

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 RESPONDENT

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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.

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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 is one of the most technologically developed nations in the world.

In 2005, there was an outbreak of a fatal disease, Rapid Erosion of White Blood Cells (REWBC), in the Republic of Zarica. A national emergency was declared and to cope with the mass scale loss of human life, the Zarican government formed the REWBC Cure and Research Institute (RCRI), an autonomous body consisting of persons appointed by the President of Zarica. Any person refusing to work with RCRI would be liable to penal servitude.

II. ALLEGED 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 the insertion of syringes by non-Zushis. The Zushi community revolted against the colonial rule of the State of Zarica. In order to preserve law and order, 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. Subsequent to the refusal of the Attandrian Government to provide the Zarican Government

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with the abovementioned blood and tissue samples, on account of the religious beliefs of the Zushi community, 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', 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 decide the factum of violation of the trade agreement.

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SUMMARY OF ARGUMENTS

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

1. The Preponderance Test has been satisfied.
2. The Subject Test has been satisfied.
3. The Nature of Claim test has been satisfied.
4. The Nature of Remedy test has been satisfied.
5. The *Sine qua non* test has been satisfied.

II. THE REPUBLIC OF ZARICA IS NOT RESPONSIBLE FOR THE ACTS OF REWBC CURE AND RESEARCH INSTITUTE (RCRI):

1. RCRI is akin to a private person in international law and therefore the State bears no responsibility for its actions.
2. The State cannot be held responsible for the subsequent conduct of an autonomous entity, merely because it establishes the entity.
3. The State is not responsible for those acts of an entity, which are not in its official capacity.

III. THE ACTIONS OF RCRI ARE IN CONSONANCE WITH ITS INTERNATIONAL OBLIGATIONS:

1. There exists the requisite standard of consent for the innocuous and standard medical procedure of drawing of blood and tissue samples.
2. The utilitarian considerations as applied in international law sanction the collection of blood and tissue samples.
3. The doctrine of informed consent lacks universal application and is antithetical, particularly to the normative behavioral patterns of indigenous communities.

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IV. THE REPUBLIC OF ZARICA HAS NOT VIOLATED ANY OF ITS INTERNATIONAL OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR):

1. The Respondent can derogate from its obligations under Article 4 of the ICCPR.
2. The Respondent has not violated its non-derogable rights under the ICCPR:
 - (a) Article 7 has not been violated.
 - (b) Article 18 has not been violated.
3. *Arguendo*, the Respondent has not violated its derogable obligations under the ICCPR:
 - (a) Article 17 has not been violated.
 - (b) Article 27 has not been violated.
4. The allegations of the violations of the Rights of the Zushi community prior to the independence of Attandra are misconceived.
5. The alleged violations of the rights of the Zushis by the employees of independent Zarican Corporations are not attributable to the State of Zarica.

V. THE TRADE AGREEMENT ENTERED INTO BETWEEN THE PARTIES TO THE DISPUTE IS VOID UNDER ARTICLE 48 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES, 1969:

1. The Trade agreement is void due to a lack of consensus ad idem.

VI. ARGUENDO, 'PROPERTY' UNDER THE TRADE AGREEMENT ENTERED INTO BETWEEN ATTANDRA AND ZARICA DOES NOT INCLUDE GENETIC MATERIAL:

1. Blood and tissue samples are not objects ordinarily capable of having a 'local market rate'.

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VII. THE REPUBLIC OF ATTANDRA'S EXPROPRIATION OF ZUSHI MEDICAL LTD. IS UNLAWFUL:

1. The rule of compensation has been violated by the Republic of Attandra.
2. The local remedies rule need not be exhausted with regard to expropriation.
3. The 'nationality principle' plays a subsidiary role to positive legal principles.

VIII. THE RESPONDENTS SEEK A DECLARATION FROM THE HON'BLE INTERNATIONAL COURT OF JUSTICE FOR PROCURING BLOOD AND TISSUE SAMPLES OF THE ZUSHIS:

1. The omission to perform the international legal obligation incumbent upon the State of Attandra under Article 12 (2) (c) imputes liability.
2. The presence of jurisdiction entails the power to declare remedial measures upon the ICJ, which in the present case would include an order to procure genetic material from the Zushi community.

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BODY OF ARGUMENTS

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

THE CLAIM IS BEING MADE FOR AN INDIRECT INJURY ON THE BASIS OF DIPLOMATIC PROTECTION FOR THE ATTANDRIAN NATIONALS, AND HENCE ATTRACTS THE RULE OF EXHAUSTION OF LOCAL REMEDIES.

When a state makes a claim on behalf of its national the injury is an indirect one.¹ The rule of exhaustion of local remedies is a rule of customary international law, which emphasizes its non-derogable nature.² The following factors, which determine the necessity of the exhaustion of local remedies principle, are clearly applicable in the instant case: preponderance, subject of the dispute, nature of the claim, nature of the remedies sought and the *sine qua non* test³.

(i) That the Preponderance Test has been satisfied:

When the dispute at hand is preponderantly based upon injuries to nationals and redressal thereof, it is imperative for local remedies to be exhausted.⁴ In the instant case, reparations are claimed for the benefit of Zushi nationals.⁵ Furthermore, the classification of the dispute

¹ D.J. Harris, *Cases and Materials on International Law* (5th edn., London: Sweet & Maxwell, 1998) at 586; I. Brownlie, *Principles of Public International Law* (6th edn., Oxford: Oxford University Press, 2003) at 459; Oppenheim, *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); *Interhandel (Switzerland v. United States of America)*, 1959 *I.C.J.* 6; *The Panevezys Saldustiskis Railway Case (Estonia v. Lithuania)*, (1939) *PCIJ Rep*, Series A/B, No. 76; *Mavrommatis Palestine Concessions case (Greece v. U.K.)*, (1924) *PCIJ Rep*, Series A, No. 2.

² See the *Interhandel Case (Switzerland v. United States)* (preliminary objections), 27 *ILR* 475; *ICJ Reports* 1959 26-7; the *ELSI Case (United States v. Italy)*, 84 *ILR* 311. See also *Ambatielos Case*, 23 *ILR* 306; *Finnish Ships Case*, 3 *RIAA* 1479; Acancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, 1983; C. Law, *The Local Remedies Rule in International Law*, Geneva, 1961; C.F. Amerasinghe, *Local Remedies in International Law*, Cambridge, 1990.

³ F. V. García Amador, *The Changing Law of International Claims* (1984), pp. 467-468. See also Draft Convention on the Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners, Harvard Law School, 1929, and Commentary, reproduced in (1929) 23 *A.J.I.L.*, Special Suppl., pp. 156-157, the *Interhandel Case (Switzerland v. United States)* (preliminary objections), 27 *ILR* 475; the *ELSI Case (United States v. Italy)*, 84 *ILR* 311, 2006 *ILC Draft Articles on Diplomatic Protection*, T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies" (1959), 35 *B.Y.I.L.* 85; Thirlway, 'The Law and Procedure of the International Court of Justice', (1998) *BYIL* 4, Amarsinghe, *supra* note 2.

⁴ *Ibid.*

⁵ *Compromis*, paragraph 10.

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as “relating to the genetic material of the Zushis” in the *Compromis* serves as an indicia that the dispute is preponderantly in favour of the Zushis.⁶ The Respondent respectfully submits that “the real interests and objects pursued by the claimant State”⁷ and that “which pervades and colours the claim”⁸ is clearly the interests of the Zushis, and unequivocally brings the dispute within the ambit of the principle.

(ii) The Subject Test has been satisfied:

The subject of the dispute is clearly a factor to be considered in the classification of a claim as direct or indirect. Where the injury is to a diplomatic or consular official⁹ or to State property¹⁰, the claim will normally be direct.¹¹ Treaty violation does not absolve a State from the responsibility to exhaust local remedies without the express stipulation of the same in the treaty in question.¹² In this regard, the presence of inter-State rights is also irrelevant.¹³ More particularly, the violation of a human rights treaty does not result in direct injury to a State.¹⁴

(iii) The Nature of Claims test has been satisfied:

In the Court’s jurisprudence, the viability of the local remedies rule hinges upon the principal element of the claim. The rule is considered inapplicable, if the claim is such that it does not involve injury of a kind which could be remedied by recourse to municipal courts. If the crux of the matter is such that it can be addressed effectively in local courts, then any ancillary issues arising from the same would be rendered inadmissible, irrespective of their nature as

⁶ See the *ELSI Case* (United States v. Italy), 84 ILR 311: ICJ Reports 1989 15 (para 51). Judge Basdevant in *Interhandel supra* note 1.

⁷ T.Meron, *supra* note 3.

⁸ *ELSI, supra* note 6.

⁹ See *The Hostages Case: United States Diplomatic and Consular Staff in Tehran* (USA v. Iran), ICJ Reports 1980 3:61 ILR 502.

¹⁰ *Aerial Incident of 27th July, 1955 Case (Preliminary Objections)*(Israel v. Bulgaria), 27 ILR 557:ICJ Reports 1959 127.

¹¹ See ILC Draft Articles on Diplomatic Protection, 2006. Yearbook of International Law Commission, 2006, Vol II, Part II.

¹² See *ELSI supra* note 6, *Interhandel supra* note 2.

¹³ “The Law and Procedure of the International Court of Justice, 1960-1989” (1995), 66 *B.Y.I.L.* 89-90.

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

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belonging to the realm of inter State rights.¹⁵ It is submitted that the nature of claim is such that redress is available in the domestic Courts of Attandra and Zarica. In light of the dicta laid down in the *Interhandel Case*¹⁶, this submission is unfettered by the contention that Acts of the State are involved in the instant case. The final word on jurisdiction is one on which the local courts alone can adjudicate. Furthermore, the International Court of Justice cannot confer jurisdiction upon a dispute until and unless the municipal courts have conclusively and expressly denied jurisdiction.¹⁷

(iv) The Nature of the Remedies test has been satisfied:

It is humbly submitted that the remedy sought by the State of Attandra is monetary relief for its nationals¹⁸ as opposed to a mere declaratory relief with respect to the violation of its rights. Thus the necessity of exhaustion of local remedies is markedly discernable in the present case.¹⁹

(v) The *Sine qua non* test has been satisfied:

The sine qua non or “but for” test, encapsulates the principle that the necessity of exhaustion of domestic remedies is to be determined on the basis of whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered affirmatively, then the claim is an indirect one and local remedies must be exhausted. Hence, from the consistent stand of the Attandrian Government, it is derivable that the dispute would not have reached the forum in question had it been severable from the interests of the Zushis.

¹⁵ The Law and Procedure of the International Court of Justice, 1960-1989” (1995), 66 *B.Y.I.L.* 89-90.

¹⁶ *Supra* n 2.

¹⁷ The *Panevezys-Saldutiskis Railway Case*(*Estonia v. Lithuania*), *PCIJ Series A/B No. 76*.

¹⁸ *Compromis*, para 10.

¹⁹ See *Air Services Agreement of 27th March 1946 Case*, United States/France, 54 *ILR* 306; ILC Draft Articles on Diplomatic Protection, 2006; T. Meron, “The Incidence of the Rule of Exhaustion of Local Remedies”, 35 *Brit.T Y.B. Int’l L.*, 83 (1959).

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II. THE REPUBLIC OF ZARICA IS NOT RESPONSIBLE FOR THE ACTS OF RCRI.

(i) RCRI is an autonomous body:

It is an uncontroverted fact that RCRI is an autonomous body. An entity is said to be autonomous when it has direct control over areas of special concern, while allowing the larger entity, which retains certain powers over that area, to exercise those powers, which are in the common interests of both entities.²⁰ This means that an entity may be autonomous even within the larger framework of Statal organization. Moreover, since the last century it has been customary State practice, and well documented in international law that the State can never be held responsible for the conduct of a private person.²¹ It is thus submitted that the actions of RCRI as an independent, autonomous entity can never be attributed to the State of Zarica.

(ii) The State cannot be held responsible for the subsequent conduct of an autonomous entity, merely because it establishes the entity:

It is an internationally recognized principle, consistently reiterated in a plethora of cases by international tribunals²² as also the International Law Commission.²³, that merely because the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for attributing to the State the subsequent conduct of that entity. An act of an autonomous entity cannot be attributed to the State merely on the basis of a *factual*

²⁰ Models of Autonomy, Louis Sohn and Rudolph Bernhardt, Edited By Yoram Dinstein. Tel Aviv Faculty of Law, Tel Aviv University; New Brunswick and London, Transaction Books 1981.PPX 319.

²¹ Award rendered in the *Ruden Case* by the United States-Peru Mixed Commission established under the Convention of 4 December 1868 (Moore, History and Digest ... (op. cit.), vol. II, pp. 1654-1655); the awards relating to *Glenn's case* rendered by an umpire appointed under the Convention of 4 July 1868 between the United States and Mexico {ibid., vol. III, p. 3138}; the award relating to the Cotesworth and *Powell Case*, rendered on 5 November 1875 by the British-Colombian Mixed Commission established under the Convention of 14 December 1872 {ibid., vol. II, p. 2082}; and the award relating to the *De Brissot and Others case*, rendered in 1890 by the United States-Venezuelan Claims Commission established by the Convention of 5 December 1885 {ibid., vol. III, p. 2968}; British Property in *Spanish Morocco Case*, United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.I), pp. 636, 709 and 710.

²² E.g. the Workers. Councils considered in *Schering Corporation v. Islamic Republic of Iran*, (1984) 5 Iran-U.S.C.T.R. 361; *Otis Elevator Co. v. Islamic Republic of Iran*, (1987) 14 Iran-U.S.C.T.R. 283; *Eastman Kodak Co. v. Islamic Republic of Iran*, (1987) 17 Iran-U..S.C.T.R. 153.

²³ ILC Commentary on the Draft Articles on State Responsibility, 2001.

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causality.²⁴ Corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate if prima facie their conduct in carrying out their activities is not attributable to the State.²⁵ The International Court of Justice itself has laid down a severe standard for attributability - mere financing and organisation or even planning, direction or support of the entity in question does not suffice for the same.²⁶ The Hon'ble Court emphasizes upon the "control" of the Government, and such control must not be general, but pertain to the act in question. In the case at hand, the impugned act refers to the collection of blood and tissue samples, wherein the control of the Government is clearly lacking.

It is thus submitted that the Republic of Zarica merely constituted the members forming RCRI for the purpose of finding a cure for REWBC. It did not have even a modicum of control, nor did it participate in any manner whatsoever in the conduct of its operations for achieving this function. The respondent State thus can never be held responsible for the autonomous, unregulated acts of RCRI.

(iii) The State is not responsible for those acts of an entity, which are not in its official capacity:

It has been recognised by the International Law Commission that the impugned conduct must comprise only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to

²⁴ R Quadri, *Diritto Internazionale Pubblico*, 5th ed, Naples Liguori 1968, pp 587-588, See Also Draft Articles on State Responsibility with commentaries thereto adopted by the International Law Commission on its First Reading, January 1997, p 17, 97-02583.

²⁵ (1987) 15 *Iran-U.S.C.T.R.* 23. See also *International Technical Products Corp. v. Islamic Republic of Iran*, (1985) 9 *Iran-U.S.C.T.R.* 206; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, (1986) 12 *Iran-U.S.C.T.R.* 335, at p. 349, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14; *The Case of Prosecutor v. Tadic*, Case IT-94-1, (1999) *I.L.M.*, vol. 38, p. 1518. See also *I.L.R.*, vol. 112, p. 1.

²⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986. See also *The Case of Prosecutor v. Tadic*, Case IT-94-1, (1999) *I.L.M.*, vol. 38, p. 1518.

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be organs or agents of the State.²⁷ It further goes on to observe that if it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).²⁸

It is respectfully submitted that Respondent State granted police powers to RCRI for the sole purpose of inducting scientists and not for the manner in which the research would be conducted.²⁹ For all the above reasons it is submitted that the Respondent State is not responsible for the acts of the autonomous body, RCRI.

III. THE ACTIONS OF THE RCRI ARE IN CONSONANCE WITH ITS INTERNATIONAL OBLIGATIONS.

The collection of blood and tissue samples by RCRI is with the consent of the Zushi community.³⁰ The Zushi community's religion is only opposed to invasive action as attributable to non-Zushi individuals.³¹ The samples as obtained by RCRI from the erstwhile Zushi Medical Centre have been collected by doctors and nurses of the Zushi community and this devolves consent unto the Zushi community. The reuse of the collection of samples by RCRI does not mandate any reporting requirements. Such requirements can be dispensed with for innocuous or standard medical procedures, such as collecting blood.³²

²⁷ *Supra* note 23.

²⁸ *Ibid.*

²⁹ See *Short v. Islamic Republic of Iran*, 16 Iran-US CTR, p. 85;82 ILR 148.

³⁰ Compromis, paragraph 5.

³¹ Compromis, paragraph 6.

³² See 34 UCLA L. Rev. 67 UCLA Law Review October, 1986 Informed Consent In Human Experimentation: Bridging The Gap Between Ethical Thought And Current Practice Richard, Delgado and Helen Leskovac .See Also: *Bang v. Miller Hosp*, 251 Minn. 427, 434, 88 N.W.2d 186, 190 (1958); *Halushka v. University of Saskatchewan*, 53 D.L.R.2d 436, 52 W.W.R. 608 (Sask. Ct. App. 1965), reprinted in J. Katz, Experimentation

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International law sanctions these actions of the Respondents since the rights of the individual are not absolute and may be restricted so long as the burdens on this right are necessary to achieve a compelling public health interest.³³ The right to health for all individuals outweighs the right of a single individual, subject to informed consent and other protections.³⁴

Further, diverging views exist with regard to the doctrine of informed consent. Various international experts believe that it is based on uniquely Western notions of individual rights and autonomy, and that there is no universality to its acceptance, especially among indigenous people.³⁵

Thus, it is submitted that the acts of RCRI are in conformity with international standards during times of a medical emergency.

IV. THE REPUBLIC OF ZARICA HAS NOT VIOLATED ANY OF ITS INTERNATIONAL OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR).

Article 4 of the ICCPR, which has been ratified by the Republic of Attandra and the Republic of Zarica, states, that during a national emergency which has been officially proclaimed, a State may derogate from its obligations under the Covenant.³⁶ The Respondent submits that all the tests encapsulating the existence of an emergency: (i) the existence of an extreme circumstance that is actual or imminent, as opposed to threatened, perceived, or persistent, (ii) the imminent threat to the survival of the organised life of the community, (iii) an impact

With Human Beings 569 (1972); R. Levine, Ethics And Regulation Of Clinical Research 93-94 (1981); Note, Informed Consent: From Disclosure to Patient Participation in Medical Decision making, 76 NW. U.L. REV. 172, 176- 77 (1981).

³³ R.J.Levine, Ethics And Regulation Of Clinical Research 93-94 (1981); Note, Informed Consent: From Disclosure to Patient Participation in Medical Decision making, 76 NW. U.L. REV. 172, 176- 77 (1981), Cooley D, Good Enough for the Third World, Journal of Medicine and Philosophy, 2000.

³⁴ Annas & Grodin, The Nazi Doctors and the Nuremberg Code, Human Rights in Human Experimentation (Oxford University Press).

³⁵ Linda Farber, Post Jeffrey Blustin; Elysa Gordon, Nancy Neveloff Dubler, Journal of Law, Medicine and Ethics, Volume 24:4, Winter 1996.

³⁶ See The Siracusa Principles on Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 7 Hum. Rts. Q. 3 1985.

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upon the entire populace in the area in which the derogating measures apply, (iv) necessity and proportionality to the contingent threat;³⁷ have been satisfied. Since a national emergency³⁸ has been declared in Zarica due to the outbreak of the fatal disease REWBC, it is submitted that Zarica may avail of the derogations permitted under this Article.

Article 4(3) states that in order to avail of the right of derogation, the concerned State must inform the other States parties to the ICCPR of this derogation through the Secretary General.³⁹ Due to constraints of information in this particular case, there is no evidence of the fact that the other State parties have been informed of this derogation. Derogation under this Article may be proven through fact or law.⁴⁰ Hence, it would only be reasonable to assume that given the circumstances, the Respondent had informed other States parties to the covenant of this derogation, as per Article 4 (3).

Further, the Respondent also submits that the truly decisive factor regarding derogation is compliance with Article 4 (1). The Human Rights Committee, in *Silva v. Uruguay*,⁴¹ has asserted that if a State party could justify its derogations under the terms of Article 4(1) and (2) of the ICCPR, then the fact that it had not complied with the notification requirements under Article 4(3) of the ICCPR would not preclude it from raising a defense based on its derogations. Moreover, there has been no suggestion of the fact that derogation compliant

³⁷ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. 7 Hum Rts Q (1983), Paris Minimum Standards of Human Rights Norms in a State of emergency 79 Am J Intl L (85) at 1073, Hartman, Derogations from human rights treaties in public emergencies A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations, 22 Harv. Int'l L.J. 1, 2 (1981), Daniel O Donnell, Commentary on the Rapporteur on Derogation, 7 Human Rts Q 23, at 24, Cf Thomas Buergenthal, To Respect and ensure State obligations and permissible derogations in the international bill of rights-The Covenant on Civil and Political Rights (Louis Henkin, ed 1981)

³⁸ Compromis para 4.

³⁹ See General Comment no. 29 of the Human Rights Committee on Article 4, adopted at the 1950th meeting on 24th July, 2001, CCPR/C/21/Rev.1/Add.11.

⁴⁰ Dominic McGoldrick, The Interface between Public Emergency Powers and International Law, 2 Int'l J. Const. L. 380.

⁴¹ UN Doc. A/36/40, 130.

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with Article 4 (1) would be invalid on the basis of non-compliance with Article 4 (3).⁴² Therefore, Zarica may validly avail of its right of derogation so long as conformity with Article 4 (1) and Article 4 (2) is established.

However, certain Articles under the ICCPR cannot be derogated from even in times of a national emergency.⁴³ Hence, these Articles will be examined in greater detail.

(i) Non-Derogable Rights:

Article 7 of the ICCPR, from which no derogation is possible, prohibits medical and scientific experimentation on persons without their free consent. The process of collection of blood and tissue samples from the Zushis does not in any way violate this Article. This is due to the fact that mere collection of blood would not fall within the ambit of the term 'experimentation'. Experimentation represents a departure from standard medical practice, and is designed to test a hypothesis with the further goal of developing new knowledge.⁴⁴ It is clear that the drafters of the convention intended to link the protection against torture, inhuman and degrading treatment with protections against coercive and potentially dangerous medical practices.⁴⁵ Since collection of blood and tissue samples refers to an innocuous and standard medical procedure, with minimal risk of any damage to the patient. Thus it cannot be referred to as 'experimentation'.

Further, the phrase 'free consent' refers to consent obtained without the intervention of any element of coercion, undue influence, fraud, misrepresentation, or mistake.⁴⁶ Since these elements were missing when genetic data was collected from the Zushis by Zushi Medical Ltd., the question of violation of this Article does not arise.

⁴² See, UN Doc. CCPR/C/SR.355, ¶ 24 (Uruguay). See also Silva case, UN Doc. A/36/40, 130.

⁴³ As per Article 4(2) of the ICCPR, no derogation from Articles 6, 7, 8,11,15,16 and 18 is permissible. See also General Comment no. 29 of the Human Rights Committee on Article 4, adopted at the 1950th meeting on 24th July, 2001, CCPR/C/21/Rev.1/Add.11; The Siracusa Principles on Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 7 Hum. Rts. Q. 3 1985; Louis B. Sohn, The New International Law: Protection of the Rights of Individuals rather than States, 32 AM UL Rev 1 (1982).

⁴⁴ See Dale H. Cowan, Innovative Therapy Versus Experimentation, 21 Tort & Ins. L.J. 619, 622 (1986).

⁴⁵ Eric Rosenthal and Clarence J. Sundram, International Human Rights in Mental Health Legislation, 21 N.Y.L. Sch. J. Int'l & Comp. L. 469.

⁴⁶ See Indian Contract Act, 1872, Section 14; Louisiana Civil Code, Art. 1819 (1870).

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As regards the change of purpose of the genetic data which had been collected by Zushi Medical Ltd., this act would not contravene free consent standards. Only in cases where experimentation, which involves a certain possibility of bodily harm, is concerned, would much higher standards of consent be required. The International Declaration on Human Genetic Data also states that a change of purpose which is incompatible with the original consent is permitted if the purpose refers to an important public interest reason.⁴⁷ Since the genetic data of the Zushis was being used for the cure of an endemic disease, this change of purpose is also warranted under the aforementioned Declaration. Hence, it is clear that Article 7 of the ICCPR has not been violated by the Respondent.

Article 18 of the ICCPR, which guarantees the freedom of religion to all persons, is also an Article from which no derogation is possible. Under the Zushi religion, any invasive action carried out by a non-Zushi would amount to the desecration of a holy place.⁴⁸ It is an undisputed fact that Zushi Medical Ltd. consisted of Zushi doctors and nurses, who collected genetic data from the Zushis. Further, as has been stated previously, it is also clear that free consent had been obtained from the Zushis,⁴⁹ prior to the collection of their genetic material. Hence, a violation of the religious rights of the Zushis does not arise.

It is also submitted that the freedom of religion is subject to the restrictions of public safety and health, particularly prevention of endemic diseases.⁵⁰ Hence, individual religious or

⁴⁷ International Declaration on Human Genetic Data (2003), Article 16(a). See also: International Ethical Guidelines for Biomedical research involving human subjects, prepared by the Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO).

⁴⁸ Compromis, para 5.

⁴⁹ Khighet, 'Evidence and proof of facts' in Damrosch; International Court of Justice at a Crossroads, pp. 355, 357. See also D.V. Sandifer, Evidence before International Tribunals, Charlottesville, 1975; S.Schwebel, Justice in International Law, Cambridge, 1994, page 125; Khighet, 'Evidence, the Court and the Nicaragua Case', 81AJIL 1987, P.1; M.Kazazi, Burden of Proof and related issues, the Hague, 1996, T.M.Franck, Fairness in International Law and Institutions, Oxford, 1995, pp. 335 ff.

⁵⁰ Article 18(3) of the ICCPR; The Siracusa Principles on Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 7 Hum. Rts. Q. 3 1985; Religion Declaration; Lesley

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cultural rights⁵¹ may be subordinated to the right to health of the community as a whole. The right to life, which includes the right to an adequate standard of health, has been called the most fundamental of all the human rights⁵² recognized in international law – the primordial right which inspires, leads and informs every other right and serves as the *raison d'etre* for the field of human rights.⁵³ The contingent violation of the right to life of the world at large in light of the impending crisis of the spread of the fatal and communicable disease REWBC renders any other rights of the Zushis secondary - since the latter are meaningless without the former.⁵⁴

(ii) Derogable Rights:

Without prejudice to the fact that the other Articles under the ICCPR which have been allegedly violated can be derogated from under Article 4, the Respondent submits that these Articles have not been violated.

Article 17 of the ICCPR states that no person shall be subjected to an arbitrary or unlawful interference with his privacy. The word ‘arbitrary’ is defined as “depending on the will alone”.⁵⁵ Once again it is emphasized that since free consent had been obtained as per Article 7 of the ICCPR, the collection of genetic material from the Zushis by Zushi Medical Ltd. cannot be considered an ‘arbitrary’ interference with their privacy. The contention of the Applicant, that the use of the genetic data of the Zushis, for a purpose incompatible with the

Stone, Lance Gable, Tara Gingerich, When the Right to Health and the Right to Religion Conflict: A Human Rights Analysis, 12 Mich. St. J. Int'l L 247. See generally the principle of *expressio unius est exclusio alterius*.

⁵¹ Stated by the U.N. Commission on Human Rights as reprinted in BG Ramcharan, The Concept And Dimensions Of The Right To Life, in The Right to Life in International Law 3 (B.G. Ramcharan ed., 1985) at 14.

⁵² See, B.G. Ramcharan, *ibid*.

⁵³ Kurt Herndl, when Assistant Secretary-General for Human Rights of the United Nations as cited in Ramcharan *ibid*.

⁵⁴ Leo Kuper, Genocide and Mass Killings: Illusion and Reality, in The Right to Life in International Law as cited in Ramcharan *ibid*. See also European Convention, Article 2(1), 213 U.N.T.S. at 224; Universal Declaration of Human Rights, Article 3; American Convention, Art. 4(1), 9 I.L.M. at 676; African Charter, *supra* note 134, art. 4, 21 I.L.M. at 60.

⁵⁵ Blacks Law Dictionary, Fifth Ed., page 96.

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original consent amounted to an arbitrary interference with privacy, is invalid. This is due to the fact that the ICCPR expressly permits arbitrary interferences with privacy in cases envisaged by domestic law.⁵⁶ Hence, it is clear that Article 17 of the ICCPR has not been violated.

Article 27 of the ICCPR protects the cultural, religious and linguistic rights of minorities.

The Human Rights committee has stated that a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation.⁵⁷ The Respondent has conclusively proved that the individual rights of the Zushis under the ICCPR have not been violated. Hence, it is clear that the rights of the Zushis by virtue of being part of a minority community have also not been infringed upon.

The allegations of the violation of the Rights of the Zushi community, prior to the independence of Attandra, are misconceived:

The Applicant's claim that the rights of the Zushis still stand violated, from the time prior to the independence of Attandra, when Zushi blood and tissue samples were taken for research by international medical practitioners and social anthropologists, is per se bad in law, in light of the principle of Extinctive Prescription. 'Extinctive Prescription' is the "bar of claims by lapse of time"⁵⁸. The doctrinal underpinnings of the Extinctive Prescription (also known as the Doctrine of Laches) principle are not based upon extrajudicially prescribed time limits, but instead upon a rich history of justice, fairness, and the equitable balancing of rights⁵⁹.

⁵⁶ Human rights Committee, 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).

⁵⁷ 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).

⁵⁸ See 2 D.P. O'Connell, International Law 1066 (2d ed. 1970) ("International law contains a rule for the extinction or barring of claims upon lapse of time"). See also 1 Oppenheim's International Law § 154 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). See also King, supra note 14, at 82 (defining extinctive prescription as "[t]he effect of lapse of time in destroying international claims"); Walter S. Johnson, Extinctive Prescription and Conflict of Laws.

⁵⁹ See McClintock, supra note 1, § 28, at 75; Robinson, supra note 1, at 971. American admiralty courts have also drawn upon the doctrine of laches in rejecting stale claims. See, e.g., Young v. Key City, 81 U.S. 653, 660 (1871); Vass & Chen, supra note 1, at 495-506.

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International Courts have announced a myriad of factors affecting the legal application of the doctrine, such as: (1) unreasonable delay; (2) prejudice to the defendant; (3) potential loss of evidence; (4) change in the value of the subject-matter involved; and (5) a fundamental change in circumstances.⁶⁰

The period during which the Zushi blood and tissue samples were taken, and research was conducted was in pre-independence Attandra, over sixty years ago.⁶¹ This indicates that there has been an unreasonable delay in the filing of claims.⁶² Also, the gathering of genetic samples occurred at a time when the Zarican regime was still in power in Attandra, before the Second World War⁶³. From this we can gather that there has been a fundamental change in circumstances; including independence for the Republic of Attandra, and relative political harmony post World War II.

The alleged violations of the rights of the Zushis by the employees of independent Zarican Corporations are not attributable to the State of Zarica:

It is the submission of the Respondent that the collection of genetic material of the Zushis by Zarican Corporations for small sums of money, as is evident from newspaper reports,⁶⁴ is not an issue which is compatible with international law. This is due to the fact that the acts of the individual Zarican Corporations are not attributable to the State of Zarica.⁶⁵

⁶⁰ See, e.g., McClintock, supra note 1, § 28, at 71-74.

⁶¹ See *United States v. Iran*, Award No. 574-B36-2 (1996); *Iran Railway v. United States*, Award No. 572-B58-2 (1996). The first of these cases, B/36, involved a contract dispute where the United States sued Iran for withholding payment pursuant to two military sales agreements executed between 1945 and 1948. In B/58, the second claim before the tribunal, Iran Railway sued the United States for damage to its railroad incurred during the Second World War. Both claims were struck down, as the alleged violations had occurred over forty years prior to filing of the claims.

⁶² The *Ambatielos Claim (Greece v. U.K.)*, 23 I.L.R. 306 (Arb. Comm'n 1956). Greece had sued the United Kingdom on behalf of a Greek citizen who pleaded various contract claims against the British government. Although the incidents in question had occurred in 1919, Greece did not file the action with the Arbitration Commission until 1952; Special Rapporteur on the ILC Draft Articles on State Responsibility, [1958] 2 Y.B. Int'l L. Comm'n 47, 67 U.N. Doc. A/CN.4/111.

⁶³ Compromis. para 2.

⁶⁴ See Compromis, para 9; *Nicaragua Case*, ICJ Reports 1986 page 14,41, 76 ILR 349.

⁶⁵ See ILC Draft Articles on State Responsibility. See also Award rendered in the *Ruden Case* by the United States-Peru Mixed Commission established under the Convention of 4 December 1868 (Moore, *History and Digest ...* (op. cit.), vol. II, pp. 1654-1655); the awards relating to Glenn's case rendered by an umpire appointed under the Convention of 4 July 1868 between the United States and Mexico (ibid., vol. III, p. 3138); the award

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Therefore, the Respondent submits that it has not violated its international obligations under the ICCPR.

V. THE TRADE AGREEMENT ENTERED INTO BETWEEN THE PARTIES TO THE DISPUTE IS VOID.

The Respondent respectfully submits that the bilateral trade agreement entered into between the Republic of Attandra and the Republic of Zarica is void. Article 48 of the Vienna Convention on the Law of Treaties, which has been ratified by the aforementioned States, refers to the invalidation of a treaty due to the existence of an error.⁶⁶

One of the most important aspects required for the formation of an agreement, *consensus ad idem*,⁶⁷ was missing at the time at which the bilateral agreement was entered into between the two States. *Consensus ad idem* is recognized by a majority of sovereign civilized nations as a necessary precondition for entering into an agreement. In fact, *consensus ad idem* is what distinguishes a unilateral act from a treaty.⁶⁸

The Respondent submits that Attandra and Zarica were not *ad idem* due to the fact that in the Trade Agreement, though they were referring to the same object i.e. property; they were not referring to it in the same sense. It is evident from recent developments that while Attandra believed that ‘property’ under the Trade Agreement would include property in its widest

relating to the Cotesworth and Powell case, rendered on 5 November 1875 by the British-Colombian Mixed Commission established under the Convention of 14 December 1872 {*ibid.*, vol. II, p. 2082}; and the award relating to the De Brissot and others case, rendered in 1890 by the United States-Venezuelan Claims Commission established by the Convention of 5 December 1885 {*ibid.*, vol. III, p. 2968}; British Property in Spanish Morocco Case, United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.I), pp. 636, 709 and 710.

⁶⁶ Article 48 of the Vienna Convention on the Law of Treaties, reads: “1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.”

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.”

⁶⁷ Defined in Blacks Law Dictionary as “a meeting of minds”; or “an agreement on the same thing in the same sense”.

⁶⁸ Georg Schwarzenburger, *A Manual of International Law*, Fifth Ed., p.151

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classification; Zarica believed that ‘property’ would only include property which would ordinarily be capable of having a ‘local market rate’.

Though *consensus ad idem* has not been expressly mentioned in the Vienna Convention on the Law of Treaties, it has been recognized in an important instrument used for interpreting the Vienna Convention: the Report on the Law of Treaties⁶⁹. Article 12(1)(b)⁷⁰ of this Report states that if a mutual error has been made by both the parties, about different things or in different senses as per Article 11(2)(a)⁷¹, then the treaty is invalidated due to a lack of *consensus ad idem*. Hence, the Respondent submits that Article 48 of the Vienna Convention

⁶⁹ Third Report on the Law of Treaties (1958) by Mr. G. G. Fitzmaurice.

⁷⁰ Article 12 of the Third Report on the Law of Treaties states:

“*Error and lack of consensus ad idem (effects):*

1. *Provided the conditions set out in paragraph 2 below are satisfied, error, if of the kind specified in paragraph 1 of article 11, will:*

(a) *In cases coming within the scope of head (a) (i) of paragraph 2 of article 11, invalidate the treaty;*

(b) *In cases coming within the scope of head (a) (ii), invalidate the treaty, provided the errors are such as to lead to a lack of consensus ad idem sufficient to preclude any common basis of agreement;*

(c) *In cases coming within the scope of head (b), invalidate the treaty only if the error was induced or contributed to by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other party, but not otherwise.*

2. *In order to rank as such for the purposes of the present article, the error must, in addition to being a material one as specified in article 11, paragraph 1, above, have the following characteristics:*

(a) *It must be an error of fact not of law;*

(b) *It must not be simply an error of judgment, and must not affect merely the motives of the parties in concluding the treaty, unless these themselves involve a mistaken belief as to the existence or actuality of a fact or state of facts;*

(c) *It must be excusable and not such as could have been avoided by the exercise of reasonable care, diligence, investigation or foresight;*

(d) *It must relate to a circumstance, fact, or state of facts assumed to be correct or in existence, or to prevail, at the time of the conclusion of the treaty, and not to something anticipated in the future or occurring subsequently.*

3. *Although, as provided in paragraph 1(c) above, an error made by one party only is not a ground of invalidity unless induced by, the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other, yet, if the treaty is a plurilateral or multilateral one, an error made by a party which did not take part in the original conclusion of the treaty, affecting the fundamental basis of its own subsequent participation, will constitute a ground on which the invalidity of that participation may be claimed, provided the error in other respects conforms to the conditions of paragraph 2 above.*

4. *The invalidity of a treaty on the basis of an error, even if the error is mutual and conforms to the above conditions, cannot be claimed by a party whose own fault or negligence caused or contributed to the error.”*

⁷¹ Article 11 of the Third Report on the Law of Treaties states:

“*Error and lack of consensus ad idem (analysis and classification):*

1. *Error means material error in some essential particular affecting the basis of the treaty.*

2. *The cases of error or mistake may, for the purposes of this Code, be classified as follows:*

(a) *Error on the part of both parties, which may take the form either (i) of common and identical error, about the same thing; or (ii) of mutual error, but about different things or in different senses;*

(b) *Error on the part of one party only.”*

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on the Law of Treaties should be interpreted in accordance with Article 11 and 12 of the Report on the Law of Treaties.

Therefore, it is clear that since Attandra and Zarica were referring to ‘property’ in different senses, the trade agreement entered into after the independence of Attandra is invalid, as the States were not *ad idem*. Hence, a question of the violation of the trade agreement would not arise, as the agreement itself is void *ab initio*.

VI. ARGUENDO, ‘PROPERTY’ UNDER THE TRADE AGREEMENT ENTERED INTO BETWEEN ATTANDRA AND ZARICA DOES NOT INCLUDE GENETIC MATERIAL.

Without prejudice to the fact that the trade agreement entered into between the Republic of Attandra and the Republic of Zarica is void, ‘property’ under the trade agreement does not include genetic material. This is due to the fact that the Trade Agreement clearly states that property must be purchased by Zarican citizens and corporations at a ‘premium to prevailing local market rates’. Article 31(4) of the Vienna Convention on the Law of Treaties, which has been ratified by the Republic of Attandra and the Republic of Zarica, states that a special meaning may be given to a term if it is established that the parties so intended. Hence, the Respondent submits that ‘property’ under the trade agreement would not include the blood and tissue samples of the Zushis, as it only refers to property which would, in the ordinary and reasonable use of the term, be capable of having a ‘local market rate’.

International Law prohibits the sale of blood and tissue samples. The Charter of the Fundamental Rights of the European Union,⁷² for example, prohibits making the human body

⁷² Article 3 of The Charter of the Fundamental Rights of the European Union, 2000, reads:

‘Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

- the free and informed consent of the person concerned, according to the procedures laid down by law,

- the prohibition of eugenic practices, in particular those aiming at the selection of persons,

- the prohibition on making the human body and its parts as such a source of financial gain,

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and its parts, a source of financial gain. Hence, marketing of blood and tissue samples is certainly not recognized, and in fact, is prohibited under international law. Therefore, being a treaty under international law, 'property' under the trade agreement would not include the genetic material of the Zushis.

The Respondent submits that the mere fact that an object may be purchased and sold does not make it a marketable commodity, having a local market rate. Therefore the question of violation of the bilateral trade agreement would not arise, as 'property' under the trade agreement would not include the blood and tissue samples collected from the Zushis.

VII. THE REPUBLIC OF ATTANDRA'S EXPROPRIATION OF ZUSHI MEDICAL LTD. IS UNLAWFUL.

'Expropriation' is the deprivation by State organs of a right of property either as such, or by permanent transfer of the power of management and control.⁷³ Expropriation of property includes deprivation of one's rights to control any form of property: be it tangible or intangible. In the *Amoco/Iran Case* it was held that "*Expropriation ... can be defined as a compulsory transfer of property rights, and may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value.*"⁷⁴

Further, with regard to the scope of an expropriation, the Iran-U.S. Claims Tribunal took the position that an expropriation of property encompasses '*all kinds of takings, whether formal and direct such as nationalization, or informal and indirect such as so-called constructive takings and 'creeping' expropriation.*'⁷⁵

- the prohibition of the reproductive cloning of human beings.

⁷³ On the various procedures of taking see Sohn and Baxter, 55 aJ (1961), 533, 559; Domke, *ibid.* 588-590; Christie, 38 BY (1962), 307-308; Whiteman, 1006-20; Weston 16 Virginia JIL (1975-6), 103-75. See also the ELSI case, ICJ Reports (1989), 15, 67-71; Sola Tiles Inc. v. Islamic Republic of Iran, ILR 83, 460; Otis Elevator Company v. Islamic Republic of Iran, ILR 84, 618; and Starrett Housing Corporation v. Islamic republic of Iran, ILR 85, 349 at 380-93 (Iran U.S. Claims Tribunal).

⁷⁴ Amoco International Finance Corp. and Islamic Republic of Iran, 6 C.T.R. 149, 168 (1984-11) at p. 220.

⁷⁵ Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* 70 (1994).

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It is clearly stated in the *Compromis* that the Republic of Attandra nationalized the Zushi Medical Center and took over management and control. The Applicant hence deprived the Zushi Medical Centre of its rights of controlling and freely disposing off its assets. Since expropriation refers to a compulsory taking of any form of property rights, it is submitted that what has been referred to by the Applicant as ‘nationalisation’ is an act of expropriation.

In principle, expropriation as an act of territorial competence is lawful, however, the rule of compensation makes its legality conditional⁷⁶. There are two interpretations of the rule of compensation. The first is that compensation provided to the affected party must be prompt, adequate and effective. This interpretation has received considerable support from the jurisprudence of international tribunals.⁷⁷ The second mode of interpretation is that compensation is only required to be ‘appropriate’ and ‘just’.⁷⁸ The second manner of interpretation is one which has been accepted by a majority of States.⁷⁹

The Respondent submits that regardless of which mode of interpretation the Hon’ble Court would like to adopt, there has been a violation of this rule, as the Nationalization of Assets Act (the statute under which Zushi Medical Ltd. was nationalized) provided for “minimal compensation” to be given to the affected parties. This act of the Applicant also does not fall within one of the exceptions to the rule of compensation.⁸⁰

A claim on the part of the Applicant that local remedies must be exhausted with regard to the act of expropriation is erroneous. This is due to the fact that the act of expropriation was

⁷⁶ Ian Brownlie – “Principles of Public International Law”, 6th Ed., p. 510.

⁷⁷ 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

⁷⁸ See American Convention on Human Rights, Art. 21; Charter of Fundamental Rights of the European Union, Art. 17.

⁷⁹ See the references in the article by Gess, 13 ICLQ (1964), 427-9, to the General Assembly Debate on the Decl. of 1962, which provides for ‘appropriate compensation’. See also Jimenez de Arechaga, Hague Recueil (1978,I), 21, 297-310.

⁸⁰ Jurists supporting the compensation rule recognize the existence of the following exceptions: under treaty provisions; as a legitimate exercise of police power; confiscation as a penalty for crimes; seizure by way of taxation or other fiscal measures; loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property; the destruction on property of neutrals as a consequence of military operations, and the taking of enemy property as part payment of reparation for the consequences of an illegal war.

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clearly legal under the municipal law of Attandra, as per the Nationalization of Assets Act. Hence, Zushi Medical Ltd.'s only local remedy would be to seek for the statute itself to be struck down. There is nothing stated in the *Compromis* to suggest that the domestic courts of Attandra have such a power of judicial review. Various States recognize the principle of Parliamentary Supremacy⁸¹, under which legislation is not subject to judicial review. Hence, it would only be reasonable to assume that no domestic remedies were available to Zushi Medical Ltd. in this regard. Further, the question of approaching the domestic courts of Zarica would not arise as they do not have the territorial jurisdiction to determine the legality of this act of expropriation.

The Applicant's contention that the nationalization of Zushi Medical Ltd. is lawful due to the fact that the nationality principle has been complied with, as the Nationalization of Assets Act does not discriminate between nationals and non-nationals, would not hold water. This can be inferred from the fact that the national treatment principle does not provide a general reliable formula⁸². In relation to expropriation, it plays a subsidiary role in the context of the positive legal principles.⁸³

Therefore, the Respondent submits that the Republic of Attandra's expropriation of Zushi Medical Ltd. is violative of its international obligations.

⁸¹ This principle is recognized by the United Kingdom, New Zealand, Switzerland, Canada and Finland among other States.

⁸² Ian Brownlie – "Principles of Public International Law", 6th Ed., p. 512.

⁸³ Fischer Williams 9 BY (1928), 28-9; Friedman – "Expropriation", pp. 133,210.

VIII. THE RESPONDENT SEEKS A DECLARATION FROM THE HON'BLE INTERNATIONAL COURT OF JUSTICE FOR PROCURING BLOOD AND TISSUE SAMPLES OF THE ZUSHIS.

The Applicant State is a party to the International Covenant on Economic, Social and Cultural Rights⁸⁴, Article 12 of which places an imperative obligation upon States to take steps for the prevention, treatment and control of epidemic and other diseases.⁸⁵

It is submitted that the Applicant State, by not responding to the grave medical emergency facing the Respondent State and by disagreeing to part with genetic material for the cure of millions, is in flagrant violation of the dictates of the Covenant as also the principle of *pacta sunt servanda*.⁸⁶ This is an omission on the part of the State and the Hon'ble Court has itself explicitly affirmed the responsibility of the State for an internationally wrongful omission in the *Corfu Channel* case.⁸⁷

In *The Spanish Zone of Morocco Claim*⁸⁸ it was held that an omission includes an 'intended inaction' which was not due to the impossibility of acting otherwise. This principle has been recognised as State practice⁸⁹ and has also been affirmed by a large number of writers.⁹⁰

⁸⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

⁸⁵ **Article 12**

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

...

(c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

(d) *The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

⁸⁶ Article 26, Vienna Convention on the Law of Treaties, 1969: "*Pacta sunt servanda*"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith. See *Nuclear Tests Case*, ICJ Reports, 1974, pp 253, 267.

⁸⁷ *Corfu Channel Case (Merits)* {I.C.J. Reports, 1949, pp. 22-23}. See also the arbitral award of 10 July 1924 in the *Affaire relative à l'acquisition de la nationalité polonaise* (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.1948.V.2) p. 425).

⁸⁸ *'It is certain however that the term 'act' includes both positive and negative act that is to say act and omission. Wherever there is a legal obligation to act or voluntary inaction- by which is meant not necessarily an intended inaction but simply an inaction which is not due to impossibility of acting otherwise- would constitutes a breach of that obligation, in other words, an unlawful act.* '(1923) : Rapport III (1924) 2 UNRIAA p 615. at p 643.

⁸⁹ League of Nations, *Bases for Discussion . . .* {op. cit.}, pp. 70 et seq., and Supplement to Volume III {op. cit.}, pp. 2-3, 12 et seq.

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In addition as observed in the *LaGrand Case*⁹¹ as well as the *Diplomatic and Consular Staff, Tehran Case*⁹², for every injury to a State, the Court is equipped to provide a remedy.

In light of the above principles it is submitted that the Applicant State has a duty to prevent the spread of an epidemic and thus the Court be pleased to declare that the Applicant State supply genetic material of the Zushis to the Respondent State, with immediate effect, in order to prevent a catastrophe.

⁹⁰ For studies concerning the specific character in international law of the offence of omission, see R. Ago, "Illecito commissivo e illecito omissivo del diritto internazionale", *Diritto internazionale* (Milan, Istituto per gli Studi di politica internazionale, 1938), pp. 9 *et seq.*; P. A. Zannas, *La responsabilite Internationale des Etats pour les actes de negligence* (Montreux, Gauguin et Laubscafer, 1952); G. Pen-in, "L'agression contre la legation de Roumank a Berne et le fondement de la responsabilite internationale dans les debits d'omission", *Revue ginirale de droit international public* (Paris), 3rd se"rie, vol. XXVTH, No.3 (1957), pp. 410 *et seq.* \ D. L6vy, "La responsabilite' pour omission et la respoosabilitS pour risque en droit international", *ibid*, t. XXXH, No. 4 (1961), pp. 744 *et seq.*

⁹¹ Germany v. United States, ICJ Reports 2001.

⁹² ICJ Reports 1980 3:61 ILR 502.

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CONCLUSION/PRAYER

Therefore in light of the questions presented, arguments advanced and authorities cited, this Hon'ble Court may be pleased to adjudge and declare that –

1. Attandra lacks the *Jus Standi* to present the claim.
2. The acts of RCRI are not attributable to the Republic of Zarica.
3. RCRI has acted in consonance with its international obligations.
4. The Republic of Zarica has not violated any of its international obligations under the International Covenant on Civil and Political Rights.
5. The Trade Agreement entered into between the parties to the dispute is void.
6. Notwithstanding the above, the Trade Agreement has not been violated.
7. The Republic of Attandra's expropriation of Zushi Medical Ltd. is unlawful.
8. The State of Attandra must fulfill its legal obligations, by providing blood and tissue samples of the Zushis to Zarica.

All of which is respectfully submitted

Agents for the Respondent.