THE 2012 – 2013 SUSAN J. FERRELL INTERCULTURAL HUMAN RIGHTS MOOT COURT COMPETITION

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

THE CASE OF YAGO RIVER

BETWEEN:
THE STATE OF AKOPIA
(APPLICANT)

v

THE STATE OF ROWAN
(RESPONDENT)

TEAM NO. 30

MEMORIAL FOR THE RESPONDENT

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QUESTIONS PRESENTED

The State of Rowan respectfully asks the Honorable court to adjudge and declare:

1. Whether this Court lacks jurisdiction to adjudicate this dispute;
2. Whether the case is inadmissible;
3. Whether Rowan has violated the BIT by constructing the dam in response to the severe drought causing a shortage of water endangering the survival of the nation;
4. Whether Agromist's claim of violation of the BIT was negated by building an unlicensed pipeline, and by using excessive amounts of water in their irrigation of sugar cane fields;
5. Whether Rowan has violated international law by not prosecuting RAM, because Rowan respects and adheres to international human rights guaranteeing free speech and assembly;
6. Whether Akopia has violated international law by blanketly detaining and placing Rowanian nationals in internment camps;
7. Whether Akopia has failed to extradite a wanted Rowanian criminal fugitive, Robert Hassan, in violation of its obligations under international law; and
8. Whether Rowan is liable for damages to Akopia as Agromist's actions and refusal to mitigate conditions caused the incidents that led to its injury.

STATEMENT OF FACTS

Background

1. Rowan is a developing and drought-prone state with fertile agricultural soils. The Khuta are Rowanian natives. They have a 112-year solemn treaty with Rowan, declaring large parts of the West Bank of the Yago River in Northwest Rowan as theirs. Akopia is a wealthy State.

2. Both Rowan and Akopia submitted individual declarations recognizing the jurisdiction of the International Court of Justice (ICJ) in accordance with Article 36(2) of the ICJ Statute. They ratified the International Covenant on Civil and Political Rights (ICCPR) and Vienna Convention on the Law of Treaties (VCLT), and they endorsed the 2007 United Nations Declaration on the Law of Indigenous Peoples (UNDRIP) in 2010.

3. Rowan made a reservation to the jurisdiction of the ICJ exempting matters regarding its "domestic economy."

4. In 2008, Rowanian President Rumulan published his election platform on spurring Rowan's development by building a dam for generation of hydroelectric power.

BIT Agreement

5. In 2008, Rowan entered into a bilateral investment treaty (BIT) with Akopia, guaranteeing, *inter alia*, fair and equitable treatment, full protection and security, and protection of its contractual rights.

ARC Agreement

6. In 2009, Rowan and Agromist, a state-owned entity of Akopia, entered into the Agromist-Rowan Contract for the Production of Sugar Cane ("ARC").

7. The terms of the ARC included: (i) Agromist to purchase a large tract of Rowan's land to grow sugar cane, (ii) Rowan would purchase a minimum of 15% of Agromist's annual sugar production at a 10% discounted price, (iii) Rowan guaranteed Agromist full access to the necessary water resources and all required licenses and permits to ensure the efficient operation of the corporation, and (iv) Rowan was to build a pipeline that would channel water from the Yago, the main river of Rowan, directly to the cane fields.

8. After the ARC was signed, *Rowanians Against Misappropriation* (RAM), a protest group, led demonstrations against the Rowanian government and Agromist.

9. Meanwhile, Rowan started the environmental impact studies required under its domestic legislation. Rowan has yet to provide the necessary permits and licenses for the use of water by Agromist.

10. Within 12 months of signing the ARC, Agromist began construction of the pipeline at its own expense. Meanwhile, Rowan purchased 15% of Agromist's sugar production.

Drought/Elevation of Conflicts

11. In early 2012, Rowan experienced a severe drought, resulting in ongoing water shortages and several deaths. Agromist's funneling of a substantial part of the Yago River's water to its cane fields exacerbated the problem.

12. In February 2012, Rumulan requested Agromist to reduce its water usage until drought conditions improved in Rowan, but Agromist's CEO King refused.

Violent Protests by RAM

13. Violent protests by RAM erupted on Agromist facilities. Gabriel, the leader of RAM, directed demonstrations and incited the Rowanians to take action against Rumulan's government and Agromist.

Hassan's Sentence

14. Dissatisfied with Rumulan's lack of response to RAM's complaint, Robert Hassan, RAM's second-in-command, had begun to form a militia to overthrow President Rumulan and take over RAM. Rowanian intelligence agents discovered Hassan's plans. Rumulan then ordered Hassan's arrest, but he eluded capture and disappeared. Rumulan ordered a hasty trial, *in absentia*, which found Hassan guilty of treason and sentenced him to death.

Agromist Attacked by RAM

15. RAM bombed several of Agromist's sugar mills which resulted in a loss of millions of dollars and 50% of its sugar production. Thereafter, King laid off 600 Agromist employees, 500 of which were Rowanians who worked in the cane fields.

Dam Construction

16. Rumulan begin the construction of the dam which reduced the water flow to Agromist's fields.

RAM's Video

17. In April, Gabriel authored a video on the Internet showcasing the worsened conditions of Rowan caused by Agromist, and displaying images of torture and death.

18. The video went viral and its negative publicity caused Agromist's stock to plummet to an all-time low. It later led to a global boycott of Agromist's products. Agromist could not sell its sugar at world market prices.

Detention and Extradition Request

19. During this upheaval in Rowan, Hassan received asylum from Akopia by offering President Arquimides information regarding a RAM sleeper cell in Akopia (poised to inflict mass destruction within Akopia).

20. Hassan presented a video in which Gabriel ordered "his soldiers" to begin "Phase One" and promised that they would be rewarded for destroying the "elitist filth" of Akopia. Gabriel also bragged that he tricked the world into believing the viral video, which documented events at RAM camps.

21. Out of concern for Akopia's national security, Arquimides ordered an immediate detention of the 20 Rowanian trainees and their families. Twenty-four hours later, Arquimides expanded his order to detain nearly 1,000 Rowanian citizens and Akopia citizens of Rowanian descent until the threat was over. Aquimides then sent a notice of this emergency order to the United Nations Security Council (UNSC).

22. A few days later, Rumulan demanded Akopia extradite Hassan and release its citizens. Arquimides refused to comply.

23. Drought conditions continued as the construction of the dam was underway in Rowan. These crises had taken a huge toll on the Rowanian economy. Rowan failed to pay for the agreed 15% of Agromist's sugar production, as set forth in the ARC. Agromist was facing an impending bankruptcy because Rowan was unable to pay and Agromist lost 50% of its investment after the bombing attack.

Destruction of Nanih Waiya

24. When the dam construction began, Rowan destroyed Nanih Waiya, the Khuta holy ground and removed the Khuta at gunpoint. The dam was expected to flood a significant portion of the Khuta's homeland.

Submission to the International Court of Justice

25. Akopia, on behalf of Agromist and the Khuta, instituted proceedings against Rowan in the International Court of Justice.

SUMMARY OF PLEADINGS

(I) This Court lacks jurisdiction to hear this dispute. Based on Article 36(3) of the ICJ Statute Rowan made a valid reservation on domestic economy which precludes the ICJ's jurisdiction.

(II) This case is inadmissible as Akopia has not exhausted local remedies. Akopia and the Khuta are not exempted from the rule and they have failed to comply with it.

(III) Rowan did not violate the BIT because the construction of dam is necessary to secure public order, national security and its citizens' human rights. Rowan has treated Agromist fairly and equitably and provided full protection.

(IV) Rowan did not violate the rights of the Khuta by building a dam. The construction of dam is necessary and proportionate to the survival of Rowanians. Rowan may derogate from its obligation under ICCPR and customary international law. Also, the dam's construction is in conformity with its sovereign rights.

(V) Akopia's detention is arbitrary. It is a violation of *jus cogens* which is non-derogable.

(VI) Akopia has an international obligation to prosecute or extradite Hassan who is a terrorist. Hassan's trial in absentia is valid and the death penalty is not a bar to extradition.

(VII) Rowan does not have to compensate Akopia because Rowan did not cause injury to Akopia, Akopia did not mitigate its loss and is contributorily negligent.

PLEADINGS

I. THIS COURT LACKS JURISDICTION

1. Whilst Article 36(2) of the Statute of the International Court of Justice (ICJ Statute) provides that a State may declare that it recognizes the compulsory jurisdiction of the International Court of Justice (ICJ), Article 36(3) stipulates that such declaration may be made on condition of reciprocity. Rowan had submitted a declaration recognizing the ICJ's jurisdiction. However, its reservation on domestic economy bars the ICJ from hearing this dispute.

(A) ROWAN'S DOMESTIC ECONOMIC RESERVATION PRECLUDES THE ICJ'S JURISDICTION

2. In *Norwegian Loans Case*, the ICJ determined that "jurisdiction is conferred upon the Court only to the extent to which the declarations of both parties coincide in conferring it, since the basis of the Court's jurisdiction is the common will of the parties."[1] In *Fisheries Jurisdiction*, the Court interpreted "the relevant words of a declaration including a reservation contained therein in a natural and reasonable way."[2] "Domestic economy" is defined as "capital and labor that was used within each State or society to exploit primary resources and to manufacture goods. The resulting products were sold within the markets of the State or available for export."[3] The current dispute concerns Agromist's use of land, water and human resources in Rowan. Rowan had also guaranteed to purchase Agromist's annual production of

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[1] *Case Concerning Certain Norwegian Loans* (*Norway v France*) [1957] ICJ Rep 9 18
[2] *Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction)* [1998] ICJ Rep 432 [54]
[3] DM McRae, 'The traditional relationship between international trade law and international law' (1996) 260 Collected Courses of the Hague Academy of International Law 109-131, 127

sugar for its domestic consumption.[4] Since the subject matter concerns Rowan's domestic economy, the ICJ does not have jurisdiction.

3. Rowan's reservation limiting the ICJ's jurisdiction over disputes concerning domestic economy is valid. "The declarations under Art 36(2) can be made with such reservations as the author State may deem fit to specify."[5] D'Amato provides that "since a party to the ICJ Statute can refuse to accept that jurisdiction altogether, it should be able to accept any lesser jurisdiction."[6] Moreover, the ICJ has not formulated any limitations on the permissibility of reservations.[7] Thus, Rowan's reservation is valid.

(B) ROWAN'S RESERVATION DOES NOT VIOLATE THE OBJECT AND PURPOSE TEST

4. Rowan's reservation does not violate the object and purpose test. According to scholar Szafarz, the "object and purpose" test does not apply to declarations.[8] "It is easy to distinguish provisions with a different degree of connection with the object and purpose of a given treaty" but declarations "concern only one provision – Article 36(2) of the ICJ Statute – which specifies a single obligation."[9] Thus, "it is certain that the criterion of compatibility of reservations with the object and purpose of [Article 36(2)] is not, and cannot be, taken as a criterion of admissibility of reservations contained in declarations."[10] Article 36(2) of the ICJ Statute requires

[4] *Compromis* [4]
[5] *Fisheries Jurisdiction* (n 2) [44]
[6] Anthony D'Amato, 'The US Should Accept, By A New Declaration, The General Compulsory Jurisdiction Of The World Court' (1986) 80 American Journal of International Law 331-337, 335
[7] Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Martinus Nijhoff Publishers, Dordrecht 1993) 48
[8] *Szafarz* (n 7) 48
[9] *Szafarz* (n 7) 49
[10] Ibid 49

declarations for assumption of jurisdiction. Thus, Rowan's declaration is not subject to the object and purpose test.

II. THE CASE IS INADMISSIBLE

(A) AGROMIST AND THE KHUTA HAVE NOT EXHAUSTED LOCAL REMEDIES

5. Brownlie observed that "a claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of injury."[11] In *ELSI*, the Court exhorted that the exhaustion of local remedies is an "important principle in customary international law."[12] Neither Akopia nor the Khuta have attempted redress in the local Rowanian courts as they were obliged to before bringing this action.

6. Dugard opined that "[a] foreign company financed partly or mainly by public capital is required to exhaust local remedies where it engages in *acta jure gestionis.*"[13] In *Wilhelm Finance Inc v Ente Administrador,* it was held that although the state-owned shipyard was controlled and financed by the state to a large extent, the business was akin to a privately owned company and was not typically recognized as governmental or sovereign activity.[14] In the present case, while Agromist was a state-owned company, it engages in business activities not normally regarded as governmental or sovereign in nature, thus triggering the local remedies rule.

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[11] Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, Oxford 2008) 492

[12] *Case concerning Elettronica Sicula SpA (ELSI) (US v Italy)* [1989] ICJ Rep 15 50

[13] UNGA 'Second report on diplomatic protection' (28 February 2001) UN Doc A/CN.4/514 [6]

[14] *Wilhelm Finance Inc v Ente Administrador Del Astillero Rio Santiago* [2009] EWHC 1074 (Comm) [21]

7. In *Interhandel*, the ICJ held that local remedies rule is only applicable where injury was caused to the company, but not the state.[15] Also, in *ELSI*, the ICJ held that "the State claims could not be segregated from the claims of the individuals injured, which were predominant"[16] and found that local remedies rule applied. Thus, indirect injury to the state is insufficient to exclude the application of the local remedies rule. In this case, the direct injuries were sustained by Agromist while conducting purely mercantile activities. Claimant must exhaust local remedies before resorting to the ICJ.

8. Crawford stated that the local remedies rule may be waived by "treaty between the forum State and the State of nationality."[17] Yet, in *ELSI*, the ICJ found "itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[18] The BIT between Akopia and Rowan did not include a clause waiving the local remedies rule, nor are there any indicia that the parties intended to waive it. Agromist has not exhausted local remedies and Akopia's petition is inadmissible.

(B) EXCEPTIONS TO LOCAL REMEDIES RULE DO NOT APPLY

9. Crawford expressed that "there are a number of well-established exceptions to the exhaustion rule" and "Article 15 of [the] Draft Articles on Diplomatic Protection lists them." [19] Pursuant to Article 15(a) of the Draft Articles on Diplomatic Protection, local remedies do not need to be exhausted where "there are no

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[15] *Interhandel Case* (*Switzerland v the US*) [1959] ICJ Rep 6 27
[16] *ELSI* (n 12) [48] - [63]; James R Crawford and Thomas D Grant, 'Exhaustion of local remedies' [2007] Max Planck Encyclopedia of Public International Law [27]
[17] *Crawford and Grant* (n 16) [15]
[18] *ELSI* (n 12) [50]
[19] *Crawford and Grant* (n 16) [13]

reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress" and Article 15(d) reads, "[T]he injured person is manifestly precluded from pursuing local remedies."[20] These exceptions are inapplicable to this dispute.

10. Amerasinghe stated that "the general principle is for the respondent merely to prove that the particular procedural remedy was available" and then it is for the applicant to "adduce evidence and prove that the particular procedural remedy was ineffective."[21] Brownlie observed that the best test of effective remedy is "a matter of reasonable possibility."[22] Here, local courts are available for the Khuta in Rowan.[23] Also, Arquimudes wrote a letter to Rumulan and requested him to take legal action against RAM.[24] This shows that Akopia has confidence in Rowan's local courts. Akopia cannot maintain that no local remedies are reasonably available. This dispute is inadmissible.

(C) AKOPIA CANNOT SUE ON BEHALF OF THE KHUTA

11. In the *Barcelona Traction Case*, the ICJ gave examples of *erga omnes* obligations as derived from "the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[25] Sir Sinclair affirmed that "there can be little doubt that the examples given [in the *Barcelona Traction*

[20] ILC, 'Draft Articles on Diplomatic Protection' (19 May 2006) GAOR 61st Session Supp 10, 16 Art. 15
[21] Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press 2004) 290
[22] *Brownlie* (n 11); Judge Lauterpacht's Separate Opinion in *Norwegian Loans* (n 1) 496
[23] Clarification No 59
[24] *Compromis* [21]
[25] *Barcelona Traction, Light and Power Co., Ltd (Belgium v Spain)* [1970] ICJ Rep 3 [34]

Case] of obligations *erga omnes* are examples of what the Court would consider to be norms *jus cogens.*"[26] De Hoogh stated that it is apparent that "the Court had the concept of *jus cogens* in mind when speaking of obligations *erga omnes.*"[27] Akopia sued on behalf of the Khuta for an alleged breach of indigenous peoples' land rights. This is not a *jus cogens* norm allowing for jurisdiction *erga omnes*.

12. In *Belgium v Senegal*, Judge Xue stated in her dissenting opinion that "the mere fact that a State is a party to the Convention does not, in and by itself, give that State standing to bring a case in the Court" and that no previous ICJ cases "has pronounced that the existence of a common interest alone would give a State entitlement to bring a claim in the Court."[28] The Khuta are not Akopian nationals, nor has the use of Khuta land affected any Akopian interest. Thus, Akopia may not rely on *erga omnes* to bring this action on behalf of the Khuta.

III. ROWAN DID NOT VIOLATE THE BIT

(A) CONSTRUCTION OF THE DAM WAS NECESSARY TO PROTECT HUMAN RIGHTS AND MAINTAIN PUBLIC ORDER AND ESSENTIAL SECURITY

13. Rowan has a duty to protect and ensure the human rights of its citizens.[29] Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR)[30] provides, "Each State Party to the present Covenant undertakes to respect and to

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[26] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester University Press, Manchester 1984) 213

[27] Andre De Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The Hague 1996) 55-56

[28] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Dissenting Opinion of 20 July 2012 [16]-[17]

[29] UNCHR, 'General Comment No 3, Implementation at the national level (Article 2)' (29 July 1981) UN Doc HRI/GEN/1/Rev.1, at 4, [1]

[30] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

ensure to all individuals within its territory … the rights recognized in the present Covenant…"[31] Rowan has a duty to prevent third parties from interfering with the right to water, the right to health and the right to life and human dignity.[32] According to *General Comment No 3* to the ICCPR, "… States parties have ... undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights."[33]

14. The construction of the dam was necessary to provide water to ensure the survival of Rowanian citizens. This duty is provided in the right to life under Article 6 of the ICCPR.[34] The Human Rights Committee (HRC) affirms that the right to life is a *jus cogens* norm.[35] Thus, States bear a peremptory obligation to ensure the right to life.[36] The construction of the dam conforms to Rowan's international obligations by providing safe drinking water and safeguarding the right to life.

15. The right to water is also customary international law. The UN General Assembly recognized in 2010 the "right to safe and clean drinking water … as a

[31] Art. 2(1) ICCPR
[32] Ibid
[33] Ibid
[34] UN Human Rights Council 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation' (2 July 2012) UN Doc A/HRC/21/42, [47]; Igna T. Winkler, *The Human Right to Water, Significance, Legal Status and Implications for Water* Allocation (Hart Publishing, Oxford 2012) 54
[35] HRC, 'General Comment 6(16) on article 6 of the ICCPR' UN Doc A/37/40 1982 Annex V [1]; Special Rapporteur of the UN Commission on Human Rights, A/37/564, [22]
[36] Inter-American Court of Human Rights, *Villagran Morales et al v Guatemala*, 19 November 1999, *Annual Report of the IACtHR* 1999, 665, [144], interpreting Article 4 of the American Convention on Human Rights; HRC, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13. [6]

human right that is essential for the full enjoyment of life."[37] The ILA found that Article 17(4) of the *Berlin Rules on Water Resources Law* requiring States to provide "water or the means for obtaining water when individuals are unable …" is customary international law.[38]

16. Access to safe and sufficient water is within the scope of Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.[39] States have an obligation to protect their citizens from interference with the right to water by third parties.[40] States have an obligation to establish an effective regulatory system to prevent abuses.[41] In General Comment No 15, the Committee noted that, during natural disasters, the obligations of States should be to ensure the survival of the civilian population.[42]

17. The drought caused mass death by starvation and dehydration. Rowan has a *jus cogens* duty to protect its citizens from droughts by building the dam; this duty

[37] UNGA 'The Human Right To Water and Sanitation' (3 August 2010) UN Doc A/Res/64/292; International Conference on Water and the Environment, *Development issues for the 21st century, 26-31 January 1992, Dublin, Ireland, The Dublin Statement, 1992*, 2: "… the basic right of all human beings to have access to clean water and sanitation at an affordable price"

[38] Right of access to water contained in Art. 17(3) ILA, 'Berlin Rules on Water Resources Law' in International Law Association Report of the 71st Conference (International Law Association, London 2004) 334, 336; The Water Resources Committee, 'Fourth Report, Berlin Conference' International Law Association (International Law Association, Berlin 2012) 23-24

[39] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 14, The right to the highest attainable standard of health (Art. 12 ICESCR)' (11 August 2000) UN Doc E/C.12/2000/4, [43(c)]; African Commission on Human and Peoples' Rights, 'Free Legal Assistance Group and Others v Zaire' (1995) Comm No 25/89, 47/90, 56/91, 100/93, interpreting a guarantee of access to water from the right to health in article 16 of the African (Banjul) Charter on Human and Peoples' Rights; Art. 39 Arab Charter on Human Rights of the League of Arab States lists the provision of safe drinking water as measures necessary to realize the right to the highest attainable stand of health

[40] CESCR, 'General Comment No 15' (20 January 2003) UN Doc E/C.12/2002/11, [23]

[41] Ibid [24]

[42] Ibid [22]

takes priority over Agromist's commercial interest. In *Gabčíkovo-Nagymaros Project*, the ICJ applied Article 33 (now Article 25) of the Responsibility of States for Internationally Wrongful Acts (*ASR*),[43] which defined necessity as "whether the [measure taken] is the only way for the victim State to safeguard an essential interest against a grave and imminent peril."[44] The construction of the dam is the only way to resolve the drought, in the short and long term, and to safeguard lives against the grave peril imposed by the drought.

18. Thus, the construction of the dam was necessary under Article 2(1) and Article 6 of the ICCPR, customary international law, and takes priority over treaty obligations as the right to life (i.e., right to water) is *jus cogens*.

19. Moreover, the construction of the dam is permitted under Article 20 of the BIT, which provides, "This Treaty shall not preclude the application by either party of measures necessary for the maintenance of public order… or… its own essential security interests."[45] Conditions in Rowan caused by the drought have led to public disorder, including mass death,[46] and created significant national security risks, including mass violence and risk of internal armed conflict and terrorist activity.[47]

20. Furthermore, Rowan is implicitly authorized to determine what constitutes public disorder and national security risk. In concluding that the majority of measures adopted by Argentina fell within the protective ambit of Article XI of the US – Argentina BIT, the *Continental Casualty* tribunal expressly embraced the margin of

[43] Art. 25, UNGA Res 56/83 "Responsibility of States for internationally wrongful acts" (28 January 2002) UN Doc A/56/589 and Corr.1 (*ASR*)
[44] *Gabčíkovo-Nagymaros Project* (n 53) 40; ICSID *Sempra Energy International v Argentine Republic* (2007) Case No ARB/02/16, 102
[45] Art. 20 BIT
[46] *Compromis* [6]
[47] *Compromis* [8], [9]

appreciation doctrine.[48] In determining whether a particular measure falls within "maintenance of public order" and "security interest," "this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight."[49]

21. In evaluating whether the steps taken were necessary to protect its own essential security interest, the tribunal empowered Argentina to determine the standard of "necessity." The tribunal asked "whether the measures were apt to and did make such a material or a decisive contribution to this end [of addressing the crisis]."[50]

22. In *Gabtikovo-Nagymaros Project*, the ICJ stated that "[t]he Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabtikovo-Nagymaros Project related to an [']essential interest['] of that State…"[51]

23. The drought has caused RAM to engage in violent protests and destroy private property. RAM has bombed civilian sites, engaged in terrorist activities, formed a militia to overthrow the government, and threatened public order and national security. The construction of the dam will ease drought conditions and remove RAM's *raison d'être*.

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[48] ICSID *Continental Casualty Company v Argentine Republic* (2008) Case No ARB/03/09 [323]
[49] Ibid [181]
[50] Ibid [196]
[51] *Gabčíkovo-Nagymaros Project* [1997] ICJ 7, 58; US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling) (20 April 2005) WT/DS285/R, para 6.461; Handyside v The United Kingdom (1976) 1 EHRR 737 [48]

(B) ROWAN'S TREATMENT OF AGROMIST WAS FAIR AND EQUITABLE

24. The Annulment Committee in *Compañia de Aguas del Aconquija and Vivendi v Argentina* held that "'mere' breaches of contract, unaccompanied by bad faith or other aggravating circumstances, will rarely amount to a breach of the fair and equitable treatment standard."[52] Rowan did not exercise bad faith. A natural catastrophe occurred over which Rowan had no control.

i. The BIT Provided for the Enforceability of Domestic Environmental Laws

25. Rowan is entitled to conduct environmental studies in accordance with its domestic legislation. BIT Article 12 provides that "each Party shall ensure that it does not waive or otherwise derogate from … its environmental laws … or fail to effectively enforce [environmental] laws..."[53]

26. In *Katte v Italy*, the European Court of Human Rights (ECtHR) held that an agreement to approve a development proposal, which contained a clause that explicitly reserved the authorities' power to regulate urban development, cannot prevent the authorities from exercising their urban planning power to prohibit development on the claimant's land.[54] Agromist was not entitled to a waiver of domestic Rowanian environmental law as explicitly reserved in the BIT.

ii. Rowan Did Not Violate Legitimate Expectations of Agromist

27. The expectation that Rowan would grant Agromist full unqualified access to the necessary water resources (and issue the required permits) in contravention of its

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[52] ICSID *Compañia de Aguas del Aconquija and Vivendi v Argentina* (2002) No ARB/97/3 Decision on Annulment [101]

[53] Art. 12 BIT

[54] *Katte Klitsche de la Grange v Italy* (1995) 19 EHRR 368 [45] – [48]; NAFTA GAMI Investments Inc v Mexico (2004) Final Award [93]

domestic law was not legitimate. The provision of access to water in the ARC should be read as "subject to" existing domestic law. Moreover, the BIT was not a "self-contained closed legal regime" but had to be "envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or domestic law nature."[55]

28. Agromist knew or should have known of the domestic law in Rowan and has a due diligence duty to assess the risk before investing. BITs "are not insurance policies against bad business judgments."[56] In *MTD Equity v Chile*, in analyzing the obligation to accord fair and equitable treatment, the tribunal held that the claimant lacked diligence as they hastily decided to invest in Chile despite a cursory understanding of Chile's laws.[57] Agromist had imputed knowledge of the need to conduct environmental assessments. The relevant laws were in place "well before" the signing of the ARC.[58] Additionally, even a preliminary investigation would have revealed that Rowan was subject to periodic drought.[59] A reasonably prudent investor would have taken measures to prepare for it. Instead, Agromist chose to assume the risk.

iii. Agromist Has Unclean Hands

29. Brownlie stated that the "clean hands doctrine" is a principle "according to which a claimant's involvement in activity illegal under either municipal or

[55] ICSID *AAPL v Sri Lanka* (1990) Case No ARB/87/3 [56]
[56] ICSID *Maffezini v Spain* (2000) Case No ARB/97/7 [64]
[57] ICSID *MTD Equity Sdn. Bhd. And MTD Chile SA v Republic of Chile* (2004) Case No ARB/01/7, [169] – [178]; *Oscar Chinn Case (UK v Belgium)* PCIJ Rep Series A/B No 63 (Dec 12 1934) [84]
[58] Clarification No 22
[59] *Compromis* [6]; Clarification No 48

international law may bar the claim."[60] The former Special Rapporteur on Diplomatic Protection, John Dugard, stated that "States have frequently raised the clean hands doctrine in direct inter-State claims and in no case has the Court stated that the doctrine is irrelevant to inter-State claims."[61]

30. In the *Case Concerning the Diversion of Water from the River Meuse*, the Netherlands were not be permitted to invoke a treaty obligation against Belgium because the Netherlands had constructed certain works contrary to the terms of the treaty. The PCIJ concluded in Judge Hudson's separate opinion, "He who seeks equity must do equity."[62]

31. In Article 12 of the BIT the parties expressly "recognize their respective environmental laws and policies."[63] Agromist built a pipeline without the required permits in violation of Rowan's domestic law. Also, while General Assembly Resolution 64/292 "recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights,"[64] Agromist refused to reduce its water use in the face of a devastating drought. It built a pipeline to deprive Rowanians of life-giving water and violated international law. Since Akopia has come with unclean hands, its claim must fail.

[60] *Brownlie* (n 11) 503
[61] ILC 'Six Report of the Special Rapporteur on Diplomatic Protection' (2004) UN Doc A/CN.4/546, [6]
[62] *Case Concerning the Diversion of Water from the River Meuse (Netherlands v. Belgium)* PCIJ Series A/B No 70 (1937)
[63] Art.12 BIT
[64] UNGA Res 64/292 (3 August 2010) A/RES/64/292 [1]

(C) ROWAN DID NOT VIOLATE ITS DUTY TO PROTECT AGROMIST

i. Rowan Did Not Fail to Provide Full Protection and Security

32. Article 5 of the BIT states that "[e]ach Party shall accord … full protection and security [which] requires each Party to provide the level of police protection required under customary international law..."[65]

33. In the 1926 *Neer* case, the US-Mexican General Claims Commission found that it was not up to "an international tribunal … to decide, whether another course of procedure taken by the local authorities … would have been more effective."[66] International law was not breached unless "the treatment of the alien … amount[s] to an outrage, to bad faith, to willful neglect, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[67]

34. The standard for full protection and security under customary international law is "due diligence,"[68] not absolute liability. In *ELSI*, the ICJ held that the requirement for constant protection and security in the respective bi-lateral Friendship, Commerce and Navigation treaty was not a warranty to an investor that no disturbance under any circumstance would occur.[69] Similarly, ICSID tribunals in *AAPL v Sri Lanka*,[70] *Wena v Egypt*[71] and *Noble Ventures v Romania*,[72] as well as

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[65] Art. 5 BIT

[66] US-Mexican General Claims Commission *LHF Neer and Pauline Neer v United Mexican States* (1926) 4 UNRIAA 60 [5]

[67] Ibid [4]

[68] US-Mexican General Claims Commission *Laura Janes Claim* (1927) 4 UNRIAA 82, 86; Italian-Venezuelan Mixed Claims Commission *Sambiaggio Case* (1903) 10 UNRIAA 499, 524

[69] *ELSI* (n 12) [108]

[70] *AAPL* (n 55) [48]

[71] ICSID *Wena Hotels Ltd v Arab Republic of Egypt* (2002) 41 ILM 896 [84]

Tecmed v Mexico, confirmed that the guarantee of full protection and security "is not absolute and does not impose strict liability upon the State that grants it."[73]

35. The Iran-US Claims Tribunal linked the national (police protection) obligation with the requirement of reasonableness by holding that "[o]rdinarily, the standard of police protection for foreign nationals is unreasonable if it is less than is provided generally for the State's nationals."[74] Rowan provided the same regular police protection it provided other residents.[75]

36. In *AAPL v Sri Lanka*, the tribunal found that "due diligence" implied "reasonable measures of prevention which a well administered government could be expected to exercise under similar circumstances."[76] Available resources and options have to be taken into account.[77] It has been particularly important for cases relating to civil unrest, where the character and extent of unrest were considered "an important factor in relation to the question of power to give protection."[78]

37. In *Pantechniki v Albania*,[79] the claimant alleged that the respondent was under an obligation to 1) actively protect the claimant's investment against riots and 2) take

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[72] ICSID *Noble Ventures Inc v Romania* Case No ARB/01/11 Award 12 October 2005 [165] - [166]

[73] ICSID *Tecmed v Mexico* Case No ARB(AF)/00/2 Award 29 May 2003 [177]

[74] Iran-US CTR *Too v Greater Modesto Insurance Associates and US* (1989) 23 Iran-US CTR 378 [22]

[75] Clarification No 16

[76] *AAPL* (n 70) [77]; ILC, 'Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC at its fifty-third session' (2001) 53 ILC Ybk, Vol II, Part II, 145

[77] US-Mexican General Claims Commission Decision *Elvira Almaguer v United Mexican States* (1929) 4 UNRIAA 523, 525; *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision 23 October 1924 2 UNRIAA 639, 646; American Law Institute, *Restatement (Third) of the Law of the Foreign Relations Law of the US* (Vol 2, American Law Institute Publishers 1987) ss711

[78] US-Mexican General Claims Commission *GL Solis v United Mexican States* (1928) 4 UNRIAA 358, 362

[79] ICSID *Pantechniki v Albania* (2009) Case No ARB/07/21 [71] – [84]

precautionary measures to prevent these events from occurring. The tribunal held that the extent of the State's duty under this provision depends, *inter alia,* on the resources available. The tribunal concluded that the Albanian authorities were powerless in the face of social unrest.

38. Rowan was in a state of national emergency and civil unrest. People were dying from the drought. Protests were widespread and RAM was engaged in terrorist activities and seeking to overthrow the government. It overwhelmed the available resources of Rowan, which is a poor state. There were simply not enough resources to provide more than normal police protection to Agromist.

39. Moreover, the standard does not extend to legal protection, such as mandated state prosecutions.[80] Thus, Rowans failure to prosecute protesters for property damage to Agromist's facilities does not violate its guarantee of full protection and security.

(D) ROWAN DOES NOT HAVE TO COMPENSATE

i. Rowan Did Not Cause Akopia's Losses

40. Rowan need not compensate because its acts did not cause injuries to Akopia. According to Article 31 of the *ASR*, States are only responsible for "the injury caused by the internationally wrongful act."[81] Causation must be direct, foreseeable, and

[80] PCA *Saluka v Czech Republic* (2006) Partial Award [484]; UNCITRAL *BG Group v Argentina* (2007) Award [324]; ICSID *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan* (2008) Case No ARB/05/16 [668]
[81] *ASR* (n 43) Art. 31

proximate.[82] In *Biwater Gauff v Tanzania,*[83] an unlawful expropriation resulting in no injury gave rise to no compensation.

41. Rowan's delay in issuing licenses did not cause Agromist to suffer losses because they built the pipeline anyway[84] and produced sugar.[85] Additionally, Rowan is not responsible for the losses resulting from the bombing because it was committed by the RAM protestors.[86] Even if Rowan were responsible for failing to protect Agromist facilities, it is still not liable because the internationally wrongful act was not the direct and proximate cause of the damages. The protestors caused the damages. Furthermore, the damages caused by the protestors were unforeseeable.[87]

42. Rowan is not responsible for the other economic losses. Agromist's losses stem from the worldwide boycott of its products,[88] the protestors bombing its sugar mills,[89] and the drought which reduced its water access.[90] There is no direct, foreseeable and proximate link between Rowan's acts and Agromist's economic losses.

ii. Akopia Did Not Mitigate Losses

43. According to *Gabcikovo-Nagymaros Project* case, "an injured State which has failed to take the necessary measures to limit the damage sustained would not be

[82] S Ripinsky with K Williams, *Damages in International Investment Law* (BIICL, London 2008) 137; Eritrea-Ethiopia Claim Commission *Decision 7 of the 'Guidance Regarding Jus Ad Bellum Liability'* (2007) [7] – [14]
[83] ICSID *Biwater Gauff Ltd (UK) v United Republic of Tanzania* (2008) Case No ARB/05/22
[84] *Compromis* [5]
[85] Clarification No 37
[86] *Compromis* [10]
[87] Ibid
[88] *Compromis* [15]
[89] *Compromis* [10]
[90] *Compromis* [6]

entitled to claim compensation for that damage which could have been avoided."[91] In *WBC Claim*, "under the general principles of international law relating to mitigation of damages…the Claimant was…obligated to take reasonable steps to…mitigate the loss, damage or injury being caused."[92]

44. By refusing to reduce its sugar crop, Agromist failed to mitigate its losses.[93] Agromist should have decreased its sugar production when asked by Rowan. A timely reduction of its crop to realistic levels would have lowered production costs and mitigated damages. These lowered costs may have prevented the bankruptcy.

45. Alternatively, Agromist should have anticipated bankruptcy and suspended its business operations and laid off all its employees earlier to mitigate further economic losses.

iii. Akopia Assumed the Risk and was Contributorily Negligent

46. BITs are not intended to protect investors from bad business decisions.[94] Investors have a duty to engage in the investment with adequate knowledge of the risk.[95] In *MTD Equity v Chile,* the Tribunal found that Chile could not be responsible for the claimant's losses due to its unwise business decisions.[96]

47. Agromist assumed the risk. In *Missionary Society v. Great Britain* the Court found that the claimant was aware of the perils and could not later claim damages stemming from a rebellion.[97] Agromist knew or should have known that their

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[91] *Gabčíkovo-Nagymaros Project* (n 51) [80]
[92] UNCC *Well Blowout Control Claim* (1996) 109 ILR 480 [54]
[93] *Compromis* [22]
[94] *MTD Equity* (n 57) [178]
[95] Peter Muchlinski (n **Error! Bookmark not defined.**) 542
[96] *MTD Equity* (n 57) [169] - [170]
[97] *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (US) v Great* Britain (1920) Vol VI RIAA 42 - 44, 42

neighboring country, Rowan, is prone to drought.[98] Agromist also knew or should have known of the relevant domestic environmental laws of Rowan. They assumed the risk when entering into the ARC.

48. Furthermore, Agromist's actions contributed to its damages.[99] *ASR* Article 39 precludes recovery where the willful or negligent act or omission of the claimant has contributed to the injury sought from the respondent.[100] The *ASR*'s Commentary on Article 39 refers to the "contributory negligence" concept.[101] Agromist failed to reduce water usage despite the drought and Rumulan's request. By overusing water and ignoring domestic environmental laws they ignited mass protest. This led to the destruction of their facilities and strengthened popular support for the terrorist RAM group (who created of the video which caused Agromist's sales to plummet and eventually led to their impending bankruptcy).

49. Finally, if any damages are awarded against Rowan they should be minimal. In *Petrobart v Kyrgyz Republic,* the tribunal found the government breached the fair and equitable standard yet the full amount of proved losses was not awarded. The weak financial situation of the governmental company had prevented it from paying full compensation.[102] Rowan is a poor country experiencing emergency conditions brought on by the drought and civil unrest. The court should exercise its discretion and order minimal or no compensation.

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[98] *Compromis* [6]
[99] British-Venezuelan Commission *Davis Case (on merits)* (1903) Vol IX RIAA 460 - 464, 460
[100] *ASR* (n 43) Art. 39
[101] ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April - 1 June and 2 July - 10 August 2001) (2001) ILC Ybk, Vol II, Part Two (Commentaries) 110
[102] *Petrobart v Kyrgyz Republic* SCC Case No 126/2003

IV. ROWAN DID NOT VIOLATE INTERNATIONAL LAW BY BUILDING THE DAM ON THE KHUTA'S LAND

(A) CONSTRUCTION OF THE DAM IS NECESSARY AND PROPORTIONATE TO THE SURVIVAL OF ROWAN

i. The Drought Threatening Rowanians' Rights Necessitates Rowan to Relocate the Khuta From the Dam Site

50. According to the *ILA Conference Report of the Hague Conference (2010)*, removal or relocation of indigenous peoples is permitted in cases of necessity under international law.[103]

51. In *Gabcíkovo-Nagymaros*,[104] the ICJ defined necessity as when a State's "essential interest" is threatened by a "grave and imminent peril." As noted above, the drought cost many Rowanians' lives. The Rowanian's right to life and right to water are essential interests threatened by the grave and imminent peril of the drought. The ICJ also cited Article 25 of the *ASR,*[105] defining it as the customary international law standard of necessity.[106]

52. *ASR* Article 25 provides that the act challenged must be the only way to safeguard the threatened "essential interest."[107] Building the dam is the necessary means for Rowan to protect the lives of its citizens.

53. If Rowan had chosen a different site for the dam, it would have affected other peoples land rights. Building a dam is the only way to provide necessary water for people suffering from the drought.

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[103] Committee on the Rights of Indigenous Peoples, 'Interim Report' in International Law Association The Hague Conference Report (2010) 21

[104] *Gabčíkovo-Nagymaros Project* (n 51) [51] – [52]

[105] *ASR* (n 43) Art. 25

[106] *Gabčíkovo-Nagymaros Project* (n 51) [51] – [52]

[107] *ASR* (n 43) Art. 25(1)(a)

ii. The Dam Construction on the Khuta's Land is Proportionate

54. *ASR* Article 25(1)(b) provides that the measure must not significantly impair another essential interest.[108] The building of the dam does not significantly impair the Khuta's interest. The Khutas were only removed from part of their territory. As elaborated by the *ASR* commentaries, the protected interest must outweigh all other considerations, on a reasonable assessment of the competing interests.[109] Rowan is protecting the right to life of its citizens. Any alleged land or minority rights are secondary and are superseded by the preemptory right to life. This is also consistent with Article 4 of the ICCPR.

55. ICCPR Article 4 provides that any derogating measure must be strictly required by the exigency of the emergency situation. This reflects the principle of proportionality.[110] The drought is an emergency situation, which involves mass death. It is proportionate to build the dam to protect the *jus cogens* right to life, even at the expense of the Khuta's right to land, culture, and religion.

56. For the above reasons, Rowan's acts were necessary and proportionate.

(B) ROWAN MAY DEROGATE FROM ITS OBLIGATIONS TO THE KHUTA

i. Rowan May Derogate from the ICCPR

57. ICCPR Article 4 provides that States may derogate from relevant obligations under the following conditions: i) a state of national emergency, ii) official

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[108] *ASR* (n 43) Art. 25(1)(b)
[109] Commentaries (n 101) 84 citing *Gabcikovo-Nagymaros Project* (n 51) 46 [58]
[110] HRC 'General Comment 29, States of Emergency (article 4)' (2001) UN Doc CCPR/C/21/Rev.1/Add.11 [4]

proclamation, iii) no violation of other international law obligations, iv) it must be done in a non-discriminatory manner; and v) notification.[111]

58. Rowan is experiencing a state of emergency because the drought is threatening the life of a nation. President Rumulan made an official proclamation by declaring the drought as a national emergency.[112]

59. Although Rowan has not provided notification under Article 4(3), the HRC has held that "…right to take derogatory measures may not depend on a formal notification being made."[113] The failure to notify the ICCPR member States is *de minimus*.

60. Though the building the dam affects the Khuta, it is not discriminatorily motivated as there is no unequal treatment and is done out of necessity.

ii. Rowan May Derogate from Customary International Norms

61. States may derogate from customary international norms in a state of necessity. In *Gabcíkovo-Nagymaros,* the ICJ stated that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."[114] The drought caused a state of necessity allowing Rowan to derogate under customary international law.

[111] Article 4 ICCPR
[112] *Compromis* [7]
[113] HRC *Jorge Landinelli Silva v Uruguay* (1978) No R.8/34, UN Doc A/36/40 130 [8.3]; HRC *William Torres Ramirez v Uruguay* (1977) No 4/1977, UN Doc A/35/40 121 at [17]
[114] *Gabčíkovo-Nagymaros Project* (n 51) [51] – [52]

iii. There is No Customary International Law of Indigenous People's Land Rights

62. According to the *Lotus* case, the plaintiff bears the burden of proof to establish that a norm has become customary international law.[115]

63. A state practice only becomes custom slowly, usually over a period of many decades.[116] It is only recently that cases (e.g., *Awas Tingni*[117]) and instruments (ILO Convention No 169,[118] UNDRIP[119]) began recognizing indigenous people's land rights. They have not existed long enough to become binding customary international law.

64. Furthermore, there is insufficient state practice.[120] Many states with significant indigenous populations do not recognize their communal land rights: most Southeast Asian States have no legal rules granting indigenous peoples the right to State-owned land.[121] The *Indigenous World 2012* provided that many states are not committed to addressing the inequalities affecting indigenous peoples' land rights.[122] Many states argued that these interests in land must be balanced with the importance of national development.[123]

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[115] *S.S. Lotus (Fr v Turk)* PCIJ Rep Series A No 10, 18
[116] Sir Robert Jennings and Sir Arthur Watts (ed), *Oppenheim's International Law*, Vol. I, Peace (2 vols) (9th edn Longman, London 1992) 30
[117] *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment, Inter-American Court of Human Rights Series C No 79 (31 Aug 2001) [148]
[118] ILO Convention No 169: Concerning Indigenous and Tribal Peoples in Independent Countries 28 ILM 1382 (1989) (Art. 13-19)
[119] UNGA Resolution 61/295 "United Nations Declaration on the Rights of Indigenous Peoples" (29 June 2006) A/61/L.67 and Add.1 (Art. 25-29)
[120] *North Sea Continental Shelf Cases (Germany v Denmark, Germany v Netherlands)* ICJ Reports 1969 [41] – [42]
[121] Rodolfo Stavenhagen, "Indigenous Peoples in Comparative Perspective" in UN Development Programme Human Development Reports 1
[122] Cæcilie Mikkelsen, *The Indigenous World 2012* (IWGIA, 2012) 16
[123] UNCHR 'Report of the working group established in accordance with Commission on Human Rights resolution' (2002) UN Doc E/CN.4/2002/98 [42] – [44]

65. While the judgment in *Awas Tingni* held that the right to property under Article 21 of the American Convention on Human Rights includes indigenous people's land rights, it is distinguishable from the instant case. Rowan is not a State Party to the American Convention. Nor does it recognize indigenous land rights in any other binding conventions.

66. Furthermore, the *Awas Tingni* interpretation is not universally accepted. Anaya suggested that under a formalist approach, the right to property in treaties has little to do with ancestral indigenous collective land, "since that right is articulated in individualistic terms and understood to be associated with accepted Western notions of property (emphasis added)."[124]

67. Rowan did not sign ILO Convention No 169, nor does the Convention signify sufficient State practices because only 22 States ratified it. For example, Australia, Canada, US, and New Zealand—four States home to almost half of the world's indigenous peoples—have not ratified the Convention.

68. UNDRIP does not bind Rowan. UNDRIP is merely an aspirational, non-binding document. A UN General Assembly Resolution is without legally binding character.[125] For example, Canada endorsed UNDRIP while stating that it is non-

[124] James Anaya, 'Divergent Discourses About Int'l Law, Indigenous Peoples, and Rights overLands and Natural Resources: Toward a Realist Trend' (2005) 16 Colo. J. Int'l Envtl. L. & Pol'y, 237-258, 245

[125] Christopher Greenwood, Sources of International Law: An Introduction. [4] <http://untreaty.un.org/cod/avl/pdf/ls/greenwood_outline.pdf> (accessed on 7th January, 2013)

legally binding, and does not reflect customary international law.[126] Similarly, Rowan's endorsement of UNDRIP does not create obligations.

69. The lack of jurisprudence and scholarship recognizing indigenous' land rights is evidence that it is not customary international law.

(C) THE CONSTRUCTION OF THE DAM IS CONSISTENT WITH ROWAN'S SOVEREIGN RIGHTS

70. Rowan has a right under international law to exercise territorial sovereignty.[127] The specific right of states to control and exploit their lands is codified in numerous UN instruments, which evidence customary international law.[128] According to the Declaration on Permanent Sovereignty over Natural Resources, and the Declaration on the Right to Development, States have the sovereign right to use their land and resources according to national interest.[129] These rights may include, *inter alia,* developing projects to improve the domestic economy for the national welfare.[130]

71. Rowan is a poor and undeveloped country.[131] Exploitation of land and resources is the only viable way to improve the welfare of its citizens. The right for Rowan to use its land is recognized by UN and customary international law. The building of the dam will provide life-giving water and improve Rowan's economy.

72. According to Anaya, "[W]hatever rights of historical sovereignty indigenous peoples may have once possessed, those rights have long ceased to be recognized by

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[126] Aboriginal Affairs and Northern Development Canada 'Canada's Statement of Support on the United Declaration on the Rights of Indigenous Peoples' (Official Statement 2010) <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>
[127] *Brownlie* (n 11) 105
[128] *Advisory Opinion on the Western Sahara* [1975] ICJ Rep 12, 31 - 37; *Texaco Overseas Petroleum Co v Libya* [1977] 17 ILM 1, 30
[129] UNGA Resolution 1803 (XVII) (14th December 1962); UNGA Resolution 41/128 (4 December 1986) UN Doc A/RES/41/128
[130] Ibid
[131] *Compromis* [1]

international law and instead have been made subject to the overriding sovereignty of states…"[132]

73. Jurisprudence of different countries with large indigenous populations has affirmed State's sovereign rights.

In US, the Supreme Court in *Tee-Hit-Tons* asserted that indigenous people's property interest is merely a right of occupancy—a right to the use of the land at the government's will, which can be extinguished by the government "without any legally enforceable obligation to compensate."[133] *Johnson v M'Intosh* laid down a principle that notwithstanding treaties reserving territory to the Indians, States still hold title to Indian land and the ultimate right to the soil.[134] This legal doctrine continues to be the governing law on this matter in US.[135]

74. In the Canadian case *St. Catherine's Milling & Lumber Co v the Queen,* the Supreme Court acknowledged that the Crown owns all lands. While the Crown possesses the legal title subject to the Indians' right of occupancy, it has "the absolute exclusive right to extinguish the Indian title either by conquest or by purchase..."[136] Rowan possesses the legal title to all its land. While the Khuta may have the right to occupy the land, Rowan has the power to abrogate that right.

75. Nor does the Treaty between the Khuta and Rowan preclude the construction of the dam. The New Zealand Supreme Court in *Wi Parata* declared the Treaty of

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[132] *James Anaya* (n 124) 245
[133] *Tee-Hit-Ton Indians v US* (1955) 348 US 272, 279
[134] *Johnson v M'Intosh* 21 US (8 Wheat.) 543 (1823) [*M'Intosh*]
[135] UNCHR, PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES Indigenous peoples and their relationship to land (11 June 2001) E/CN.4/Sub.2/2001/21 [45]

[136] *St Catherine's Milling & Lumber Co v the Queen* [1877] 13 S.C.R. 577, 599 - 600

Waitangi invalid because the Maori had no legal system and thus was not a State competent to enter into a treaty.[137] Courts continued to follow Wi Parata in subsequent cases that allowed the Crown prerogative to disregard native title.[138]

76. Indigenous people's claim for rights may be rejected for reasons of "national interest." Legal doctrines such as the "act of State" doctrine in commonwealth states and the "plenary power" doctrine in the US have been adopted by courts to justify the dispossession of indigenous peoples based on the principle of national interest.

77. The Khuta are not a sovereign state, but subjects of the state of Rowan. All title vests from the state. In the treaty, Rowan has only ceded limited privileges to the Khuta over the land, such as the right to occupancy. These privileges can be extinguished subject to the will of the sovereign.

78. Rowan's previous practice of consulting with the Khuta before taking possession does not create a binding obligation as there is no *indicium* that it is *opinio juris*. There is no provision for binding domestic customary law in Rowan, nor is it stipulated as an obligation under the treaty.

V. AKOPIA'S DETENTION IS A VIOLATION OF INTERNATIONAL LAW

(A) AKOPIA'S DETENTION WAS ARBITRARY

79. Akopia's detention violates Article 9(1) of the ICCPR, which provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

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[137] *Wi Parata* (1877) 3 NZ Jur, 76 - 78

[138] *Re The Ninety-Mile Beach* [1963] NZLR 461, 468 CA (NZ)

80. In providing guidance for interpreting Article 9(1), the HRC in the cases of *Hugo van Alphen v The Netherlands*[139] and *A v Australia*[140] concluded that an "arbitrary detention" would include elements of "necessity" and "proportionality." Applying the above cases, Akopia's detention is unnecessary and disproportionate.

81. In *A v Australia*, the HRC stated that "remand in custody could be considered arbitrary if it is not necessary in all circumstances."[141] Further, in *Opinion 1/2002* of the Council of Europe Commissioner for Human Rights, Mr. Alvaro Gil-Robles observed that "several European states long faced with recurring terrorist activity have not considered it necessary to derogate from [European] Convention rights. Nor have found it necessary to do so under the present circumstances."[142]

82. Akopia detained 1,000 people based solely on their ethnicity or national origin. Akopia should have only detained suspects based on probable cause (e.g., suspects identified by Hassan and consequently from further investigation). This would have preserved Akopia's national security interest, particularly as there had been no actual attacks by RAM in Akopia. Thus, it is unnecessary for Akopia to detain all ethnic-Rowanians.

83. Additionally, the detention is disproportionate. In *General Comment No 27*, the HRC provided guidance for assessing proportionality. Measures must be: i) appropriate to achieve their protective function; ii) the least intrusive instrument

[139] (1990) Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988 [5.8]
[140] (1997) Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 [9.2]
[141] Ibid [para 9.2]
[142] Opinion 1/2002 of the Council of Europe Commissioner for Human Rights Comm DH (2002) 7, 28 August 2002 [33]

amongst those which might achieve the desired result; and iii) proportionate to the interest to be protected.[143]

84. Akopia's detention is inappropriate to achieve its protective function as the threat is only potential and not actual or imminent. The European Commission found that *potential* threats will not be sufficient for a State to derogate from its obligations.[144] The European Court of Human Rights decision in *Lawless v Ireland* found there was imminent peril only after there had been an increase in terrorist activities and violence including homicidal ambush, destruction of military targets, assassination and armed attacks.[145]

85. Akopia experienced no violence and no imminent threat as there is not evidence the cells were actively engaged in terrorist activity or planning. Allowing a broad reading of "actual or imminent threat" runs the risk of permanent derogation from international treaties. It would clearly undermine international law as a State would be permitted to take action that would otherwise be in violation of the treaty.[146]

86. Moreover, the detention is not the least intrusive way to achieve the desired result. Lord Hope of Craighead stated that "the prolonged and indefinite detention without trial of those affected by the Derogation Order cannot be said to be required by the exigencies of the situation."[147] The executive order in Akopia mandates that the detainees will be held in makeshift camps until the threat dissipates. The

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[143] HRC 'General Comment No 27' UN Doc CCPR/C/21/Rev.1/Add.9 [4]
[144] Report of the European Commission (Adopted on 19 December 1959) Application No. 332/157 [92]
[145] ECHR *Lawless v Ireland* (No 3) application 332/57 [14] – [29]
[146] Delmas-Marty and Soulier, 'Restraining and Legitimating the Reason of State' in Delmas-Marty (ed), The European Convention for the Protection of Human Rights (Marinus Nijhoff Publishers, Dordrecht 1992) 7
[147] *A v Secretary of State for Home Department* [2004] UKHL 56 [96]

exigencies of the situation do not strictly require detention as it will usually be impossible to say when an emergency arises and how long it will last.[148] Thus, it can be presumed that Akopia intends to hold the detainees indefinitely.

87. Additionally, Akopia should have detained actual suspects instead of casting a broad net by arresting 1,000 people, including children. It is disproportionate because Akopia intends to indefinitely detain detained all ethnic-Rowanians solely on the grounds of nationality and descent despite a lack of imminent peril.

(B) AKOPIA COULD NOT DEROGATE FROM ITS OBLIGATIONS

Akopia is not entitled to derogate from its obligations under Article 4 of the ICCPR. Derogation requires i) a state of national emergency: ii) official declaration; iii) no violation of other international law obligations; and iv) it must be done in a non-discriminatory manner.[149]

i. Inconsistent With Other International Obligations

88. Akopia's detention violates the rights of children. Under the Convention on Rights of the Child (CRC),[150] children must be protected even in times of emergency.[151] Professor Geraldine Van Bueren noted that the CRC has in whole or in part become customary international law.[152]

89. Akopia arbitrarily detained all ethnic-Rowan children, solely on the ground of national origin. The rights of childern, both under treaty and customary international law, are obviously infringed.

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[148] Ibid [122]
[149] Art. 4 ICCPR
[150] Convention on the Rights of Child (20 November 1989)1577 UNTS 3
[151] CHR Human rights: a uniting framework Report of the High Commissioneer E/CN.4/2002/18 [18]
[152] Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Netherlands 1995) 53

ii. Akopia's Detention is Discriminatory

90. *General Recommendation No 30* of the Committee on Elimination of Racial Discrimination provides that States should "[e]nsure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the ground of race, colour, descent, or national or ethnic origin."[153] In *Korematsu v US*, Justice Robert Jackson (dissenting) observed, "[H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice."[154]

91. Akopia's detention is discriminatory because Akopia detained ethnic-Rowanians solely on the grounds of nationality and descent. This measure violates Articles 2, 4 and 26 of the ICCPR.

92. *General Comment No 29* (HRC) provides that "[e]ven though [A]rticle 26 or the other Covenant provisions related to non-discrimination have not been listed among the non-derogable provisions in [A]rticle 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances."[155]

93. Akopia's detention is discriminatory since it is taken solely on the ground of nationality and national origin. Akopia cannot derogate even though Article 26 is technically a derogable right because Article 4 (1) has an independent requirement of non-discrimination rendering Article 26 derogation redundant.

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[153] UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination Against Non Citizens, 1 October 2002
[154] *Korematsu v US* 323 US 214 (1944) [233]
[155] *General Comment No 29* (n 110)

iii. No State of National Emergency

94. In *Lawless v Ireland*, Susterhenn stated that "… the emergency being only potential … [it] cannot be regarded as of exceptional gravity, but only as a latent emergency of a minor degree."[156] The threat Akopia faced is a potential one which is insufficient to derogate from its international obligations.

95. In *A v Secretary of State for Home Department*, Lord Hoffman did not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation.[157] There may be potential violence posed by RAM in the future. However, Akopia is unlikely to face a threat of the magnitude that would threaten the life of the nation.

iv. No Timely Declaration

96. HRC *General Comment No 29*[158] and the *Siracusa Principles*[159] state that the State party must have officially proclaimed a state of emergency. Failure to comply with this requirement constitutes a violation of international law. However, Akopia arbitrarily detained ethnic-Rowanians before officially proclaiming a state of emergency.

(C) THE DETENTION VIOLATES *JUS COGENS*

97. The HRC has confirmed that "arbitrary deprivation of liberty" constitutes a violation of peremptory norms of international law.[160] The Working Group on

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[156] Report of the European Commission (adopted on 19 December 1959), Application No. 332/57

[157] *A v Secretary of State for Home Department* (n 147)

[158] HRC 'General Comment 29, States of Emergency (Art. 4)' (2001) UN Doc CCPR/C/21/Rev.1/Add.11 [2]

[159] ECOSOC 'Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR' (1985) UN Doc E/CN.4/1985/4

[160] General Comment No 29 (n 155) [11]

Arbitrary Detention also defines the prohibition of arbitrary detention as a peremptory norm (or *jus cogens* norm) of international law.[161] The Restatement (Third) on Foreign Relations Law of the US provides that prolonged arbitrary detention is *jus cogens*.[162]

98. Article 53 of the VCLT stipulates that a treaty is void if it conflicts with a peremptory norm of general international law. Further, Article 64 of the VCLT states that "if a new peremptory norm of general international law emerges, any existing treaty which conflicts with that norm becomes void and terminates."[163]

99. As the prohibition against arbitrary detention has recently become recognized as a peremptory norm, Akopia cannot now derogate from its obligations under Article 9(1) of the ICCPR. Akopia is bound by Article 64 of the VCLT which expressly forbids derogation from nascent peremptory norms.

VI. AKOPIA HAS A DUTY TO EXTRADITE ROBERT HASSAN

(A) AKOPIA MUST PROSECUTE OR EXTRADITE HASSAN UNDER CUSTOMARY INTERNATIONAL LAW

100. According to UN Security Council Resolution 1373, all States shall "(2c) deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" and "(2)(e) ensure that any person who participates in the financing,

[161] UNGA 'Report of the Working Group on Arbitration Detention' (26 December 2011) UN Doc A/HRC/19/57
[162] American Law Institute, *Restatement (Third) of the Law of the Foreign Relations Law of the US* (Vol 2, American Law Institute Publishers 1987) ss 702
[162] Ibid ss 331(2)
[163] Art. 53 and 64 VCLT

planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice."[164]

101. The US Department of Defense defines terrorism as "the unlawful use of violence or threat of violence to instill fear and coerce governments or societies. Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political."[165]

102. Hassan, a RAM leader, masterminded the formation of paramilitary guerillas to commit terrorist acts within Rowan. RAM bombed Agromist's sugar mills[166] and committed torture.[167] Hassan should be extradited to Rowan for execution of sentence. By refusing to extradite Hassan, Akopia is providing safe haven to terrorists in violation of international law.

103. According to Bassiouni, all States have a customary international law duty to prosecute or extradite where there is an international crime giving rise to universal jurisdiction.[168] In *Belgium v Senegal*, the ICJ found that Senegal violated its obligations under the Convention against Torture[169] by failing to submit the case to its competent authorities for prosecution if not surrendering the suspect.[170] Akopia did not try Hassan who is a terrorist, nor did they extradite him, Akopia has breached its obligation under international law.

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[164] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 [2]
[165] The US Department of Defense, *Antiterrorism* (Joint Pub 3-07.2, 2010); UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566
[166] *Compromis* [10]
[167] *Compromis* [13]
[168] M Cherif Bassiouni, *Crimes against humanity: historical evolution and contemporary application* (Cambridge University Press, New York 2011) 270-71
[169] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85
[170] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment of 20 July 2012 [121]

104. In paragraph 3(g) of the UN Security Council Resolution 1624, all States are called upon to ensure "that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists." In *Federal Republic of Germany v B*, the Court of Justice of the European Union held that "[t]errorist acts are 'serious non-political crimes'… even if committed with purportedly political objectives."[171] Hence, Akopia's refusal to extradite based on the political exception is not applicable to Hassan who is a terrorist.

(B) HASSAN'S TRIAL IN ABSENTIA IS VALID

105. In *Demebukov v Bulgaria,* the ECtHR held that where the complainant deliberately created the situation that made him unavailable to participate in criminal proceedings against him, his conviction in absentia did not violate his right to a fair trial.[172] Hassan was wanted for treason in Rowan but deliberately eluded capture and disappeared.[173] Thus, he made himself unavailable to participate in the criminal proceedings and waived his right to trial. His conviction in absentia is not a violation of his right to a fair trial.

(C) DEATH PENALTY IS NOT A BAR TO EXTRADITION

106. The Special Rapporteur on Human Rights and Counter-Terrorism, Scheinin, observed that "the fact that almost one third of all States continue to apply capital punishment is an indication that there is no norm of customary international law that would generally prohibit the death penalty."[174] UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mendez, in his

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[171] *Federal Republic of Germany v B* [2012] 1 WLR 1076 [66]
[172] *Demebukov v Bulgaria* (Application No 68020/01) (2010) 50 EHRR 41 [57]
[173] *Compromis* [9]
[174] Martin Scheinin, 'Death Penalty' (2008) Max Planck Encyclopedia of Public International Law [13]

report stated that capital punishment is not a *per se* violation of the right to life and the international human rights bodies have yet to hold that the death penalty *per se* violates the prohibition on torture and cruel, inhuman or degrading treatment.[175] The death penalty is not expressly prohibited by international law. Akopia cannot use it as a bar to extradition.

107. The ILC stated that "Security Council resolutions override conflicting customary law as the Security Council is a creation of the [UN] Charter."[176] Akopia has an international obligation to extradite Hassan as a terrorist. Such duty is not barred by the imposition of the death penalty after a valid trial.

[175] UNGA, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc A/67/279 [26], [27]
[176] ILC, 'Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 [345]

CONCLUSION AND PRAYER FOR RELIEF

Respondent requests that the ICJ adjudge and declare that:

a. The International Court of Justice does not have jurisdiction to adjudicate this case;
b. This case is inadmissible;
c. Rowan did not violate the BIT;
d. Rowan did not violate the Khuta's rights;
e. Akopia's detention is arbitrary and violated international law;
f. Akopia has to extradite Hassan; and
g. Rowan does not have to compensate Akopia.

Respectfully submitted,

COUNSEL FOR RESPONDENT