IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE

TRANSBOUNDARY HAZE AND SPECIES PROTECTION

FEDERAL STATES OF ABELII

APPLICANT

v.

REPUBLIC OF REDOX

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2012 STETSON MOOT COURT COMPETITION

NOVEMBER 2012

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STATEMENT OF JURISDICTION

The Federal States of Abelii and the Republic of Redox submit the present dispute to the International Court of Justice. Pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice, States may bring cases before the Court by special agreement. On the 25th of June 2012, the parties signed a special agreement and submitted it to the Registrar of the Court (R. at 2). See the Special Agreement Between the Federal States of Abelii and the Republic of Redox for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Transboundary Haze and Species Protection (R. at 3-4). The Registrar of the Court addressed notification to the parties on the 27th of June 2012 (R. at 2).

QUESTIONS PRESENTED

I. WHETHER THE REPUBLIC OF REDOX VIOLATED INTERNATIONAL LAW ON TRANSBOUNDARY HARM

II. WHETHER THE REPUBLIC OF REDOX HAS LEGALLY EXERCISED ITS SOVEREIGN RIGHT TO UTILIZE ITS OWN NATURAL RESOURCES

STATEMENT OF FACTS

The Federal States of Abelii and the Republic of Redox are members of the United Nations and are Parties to the Vienna Convention on the Law of Treaties (VCLOT), the Convention on Biological Diversity (CBD), and the Ramsar Convention (Ramsar) (R. at 5). Representatives from both States attended the 1972 United Nations Conference on the Human Environment at Stockholm, the 1992 UN Conference on Environment and Development at Rio de Janeiro, and the 2012 Rio+20 Conference at Rio de Janeiro, and helped draft the resulting documents (R. at 5).

There exists a treaty on transboundary haze called the Heinze Regional Agreement (HRA) (R. at 6), but Redox has not ratified it (R. at 5) and is not a party to it.

Two fires occurred on peatlands owned by P-Eco, Incorporated in the Cienaga province Cienaga. Cienaga Environmental officials held two P-Eco employees liable as the arsonists. (R. at 6). P-Eco fired the employees who pled guilty to illegal burning. Said employees were fined and sentenced to prison (R. at 6).

Abelii sent a diplomatic note to Redox. (R. at 7). Redox replied assuring Abelii that the Redox Ministry of the Environment has already requested local authorities in Cienaga for an investigation of the fire. Redox also declared that it has neither violated international law nor is it a party to the HRA which Abelii accuses it of (R. at 7-8).

Abelii disagreed with Redox in the latter's first reply. Redox then assured Abelii again that the federal government of Redox has done everything it can as permitted by its constitution, while at the same time maintained that it is not bound by the HRA nor has it violated international law (R. at 8).

In 2012, P-Eco sought permission to clear, drain, and burn the Fahy Peatlands located in Huiledepalme. An environmental impact assessment was executed with the results showing that Abelii would not be significantly affected (R. at 9).

Abelii objected to the controlled burning stating that such will constitute a violation of an *erga omnes* obligation against the intentional extirpation of a species and a violation of the CBD and customary international law (R. at 9).

Redox replied that no such *erga omnes* obligation exists and that they have the sovereign right to exploit their own resources pursuant to their environmental and developmental policies. Also, a captive breeding program was embarked by the Huiledepalme government wherein ten adult Redox orangutans and two juvenile male orangutans would be taken care of by the Huiledepalme Zoo. Moreover, P-Eco was incorporated in Hameng, a separate state in the Heinze region (Answers to Clarificatory Questions), and its majority shareholder is an Abelii citizen (R. at 9-10).

After failed negotiations between the two countries, they agreed to submit the dispute to the International Court of Justice (R. at 10).

SUMMARY OF SUBMISSIONS

The Republic of Redox did not violate International Law. It complied with its interim obligations as a signatory to the HRA on good faith and is not obligated by the treaty provisions of the HRA due to the lack of its subsequent ratification. The acts which led to the haze are not imputable to the Republic of Redox, and no breach of an international obligation was committed.

Redox did breach any regional or international customary norm and has complied the required standard of due diligence. Moreover the alleged harm of economic damage to tourism did not meet the threshold of severity sufficient to produce liability to Redox.

The proposed controlled burning is within the sovereign right of Redox to utilize its own resources. There currently exists no customary norm nor *erga omnes* obligation to conserve endangered species. Even assuming that there exists such an obligation, Redox has fulfilled such obligation by taking steps to ensure the conservation of the Redox Orangutan through a captive breeding program. Therefore Redox has not committed any breach of its international law obligations.

SUBMISSIONS

I. THE REPUBLIC OF REDOX HAS NOT VIOLATED INTERNATIONAL LAW ON TRANSBOUNDARY HARM

A state commits an internationally wrongful act when its conduct is attributable to the state and when that conduct constitutes a breach of an international obligation of the state.[1] The alleged conduct is not attributable to Redox and does not constitute a breach of any of its international obligations.

A. REDOX IS NOT OBLIGATED TO AND THEREFORE DID NOT BREACH THE HRA

Treaties give rise to legal obligations only when there is consent from the state parties.[2] *Fitzmaurice* points out that consent of the state is necessary for the treaty obligation to exist and although a state may not deny its concession if apparently given, there must be express consent or if implied consent it must be established by inference from the facts.[3] Redox did not expressly, nor impliedly, expresses its consent to be bound by the HRA.

1. *The signature of Redox is not tantamount to consent to be bound, thus ratification by Redox is necessary for it to be a party to the HRA*

In accordance with Article 12 of the VCLOT[4], the consent to be bound as expressed by signature only occurs when:

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[1] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. DOC. A/56/49(Vol. I)/Corr.4.

[2] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 147 (Martinus Nijhoff Publishers, 1985).

[3] MARK EUGEN VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff Publishers, 2009).

[4] Vienna Convention on the Law of Treaties Art. 12, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

(a) the treaty itself provides that it shall have that effect

(b) it is otherwise established by the negotiating states that it shall have that effect; or

(c) the intention of the state to give that effect to its signature appears from the full powers of its representative or was expressed during negotiation.[5]

None of the aforementioned apply in this case. The HRA does not expressly provide that the signature of a state has the effect of binding it as a party to the treaty. Likewise it does not meet the requirements of Article12(b) because it cannot be established that that the consent to be bound to the HRA by mere signature was expressed during the negotiations of the HRA nor can it be established that the negotiating States of the HRA agreed that the signature shall have this effect. Whenever a State claims to have reached an agreement by means not expressly stated it must demonstrate that the other States have also agreed that signature would have the effect of consent to be bound by the treaty.[6] Neither does it meet the requirement of Article12(c) because for Redox the authority to sign is subject to ratification as evidenced by its emphasis on the need for their ratification of the HRA to bind them to it[7] nor is there any evidence to support that the intent to be bound by signature was expressed during the negotiation of the HRA.

There is no sufficient demonstration of the aforementioned requirements to establish that signature should have the effect of expressing consent to be bound to the HRA, therefore Redox's signature does not tantamount to it being a party to the HRA and requires its ratification to bind it to the HRA.

[5] Report of the International Law Commission to the General Assembly on the Work of its Eighteenth Session, Int'l Law Commission Y.B., Vol. 2, part II, (1966), U.N. Doc. A/CN.4/SER.A/1966/Add.1.

[6] *Supra* note 3, at 188.

[7] R. at 5 and 7.

Ratification is required in all instances except when the treaty itself nor the circumstances of which do not clearly indicate a clear intent to dispense with ratification.[8] Treaties in general require ratification.[9] The principle that treaties create no obligation unless it is ratified is upheld by decisions of international tribunals. In the *River Oder case*, the PCIJ ruled that Poland should not be bound by its mere signature of the Barcelona Convention without ratification.[10] The court stated that ratification was not superfluous, and the Convention cannot produce any effect independent of ratification.[11]

In similar tenor, the ICJ in the *North Sea Continental Shelf Cases* ruled that Article 6 of the Continental Shelf Convention did not apply to Germany who signed the convention but did not ratify it. It was alleged that it was binding on Germany because "by conduct, by public statements and proclamations, and in other ways, the Republic had assumed the obligations of the Convention."[12] The court ruled the argument untenable stating that only a very definite and very consistent course of conduct of the State can justify upholding the contention.[13] As with the aforementioned case, Redox's single mere public statement adopting "zero burning" as a national goal does not tantamount to very definite and very consistent course of conduct sufficient to bind it to the HRA without its consent.

[8] LORD ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES (Oxford Clarendon Press, 1961).

[9] Report of the International Law Commission to the General Assembly on the Work of its Fourteenth Session, Int'l Law Commission Y.B., Vol. 2, (1962), U.N. Doc. A/CN.4/SER.A/1962/Add.1.

[10] Territorial Jurisdiction of the Int'l Comm'n of River Oder (U.K . v. Pol.), 1929 P.C.I.J. (ser.A) No. 23.

[11] *Id.*

[12] North Sea Continental Shelf (F.R.G. v. Den.-Neth.), 1969 I.C.J. 3, 43.

[13] *Id.*

2. *The obligation of Redox to not defeat the object and purpose of the HRA is an interim obligation in good faith*

a. VCLOT, Article 18 stipulates an interim obligation which expires after a treaty has entered into force

Article 18 of the VCLOT states that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval . . ."[14] As the title itself of Article 18 provides, the rule contemplates a situation prior to a treaty's entry into force.[15] Thus, the underlying idea of Article 18 imposes an interim obligation until the treaty has entered into force.[16] The HRA entered into force in December 1998[17] thereby extinguishing the interim obligation of the negotiating states upon the HRA's entry into force. The earliest incident allegedly constituting breach of the HRA occurred in 2007, nine years after the HRA entered into force.[18] Thus, the incidents in question are no longer within the period covered by Article 18.

b. The obligation imposed by Article 18 is a duty of good faith and not a legal obligation

In addition to being an interim obligation, Article 18 of the VCLOT contemplates merely a duty of good faith and not a legal obligation. This is proven by the *travaux preparatoires* of the VCLOT. In the interpretation of treaty provisions, recourse may be had to supplementary means

[14] Vienna Convention, Art. 18, *supra* note 4.

[15] *Supra* note 3, at 248.

[16] Jan Klabbers, How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent Jan Klabbers, How to Defeat a Treatys Object and Purpose, 34 Vand J Transnat'l L 283, 289 (2001) (discussing the interim obligation pending a treaty's entry into force).

[17] R. at 6.

[18] *Id*.

of interpretation, such as preparatory work of the treaty as stated in Article 32 of the VCLOT[19]. Although it is established that the general rule of interpretation stipulated in Article 31 is the primary means of interpretation, in support of Article 32, the ILC is nonetheless of the opinion that supplementary means of interpretation may be valuable in "throwing light on the expression of the agreement in text."[20] The ICJ has in the past has made recourse to *travaux preparatoires* in cases such as the *Fisheries Jurisdiction* and *Nicaragua* cases.[21]

Article 9 of the 1935 Harvard research project, whose treaty portions was a precursor to the VCLOT, contained a draft article on the interim obligation noting that it concerned a duty of good faith rather than international law.[22] It states that:

> "Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is **under no duty to perform the obligations stipulated, prior to the coming into force** of the treaty with respect to that state; under some circumstances, however, **good faith may require that pending the coming into force** of the treaty the states shall, **for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult**.[23]" (emphasis supplied)

Article 18 of the VCLOT may be traced to the ILC Reports of *JL Brierly* who comments that what the article contemplates is a **moral rather than a legal obligation[24]**. This court found in the *Border and Transborder Armed Actions (Nicaragua/Honduras) Case*, "[good faith] is not

[19] Vienna Convention, Art. 32, *supra* note 4.

[20] 18th ILC Report, *supra* note at 5.

[21] Martin Ris, Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 14 B.C. Int'l & Comp.L. Rev. 111 (1991).

[22] Curtis A. Bradley, *Treaty Signature in*, THE OXFORD GUIDE TO TREATIES (Duncan Holis ed., Oxford University Press, 2012).

[23] (1935) 29 AJIL.

[24] Documents of the 4th Session Including the Report of the Commission to the General Assembly, [1952] 2 Y.B. Int'l L Comm'n 54, UN Doc A/CN.4/SER.A/1952/Add.1.

in itself as source of obligation where none would otherwise exist."[25] Thus Abelii may not invoke Article 18, an obligation of good faith, to impose a legal obligation upon Redox.

3. *Redox has in good faith complied with its obligation not to defeat the object and purpose of the HRA*

a. Redox complied with its obligation prior to the HRA's entry into force

Assuming that VCLOT Article 18 does create a binding obligation on Redox, it nevertheless has not violated it. A recommended test of whether the obligation not to defeat the object and purpose of a treaty has been breached is the *Manifest Intent Test*, which looks at whether the behavior seems unwarranted and condemnable and if so assumes to be motivated by bad faith.[26] The actions contemplated by Article 18 are actions which substantially impair the ability of states to comply with its treaty obligations should the negotiating state decide to ratify it and should the treaty enter into force.[27] Between the period in which the HRA was being negotiated and the period in which the HRA entered into force in December 1998, Redox has not behaved in an unwarranted and condemnable way nor had it acted in any way which would have significantly impaired its ability to comply with treaty obligations should they had chosen to ratify the HRA.

b. Redox has not violated its obligation even assuming that it is a persisting legal obligation

[25] Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility Judgment, I.C.J. Rep. 1988.

[26] *Supra* note 16, 330-331 (discussing the manifest intent test).

[27] *Supra* note 22 (discussing signing obligation to comply with terms of a treaty).

Assuming that Article 18 creates a binding obligation on Redox beyond the HRAs entry into force, Redox has not violated it. The obligation imposed by Article 18 is not one that imposes an affirmative duty to do certain acts or carry out specific provisions of a treaty, rather it is one that imposes and obligation to *refrain from* or *not to do* acts that would subsequently impair the carrying out of the treaty.[28] In the *Iloilo Claims* case,[29] the tribunal refused to impose upon the U.S. the obligation of keeping order in the Philippines during the period between the signing of the peace treaty between Spain and the US and its subsequent entry into force because it imposed an affirmative obligation *to do* something rather than the passive obligation *not to do* something as contemplated by Article 18. Thus, a signatory state whose conduct does not result in consequences which would render provisions of the treaty impossible of performance when the treaty enters into force is not in breach of the obligation envisioned by Article 18[30]. In the case of Redox, the acts imputed against it do not render the provisions of the HRA impossible of performance should Redox subsequently ratify it. The HRA requires party states to undertake legislative and administrative measures in order to prevent and control activities related to land and/or forest fires that may lead to transboundary haze pollution.[31] Should Redox subsequently ratify the HRA the actions imputed to it in the present case do not prevent Redox from undertaking the stated legislative and administrative measures.

Sir *Lauterpacht's* ILC report expresses the obligation stipulated by Article 18 as contemplating "any act committed in *bad faith*, *deliberately aiming* at depriving the other party

[28] Martin A. Rogoff, The International Legal Obligations of Signatories to an Unratified Treaty 32 Maine L Rev 263 (1980).

[29] Several British Subjects (Great Britain) v. United States (Iloilo Claims) 1925 U.N. Reports of Arbitral Awards Vol 6 pp. 158-160.

[30] *Supra* note 28, at 297.

[31] R. at 13.

of the benefits which it legitimately hoped to achieve from the treaty."[32] (emphasis supplied) Redox had complied with its obligations to the HRA as a signatory by refraining from any deliberate actions in bad faith which would impair its ability to comply with the provisions of the HRA should it subsequently ratify it.

B. THE REPUBLIC OF REDOX DID NOT COMMIT AN INTERNATIONALLY WRONGFUL ACT

1. *The acts of P-Eco are not attributable to Redox*

To establish international responsibility, the unlawful act must be imputable to the State as a legal person.[33] Only acts of a state in its capacity as a sovereign, such as where a person is acting *de jure* on behalf of the state, are attributed to the state for the purposes of international liability.[34] P-Eco is not a State organ or official. The nationality of a corporation is determined by its place of incorporation[35] and P-Eco was incorporated in Hameng not Redox. The act of arson committed by P-Eco employees is a private conduct which is not attributable to the Republic of Redox. A state can only become responsible for private acts if it encouraged them, if the individuals were acting as State agents, or if it endorses the acts of the individuals as its own.[36] The employees were not acting under the direction, control or instruction of Redox.

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[32] Addendum – First Report on the Law of Treaties by Sir Hersch Lauterpacht, Special Rapporteur – Law of Treaties, Int't Law Comm'n, U.N. Doc. A/CN. 4/8ER. A/Add. 1 (1953).

[33] E. JIMENEZ DE ARECHAGA, INTERNATIONAL LAW IN THE PAST THIRD OF A CENTURY 267 (1978).

[34] RENE LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 60, *in* 24 DEVELOPMENTS IN INTERNATIONAL LAW (1996).

[35] Case Concerning the Barcelona Traction, Light and Power Company Limited, (Belg. v. Spain), 1970 I.C.J. 3, 52 (Feb. 5).

[36] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 154 (1994).

2. *There exists no regional custom on transboundary haze pollution*

The HRA provisions do not constitute regional customary international law. Though a convention may also exist as part of customary international law,[37] two requisites must be met before a customary rule can be said to have been formed: (1) a general practice among states and (2) *opinio juris.*[38] Even assuming that the adoption of "zero burning" legislation may be seen as a state practice to prevent and monitor transboundary haze pollution, the second element, *opinio juris*, is not present. *Opinio juris* means that there is consciousness of a legal duty – that states act in a certain way because they feel committed to do so out of duty.[39] There is no indication that the states in the Heinze Region felt that they had to comply with the obligations embodied in the HRA because of a sense of duty arising from regional customary international law. Otherwise, states not parties to or prior to becoming parties to the HRA would have complied with it.

3. *Redox did not breach customary international law*

State responsibility arises for a breach of an international obligation.[40] Failure to meet the standard of care required, with resultant harm, is the internationally wrongful act for which state

[37] *North Sea,* 1969 I.C.J.

[38] *Id.* at 44.

[39] MICHEL VIRALLY, THE SOURCES OF INTERNATIONAL LAW in MANUAL OF PUBLIC INTERNATIONAL LAW, 134 (Max Sorensen ed., MacMillan, 1968).

[40] *Supra* note *1*.

responsibility attaches.[41] Redox exercised the due diligence required to prevent transboundary harm in accordance with customary international law.[42]

The polluter pays principle *Trail Smelter*[43] does not apply to Redox because in that case Canada itself voluntarily assumed liability for the pollution created by a privately-operated facility.[44] The aforementioned circumstance is not analogous to Redox as it has not assumed such liability.

a. Redox has met the standard of due diligence

In complying with a State's duty to prevent transboundary harm, the standard of conduct required to be observed is due diligence.[45] Due diligence is addressed by reasonable efforts to take appropriate measures in a timely manner.[46] Thus state becomes responsible under international law if it fails to take necessary measures to address the harm.[47] Due diligence leaves room for States to determine which measures are necessary, appropriate, feasible and available within their capacities to achieve the given objective.[48] Redox taking reasonable regulatory precautions by adopting "zero burning" as a national goal, conducting investigations of the

[41] HIGGINS, *supra* note 36 at 165.

[42] Pulp Mills in the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 55-56 (Apr. 20); Report of the International Law Commission on the Work of its Fifty-Third Session, 154, U.N. Doc.A/56/10 (2004) [53rd ILC Report].

[43] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938/1941).

[44] *Id.* at 1912-1913.

[45] Convention on Biological Diversity, 1992, art.3, 31 I.L.M. 818; Stockholm Declaration on the Human Environment, Prin.21, U.N. Doc.A/CONF.48/14/Rev.1 (1973); Rio Declaration on Environment and Development, Prin.2, U.N. Doc. A/CONF.151/26 (1992).

[46] *Id.* 53rd ILC Report.

[47] *Pulp Mills,* 2010 I.C.J. at 55-56.

[48] XUE HANQIN. TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW, CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW 164 (Cambridge University Press, 2003).

incident, and prosecuting the arsonists at fault, is sufficient compliance with the due diligence requirement.[49]

b. Transboundary harm does not cover mere economic damage

A state has the obligation to supervise activities within its jurisdiction or control, so that such activities do not cause significant environmental harm either to the territory or resources of other States.[50] However, the occurrence of transboundary damage in itself does not necessarily equate to State responsibility.[51] There is a threshold criterion in that transboundary damage should reach a certain degree of severity.[52] Mere occurrence of damage is not sufficient to render a state liable as a certain degree of harm is inherent in interaction among states.[53] To be legally relevant, the damage should be at least greater than the mere nuisance or insignificant harm which is normally tolerated.[54] In the opinion forwarded by the ILC, there is no breach without the actual occurrence of transboundary environmental interference causing significant harm.[55] There should be environmental damage, physical injury, or loss of life and property occurring in one country caused by activities conducted in the territory of another country.[56]

[49] R. at 6 - 8.

[50] Riccardo P. Mazzeschi, *Forms of International Responsibility for Environmental Harm, in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francesco Francioni & Tullio Scovazzi eds, 2001).

[51] HANQIN, *supra* note 48, at 39.

[52] *Id.*

[53] NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES 67 (Oxford University Press, 2002).

[54] HANQIN, *supra* note 48, at 40.

[55] LEFEBER, *supra* note 34, at 24.

[56] HANQIN, *supra* note 48, at 42.

The only damage that Abelii alleged it has suffered is a decline in its tourism levels,[57] which is not sufficient to in itself make Redox liable under customary international law because the transboundary damage for which a state is liable does not include economic and financial activities.[58]

II. THE CONTROLLED BURNING TO BE CONDUCTED BY REDOX IS WITHIN ITS SOVEREIGN RIGHT TO UTILIZE ITS OWN RESOURCES

The principle 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"[59] is considered as a rule of customary international law.[60] This rule has been incorporated in various international treaties since 1972, one of which is the CBD.[61]

Redox and Abelii are both parties to the CBD. Article 15 of the CBD recognizes the sovereign rights of State over their natural resources. This is furthermore stated in Principle 2 of the Rio Declaration on Environment and Development, which both Redox and Abelii had helped draft.[62]

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[57] R. at 6 and 8.

[58] *Id.* at 37.

[59] Stockholm Declaration, *supra* note 45.

[60] *Human Rights, Environment, and Economic Development*, Center for International Earth Science Information Network. Earth Institute, www.ciel.org/Publications/olp3v.html.

[61] CBD, *supra* note 45.

[62] R. at 5.

The General Assembly resolution 1803 (XVII) of 14 December 1962 also recognized "the right of peoples and nations to permanent sovereignty over their natural wealth and resources" and declared that the "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace." Being members of the U.N., Abelii and Redox are bound to comply with the Charter of the United Nations.[63]

Absent damage to another state, it is within the limits of a state's right to utilize its own natural resources.[64] The controlled burning would be well within the sovereign right of Redox to utilize its own natural resources since no damage will be suffered by Abelii.

A. REDOX HAS NOT VIOLATED ANY CUSTOMARY INTERNATIONAL NORM

1. There is no customary norm that dictates the conservation of endangered species

There exists no customary norm for the conservation of endangered species, nor is the specific means for carrying out such obligation mandated by international law. Customary norms as enshrined in Article 38 of the ICJ statute are distinguished by an established, consistent, and extensive practice by states and the presence of *opinion juris*.[65]

State practice may be determined through the existence of treaties, diplomatic correspondence, opinions of national or legal advisers, state practice within international

[63] *Id.*

[64] Stockholm Declaration, *supra* note 45.

[65] Malcolm D. Evans, INTERNATIONAL LAW 122 (2nd ed. 2006).

organizations, and the like which all pertain to a specific determinable concept.[66] Such practice must be virtually uniform in order to establish it as state practice.[67]At present, no widely established international convention exists which provides an absolute mandate of conservation of endangered species in general. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is the only convention widely recognized in the international community with 176 state parties. This convention merely regulates the use of endangered animals in relation to international trade and does not impose an obligation on parties to conserve endangered species per se.[68] Other conventions on the subject of conservation of endangered species such as the Bern Convention[69], the Agreement on the Conservation of Gorillas and Their Habitats[70], and the Convention for the Regulation of Whaling[71] are subscribed to by only a small number of states and are vague as to the means of conservation employed.

No *opinio juris* exists with regards to the absolute conservation of endangered species. The conventions that are in existence, allows for withdrawal from the convention at any time. Moreover, the conventions itself allows for exceptions in which the killing of endangered species may be allowed even to state parties.[72] This shows no *opinion juris* present within the international community on the conservation of endangered species as an obligation that exists outside of conventional international law.

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[66] Rebecca M. Wallace, INTERNATIONAL LAW IN A NUTSHELL (2006).

[67] Michael J. Glennon, *Has International Law Failed the Elephant?*, 1 Am. J. Int'l L. 84 (1990).

[68] CITES, *Member Countries*, available at http://www.cites.org/eng/disc/parties/index.php.

[69] Convention on the Conservation of European Wildlife and Natural Habitats, December 1, 2009, Bern, 19.IX.1979.

[70] Agreement on the Conservation of Gorillas and Their Habitats, September 6, 2011, UNEP/GA/MOP2/Inf.7.4.

[71] International Convention for the Regulation of Whaling Schedule, November 10, 1948, 161 UNTS 72, 338 UNTS 366.

[72] *Supra* notes 70, 71, 72.

2. Assuming there exists a customary norm on conservation of endangered species, Redox' captive breeding program is a valid means for such conservation

Conservation of endangered species in an ex-situ environment, such as a captive breeding program is a viable way to ensuring that the Redox orangutan species will continue to thrive. Captive breeding programs are recognized as tending to reduce the risk of extinction in a number of species.[73] The Pongo Abelii, a species similar to the Redox orangutan, is steadily declining in number despite government-imposed conservation areas due to harmful external factors. Given their high behavioral and dietary flexibility, ex-situ conservation may be a viable option for such species, with hopes of successful reintroduction into the wild once their numbers increase significantly.[74] A few species such as the Przewalski's horse and the Pere David's deer are extinct in the wild but thrive in captivity and some species born in captivity have been successfully reintroduced into the wild.[75]

The CBD recognizes ex-situ conservation as a viable option to sustain biodiversity.[76] Given the recent consequences of global climate change and the differential responses of various species to it, ecosystem conservation is not an exclusive means of biodiversity protection.[77] The ex-situ conservation of animal species is a viable solution to the concerns of biodiversity conservation, thus showing Redox's sufficient conservation efforts in accordance with the CBD.

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[73] Karen McGhee, *The Good Fight: Captive Breeding Programs,* Aust. Geo. Oct-Dec (2007).

[74] David Dellatore, *Behavioural Health of Reintroduced Orangutans (Pongo Abelii) in Bukit Lawang, Sumatra, Indonesia*, (October, 2007) (unpublished M.A., Oxford Brookes University, available at http://www.yorku.ca/arusson/Papers/Dellatore%20%20Behavioural%20Health%20of%20Reintroduced%20Orangutans%20(Pongo%20abelii).pdf.

[75] Richard Primack, ESSENTIALS OF CONSERVATION BIOLOGY 361-393 (3rd ed. 2002).

[76] CBD, Art. 9, *supra* note 45.

[77] Diana Pritchard and Stuart Harrop, *A Re-Evaluation of the Role of Ex-Situ Conservation in the Face of Climate Change*, 1 BGCI 7 (2010).

B. NO *ERGA OMNES* OBLIGATION IS VIOLATED IN THE PROPOSED CONTROLLED BURNING

1. Erga omnes obligations are exclusive to breaches of fundamental human rights of which conservation of animal species is not a part of

In *Barcelona Traction*, this court defined obligations *erga omnes* as obligations towards the international community as a whole which by the importance of the rights involved, all States can be held to have a legal interest in the protection of these rights[78]. The ICJ in cases such as the Barcelona Traction[79], Bosnia vs. Serbia case[80], and Portugal vs. Australia[81] recognizes as *erga omnes* obligations those concerning protection of fundamental human rights, like genocide, slavery, torture, racial discrimination, and the right to self-determination. Such crimes are also reflected in the Rome Statute under Article 5.[82] The ICJ has consistently limited obligations *erga omnes* to the protection of fundamental human rights.

The ILC limits the coverage of the concept of *erga omnes* to "fundamental human rights deriving from general international law and not just from a treaty regime".[83] The Special Rapporteurs recognize the importance of specifying the limitations of the applicability of *erga omnes* obligations as a wide interpretation of such would weaken and divide the concept of human rights. The ILC stated that it was for "the international community itself, through a

[78] Barcelona Traction, 1970.

[79] *Id*. At 14.

[80] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia vs. Serbia), 2007 I.C.J. (Feb.26).

[81] Case Concerning East Timor, (Port. vs. Aus.), 1995 I.C.J. (June 30).

[82] Rome Statute of the International Criminal Court art. 5, July 17, 1998 ISBN No. 92-9227-227-6.

[83] Report of the International Law Commission on the work of its fifty-second session, 30, U.N. Doc. A/55/10 (2000).

unanimous or nearly unanimous decision, in a forum which admitted of universal participation by States, to determine the essential obligations for the protection of its fundamental interests."[84]

It is inaccurate for Abelii to assert that extirpation of animal species is an obligation *erga omnes* because decisions of the ICJ and widely ratified conventions such as the Rome Statute have only recognized obligations *erga omnes* pertaining to fundamental human rights. All such established *erga omnes* obligations have been deemed as a general rule of international law that is customary in nature.[85] Considering that not even a customary norm dictating the conservation of endangered species exists at present, it cannot be said that there is a consensus among the international community to include obligations to protect specific animal species as a fundamental interest.

Extirpation of animal species, as included under the concept of ecocide, has been directly excluded in the Rome Statute by the ILC. A draft of the International Convention on the Crime of Ecocide studied by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities was also disregarded.[86]

2. Assuming that animal conservation is an erga omnes obligation, Redox did not commit a serious breach of such obligation

The concept of *erga omnes* obligations is further classified by liability arising only from serious breaches of such obligation. Such classification is intended to increase the effectiveness

[84] Report of the International Law Commission on the work of its fifty-second session, 22, U.N. Doc. A/CN.4/513 (2000).

[85] Marjan Ajevski, *Serious Breaches, the Draft Articles on State Responsibility and Universal Jurisdiction*, 1EJLS 2 (2008).

[86]Gauger, Rabatel-Fernel, Kulbicki, Short, and Higgins, *Ecocide is the Missing 5th Crime Against Peace*, July 2012, available at http://www.sas.ac.uk/sites/default/files/files/hrc/Events%20Documents/Ecocide%20is%20the%20missing%205th%20Crime%20Against%20Peace.pdf.

of response to grave crimes and to prevent abuses in the use of the concept[87]. A serious breach is a "gross or systematic failure by the responsible state to fulfill the obligation." A "gross" failure refers to the gravity or intensity of such failure while a "systematic" failure refers to violations carried out in an organized and deliberate way.[88]

a. The reduction of the Redox orangutan population is insufficient to constitute a gross failure

The IUCN Red List characterizes the "extinct" category as the moment when "there is no reasonable doubt that the last individual has died."[89] Even assuming that intentional extirpation may be recognized as an *erga omnes* obligation, Redox cannot be said to have grossly breached such obligation because there will be no extinction of the Redox orangutans resulting from the proposed controlled burning. Redox has undertaken a captive breeding program of Redox orangutans.[90]

The ever-growing population of the earth's inhabitants and the limitation in resources make *conservation triage* a valid recourse, [91] this recognizes that limited resources must be allocated efficiently in order to ensure that valuable assets are maximized.[92] Since the numbers of the Redox orangutan constrained to the island of Huiledepalme are steadily declining,[93] the

[87] 52nd ILC Report, supra note at 84

[88] Ajevski, *supra* note 85.

[89] IUCN. (2011). IUCN Red List Categories and Criteria: Version 3.1. IUCN Species Survival Commission.IUCN, Gland, Switzerland and Cambridge, UK.Ii + 30pp.

[90] R. at 9.

[91] Ken Paige, *Conservation Scientists 'Unanimous' in Expectations of Serious Loss of Biological Diversity, Study Shows*, 6 Biol Conserv 26 (2011).

[92]MC Bottrill, et al. Is *Conservation Triage Just Smart Decision Making*?, 23 Trends Ecol. Evol. 12 (2008).

[93] R. at 9.

most economically efficient and practical solution available to Redox to ensure that the species continue to be genetically represented would be to monitor their survival closely through a captive breeding program.

b. The controlled burning does not constitute a systematic failure

There is no systematic violation of the obligation because Redox does not have an institutionalized policy of animal extirpation. The alleged animal extirpation is merely a reduction of the Redox orangutan population incidental to a valid exercise of controlled burning.

Controlled burning is recognized as a viable activity for peatland management.[94] Peatland burning has shown to have significant positive effects to the ecosystem such as increased production of grouse and sheep species.[95] The burning of the Fahy Peatlands is not prohibited by any convention that Redox is a party to given that it is not part of the List of Wetlands of International Importance under Ramsar. Beyond such list, state parties are committed only to the wise use of such peatlands which does not prohibit controlled burning.[96] The Ramsar Handbook 18 states that intentional disturbance is recognized as a necessary means of "maintaining community vigor."[97]

The reduction of the Redox orangutan population is merely incidental to such valid activity. In no way was the permit issued to authorize specifically the extirpation of Redox

[94] Ramsar Convention Secretariat, *Burning Peatlands* (2008).

[95] Worrall, Clay, Marrs, and Reed, *Impacts of Burning Management on Peatlands*. Scientific Review, (2010).

[96] Convention on Wetlands of International Importance especially as Waterfowl Habitat.Ramsar (Iran), 2 February 1971. UN Treaty Series No. 14583.As amended by the Paris Protocol, 3 December 1982, and Regina Amendments, 28 May 1987.

[97] Ramsar Convention Secretariat, 2010. "Managing wetlands: Frameworks for managing Wetlands of International Importance and Other Wetland Sites". Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 18.Ramsar Convention Secretariat, Gland, Switzerland.

orangutans. Contrary to allegations of deliberate acts of extirpation, the government of Redox has undertaken a policy of preservation of the species through its captive breeding program to ensure that even in the event of incidental reduction of the orangutan population, under no circumstance will extinction of its species occur.[98]

C. REDOX ORANGUTAN POPULATION REDUCTION DOES NOT CONSTITUTE BIODIVERSITY LOSS UNDER THE CBD

The CBD defines biodiversity as "variability among living organisms from all sources."[99] The CBD's approach is to focus on biological diversity rather that endangered species in itself.[100] The definition of biodiversity loss adopted by the CBD is the "long term or permanent qualitative or quantitative reduction in components of biodiversity and their potential to provide goods and services, as measured at global, regional, and national levels."[101] A study in biodiversity recognizes that there are species which do not affect the ecosystem in any measurable way, only a small set of species and physical processes are significant in the general behavior and structure of global ecosystems.[102] The environmental impact assessment accomplished by Redox for the controlled burning showed that there will be no significant loss

[98] R. at 9.

[99] CBD, *supra* note 45.

[100] Ved Nanda and George Pring, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 159 (2004).

[101]Costanza, Kemp, and Boynton**,** *Scale and Biodiversity in Coastal and Estuarine Ecosystems*. 84-125 in: C. A. Perrings, K.-G. Mäler, C. Folke, C. S. Holling, and B.-O. Jansson (eds.), BIODIVERSITY LOSS: ECONOMIC AND ECOLOGICAL ISSUES, 325 (1995).

[102] *Id*. at 36.

due to it.[103] Therefore, Redox's authorization of controlled burning activity does not significantly reduce biodiversity to such extent that it constitutes a breach of the CBD.

[103] R. at 9.

CONCLUSION AND PRAYER FOR RELIEF

Respondent, Republic of Redox, respectfully requests that the International Court of Justice adjudge and declare that:

1. Redox did not violate international law on transboundary harm; and
2. Redox has legally exercised its sovereign right to utilize its own natural resources

Respectfully submitted,

AGENTS OF RESPONDENT