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THE INTERNATIONAL COURT OF JUSTICE

The Peace Palace

The Hague, Netherlands

QUESTIONS RELATING TO

MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

2023 General List no. 303

ARINGUV

(APPLICANT)

v.

REPLOMUTÉ

(RESPONDENT)

– Memorial for the Applicant –

28TH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, 2023-24

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INTERNATIONAL TREATIES AND CONVENTIONS

TABLE OF ABBREVIATIONS

APTHHA	ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries
ARSIWA	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries
CBD	Convention of Biological Diversity
CIL	Customary International Law
CMS	Convention of Migratory Species
COP	Conference of Parties
DRI	the Democratic Republic of Ibirunga
EIA	Environmental Impact Assessment
ICJ	International Court of Justice
IEL	International Environmental Law
ILC	International Law Commission
MEA	Multilateral Environment Agreement
NDC	Nationally Determined Contribution
R	Record
Royal Mountain Gorilla (*Gorilla ibirungai royali*)	Mountain Gorilla
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
¶	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 DRI VIOLATE INTERNATIONAL LAW?

STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and the annexed Record, concluded on 24th July 2023, including the clarifications agreed to therein, the states of Aringuv and Replomuté, have submitted by Special Agreement the differences between them concerning questions relating to Mountain Gorillas and Impact Assessment, in accordance with Article 40 (1) of the Statute of the International Court of Justice ("ICJ").

The Registrar of the Court, in acknowledgement of the above, addressed a notification to the parties on 31st July 2023. Aringuv and Replomuté have accepted the jurisdiction of the ICJ pursuant to Article 36 (1) of the Statute and request the Court to adjudge the dispute on the basis of the rules and principles of general international law, including any applicable treaties. The parties have agreed to accept as final and be bound by the decision of the Court.

STATEMENT OF FACTS

The Democratic Republic of Ibirunga (DRI) and Aringuv are neighbouring states located in Africa (R¶1). Aringuv is a lower-middle-income country with growing wildlife tourism, including mountain gorilla tourism (R¶2). By contrast, DRI is a low-income country whose economy is based on agriculture (R¶1). The Royal Mountain Gorilla, a critically endangered species, is endemic to both DRI and Aringuv with its southern population primarily residing in DRI (R¶9).

DRI has extensive natural resources, particularly oil (R¶1). Therefore, Replomuté, a high-income European country (R¶3), entered into an agreement with DRI to extract this resource (R¶17). This 1981 agreement permitted Lenoir Corporation, an entity wholly owned and controlled by Replomuté, to explore and extract oil. Oil extraction is planned to occur in DRI's national park, home to the southern population of the Mountain Gorillas. However, several events, such as the civil war, the Ebola outbreak and the COVID-19 pandemic derailed the project, due to which it stands incomplete to this date (R¶18,19).

In 2012, a military coup in DRI brought General Mina to power. Subsequently, General Mina asserted DRI's withdrawal from the 1981 agreement (R¶22). This was due to DRI acceding to the Gorilla Agreement, specifically aimed at protection of the endangered species. This withdrawal was foreclosed by Replomuté's invocation of the mandatory arbitration clause and an $825 million award in its favour (R¶23).

The project was opposed by Aringuv due to its potentially harmful environmental and biodiversity impacts, particularly on the Mountain Gorillas. In 2018, Aringuv initiated a diplomatic exchange with the government of Replomuté (R¶27). Through the diplomatic notes, Aringuv expressed its deep concerns regarding the project due to its likely transboundary impacts and harm to the Mountain Gorillas. It also contended Replomuté's violation of the CMS, CBD, UNFCCC, and the Gorilla Agreement, along with the coercive nature of Replomuté's activities. However, Replomuté held that no transboundary harm would occur from its project. It declined to undertake the responsibility of preparing an EIA and used its non-range status under the CMS to deny any responsibility towards the conservation of the Mountain Gorillas (R¶28). It also dispelled Aringuv's claim of coercion by citing DRI's sovereign right to use its resources and its consent.

This dispute was attempted to be resolved via negotiations facilitated by Uganda. As a result of this negotiation, Aringuv and Replomuté agreed to submit certain questions to the ICJ for determination (R¶35).

SUMMARY OF ARGUMENTS

A. AS A PROCEDURAL MATTER, THE FAILURE OF REPLOMUTÉ TO PREPARE AN EIA WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN DRI VIOLATES INTERNATIONAL LAW

First, the acts of Lenoir Corporation are attributable to Replomuté because it had complete control over Lenoir's operations. The territorial origin of the exploration and extraction activities is irrelevant, as the responsibility rests on the state pursuing the activity.

Second, Replomuté breaches its customary international law (hereinafter CIL) and treaty obligations. The previous Environment Impact Assessment (hereinafter EIA) conducted in 1981, which ignored impacts on the Mountain Gorillas and the surrounding environment, is inadequate because it falls short of certain minimum requirements of international law. Replomuté fails to understand that the potential impacts of its activities are both significant and transboundary.

Lastly, EIA obligations under CIL are continuous, and Replomuté has not taken any effort to monitor the effects of its project for the past 40 years. By virtue of this, Replomuté violates its CIL obligations of prevention, precaution, and cooperation. Replomuté also breaches its obligations under the Convention of Biological Diversity (hereinafter CBD), Convention on Migratory Species (hereinafter CMS), and the United Nations Framework Convention on Climate Change (hereinafter UNFCCC).

B. AS A SUBSTANTIVE MATTER, THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN DRI VIOLATE INTERNATIONAL LAW.

First, Replomuté breaches its obligations under the CBD and the CMS. These conventions impose obligations of protection of endangered biodiversity and migratory species (such as the Mountain Gorilla). Replomuté's project is diametrically opposite to its duties.

Second, Replomuté violates various established principles of CIL, including the principles of cooperation, prevention, and precaution. Replomuté has ignored its responsibilities of notification, consultation, and information sharing. As a stakeholder (the Mountain Gorilla is a shared resource), Aringuv is entitled to the fulfilment of these obligations. Additionally,

Replomuté violates the prevention principle by ignoring the potentially harmful consequences of its acts on Aringuv. The oil exploration that has been ongoing for the past few decades might have already caused harm to the Mountain Gorillas. Scientific uncertainty cannot be used as an excuse in circumstances where the potential harm is significant.

Lastly, Replomuté is liable for coercion under international law. Replomuté has economic leverage over DRI due its high-income status and investments in DRI. In indirectly coercing DRI to follow through with the 1981 Agreement, Replomuté violates the principle of non-intervention and limits DRI's sovereign right to make its own choices. Aringuv is impacted because Replomuté's coercion leads to transboundary impacts extending to Aringuv in violation of the Gorilla Agreement.

ARGUMENTS ADVANCED

A. AS A PROCEDURAL MATTER, THE FAILURE OF REPLOMUTÉ TO PREPARE AN EIA WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN DRI VIOLATES INTERNATIONAL LAW

A State's conduct violates international law when it is attributable to the state, and constitutes a breach of an international obligation.[1] In the present case, the responsibility to prepare an EIA falls on Replomuté as oil exploration and extraction activities are attributable to it **(1)**, and Replomuté breaches its international obligations in its failure to prepare one **(2)**. Therefore, Replomuté violates international law.

1. THE ACTS OF LENOIR CORPORATION ARE ATTRIBUTABLE TO REPLOMUTÉ

The conduct of an entity shall be considered an act of a State if the entity is acting on the instructions of, or under the direction or control of, that State.[2] Replomuté completely owns and operates Lenoir Corporation.[3] Moreover, it was Replomuté and not Lenoir Corporation which entered into the oil extraction agreement with DRI in 1981.[4]

While oil exploration and extraction activities take place in the sovereign territory of DRI, physical control of territory is the determining factor and not administrative sovereignty.[5] In the cases concerning Costa Rica and Nicaragua, the ICJ held that the responsibility to prepare an EIA with respect to a proposed activity "*rests on the State pursuing the activity*".[6] States

[1] ILC Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES/56/83, (Dec. 12, 2001), art. 2 [hereinafter ARSIWA].

[2] ARSIWA, art. 8.

[3] Record at ¶ 17.

[4] *Id.*

[5] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. Rep. 16.; MALCOLM N. SHAW, INTERNATIONAL LAW 688 (9 ed. Cambridge University Press 2021) [hereinafter Shaw].

[6] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road (Nicaragua v. Costa Rica), Judgement, 2015 I.C.J. Rep. 665, ¶ 153 (Dec. 16) [hereinafter CostaR/Nicaragua Cases].

must ensure that activities within their jurisdiction or control do not harm the environment of other States,[7] irrespective of them taking place outside sovereign territory.[8]

In the present case, the State pursuing the activity, albeit through a corporate veil,[9] is Replomuté.[10] The activities relating to oil extraction and exploration are within its jurisdiction and control. Therefore, the responsibility to prepare an EIA falls on Replomuté.

2. REPLOMUTÉ HAS BREACHED ITS INTERNATIONAL OBLIGATIONS IN ITS FAILURE TO PREPARE AN EIA.

The ICJ, in the Pulp Mills case, considered it "*a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context*".[11]

The EIA conducted in 1981 was inadequate and invalid **(2.1)** as Replomuté failed to consider the significant transboundary harm likely to ensue from the oil extraction project **(2.2)**. Replomuté is a party to various treaties imposing EIA obligations as well. Therefore, Replomuté breaches its duties under customary international law (hereinafter 'CIL') **(2.3)** and treaty law in its failure to conduct an EIA **(2.4)**.

2.1. The previous EIA is inadequate and invalid

While the specific content of an EIA is to be determined by the State conducting it, an EIA must have "*regard to the nature and magnitude of the proposed development and its likely*

[7] Convention on Biological Diversity, June 5, 1992, 1760, art. 3, 79 U.N.T.S. [hereinafter CBD].

[8] KEES BASTMEIJER & TIMO KOIVUROVA, Transboundary Environmental Impact Assessment: An Introduction, in THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT 5 (Martinus Nijhoff 2008).

[9] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 141-165 (Cambridge University Press 2013).

[10] Record ¶ 17.

[11] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, ¶ 204 (Apr. 20) [Hereinafter Pulp Mills].

adverse impact on the environment".[12] In this regard, due diligence plays a substantive role providing the standard by which the adequacy of EIAs will be assessed.[13]

However, beyond what may be required by national law, international law requires EIAs to assess possible effects on the environment of other states likely to be affected.[14] In the *South China Sea Arbitration*, notwithstanding China's domestic laws, it was held that as a minimum, China was required to "*have assessed possible effects on the marine ecosystem of the South China Sea, the coral reefs at issue, the biodiversity and sustainability of living resource there and endangered species*".[15] Therefore, mere conformity with domestic law does not preclude the conduct being characterised as internationally wrongful.[16]

In the present case, while the previous EIA was in conformity with local laws, it only assessed impacts on human populations and the amount of possible waste generation.[17] Impacts on the Gorillas and their habitat, along with transboundary impacts, were not considered.[18] The environmental effects in an EIA must be assessed with a degree of detail commensurate with their likely environmental significance.[19] In addition, more than 40 years have passed since this EIA was conducted, and scientific understanding of environmental impacts has become more precise.[20] Therefore, the previous EIA is severely inadequate and cannot be used as an excuse by Replomuté to deny responsibility to prepare an EIA.

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[12] Pulp Mills at ¶205.

[13] Neil Craik, *The Duty to Cooperate in the Customary Law of Environmental Impact Assessment*, 69 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 245 (2020) [hereinafter Craik on Cooperation].

[14] I.L.C., Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Rep. on the Work of Its 53rd Session, U.N. Doc. A/56/10, at 157-8, art. 2 (2001) [hereinafter APTHHA], art. 7.; CostaR/Nicaragua Cases at ¶105.

[15] South China Sea Arbitration (Phil. v. China), Perm. Ct. Arb. Case No. 2013-19, Award, ¶ 911 (2016).

[16] ARSIWA, art. 3.

[17] Record at ¶ 17.

[18] *Id.*

[19] United Nations Environmental Programme, *The Goals and Principles of Environmental Impact Assessment*, Principle 5, UNEP/GC.14/L.37-B (UNEP 1987); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 659 (4 ed. Cambridge University Press 2018) [hereinafter Sands].

[20] APTHHA at 152-3, art. 2.

2.2. The impacts are potentially significant and transboundary

The "risk of causing significant harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact.[21] Replomuté argues there is no demonstrable negative impact from its project on the Mountain Gorillas or the environment.[22] However, the term "significant" is interpreted to mean something more than "detectable".[23] The harm need not be serious or substantial to be actionable.[24] An EIA must be prepared even if the risk of significant harm is small and uncertain.[25] Therefore, the mere presence of a risk of significant and transboundary harm is enough to trigger an EIA obligation. In the present case, contrary to mere presence, oil exploration and extraction pose a significant, and previously unaccounted for,[26] threat to the endangered Mountain Gorillas and their habitat. This harm is likely to affect the inherently migratory species and the ecology of the region including Aringuv.[27]

Past experiences have revealed that Mountain Gorillas are particularly prone to respiratory illnesses arising from humans and their industrial activities.[28] Biologically, Mountain Gorillas have a weak immune system – even a common cold can prove fatal.[29] Apart from the hazardous pollutants damaging the health of the Mountain Gorillas, there is a risk of spillage polluting water bodies and altering the ecology. Such effects can lead to far-reaching consequences for

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[21] M. B. Akehurst, *International liability for injurious consequences arising out of acts not prohibited by international law*, 16 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 9-12 (1985).

[22] Record at ¶ 30.

[23] APTHHA at 152.

[24] *Id.*

[25] The MOX Plant Case (Ireland v. United Kingdom), Case No. 10, Order of Dec. 3 2001, ITLOS Rep. 95, ¶84; Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), 2000 Arbitral Tribunal 1, ¶79 (Aug. 4).

[26] *Infra* § 2.1.

[27] *Oil and Gas Exploration Impacts*, TRIBAL ENERGY AND ENVIRONMENTAL INFORMATION CLEARINGHOUSE (Nov. 7, 2023), http://teeic.anl.gov/er/oilgas/impact/explore/index.cfm.

[28] Lucy H. Spelman et al, *Respiratory Disease in Mountain Gorillas (Gorilla beringei beringei) in Rwanda, 1990 – 2010: Outbreaks, Clinical Course, and Medical Management*, 44(4) JOURNAL OF ZOO AND WILDLIFE MEDICINE 1027-1035 (2013).

[29] *Mountain Gorillas: Close Relatives at Risk*, WORLD WILDLIFE FUND (Nov. 7, 2023), https://www.wwf.org.uk/learn/wildlife/mountain-gorillas.

neighbors such as Aringuv due to their transboundary nature. The experiences of extraction in Ogoniland, Niger Delta and Bas-Congo regions in Eastern Africa serve as cautionary examples.[30] Therefore, the constant human intervention in their natural habitat can prove to be a grave and transboundary risk.

In addition, the regenerative capacity of the species *Gorilla beringei beringei* – a species similar in characteristics to the Mountain Gorillas[31] - is very low.[32] In the past 3 decades, the increase in the population of the former has been close to only 300.[33] Therefore, any harm caused to one-third of the Mountain Gorilla population in DRI may lead to severe implications and hamper the survival of the species as a whole.

A loss of their habitat may also cause their encroachment into the human settlement of Aringuv. This displacement may impact their numbers since the land they move to may not be a suitable habitat. The movements of Mountain Gorillas is restricted to high altitudes.[34] If they are forced to migrate to even higher ground they may die of hypothermia.[35]

Furthermore, oil extraction results in large emissions of greenhouse gases affecting surrounding areas.[36] Vehicular pollution due to the transportation of raw materials will only add to this.[37] The vast number of pollutants released will be carried to surrounding areas,

[30] AMNESTY INTERNATIONAL, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, AFR 44/018 (2009).

[31] Clarification A9.

[32] A. C. Granjon at al, *Estimating abundance and growth rates in a wild mountain Gorilla population*, 23(4) ANIMAL CONSERVATION 455-465 (2020).

[33] Ini Ekott, *Without room to expand, mountain gorillas' population growth could backfire*, MONGABAY (Nov. 7, 2023), https://news.mongabay.com/2021/06/without-room-to-expand-mountain-gorillas-population-growth-could-backfire/.

[34] Stephanie L. Cannington, *Gorilla beringei (Primates: Hominidae)*, 50 MAMMALIAN SPECIES 126 (2018).

[35] Abel Musana & Alphonse Mutuyeyezu, *Impact of climate change and climate variability of altitudinal ranging movements of Mountain Gorillas in Volcanoes National Park, Rwanda*, in EDUCATION AND TRAINING PROGRAM ON CLIMATE CHANGE AND BIODIVERSITY IN ALBERTINE RIFT (2011).

[36] David Gonzalez et al, *Upstream oil and gas production and ambient air pollution in California*, 806(1) SCIENCE OF THE TOTAL ENVIRONMENT (2022).

[37] *Sources of Oil and Gas Air Pollution*, EARTHWORKS (Oct. 6, 2023), https://earthworks.org/issues/sources-of-oil-and-gas-air-pollution/.

including Aringuv, by wind.[38] These pollutants may even lead to secondary consequences such as acid rain.[39]

These concerns mirror those expressed when SOCO International, a British energy firm, intended to extract oil in Virunga National Park where the species *Gorilla beringei beringei* resides.[40] Its project was halted and prohibited even before it could start exploratory operations, despite having a production-sharing agreement with the Congolese Government.[41]

Lastly, the conservation efforts pertaining to the Mountain Gorillas are likely to be reversed. The risk need not be of a high probability and is to be measured by factual and objective standards. [42] Mountain Gorillas undeniably rely on their habitat for survival.[43] Due to their highly protected status, the fact that they are listed as a "critically endangered species," and the possible decline in their populations, the damage is objectively shown by the destruction of the habitat. In addition, due to their migratory status, they form a shared resource between DRI and Aringuv,[44] making the latter an important stakeholder.

2.3. Replomuté violates CIL

EIA obligations under CIL display both state practice and *opinio juris*. Such requirements have been established in domestic legislation worldwide[45] and have become institutionalised in over 100 countries.[46] They are established in several MEAs and soft law commitments of most

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[38] *Weather and air quality*, WAIKATO (Oct. 6, 2023), https://www.waikatoregion.govt.nz/environment/air/weather-and-air/#:~:text=or%20no%20wind.-,Wind%20speed,in%20dry%20windy%20rural%20areas.

[39] *Acid rain*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (Oct. 6, 2023), https://www.epa.gov/acidrain/what-acid-rain.

[40] *Virunga National Park and SOCO International Plc*, WORLD WILDLIFE FUND (Nov. 7, 2023), https://assets.wwf.org.uk/downloads/share_action_virunga_brief.pdf.

[41] *Soco halts oil exploration in Africa's Virunga national park*, THE GUARDIAN (Nov. 7, 2023), https://www.theguardian.com/environment/2014/jun/11/soco-oil-virunga-national-park-congo-wwf.

[42] APTHHA at 151.

[43] Raymon A. Dart, *Can the Mountain Gorillas be Saved?*, 1(4) CURRENT ANTHROPOLOGY 330-331 (1960).

[44] Klemm Cyril De, *Migratory Species in International Law*, 29 (4) NATURAL RESOURCES JOURNAL 952 (1989).

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

[46] UNECE International Study on the Effectiveness of EA - https://unece.org/DAM/env/eia/documents/StudyEffectivenessEA.pdf.

nations.[47] Moreover, no state has challenged the existence of an EIA obligation in a dispute before the ICJ.[48] Therefore, there is sufficient evidence of state practice and *opinio juris* concerning the existence of an EIA obligation.[49] Replomuté, through its activities, violates the precautionary and prevention principle **(2.3.1)** and the cooperation principle **(2.3.2)**.

2.3.1. Replomuté violates the principles of prevention and precaution

The preventive principle requires states to prevent, reduce and control the risk of environmental harm to other states,[50] and has been considered as *lex lata* by the ICJ on various occasions.[51] Not preparing an EIA where there is a risk of transboundary harm violates this principle and the related due diligence duty.[52] The ICJ has always noted that vigilance and prevention are necessary for the often irreversible nature of environmental damage.[53] An EIA is imperative to detect signs of future environmental harm and aid decision-making.[54] Moreover, such an obligation is not precluded by uncertainty with respect to the possible harm,[55] and states must undertake relevant precautions in the form of an EIA.[56]

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[47] Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention*, 20(3) REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW 227-231 (2011).

[48] CostaR/Nicaragua Cases at ¶101; Pulp Mills at ¶116 & ¶203.

[49] CostaR/Nicaragua Cases (separate opinion by Dugard, J. *Ad Hoc*) at ¶9.

[50] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 275-285 (7 ed. Oxford University Press 2008).

[51] Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 29 (July 8) [hereinafter Nuclear Tests case]; Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgement, 1997 I.C.J. 3, ¶53 (Feb. 5) [hereinafter Gabcikovo]; See Sands at 236.

[52] RENE LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 19-25 (Springer 1996); PATRICIA BIRNIE AND ALAN BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 109 (2 ed. Oxford University Press 2002) [hereinafter Birnie and Boyle]; CostaR/Nicaragua Cases at ¶ 104.

[53] Gabcikovo at ¶ 140.

[54] Yoshifumi Tanaka, *Obligation to Conduct an Environmental Impact Assessment (EIA) in International Adjudication: Interaction between Law and Time*, 90(1) *NORDIC JOURNAL OF INTERNATIONAL LAW* 101-2 (2021).

[55] U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 15, U.N. Doc. A/C0NF.151/26/Rev.1 (Aug. 12, 1992).; See ARIE TROUWBORST, EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW 303-347 (Kluwer Law International 2002).

[56] Pulp Mills (separate opinion by Cançado Trindade, J.) at ¶ 63 & ¶ 71; Nuclear Tests case (dissenting opinion of Weeramantry, J.) at 344; ALAN BOYLE & MICHAEL BOWMAN, ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW: PROBLEMS OF DEFINITION AND VALUATION 141 (Oxford University Press 2002).

Replomuté cannot argue that it has fulfilled its due diligence obligations when it has failed to study the impacts of its proposed project on Aringuv's environment.[57] Further, it has deviated from the precautionary approach that is required in such circumstances. Thus, Replomuté violates the principle of prevention and its due diligence obligations in failing to prepare an EIA.[58]

2.3.2. Replomuté violates the cooperation principle

The cooperation principle is a customary rule[59] and requires states to cooperate in good faith in matters concerning the environment.[60] EIA processes, in governing the modalities of notification and consultation, are the primary means of implementing the duty to cooperate.[61] The objective of an EIA is only to provide Aringuv with an opportunity to express its concerns.[62] In helping both parties understand the nature of impacts, an EIA is crucial if Replomuté intends to cooperate.[63] However, Replomuté has not prepared an EIA. Further, the prior EIA in 1981 did not assess impacts on biodiversity and climate change.[64] Therefore, Replomuté violates the cooperation principle. [65]

2.3.3. Replomuté's obligations are continuous under CIL

The ICJ has observed that "*the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project*".[66] Judge Weeramantry

[57] Record at ¶17.

[58] *Id.*

[59] CostaR/Nicaragua Cases at ¶106. See APTHHA at 159, art. 8. See RioDec, Principle 27.

[60] Sands at 213.

[61] Craik on Cooperation at 247.

[62] CostaR/Nicaragua Cases.

[63] R Bartlett and P Kurian, *The Theory of Environmental Impact Assessment: Implicit Models of Policy Making*, 27(4) POLICY AND POLITICS 415 (1999).

[64] Record at ¶ 17.

[65] NEIL CRAIK, THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT 95 (Cambridge University Press 2008) [hereinafter Craik's Book].

[66] Pulp Mills at ¶ 205; Gabcikovo case ¶ 140.

reasoned that "*since the obligation to prevent harm continues beyond the planning stage, so too should the obligation to monitor impacts to ensure no adverse impact*".[67]

As the responsibility to conduct an EIA as already been attributed to Replomuté, this responsibility continued from 1981 to the present time. Replomuté has not made any effort in the past 4 decades to monitor its project in DRI,[68] and therefore violates CIL.

2.4. Replomuté violates its treaty obligations

Replomuté is a party to the CBD **(2.4.1)**, the CMS **(2.4.2)**, and the UNFCCC **(2.4.3)**.[69] Each of these treaties imposes EIA obligations on parties. Article 26 of the VCLT holds that every treaty binding upon parties must be upheld in good faith.[70] In its failure to prepare an EIA, Replomuté violates each of these treaties.

2.4.1. Replomuté violates the CBD

Article 14(1)(a) of the CBD requires each party to carry out an EIA of its proposed projects that are likely to have significant effects on biological diversity.[71] It does not limit conducting an EIA in a transboundary context. Therefore, the rare presence of Southern population of the Mountain Gorillas in Aringuv is no justification for failing to prepare an EIA.

Further, the COP of the CBD has taken many decisions with respect to the furtherance of the EIA commitment under Article 14(1)(a).[72] COP Decisions and guideline documents are normatively significant and elaborate upon existing treaty obligations.[73] Considering the sheer magnitude of soft law commitments, it is clear that the parties to the CBD have attempted to

[67] Gabcikovo Case (separate opinion of Weeramantry J.) at ¶ 111-113. See Craik's Book at 115.

[68] Record at ¶ 18-26.

[69] Record at ¶ 7, ¶ 8, & ¶ 13.

[70] Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Shaw at 788-9.

[71] CBD, art.14(1)(a).

[72] See Decision VIII/28 Adopted by the COP to the CBD, U.N. Doc. UNEP/CBD/COP/DEC/VIII/20, 2006.

[73] Craik's Book at 105-7; A.J.P Tammes, *Decisions of International Organs as a Source of International Law*, 94 HR 265 (1958).

further the EIA commitment. Replomuté is a party to the CBD and its allied soft law commitments.[74]

Replomuté has failed to correctly conduct an EIA, which is mandatory where the potential harm is significant and transboundary.[75] Moreover, CBD provides that consultation with and warning to "stakeholders" who may be affected by the actions of a state is necessary to correctly conduct an EIA.[76] Replomuté, through its inadequate EIA and lack of consultation has failed to adhere to the provisions of the CBD.

2.4.2. Replomuté violates the CMS

Resolution 7.2 of the COP to the CMS deals with impacts assessment and migratory species. The COP understood the EIA commitment as a manifestation of Article 2(2) [on avoiding endangerment of migratory species] and Article 3(4) [on protection of Appendix I species, which includes the Mountain Gorillas].[77] Further, a strong connection was made with the COP decisions of the CBD.[78] Not conducting an EIA would indirectly violate the duties of protection and non-endangerment set out in Articles 2 and 3 of the CMS.

The value and importance of soft law instruments are indisputable. Replomuté is a party to the CMS,[79] and in not adhering to Resolution 7.2, it violates its commitments under the CMS to protect migratory species and thereby conduct an EIA.

2.4.3. Replomuté violates the UNFCCC

Article 4(1)(f) of the UNFCCC mandates that all parties shall take climate change considerations into account in their relevant economic actions by appropriate methods such as impact assessments, to minimize adverse effects on the quality of the environment, of projects

[74] Record at ¶ 7.

[75] *Infra* § 2.1.

[76] CBD, art. 14(1)(c).

[77] Convention on the Conservation of Migratory Species of Wild Animals, 3 June 1979, 333, art. 2(2) & art. 3(4), 1651 U.N.T.S. [hereinafter CMS].

[78] See Decision IV/10c Adopted by the COP to the CBD, U.N. Doc. UNEP/CBD/COP/DEC/IV/10c, 1995.

[79] Record at ¶ 8.

or measures undertaken *by them*.[80] This commitment is accompanied by several soft law instruments both elaborating and reinforcing it.

By failing to conduct an EIA, Replomuté violates its direct and soft law obligations under the UNFCCC. The usage of the phrase 'by them' reinforces that the commitment is none but Replomuté's.

B. AS A SUBSTANTIVE MATTER, THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI VIOLATE INTERNATIONAL LAW.

Replomuté violates its international obligations under treaty law **(3)** and CIL **(4)** and is indirectly responsible for its coercive acts against DRI **(5)**.

3. REPLOMUTÉ VIOLATES ITS TREATY OBLIGATIONS

Each state is bound by its treaty obligations which they must conform to in good faith.[81] The activities of Replomuté within the territory of DRI violate the CMS **(3.1)** and the CBD **(3.2)**.

3.1. Replomuté violates the CMS

The CMS classifies all members of a species, including those geographically separated, as 'migratory' if a significant portion of its population migrates.[82] Following the provision, the southern population of the Mountain Gorillas must be considered migratory under Appendix 1.[83] Thus, the activities of Replomuté affecting them will fall within the ambit of the CMS.

As a non-range state,[84] Replomuté carries the responsibility of extending immediate protection to Appendix 1 species such as the Mountain Gorillas.[85] Replomuté's project is in direct contravention of this provision as it damages the natural habitat of the Mountain Gorillas,

[80] United Nations Framework Convention on Climate Change, 9 May 1992, 107, art 4(1)(f), 1771 U.N.T.S. [hereinafter UNFCCC].

[81] VCLT, art. 24.

[82] CMS, art. 1(1).

[83] CMS, appendix 1.

[84] Record at ¶10.

[85] CMS, art. 2(3).

leading to their potential displacement. It brings humans into close contact with them, exposing them to the threat of transmission of illness and diseases.[86]

The risk of the species becoming invasive if translocated outside their natural range also persists due to their potential displacement.[87] Therefore, the CMS states that parties should undertake dedicated risk assessments incorporating the future movement of animals.[88] Replomuté failed to assess this risk as evidenced by the inadequate EIA.[89]

Further, COP resolutions require Replomuté to set up a monitoring mechanism to assess the environmental impacts of its project on migratory species.[90] Replomuté is bound by CMS Resolutions because these serve as an authoritative interpretation of international agreements.[91] Replomuté must take additional care due to the critically endangered status of the Mountain Gorillas.[92]

3.2. Replomuté violate the CBD

The CBD maintains that states must ensure the sustainable use of its biological resources, reduce harmful impacts on biodiversity,[93] and protect natural habitats and viable populations of species.[94] Far from being sustainable, Replomuté's activities harm the natural habitats of the Mountain Gorillas and affect the health of their population. Replomuté has been conducting oil exploration in these regions for the past 40 years. However, exploratory activities such as seismic surveys and surface drilling will certainly alter the natural habitat of the Mountain

[86] *supra* note 30.

[87] *Invasive alien species and sustainable development*, IUCN (Nov. 7, 2023), https://www.iucn.org/resources/issues-brief/invasive-alien-species-and-sustainable-development.

[88] Resolution 7.03, Adopted by the COP to the CMS, U.N. Doc. UNEP/CMS/COP/Resolution 7.03, 2017.

[89] *Infra* § 2.1.

[90] *supra* note 88.

[91] Sands at 109.

[92] IUCN Species Survival Commission, *Guidelines for Reintroductions and Other Conservation Translocations*, annex 3(4) (2013).

[93] CBD, art. 10.

[94] *Id.*

Gorillas by clearing the surrounding vegetation.[95] This will prove detrimental to the species as its diet consists predominantly of plants and other vegetation.[96]

The CBD imposes obligations on Replomuté to identify activities which may significantly impact biodiversity and to monitor the effects of these activities.[97] Replomuté must also consult and communicate with Aringuv in matters affecting its territory.[98] Moreover, states cannot misuse their sovereign rights to cause damage to the environment or territory of another state.[99] Thus, the consent of DRI cannot be used by Replomuté to evade responsibility. Replomuté has not made any effort to monitor the effects of its activities and has not communicated with Aringuv.[100] The ramifications of its ongoing oil exploration remain unaddressed due to this. The cumulative effect of Replomuté's inaction is its failure to conform to the CBD.

4. REPLOMUTÉ VIOLATES CIL

The actions of Replomuté violate its duty to cooperate **(4.1)**, along with its due diligence and precautionary obligations **(4.2)**.

4.1. Replomuté violates its duty to cooperate

CIL obligates States to cooperate concerning environmental matters.[101] The principle is contained in many treaties,[102] and international instruments,[103] and supported by extensive State practice,[104] sustaining the view that it is CIL.[105]

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[95] The Energy Group, *Conducting Seismic Exploration: Environmental Challenges and Government Requirements*, in INSIGHT CONFERENCE ON SEISMIC DATA AND NEW TECHNOLOGIES (Lawson Lundell LLP 2002).

[96] *Mountain Gorilla Diet*, NYUNGWE FOREST NATIONAL PARK (Nov. 7, 2023), https://www.nyungweforestnationalpark.org/mountain-gorilla-diet/.

[97] CBD, art. 7(c)(d).

[98] CBD, art. 5.

[99] CBD, art. 3.

[100] Record at ¶ 18-26.

[101] Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, ¶ 22 (Apr. 9) [hereinafter Corfu Channel].

[102] Craik on Cooperation.

[103] Charter of the United Nations, Oct. 24 1945, 1, art. 74, 16 U.N.T.S.

[104] Craik on Cooperation.

[105] Sands at 842.

This duty requires notification to other states of any activities likely to produce harmful effects on their environment and to provide them with all relevant and useful information[106]. States are obligated to notify prior to such activities taking place and have a duty to consult at an early stage.[107] Despite Aringuv being a neighbouring state and the harm likely to be transboundary, no notification or consultation was undertaken by Replomuté. Even when the threat of extraction was imminent, it was Aringuv who approached Replomuté via diplomatic exchange. Despite this, Replomuté failed to address the Aringuv's concerns.[108]

Moreover, this duty must be carried out in good faith and not as a mere formality.[109] Replomuté's insistence upon its position without contemplating any modification of it,[110] and constant refusals to take into consideration Aringuv's concerns evince bad faith and a breach of its duty to cooperate.

4.2. Replomuté violates due diligence and precautionary obligations

A state cannot permit or conduct activities which disregard the rights of other states.[111] The requirement that a state must take preventive measures to avoid transboundary harm is a customary rule, [112] and a due diligence obligation.[113] A state is mandated *"to exert its best possible efforts to minimize the risk"* of transboundary harm.[114] This duty may not be an obligation of result but is certainly one of attempt.[115] Additionally, a state is required to take precautionary measures if an apprehension of significant harm accompanies its activities.[116] Even if its customary status is challenged, once a state has endorsed the precautionary principle

[106] Corfu Channel.

[107] Craik on Cooperation

[108] Record at ¶ 31.

[109] Lake Lanoux Arbitration (France v. Spain), 12 R.I.A.A. 281, 300 (1957).

[110] North Sea Continental Shelf Cases (Germany v. Denmark), Judgment, 1969 I.C.J. Rep. 3, ¶ 85 (Feb. 20).

[111] CBD, art. 3.

[112] Nuclear Tests case at ¶ 29; Gabcikovo at ¶ 53.

[113] Pulp Mills at ¶101.

[114] APTHHA at 154.

[115] Birnie and Boyle at 148.

[116] ARIE TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES (Martinus Nijhoff Publishers 2006).; Rosie Cooney, *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management*, IUCN Policy and Global Change Series No. 2 (2004).

then it is bound to adhere to it.[117] Replomuté has done the same by signing the Stockholm and Rio Declarations.

In light of due diligence and precautionary obligations, Replomuté must have taken appropriate measures to prevent, or at least mitigate the harm. While an EIA was conducted previously, it has been proven to be severely inadequate.[118] Despite creating scientific uncertainty by disregarding its procedural obligation, Replomuté is bound to exercise precaution.[119] It has even failed to monitor the project during its construction and operational phases. Therefore, Replomuté has failed to adhere to the precautionary principle and its due diligence obligation.

5. REPLOMUTÉ IS LIABLE FOR COERCION

As per Article 18 of ARSIWA, a state which coerces another state to commit an internationally wrongful act is responsible for that act.[120] In the present case, Replomuté has coerced DRI to conduct an internationally wrongful act **(5.1)**, which further impacts Aringuv **(5.2)**.

5.1. The actions of Replomuté are coercive

To invoke responsibility, Replomuté should be aware of the circumstances of the internationally wrongful act in question.[121] Replomuté was certainly aware that DRI would possibly violate various treaties (CMS, CBD etc.) if it was made to conform to the 1981 agreement. This is because Replomuté is a party to the same treaties and was regardless aware of DRI's commitments.[122]

The control model conceptualizes coercion as an action by the coercing State that removes the victim's ability to exercise control over its policy choices.[123] It involves *"the coercive*

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[117] Warwick Gullett, *Environmental protection and the precautionary principle: a response to scientific uncertainty in environmental management*, 14 ENVIRONMENTAL AND PLANNING LAW JOURNAL 57 (1997).

[118] *Infra* § 2.1.

[119] Sands at 230.

[120] ARSIWA, art. 18.

[121] *Id.*

[122] Record at ¶ 4-13.

[123] Marko Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International* Law, AMERICAN JOURNAL OF INTERNATIONAL LAW (2023).

manipulation of the target's decision-making process".[124] Importantly, the use of force is not required to constitute coercion but can take other forms such as economic pressure.[125] Replomuté's significant investments through the project in DRI,[126] its high-income status,[127] and an $825 million arbitral award in its favour give it considerable leverage over DRI.[128] The setting up of a $10 million friendship fund is also evidence of their economic muscle. By virtue of such asymmetry, Replomuté misuses its position of dominance by hampering DRI's ability to make an effective choice with respect to its treaty obligations, and interfering with its sovereignty.

The principle of non-intervention is a fundamental right of every State to choose and implement its sovereign policy.[129] Intervention in the reserved domain of a state is prohibited if it is coercive in nature.[130] The insistence on the continuation of the 1981 agreement by Replomuté interferes with the foreign policy of DRI and the control it has over its treaty obligations.[131] DRI signed a new treaty during the course of the project, specifically aimed at protecting Mountain Gorillas in the national park where oil exploration was taking place.[132] This treaty reflects DRI's commitment to biodiversity protection. Further, the fact that even Replomuté ratified the CBD in the interval cannot be ignored.[133] Its insistence on continuing the project in the face of the Gorilla Agreement, and its own obligations, demonstrates a disregard for environmental concerns and a coercive influence over DRI's policy decisions.

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[124] Charter of the United Nations, Oct. 24 1945, 1 U.N.T.S. 16, art. 2(4); Steven Wheatley, *Foreign Interference in Elections under the Non-intervention Principle: We Need to Talk about "Coercion"*, 31 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 161 (2020); Mohamed Helal, *On Coercion in International Law*, 52 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 1 (2019).

[125] Ido Kilovaty, *The Elephant in the Room: Coercion*, 113 AMERICAN JOURNAL OF INTERNATIONAL LAW 87-91 (2019).

[126] Record at ¶ 17.

[127] Record at ¶ 3.

[128] Record at ¶ 23; New Zealand Statement, *Coercion can be direct or indirect and may range from dictatorial threats to more subtle means of control* at ¶ 9 (2020).

[129] Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22(2) LEIDEN JOURNAL OF INTERNATIONAL LAW (2009).

[130] *Id.*

[131] Record at ¶ 34.

[132] Record at ¶ 9.

[133] Record at ¶ 7.

5.2. Such coercive acts harm Aringuv

The responsibility of the coercing State derives not from its act of coercion but from the wrongful conduct resulting from the action of the coerced State.[134] The coercing state will be held responsible for the obligations breached by the coerced state, regardless of the coercing state being party to such an obligation.[135] By coercing DRI to continue the 1981 Agreement, Replomuté will be held responsible for the duties breached under the Gorilla Agreement by DRI.

The Gorilla Agreement requires the parties to conserve and protect the species through cooperation.[136] The states are also required to investigate problems caused by human activities and reverse them through remedial measures and restoration of habitat.[137] Through the continuation of the 1981 Agreement, DRI has breached these obligations that it owes to Aringuv under the Gorilla Agreement. Far from investigating the problem of the project, DRI is made to adhere to the same without any effective choice. Since the critically endangered Mountain Gorillas are a shared resource between the two,[138] Aringuv will be specifically affected by any harm caused to the species. The harm likely to be caused by the oil extraction activity and the subsequent breach of obligations and care by DRI is both significant and transboundary.[139] Aringuv is exposed to such risks due to the coercive actions of Replomuté leading to DRI's breach of obligations. Such activities are antithetical to the purpose of the Gorilla Agreement and can have far-reaching ramifications which have not even been assessed by Replomuté through its EIA.[140]

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[134] ARSIWA at 70.

[135] ARSIWA at 70.

[136] Agreement on the Conservation of Gorillas and their Habitats (Gorillas Agreement), Oct. 26, 2007, art 2. [hereinafter Gorillas Agreement].

[137] Gorillas Agreement, art. 3.

[138] *supra* note 44.

[139] *Infra* § 2.2.

[140] *Infra* § 2.1.

CONCLUSION AND PRAYER

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

I. As a procedural matter, the failure of Replomuté to prepare an EIA with respect to the proposed oil extraction activities in the region violates international law, and

II. As a substantive matter, the actions of Replomuté with respect to the proposed oil extraction activities in DRI violate international law.

Respectfully Submitted,
Agents of Applicant