

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS



QUESTIONS RELATING TO RESPONSES TO HIGHLY PATHOGENIC AVIAN
INFLUENZA AND TRANSBOUNDARY WETLANDS

THE FEDERAL STATES OF AVES

APPLICANT

v.

THE REPUBLIC OF RENAC

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2017-2018 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT
COMPETITION

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TREATIES AND CONVENTIONS

Agreement on the Conservation of African – Eurasian Migratory Waterbirds, 16 June 1995, 2365 U.N.T.S. 251	8, 17
Conservation of European Wildlife and Natural Habitats	5
Convention for the Protection of Migratory Birds between the United States and Great Britain	5
Convention on Biological Diversity, 6 June 1992, 1760 U.N.T.S. 79	2, 3, 4, 17
Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 U.N.T.S. 333 ('CMS')	5, 8, 17
Convention on Wetlands of International Importance especially as Waterfowl Habitat, ('Ramsar Convention'), 28 May 1987, U.N.T.S 14583	1, 8, 9, 11, 12, 13, 20
Statute of the International Court of Justice, 26 June 1945, T.S. 993	9, 10, 14
Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331	18

U.N. DOCUMENTS AND OTHER INTERNATIONAL DOCUMENTS

Commentary on the Articles on State Responsibility, Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 202-03, UN Doc. A/56/10; GAOR, 56th Sess., Supp. 10 (2001)	9, 15
Commission of the European Communities, Impact Assessment Avian Influenza, COM(2005)171	7
United Nations Conference on Environmental and Development, June 3-14, 1992, Rio Declaration on the Human Environment, UN Doc. A/CONF. 151/26 (1992) ('Rio Declaration')	10
Yearbook of the International Law Commission, Vol. II, Part One (1980)	15, 16

JUDICIAL AND ARBITRAL DECISIONS

<i>Certain Activities carried out by Nicaragua in the Border Area; Construction of a Road in Costa Rica along the San Juan River, Costa Rica v Nicaragua</i> , 2015 I.C.J.	9, 10
--	--------------

<i>Corfu Channel Case (U.K. v. Alb.)</i> , 1949 I.C.J.	9
<i>Fisheries Jurisdiction Case (UK. v Iceland)</i> 1974 I.C.J.	18
<i>Gabcikovo-Nagymaros (Hung. v. Slov.)</i> , 1997 I.C.J.	15, 16
<i>Legality of the Threat or use of Nuclear Weapons, Advisory Opinion</i> , 1996, I.C.J.	9
<i>Pulp Mills on the River Uruguay (Arg. v. Uru.)</i> , 2010 I.C.J.	9
<i>Trail Smelter Arbitration (US. v. Canada)</i> , 3 U.N. Rep Int'l Arb Awards 1905, 1941	9
<i>US- Restrictions on the Imports of Tuna (Mexico v US)</i> 1991 30 ILM 1594	3

BOOKS

ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2007)	10
BEYERLIN ET AL., INTERNATIONAL ENVIRONMENTAL LAW (2014)	5
BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (2009)	9
BOYLE, <i>The Rio Convention on Biological Diversity</i> , in INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY (1996)	3
CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2012)	10
CRAWFORD, INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002)	15
EVANS, INTERNATIONAL LAW (2014)	1
GILLESPIE, CONSERVATION, BIODIVERSITY AND INTERNATIONAL LAW (2013)	5
MEINE ET AL., THE CRANES: STATUS SURVEY AND CONSERVATION ACTION PLAN (1996)	14
RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW (2006)	5

SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2014)	3
SCHOLZ, WETLANDS FOR WATER POLLUTION CONTROL (2016)	1
TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES (2006)	10
ESSAYS, ARTICLES AND JOURNALS	
Árnadóttir, <i>Termination of Maritime Boundaries Due to a Fundamental Change of Circumstances</i> Utrecht Journal of International and European Law, Vol. 32, 2016	18
Boed, <i>State of Necessity as a Justification for Internationally Wrongful Conduct</i> , Yale Human Rights and Development Journal, vol.3, 2014	16
Burhenne-Guilmin et al., <i>The Convention on Biological Diversity: A Hard Won Global Achievement</i> , Yearbook of International Environmental Law, vol. 3, 1992	4, 5
Cameron, <i>The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment</i> , B.C. Int'l & Comp. L. Rev, vol. 14, 1991	10
Cromie et al., <i>Responding to Emerging Challenges: Multilateral Environmental Agreements and Highly Pathogenic Avian Influenza H5N1</i> , Journal of International Wildlife Law and Policy, vol.14, 2011	7
Fabian, <i>H5N1: A Special Report – What is the threat and why should the environmental health profession be concerned?</i> Journal of Environmental Health, vol. 68, 2006	15
Fasanmi et al., <i>Public health concerns of highly pathogenic avian influenza H5N1 endemicity in Africa</i> , Veterinary World, vol. 10, 2017	7
Fitzmaurice, <i>Necessity in International Law</i> , Netherlands Yearbook of International Law, vol.41, 2011	16
Gullett, <i>‘Environmental protection and the precautionary principle: a response to scientific uncertainty in environmental management’</i> Environmental and Planning Law Journal, vol.14, 1997	10

Horwitz et al., <i>Wetlands as Settings for Human Health: Incorporating Ecosystem Services and Health Impact Assessment into Water Resource Management</i> , BioScience, vol. 61, 2011	1
Jamieson, “ <i>An Analysis of Municipal Wetlands Laws and Their Relationship to the Convention on Wetlands of International Importance Especially As Waterfowl Habitat (Ramsar)</i> ” Pace Environmental Law Review, vol. 4, 1986	12
Lewis, <i>Migratory Waterbird Conservation at the Flyway Level: Distilling the Added Value of AEWA in Relation to the Ramsar Convention</i> , Pace Env'tl. L. Rev, vol. 34, 2016	8
Ligon, <i>Avian Influenza Virus H5N1: A Review of its History and Information Regarding Its Potential to Cause the Next Pandemic</i> , Seminars in Pediatric Infectious Diseases vol.16, 326	14
Rice et al., ‘ <i>Chlorine Inactivation of Highly Pathogenic Avian Influenza Virus (H5N1)</i> ’ Emerging Infectious Diseases vol. 13, 2007	1
Swayne, ‘ <i>Impact of Vaccines and Vaccination on Global Control of Avian Influenza</i> ’ Avian Diseases, vol. 56, 2012	7
Trouwborst, <i>Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species</i> , Cornell International Law Journal Online, vol.2, 2014	6
Waldron, <i>The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus</i> , Otago Law Review, vol. 11, 2005 available at http://www.nzlii.org/nz/journals/OtaLawRw/2006/1.html	18
Wolfrum et al., <i>The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity</i> , Max Planck Yearbook of United Nations Law, 2000	4

SCIENTIFIC REPORTS

A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character (COP9, Resolution IX.1 Annex A, 2005)	1
Centre for Disease Control and Prevention, <i>Highly Pathogenic Asian Avian Influenza A (H5N1) in People</i> , (2015) available at https://www.cdc.gov/flu/avianflu/h5n1-people.htm	2
FAO Animal and Production and Health Manual, <i>Wild Bird Highly Pathogenic Avian Influenza Surveillance</i> , (2006) available at http://www.fao.org/3/a-a0960e.pdf	10

Ramsar Convention Secretariat, <i>Wise use of wetlands: Concepts and approaches for the wise use of wetlands, Ramsar handbooks for the wise use of wetlands, 4th ed., Vol. 1</i> (2003)	1
Ramsar Technical Report No. 7: <i>Ramsar Wetland Disease Manual, Guidelines for Assessment, Monitoring and Management of Animal Disease in Wetlands</i> (2012), available at https://www.ramsar.org/sites/default/files/documents/library/rtr7-disease.pdf	6
Ramsar Wise Use Handbooks, <i>Handbook 1: Wise Use of Wetlands, 4th edn.</i> (2010)	1
Ramsar Wise Use Handbooks, <i>Handbook 4: Avian Influenza and Wetlands, 4th edn.</i> (2010)	17
The Ramsar Strategic Plan 2003-2008 (COP8, Resolution VIII.25, 2002)	1
Water Quality and Health Council, <i>Drinking Water Chlorination: A Review of Disinfectant Practices and Issues</i> (2017) available at http://www.waterandhealth.org/drinkingwater/wp.html#chlo	11
Weber et al., <i>Ecologic Immunology of Avian Influenza (H5N1) in Migratory Birds</i> , vol. 13, 2007, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2828095/#R30	7, 8
World Health Organisation, <i>Avian and other Zoonotic Influenza</i> , (2016) available at http://www.who.int/mediacentre/factsheets/avian_influenza/en/	2

MISCELLANEOUS

Arup, <i>Greg Hunt Grants Western Australia Exemption for Shark Cull Plan</i> , <i>The Sydney Morning Herald</i> (January 21, 2014) available at http://www.smh.com.au/federal-politics/political-news/greg-hunt-grants-wa-exemption-for-shark-cull-plan-20140121-315zk.html	6
Packham, <i>Western Australian given Exemption from Federal Laws to Cull Sharks</i> , <i>The Australian</i> , (January 21, 2014) available at http://www.theaustralian.com.au/national-affairs/western-australia-given-exemption-from-federal-laws-to-cull-sharks/news-story/3a4336468c06bb681dfb86f7f75e6deb	6
Kelland, <i>Proliferation of Bird Flu Outbreaks raises Risk of Human Pandemic</i> , <i>Reuters</i> (January 26, 2017) available at https://www.reuters.com/article/us-health-birdflu-risks/proliferation-of-bird-flu-outbreaks-raises-risk-of-human-pandemic-idUSKBN15A22D	16

STATEMENT OF JURISDICTION

In accordance with Article 40 of the Statute of the International Court of Justice, the Federal States of Aves ('Aves') and the Republic of Renac ('Renac') have submitted by Special Agreement their differences concerning questions relating to responses to highly pathogenic avian influenza and transboundary wetlands, and transmitted a copy thereof to the Registrar of the International Courts of Justice ('ICJ') on 4 July 2017. The Registrar of the Court addressed notification to the parties on 10 July 2017. Therefore, Aves and Renac have accepted the jurisdiction of the ICJ pursuant to Article 36 (1) of the Statute.

QUESTIONS PRESENTED

1. Whether Renac's responses to the 2014 and 2015 outbreaks of highly pathogenic avian influenza were justified under international law.
2. Whether Renac violated international law by delisting the Adeguri Marsh as a Ramsar Site and as a Transboundary Ramsar Site and whether it provided adequate compensation.

STATEMENT OF FACTS

The Federal States of Aves and the Republic of Renac are neighbouring sovereign states. Aves is a developed country with a per capita GDP of US \$17,500. Renac is a developing country with a per capita GDP of US \$1,500. Both countries' economies rely heavily on poultry production (R.1) with ecotourism also providing a source of income (R11).

Located between the states is the Adehuri Marsh ('the Marsh'), a 20,000-hectare freshwater wetland. The Marsh is listed as a wetland of international importance under the Ramsar Convention, to which both Aves and Renac are Contracting Parties. (R.1)(R.9) The Marsh is habitat to many species of waterfowl, including the endangered blue-crowned crane. Since 2009, Aves and Renac have experienced outbreaks of highly pathogenic avian influenza (HPAI). Both states heavily culled poultry previously to contain the virus.

In 2014 and 2015, Renac suffered two severe outbreaks of HPAI. These outbreaks killed five of its citizens, caused food shortages and threatened Renac's food security by largely eliminating an important source of protein for Renac citizens. Millions of domestic poultry were killed during the outbreaks. This had a significant impact on Renac's economy. The outbreaks also killed 750 wild waterbirds, 200 of which were blue-crowned cranes. The virus reportedly originated in Aves; a finding not contested by the Applicant. Samples taken from the dead birds in both outbreaks tested positive for a severe strain of HPAI, H5NX (similar to H5N1) (R.16)(R.24).

In response to the 2014 outbreak, Renac culled the likely infected waterfowl at the Marsh to prevent further cross-infection from Aves to Renac. While Aves did not agree with Renac's decision to cull the waterfowl (R.17), the infection was contained (R.19). In response to the 2015 outbreak, Renac culled waterfowl at the Marsh, including 100 blue-crowned cranes, and dispensed disinfectants into the wetland to counteract the virus. Aves protested this decision

(R.22). The outbreak was contained and Renac has not experienced another outbreak since (R.24).

Given the severity and frequency of the HPAI outbreaks, Renac decided to delist the Marsh as a Ramsar Site to allow for more flexibility in preventing any future outbreaks (R.26). On 3 March 2016, after carrying out an extensive environmental impact assessment ('EIA')(R.28), Renac notified Aves and the Ramsar Convention Secretariat of its plan to delist the Adeguri Marsh. In the notification, Renac proposed compensation in the form of enhancing and preserving a rural 17,000-hectare coastal salt marsh, home to the critically endangered Kleinmann's tortoise and an endangered subspecies of saltmarsh harvest mouse (C.32) Renac also suggested that the salt marsh be put forward for designation as a Ramsar Site (R.29). On 4 October 2016, having followed the required process and citing urgent national interests, Renac officially delisted the Adeguri Marsh as a Ramsar Site (R.34). Aves subsequently instituted proceedings against Renac at the ICJ (R.35) alleging that its responses were not in compliance with international law; that Renac cannot invoke its sovereign right to delist the Marsh as a Ramsar site; and that its proposed compensation for delisting the Marsh was inadequate.

SUMMARY OF ARGUMENTS

Renac's responses to the 2014 and 2015 HPAI outbreaks are fully compliant with its international law obligations. As a developing nation, Renac has taken necessary measures to contain the spread of the infection and deal with the public health emergency in its territory.

The dispersal of disinfectants counteracted the contamination of the Marsh without causing any notable degradation to its ecosystem. This is in accordance with Renac's treaty and customary law obligations. Furthermore, the public health emergency caused by the outbreaks amounts to extraordinary circumstances, allowing Renac to justify the culling of the likely infected wild waterbirds under the CMS.

Should this Court find a breach of Renac's international obligations arising from its responses to the HPAI outbreaks, Renac can rely on the defence of necessity, due to its national public health emergency. Furthermore, the fact that the virus has developed to infect and kill humans and wild waterbirds amounts to a fundamental change of circumstances altering Renac's treaty obligations such that it can unilaterally withdraw from relevant treaties, in accordance with Article 62 of the Vienna Convention on the Law of Treaties.

Renac has a sovereign right to delist the Adeguri Marsh as a Ramsar Site due to its urgent national interests and it has compensated adequately for this by agreeing to enhance and protect the coastal saltmarsh. This upholds Renac's obligations under the Ramsar Convention.

Aves has violated international law by failing to contain HPAI within its territory. Moreover, having allowed the virus to spread to Renac, it failed to cooperate with or offer assistance to Renac in its efforts to suppress the virus.

ARGUMENT

I. RENAC HAS ADHERED TO ITS INTERNATIONAL LAW OBLIGATIONS WITH RESPECT TO ITS RESPONSES TO THE 2014 AND 2015 OUTBREAKS OF HIGHLY PATHOGENIC AVIAN INFLUENZA

A. RENAC HAS COMPLIED WITH ITS TREATY OBLIGATIONS

1. Renac has complied with the Ramsar Convention ('Ramsar')

Ramsar is the only global environmental treaty to deal specifically with wetlands.¹ Article 3 provides that Contracting Parties should, as far as possible, promote the wise use of wetlands within their territory. The “wise use” of wetlands is defined as the maintenance of their ecological character, achieved through implementing ecosystem approaches within the context of sustainable development.² This is a fundamental tenet of Ramsar and has been equated to the maintenance of ecosystem services to ensure the long-term maintenance of both biodiversity and human well-being.³

Renac has not violated the principle of the wise use of wetlands by dispensing chlorine into the Adeguri Marsh. As the Marsh is used for drinking water and recreation, it was imperative that Renac act quickly to eliminate the virus to safeguard public health. Chlorine was a prudent choice, as it readily inactivates avian influenza.⁴ Furthermore, the widespread and long-standing use of chlorine as a disinfectant means that controls for its safe use are well established.⁵ The ecological character of the Marsh has been maintained, as there has been no appreciable degradation in water quality.

¹ EVANS, INTERNATIONAL LAW (2014), 714

² Ramsar Wise Use Handbooks, Handbook 1: Wise Use of Wetlands, 4th edn. (2010) A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character (COP9, Resolution IX.1 Annex A, 2005), The Ramsar Strategic Plan 2003-2008 (COP8, Resolution VIII.25, 2002), Ramsar Convention Secretariat, Wise use of wetlands: Concepts and approaches for the wise use of wetlands, Ramsar handbooks for the wise use of wetlands, 4th ed., Vol. 1 (2003)

³ Horwitz et al., Wetlands as Settings for Human Health: Incorporating Ecosystem Services and Health Impact Assessment into Water Resource Management, *BioScience*, vol. 61, 2011, 679

⁴ Rice et al., ‘Chlorine Inactivation of Highly Pathogenic Avian Influenza Virus (H5N1)’ *Emerging Infectious Diseases* vol. 13, 2007, 10

⁵ SCHOLZ, WETLANDS FOR WATER POLLUTION CONTROL (2016), 135

2. Renac has acted in accordance with the Convention on Biological Diversity ('CBD')

i. Renac has complied with Article 3 of the CBD

Article 3, CBD provides that states have a sovereign right to exploit their resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states. Notwithstanding the resources available to Aves as a developed state and its acknowledgement of the “gravity and urgency of the situation,” both outbreaks at issue originated in Aves. The virus is zoonotic: it was transmitted from infected birds to humans during the 2014 and 2015 outbreaks. The mortality rate of HPAI in humans is high, approximately 60%.⁶ Of the twelve Renac citizens infected, five cases proved fatal.⁷ Ongoing circulation of HPAI is a global public health concern as it causes severe infection in humans and has the potential to mutate to become more transmissible between humans.⁸ An influenza pandemic occurs when an avian influenza emerges with the ability to cause sustained human-to-human transmission and the population has no immunity against it. Localized epidemics can quickly transform into international pandemics, leaving authorities incapable of dealing with the ensuing public health emergency.⁹ Aves’ failure to contain the outbreaks within its territory meant that Renac had to act to suppress the public health emergency.

In response to the outbreaks, Renac culled poultry and wild waterbirds and dispersed disinfectants to reverse the contamination of the Marsh. The measures taken were within Renac’s capacity as a developing state. There has not been any notable degradation of the

⁶ Centre for Disease Control and Prevention, Highly Pathogenic Asian Avian Influenza A (H5N1) in People, (2015)

⁷ Ibid

⁸ World Health Organisation, Avian and other Zoonotic Influenza, (2016)

⁹ Ibid

Marsh, nor any further outbreaks of the virus since. Aves' contention that Renac should have closed or relocated poultry farms amounts to an unacceptable imposition of its environmental standards on Renac. The GATT panel in the *Dolphin Tuna* case rejected the attempt by the US to force the extrajudicial application of its environmental standards on Mexico.¹⁰ Although Aves may disagree with Renac's chosen course of action, its responses were necessitated by the public health emergency caused by Aves' failure to contain the HPAI outbreaks within its territory.

ii. Renac has complied with Article 5 of the CBD

Article 5, CBD states that Contracting Parties shall cooperate with other Contracting Parties for the conservation and sustainable use of biological diversity as far as possible and as appropriate.¹¹ The CBD acknowledges that special provision must be made to assist developing countries to fulfil their obligations, through the provision of new and additional financial resources and appropriate access to relevant technologies.¹² It also recognises that poverty eradication, economic and social development are the first and overriding priorities of developing countries.¹³

Renac constructively engaged with Aves by responding promptly to each communication it received, noting the urgency of the situation and the devastating effect HPAI was having in its territory. Renac explained the rationale for its strategy and its justification under international law while highlighting its limited capacity as a developing state to deal with the outbreaks. In response, Aves criticised Renac's planned management strategy as a violation of international

¹⁰ *US- Restrictions on the Imports of Tuna (Mexico v US)* 1991 30 ILM 1594. See also SANDS ET AL., *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (2014), 193

¹¹ See also BOYLE, *The Rio Convention on Biological Diversity*, in *INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY* (1996), 42

¹² Article 8(m), CBD

¹³ Preamble, CBD

law and suggested that Renac implement costly biosecurity measures and either close or relocate their poultry facilities, a sector which its economy is heavily reliant on. In terms of actions, Aves remained passive in counteracting the outbreaks which were traced to its facilities. Co-operation is two-fold and places bilateral obligations on both Renac and Aves. Renac has shown genuine engagement with this duty. However notwithstanding its criticism of Renac, Aves evidently failed to take appropriate steps to cooperate with Renac to suppress the HPAI outbreaks.

iii. Renac complied with Article 8 of the CBD

Article 8 CBD places an obligation on Contracting Parties to conserve, as far as possible and appropriate, its biological resources with a view to ensuring their sustainable use. Parties must also promote the protection of ecosystems within their territories and ensure that viable populations of species are maintained in their natural habitats. The “as far as possible and appropriate” qualifier provides states with considerable scope for interpreting¹⁴ how it chooses to uphold its obligations.¹⁵ When Renac culled the potentially infected waterfowl and chlorinated the water of the Adeguri Marsh, it acted in accordance with its environmental standards and within its resources as a developing state. This action has not resulted in any degradation of the water quality of the Marsh.

Article 8(f) CBD provides that Contracting Parties shall, as far as possible and appropriate, rehabilitate and restore degraded ecosystems and promote the recovery of threatened species. The wild waterbirds of the Adeguri Marsh have faced unabated threats of HPAI since 2009.

¹⁴ Wolfrum et al., *The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity*, Max Planck Yearbook of United Nations Law, 2000, 474

¹⁵ Burhenne-Guilmin et al., *The Convention on Biological Diversity: A Hard Won Global Achievement*, *Yearbook of International Environmental Law*, vol. 3, 1992, 52

Renac, mindful of its limited resources, immediately acted to contain the HPAI outbreaks and alleviate its presence from the Marsh. In contrast, Aves did not implement a biosecurity plan or use any resources, however minimal, to control the virus despite being a developed country and despite the HPAI likely originating in drainage from its facilities in 2015.

3. Renac has acted in accordance with the Convention on Migratory Species (‘CMS’)

i. Renac has complied with Article II of the CMS

Article II CMS requires Renac to conserve migratory species wherever and whenever possible. This means that Renac should endeavour to provide protections to the blue-crowned crane, but may take action as appropriate, which may not have conservation at the foremost.¹⁶ The use of such qualifiers strengthens conventions, as the alternative would hold even developing states, like Renac, to a strict liability standard regardless of extenuating circumstances.¹⁷ To safeguard the health, safety, and well-being of its citizens, it was necessary for Renac to take action to quell the spread of the HPAI infection by culling the likely infected wild waterbirds. It is important to emphasise that of the sample taken from the wild water birds, all had been infected with HPAI.

ii. Renac’s actions are justified under the Article III ‘extraordinary circumstances’ exception

The text of Article III.5 is an open-ended clause which permits the taking of migratory species if ‘extraordinary circumstances so require.’ The extraordinary circumstances exception is a

¹⁶ GILLESPIE, CONSERVATION, BIODIVERSITY AND INTERNATIONAL LAW (2013), 260

¹⁷ Burhenne-Guilmin et al., *The Convention on Biological Diversity: A Hard Won Global Achievement*, *Yearbook of International Environmental Law*, vol. 3, 1992, 52. See also BEYERLIN ET AL., INTERNATIONAL ENVIRONMENTAL LAW (2014), 61 and RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW (2006), 12

common feature of many conservation agreements.¹⁸ It grants states a considerable degree of discretion in determining when it should be invoked.¹⁹

The government of Western Australia invoked this exception in 2014 to justify the culling of sharks.²⁰ The government cited research showing that shark attacks had increased from once a year in the mid-1990s to two or three times annually from 2010 to 2013. The Federal Minister for the Environment explained that "One does not have to agree with a policy to accept that a national interest exemption is warranted to protect against imminent threat to life, economic damage and public safety more generally." He also stated that the matter was of national significance, as a loss of confidence in water-based activities has an impact on tourism and consequently the Australian economy.²¹

700 cases of human HPAI (H5N1) infection have been reported to the World Health Organisation ('WHO') from 15 countries spanning Asia, Africa, the Pacific and Europe since 2003.²² The mortality rate is high; approximately 60% of those infected with the virus have died.²³ The continuous circulation of HPAI around the world, its ability to mutate into multiple genetic lineages, and its potential to provide a precursor for a human pandemic strain is a cause for significant alarm.²⁴ The persistent outbreaks of the virus in Renac have to date infected twelve Renac citizens and killed five. The high mortality rate of HPAI and the fact that it can

¹⁸ Article 4, Ramsar Convention; Article 4, Article 9, Conservation of European Wildlife and Natural Habitats, Article VII, Convention for the Protection of Migratory Birds between the United States and Great Britain

¹⁹ Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, Cornell Intl L. Jour. Online, vol.2, 2014, 42

²⁰ Arup, *Greg Hunt Grants Western Australia Exemption for Shark Cull Plan*, The Sydney Morning Herald (January 21, 2014)

²¹ Packham, *Western Australian given Exemption from Federal Laws to Cull Sharks*, The Australian, (January 21, 2014)

²² Supra note 6

²³ Supra note 6

²⁴ Ramsar Technical Report No. 7: Ramsar Wetland Disease Manual, Guidelines for Assessment, Monitoring and Management of Animal Disease in Wetlands (2012), 201

be transmitted to humans from animals mean it could become a pandemic of zoonotic importance.²⁵

Recent HPAI outbreaks have resulted in the culling of over 250 million birds worldwide.²⁶ This has had catastrophic economic repercussions and global estimates have amounted to billions of dollars since 2003.²⁷ Renac is a developing state with a per capita GDP of US \$1,500 and a very limited capacity to tackle the outbreaks. Aves has suggested that Renac close or relocate relevant agricultural facilities as well as implementing costly biosecurity measures. This would have severely affected Renac's economic viability, which is primarily based upon its poultry industry. Aves, despite being a developed country, has not made any discernible effort to contain the source of HPAI responsible for the outbreaks. This failure forced Renac to act to protect its public health and economy.

The main recommended course of action following the outbreak of avian influenza is the culling of domestic poultry flocks, the implementation of movement restrictions and the disinfection of affected premises.²⁸ There is no convincing evidence to show that wild waterbirds infected with avian influenza can or do carry the virus along established long-distance migration routes.²⁹ The exertion involved in long-distance migration takes a significant physiologic toll on migratory species and research suggests infected birds would before completing a long journey. Therefore Aves' contention that the culling of wild

²⁵ Fasanmi et al., *Public health concerns of highly pathogenic avian influenza H5N1 endemicity in Africa*, *Veterinary World*, vol.10, 2017, 1194

²⁶ Swayne, 'Impact of Vaccines and Vaccination on Global Control of Avian Influenza' *Avian Diseases*, vol.56, 2012, 818

²⁷ Commission of the European Communities, *Impact Assessment Avian Influenza*, COM(2005)171. See also Cromie et al., *Responding to Emerging Challenges: Multilateral Environmental Agreements and Highly Pathogenic Avian Influenza H5N1*, *Journal of International Wildlife Law and Policy*, vol.14, 2011, 207

²⁸ *Supra* note 24, 198

²⁹ Weber et al., *Ecologic Immunology of Avian Influenza (H5N1) in Migratory Birds*, vol.13, 2007, 1143

waterbirds could lead to greater geographic dispersal is unfounded.³⁰ Renac took decisive action to disinfect the contaminated Marsh and to cull domestic poultry and the likely infected wild waterbirds. Prior to the implementation of its management strategy, 500 wild waterbirds, including around 150 blue-crowned cranes, had been found dead around the Marsh. Another severe outbreak in 2015 left 250 wild waterbirds dead, including approximately 50 blue-crowned cranes. In both instances samples taken from a selection of the dead wild birds tested positive for the HPAI virus. The threat posed to Renac's citizens, economy and waterfowl clearly justify the invocation of this exception.

4. Renac has complied with the Agreement on the Conservation of African-Eurasian Migratory Waterbirds ('AEWA')

The AEWa is a treaty dedicated to the conservation of migratory waterbirds and their wetlands, developed within the framework of the CMS. The AEWa's habitat provisions were "drafted with joint implementation in mind," meaning its obligations should be pursued in liaison with other relevant treaties, including Ramsar.³¹

The culling of blue-crowned cranes is prohibited as it is listed as a protected species under Annex 2 Table 1 (Column A, Category 1(a), 1(b), 1(c)) AEWa. However, Renac may grant an exemption to this prohibition "where there is no other satisfactory solution" in circumstances including in the interests of "public health and public safety, or for imperative reasons of overriding public interest, including those of a social or economic nature." (Annex 3, 2.1.3(b)). Faced with fatalities, the risk of a pandemic, and severe economic repercussions including a considerable threat to its food security, Renac culled approximately 550 blue-crowned cranes in order to definitively contain the HPAI virus. Given its per capita GDP of just US \$1,500, no

³⁰ Supra note 29

³¹ Lewis, 'Migratory Waterbird Conservation at the Flyway Level: Distilling the Added Value of AEWa in Relation to the Ramsar Convention' Pace Env'tl. L. Rev. vol.34, 2016, 37

other satisfactory solution was available to Renac to respond to the increasingly severe outbreaks.

B. RENAC HAS ADHERED TO CUSTOMARY INTERNATIONAL LAW

1. Renac has adhered to its duty not to cause transboundary harm

The duty not to cause transboundary harm holds that no state has the right to cause an injury of serious consequence to another state.³² The duty is breached when a physical relationship between the activity concerned and the damage caused is established and the threshold of the harm inflicted is “significant.”³³ Aves has not proven that Renac’s responses to the outbreaks have caused significant transboundary harm.

In the *Pulp Mills* case, the Court held that relevant evidence to substantiate the claim that transboundary harm should be submitted by the applicant.³⁴ Similarly, in the *San Juan* joined cases, the claims of transboundary harm were rejected by the ICJ, as the evidence adduced did not prove that it had occurred. Nicaragua’s dredging of the San Juan River was found not to have caused harm to its wetlands or the Colorado River.³⁵ The Court also found that Nicaragua did not prove that the sediment dumping, which was part of the construction of a road, had caused significant harm to the water quality or ecosystem of the river, notwithstanding that the road passed through a Ramsar protected wetland. The Court described the risk of toxic spills into the river as speculative as harm to the health of its citizens or on tourism was not proven.

³² *Trail Smelter Arbitration (US. v. Canada)*, 3 U.N. Rep Int’l Arb Awards 1905 (1941), 78; *Legality of the Threat or use of Nuclear Weapons, Advisory Opinion*, 1996, I.C.J., BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENTAL (2009), 140

³³ Commentary on the Articles on State Responsibility, Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 202-03, UN Doc. A/56/10; GAOR, 56th Sess., Supp. 10 (2001); *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J., 15

³⁴ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J., 162

³⁵ *Certain Activities carried out by Nicaragua in the Border Area; Construction of a Road in Costa Rica along the San Juan River, Costa Rica v Nicaragua*, 2015 I.C.J., 119

Chlorine disinfectants are recommended as effective agents in killing all virus groups, including the category A HPAI virus.³⁶ Since Renac's dispersal of the disinfectants there has been no notable degradation to the water quality of the Adeguri Marsh. Furthermore, the culling of the likely infected waterfowl on Renac's portion of the Adeguri Marsh was necessitated by the relentless HPAI outbreaks originating from Aves' poultry facilities. Renac highlights that of the sample taken, all of the dead wild birds tested positive for the virus and there have been no further outbreaks of the HPAI virus.

2. The precautionary principle does not apply to Renac's actions

The precautionary principle requires states to take precautionary measures if it is anticipated that significant, serious or irreversible harm will occur.³⁷ If a state has endorsed this principle, then it is liable for any significant harm caused by its activities if this harm had been anticipated.³⁸ Renac, as signatories to the Rio Declaration, has endorsed this principle. In order to protect the environment, the precautionary principle should be applied by states according to their capabilities.³⁹ There is much support for the contention that the principle is a general principle of law and while some argue that it has achieved customary status,⁴⁰ since both are primary sources of law under Article 38, this characterization is irrelevant.⁴¹

³⁶ FAO Animal and Production and Health Manual, Wild Bird Highly Pathogenic Avian Influenza Surveillance, (2006)

³⁷ TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES (2006), 121

³⁸ Gullett, 'Environmental protection and the precautionary principle: a response to scientific uncertainty in environmental management' Environmental and Planning Law Journal, vol.14, 1997, 57

³⁹ CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2012), 357

⁴⁰ Cameron., *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, B.C. Int'l & Comp. L. Rev, vol. 14, 1991, 20

⁴¹ ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2007), 286

Chlorination is the most widely used disinfectant in water treatment.⁴² It is safe practice, the consequences of which are not environmentally harmful or uncertain. Further, the culling of potentially infected waterfowl does not cause harm but instead removes an environmental threat. Renac did not have reason to suspect that their actions would cause significant harm, and subsequently there has been no notable degradation of the Marsh. As emphasised in the *San Juan* judgment, Renac cannot be held liable for a “speculative” harm and therefore this principle does not apply to the instant case.⁴³

II. RENAC HAS A SOVEREIGN RIGHT TO DELIST THE ADEGURI MARSH AND HAS PROVIDED ADEQUATE COMPENSATION

A. RENAC DELISTED THE ADEGURI MARSH DUE TO ITS URGENT NATIONAL INTERESTS

Renac decided to delist the Adeguri Marsh in the wake of a series of deadly outbreaks of HPAI near the Marsh. The most devastating of these occurred in 2014 and 2015 and resulted in the deaths of a number of Renac’s citizens, as well as causing considerable damage to its fledgling economy. These outbreaks are thought to have originated from poultry facilities in Aves. This has not been refuted by the Applicant.

Considering the reluctance of Aves to take any action in light of two serious HPAI outbreaks, Renac was faced with no option but to turn to reasonable and cost-effective measures to end the recurrence of the virus at the Marsh. By delisting the Marsh, Renac is providing itself with greater flexibility in responding to any future outbreaks of HPAI. Renac must protect its urgent

⁴² Water Quality and Health Council, *Drinking Water Chlorination: A Review of Disinfectant Practices and Issues* (2017)

⁴³ *Supra* note 35, 216

national interests. The increasing frequency and severity of the outbreaks are a growing threat to the lives and health of Renac's citizens and its economy.

1. Renac adhered to the provisions of Article 2.5 and 4.2 of the Ramsar Convention

Under Article 2.5, a Contracting Party may delist a Ramsar site because of "urgent national interests." There is significant discretion given to Contracting Parties in justifying urgent national interests because the term, as used in the Convention, has yet to be defined, despite its presence in both Articles 2.5 and 4.2.

By including such a provision without providing further guidance as to its interpretation, Ramsar effectively allows for "the loss of a national resource area once thought to be of international importance or significance and does not provide for any safeguards for a listed wetland."⁴⁴ Renac has used the discretion afforded to it by this provision to delist the Adeguri Marsh. It is unreasonable to impose fictional obligations on Renac and to hold it to a standard significantly higher than that which is outlined in Ramsar.

As Ramsar allows for Renac to delist sites at its discretion, it is not necessary to examine any threshold to be met. However, even if Renac were to be held to a threshold in relation to this provision, it is likely that Renac would have already met this threshold given the significant impact that the HPAI virus has had on its country. In 1997 Australia proposed a reduction in the size of the Ramsar-listed Port Phillip Bay and Bellarine Peninsula wetlands in order to relocate a chemical storage facility. Australia asserted that the reduction was in its urgent

⁴⁴ Jamieson, "An Analysis of Municipal Wetlands Laws and Their Relationship to the Convention on Wetlands of International Importance Especially As Waterfowl Habitat (Ramsar)" *Pace Environmental Law Review*, vol.4, 1986, 211

national interests as the relocation would support economic expansion and job creation, provide a better health and safety outcome for its citizens and bring about improved conservation through the environmental compensation package.

The criteria used by Australia is equally applicable to Renac. Renac is acting to protect the health and safety of its citizens from the threat posed by HPAI. This virus has already had a significant detrimental effect on Renac's economy and will continue to do so if more outbreaks occur.

B. RENAC HAS PROVIDED ADEQUATE COMPENSATION

Article 4.2, Ramsar states that a Contracting Party is obliged to provide compensation for a delisted site "as far as possible" and should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat. Contracting Parties that have decided to delist a Ramsar site due to "urgent national interests" have discretion to decide what compensation, if any, they consider is possible, given the circumstances. Renac has provided compensation for the delisting of the Adeguri Marsh by agreeing to enhance and preserve a 17,000-hectare coastal salt marsh which is capable of acting as a nature reserve for waterfowl. There is no obligation to provide an exact replica of the delisted site, thus the coastal marsh is sufficiently proximate in its conditions to amount to good compensation.

The coastal salt marsh that Renac proposes to enhance and add to the Ramsar List is a habitat that supports many plant and animal species, including the critically endangered Kleinmann's tortoise and an endangered subspecies of saltmarsh harvest mouse. Renac is proposing to

compensate by providing enhanced protection to two additional endangered wetland species which, while not replacing the blue-crowned crane, comply with the core principles of Ramsar to conserve wetland habitats for all species which provide value (scientific, cultural or otherwise) and the loss of which would be irreparable.

While the proposed marsh is not currently habitat to blue-crowned cranes, it would be an excellent environment to introduce the species into. There is substantial scientific evidence to support this introduction, as it is widely acknowledged that cranes have a generalist diet allowing the species to adapt well to environmental changes.⁴⁵ Cranes have proven repeatedly that they are adept to colonising human-altered landscapes and thrive in coastal salt marshes,⁴⁶ therefore it is likely that their introduction to the proposed marsh would prove successful. The coastal salt marsh is similar but not identical to the Adeguri Marsh and has the potential to be a valuable resource by providing a sustainable and protected habitat to two endangered wetland species in addition to the blue-crowned crane.

III. RENAC'S ACTIONS ARE JUSTIFIED BECAUSE OF THE PUBLIC HEALTH EMERGENCY

A. RENAC CAN RELY ON THE DEFENCE OF NECESSITY

In the event that Renac is found to have breached international law in its responses to the HPAI outbreaks, Renac's actions are justified under the defence of necessity. The exposure to HPAI threatened Renac's public health, its food safety, and its agriculture-dependent economy. In total, twelve Renac citizens became infected with HPAI, five of whom died as a result. Despite

⁴⁵ MEINE ET AL., THE CRANES: STATUS SURVEY AND CONSERVATION ACTION PLAN (1996), 199

⁴⁶ Ibid

the relatively small numbers of fatalities both in Renac and globally, HPAI has been recognised as a severe threat due to its potential to cause a catastrophic global pandemic.⁴⁷ With avian mortality approaching 100% and human mortality approximately 60% according to the WHO, HPAI is “the most lethal form of flu ever experienced by humans.”⁴⁸ Renac had no choice but to respond decisively to this public health emergency.

In the *Gabcikovo-Nagymaros Project* case, the ICJ held that necessity may be invoked to preclude the wrongfulness of an act in the following circumstances: (1) the act “must have been occasioned by an ‘essential interest’ of the acting state; (2) that interest must have been threatened by a ‘grave and imminent peril,’ and (3) the act being challenged “must have been the ‘only means’ of safeguarding that interest.” Furthermore, “the state which is the author of that act must not have ‘contributed to the occurrence of the state of necessity.’”⁴⁹ These elements are satisfied in the instant case.

1. Renac’s actions are the only means of safeguarding its public health and economy against a grave and imminent peril

Protecting the lives of its citizens and environment clearly constitutes Renac’s ‘essential interests.’ The Commentary on the ILC Articles (‘ILC Commentary’) notes that an ‘essential interest’ is to be decided on a case-by-case basis and does not refer exclusively to preserving the existence of the state.⁵⁰ Examples include the economic survival of a state, the survival of

⁴⁷ Ligon, *Avian Influenza Virus H5N1: A Review of its History and Information Regarding Its Potential to Cause the Next Pandemic*, *Seminars in Pediatric Infectious Diseases* vol.16, 326

⁴⁸ Fabian, *H5N1: A Special Report – What is the threat and why should the environmental health profession be concerned?* *Journal of Environmental Health*, vol.68, 2006, 48

⁴⁹ *Gabcikovo-Nagymaros (Hung. v. Slov.)*, 1997 I.C.J., 52

⁵⁰ CRAWFORD, *INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002), 183

a sector of its population, and the preservation of the environment of its territory or a part thereof.⁵¹

For a peril to be “grave and imminent,” it must have been a threat to the interest at the time the measures were taken.⁵² It is irrelevant that another HPAI outbreak may not have occurred immediately: a peril may be grave and imminent even if it threatens long-term rather than immediate consequences.⁵³

In *Gabcikovo-Nagymaros*, this Court observed that the cost of possible alternatives to internationally unlawful conduct is not a determinative factor in evaluating whether the conduct was the only means available. For the conduct to qualify as the only means, the additional cost of the alternative means must be of such magnitude that to resort to it would threaten an essential interest of the state.⁵⁴

Aves directed Renac to implement biosecurity measures beyond its capacity as a developing state and to close or relocate poultry facilities indispensable to its poultry industry. As a developing state; employing such alternative means would have imperiled Renac’s economy, an essential state interest. As Aves failed to implement measures to address the cross-contamination and spread of infection from its poultry farms, Renac had no option but to unilaterally act to the best of its ability to protect its citizens, food supply, and economy.

⁵¹ Yearbook of the International Law Commission, vol. II, Part One (1980), 2

⁵² Supra note 49, 54

⁵³ Fitzmaurice, *Necessity in International Law*, Netherlands Yearbook of International Law, vol.41, 2011, 177

⁵⁴ Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, Yale Human Rights and Development Journal vol.3, 2014, 18

2. Renac's actions do not seriously impair any essential interest of Aves

To rely on the doctrine of necessity, the essential interest being safeguarded must be of greater importance than the interest of the foreign state being sacrificed. The issue is one of proportion between the two interests, rather than absolute interest.⁵⁵ While Renac's actions at the Marsh may impact upon Aves' ecotourism industry, they were taken to protect Renac's citizens and poultry industry. Ecotourism is only one sector of Aves' economy, but Renac's poultry industry forms the very bedrock of its developing economy. The health of Renac's citizens, as well as the survival of its economy, clearly outweighs any potential loss occasioned to Aves' ecotourism industry.

3. Renac did not contribute to the situation of necessity

The 2014 and 2015 HPAI outbreaks are thought to have originated in poultry facilities in Aves; a finding not contested by the Applicant. Despite being a developed country with a per capita GDP ten times that of Renac, Aves did not take any steps to increase its biosecurity and prevent the repeated outbreaks of HPAI. The situation of necessity is thus attributable to Aves, not to Renac.

B. THE PUBLIC HEALTH EMERGENCY IN RENAC CONSTITUTES A FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Avian influenza has been a prominent public health issue since the 1990s, however its proliferation in recent years in terms of geography and strains has been described as a fundamental change in the natural history of influenza virus.⁵⁶ The Organisation for Animal

⁵⁵ Supra note 51

⁵⁶ Kelland, *Proliferation of Bird Flu Outbreaks raises Risk of Human Pandemic*, Reuters (January 26, 2017) See also Ramsar Wise Use Handbooks, Handbook 4: Avian Influenza and Wetlands, 4th edn. (2010), 8

Health has described the concurrent outbreaks as a global public health concern, while the WHO's Director-General has cautioned that the world "cannot afford to miss the early signals" of a possible human influenza pandemic.⁵⁷

Prior to the HPAI outbreaks, Renac was obliged by the CBD, the CMS, and the AEWA to conserve waterfowl at the Adeguri Marsh. This obligation required minimal action on Renac's behalf and revolved around the prohibition of deliberate disturbance to the waterfowl and their environment. Circumstances are now fundamentally different from the time Renac entered into its various treaty obligations regarding the Marsh and its species. Previous HPAI outbreaks in Renac (in 2009 and 2012) did not result in any human or wild bird fatalities. By contrast, Renac's citizens lost their lives during both the 2014 and 2015 outbreaks and a number of wild birds were killed. Transmission to humans illustrates how quickly the virus has mutated and signals a clear threat of pandemic.

The waterfowl that Renac consented to protect are now a threat to the health of its citizens, its economy, and future biodiversity at the Adeguri Marsh. For these reasons, Renac is invoking its right to unilaterally withdraw from its treaty obligations due to a fundamental change of circumstances.

This Court in the *Fisheries Jurisdiction* case, accepted that the customary doctrine of *rebus sic stantibus* has been codified in Article 62 of the Vienna Convention on the Law of Treaties ('VCLT').⁵⁸ Under this principle, a Contracting Party may be freed from its obligations where the circumstances leading to the conclusion of a treaty have changed.⁵⁹ The change in

⁵⁷ Ibid

⁵⁸ *Fisheries Jurisdiction Case (UK. v Iceland)* 1974 I.C.J, 36

⁵⁹ Árnadóttir, *Termination of Maritime Boundaries Due to a Fundamental Change of Circumstances Utrecht Journal of International and European Law*, vol.32, 2016, 1

circumstances must be unforeseen and fundamental. In addition, it must affect the essential basis of the treaty and radically transform the extent of the parties' obligations. An essential change may include changes in the scale of costs that treaty obligations would involve, as in the instant case.⁶⁰

The reoccurrence and severity of the HPAI outbreaks could not have been foreseen by Renac at the time it consented to conserve the waterfowl at the Marsh. Continuing to adhere to its obligations under the treaties would have required Renac to remain passive and allow the potentially infected waterfowl to further spread the virus. In turn, this could have resulted in many more human and wild bird fatalities. It is without question that Renac could not allow this threat to continue and that a fundamental change of circumstance has occurred.

⁶⁰ Waldron, *The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus*, Otago Law Review, vol.11, 2005, 161

CONCLUSION AND PRAYER FOR RELIEF

The Respondent, the Republic of Renac respectfully requests the Court to adjudge and declare that:

1. The Republic of Renac did not violate international law with respect to its responses to the 2014 and 2015 outbreaks of highly pathogenic avian influenza, and
2. The Republic of Renac did not violate international law by delisting the Adeguri Marsh as a Ramsar Site and as a Transboundary Site, and the proposed compensation was adequate.

Respectfully submitted,

AGENTS FOR THE RESPONDENT