rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997.	13
13. Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993.	7
14. Securities Act of 1933, 15 <i>U.S.C.</i> 77 (1994).	19

MEMORIAL FOR THE APPLICANT

15. United Nations General Assembly Resolution of 14 th December 1962 (Resol. 1803 (XVII)).	21
16. United Nations General Assembly Resolution of 1962 of Permanent Sovereignty over National Resources.	21
17. United Nations General Assembly Resolution of 21 December, 1952 (Resol. 626 (VII)).	21
18. Universal Declaration on the Human Genome and Human Rights.	11
19. UNRIAA, vol, p. 516 (1929); UNRIAA, vol. X, p. 730 (1903); UNRIAA, vol. XI, p. 549 (1916); UNRIAA, vol. IV, p. 110 (1916); UNRIAA, vol. XX, p. 217 (1990).	1, 5, 6
20. Virginia Fair Housing Law, <i>Va. Code Ann.</i> 36-96 (West 1999).	19

MEMORIAL FOR THE APPLICANT

STATEMENT OF JURISDICTION

The Republic of Attandra and the Republic of Zarica have submitted this dispute to the International Court of Justice pursuant to a Special Agreement (*Compromis*). The Court's jurisdiction is invoked under Article 36(1) read with Article 40(1) of the Statute of the International Court of Justice, 1950.

MEMORIAL FOR THE APPLICANT

SYNOPSIS OF FACTS

I. THE BACKGROUND

The Republic of Attandra attained independence from the Republic of Zarica's colonial rule in the late 1940's, post World War II. Despite being endowed with natural resources, it is a developing country, with a majority of the population reliant on subsistence farming. The Republic of Zarica has become one of the most technologically developed nations in the world by exploiting the natural resources of its colonies.

In 2005, there was an outbreak of a fatal disease, Rapid Erosion of White Blood Cells (REWBC), in the Republic of Zarica. To tackle this disease the Zarican government formed the REWBC Cure and Research Institute, an autonomous body consisting of persons appointed by the President of Zarica. Any person either refusing to work or refusing to complete his tenure with RCRI would be liable to penal servitude.

II. VIOLATION OF THE HUMAN RIGHTS OF THE ZUSHIS

The Zushi community, which resides in remote areas in Attandra, is an indigenous tribe, which believes in the sanctity of their bodies and is therefore opposed to any invasive action, including insertion of syringes by non-Zushis. The Zushi community revolted against the colonial rule of the State of Zarica. To crush the abovementioned rebellion as well as for scientific research purposes the then Zarican Colonial Government encouraged medical practitioners and social anthropologists to procure genetic material from the Zushis, and conduct research on the same.

Pursuant to the outbreak of the fatal REWBC disease, the research as carried out by social anthropologists (particularly a paper in 1938) led the Zarican Government formed RCRI to the belief that the genetic material of the Zushis could afford a cure to the disease. The Attandrian Government did not comply with Zarica's request for blood and tissue samples of

MEMORIAL FOR THE APPLICANT

the Zushis since it would entail violation of religious beliefs, right to privacy, confidentiality, property and other allied rights of the tribal community. To attempt the prevention of the spread of the disease RCRI acquired Zushi Medical Ltd. Zushi Medical Ltd. was formed for the benefit of the Zushis, and possessed genetic data of the Zushi community which was collected for their medical treatment. RCRI utilised the abovementioned genetic data and were partly successful in their endeavour to cease the spread of the disease of REWBC. However, before they were entirely successful, the Attandrian Government, disapproving of the alleged violation of the rights of the Zushis, nationalized Zushi Medical Ltd, paying minimal compensation.

III. THE TRADE AGREEMENT

After the independence of Attandra, the two States entered into a trade agreement in furtherance of bilateral relations. The trade agreement stipulated that purchase of property in Attandra by Zaricans or Zarican corporations should take place at a 'premium to prevailing local market rates', without defining the phrase 'property rights'.

Subsequent to the outbreak of the disease REWBC's, individual employees of Zarican Corporations entered into contracts with members of the Zushi Community for the sale of their genetic matter, for small amounts of money. A debate is ensuing regarding whether blood and tissue samples constitute 'property' under the trade agreement, which accordingly decides the factum of violation of the trade agreement.

MEMORIAL FOR THE APPLICANT

SUMMARY OF ARGUMENTS

I. ATTANDRA HAS THE *JUS STANDI* TO PRESENT THE CLAIM:

1. The claim being made is for a direct injury to the State of Zarica.
2. Arguendo, there is no necessity to exhaust local remedies in the municipal courts of the Republic of Zarica.
3. Arguendo, there is no necessity to exhaust local remedies in the municipal courts of the Republic of Attandra.
4. Arguendo, the exhaustion of local remedies is futile in the present case

II. THE ACTIONS OF RCRI ARE ATTRIBUTABLE TO THE REPUBLIC OF ZARICA:

1. The qualifying factors for determining what constitutes a ‘public function’ have been satisfied which disproves any suggestion as to its autonomy.
2. The ‘Structural’ and ‘Functional’ tests have been satisfied.

III. THE STATE OF ZARICA HAS FLAGRANTLY VIOLATED ITS CUSTOMARY INTERNATIONAL LAW OBLIGATIONS:

1. The doctrine of informed consent has been violated by the Respondents.

IV. THE REPUBLIC OF ZARICA HAS VIOLATED THE RIGHTS OF THE ZUSHIS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR).

1. The Respondent cannot derogate from its obligations under Article 4 of the ICCPR.
2. The Respondent has violated its obligations under the ICCPR
 - (a) Article 7 has been violated
 - (b) Article 17 has been violated
 - (c) Article 18 has been violated

MEMORIAL FOR THE APPLICANT

(d) Article 27 has been violated

V. THE BLOOD AND TISSUE SAMPLES OF THE ZUSHIS IS PROPERTY.

1. The genetic material of the Zushis satisfies the “Patentability Criteria.”
2. The cure for REWBC is not freely occurring in nature, and does not have a clear previously recognized existence.

VI. THE BILATERAL TRADE AGREEMENT ENTERED INTO BETWEEN THE REPUBLIC OF ATTANDRA AND THE REPUBLIC OF ZARICA HAS BEEN VIOLATED.

1. ‘Property’ under the Trade Agreement includes the blood and tissue samples of the Zushis, as the existence of a ‘market’ for blood and tissue samples cannot be denied.

VII. THE REPUBLIC OF ATTANDRA’S NATIONALIZATION OF ZUSHI MEDICAL LTD. IS IN CONFORMITY WITH ITS INTERNATIONAL OBLIGATIONS:

1. Local remedies must be exhausted with regard to the claim of an unlawful nationalization.
2. The ‘Nationality Principle’ has been complied with.
3. The rule of compensation has not been violated in the instant case.
4. The claim regarding expropriation has not been stated in the Compromis.

VIII. THE DEFENCE OF THERE EXISTING A STATE OF NECESSITY DOES NOT APPLY IN THE PRESENT CASE:

1. The conditions required for invoking the defence of the existence of a state of necessity have not been satisfied.
2. A state of necessity does not absolve a State of its liability of fulfilling its contractual obligations.

MEMORIAL FOR THE APPLICANT

BODY OF ARGUMENTS

I. ATTANDRA HAS THE *JUS STANDI* TO PRESENT THE CLAIM.

(i) THE CLAIM BEING MADE IS FOR A DIRECT INJURY TO THE STATE OF ATTANDRA.

When a direct breach of international law is committed against a state, such as when the breached obligation flows from a treaty,¹ the aggrieved State is entitled to claim declaratory relief as well as reparation.²

The exhaustion of local remedies rule is superfluous in the present case as it is applicable only in cases of diplomatic protection when the Claimant State has been injured “indirectly” or through its national.³ The Applicant submits that the present case pertains to a direct injury sustained by the State of Attandra due to the wrongful acts committed by the Republic of Zarica. The same is in consonance with the principle of *par in parem non habet imperium non habet jurisdictionem*.⁴ The refusal of the Government of Zarica “through its lawfully constituted agents to recognize treaty rights constitutes a direct wrong”⁵ upon the State of Attandra. The rights of the State of Attandra with relation to its trade and treaty interests constitute an “intrinsic attribute as a State.”⁶ The Applicants further contend that there is interdependence between the rights of their Zushi nationals and the rights of the State and the

¹ *Phosphates in Morocco*, PCIJ Ser.A/B., No. 74, 1938; *Aerial Incident of July 27, 1955 (Israel v. Bulgaria)* ICJ Pleadings (1955) 530; *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15; *Rainbow Warrior (New Zealand v. France)*, 20 UNRIAA 217 (1990). See also Oppenheim’s *International Law-Vol. I* (Sir R. Jennings and Sir A. Watts ed., 9th edn., New York: Longman, 1996) at 512; R.Y.Jennings, “General Course in International Law”, 121 *Recueil des Cours*, 323 (1967-II); D.J. Harris, *Cases and Materials on International Law*, (5th edn., London: Sweet & Maxwell, 1998) at 85; I. Brownlie, *Principles of Public International Law* (6th edn., Oxford: Oxford University Press, 2003) at 472.

² Oppenheim, *supra* note 1 at 511-512; *The Panevezys Saldustiskis Railway Case (Estonia v. Lithuania)*, (1939) PCIJ Rep, Series A/B, No. 76; *The Mexican Eagle Oil Company Dispute*, Grotius Socy. (1957); *Case Concerning ELSI* *ibid*; *Corfu Channel Case (Merits)*, I.C. J. 1949. See R. Y. Jennings, *ibid*.

³ J.E.S. Fawcett, “The Exhaustion of Local Remedies: Substance or Procedure?”, 80 *Brit. Y.B. Int’l L.*, 452 (1954); *Phosphates in Morocco*, *supra* note 1; *Case of Certain Norwegian Loans (France v. Norway)*, 1957 I.C.J. 9; *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 I.C.J. 432; I. Brownlie, “General Course in Public International Law”, 255 *Recueil des Cours*, 11 (1995); D.P. O’Connell, *International Law Vol. II* (2nd edn., London: Stevens & Sons, 1970) at 1049.; Judge Windarski in *Case Concerning ELSI*, *supra* note 1

⁴ T. Meron, “The Incidence of the Rule of Exhaustion of Local Remedies”, 35 *Brit. Y.B. Int’l L.*, 83 (1959); W.M. Reisman et al., *International Law in Contemporary Perspective* (New York: Foundation Press, 2004) at 461.

⁵ *Salem case (Egypt v. United States)*, 6 Ann Dig 188.

⁶ *Aerial incident of July 27 1955 Case* (Preliminary Objections), ICJ Reports 1959 127.

MEMORIAL FOR THE APPLICANT

same affords them submission to the jurisdiction of the Hon'ble International Court of Justice.⁷

Particularly, the violation of the bilateral treaty attributes to the Applicant State violation of “a right granted by one Government to the other Government” and thereby brings it within the realm of the jurisdiction of the ICJ.⁸

(ii) ARGUENDO, THERE IS NO NECESSITY TO EXHAUST LOCAL REMEDIES IN THE MUNICIPAL COURTS OF THE REPUBLIC OF ZARICA.

The rationale for the rule of exhaustion of local remedies is the risk undertaken by a national in residing in a foreign State as an alien.⁹ It is an accepted fact that a national must submit himself voluntarily to the jurisdiction of the local Courts of a foreign State. It is only pursuant to such submission that he is required to exhaust local remedies.¹⁰ Such submission to the local Courts of a foreign State is evident in cases in which “an alien resides, either permanently or temporarily, in the territory of the Respondent State, engages there in business, owns property there or enters into contractual relations with the Government of that State.”¹¹ It is submitted on behalf of the Applicant that the Zushi community has never submitted itself to the jurisdiction of the local Courts in the State of Zarica, either expressly or implicitly, by the satisfaction of the abovementioned tests. Further, the present case evidences the lack of a *voluntary, conscious and deliberate connection*¹² between the Zushi community and the Republic of Zarica, which is a pre-requisite to the applicability of the exhaustion of local remedies rule. International law prescribes a cogent acknowledgement of the justice of the municipal Court being applicable to the injured national as a requirement for

⁷ *Mexico v. USA*, ICJ Reports, 1991 17,, *United States Diplomatic and Consular Staff in Teheran Case (USA v. Iran)*, ICJ Reports 1980 3:61 ILR 502, *Heathrow Airport User Charges Arbitration* 102 ILR 215.

⁸ *Air Services Agreement of 27 March 1946 Case (United States/France)* 54 ILR 306.

⁹ Brownlie *Principles* 501.

¹⁰ ILC Rapporteur Report on Diplomatic Protection.

¹¹ *Supra* note 6.

¹² Shabtai Rosenne, the *Aerial Incident case*, *supra* note 6.

MEMORIAL FOR THE APPLICANT

the exhaustion of local remedies by the national.¹³ Furthermore, the Applicant submits that strict tests have been employed in gauging the necessity of exhaustion of local remedies, which mandate: “the person or property must also be located in the delinquent State”¹⁴ or the existence of “a foreigner in dispute with the State *under whose sovereignty he has chosen to live*”¹⁵.

Thus, the lack of a genuine link between the municipal Courts of the State of Zarica and the Zushi community evidences the inapplicability of the rule of exhaustion of local remedies to the present case.

(iii) ARGUENDO, THERE IS NO NECESSITY TO EXHAUST LOCAL REMEDIES IN THE MUNICIPAL COURTS OF THE STATE OF ATTANDRA.

The nature of the claim by the State of Attandra encapsulates declaratory relief, holding the State of Zarica in violation of its international obligations, and the termination of the same.¹⁶ No domestic Court is competent to adjudicate upon the responsibility of a State for violations of its international obligations.¹⁷

(iv) ARGUENDO, THE EXHAUSTION OF LOCAL REMEDIES IS FUTILE IN THE PRESENT CASE.

The massive and systematic human rights violations by the Applicant State are directly attributable to the administrative and legislative framework of the State of Zarica. The futility of exhaustion of domestic remedies in this scenario is easily discernable from a copious

¹³ *Supra* note 5.

¹⁴ *C.F. Amerasinghe, Local Remedies in International Law, Cambridge, 1990.*

¹⁵ *Norwegian Loans case, 1957 I.C.J. Pleadings*, vol. 1, p. 408 (quoted in R. Ago, Sixth report, *supra* note 75, p. 38, para. 98.

¹⁶ *Compromis*, para 10.

¹⁷ *Supra* note 8.

MEMORIAL FOR THE APPLICANT

corpus of international judicial material.¹⁸ There is a close link between exhaustion of local remedies and administrative practice.¹⁹

It is an uncontroverted fact that the policy of the Zarican Government has always vehemently been in favour of advocating the use of Zushi genetic material.²⁰ It is submitted on behalf of the Applicant that the Government of Zarica's policy of being vociferously in favour of carrying out deleterious and reprehensible invasive action on the Zushis is equivalent to their "impeding certain persons from invoking local remedies" and thus, exhaustion of local remedies is "a senseless formality"²¹. The same is exacerbated in light of "the determined policy of the Executive to reach the desired result"²² of acquisition of the genetic material of the Zushis.

The domestic remedy in every case must be adjudged with particular reference to the facts of the case²³ and the conditions prevailing therein.²⁴ The Applicant State thus submits that it is reasonably justified in believing that there exists no local remedy²⁵ and that the remedy is "obviously futile"²⁶.

¹⁸ 176/56, *First Cyprus*, 299/57, *Second Cyprus*, 2 YB ECHR, 184, 190; 3321/67, *Greek*, 11 YB ECHR, 726; 4448/70, *Second Greek*, 13 YB ECHR, 134; 5310/71, *Ireland v. UK*, 15 YB ECHR, 120; *Ireland v. UK*, 19 YB ECHR, 762, 768;

9940-44/82, *Turkish case* (admissibility), 4 HRLJ, 550.

¹⁹ 2006 ILC Draft Articles on State Responsibility. Yearbook of International Law Commission, 2006, Vol II, Part II.

²⁰ See *Fisheries Jurisdiction (Spain v. Canada)* ICJ Reports 1998 432.

²¹ *Velasquez Rodriguez*, Ser. C, No. 4, para. 68.

²² *Robert E Brown (United States v. Great Britain American and British claims arbitration)* 6 Int Arb Awards 123 See Also David Mummery, *The content of the duty to exhaust local remedies* 58 Am. J. Int'l L. 414 1964.

²³ Judge Hudson in the *Railway Case*. *Supra* n. 1.

²⁴ Judge Lauterpacht in the *Norwegian Loans Case*. *Supra* n. 3.

²⁵ *Finnish Ships Arbitration* 3 RIAA P.1484.

²⁶ *Finnish Ships Arbitration*, *supra* note 3, *Ambatelios Claim (Greece v. United Kingdom)*, 23 ILR p 306.

MEMORIAL FOR THE APPLICANT

II. THE ACTIONS OF RCRI ARE ATTRIBUTABLE TO THE REPUBLIC OF ZARICA.

It is submitted on behalf of the Applicants that the conduct of RCRI is attributable to the State of Zarica irrespective of whether it is an organ of the State since it is empowered by the law of that State to exercise elements of governmental authority or functions of a public character.²⁷

This is particularly so since RCRI is a parastatal entity, which exercises elements of governmental authority in place of State organs, but retains certain public or regulatory functions, despite its status as a semi-public or even private company. The qualifying factors that render a function a public function include: (a) power to include identification of property for seizure,²⁸ (b) carrying out any activity for the benefit of the public (for example public transportation),²⁹ (c) systematic or recurrent conduct complained of,³⁰ (d) the existence of police powers,³¹ (e) the State's supervening interest in achieving an objective.³² Particularly in the case of corporations, the imputability to the Government is determined by two factors: (i) the structural test, (ii) the functional test.³³ The structural test entails the following considerations for its satisfaction: (a) whether the corporation has been formed by an act of the State,³⁴ (b) whether the managing directors have been recruited or generally

²⁷ ILC Draft Articles on State Responsibility, 2001, Article 4. UN DOC A/56/10 (2001).

²⁸ *Hyatt International Corporation v. Government of the Islamic Republic of Iran* (1985) 9; Iran-United States Claims Tribunal.

²⁹ *The Panevezys Saldustiskis Railway Case (Estonia v. Lithuania)*, (1939) *PCIJ Rep*, Series A/B, No. 76.

³⁰ Commentary on Article 7 of the ILC Draft Articles on State Responsibility, 2001, *supra* note 27.

³¹ *UNRIAA*, vol. p. 516 (1929), at p. 531. For other statements of the rule see *Maal*, *UNRIAA*, vol. X, p. 730 (1903) at pp. 732-733; *La Masica*, *UNRIAA*, vol. XI, p. 549 (1916), at p. 560; *Youmans*, *UNRIAA*, vol. IV, p. 110 (1916), at p. 116; *Mallen*, *ibid.*, vol. IV (1925), p. 173, at p. 177; *Stephens*, *ibid.*, vol. IV, p. 265 (1927), at pp. 267-268; *Way*, *ibid.*, vol. IV, p. 391 (1925), at pp. 400-01. *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931); *A.D.P.I.L.C.*, vol 6, p. 442.

³² *Foremost Tehran, Inc. v. Islamic Republic of Iran* (1986) 10 Iran-U.S.C.T.R. 228; *American Bell International Inc. v. Islamic Republic of Iran* (1986) 12 Iran-U.S.C.T.R. 170; *Hertzberg et al. v. Finland*, (Communication No. R.14/61), (1982), A/37/40, annex XIV, para. 9.1. See also *X v. Ireland*, (App. 4125/69), (1971) 14 Yearbook E.C.H.R. 198; *Young, James and Webster v. United Kingdom*, E.C.H.R., Series A, No. 44 (1981).

³⁴ *Emilio Agustin Maffezini v. the Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction available online at www.worldbank.org/icsid.

; *Salini v. Kingdom of Morocco*, ICSID Decision on Jurisdiction of July 23, 2001, International Legal Materials, Vol 42,2003.

³⁴ *Maffezini v. Kingdom of Spain. Ibid.*

MEMORIAL FOR THE APPLICANT

appointed by the Government;³⁵ whereas the functional test entails: (a) the performance of an act of a public nature inclusive of any activity which provides benefit to the public at large, (b) the presence of police powers, (c) whether financial considerations are the primordial factor to be considered.³⁶

Further the Court has observed that there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *Rainbow Warrior* arbitration, the Tribunal affirmed that in the international law field there, is no distinction between contractual and tortious responsibility.³⁷

It is also submitted that a State is responsible for damage suffered by a foreigner as the result of acts or omissions of such autonomous institutions which exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.³⁸

III. THE STATE OF ZARICA HAS FLAGRANTLY VIOLATED ITS CUSTOMARY INTERNATIONAL LAW OBLIGATIONS.

The doctrine of informed consent is firmly ingrained into the corpus of customary international law.³⁹ A plethora of judicial material⁴⁰ supports the rigorous application of the

³⁵ *Salini v. Kingdom of Morocco*, ICSID Decision on Jurisdiction of July 23, 2001, International Legal Materials, Vol 42,2003.

³⁶ *Ibid*

³⁷ *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75.

³⁸ League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: Responsibility.

³⁹ Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993, at para 35, George J Annas, Mengele's Birthmark: The Nuremberg Code in US Courts 7J Contem. Health L& Pol'y 17,19-21(Spring 91), Appleman, Military Tribunals and International Crimes 47 1971 at 141,David P Fidler "Geographic Morality" Revisited: Intl Relns, Intl Law and the controversy over Placebo Controlled HIV Clinical Trials in Developing Countries ,42 Harv Intl LJ 299,296(2001), *Grimes* ,782 A 2d at 835, Victoria Orłowski, Promising Protection through Internationally Derived Duties,36 Cornell Int'l LJ 381, George Annas, The Changing Landscape of Human Experimentation:Nuremberg , Helinski and Beyond, 2 Health ,Matrix,119,121(92),The status of rebels under the 1977 Geneva protocols on non international armed conflict,30 International and Comparative Law quarterly(1981) 416.

MEMORIAL FOR THE APPLICANT

principle of informed consent particularly to cases where blood and tissue samples are collected for the purpose of conducting genetic research upon them, irrespective of the element of risk. The binding nature of the doctrine of informed consent purports more than a formal acquiescence – it necessarily entails consent granted pursuant to complete knowledge of the purpose for which consent has been undertaken.⁴¹ It is an uncontroverted fact that the Zushi community had given consent specifically for the purpose of their medical treatment by Zushi doctors and nurses.⁴² It is thus the submission of the Applicants that the use of the said genetic material for a purpose wholly unconceived by the Zushi community without availing their fresh consent for the same, results in a grave and reprehensible violation of customary international law.⁴³ The Applicant further submits that the fundamental nature of the customary principle of international law is such that it is non-derogable even under circumstances of medical emergency or cultural relativism.⁴⁴ The Applicant submits that the culpability of the State of Zarica is further compounded by the later incident when individual Zarican employees of Zarican Corporations collected blood and tissue samples from Zushi nationals, without the due observance of the recognised standard of consent.⁴⁵ The ultimate use of the abovementioned blood and tissue samples by the Zarican State's organ RCRI pins liability upon it, since the elementary principle of informed consent is non delegable in nature.⁴⁶ More particularly, the principle of informed consent is antithetical to any means of coercion in the collection of blood and tissue samples⁴⁷ and the term 'coercion' includes within its ambit the providing of any incentives to the donor of blood and tissue samples

⁴⁰ Larry I Palmer, Disease Management and liability in the Human Genome Era, 47 Vill L Rev, 24-28 (2002), *Moore v. Regents of the University of California* 793 P2d 479 (Cal 1990), *Greenberg v. Miami Children's Hospital Research Institute Inc- Complainant* (ND Ill Oct 30, 2000 No 00-CO-6779), Jay Katz, Human Experimentation and Human Rights, 38 St Louis University Law Journal 22 (93).

⁴¹ Article 1 of the Nuremberg Code. *United States v. Karl Brandt*. See Jackson, *Trial of German Major War criminalities*, HMS Office (1946).

⁴² *Compromis*, Para 6.

⁴³ International Declaration on Human Genetic Data (2003), Article 16.

⁴⁴ Ruth Macklin, Universality of the Nuremberg Code in Nazi Doctors, at 240.

⁴⁵ *Compromis*, para 9.

⁴⁶ Nuremberg Code, Article 1, *supra* note 41.

⁴⁷ Nuremberg Code, Article 1, *supra* note 41.

MEMORIAL FOR THE APPLICANT

particularly when the donor belongs to an economically, socially, geographically marginalised or otherwise backward community particularly indigenous communities in developing nations.⁴⁸

IV. THE REPUBLIC OF ZARICA HAS VIOLATED THE RIGHTS OF THE ZUSHIS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR).

The Applicant submits that the Respondent's contention that it may derogate from its obligations under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) is invalid. This conclusion can be drawn by examining Article 4(3) of the ICCPR, which states that any State party availing of its right of derogation under the ICCPR must inform other States parties to the Covenant of this derogation through the Secretary General of the United Nations.⁴⁹

If the Republic of Zarica had availed itself of the right of derogation under this Article, it would only be reasonable to assume that a fact as significant as this would have been mentioned in the *Compromis*. The Human Rights Committee has stated that it is extremely important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefore and, further, to fulfil their reporting obligations under Article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.⁵⁰

Hence, the Republic of Zarica cannot claim derogation from its obligations under this Article

⁴⁸ Kevin M King, A proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects, 34 *Stanford Journal of International Law* 163.

⁴⁹ Article 4(3) of the ICCPR reads as follows: '*Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*'

⁵⁰ General Comment No. 05: Derogation of rights (Art. 4): 31/07/81. ICCPR General Comment No. 5. (General Comments).

MEMORIAL FOR THE APPLICANT

unless it can conclusively be proved that information regarding the nature and extent of derogation was communicated to the Applicant State and other States Parties to this Covenant.

No derogation is possible from certain Articles⁵¹ of this Covenant, as per Article 4(2). Even if the Respondent is able to establish the fact that it derogated from its obligations as per Article 4 of this Covenant, the Applicant submits that the Republic of Zarica has violated certain obligations⁵² which cannot be derogated from in any circumstance.

Article 7 of the ICCPR prohibits medical and scientific experimentation on persons without their free consent⁵³. The Respondent's Contention that the collection of genetic material from the Zushis cannot be referred to as 'experimentation' is invalid. The term 'Experimentation' is defined as "a trial or special test or observation made to confirm or disprove something doubtful."⁵⁴ Since the blood and tissue samples of the Zushis were subsequently used to try and obtain a cure of REWBC, this act certainly falls within the ambit of the word 'experimentation'.

Further, the phrase 'free consent' refers to consent obtained without the intervention of any element of coercion, undue influence, fraud, misrepresentation, or mistake.⁵⁵ 'Misrepresentation' is broadly defined to include not only false statements but also misleading conduct, concealment, half-truth, and other behaviour designed to instill false

⁵¹ Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, 18 are those from which no derogation is possible.

⁵² The Respondent has violated Articles 7 and 18, from which no derogation is possible.

⁵³ Article 7 states: '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*'

⁵⁴ Blacks Law Dictionary, Fifth Ed.

⁵⁵ See Indian Contract Act, 1872, Section 14; Louisiana Civil Code, Art. 1819 (1870).

MEMORIAL FOR THE APPLICANT

beliefs.⁵⁶ Concealment of fact only amounts to misrepresentation when the concerned party is under a duty to speak. Keeping in mind the doctrine of informed consent emphasized in the Nuremberg trials⁵⁷ and its significance in international customary law⁵⁸, the Applicant submits that Zushi Medical Ltd. was under a duty to inform the Zushis from whom genetic data was collected, that their genetic data was liable to be used for different purposes by Zushi Medical Ltd. Hence, there has been a blatant violation of Article 7 of the ICCPR.

A number of international law declarations which came into effect after the inception of the ICCPR also state that consent must not only be free, but also prior, express and informed consent.⁵⁹

In *Moore v. Regents of the University of California*,⁶⁰ the California Supreme Court stated that the independent significance of the informed consent doctrine is easiest to discern when a physician recommended procedures with little or no therapeutic effect. Some individuals object on religious, ethical, or other personal grounds to particular medical procedures even when those procedures carry an appreciable possibility for improving their own health.⁶¹ The failure to obtain informed consent often frustrates non-medical patient interests. Hence it is submitted that the mere fact that collection of blood and tissue samples is a standard medical procedure is no ground for evading the doctrine of informed consent. The use of the genetic material for utilitarian purposes also cannot be used as a basis for eschewing this doctrine.

⁵⁶ Emily Sherwin – “Nonmaterial Misrepresentation: Damages, Rescission, and the possibility of Efficient Fraud”, 36 Loy. L.A. L. Rev. 1017.

⁵⁷ *Supra* note 41.

⁵⁸ *Supra* note 39.

⁵⁹ See International Declaration on Human Genetic Data (2003) (Article 8(a)), Universal Declaration on the Human Genome and Human Rights (Article 5 (b)).

⁶⁰ *Moore v. Regents of the University of California*, 51 Cal. 3d 120.

⁶¹ See *In re Osborne*, 294 A.2d 372, 375 (D.C. 1972) (recognizing a patient's right to refuse treatment on religious grounds); *Lane v. Candura*, 6 Mass. App. Ct. 377, 385, 376 N.E.2d 1232, 1236 (1978) (recognizing a patient's right to refuse treatment on irrational grounds).

MEMORIAL FOR THE APPLICANT

Article 16 of the abovementioned International Declaration on Human Genetic Data refers to a change of purpose, and states that if the original consent is incompatible with the different purpose for which genetic data is to be used; then prior, free, express and informed consent must once again be obtained from the person before use of the genetic data for a different purpose. As has been stated previously, it cannot be said that informed consent was obtained by the Republic of Zarica, as the genetic material collected by Zushi Medical Ltd. was used for a purpose different from that for which consent had been obtained. This Article needs to be used as an instrument for interpreting Article 7 of the ICCPR.

Therefore, the Applicant submits that the Republic of Zarica has also violated Article 7 of the ICCPR.

The ICCPR has recognized that no person shall be subjected to an arbitrary or unlawful interference with his privacy.⁶² The Human Rights Committee, in its general comments on this Article, stated that the term "unlawful" implies that no interference can take place except in cases envisaged by law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.⁶³ Even if the Republic of Zarica's municipal law permitted the use of historically collected blood and tissue samples of the Zushis for a purpose for which consent was not obtained, this act was in violation of Article 7 of the ICCPR, as has been established previously. Therefore the act of using the genetic material of the Zushis for a purpose incompatible with the original consent is also considered an arbitrary and unlawful interference with the privacy and confidentiality of the Zushis, as an authorized interference must be consistent with the provisions of the ICCPR.

⁶² See Article 17.

⁶³ General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17): 08/04/88. ICCPR General Comment No. 16. (General Comments).

MEMORIAL FOR THE APPLICANT

Article 18 of the ICCPR gives persons the freedom of thought, conscience and religion. Article 27, on the other hand, gives similar rights to ethnic, religious and linguistic minorities. The only difference between Article 18 and Article 27 is that though the former is subject to restrictions provided by law, the latter refers to an absolute right. The Human Rights Committee, in emphasizing the significance of Article 27, has stated that “ *The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.* ”⁶⁴

Under the Zushi religion, any invasive action carried out on a Zushi individual by a non-Zushi amounted to the desecration of a holy place.⁶⁵ Numerous publicists⁶⁶ and international law organizations, including the Inter-American Court of Human Rights and the Human Rights Committee, have recognized the importance of the collective rights of minority communities.⁶⁷ The tribal courts of the Navajo Nation in the South Western region of the United States, for example, have articulated the principle of the *sui generis* character of property rights in their indigenous community in clear and illuminating terms.⁶⁸ The Navajo courts have consistently stressed that the property rights of the said community derive from their unique cultural traditions and from Navajo land tenure. The Navajo Supreme Court explained the difference between Navajo land tenure and the land tenure system of the dominant United States society in the case of *Begay v. Keedah*:

‘Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for

⁶⁴ General Comment No. 23: The rights of minorities (Art. 27) : . 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments).

⁶⁵ See *Compromis*, paragraph 5.

⁶⁶ *The Rights of People in International Law*, Ian Brownlie - The Rights of People, edited by James Crawford, Clarendon Press. Oxford Publications

⁶⁷ See also “Proposed American Declaration on the Rights of Indigenous Peoples”, Art. XVIII, approved by the Inter-American Commission on Human Rights at its 133rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997.

⁶⁸ See David Getches et al., *Federal Indian Law: Cases and Materials*, p. 397-98.

MEMORIAL FOR THE APPLICANT

*subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership.’*⁶⁹

Thus, according to Navajo customary law, as with the customs and usages of many other indigenous communities, the ownership of land is vested in the indigenous community or group as a whole.⁷⁰ Also significant are the pronouncements of the Human Rights Committee in the *Lansmann Case*.⁷¹ The Committee stated that the provisions of Article 27 extend to activities which are an essential element in the culture of an ethnic community.⁷² The Applicant submits that interference with a Zushi individual’s body by a non-Zushi would amount to desecration of a holy place, and hence would certainly constitute an essential element of the distinctive culture of the Zushis. The act of the employees of Zarican corporations obtaining genetic material from Zushi individuals thus violates Article 17 and 27 of the ICCPR, which require conformity with the religious beliefs and indigenous rights of persons. Acquiring blood and tissue samples of the Zushi individuals in effect deprived the Zushi community of its resources. Consequently, the Applicant submits that collection of such resources from Zushis without prior authorization from the community as a whole, or a representative of the community would amount to an infringement of the rights guaranteed to the Zushis under the ICCPR. A similar principle was cited by the Supreme Court of Canada, in the landmark *Delgamuukw* decision concerning aboriginal title where it was held that, in the disposition of indigenous peoples’ lands and resources, the duty of consultation was imperative, and in certain cases required the consent of an entire aboriginal nation.⁷³

⁶⁹ Indian L. Rep. 6021, 6022 (Navajo 1991).

⁷⁰ See *Yazzie v. Jumbo*, 5 Navajo Rptr. 75, 77 (Navajo 1986).

⁷¹ Committee's Views on case No. 511/1992, *Lansmann et al. v.. Finland*, CCPR/C/52/D/511/1992.

⁷² S. James Anaya and Robert A. Williams, Jr., “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the Inter-American Human Rights System”, Harvard Human Rights Journal, Volume 14, spring 2001.

⁷³ *Delgamuukw*, [1997] 3 S.C.R. at 1113.

MEMORIAL FOR THE APPLICANT

Therefore the Applicant submits that the Republic of Zarica has violated the individual rights of the Zushis.

V. THE BLOOD AND TISSUE SAMPLES OF THE ZUSHIS IS PROPERTY.

“Intellectual Property Rights” is a term incorporating a collection of Rights, which are granted to individuals or organizations, for works that involve a creative input or exercise of intellect. The era of biotechnology patents was ushered in with the United States Supreme Court’s ruling in *Diamond v. Chakraborty*, in which it was held that genetically engineered oil eating microbes were patentable.⁷⁴ The Hon’ble Court stated that the mere fact that the object for which a patent is to be obtained consisted of “living matter” did not warrant exclusion. Hence, the Applicant submits that the contention of the Respondent, that “living matter” cannot be considered intellectual property, would be erroneous.

As regards “patentability” criteria, legislation worldwide is almost uniform. By and large most states emphasize on three fundamental criteria i.e., the invention should be (i) novel; (ii) non-obvious; and (iii) one which has utility.⁷⁵ It is clear that the finding of certain qualities in the genetic material of the Zushis, which are used to cure the fatal disease REWBC, can be considered a novel one. Novelty requires effectively, that the information content of the claimed patent is new that is, has not been published or made available to the public. This implies that natural substances can be novel if they have not been described or made specifically available to the public before. It is true that in 1938 itself, a research paper revealed that the genetic markers present in the Zushis could be used to cure certain tropical diseases in the future.⁷⁶ However, the Applicant submits, that this research paper merely gave a vague description of the present use of the genetic material of the Zushis. The public was not aware of the specific use of the Zushi genetic material, i.e. for the cure of REWBC.

⁷⁴ 447 U.S. 303

⁷⁵ See generally Dan L. Burk & Mark A. Lemley, Policy Levers in Patent Law, 89 VA. L. REV. 1575, 1611 (2003); Molly A. Holman & Stephen R. Munzer, Intellectual Property Rights in Genes and Gene Fragments: A Registration Solution for Expressed Sequence Tags, 85 IOWA L. REV. 735 (2000).

⁷⁶ *Compromis*, paragraph 5.

MEMORIAL FOR THE APPLICANT

Hence the Applicant submits that the criterion of novelty has been fulfilled. The other criteria are also fulfilled as neither is this use obvious nor is it lacking in utility.

At this juncture, it would be necessary to distinguish between a “discovery” and an “invention”. In the form of a guideline, the European Patent Office has stated:

“To find a substance freely occurring in nature is a mere discovery and therefore unpatentable. However, if a substance found in nature has first to be isolated from its surroundings and a process for obtaining it developed, that process is patentable. Moreover, if the substance can be properly characterised either by its structure, by the process by which it is obtained or by other parameters and it is ‘new’ in the absolute sense of having no previously recognised existence, then the substance per se may be patentable.”⁷⁷

Therefore, since the proposed use of genetic material, i.e. for the cure of REWBC, does not specifically have a previously recognized existence, it is, in the submission of the Applicant, patentable, and hence forms a part of intellectual property. The Applicant also submits that the genetic markers are not freely found in nature, but are restricted to a particular group of persons, the Zushis.

VI. THE BILATERAL TRADE AGREEMENT ENTERED INTO BETWEEN THE REPUBLIC OF ATTANDRA AND THE REUBLIC OF ZARICA HAS BEEN VIOLATED.

The Applicant submits that the bilateral trade agreement entered into between the Applicant and the Respondent has been violated due to the fact that the agreement clearly states that Zarican Nationals and corporations must purchase property in Attandra at a ‘premium to

⁷⁷See for e.g., the European Patent Convention (EPC) Articles 52-57, which require that the ‘invention’(a concept which is not defined) to be patentable:

- i) must be ‘novel’
- ii) must involve an ‘inventive step’
- iii) must be capable of ‘industrial application’ and
- iv) must not fall “as such” within any of the categories of subject matter specifically included.

MEMORIAL FOR THE APPLICANT

prevailing local market rates'. Employees of Zarican corporations had purchased blood and tissue samples from individual Zushis for small sums of money.⁷⁸ Hence it is clear that since the genetic data was not sold at a premium to prevailing local market rates, the Trade Agreement has been violated.

The Respondent's contention, that property under the Trade Agreement does not include blood and tissue samples, is erroneous. Article 31(1) of the Vienna Convention on the Law of Treaties, which has been ratified by the Applicant and the Respondent, reads:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

In the *Ivcher Bronstein* Case, the Inter-American Court of Human Rights has held that the right to property includes both tangible and intangible property of any value.⁷⁹ Various international jurists, including Rosalyn Higgins,⁸⁰ have expressly stated that 'property' ordinarily includes real and personal property, whether tangible or intangible, and also includes intellectual property. As has been previously stated, the genetic data of the Zushis can be considered intellectual property. Hence, property under the trade agreement would include blood and tissue samples of the Zushis.

The contention of the Respondent is based on the fact that 'property' under the trade agreement would not include genetic material, as it does not have 'local market rates'.

Human biological materials can only be described as being beyond the scope of the market if rights to their possession or use are never exchanged for anything of value and if such materials are never used as inputs into products or packaged with services that are exchanged for value. In other words, the eradication of commerce in human biological materials would require the total abandonment of the price system as a vehicle for allocating rights to human

⁷⁸ See *Compromis*, paragraph 9.

⁷⁹ *Baruch Ivcher Bronstein vs. Peru*, Inter-American Court of Human Rights, Judgment of February 6, 2001.

⁸⁰ R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 *Recueil des Cours*, 259 (1982-III).

MEMORIAL FOR THE APPLICANT

components.⁸¹ Hence, in order for the Respondent to establish that genetic data is not a marketable commodity, the Respondent would have to conclusively prove that genetic data is never exchanged for anything of value.

To state that a market exists in a particular good should not be taken as an assertion that there is a flurry of unregulated bargains. "Market" simply denotes transfers for consideration, with buyers and sellers engaging in mutually beneficial exchanges. Many markets are, of course, heavily regulated, with the terms and conditions of permissible bargains between ready and willing participants curtailed. The mere fact that there may be heavy regulation on the sale of human blood and tissue does not take away from the fact that a market still exists for the same.⁸²

Further, human tissue that has been or can be separated from its source has attributes that are traditionally associated with property: it is definable, defensible, and divestible. Property rights in human tissue include rights to use, alienate, exclude, or in any way control materials. Therefore, the Applicant submits that the bilateral trade agreement has been violated, as the sale of genetic material of the Zushis was not at a 'premium to prevailing local market rates'.

VII. THE REPUBLIC OF ATTANDRA'S NATIONALIZATION OF ZUSHI MEDICAL LTD. IS IN CONFORMITY WITH ITS INTERNATIONAL OBLIGATIONS:

Expropriation refers to a governmental taking or modification of property rights⁸³. The right to expropriate is derived from international acceptance and protection of territorial sovereignty and the right of nations to exercise control over their natural resources.⁸⁴

⁸¹ Julia D. Mahoney – "The Market for Human Tissue", 86 Va. L. Rev. 163.

⁸² See, e.g., Securities Act of 1933, 15 U.S.C. 77 (1994); Virginia Fair Housing Law, Va. Code Ann. 36-96 (West 1999).

⁸³ Blacks Law Dictionary, 8th Ed., 2004.

⁸⁴ Larry George – "Expropriation", I.E.L.T.R 2002, 3, 46-52.

MEMORIAL FOR THE APPLICANT

It is a basic rule of international law that a state may not pursue a remedy on behalf of an injured party unless and until that party has exhausted all the available remedies (administrative, arbitral and judicial).⁸⁵ Therefore, in practice, if a host nation expropriates property from a person and little or no compensation is paid, the person must exhaust every available effective local option before they can benefit from the rights given to individuals under international law.⁸⁶ Hence, the Applicant submits that this claim is not admissible until available local remedies are not exhausted.

Without prejudice to the above argument, the Applicant would also like to dismiss the claim of the Respondent on merits. Expropriation as an act of territorial competence is lawful; however, the rule of compensation makes its legality conditional.⁸⁷ This rule stipulates that compensation given to the affected party must be ‘prompt, adequate and effective’⁸⁸, or at least ‘appropriate and just’⁸⁹.

A number of jurists⁹⁰ and international tribunals⁹¹ have subscribed to the view that an alien cannot complain provided he receives the same treatment as nationals. It is clear that in the instant case there is no element of discrimination on the part of the Applicant. Any affected party whose property is nationalized under the Nationalization of Assets Act would only be entitled to receive minimal compensation.

⁸⁵ *The Interhandel Case (Switzerland v. U.S.A)*, [1959] 1 C.J. 6.

⁸⁶ Larry George – “Expropriation”, I.E.L.T.R 2002, 3, 46-52.

⁸⁷ Ian Brownlie – “Principles of Public International Law”, 6th Ed., p. 510.

⁸⁸ This rule appears in various modern commercial treaties such as the Anglo Japanese Commercial Treaty of 1963, Art. 14, see Almond, 13 ICLQ (1964), 925 at 949. See also Whiteman, 1085-9. Also see Garcia Amador, Yrbk, ILC (1959), 16-24; ICJ Pleadings, *Anglo Iranian Oil Co. Case (United Kingdom v. Iran)*, 100 ff.

⁸⁹ See American Convention on Human Rights, Art. 21; Charter of Fundamental Rights of the European Union, Art. 17.

⁹⁰ See Dunn, 28 Col. LR (1928), 166-80; Cavaglieri, 38 RGDIP (1931), 257-96; Brierly, p. 284; Fischer Williams, 9 BY (1928), 28-9. See further Herz, 35 AJ (1928), 404.

⁹¹ See the Canevaro case PCA (1912), Hague Court Reports, 285; 6 AJ (1912), 746; RIAA 397; *Standard Oil Co. Tankers* (1926), RIAA 781, 794; 8 BY (1927), 156; 22 AJ (1928), 404.

MEMORIAL FOR THE APPLICANT

Further, it is submitted that the rule of compensation is not absolute. Nationalization is unlawful only if there is no provision for compensation payable on a basis compatible with the economic objectives of the nationalization, and the viability of the economy as a whole⁹². The Republic of Attandra is a developing country and hence economically, it would be unable to provide large amounts of compensation to affected parties. Further, the issue of expropriation does not figure in the *Compromis*. Since the ICJ only has jurisdiction to the extent consented thereto by the parties,⁹³ the Applicant also submits that this claim cannot be raised in the Hon'ble International Court of Justice.

VIII. THE DEFENCE OF THERE EXISTING A STATE OF NECESSITY DOES NOT APPLY IN THE PRESENT CASE.

It is an accepted international principle that the doctrine of necessity can be invoked only in 'exceptional circumstances' and that too under very strict conditions.⁹⁴ One of those conditions is that the act being challenged is the only way for the State to safeguard an

⁹² Ian Brownlie – "Principles of Public International Law", 6th Ed., p. 514. See United Nations General Assembly Resolution of 1962 of Permanent Sovereignty over national resources. See also General Assembly Resolution of 21 December, 1952 (Resol. 626 (VII)); General Assembly Resolution of 14th Decmber 1962 (Resol. 1803 (XVII)); *The James Case*, Judgment of 21 Feb. 1986; ECHR Ser. A, no. 98, para. 54. See also Spporrng and Lonnroth, Ser. A, no. 52, paras. 56-75; Lithgow, Ser. A, no. 102, paras 111-74; Higgins, 176 Hague Recueil (1982,III), 355-75; and Mendelson, 57 BY (1986), 33-76; the decision of the Iran-U.S. Claims Tribunal in *INA Corporation v. Government of the Islamic Republic of Iran*, ILR 75, 595. See, most recently, ECHR Ser. A, no. 169, para 47.

⁹³ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda)* 45 ILM 562 (2006).

⁹⁴ See B. Ayala, *De jure et officii bellicis et disciplina militari, libri tres* (1582, repr. Washington, Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612, repr. Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646, repr. Oxford, Clarendon Press, 1925), vol. II, p. 193; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 295-296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 173-174; E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), vol. III, p. 149; Case concerning the *Gabcikovo-Nagymaros Project* "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (I.C.J. Reports 1997, p. 40, para. 51).

MEMORIAL FOR THE APPLICANT

essential interest against a grave and imminent peril.⁹⁵ It is submitted that expropriating Zushi genetic material, was not the only way available to the Respondent State to organize vaccination. Moreover as it endangers more lives than it may save and is otherwise likely to create a greater peril⁹⁶ to the Applicant State, the act in question cannot be construed as one of necessity. As noted by the International Law Commission the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient."⁹⁷ In the *CMS Gas Transmission Company v. The Argentine Republic*⁹⁸, the facts of which are very similar to the instant case, a national emergency was declared in Argentina due to an internal crisis. However the tribunal maintained that the state of necessity under domestic law would not offer an excuse to preclude the Argentine Republic from fulfilling its contractual obligations. It was also observed that even if elements of necessity are 'partially present' here and there, but as a whole do not meet the 'cumulative test' the inevitable conclusion would be that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts of the State, as is the case with Zarica in the instant case.

⁹⁵ Stated by the Court in terms used by the International Law Commission, in a text which in its present form requires (Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text).

⁹⁶ ILC Draft Articles on State Responsibility, 2001. Commentary to Article 24.

⁹⁷ Crawford, at 184. See ICJ's Opinion in, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory* 43 I.L.M. 1009 (2004).

⁹⁸ 44 I.L.M. 1205 (2005).

MEMORIAL FOR THE APPLICANT

CONCLUSION/PRAYER

Therefore in light of the facts of the case, arguments advanced and authorities cited, this court may be pleased to adjudge and declare that –

1. The Applicant has the *jus standi* to approach this Court;
2. The actions of RCRI are attributable to the Republic of Zarica;
3. The Republic of Zarica has violated its customary international law obligations;
4. The Republic of Zarica has violated the rights of the Zushi Community under the International Covenant on Civil and Political Rights;
5. The blood and tissue samples of the Zushis is intellectual property;
6. The bilateral Trade Agreement entered into between the Republic of Attandra and the Republic of Zarica has been violated;
7. The Republic of Attandra's Nationalization of Zushi Medical Ltd. is in conformity with its international obligations.

All of which is respectfully submitted

Agents for the Applicant.