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THE 28TH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, 2023

BEFORE

THE INTERNATIONAL COURT OF JUSTICE

LA COUR INTERNATIONALE DE JUSTICE

AT THE PEACE PALACE,

THE HAGUE, NETHERLANDS

GENERAL LIST NO.

303 of 2023

QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

STATE OF ARINGUV…….APPLICANT

V

STATE OF REPLOMUTÉ……...…….RESPONDENT

-WRITTEN SUBMISSION ON BEHALF OF THE APPLICANT-

TABLE OF CONTENT

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES AND DECLARATIONS

JUDICIAL AND ARBITRAL DECISIONS

UN DOCUMENTS AND OTHER INTERNATIONAL DOCUMENTS

JOURNALS AND ARTICLES

BOOKS

TABLE OF ABBREVIATIONS

1.	ARSIWA	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries
2.	CBD	Convention on Biological Diversity
3.	CIL	Customary International Law
4.	CMS	Convention on the Conservation of Migratory Species of Wild Animals
5.	DRI	Democratic Republic of Ibirunga
6.	EIA	Environmental Impact Assessment
7.	FAO	Food and Agricultural Organization
8.	Gorilla Agreement	Agreement on the Conservation of Gorillas and their Habitats
9.	ICJ	International Court of Justice

10.	ILC	International Law Commission
11.	ITLOS	International Tribunal for the Law of the Sea
12.	IUCN	International Union for Conservation of Nature
13.	PCIJ	Permanent Court of International Justice
14.	RIAA	Reports of International Arbitral Awards
15.	Rio Declaration	United Nations Conference on Environment and Development at Rio de Janeiro, 1992
16.	RMG	Royal Mountain Gorillas
17.	Stockholm Declaration	United Nations Conference on the Human Environment at Stockholm, 1972
18.	UN	United Nations
19.	UNEP	United Nations Environment Programme
20.	UNFCCC	United Nations Framework Convention on Climate Change
21.	UNTS	United Nations Treaty Series
22.	USA	United States of America
23.	USD	United States Dollar

24. ¶ Paragraph

QUESTIONS PRESENTED

I.

WHETHER THE FAILURE OF REPLOMUTÉ TO PREPARE AN EIA WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE REGION VIOLATES INTERNATIONAL LAW.

II.

WHETHER THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI VIOLATE INTERNATIONAL LAW.

STATEMENT OF JURISDICTION

In accordance with Article 40, paragraph 1 of the Statute of the ICJ, the Republic of Aringuv and Replomuté (collectively "the Parties") have submitted to the ICJ by Special Agreement, questions concerning the Mountain Gorillas and Impact Assessment as contained in Annex A of the Special Agreement, including the Clarifications.

The parties transmitted a copy of the Special Agreement to the Registrar of the ICJ on July 24, 2023. The Registrar of the Court, in accordance with Article 26 of the Rules of Court, addressed a notification of receipt of the Special Agreement to the parties on 31, July 2023.

The Parties have accepted the jurisdiction of this Court under Article 36(1) of this Court's Statute, and shall accept its judgement as final and binding and execute it in its entirety and in good faith.

STATEMENT OF FACTS

Background

The Democratic Republic of Ibirunga (DRI), a low income country rich in natural resources, and Aringuv, a lower middle income country with a thriving wildlife tourism industry, are neighbouring countries in Central Africa. Replomuté is a high income country in Europe.

The Royal Mountain Gorillas

Aringuv and the DRI are parties to the Agreement on the Conservation of Gorillas and Their Habitats (Gorilla Agreement) which protects the Royal Mountain Gorillas (RMG), a species of mountain gorillas, endemic to their territories and considered an endangered species. The species comprises two populations: the northern population, which inhabits a transboundary national park and frequently crosses Aringuv and the DRI border; and the southern population, which primarily resides in a national park in the DRI.

The 1981 DRI-Replomuté Agreement

In 1981, Replomuté and the DRI agreed to grant the Replomuté- owned Lenoir Corporation the rights to undertake oil exploration activities in the area occupied by the southern RMG population. Prior to signing the agreement, the DRI conducted a national EIA which did not factor in potential impacts on the gorillas, their habitat, or climate change.

Local Concerns

In 2009, the Lenoir Corporation after successfully exploring the area commenced the construction of a pipeline and in 2012, announced its plans to begin oil extraction activities upon completion of the pipeline. In the same year, local and international Non-Governmental Organisations (NGOs)

expressed serious concerns to the DRI, Replomuté, and the CMS Secretariat regarding the expected detrimental effects on the RMG resulting from these oil extraction activities.

The DRI - Replomuté Arbitration

In June 2012, the DRI, in light of their obligations under the Gorilla Agreement, expressed their intention to withdraw from the 1981 Agreement unless Replomuté established a $50 million (USD) fund to compensate for the expected adverse project impacts. Replomuté, in response, initiated mandatory arbitration under the 1981 Agreement. In March 2015, the arbitration panel, ruling in favour of the Lenoir Corporation, ordered the DRI to allow oil activities to proceed or face penalties exceeding $825 million (USD). They complied with the latter.

Aringuv's Concerns and Replomuté's Response

In 2018, Aringuv expressed concerns to Replomuté about the Lenoir Corporation's planned oil extraction activities in the DRI and the potential adverse impacts on the RMG and climate change. Replomuté rejected Aringuv's request for an EIA and insisted on proceeding with its planned activities. Aringuv accused Replomuté of inducing the DRI to breach the Gorilla Agreement thereby coercing the DRI to commit an internationally wrongful act. On 22nd May 2022, Aringuv called on the DRI to revoke the permits granted to the Lenoir Corporation for construction and operation of the pipeline. However, the DRI could not do so due to an arbitral award in March 2015 from the binding arbitration.

Following numerous negotiations, Aringuv and Replomuté agreed to submit their differences to the International Court of Justice (ICJ).

SUMMARY OF ARGUMENTS

I

The failure of Replomuté to prepare an EIA regarding the proposed oil activities in the region violates international law. Replomuté has a duty to conduct an EIA under treaty law. CIL obligates Replomute to prepare an EIA. Furthermore, the EIA conducted by the DRI in respect of the proposed activities is insufficient under international law and therefore Replomuté is not relieved of its duty to conduct an EIA with respect to the proposed activities. Additionally, Replomuté has an obligation to continually monitor the impact of the activities on the environment throughout the duration of the project.

II

The actions of Replomuté with respect to the proposed oil extraction activities in the DRI violate international law. Since the Lenoir Corporation is wholly owned by Replomuté, Replomuté is directly responsible for any internationally wrongful act done by the Corporation. The DRI would have complied with its international obligations but for Replomuté's coercion. For this reason, Replomuté is indirectly responsible for the actions of the DRI with respect to the proposed oil extraction activities.

ARGUMENTS

I. THE FAILURE OF REPLOMUTÉ TO CARRY OUT AN EIA REGARDING THE PROPOSED OIL ACTIVITIES IN THE REGION VIOLATES INTERNATIONAL LAW.

A. Replomuté violated the CBD.

Parties to the CBD are obliged to ensure the conservation and protection of biodiversity.[1] The CBD requires states to introduce procedures that require an EIA of proposed projects that are likely to have significant adverse effects on biodiversity.[2]

1. The activities may result in extinction of the RMG.

Replomuté became a party to the CBD in 1992.[3] Parties to the CBD are obliged to establish protected areas to conserve biodiversity.[4] The world's loss of biodiversity can be attributed to

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[1] Report of the United Nations Conference on Environment and Development Rio de Janeiro, Brazil. Annex I: Rio Declaration on Environment and Development, June 3-14, 1992, Rio de Janeiro, Brazil. A/CONF.151 26/ Rev.1 (Vol. I) Principle 2, 3, 7, [hereinafter Rio Declaration]; United Nations Conference on Environment and Development Rio de Janeiro, Brazil. (1993). *Agenda 21 : programme of action for sustainable development ; Rio Declaration on Environment and Development ; Statement of Forest Principles: The final text of agreements negotiated by governments at the United Nations Conference on Environment and Development (UNCED), June 3-14, 1992, Rio de Janeiro, Brazil*. United Nations Dept. of Public Information [hereinafter Agenda 21].

[2] *Id.*, art. 14(1) (a).

[3] Record, ¶ 13.

[4] Convention on Biological Diversity, art. 8(a), June 5 1992, 1760 U.N.T.S.79 [hereinafter CBD].

habitat destruction, pollution and over-exploitation of biological resources.[5] Accidental oil spills, the discharge of crude and oil wastes cause harm to migratory species and their food sources through pollution and habitat loss.[6] The proposed oil activities will take place in the primary habitat of the southern RMG population.[7] Local and international NGOs have raised concerns over the potential adverse impacts the activities may have on the species.[8] Classified as critically endangered on the IUCN Red List,[9] the effects of these oil activities may cause the extinction of the RMG which will ultimately result in the loss of biodiversity; hence, Replomuté must conduct an EIA.

2. The obligation applies extraterritorially.

Treaties are generally interpreted in their ordinary sense and in the context and light of their object and purpose.[10] The CBD states that the treaty covers parties involved in activities within their control or jurisdiction, both within and outside their national borders.[11] Contrary to Replomuté's contention that the scope of Article 14(1) (a) of the CBD is limited to projects within its own territory,[12] Article 4(b) demonstrates that the obligation to conduct an EIA where a project is likely to harm biodiversity may apply to activities carried out extraterritorially. Moreover, Replomuté's

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[5] Agenda 21, Chapter 15.3. Environmental Law Alliance Worldwide, *Guidebook for Evaluating Mining Project EIAs* (1st ed. 2010), https://www.elaw.org/files/mining-eia-guidebook/Chapter1.pdf <accessed 5th November, 2023>.

[6] Oil Pollution and Migratory Species UNEP/CMS/Resolution 7.3 (2017) of October 2017, (Rev.COP12).

[7] Record, ¶ 21.

[8] Record, ¶ 21.

[9] Record, ¶ 9.

[10] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[11] CBD, art. 4(b).

[12] Record, ¶ 28.

interpretation is inconsistent with the object and purpose of the CBD, which seeks to conserve biodiversity[13] which is considered a common concern of mankind.[14] Replomuté as a party to the CBD, is therefore obligated to perform its EIA duty accordingly regardless of the fact that the project is not within its territory, since the proposed oil activities may have a devastating impact on biodiversity.

B. Replomuté violated the Espoo Convention.

Replomuté has been party to the Espoo Convention since 1997.[15] States are required to prepare an EIA before implementing a project that is likely to have a significant adverse transboundary impact.[16] Replomuté's oil extraction activities are likely to lead to transboundary harm on the environment.

1. The RMG is a Migratory Species.

Migratory species refer to the "entire population or any geographically separate part of the population of any species, a significant proportion of whose members cyclically and predictably

[13] CBD, art. 1.

[14] CBD, Preamble.

[15] Record, ¶ 12.

[16] Convention on Environmental Impact Assessment in a Transboundary Context, art. 2, February 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention]; Rio Declaration, Principle 17; Case Concerning Pulp Mills on The River Uruguay (Argentina v. Uruguay), Judgement 2010, I.C.J. Rep. 14, ¶ 204 [hereinafter Pulp Mills Case]; Certain Activities Carried out by Nicaragua in the Border Area/Construction of a Road in Costa Rica Along the San Juan River (Costa Rica v Nicaragua), Judgment, 2015 I.C.J. 665 [hereinafter Costa Rica v Nicaragua Cases].

cross national jurisdictional boundaries."[17] Hence, a species as a whole can be considered migratory although some of its members may not migrate.[18] Allowing geographically separate populations of a species to be considered independently enables states to single out endangered populations for special protection when populations elsewhere are not endangered.[19] The facts indicate that there are two RMG populations. The northern population has 640 members which constitutes about 68% of the total population of the species. The members of the northern population frequently cross the border between the DRI and Aringuv. With a significant proportion of the members of the species frequently crossing a national boundary, the RMG is a migratory species under the CMS.

2. The oil extraction activities will likely have negative impacts on the RMG.

Oil extraction activities have negative effects on nature and the environment.[20] The proposed oil project will take place in the primary habitat of the southern RMG population[21] and drilling processes and accidental oil spills may cause the death of some of the gorillas, with surviving gorillas being displaced due to habitat loss. Such significant harm to the southern RMG population will negatively impact the already endangered species as a whole by reducing their numbers. Since

[17] Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, 1651 U.N.T.S. 333 art. I (1) (a) [hereinafter CMS].

[18] Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention)*, Vol. 29, *Natural Resources Journal*, p.978 (1989).

[19] *Id.*

[20] Environmental Law Alliance Worldwide, *Guidebook for Evaluating Mining Project EIAs* (1st ed. 2010), https://www.elaw.org/files/mining-eia-guidebook/Chapter1.pdf <accessed 5th November, 2023>.

[21] Record, ¶ 21.

the RMG is a migratory species,[22] the risk of significant harm to the species in the DRI is considered to likely cause damage to the environment of Aringuv. Replomuté's oil extraction activities have the potential to cause significant adverse transboundary impact. Consequently, Replomuté is under a legal duty to perform an EIA prior to the commencement of the Lenoir Corporation's activities.

C. Replomuté violated the UNFCCC.

Replomuté became a party to the UNFCCC in 1992.[23] Parties must consider the effects of their actions on climate change while conducting their affairs and implementing national policies.[24] They are encouraged to use impact assessments to reduce the negative effects of their projects on the environment.[25] Human activities substantially increase the concentration of harmful gases,[26] and fossil fuels like gas and oil constitute over 75% of the world's greenhouse gas emissions, contributing to climate change.[27] Industrial and mining processes are some activities which release these harmful greenhouse gases in the atmosphere. Replomuté's exploration of the area for oil coupled with the construction of an oil pipeline[28] will likely harm the climate because of the

[22] Record, ¶ 9.

[23] Record, ¶ 13.

[24] United Nations Framework Convention on Climate Change preamble, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

[25] UNFCCC, art. 4(1).

[26] *Id.*, Preamble, ¶ 2.

[27]Causes and Effects of Climate Change https://www.un.org/en/climatechange/science/causes-effects-climate-change <accessed 8th November, 2023>.

[28] Record, ¶ 17.

potential emission of greenhouse gases which may result from its proposed activities. As a party to the UNFCCC, Replomuté is obligated to prepare an EIA assessing the risks of its intended actions on climate change to minimise or prevent such harm to the environment. Thus, the failure to carry out this EIA is a breach of its treaty obligations and therefore violates international law.

D. <u>Replomuté violated its CIL obligation.</u>

CIL obliges states to undertake EIA where planned industrial activities are likely to cause significant transboundary harm, especially to states' shared resources.[29] Additionally, this requirement extends to proposed activities that may have similar impact on the environment.[30]

In determining CIL, judicial decisions are important[31] in ascertaining state practice and *opinio juris*. Judicial decisions indicate widespread acceptance of EIA as a legal obligation. Additionally, relevant state practice requiring EIAs when transboundary harm is likely is evident in the National Environmental Policy Act adopted by the United States in 1969, and since then in similar domestic legislations in China, the United Kingdom, Australia, Canada and India.[32] The obligation is also stipulated in various multilateral treaties, including the CBD, the UNCLOS and the Espoo Convention. Furthermore, guidelines or recommendations concerning EIA have been adopted by the UNEP, the Conference of the Parties to CBD, FAO and other international organisations.

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[29] Pulp Mills Case, ¶ 204; Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, pp. 10–78, ¶ 145.

[30] Costa Rica v. Nicaragua Cases, ¶ 104.

[31] ILC, Draft conclusion on identification of customary international law with commentaries, General Assembly Official Record, Seventy-third Session, Supplement No. 10 (A/73/10).

[32]UN Environment. Assessing Environmental Impacts— A Global Review of Legislation; UN Environment: Nairobi, Kenya, 2018.

In the present case, Replomuté asserts that it owes no EIA obligations to Aringuv as far as the Espoo Convention is concerned because Aringuv is not a Party to the treaty and thus no reciprocity exists between the states[33]. However, as established above, the obligation of conducting EIAs where there is risk of transboundary harm is a CIL obligation.[34] Based on this, despite the fact that Aringuv is not a Party to the Espoo Convention, there is a universal requirement of prior assessment of potential transboundary impact of States' planned activities. Consequently, Replomuté's failure to prepare an EIA in respect of the proposed oil activities is a violation of CIL.

E. <u>The EIA conducted by the DRI was insufficient under international law.</u>

1. The DRI neither notified nor consulted Aringuv on the potential significant adverse transboundary impact of the proposed oil extraction activities.

A State is obliged to notify and consult with other States that may be potentially affected by proposed activities of that State[35] to prevent or mitigate resulting adverse impact. The EIA conducted by the State forms a basis for these consultations with potentially affected parties.[36] The essence of conducting an EIA is to prevent damage to the environment of other states which is an obligation of due diligence to ensure appropriate measures are taken to minimise the risk of

[33] Record, ¶ 28.

[34] Costa Rica v. Nicaragua Cases,¶ 104; Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention*, Vol. 20, *Review of European, Comparative & International Environmental Law*, p.227 (2011), https://doi.org/10.1111/j.1467-938 8.2011.00726.x <accessed November 5, 2023>.

[35] Espoo Convention, art. 5; Rio Declaration, Principle 19; ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), art. 9; Costa Rica v Nicaragua Cases, ¶ 104.

[36] Espoo Convention, art. 5.

foreseeable transboundary harm as much as possible.[37] Such measures include notifying and consulting with States that are likely to be affected by the proposed activities. From the facts, the DRI did not notify nor consult with Aringuv following the performance of the EIA in accordance with its laws prior to the concession agreement to grant Replomuté oil exploration and extraction rights within the primary habitat of the southern population.[38] The failure to notify and consult with Aringuv is a breach of the due diligence owed in the duty to prevent environmental damage to the areas of other States under international law.

2. Public concerns and participation were not considered in the EIA process.

The EIA process must provide a mechanism for ensuring the participation of the public in the decision-making process.[39] According to the Espoo Convention, the Public refers to one or more natural or legal persons.[40] The EIA procedure must create an opportunity for all concerned citizens and persons who may suffer environmental consequences of proposed activities to have a say in making decisions regarding such activities. They have a right to participate in environmental decision making which encompasses the right to be heard and to affect decisions to be made on environmental issues that may affect them.[41] In the present case, serious concerns have been

[37] Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and The Environment*, at 143-150 (Oxford University Press 3rd ed. 2009).

[38] Record, ¶ 9.

[39] Espoo Convention, art. 2(6); CBD, art. 14(1) (a); UNFCCC, art. 6(a) (iii); Rio Declaration, Principle 10.

[40] Espoo Convention, art. 2.

[41] Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized,* Vol. 35, *Denver Journal of International Law & Policy*, p.129 (2006).

expressed by local and international non-governmental organisations[42] about the negative impacts of the Lenoir Corporation's oil extraction activities on the RMG and on climate. The decision making process regarding the oil extraction activities did not consider public opinion or provide the widest possible opportunity for public participation. By virtue of this, the EIA carried out by the DRI in respect of the proposed activities of the Lenoir Corporation is therefore insufficient under international law.

F. Replomuté has a continuing responsibility to monitor the impact of the proposed activities on the environment.

The EIA obligation in international law is of a continuous nature and not a one-time requirement.[43] Once a proposed project commences, the concerned State is obliged throughout the duration of the project to monitor its environmental impact and review to cater for potential implications which may arise. From the facts, the EIA conducted prior to the concession agreement was before the existence of the Gorilla Agreement and the climate change conventions[44] and hence did not consider the impact of the Replomuté's proposed oil extraction activities on the climate and gorillas.[45] Following the conclusion of the concession agreement, significant progress has been made in the construction of the oil pipeline. Despite complaints to Replomuté regarding possible adverse effects of the planned activities, there have been no reviews of the initial EIA conducted to address the likely impact of the proposed project on the gorillas and climate. Replomuté failed

[42] Record, ¶ 21.

[43] Espoo Convention, art. 6(3); Pulp Mills Case, ¶ 205.

[44] Record, ¶ 29.

[45] Record, ¶ 17.

to continuously monitor the impacts of their activities on the environment throughout its duration despite new information on the negative effects it may have on biodiversity and the climate.

II. THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI VIOLATE INTERNATIONAL LAW.

A. Replomuté is directly responsible for the Lenoir Corporation's breach of international law in relation to their proposed activities.

Every internationally wrongful act of a state entails the international responsibility of that state.[46] Internationally wrongful acts arise when actions or omissions are attributable to the State under international law and constitute a breach of an international obligation of the State.[47] In the present case, Replomuté is directly responsible for acts of the Lenoir Corporation because their activities towards the achievement of the proposed oil extraction project are attributable to Replomuté **[1]**; and the further endangerment of the already endangered gorillas and failure to conserve the gorillas as well as the forest constitute a breach of international law **[2]**.

[46] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), art.1. [hereinafter ARSIWA]; Phosphates in Morocco, Italy v France, Preliminary objections, Judgment, PCIJ Series A/B No 74 [hereinafter Phosphates in Morocco Case]; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion [1949] I.C.J. Rep 174;

[47] ARSIWA, art. 2; Case Concerning United States Diplomatic and Consular Staff In Tehran (United States of America v Iran), Judgement, [1980] I.C.J. Rep 3; Dickson Car Wheel Company (U.S.A.) v. United Mexican States (1931) 4 R.I.A.A. 669 [hereinafter Dickson Car Wheel Case].

1. The activities of the Lenoir Corporation are attributable to Replomuté.

Under international law, international responsibility arises for a state where a breach of an international obligation is attributable to the state.[48] The ARSIWA provides that conduct of person(s) shall be considered acts of a state where the person(s) act on the instructions of or under the control of the state in carrying out the said conduct.[49] Despite this, the actions of corporations wholly owned and controlled by a state may not always be actions of that state. ARSIWA explains that the fact that a State establishes a corporate entity does not mean the acts of the corporation are attributable to it.[50] The ICJ recognised the process of lifting the veil of incorporation as admissible in international law and noted that international law acknowledges the legal personality of corporate entities at the national level.[51] State-owned corporations are considered separate from the state, for this reason their acts are not attributable to the state unless they exercise elements of governmental authority as provided in Article 5 of the ARSIWA.[52] Article 5 deals with the attribution to the State of conducts of bodies which are not State organs, but which are nonetheless authorised to exercise governmental authority.[53] In essence, the actions of a state-owned corporation will be attributable to the state where the corporation is subject to the control of the state and it has been authorised to exercise governmental authority.

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[48] ARSIWA, art. 1, 2.

[49] *Id.*, art. 8.

[50] *Id.*, art. 8 ¶ 6.

[51] Barcelona Traction, Light and Power Company, Limited, Judgment, [1970] I.C.J. Rep 3, ¶ 58.

[52] ARSIWA, art. 8 at 48 ¶ 6.

[53] *Id.*, art. 5.

From the facts, the Lenoir Corporation is wholly owned and operated by Replomuté.[54] The concession agreement for the proposed oil extraction agreement was signed between the DRI and Replomuté. Additionally, Replomuté was the one who engaged in subsequent engagements regarding the agreement, like the arbitration in 2015.[55] In effect, the activities of Lenoir Corporation are attributable to Replomuté.

2. The activities of the Lenoir Corporation constitute an internationally wrongful act.

A preparatory act is not an internationally wrongful act unless that act predetermines the final decision to be taken.[56] The ARSIWA makes provision for a completed breach and a continuing breach, stating that, "a completed breach occurs the moment the act is performed while a continuing breach is one that is commenced but is of such a character that the activities extend over a period of time."[57] In considering either breach, the common question that arises is when exactly the breach can be said to have occurred.[58] The commentary answers this by referring to the preparatory conduct of a state towards the international wrong. In the Gabcikovo-Nagymaros Case, where Hungary suspended construction of their portion of the Gabcikovo barrage, Czechoslovakia responded by preparing the provisional solution, "Variant C". In answering the question of when "Variant C" was put into effect for it to amount to an internationally wrongful act, the ICJ

[54] Record, ¶ 17.

[55] Record, ¶ 23.

[56] United Nations Legislative Series. Materials on the Responsibility of States for Internationally Wrongful Acts. 2nd ed (ST/LEG/SER.B/25/Rev.1) Chapter III.

[57] ARSIWA, Article 14(2).

[58] *supra*, note 56 at 199.

explained the difference between the actual commission of an act and preparatory actions.[59] Preparatory activities towards an internationally wrongful act may also be considered internationally wrongful acts if they predetermine the final decision to be taken.[60]

The Lenoir Corporation began activities in pursuit of their proposed oil extraction project in an area inhabited by RMG without recourse to their protection and the conservation of their habitat and without considering the effect of their project on the climate. This species has been listed as endangered species under Appendix I of the CMS.[61] The Lenoir Corporation has engaged in exploration activities and proceeded to construct a pipeline which is almost complete, all in preparation for their oil extraction project in the DRI. The Lenoir Corporation announced its plans to begin oil extraction activities in the DRI upon completion of the pipeline.[62] The construction and subsequent completion of the pipeline predetermines the final decision by the Lenoir Corporation to engage in an oil extraction project in the DRI contrary to international law. As provided by the ARSIWA, the act must be attributable to the state and it must also be a breach of an international obligation.[63] Parties to the CBD express their determination to conserve biodiversity for the benefit of the present and future generations.[64] One objective of the CBD is to conserve biodiversity.[65] Any state that engages in activities that put biodiversity in danger of

[59] Gabcikovo-Nagymaros (Hungary. v. Slovakia.), [1997] I.C.J. Rep 7, ¶ 79.

[60] *Id.*, ¶ 7; United Nations Legislative Series. Materials on the Responsibility of States for Internationally Wrongful Acts. 2nd ed (ST/LEG/SER.B/25/Rev.1), Chapter III ¶ 13.

[61] Record, ¶9.

[62] Record, ¶ 20.

[63] ARSIWA art. 1, 2.

[64] CBD, Preamble, ¶ 23.

[65] *Id.*, art. 1.

extinction breaches the obligation to conserve them. The parties to the CMS have acknowledged the need to take actions to avoid the endangerment of any migratory species.[66] To this end, the parties are to provide immediate protection for migratory species included in Appendix I of the CMS.[67] Parties to the UNFCCC are obliged to conserve forests.[68] Oil extraction activities lead to deforestation in acquiring space to install oil rigs and may lead to spillage and release of greenhouse gases into the atmosphere.[69] The pipeline constructed by the Lenoir Corporation would have required the felling of numerous trees in the forest. The proposed oil extraction activities will also require further destruction of the forest to be able to construct roads, oil rigs and oil pads. The destruction of the forest is in violation of the UNFCCC requirement to conserve forests. The destruction will also destroy the habitat of the mountain gorillas and rob them of their food. This will put the RMG listed under Appendix I and the IUCN Red List of Threatened Species as critically endangered, into further endangerment. The gorillas will be unable to thrive and survive without habitat or food. The proposed oil extraction activities by the Lenoir Corporation will endanger the survival of the southern RMG population instead of conserving them as required by both the CBD and the CMS. The Lenoir Corporation is in breach of the UNFCCC, the CBD and the CMS, all of which are attributable to Replomuté.

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[66] CMS, art. II (2).

[67] *Id.*, art. II (3) (c).

[68] UNFCCC, art. 4(1) (d).

[69] Adedapo O. Adeola et al., *Crude oil exploration in Africa: socio- economic implications, environmental impacts, and mitigation strategies,* Environment Systems and Decisions, at 26, at Chapter 7 Section IV (2022), https://doi.org/10.1007/s10669-021-09827-x <accessed October 20, 2023>.

B. Replomuté has breached its duty under the CMS as a non-range state.

Replomuté is not a range state under the CMS with respect to the RMG. The CMS does not only place obligations on range states, but parties under the CMS as well. Replomuté, a party to the CMS, breached its international obligation under it.

1. Replomuté is not a range state under the CMS but still has some duties as a party to the CMS.

A range state is any state that exercises jurisdiction over an area inhabited by a species or an area where they temporarily migrate.[70] Replomuté does not exercise jurisdiction over the DRI's territory where the RMG inhabit, hence, Replomuté is not a range state. The CMS does not only place duties on range states, it also places duties on state parties to the treaty. Article I, defines a Party to "include a state which has the competence to negotiate, conclude and apply international agreements in matters covered by the CMS."[71] This means that a state, whether a range state or not, can be party to the CMS. Replomuté has signed and ratified the CMS, it has negotiated, concluded and applied the CMS and is a Party to the CMS. The CMS encourages Parties to acknowledge the need to take action to avoid migratory species from becoming endangered.[72] To achieve this, Article II (3) places obligations on State Parties.

Article II(3)(a) obliges states to promote, co-operate in and support research relating to migratory species, (b) obliges states to provide immediate protection for migratory species included in Appendix I and (c) places a duty on states to conclude 'Agreements' covering the conservation

[70] CMS, art. I (1) (f).

[71] *Id.*, art. I (k).

[72] *Id.*, art. II (2).

and management of migratory species included in Appendix II.[73] In accordance with Article II (3) (b), state parties have an obligation to provide immediate protection for the migratory species included in Appendix I. The RMG is listed under Appendix I and as a party to the CMS, Replomuté has an obligation to protect the RMG from endangerment.

2. Replomuté has a duty to protect the RMG from endangerment.

A migratory species is one that moves from one state territory to another. By the definition in the CMS, a geographically separate part of the population of any species, a significant population whose members periodically cross national jurisdictional boundaries, is a migratory species.[74] It is unnecessary for all the members of the species to cross boundaries, however, it is sufficient for a significant part of them to cross even if they are located in separate parts of the nation's territory. The southern RMG population in the DRI are migratory species since the northern population, which is larger, crosses the border between Aringuv and the DRI.

Since the southern RMG population is a migratory species, it is protected by the CMS and is included in Appendix I. Replomuté has an obligation to prevent them from becoming endangered. By entering into a concession agreement to engage in oil extraction activities in the area inhabited by these southern RMG without putting in place measures to protect the gorillas and their habitat, Replomuté is not conforming with their obligation to protect them from endangerment. In furtherance of their oil extraction project, Replomuté has already dug through the habitat of the mountain gorillas and laid pipes. Soon, they will get rid of the vegetation in the area and put up their oil extraction site and equipment. Their activities are likely to drive the mountain gorillas out

[73] *Id.*, art. II (3).

[74] *Id.*, art. I (1) (a).

of their habitat and would also destroy their food and disrupt their lifecycle. The chemicals and hazardous waste likely to be produced from the oil extraction will further cause the species to suffer diseases that may lead to their death. Replomuté has not put any measures in place to protect the RMG or their habitat, nor have they set aside any funds for the environmental impacts their activities are likely to result in. Replomuté is in breach of its duties under the CMS as a state party to the treaty.

C. Replomuté is indirectly responsible for the DRI's breach of the Gorilla Agreement.

A state is indirectly responsible for internationally wrongful acts committed by another state or party where the act was authorised by the state[75]. The DRI's breach of its range state obligations under the Gorilla Agreement was as a result of coercion by Replomuté and for this reason, Replomuté is indirectly responsible for the breaches of the DRI.

1. The DRI breached its range state obligations under the Gorilla Agreement.

A range state is any state that exercises jurisdiction or control over an area inhabited by a species or an area where they temporarily migrate.[76] Jurisdiction is the exercise of the authority of a state to alter, create or terminate legal relationships and obligations.[77] The DRI has authority to attend many international conferences and partake in agreements that create obligations on it as a state, including the CMS, UNFCCC and the Gorilla Agreement with Aringuv which created obligations on them to conserve and protect the RMG in their state.[78] Since the southern RMG population are

[75] ARSIWA, art. 4.

[76] CMS, art. I (1) (h).

[77] Malcolm N. Shaw, *International Law* at 483 (Cambridge University Press 8th ed. 2017).

[78] Record, ¶ 5, 6, 7.

migratory species and they live in the DRI's territory, the DRI has jurisdiction over the habitat of the species.

Range states are obliged to conserve the RMG and their habitat.[79] To achieve this obligation, range states are to strictly conserve gorillas in their territories as provided for under Article III (4) of the CMS.[80] The CMS obligates a range state to conserve the habitats of the species which are of importance in removing those creatures from danger of extinction.[81] The habitats of migratory species are important for their survival. The RMG is a migratory species listed in Appendix I.[82] The DRI breached its obligation under Article III (4)(a) of the CMS by allowing the Lenoir Corporation to engage in the construction of a pipeline from the area inhabited by the southern RMG population and entering a concession agreement for an area inhabited by endangered species without putting in place measures to conserve the habitat of the southern RMG. Range states are to prevent, reduce or control factors that are endangering or are likely to further endanger the endangered species.[83] As a range state, the DRI has a duty to prevent or control factors likely to endanger the migratory species and this constitutes preventing or where it cannot prevent, putting measures in place to control factors likely to further endanger the southern RMG population. By granting a concession to the Lenoir Corporation to extract oil in the habitat of southern mountain

[79] Agreement on the Conservation of Gorillas and their Habitats (Gorilla Agreement), October 24, 2007, 2545 U.N.T.S. 55 art. III (1), (2) (a), (2) (b) [hereinafter Gorilla Agreement].

[80] Gorilla Agreement, art. III (2) (b).

[81] CMS, art. III (4) (a).

[82] Record, ¶ 9.

[83] *Id.*, art. III (4) (c).

gorillas, the DRI breached Article III (4) (c). By allowing the Lenoir Corporation to construct a pipeline in the area without even giving them instructions or measures on protecting the gorillas from further endangerment, the state of the DRI breached Article III (4) (c).

2. Replomuté coerced the DRI into breaching their obligations as a range state under the Gorilla Agreement.

Each state is responsible for any conduct which is attributable to it.[84] A state may also be responsible for an act of another state when it coerces the other state into committing an internationally wrongful act.[85] To be responsible, a state must first engage in an internationally wrongful act and this act must be one that would generally be the act of that state but is not because of coercion by another state.[86] Secondly, the coercing state must have done so knowing about the factual situation.[87] Additionally, an act is coercive if it denies the coerced state any possibility of conforming to the obligation breached.[88] The DRI sought to withdraw from the DRI-Replomuté Agreement but Replomuté invoked the mandatory arbitration provision of the DRI-Replomuté Agreement and the arbitral panel ordered the DRI to permit the Lenoir Corporation to proceed with its oil extraction activities or be subject to more than $825 million (USD) in penalties.[89] The DRI could not revoke the permits they issued for the construction and operation of the pipeline for fear of the $825 million penalty. As a low-income state ravaged by insurgent attacks, Ebola

[84] ARSIWA, art. 1, 2.

[85] ARSIWA, art. 18.

[86] *Id.*, art. 18(a).

[87] *Id.*, art. 18(b).

[88] *Id.*, art. 18 at 70 ¶ 2.

[89] Record, ¶ 23.

outbreaks, corona virus and a military coup,[90] such a penalty will be a huge debt on the state and it may be unable to pay back for years to come. The DRI had no choice than to remain in breach of the Gorilla Agreement. Replomuté is aware of the DRI's obligations under the Gorilla Agreement as they were notified of them in June 2012, they were also given the option by the DRI to either establish a fund for the environmental and societal impacts the proposed oil extraction project will have or have the DRI withdraw from the concession agreement.[91] Replomuté, being aware of the factual situation and the laws the DRI was subject to, decided to take them to arbitration to compel the DRI to carry on with the agreement against their will, knowing that the DRI would not be able to afford the penalty. Replomuté's action amounts to coercion of the DRI as they prevented the DRI from performing their duties under the Gorilla Agreement.

It is recognised that the DRI became a party to the Gorilla Agreement in 2007 but failed to conform to its duties as a range state under the agreement for years and the DRI was solely responsible for that breach. However, in 2012, the DRI opted to fulfil their international obligations by asking to either withdraw from the agreement or have Replomuté pay for environmental and societal impact.[92] They, however, continued to breach their international obligations due to Replomuté's coercion. Replomuté is internationally responsible for the DRI's breach of its international obligations.

[90] Record, ¶ ¶ ¶ ¶ 18, 19, 32, 22.

[91] Record, ¶ 22.

[92] Record, ¶ 22.

3. The ARSIWA codifies CIL on coercion.

The ARSIWA assembles and codifies CIL on international obligations of state and their responsibilities.[93] Its articles have been referred to by the ICJ in several cases.[94] The ARSIWA reflects state practice on coercion of a state by another state.[95] Coercion may involve a violent use of force or a non-violent use of force like economic pressure.[96] The USA has been accused severally of using military force as a coercive tool to achieve its political objectives.[97] Colonial powers took advantage of their dominance over their colonies and coerced them into entering agreements to either cede their lands to them or capture their natural resources. For instance, the "labour problem" in Kenya was premised on the settler estate producers applying official coercion on the indigenes like the use of African taxation to ensure the recruitment of labour and sustain the necessary relations of production.[98] Not only does the ARSIWA provide for state coercion, but it also reflects the practices of states on the ground.

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[93] *Id.*, ¶ 1.

[94] Corfu Channel, United Kingdom v Albania, Judgment, (1949) I.C.J. Rep 244; Dickson Car Well Case; Phosphates in Morocco Case.

[95] ARSIWA, art.18.

[96] *Id.*, art.18, ¶ 3.

[97] Barry Blechman, James Siebens & Melanie W. Sisson, *Military Coercion and US Foreign Policy: The Use of Force Short of War* (Barry Blechman et al, 2020), Military Coercion and US Foreign Policy: The Use of Force Short of War • Stimson Center <accessed November 8, 2023>.

[98] B. J. Berman & J. M. Lonsdale, *Crises of Accumulation, Coercion and the Colonial State: The Development of the Labor Control System in Kenya, 1919-1929,* Vol. 14, Canadian Journal of African Studies/ Revue Canadienne des Études p. 55-81 (1980), p.81 https://www.jstor.org/stable/484278?seq=1&cid=pdfreference#references_tab_contents <accessed November 8, 2023>.

CONCLUSION

Applicant, Aringuv respectfully requests the Court to adjudge and declare that:

1. As a procedural matter, the failure of Replomuté to prepare an EIA with respect to the proposed oil extraction activities in the DRI violates international law; and
2. As a substantive matter, the actions of Replomuté with respect to the proposed oil extraction activities in the DRI violate international law.

Respectfully submitted,

Agents for the Applicant.