

IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE

THE HAGUE, NETHERLANDS

QUESTIONS RELATING TO CULTURAL PROPERTY AND THE PROTECTION OF ELEPHANTS

THE FEDERAL STATES OF ALIYA

(APPLICANT)

V.

THE REPUBLIC OF RINCOSSI

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

2016

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INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S 79.....	6, 14, 15
Convention on the International Trade in Endangered Species on Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243	3, 8, 18, 23
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14 1970, 823 U.N.T.S. 231	16, 18, 19, 20, 21
U.N. Charter.....	13
United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.6, 9, 10, 11, 12, 13, 27	
United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.....	4, 9, 10, 13, 27
Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S 95.....	12
Vienna Convention on the Law of Treaties May 23, 1969, 1155 U.N.T.S. 331 7, 10, 11, 12, 17, 18	

U.N. DOCUMENTS

Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 in <i>Report of the International Law Commission on the Work of its Fifty-Third Session</i> , Report of the Commission to the General Assembly on the work of its Fifty-third session, <i>Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)</i> , chp.IV.E.2	2, 6
G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov.,2000);	11
G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 2003).	11

G.A. Res. 64/78, U.N. Doc. A/RES/64/78 (Dec. 7, 2009).....	22
G.A. Res. 69/314, U.N. Doc. A/RES/69/314 (July 31, 2015).	7
I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts <i>in Report of the International Law Commission on the Work of its Fifty-Third Session</i> , U.N. GAOR, 56th Sess., Supp No.10, U.N. Doc. A/56/10 (2001)	1
LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME AND THE PROTOCOL THERETO (UNODC, 2004)10, 26, 27	
LEGISLATIVE GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNODC, 2007)	12, 27
Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, C70/15/3.MSP/11, (UNESCO, 1970).....	17, 20
Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone, 11 th session, UNESCO (France, 1960).	19
S.C. Res. 1373, art.2(d), UN Doc. S/RES/1373, (Sept. 28, 2001).....	4
Special Rapporteur on State Responsibility, <i>Fourth Rep. on State Responsibility</i> , Int'l Law Comm'n, U.N.Doc.A/CN.4/264 and Add.1 (1972) (by Robert Ago).	2
TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNODC, 2009)	11, 13
UNESCO HANDBOOK ON LEGAL AND PRACTICAL MEASURES AGAINST ILLICIT TRAFFICKING IN CULTURAL PROPERTY International Standards Section, Division of Cultural Heritage (2006).	17

UNESCO, Draft Operational Guidelines for the Implementation of 1970 Convention by the Subsidiary Committee of the Meeting of States Parties to the Cultural Property Convention, C70/13/1.SC/4 (July2013).	20
UNESCO, Preliminary Report Prepared in Compliance with Article 10.1 of the Rules of Procedure Concerning Recommendations to Member States and International Conventions Covered by the Terms of Article IV, Paragraph 4, of the Convention, UNESCO Doc. SHC/MD/3 (Aug. 8, 1969).	20

JUDICIAL AND ARBITRAL DECISIONS

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43 (Feb. 26).	4
Arrest Warrant of April 11 2000 (Dem. Rep. of Congo v. Belg.), 2000 I.C.J. 3 (Feb. 14).12, 13	
Caire Case (Fr. v. Mex.), 5 R.I.A.A 516 (1929).	2
Canada, Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos, 18 I.L.M. 899, 954 (1979).....	6
Case A/2, Decision No. DEC 1-A2-FT, 1 Iran-U.S. Cl. Trib. Rep. 104 (1982).....	26
Central Rhodope Forests (Greece v. Bulg.), 3 R.I.A.A 1405 (1931).....	6
Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 22 (Apr. 9).	4, 5
De Brissot Case (U.S.A. v. Venez.), 29 R.I.A.A. 258 (1885).	5
Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70.....	13
Factory at Chorzow (Ger. v. Polish Republic), 1927 P.C.I.J (ser. A) No. 9, at 21 (July 26). ...	6
Janes Case (U.S.A v. Mex.), 4 R.I.A.A. 82 (1925).....	5
Kayumba Emile Ogane v. Commissioner Customs Uganda Revenue Authority, UGHCCD 189, Feb. 2014, High Court at Nakawa (Uganda).	24

Knab v. Republic of Georgia, No. 97-CV-03118(TPH), (United States District Court May 29, 1998).	2
Lemong Thai v. S, No. A82/2013, South Gauteng High Court, Johannesburg, (South Africa)	11
Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J., ser.B, No. 4, (Feb. 7).	14
North Sea Continental Shelf (Germ. v. Den.), 1969 I.C.J. 3 (Feb. 20).	26
Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 177 (June 4).	18
Rainbow Warrior Affair (N.Z. v. Fr.), 19 R.I.A.A. 199 (1986).	6
Sansar Chand v. State of Rajasthan, (2010) 10 SCC 604, Supreme Court of India (India).	11
U.S.A. v. Tania Siyam, No.1:04CR98-001, U.S. Dist., Northern District of Ohio (2008)	11
U.S.A. v. Victor Gordon 11 U.S. (7 Cranch) 287 (District Court, Brooklyn, N.Y., June 4, 2014).	25
United States Diplomatic and Consular Staff in Tehran (U.S.A v. Iran), 1980 I.C.J. 3 (May 24).	4
Velasquez Rodriguez, Inter-Am. Ct. H.R. (ser.C) No.4 (1989).	2
Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), 2014 I.C.J. 226 (Mar. 31);	8

TREATISES

CYRILLE DE KLEMM, GUIDELINES FOR LEGISLATION TO IMPLEMENT CITES (IUCN Env Pol’y & L. Paper No. 26, 1993).	25
DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENT LAW (2010).	12, 15
IUCN RED LIST CATEGORIES AND CRITERIA (VERSION 3.1) (2 nd ed., IUCN, 2012).	14
JOHN SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY (2014).	17, 18
MICHAEL BOWMAN ET. AL., LYSTER’S INTERNATIONAL WILDLIFE LAW (2 nd ed., 2010).	8

VERNON N. KISLING, ZOO AND AQUARIUM HISTORY: ANCIENT ANIMAL COLLECTIONS TO ZOOLOGICAL GARDENS (2001)..... 19

XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW (2003)..... 15

ARTICLES

Daniel Eck & Patty Gerstenblith, *Cultural Property*, 38 THE INT'L LAW. 469, 474 (2004)..... 21

DeVeau Dane, *Taking of Threatened Species under the Endangered Species Act: Fund for Animals v. Turner, The Casenotes and Comments* 30 (1) IDAHO L. REV. 109, 114 (1993-94). 18

Domestic Ivory Markets: Where They are and How They Work, Briefing Document, TRAFFIC, (Sept. 2004)..... 8

Ethan Arthur, *Poaching Cultural Property: Invoking Cultural Property Law to Protect Elephants*, J. INT'L WILDLIFE L. & POL'Y 231, 236 (2014). 20

Francesco Francioni, *Cultural Heritage*, II MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 906 (2007). 17

Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 119 (1957-II). 13

J Brierly, *The Theory of Implied State Complicity in International Claims* 1, 9 BRIT. Y.B. INT'L L. 42 (1928)..... 5

L. Preuss, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction* 630, 74 RECUEIL DES COURS, HAGUE ACADEMY OF INTERNATIONAL LAW (1949). 14

Michael Glennon, *Has International Law Failed The Elephant?* 84 (1) AM. J. INT'L L. 10 (1990). 15

Mildge & Abdi, <i>A Model for Africa: Ethiopia's Efforts To Close Unregulated Domestic Ivory Markets in Addis Ababa</i> 20(3) TRAFFIC BULLETIN 119 (2005).....	8
Riccardo-Pisillo Mazzeschi, <i>Forms of International Responsibility for Environmental Harm</i> , in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 29 (1991).....	15

MISCELLANEOUS

4 th Meeting of COP, RESOLUTION CONF. 4.17 (REP. CoP 9), RE-EXPORT OF CONFISCATED SPECIMENS (1993), http://www.ciesin.columbia.edu/repository/entri/docs/cop/CITES_COP004_res017.pdf (last visited Nov. 17, 2015).....	23
54 th Meeting of the Standing Committee, SC54 Doc. 26.1 (Rev. 1), CITES (Oct. 2006).....	8
9 th Meeting of CoP, Doc. 9.22 (Rev.) ¶23, CITES (Nov. 1994).	23, 24
Adam Cruise, <i>Namibia Says No to Destroying Its Huge Ivory and Rhino Horn Stockpile, in a voice for Elephants in National Geographic</i> , July 20, 2015, http://voices.nationalgeographic.com/2015/07/20/namibia-says-no-to-destroying-its-huge-ivory-and-rhino-horn-stockpile/	26
<i>AG seeks Thai help in ivory probe</i> , DAILY NATION, Aug. 30, 2015, http://www.nation.co.ke/news/Kenya-Thailand-Ivory-Poaching-Crime/-/1056/2852358/55k8y5/-/index.html	24
Art.1, Law No. 37 on Cultural Property, 2008 (LEB.)	17
Art.3, Law on the Protection of Historical and Cultural Properties, 2004 (AFG.).....	17
DECISION, CoP12 Doc. 20.1 Annex 5, 12 th Meeting of CoP of CITES, (Nov., 2002).....	8
<i>Final Obelisk Section in Ethiopia</i> , BBC NEWS, Apr. 25, 2005, http://news.bbc.co.uk/2/hi/africa/4472259.stm	21

Handling Confiscated Specimens, 16TH CITES WORLD 13, (CITES, Dec., 2005);
Clarifications(A.16).....24

John Scanlon, *CITES Secretary- General’s remarks on the destruction of confiscated elephant ivory at Bangkok, Thailand, on Aug. 26 2015*,
https://cites.org/eng/news/sg/thailand_ivory_crush_26082015.....25

John Scanlon, *CITES Secretary-General’s remarks on the destruction of confiscated elephant ivory in Thailand, the United States of America, China, the United Arab Emirates and the Czech Republic*, <https://cites.org/eng/news/sg/index.php>.....25

Lacey Act, 16 U.S.C. §§ 3371- 3378 (1900);.....7

Leya Musa, *Thailand could be ready to begin burning ivory stockpile*, WILDLIFE NEWS, Mar. 17, 2015, <http://wildlifeneews.co.uk/2015/03/thailand-could-be-ready-to-begin-burning-ivory-stockpile>24

Model Laws on International Trade in Wildlife Flora & Fauna, CITES SECRETARIAT *available at* <https://cites.org/sites/default/files/eng/prog/Legislation/E-Model%20law-updated-clean.pdf>.
.....7

RESOLUTION CONF. 10.10 (REV. CoP 16), TRADE IN ELEPHANT SPECIMENS,
<https://cites.org/eng/res/10/10-10R16.php> (last visited Nov.17, 2015).8

RESOLUTION CONF. 9.10 (REV. CoP 15), DISPOSAL OF CONFISCATED AND ACCUMULATED SPECIMENS, <https://cites.org/eng/res/09/09-10R15.php> (last visited Nov.17, 2015).22

RESOLUTION CONF. 9.9, CONFISCATION OF SPECIMENS EXPORTED OR RE-EXPORTED IN VIOLATION OF THE CONVENTION, <https://cites.org/eng/res/09/09-09.php> (last visited Nov.17, 2015)...24

Richard Blystone, *Scotland's 'Stone of Scone' Finds its Way Home*, CNN WORLD NEWS, Nov. 15, 1996, <http://www.cnn.com/WORLD/9611/15/stone.of.scone/>.....21

The US Ivory Crush at Times Square, Destruction of Confiscated Elephant Ivory in Times Square, Questions and Answers with the US Fish and Wildlife Service (June 2015), <https://www.fws.gov/international/pdf/factsheet-ivory-crush-qa.pdf>.....26

TRAFFIC, TRAFFIC BULLETIN: SEIZURES & PROSECUTIONS, TRAFFIC BULLETIN: MARCH 1997- OCTOBER 2014 (2014);.....7

STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and the Record concluded on 19th June, 2015 including the Clarifications agreed to therein, between the Federal States of Aliya and the Republic of Rincossi [**“the Parties”**], and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties submit to this Honourable Court its dispute regarding the differences between the Parties concerning the Questions Relating to Cultural Property and the Protection of elephants.

In accordance with Article II (1) of the Special Agreement, notified to the Court on 19th June 2015, this Honourable Court is requested to adjudge the dispute in accordance with the rules and principles of general international law, including any applicable treaties.

The Parties have agreed to respect the decision of this Court.

QUESTIONS PRESENTED

I-

Whether Rincossi has violated international law by its failure to arrest and prosecute Ambassador Cusi and the 20 members of the Barnum Uritovsky for trafficking illegal Thornon Elephant Ivory?

-II-

Whether Rincossi has violated international law by refusing to return the confiscated Thornon Elephant ivory to Aliya?

STATEMENT OF FACTS

The Federal States of Aliya [“**Aliya**”] and the Republic of Rincossi [“**Rincossi**”] are two nations on the continents of Thorno and Rabab, respectively. (R.¶1) While Aliya is a developing country, with a GDP around \$6 billion, Rincossi is a rapidly developing country with a GDP of \$4.7 trillion. In recent times, the population of the Thornon Elephant, that is indigenous to Thorno, has been declining rapidly. (R.¶2-¶4)

The Thornon elephant plays a significant role in the Aliyan culture and is a “keystone species”. The Thornon Elephant National Park [“**Park**”] in Aliya preserves the poaching of elephants and maintains DNA information of all the elephants. (R.¶15-¶16) Aliya and Rincossi have enacted legislations for penalizing wildlife offences. While Aliya has prosecuted many cases of ivory trafficking, Rincossi has only prosecuted two such instances. (R.¶17-¶18)

As part of a diplomatic mission, Ambassador Cusi from Rincossi had visited Aliya to review Rincossi’s infrastructural projects. (R.¶20) Later, it was discovered that she had smuggled 25kg of illegal ivory from Aliya, which was subsequently confiscated by Rincossi. Aliya and Rincossi conducted a joint investigation whereby the Ambassador’s activity were found to be a part of a criminal operation perpetrated by a private group, the Barnum Uritovsky [“**BU**”]. Despite Aliya’s requests, the members of BU were neither arrested nor prosecuted. Rincossi issued a written warning to BU and the Ambassador, threatening future punishment for repeated conduct. (R.25-¶26)

After discovering that the DNA of the confiscated ivory matched that of the elephants in the Park, Aliya requested the return of this ivory from Rincossi. (R.¶31) Rincossi however, refused such return, instead proposing to destroy the confiscated ivory.

Negotiations between the two countries failed to resolve their issues and hence, they submitted their disputes to the International Court of Justice. (R.¶35-¶37)

SUMMARY OF ARGUMENTS

-I-

Rincossi is responsible for the illegal acts of Ambassador Cusi, considering that she was on a diplomatic mission to Aliya. Her acts, though unauthorized, were still within the scope of her authority and hence, were attributable to Rincossi. With respect to the BU, Rincossi is responsible for their illegal acts as it failed to act in a diligent manner to prevent and punish these activities. Consequently, Rincossi had an obligation to make reparations for the injury caused by prosecuting these offenders.

As a minimum obligation under Article VIII of the Convention on the International Trade in Endangered Species of Flora and Fauna [“**CITES**”], Rincossi was mandated to prosecute these individuals for their acts of illegal ivory trading. A mere issuance of a written warning to the offenders does not discharge this obligation. Additionally, Rincossi has violated its duty to prosecute under the United Nations Convention Against Transnational Organised Crime [“**UNTOC**”] and the United Nations Convention Against Corruption [“**UNCAC**”], and cannot invoke the *domestic jurisdiction* exception under these Conventions. Rincossi is also in violation of its duty to take conservation measures under the Convention on Biological Diversity [“**CBD**”], considering that it has consistently failed to implement its domestic legislation to protect the Thornon elephant.

-II-

Rincossi has violated its obligations under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [“**Cultural Property Convention**”], by refusing to return the confiscated ivory, considering that Aliya had

specifically designated it as cultural property. Further, the Park can be classified as a “*museum or similar institution*”, as it maintains an inventory, documenting information about the DNA of the elephants. Hence, Rincossi cannot refuse to return the stolen ivory under Article 7 of the Convention.

Rincossi has violated its obligations under CITES, as under Resolution 9.9 adopted by the Conference of Parties, a confiscating State cannot refuse the return of specimens if the requesting State has taken measures to prevent their re-entry into illegal trade. In this case, Aliya has undertaken to store the ivory in a secure government facility on return. Finally, under the UNCAC and UNTOC, Rincossi has violated its obligations to give *priority consideration* to the option of return.

ARGUMENTS

I. RINCOSSI HAS VIOLATED INTERNATIONAL LAW BY FAILING TO PROSECUTE AMBASSADOR CUSI AND 20 MEMBERS OF THE BU FOR TRAFFICKING ILLEGAL THORNON ELEPHANT IVORY.

Rincossi has violated international law by failing to prosecute Ambassador Cusi and the twenty members of the BU under customary international law [“CIL”] [A] and under its treaty obligations [B].

A. Rincossi has violated its obligations under CIL.

Under CIL, Rincossi is responsible for the illegal acts of Ambassador Cusi [1] and BU [2]. Additionally, Rincossi has violated its obligation to make adequate reparations to Aliya [3].

1. RINCOSSI IS RESPONSIBLE FOR THE ACTS OF AMBASSADOR CUSI.

An internationally wrongful act of a State consists of an act that is attributable to the State, which entails a violation of its international obligations.¹ The acts of Ambassador Cusi are attributable to Rincossi [a] and constituted a breach of its international obligations [b].

¹ I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts *in Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp No.10, art.2, U.N. Doc. A/56/10 (2001) [“ARISWA”].

a) The act of Ambassador Cusi is attributable to Rincossi.

Article 7 of the Articles of Responsibility of States for Internationally Wrongful Acts [“**ARSIWA**”], which represents CIL,² holds a State responsible for the unauthorized acts of a State official, that are committed within his apparent scope of authority.³ Such acts include those committed under the cover of official status⁴ or by abusing means placed at the disposal of officials by virtue of their status.⁵ For instance, an accident caused by a diplomat after attending an official reception is an act within his official capacity, and can be attributed to the State.⁶

Ambassador Cusi purchased ivory illegally when she was on a diplomatic mission to Aliya.⁷ In fact, she completed this purchase while visiting one of Rincossi’s infrastructure projects at the

² Special Rapporteur on State Responsibility, *Fourth Rep. on State Responsibility*, Int’l Law Comm’n, U.N.Doc.A/CN.4/264 and Add.1 (1972) (by Robert Ago).

³ Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 in *Report of the International Law Commission on the Work of its Fifty-Third Session*, Report of the Commission to the General Assembly on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.2, pg. 99 [“**ILC Commentary**”].

⁴ Velasquez Rodriguez, Inter-Am. Ct. H.R. (ser.C) No.4, ¶ 170 (1989).

⁵ Caire Case (Fr. v. Mex.), 5 R.I.A.A 516 (1929).

⁶ Knab v. Republic of Georgia, No. 97-CV-03118(TPH), (United States District Court May 29, 1998).

⁷ *Record*(¶23).

port.⁸ Considering that she even invoked her diplomatic immunity as a tool to induce the poachers to complete the sale of ivory,⁹ her act was under the cover of her official status and Rincossi is therefore, responsible for it.

b) The acts of Ambassador Cusi violate Rincossi's international obligations.

Under Article II of CITES,¹⁰ the trade in ivory of Thornon elephant, a species listed under Appendix I,¹¹ is subject to strict regulation.¹² The export of ivory is allowed only if an export permit has been issued by the exporting state.¹³ Further, any trade in violation of these provisions is strictly prohibited.¹⁴ The smuggling of 25 kg of illegal ivory by Ambassador Cusi,¹⁵ without obtaining the requisite permits, therefore, violated the CITES.

2. RINCOSSI IS RESPONSIBLE FOR THE ACTS OF BU.

Rincossi is responsible for the acts of BU as it has violated its due diligence obligations by failing to prevent [a] and punish [b] the wrongful acts of BU.

⁸ *Id.*

⁹ *Record*(¶24).

¹⁰ Convention on the International Trade in Endangered Species on Wild Fauna and Flora, art.II, Mar. 3, 1973, 993 U.N.T.S. 243 [“CITES”].

¹¹ Appendix I, CITES.

¹² Art.II, CITES.

¹³ Art.III, CITES.

¹⁴ Art.VIII, CITES.

¹⁵ *Record*(¶23).

a) Rincossi is responsible for its failure to prevent the acts of BU.

Under international law, States have a *due diligence* obligation to prevent the wrongful acts of private individuals within its territory.¹⁶ In transnational crimes, the State in which the preparation of a criminal activity takes place, must also take measures to prevent its commission.¹⁷ Although the act of illegal ivory trade occurred in Aliya, the BU operated out of Rincossi.¹⁸ Thus, Rincossi had a due diligence obligation to prevent their activities as it *knowingly* allowed its territory to be used for illegal criminal operations.¹⁹ Additionally, this obligation, for an act committed outside the territory of a State, also arises when the State has the capacity to influence the actions of the offenders.²⁰ Since the BU had strong political links with the government²¹ and was also given government contracts for its transporting services,²² Rincossi had the ability to influence its actions. Further, Ambassador Cusi, who is a diplomat of Rincossi, was also a part of the criminal

¹⁶ United States Diplomatic and Consular Staff in Tehran (U.S.A v. Iran), 1980 I.C.J. 3, ¶62 (May 24).

¹⁷ United Nations Convention against Transnational Organized Crime, art.6(b)(ii), Nov. 15, 2000, 2225 U.N.T.S. 209 [“UNTOC”]; S.C. Res. 1373, art.2(d), UN Doc. S/RES/1373, (Sept. 28, 2001).

¹⁸ *Record*(¶26).

¹⁹ Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 22 (Apr. 9).

²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶438 (Feb. 26).

²¹ *Record*(¶25).

²² *Clarifications*(A.24).

operation perpetrated by the BU.²³ Thus, Rincossi was in a position to prevent the illegal acts of ivory trading and was obligated to take all possible steps necessary to prevent the wrongful act.²⁴ Its failure to do so, despite having political ties with them²⁵ and monitoring their activities for three years,²⁶ is in violation of its obligations.

b) Rincossi has violated international law by failing to punish the wrongful acts of BU.

Under international law, the obligation of due diligence extends to the punishment of individuals for their wrongful acts.²⁷ This requires an honest endeavour on part of the State to prosecute the offenders who have committed the wrongful act.²⁸ Rincossi's failure to take *any* measure to prosecute the members of BU, despite a domestic legislation being in place, indicates its lack of political will to adhere to its due diligence obligation.²⁹ This amounts to its complicity in the acts of BU and therefore, is an internationally wrongful act of Rincossi.³⁰

²³ *Record*(¶23).

²⁴ Corfu Channel Case, *supra* note 19 at 23.

²⁵ *Clarifications*(A.26).

²⁶ *Record*(¶26).

²⁷ Janes Case (U.S.A v. Mex.), 4 R.I.A.A. 82 (1925).

²⁸ De Brissot Case (U.S.A. v. Venez.), 29 R.I.A.A. 258 (1885).

²⁹ *Record*(¶28).

³⁰ J Brierly, *The Theory of Implied State Complicity in International Claims* 1, 9 BRIT. Y.B. INT'L L. 42 (1928).

3. RINCOSSI HAS VIOLATED ITS OBLIGATION TO MAKE REPARATIONS TO ALIYA.

Article 31 of the ARSIWA codifies a general principle of law,³¹ obligating the State responsible for an internationally wrongful act to make reparation for the injury caused. This obligation arises immediately on the commission of the wrongful act.³² Considering that the Thornon elephants cannot be restored to their previous number³³ and that their loss cannot be quantified in monetary terms,³⁴ *restitution* or *compensation* are not suitable reparations in this case. Thus, Rincossi was obligated to make appropriate *satisfaction* for the injury caused to Aliya, by prosecuting Ambassador Cusi and the members of the BU.³⁵ Having failed to do so, Rincossi is in violation of its international obligations.

B. Rincossi has violated its treaty obligations.

Rincossi's actions violated its treaty obligations under the CITES [1], the UNTOC and the UNCAC³⁶ [2], and the CBD³⁷[3].

³¹ Factory at Chorzow (Ger. v. Polish Republic), 1927 P.C.I.J (ser. A) No. 9, at 21 (July 26).

³² ILC Commentary, *supra* note 3 at 223.

³³ Central Rhodope Forests (Greece v. Bulg.), 3 R.I.A.A 1405 (1931).

³⁴ Canada, Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos, 18 I.L.M. 899, 954 (1979).

³⁵ Rainbow Warrior Affair (N.Z. v. Fr.), 19 R.I.A.A. 199 (1986).

³⁶ United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [“UNCAC”].

³⁷ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S 79 [“CBD”].

1. RINCOSSI HAS VIOLATED ITS OBLIGATIONS UNDER CITES.

Rincossi has violated its obligations under the CITES as it has not penalised Ambassador Cusi or the members of BU [a]. Further, it has failed to take any effective measures to control domestic ivory trade [b].

a) Rincossi has not penalised Ambassador Cusi or the members of BU.

Article VIII(1)(a) of the CITES mandates Parties to penalize the illegal trade in animal specimens. Although Parties to the CITES enjoy discretion to decide the kind of penalties to be imposed, their subsequent practice³⁸ indicates that prosecution of the offenders is regarded as the minimum punishment.³⁹ Accordingly, States reserve their discretion *only* with regard to the duration of the imprisonment or the amount of fine to be imposed, pursuant to such prosecution.⁴⁰ Thus, Rincossi had an obligation to prosecute the offenders, failing which it has violated its obligations under the CITES.⁴¹

³⁸ Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 [“VCLT”].

³⁹ Lacey Act, 16 U.S.C. §§ 3371- 3378 (1900); TRAFFIC, TRAFFIC BULLETIN: SEIZURES & PROSECUTIONS, TRAFFIC BULLETIN: MARCH 1997- OCTOBER 2014 (2014); G.A. Res. 69/314, U.N. Doc. A/RES/69/314 (July 31, 2015).

⁴⁰ Model Laws on International Trade in Wildlife Flora & Fauna, CITES SECRETARIAT *available at* <https://cites.org/sites/default/files/eng/prog/Legislation/E-Model%20law-updated-clean.pdf>.

⁴¹ *Record*(¶28).

b) Rincossi has failed to take effective measures to control its domestic ivory market.

Under Resolution 10.10, adopted at the Conference of Parties of the CITES, Rincossi had a duty to introduce enforcement mechanisms to control its domestic ivory market.⁴² While resolutions do not constitute binding obligations by themselves,⁴³ they can be used to interpret the Convention.⁴⁴ Pursuant to this Resolution, States having large domestic ivory markets⁴⁵ such as Ethiopia,⁴⁶ China,⁴⁷ and the U.S.A.,⁴⁸ have taken measures to control their domestic ivory markets for effective implementation of the CITES. These measures include the registration of ivory traders, training of officials for enforcement of legislations, improved market monitoring mechanisms etc.⁴⁹

⁴² RESOLUTION CONF. 10.10 (REV. CoP 16), TRADE IN ELEPHANT SPECIMENS, <https://cites.org/eng/res/10/10-10R16.php> (last visited Nov.17, 2015).

⁴³ MICHAEL BOWMAN ET. AL., LYSTER'S INTERNATIONAL WILDLIFE LAW 488 (2nd ed., 2010).

⁴⁴ Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), 2014 I.C.J. 226, ¶46 (Mar. 31); Art.XI, CITES.

⁴⁵ DECISION, CoP12 Doc. 20.1 Annex 5, 12th Meeting of CoP of CITES, (Nov., 2002).

⁴⁶ Mildge & Abdi, *A Model for Africa: Ethiopia's Efforts To Close Unregulated Domestic Ivory Markets in Addis Ababa* 20(3) TRAFFIC BULLETIN 119 (2005).

⁴⁷ 54th Meeting of the Standing Committee, SC54 Doc. 26.1 (Rev. 1), CITES (Oct. 2006).

⁴⁸ *Domestic Ivory Markets: Where They are and How They Work*, Briefing Document, TRAFFIC, (Sept. 2004).

⁴⁹ *Id.*

Rincossi's growing demand for ivory⁵⁰ and its active international trading,⁵¹ indicate that it has a large domestic ivory market. Despite this, the fact that the Ambassador planned to sell illegal ivory in Rincossi signifies the lack of determination of the origin of the ivory, or the registration of an ivory trader in this market.⁵² Further, Rincossi has consistently failed to prosecute instances of illegal ivory smuggling.⁵³ Thus, Rincossi lacks effective enforcement mechanisms to control its market, thereby not complying with its obligations under the CITES.

2. RINCOSSI HAS VIOLATED ITS OBLIGATIONS UNDER UNTOC AND UNCAC.

Under the UNTOC and the UNCAC [**“Conventions”**], Rincossi has violated its obligation to prosecute the members of BU and Ambassador Cusi for their acts [**a**]. Further, such prosecutorial decisions are not a matter of Rincossi's domestic affairs and hence, do not constitute a violation of its sovereignty [**b**].

a) Rincossi has violated its obligation to prosecute the members of BU and the Ambassador.

i. *The possession of illegal ivory constitutes an offence under the Conventions.*

The UNTOC and UNCAC criminalise the possession of property, which has been obtained by committing another offence; the latter being known as a predicate offence.⁵⁴ In order to prosecute the former offence under the Convention, it is necessary that the predicate offence constitute a

⁵⁰ Record(¶18).

⁵¹ Record(¶4).

⁵² Record(¶23).

⁵³ Record(¶22).

⁵⁴ Art.6(1)(b)(i), UNTOC; Art.23(1)(b)(i), UNCAC.

crime under the domestic laws of the State.⁵⁵ Further, in cases, where the predicate offence is committed outside the jurisdiction of the State prosecuting the former offence, it must be a crime under the laws of both the States, i.e. where it is committed and where the possession of its proceeds are being prosecuted.⁵⁶ The illegal trade in ivory is a predicate offence as even though it was committed outside Rincossi's jurisdiction, it is criminalised under the domestic laws of both Aliya⁵⁷ and Rincossi.⁵⁸ Thus, the possession of illegal ivory constitutes a laundering offence under the Conventions.

ii. *Rincossi has an obligation to prosecute the offences committed by BU and the Ambassador.*

Under the Conventions, States shall endeavour to *maximise* the extent of prosecutorial discretion available for effective law enforcement and deterrence of the offences.⁵⁹ While this provision is not mandatory, it requires States to make genuine efforts to fulfil this obligation.⁶⁰ Moreover, while interpreting this provision in light of the object of the Conventions,⁶¹ the

⁵⁵ Art.6(2)(b), UNTOC.

⁵⁶ Art.6(2)(c), UNTOC; Art. 23(2)(c), UNCAC.

⁵⁷ *Record*(¶17).

⁵⁸ *Record*(¶21).

⁵⁹ Art.11(2), UNTOC; Art.30(3), UNCAC.

⁶⁰ LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME AND THE PROTOCOL THERETO 6, (UNODC, 2004) [**“Legislative Guide, UNTOC”**].

⁶¹ Art.31(1), VCLT.

prosecution of these offences is considered to be the most effective deterrent measure.⁶² Subsequent practice⁶³ indicates that States have consistently prosecuted offences under the Conventions, resulting in either conviction or imposition of fines.⁶⁴ Rincossi has not prosecuted instances of illegal ivory trade either before⁶⁵ or after amendment of its Trafficking Act in 2010.⁶⁶ In the present case, Rincossi has merely issued a written warning to the Ambassador and the BU.⁶⁷ Thus, Rincossi's prosecutorial discretion is illusory in nature as it has never used it in a manner to ensure effective deterrence from the crime.

Further, even developing countries, with limited financial resources, must prosecute major cases involving high-level public officials, to prevent the wanton abuse of public authority.⁶⁸ Given that Rincossi is a rapidly developing economy,⁶⁹ with strong political ties with the BU and the

⁶² G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov.,2000); G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 2003).

⁶³ Art.31(3)(b), VCLT.

⁶⁴ U.S.A. v. Tania Siyam, No.1:04CR98-001, U.S. Dist., Northern District of Ohio (2008); Lemong Thai v. S, No. A82/2013, South Gauteng High Court, Johannesburg, (South Africa); Sansar Chand v. State of Rajasthan, (2010) 10 SCC 604, Supreme Court of India (India).

⁶⁵ *Clarifications*(A.10).

⁶⁶ *Record*(¶21).

⁶⁷ *Record*(¶28).

⁶⁸ TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 87, (UNODC, 2009) [**“Technical Guide, UNCAC”**].

⁶⁹ *Record*(¶4).

Ambassador,⁷⁰ its failure to prosecute them stems from a lack of political will to adhere to its obligation. Thus, Rincossi has not acted in good faith⁷¹ and cannot use its status as a developing nation as a ground for avoiding its obligations.⁷²

iii. *Rincossi cannot avoid prosecution on grounds of the Ambassador's diplomatic status.*

Under Article 31(1) of the Vienna Convention on Diplomatic Relations a diplomat is immune from the criminal jurisdiction of the receiving State. However, this does not absolve the diplomats of legal liability⁷³ and they may be prosecuted by the sending State.⁷⁴ Further, under the UNCAC, States have to maintain a balance between the immunity of the official and their prosecution under the Convention.⁷⁵ Failure to do so would defeat the anti-corruption objectives of the Convention and reduce the public accountability of these officials.⁷⁶ Thus, Ambassador Cusi should be tried in her own State, i.e. Rincossi, for her criminal acts committed abroad.⁷⁷

⁷⁰ *Clarifications*(A.26).

⁷¹ Art.26, VCLT.

⁷² DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENT LAW* 231 (2010).

⁷³ Arrest Warrant of April 11 2000 (Dem. Rep. of Congo v. Belg.), 2000 I.C.J. 3, ¶59, (Feb. 14).

⁷⁴ Vienna Convention on Diplomatic Relations, art. 31(4), Apr. 18, 1961, 500 U.N.T.S 95.

⁷⁵ Art.30 (3), UNCAC.

⁷⁶ LEGISLATIVE GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 132, (UNODC, 2007) [**“Legislative Guide, UNCAC”**].

⁷⁷ Arrest Warrant Case, *supra* note 73 at ¶63.

iv. *The doctrine of “clean hands” is not applicable in the present case.*

The doctrine of clean hands is a general principle of law,⁷⁸ according to which a State that has *continuously* not performed its obligations is barred from bringing a claim of corresponding non-performance of obligations by other States.⁷⁹ However, the State bringing the claim must have acted *mala fide* in not performing its obligations.⁸⁰ Aliya has consistently prosecuted most of the cases of ivory trafficking in its jurisdiction⁸¹ and has also arrested the poachers involved in the present case.⁸² Considering that Aliya is financially less developed than Rincossi and has been unable to prosecute all cases owing to a lack of resources,⁸³ it has not acted in bad faith. Thus, its claims against Rincossi are admissible.

b) Rincossi’s prosecutorial decisions are not a matter of its domestic affairs.

The principle of non-intervention, codified in the Conventions⁸⁴ and the UN Charter,⁸⁵ is violated if a State interferes in the “domestic affairs” of another State. However, what constitutes

⁷⁸ *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 50 (dissenting opinion of J. Anzilotti).

⁷⁹ Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 119 (1957-II).

⁸⁰ *Arrest Warrant Case*, *supra* note 73 at ¶35 (dissenting opinion of J. Van Den Wyngaert).

⁸¹ *Record*(¶19); Technical Guide to UNCAC, *supra* note 68.

⁸² *Clarifications*(A.33).

⁸³ *Record*(¶19).

⁸⁴ Art.4, UNTOC; Art.4, UNCAC.

⁸⁵ U.N. Charter, art.2(7).

“domestic affairs” is in turn, determined by the development of international relations.⁸⁶ Under international law, matters that have an adverse effect on other States⁸⁷ or affect international relations,⁸⁸ are considered to be outside the State’s “domestic jurisdiction”. Although Rincossi’s prosecutorial decisions are governed by its domestic law, its repeated failure to prosecute offenders has led to an increase in the illegal ivory trade between Aliya and Rincossi.⁸⁹ Owing to this, the population of Thornon elephants has decreased causing a direct adverse effect on Aliya’s biodiversity.⁹⁰ As these prosecutorial decisions have a detrimental effect on Aliya, they do not remain matters within Rincossi’s domestic jurisdiction.

3. RINCOSSI HAS VIOLATED ITS OBLIGATIONS UNDER THE CBD.

Article 8(k) of the CBD, requires Parties to enact legislations for the protection of “threatened species”.⁹¹ Having been listed as “vulnerable” on the IUCN Red List,⁹² the Thornon elephant enjoys the protection of this provision.⁹³ Further, while the CBD mandates the enactment of

⁸⁶ Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J., ser.B, No. 4, (Feb. 7).

⁸⁷ *Id.*

⁸⁸ L. Preuss, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction* 630, 74 RECUEIL DES COURS, HAGUE ACADEMY OF INTERNATIONAL LAW (1949).

⁸⁹ *Record*(¶20).

⁹⁰ *Record*(¶2).

⁹¹ Art.8(k), CBD.

⁹² *Record*(¶2).

⁹³ IUCN RED LIST CATEGORIES AND CRITERIA (VERSION 3.1) 5 (2nd ed., IUCN, 2012).

appropriate legislation, it is implied that States must also implement them, as it would otherwise frustrate the purpose of the treaty.⁹⁴ Thus, Rincossi had an obligation to protect the Thornon elephants by effectively implementing the Trafficking Act to curb illegal ivory trade. Its failure to do so,⁹⁵ is a violation of its obligations under the CBD.

Additionally, under Article 3 of the CBD,⁹⁶ a State is enjoined from conducting activities within its jurisdiction, that cause adverse effects in another State, even without any physical manifestations of such harm.⁹⁷ In this case, the Thornon elephants are a *keystone* species that help maintain the ecological balance of Aliya.⁹⁸ The poaching activities for acquiring ivory have decreased the population of the Thornon elephant by 50% in the last ten years in Aliya.⁹⁹ As Rincossi is the primary market for this ivory,¹⁰⁰ its failure to prevent illegal trade in ivory has caused harm to Aliya's ecosystem, which falls within the ambit of transboundary harm.¹⁰¹

⁹⁴ BODANSKY, *supra* note 72 at 214.

⁹⁵ *Record*(¶¶22,28).

⁹⁶ Art.3, CBD.

⁹⁷ XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 4 (2003).

⁹⁸ Michael Glennon, *Has International Law Failed The Elephant?* 84 (1) *AM. J. INT'L L.* 10 (1990); *Record*(¶15).

⁹⁹ *Record*(¶2).

¹⁰⁰ *Record*(¶15).

¹⁰¹ Riccardo-Pisillo Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in *INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM* 29 (1991).

II. RINCOSSI HAS VIOLATED INTERNATIONAL LAW BY REFUSING TO RETURN THE CONFISCATED THORNON ELEPHANT IVORY TO ALIYA.

Rincossi has violated its obligations under the Cultural Property Convention¹⁰² [A], the CITES [B], the UNTOC and the UNCAC [C] by refusing to return the confiscated Thornon elephant ivory to Aliya.

A. Rincossi has violated its obligations under the Cultural Property Convention.

The Thornon elephant ivory has been designated as “cultural property” belonging to Aliya [1], giving rise to Rincossi’s obligation to return this property to it, under the Cultural Property Convention [2].

1. THE THORNON ELEPHANT IVORY IS “CULTURAL PROPERTY” BELONGING TO ALIYA.

Under Article 1 of the Cultural Property Convention, a property must have scientific and historical importance and must be specifically designated by a State to be its “cultural property”. The Thornon elephant ivory has been specifically designated to be the cultural property of Aliya [a]. Further, it falls within the category of “rare collections and specimens of fauna and flora” under the Convention [b].

a) Aliya has specifically designated Thornon elephant ivory as cultural property.

¹⁰² Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14 1970, 823 U.N.T.S. 231 [“**Cultural Property Convention**”].

Under the Cultural Property Convention, States are required to “specifically” designate property as cultural property in order for it to be entitled to the protection under the Convention.¹⁰³ This designation can be done by grouping items under a category and designating such category as cultural property.¹⁰⁴ In fact, the practice of States¹⁰⁵ indicates that there is no requirement for designating each object individually, for it to be defined as cultural property.¹⁰⁶

Aliya has specifically designated the “parts and derivatives” of the Thornon elephant as its cultural property.¹⁰⁷ As the ivory is a part of the Thornon elephant,¹⁰⁸ it falls within the designated category. Thus, it is entitled to the protection of the Convention as the cultural property of Aliya.

- b) The Thornon elephant ivory falls within the category of “rare collections and specimens of fauna and flora”.

¹⁰³ Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, ¶34, C70/15/3.MSP/11, (UNESCO, 1970) [**“Operational Guidelines, UNESCO”**].

¹⁰⁴ UNESCO HANDBOOK ON LEGAL AND PRACTICAL MEASURES AGAINST ILLICIT TRAFFICKING IN CULTURAL PROPERTY 5, International Standards Section, Division of Cultural Heritage (2006).

¹⁰⁵ Art.31(3)(b), VCLT.

¹⁰⁶ Art.1, Law No. 37 on Cultural Property, 2008 (LEB.); Art.3, Law on the Protection of Historical and Cultural Properties, 2004 (AFG.); Francesco Francioni, *Cultural Heritage*, II MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 906, ¶10 (2007).

¹⁰⁷ Record, ¶15.

¹⁰⁸ JOHN SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY 80 (2014).

For the Thornon elephant ivory to be regarded as “cultural property”, it must fall under any of the twelve categories listed under the Cultural Property Convention; one such category is “rare specimens of fauna and flora”.¹⁰⁹ As the term “specimen” has not been defined in the Cultural Property Convention, it can be interpreted by using the CITES¹¹⁰ to mean any part or derivative of a species.¹¹¹ Further, such species are considered to be rare when they face a risk of extinction.¹¹²

As ivory is a derivative of the Thornon elephant, it qualifies as its *specimen*.¹¹³ Moreover, the Thornon elephant is listed as a vulnerable species on the IUCN Red List¹¹⁴ as well as on Appendix I of the CITES.¹¹⁵ This signifies that the Thornon elephant, along with its ivory, faces a high risk of extinction¹¹⁶ and is therefore, rare. Thus, the Thornon elephant ivory falls under the category of “rare collections and specimens of fauna and flora” and can be regarded as “cultural property” under the Convention.

2. RINCOSSI HAS VIOLATED ITS OBLIGATION TO RETURN THE CULTURAL PROPERTY TO ALIYA.

¹⁰⁹ Art.1, Cultural Property Convention.

¹¹⁰ Art. 31(3)(c), VCLT; Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 177 (June 4).

¹¹¹ Art.I(b)(ii), CITES.

¹¹² DeVeau Dane, *Taking of Threatened Species under the Endangered Species Act: Fund for Animals v. Turner*, *The Casenotes and Comments* 30 (1) IDAHO L. REV. 109, 114 (1993-94).

¹¹³ SPRANKLING, *supra* note 108.

¹¹⁴ *Record*(¶2).

¹¹⁵ *Record*(¶8).

¹¹⁶ Art.II(1), CITES.

Under Article 7(b) of the Cultural Property Convention, Rincossi is under an obligation to return the cultural property as it was stolen from a museum or a similar institution in Aliya [a]. Further, the institution has also documented this cultural property in its inventory [b]. Moreover, Aliya has complied with its obligation to facilitate the return of such property [c].

a) The cultural property was stolen from a museum or a “similar institution”.

Under Article 7(b) of the Cultural Property Convention, States can request the return of cultural property if it was stolen from a museum or any other similar institution.¹¹⁷ The term “museum” includes zoological gardens¹¹⁸ or permanent establishments¹¹⁹ that preserve and exhibit animals.¹²⁰ As the Thornon Elephant National Park protects¹²¹ and displays the Thornon elephants to the public,¹²² it qualifies as a “museum” under the Cultural Property Convention.

Alternatively, the Park is a “similar institution” under the Convention. Under Article 5(c) of this Convention, the term “similar institution” refers to an institution that conducts scientific

¹¹⁷ Art.7(b)(i), Cultural Property Convention.

¹¹⁸ Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone, 11th session, UNESCO (France, 1960).

¹¹⁹ *Id.*

¹²⁰ VERNON N. KISLING, ZOO AND AQUARIUM HISTORY: ANCIENT ANIMAL COLLECTIONS TO ZOOLOGICAL GARDENS viii (2001).

¹²¹ *Record*(¶16).

¹²² *Clarifications*(A.32).

research,¹²³ and preserves and presents cultural property.¹²⁴ The scientists at the Park have carried out research on the DNA of elephant populations within the Park.¹²⁵ Moreover, the Park preserves¹²⁶ and presents the elephants to the public,¹²⁷ thereby qualifying as a “*similar institution*” under the Cultural Property Convention.

b) The Park has documented the cultural property in its inventory.

Under the Cultural Property Convention, the *museum* or *similar institution* of the requesting State must document an inventory of the cultural property.¹²⁸ Accordingly, each item that is protected as cultural property must be listed and described in this inventory.¹²⁹ In case items cannot

¹²³ UNESCO, Preliminary Report Prepared in Compliance with Article 10.1 of the Rules of Procedure Concerning Recommendations to Member States and International Conventions Covered by the Terms of Article IV, Paragraph 4, of the Convention, ¶¶ 35, UNESCO Doc. SHC/MD/3 (Aug. 8, 1969).

¹²⁴ Ethan Arthur, *Poaching Cultural Property: Invoking Cultural Property Law to Protect Elephants*, J. INT’L WILDLIFE L. & POL’Y 231, 236 (2014).

¹²⁵ *Record* (¶16).

¹²⁶ *Record* (¶16).

¹²⁷ *Clarifications*(A.32).

¹²⁸ Art.7(b)(i), Cultural Property Convention.

¹²⁹ UNESCO, Draft Operational Guidelines for the Implementation of 1970 Convention by the Subsidiary Committee of the Meeting of States Parties to the Cultural Property Convention, ¶60, C70/13/1.SC/4 (July2013).

be listed, they may be grouped within a category,¹³⁰ with proper description.¹³¹ The Park is home to a large number of elephants,¹³² making it difficult to list each elephant in its inventory. Thus, by listing and describing the families of elephants in its inventory,¹³³ Aliya has complied with its obligation of documenting its cultural property.

c) Aliya has complied with its obligations to facilitate the return of the cultural property.

Under the Cultural Property Convention, the requesting State is obligated to pay all the expenses, incidental to the return and delivery of the cultural property.¹³⁴ As Aliya is willing to bear this expense,¹³⁵ it has fulfilled its obligations. Consequently, Rincossi has an obligation to return the cultural property of Aliya.¹³⁶ In practice, States have consistently returned cultural property to the country of origin; for instance, Britain returned the Coronation Stone to Scotland¹³⁷

¹³⁰ Operational Guidelines, UNESCO, *supra* note at 103, ¶37.

¹³¹ *Id.*

¹³² *Record*(¶16).

¹³³ *Record*(¶16).

¹³⁴ Art.7, Cultural Property Convention.

¹³⁵ *Clarifications*(A.15).

¹³⁶ Art.7(b)(ii), Cultural Property Convention.

¹³⁷ Richard Blystone, *Scotland's 'Stone of Scone' Finds its Way Home*, CNN WORLD NEWS, Nov. 15, 1996, <http://www.cnn.com/WORLD/9611/15/stone.of.scone/>.

and Ethiopia returned the Axum Obelisk to Italy.¹³⁸ Further, the UN General Assembly has repeatedly called upon States to return cultural property.¹³⁹ Thus, by failing to return the ivory¹⁴⁰ Rincossi has violated its obligations under the Cultural Property Convention.

B. RINCOSSI HAS VIOLATED ITS OBLIGATIONS UNDER THE CITES.

Under Article VIII(1)(b) of the CITES, a State must either confiscate or return the illegally traded specimens to the State of export. After confiscation, a State may return these specimens to the State of export.¹⁴¹ Rincossi has violated its obligations under the CITES by refusing to return the confiscated Thornon ivory to Aliya [1]. Further, the destruction of the confiscated ivory is in violation of the CITES [2].

1. RINCOSSI HAS VIOLATED ITS OBLIGATION BY REFUSING TO RETURN THE CONFISCATED THORNON IVORY TO ALIYA.

¹³⁸ *Final Obelisk Section in Ethiopia*, BBC NEWS, Apr. 25, 2005, <http://news.bbc.co.uk/2/hi/africa/4472259.stm>; Daniel Eck & Patty Gerstenblith, *Cultural Property*, 38 THE INT'L LAW. 469, 474 (2004).

¹³⁹ G.A. Res. 64/78, U.N. Doc. A/RES/64/78 (Dec. 7, 2009); G.A. Res. 61/52, U.N. Doc. A/RES/61/52 (Dec 4, 2006).

¹⁴⁰ *Record*(¶32).

¹⁴¹ RESOLUTION CONF. 9.10 (REV. CoP 15), DISPOSAL OF CONFISCATED AND ACCUMULATED SPECIMENS, <https://cites.org/eng/res/09/09-10R15.php> (last visited Nov.17, 2015).

The obligation to return the ivory cannot be avoided on the ground that the CITES favours destruction of such ivory [a]. Further, it cannot be avoided on account of the possibility of re-entry of ivory into illegal trade, in case of its return. [b].

- a) Rincossi cannot avoid its obligation on the ground that the CITES favours destruction of confiscated ivory.

Under the CITES, a State can re-export the originally imported specimens, if such import was in accordance with the provisions of the treaty.¹⁴² However, in case the import was illegal, the specimens are deemed to be imported in accordance with the CITES,¹⁴³ in order to facilitate their return to the country of export.¹⁴⁴ In fact, the inclusion this deeming provision indicates that CITES prefers the return of confiscated specimens over its destruction.¹⁴⁵ Thus, Rincossi cannot deny the return of the ivory, on the ground that the CITES favours the destruction of such specimens.

- b) Rincossi cannot avoid its obligation on account of the possibility of re-entry of ivory into illegal trade.

¹⁴² Art.III(4)(a), CITES.

¹⁴³ Art.VIII(1)(b), CITES.

¹⁴⁴ 4th Meeting of CoP, RESOLUTION CONF. 4.17 (REP. CoP 9), RE-EXPORT OF CONFISCATED SPECIMENS (1993), http://www.ciesin.columbia.edu/repository/entri/docs/cop/CITES_COP004_res017.pdf (last visited Nov. 17, 2015).

¹⁴⁵ *Id.*

A specimen may re-enter the illegal trade when it is not allowed to enter the country of import¹⁴⁶ and further, such refusal is not notified to the country of export.¹⁴⁷ This does not arise in the present case as Aliya, i.e., the country of export, has requested the return of the confiscated ivory.¹⁴⁸ Further, under the CITES, the confiscating State is obligated to return such specimens when the requesting State has taken measures to prevent their re-entry into illegal trade.¹⁴⁹ As Aliya has undertaken to store the ivory in a secured government facility¹⁵⁰ and has prosecuted the poachers in the present case,¹⁵¹ it has taken measures to prevent the re-entry of ivory into illegal trade. Thus, Rincossi cannot refuse to return this ivory to Aliya.

2. THE DESTRUCTION OF THE CONFISCATED THORNON IVORY IS IN VIOLATION OF THE CITES.

Under the CITES, Parties prioritize the return of confiscated ivory over its destruction, when a specific request for such return is made.¹⁵² For instance, when Malawi and Kenya requested to

¹⁴⁶ 9th Meeting of COP, Doc. 9.22 (Rev.) ¶23, CITES (Nov. 1994).

¹⁴⁷ *Id* at 543-45.

¹⁴⁸ *Record*(¶33).

¹⁴⁹ RESOLUTION CONF. 9.9, CONFISCATION OF SPECIMENS EXPORTED OR RE-EXPORTED IN VIOLATION OF THE CONVENTION, <https://cites.org/eng/res/09/09-09.php> (last visited Nov.17, 2015).

¹⁵⁰ *Handling Confiscated Specimens*, 16TH CITES WORLD 13, (CITES, Dec., 2005); *Clarifications*(A.16).

¹⁵¹ *Clarifications*(A.33).

¹⁵² Leya Musa, *Thailand could be ready to begin burning ivory stockpile*, WILDLIFE NEWS, Mar. 17, 2015, <http://wildlifeneews.co.uk/2015/03/thailand-could-be-ready-to-begin-burning-ivory->

return the confiscated ivory tusks, such requests were accepted by the Netherlands and Thailand.¹⁵³ Thus, States resort to destruction only where the country of origin is unknown, or no request is made for the return of ivory.¹⁵⁴ The Thornon elephant ivory originated from Aliya¹⁵⁵ and accordingly, Aliya has formally requested Rincossi to return this ivory.¹⁵⁶ Thus, Rincossi cannot refuse to return the ivory by relying on instances of ivory destruction where the State of origin was unknown.¹⁵⁷

stockpile; Kayumba Emile Ogane v. Commissioner Customs Uganda Revenue Authority, UGHCCD 189, Feb. 2014, High Court at Nakawa (Uganda).

¹⁵³ *Supra* note 146 at 537; *AG seeks Thai help in ivory probe*, DAILY NATION, Aug. 30, 2015, <http://www.nation.co.ke/news/Kenya-Thailand-Ivory-Poaching-Crime/-/1056/2852358/55k8y5/-/index.html>.

¹⁵⁴ CYRILLE DE KLEMM, GUIDELINES FOR LEGISLATION TO IMPLEMENT CITES 62,67 (IUCN Env Pol’y & L. Paper No. 26, 1993).

¹⁵⁵ *Id.*

¹⁵⁶ *Record*(¶31).

¹⁵⁷ John Scanlon, *CITES Secretary- General’s remarks on the destruction of confiscated elephant ivory at Bangkok, Thailand, on Aug. 26 2015*, https://cites.org/eng/news/sg/thailand_ivory_crush_26082015.

Moreover, the practice of States indicates that destruction of ivory, without prosecution of offenders, does not deter its illegal trade.¹⁵⁸ For instance, ivory confiscated by the U.S.A. was not crushed for five years,¹⁵⁹ till the offender was prosecuted.¹⁶⁰ In fact, elephant range States like Namibia and Zimbabwe, which are the “specifically affected States”,¹⁶¹ do not even indulge in ivory destruction for deterring illegal trade.¹⁶² As Rincossi has not prosecuted the offenders,¹⁶³ the mere destruction of ivory would not deter the illegal trade. Thus, Rincossi cannot destroy the ivory.

C. RINCOSSI HAS VIOLATED ITS OBLIGATIONS UNDER THE UNTOC AND UNCAC.

¹⁵⁸ John Scanlon, *CITES Secretary-General’s remarks on the destruction of confiscated elephant ivory in Thailand, the United States of America, China, the United Arab Emirates and the Czech Republic*, <https://cites.org/eng/news/sg/index.php>.

¹⁵⁹ *The US Ivory Crush at Times Square, Destruction of Confiscated Elephant Ivory in Times Square, Questions and Answers with the US Fish and Wildlife Service* (June 2015), <https://www.fws.gov/international/pdf/factsheet-ivory-crush-qa.pdf>.

¹⁶⁰ *U.S.A. v. Victor Gordon* 11 U.S. (7 Cranch) 287 (District Court, Brooklyn, N.Y., June 4, 2014).

¹⁶¹ *North Sea Continental Shelf (Germ. v. Den.)*, 1969 I.C.J. 3, ¶¶73-74, (Feb. 20).

¹⁶² Adam Cruise, *Namibia Says No to Destroying Its Huge Ivory and Rhino Horn Stockpile, in a voice for Elephants in National Geographic*, July 20, 2015, <http://voices.nationalgeographic.com/2015/07/20/namibia-says-no-to-destroying-its-huge-ivory-and-rhino-horn-stockpile/>.

¹⁶³ *Record*(¶28).

Under Article 14(1) of the UNTOC, States may dispose the confiscated property in accordance with their domestic laws. However, Article 14(2) provides a specific disposal option,¹⁶⁴ whereby a State must give *priority consideration* to the option of return, when a request to return the property has been made.¹⁶⁵ On application of the maxim *specialia derogant generalibus*,¹⁶⁶ Article 14(2) prevails over Article 14(1) in cases where a request of return of the property has been made. As Aliya has made such a request of return,¹⁶⁷ Rincossi must give priority consideration to it.¹⁶⁸

Further, this obligation requires States to make genuine efforts to see whether the option of return would be compatible with their legal system.¹⁶⁹ In the event it is not compatible, States have to review their domestic policy to facilitate the return of the confiscated property.¹⁷⁰ By failing to review its domestic policy in favour of such return,¹⁷¹ Rincossi has violated its obligations under the Conventions.

¹⁶⁴ Legislative Guide, UNTOC, *supra* note 60 at 143.

¹⁶⁵ *Id* at 152.

¹⁶⁶ Case A/2, Decision No. DEC 1-A2-FT, 1 Iran-U.S. Cl. Trib. Rep. 104 (1982).

¹⁶⁷ *Record*(¶¶33).

¹⁶⁸ Art.14(2), UNTOC; Art.57(3)(c), UNCAC.

¹⁶⁹ Legislative Guide, UNCAC, *supra* note 76 at 4; Legislative Guide, UNTOC, *supra* note 60 at 143.

¹⁷⁰ Art.57(2), UNCAC.

¹⁷¹ *Record*(¶¶33,34).

CONCLUSION AND PRAYER

In light of the above, the Federal States of Aliya requests the Honourable Court to adjudge and declare that:

1. Rincossi has violated international law by its failure to arrest and prosecute Ambassador Cusi and the 20 members of the Barnum Uritovsky for trafficking illegal Thornon Elephant Ivory.
2. Rincossi has violated international law by refusing to return the confiscated Thornon Elephant ivory to Aliya.

Respectfully Submitted

Agents for the Federal States of Aliya