IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

Questions Relating to

Reintroduction of Bears

(Federal States of Arctos v. Republic of Ranvicora)

MEMORIAL FOR THE APPLICANT

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QUESTIONS PRESENTED

I. WHETHER THE REPUBLIC OF RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT

II. WHETHER THE FEDERAL STATES OF ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S REINTRODUCTION OF GREY BEARS.

STATEMENT OF JURISDICTION

The Federal States of Arctos (Arctos) and the Republic of Ranvicora (Ranvicora) submit their case on questions relating to the reintroduction of bears, pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice (ICJ).The registrar of the ICJ, through a notification dated 22 July 2019 entered the case having received a joint notification for submission of the case to the ICJ. *See* Joint Notification, dated 15 July 2019, Artcos and Ranvicora accepted the jurisdiction of the ICJ in the special agreement for the submission of the ICJ.

STATEMENT OF FACTS

Arctos and Ranvicora, considered as well developed, are neighbouring countries in the continent of Suredia. The area along the border consists of privately owned farms.Arctos does not share a border with any other country.[1] The grey bear is endemic in Suredia, listed as Endangered on the IUCN Red List of Threatened Species, on Appendix II of the Bern Convention, and on Appendix I of CMS.[2] Bears from the Ranvicora migrated within Ranvicora but were not known to have moved into any other country.

Grey bears went extinct in Ranvicora in 1963 due to overhunting and habitat destruction. In 2008, Ranvicora considered reintroduction of grey bears and conducted an environmental impact assessment which was national in scope. Ranvicora did not inform or consult with other countries about the reintroduction project and did not assess the potential impacts of the reintroduction project on other countries.[3] It was decided that the grey bears would be released in the northern region of Ranvicora close to the border with Arctos with the first release taking place on 23 March 2013.

The bears were released at six locations in the northern region of Ranvicora near the Arctos border and on 19 September 2017, a grey bear was spotted in Arctos and in subsequent months citizens reported having spotted grey bears. Half of the bears were fitted with GPS collars and scientists confirmed that some of the grey bears had been intermittently moving back and forth between Ranvicora and Arctos, based on tracking information. On 27 February 2018, a farmer in Arctos reported that one of her horses had been attacked and killed. Over the next five and a half months, 7 horses and 20 sheep were killed on different farms. Grey bears also began damaging apple orchards and beehives in Arctos.[4]

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[1] R. ¶ 1.
[2] R ¶ 9.
[3] R ¶ 12.
[4] R ¶ 17.

The grey bears were sniffing out the nests and consuming the eggs and nestlings of the Trouwborst tern, an endangered endemic species in Arctos that breeds on the ground. The Trouwborst is protected under the national law in Arctos. Farmers and other citizens in Arctos, outraged by the attacks on animals and environmental damage, demanded that the Government of Arctos take action.[5]

Arctos communicated its concerns about the reintroduction of grey bears in Ranvicora asking for an end to the reintroduction program. Ranvicora denied responsibility of the destruction caused by the grey bears and any compensation thereto. Two children in Arctos were killed by a grey bear leading Arctos to issue an emergency regulation for citizens to shoot the bears. The two countries exchanged notes and had negotiations which did not yield fruits.

The countries entered into a special agreement to submit the dispute to the ICJ.Arctos seeks an order from the ICJ declaring that (1) the Republic of Ranvicora violated international law with respect to its grey bear reintroduction project, and (2) the Federal States of Arctos did not violate international law with respect to its responses to Ranvicora's reintroduction of grey bears.[6]

[5] Id.
[6] R ¶ 25.

SUMMARY OF ARGUMENT

I. Ranvicora grossly violated international law by failing in their responsibility to ensure that the reintroduction of grey bears does not damage the environment of other states failing to cooperate with Arctos with respect to the area in Arctos, beyond Rancivora's jurisdiction on a matter of mutual interest and failing to manage the reintroduction of bears despite the adverse effects they have caused to the biodiversity in Arctos as espoused in the CBD.Ranvicora in reintroducing the grey bear failed to ensure that it would be acceptable to Artcos.

II. Arctos has not violated any International law. The taking of grey bears, listed as endangered under Appendix 1 of the CMS is justifiable under the exception of extraordinary circumstances. Arctos asked for cooperation from Ranvicora which failed to cooperate thereby necessitating the response to protect human life and biodiversity in Arctos which faced grave and imminent peril.

ARGUMENT

1. RANVICORA HAS VIOLATED ITS OBLIGATIONS UNDER INTERNATIONAL LAW

I. That the reintroduction project is on invasive alien species and should be stopped immediately

The objective of the Bern Convention is the conservation of wild flaura and fauna and their natural habitat.[7]Article 8(h) of the CBD requires that Parties "as far as possible and as appropriate, [to] prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species".[8]Invasive alien species are ... animals that are introduced by man, accidentally or intentionally, outside of their natural geographic range into an area where they are not naturally present.[9]The standing committee to the Bern Convention recommended that contracting parties 'Adopt the good practice. .. Of implementing measures for the assessment of introductions that include assessment of the impacts of projected climate changes on species' invasion potential... .'[10]The reintroduction has caused significant Transboundary harm, contrary to the spirit of Draft Articles on prevention of Transboundary damage.[11]

There are no historic or fossil records of grey bear presence in Arctos.[12] This qualifies them as alien species .They have become invasive by threatening another endangered species in Arctos, the Trouwborst tern. The reintroduction project has also resulted in threatening of the ecosystem in Arctos. The actions of the government are intentional and negligent. They

[7] Bern Convention, Article 1.
[8] Convention on Biological Diversity, 6 June 1992, 1760 U.N.T.S. 79, Article 8.
[9] IUCN, Invasive Alien Species, https://www.iucn.org/regions/europe/our-work/invasive-alien-species 4 Dec. 2019.
[10] Recommendation No. 159 (2012) of the Standing Committee, on the effective implementation of guidance for Parties on biodiversity and climate change,30 Nov.2012.
[11] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries – A/RES/56/82 (2001), 56 UN GAOR Supp (No. 49) at 498, Supp. (No. 10) A/56/10.
[12] R ¶ 10.

cannot claim that since they had no control over the animals,they are not responsible. Strict liability has been adopted when assigning liability in cases of transboundary harm .[13]

Damage and harm has not only been caused to horses,sheep,beehives and orchads but has also resulted to loss of lives of the citizens of Arctos. Ranvicora cannot violate the obligation to preserve the natural habitat yet claim to be honouring their obligation to protect endangered species. This also contravenes the spirit of human rights instruments that they are party to.The doctrine of "clean hands" has also been recognized in domestics order of many States, it has been qualified ... as a general principle of law and consequently a source of international law according to Article 38(1) c) of the ICJ Statute.[14]

II. Ranvicora failed to adhere to its obligations on Environmental Impact assessment (EIA)

Article 14 of the CBD mandates contracting parties to introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects.[15] The International Law Commission (ILC) requires states not only to establish impact assessment but also notify a potentially affected state if the assessment indicates a risk of significant Transboundary harm.[16] A potentially affected state is that which which has jurisdiction over any place where such harm is likely to occur.[17]

This court in the Chorzow factory case enunciated the principle that in the Pulp Mills case on the River Uruguay held that EIA must be transmitted to the other party before the granting of

[13] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries (2006), Principle 3.

[14] Dumberry, Patrick & Dumas-Aubin, G. "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", in: Ursula Kriebaum (ed), Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection, TDM, 2013.
[15] Convention on Biological Diversity, 284 U.N.T.S. 209 (1982),Article 14(1)(a).
[16] *Id* 11,Article 10 (1).
[17] *Id* Article 2(e).

an environmental authorization.[18] The ICJ put the requirement to carry out an EIA "on any plan that is liable to cause significant transboundary harm to another State"[19] Judge Weeramantry dissenting in the Nuclear test case stated there is a *prima facie* obligation to conduct an EIA and to show that no harm would occur.

Ranvicora did an EIA,limited to its scope and did not consult with other countries.It also did not assess the potential impacts of the reintroduction project on other countries.[20]Arctos was a potentially affected state which was not involved of any reintroduction project and any significant risk involved thereto.This fails the standard required for an EIA.

III. Ranvicora has committed an internationally wrongful act

The Articles of State Responsibility, a state commits an internationally wrongful act when conduct consisting an action or omission is;1) is attributable to the State under international law; and ii) constitutes a breach of an international obligation of the State.[21]Article 12 further provides that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[22]Such a state is bound to make full reparation for the injury caused by the wrongful act.[23] The Corfu Channel Case establishes a prima facie liability for the harmful effects of conditions created even by trespassers of which the territorial sovereign has knowledge or means of knowledge.[24]

The reintroduction of grey bears was done by the government of Ranvicora. During the reintroduction, the government of Ranvincora did not inform or consult with other countries

[18] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 2010 I.C.J., 162.
[19] *Id. 113*.
[20] R ¶ 12.
[21] I.L.C., Articles of Responsibility of States for Internationally Wrongful Acts, GA U.N. Doc. A/56/10, Art. 2 (2001).
[22] *Id*. Art. 12
[23] *Id* Art. 31.
[24] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J.

about the reintroduction project.[25]They further did not assess the potential impacts of the reintroduction project on other countries.[26]The acts are directly attributable to the government of Ranvicora. Claiming that the bears are wild and cannot be controlled on where they migrate cannot justify their omission of restricting their movement. It is a fact that animal behaviour cannot be controlled but their movement certainly can. Measures that prevent international movement of invasive species and promote rapid detection at borders are less costly than control and eradication.[27] The grey bears were fitted with GPS collars,wich monitor their movement. It is our averment that the movement of the grey bears could be tracked but they disregarded the invasion and the subsequent harm caused by the bears.

This Prevention requires collaboration among governments, economic sectors and non-governmental and international organizations.[28] International law establishes that a Range State has the individual responsibility to ensure that the activities within its jurisdiction or control do not cause damage to the environment of other Range States or of areas beyond the limits of national jurisdiction.[29] "...to achieve conservation and sustainable use objectives many migratory species require concerted action and these actions must be co-ordinated internationally among Range States through co-operative efforts.'[30]The reintroduction of the non-native bears has caused great harm to the native birds and disrupted breeding success by sniffing out the nests and consuming the eggs and nestlings of the Trouwborst tern.

[25] R ¶ 18.
[26] *Id.*
[27] UNEP, Invasive Alien Species and Migratory Species, UNEP/CMS/ScC17/Doc.11 19 Oct. 2011,P3.
[28] *Id.*
[29] Lyle GlowkA, Complementarities Between the Convention on Migratory Species and the Convention on Biological Diversity, Vol 3(200) p. 211.
[30] *Id*.

IV. The actions of Ranvicora contravene the doctrine of pacta sunt servanda

Every treaty in force is binding upon the parties and must be performed in good faith.[31]The court in the Gabcicovo Nagymaros case while making a direct reference to the principle of pacta sunt servanda observed that the two elements, the binding nature of treaties and performance in good faith were of equal importance.[32] Good faith means that the source state must undertake Transboundary environmental impact assessment in order to comply with the no-harm principle. It would be hard for a state to argue that it had acted in due diligence if it had not even studied what the impacts of a proposed project on another state's environment would be. Hence, should significant harm occur to the affected state, the source state has breached the no-harm principle.[33]

The failure of Ranvicora to carry out a Transboundary EIA before embarking on the reintroduction of the grey bear is an action in bad faith. Despite receiving two diplomatic notes from Arctos to remedy the harm caused, they blatantly ignored and shifted blame on Arctos.

RANVICORA HAS VIOLATED CUSTOMARY INTERNATIONAL LAW

Legally binding customary international law is determined by state practice and *opinio juris*.[34] , Customary law provides a basis for imposition of State responsibility on a sovereign State causing, maintaining, or failing to control a source of nuisance to other States.[35]

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[31] Vienna Convention on the Law of Treaties, 23 May 1969, 1155U.N.T.S. 331, Article 26.
[32] *Gabčikovo-Nagymaros Project (Hung. v. Slov.*), Judgment, 1997 I.C.J par 114.
[33] KEES BASTMEIJER, TIMO KOIVUROVA GLOBALISATION OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT, Brill Martinus Nijhoff Publishers, 2008,348.
THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT, pp. 347-389, Brill Martinus Nijhoff Publishers, 2008
[34] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press 2) (2003).
[35] IAN BROWNLIE, A SURVEY OF INTERNATIONAL CUSTOMARY RULES OF ENVIRONMENTAL PROTECTION, 13 Nat. Resources J. 179 (1973).

I. Ranvicora violated the rule not to cause transboundary harm

Principle 21 of the Stockholm declaration establishes that States have "the sovereign right to exploit their own 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 or of areas beyond the limits of national jurisdiction.[36]This is a non-binding declaration which has evolved into customary international law.[37]The duty to respect the environment of other States has been recognized by several arbitral awards and nowadays must be considered customary international law.[38] States are under the obligation to respect the environment of other states,as expressed by the *sic utere maxim.* Publicists have attributed international responsibility to states for harm caused to other states using this maxim.[39] This has been the position in judicial decisions,the locus classicus being the Trail Smelter case[40] and the Corfu Channel case.[41]This has been uniformly and consistently applied. In the Nuclear Weapons advisory, the court pronounced itself thus:

".. The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings.. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment."[42]

[36]Stockholm Declaration, Principle 21.
[37] Boon, Foo Kim. *"The RIO Declaration and its Influence on International Environmental Law."* Singapore Journal of Legal Studies, 1992, p 352.
[38] Lake Lanoux Arbitration (*France v. Spain*) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101
[39] Lynham, Greg. *The Sic Utere Principle as Customary International Law: A Case of Wishful Thinking?* James Cook University Law Review, Vol. 2, 1995: 173.
[40] Trail Smelter Arbitral Decision (U.S. v. Can.), 3 R.I.A.A. 1905.
[41] *Id* 23.
[42] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* ICJ Rep 94 (8 July 1996), p. 241, para 29.

II. Ranvicora has violated the no-harm principle.

The no-harm rule is a widely recognised principle of customary international law whereby a State is duty-bound to prevent, reduce and control the risk of environmental harm to other states.[43] The preamble of the UNFCCC recalls that "States have,… , the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". [44]It confirms that the no-harm rule forms part of the international law surrounding climate change, and has some relevance to the relationship between parties to the Convention.[45]

2. ARCTOS HAS COMPLIED WITH ITS INTERNATIONAL LAW OBLIGATIONS IN IT'S RESPONSE TO THE REINTRODUCTION OF THE GREY BEAR SPECIES.

I. Arctos response was necessary to avert risk of harm to life, health, private property and environmental protection.

Participating states in the Stockholm Conference on the Human Environment recognised that environmental protection is a prerequisite to the effective enjoyment of human rights. The UN General Assembly reaffirmed the nexus between environmental protection and human rights in resolution 45/94.The Human Right Council stressed the need of enhanced cooperation among states in in the protection of human rights and the protection of the environment.[46]The European court,on the right to life, stated that the guarantee of the right to life includes a positive obligation on states to take appropriate steps to safeguard the lives of

[43] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 7th ed., (2008) .275
[44] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107,Preamble.
[45] Christoph Schwarte, 'No-harm rule' and climate change' 24 July 2012,3.
[46] General Assembly resolution 37/8, *Human Rights and the Environment*, A/HRC/RES/37/8 (22 March 2018) available from, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/37/8.

those within their jurisdiction. This obligation extends to any activity,in which the right to life may be at stake.[47]

The allegation that the shooting of the grey bear was intentional is false.This was a countermeasure which is justified by virtue of it being a response.It was an act not to punish but to trigger compliance, a social engineering tool for international relations.The countermeasure fulfils the requirements by the ILC on state responsibility.[48]

The actions of Arctos have been in good faith,evidenced by the diplomatic notes state to Ranvicora seeking cooperation in dealing with the grey bears.The emergency regulation as the name suggests, was just to apply during emergencies. No bears have been intentionally and indiscriminately shot.The burden lies upon the Defendants to prove intentional killing.

II. The International Union for Conservation of Nature (IUCN) list of endangered species is neither conclusive nor binding

The IUCN red list is not binding, it is a mere list of data to guide decision making and an indicator of the status of nature.[49]It only seeks to provide information about range,population and to inform policy decision making. It is of no authoritative nature and invoking it would be in vain seeing that it does not form part of the sources of law as in Article 38 of the ICJ statute.[50]This is the list that informs the reviewing of annexes to the CBD,CMS and CITES.[51]

However, the IUCN does not carry out an assessment of all species and thus may not have a conclusive list of endangered species. That the Trouwborst tern is not a listed species on any

[47] *Id.*
[48] Draft articles on Responsibility of States for Internationally Wrongful Acts,with commentaries 2001.
[49] IUCN, IUCN Red List of Threatened Species, https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species 3 Dec. 2019.
[50] Statute of the International Court of Justice, 1945, Article 38.
[51] *Id* 25.

international treaty does not make it less endangered. This may be attributed to the limited taxonomic coverage and narrow base of the IUCN[52] whose data informs the treaties.

The grey bears were sniffing out the nests and consuming the eggs and nestlings of the Trouwborst tern.[53] This violates the doctrine of integrity of sovereignty. Such harm cannot be reversed and compensation would not be sufficient since the bird is endangered. In the spirit of protecting and conserving endangered species,we seek immediate stoppage of the harmful reintroduction project.

III. That Arctos response was in fulfilling its obligation under the principle of preventive action

Principle 24 of the Stockholm principle provides that "Cooperation through ... bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."[54]The court has also held that the preventive principle requires action to be taken at an early stage, before damage has actually occurred.[55]

The preventive principle seeks to minimise environmental harm as an object in itself.[56]This means that a state may be under an obligation to prevent damage to the environment within its own jurisdiction.[57]This principle is based on the integrity of sovereignty.

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[52] *Id.*
[53] R ¶ 17.
[54] Stockholm Declaration, Principle 24.
[55] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)(*1997) ICJ Reports 7 at 78 par 140.
[56] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press 2) (2003).
[57] JUDGE N. SINGH, R.D MUNRO AND J.G. LAMMERS (EDS.) ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (1986) 'Foreward'.

CONCLUSION AND PRAYER FOR RELIEF

The Applicant, Federal Republic of Arctos has greatly suffered from the invasion of the grey bear and continuing with the reintroduction of grey bears will cause further irreparable harm to the citizens and ecosystem of Arctos. Having presented our case,the Applicant humbly ask the court to declare that:

1. The Republic of Ranvicora violated international law with respect to its grey bear reintroduction project.
2. The Federal States of Arctos did not violate international law with respect

to its responses to Ranvicora's reintroduction of grey bears.

RESPECTFULLY SUBMITTED,

AGENTS FOR THE APPLICANT.