

TEAM CODE: 2433

28TH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

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

-WRITTEN SUBMISSION ON BEHALF OF THE APPLICANT-

TABLE OF CONTENTS

| | |
|--|-----------|
| INDEX OF AUTHORITIES | 4 |
| QUESTIONS PRESENTED | 11 |
| STATEMENT OF JURISDICTION | 12 |
| SUMMARY OF ARGUMENTS | 16 |
| ARGUMENTS | 17 |
| I. REPLOMUTÉ VIOLATED INTERNATIONAL LAW WHEN IT FAILED TO PREPARE AN EIA WITH RESPECT TO THE ACTIVITIES. | 17 |
| A. REPLOMUTÉ VIOLATED ITS TREATY OBLIGATIONS. | 17 |
| 1. Replomuté violated its obligations under the CBD. | 17 |
| a) Replomuté failed to account for biodiversity. | 17 |
| (1) Article 14(1)(a) applies to projects beyond Replomuté’s national jurisdiction. | 18 |
| b) Replomuté failed to consider its activities’ biodiversity impacts. | 18 |
| (1) Replomuté cannot proceed with oil extraction without an EIA. | 18 |
| c) CBD Article 14(1)(c) does not control. | 19 |
| d) CBD obligations apply to the concession agreement. | 19 |
| 2. Replomuté violated Article II(2) of the CMS. | 20 |
| a) The Gorilla is a migratory species. | 20 |
| b) Replomuté failed to employ measures to anticipate Gorilla impacts. | 21 |
| 3. Replomuté violated the Espoo Convention. | 21 |
| a) Replomuté’s defense of non-reciprocity is unavailing. | 21 |
| 4. Replomuté violated the UNFCCC. | 22 |
| B. REPLOMUTÉ VIOLATED CUSTOMARY INTERNATIONAL LAW. | 23 |
| 1. Replomuté failed to prepare an EIA despite a risk of significant transboundary impact. | 23 |
| a) Replomuté’s activities have a potential adverse effect on Aringuv’s environment. | 23 |
| b) There is convincing evidence to establish the project’s potential harm to the environment. | 24 |
| c) There is a causal link between Replomuté’s activities and the significant risk of environmental harm. | 25 |
| d) The DRI-conducted EIA cannot satisfy Replomuté’s CIL obligation. | 25 |
| 2. Replomuté failed to continuously monitor the project’s environmental effects. | 26 |
| II. REPLOMUTÉ’S ACTIONS WITH RESPECT TO ACTIVITIES IN THE DRI VIOLATE INTERNATIONAL LAW. | 26 |
| A. REPLOMUTÉ IS DIRECTLY RESPONSIBLE FOR VIOLATIONS OF INTERNATIONAL LAW. | 26 |
| 1. Replomuté violated the precautionary principle (“PP”). | 26 |

| | |
|--|-----------|
| a) The activities pose a threat to the environment. | 27 |
| b) The activities cause harm of serious and irreversible character. | 27 |
| c) There exists scientific uncertainty, such that no causal link between the activities and environmental damage can be established. | 28 |
| 2. Replomuté violated its obligation to protect the Gorillas. | 28 |
| a) Replomuté failed to provide immediate protection to Gorilla under the CMS. | 29 |
| b) Replomuté failed to protect the Gorillas’ habitat. | 31 |
| 3. Replomuté failed to protect ecosystems and maintain viable populations of species under the CBD. | 32 |
| a) Oil activities disrupt the entire ecosystem. | 32 |
| b) The activities threaten the health of Royal Mountain Gorilla populations. | 32 |
| 4. Replomuté violated its obligation to cooperate under the CMS and the CBD. | 33 |
| 5. Replomuté is bound by the principle of Common But Differentiated Responsibility (“CBDR”). | 34 |
| B. REPLOMUTÉ IS INDIRECTLY RESPONSIBLE FOR THE DRI’S VIOLATIONS OF INTERNATIONAL LAW. | 35 |
| 1. Replomuté is derivatively responsible for the DRI’s acts. | 35 |
| a) Derivative responsibility from coercion is part of CIL. | 35 |
| (1) Article 18 of the ARSIWA fulfills the two-fold requirements of CIL. | 35 |
| (2) The ILC’s ARSIWA merits special consideration in the identification of custom. | 36 |
| b) Replomuté has coerced the DRI into committing violations of international law. | 37 |
| (1) Due to serious economic pressure, the DRI was coerced into continuing the concession agreement. | 37 |
| (2) Replomuté’s insistence to enforce the Agreement passes the but-for test of legal causation. | 38 |
| (3) Replomuté was aware why the DRI attempted to withdraw from the agreement. | 38 |
| 2. Replomuté is responsible for the DRI’s violations of international law. | 38 |
| a) Replomuté is responsible for the DRI’s violations of its CMS Range State obligations. | 38 |
| b) Replomuté is responsible for the DRI’s violations of the Gorilla Agreement and the 1968 Algiers Convention. | 39 |
| CONCLUSION AND PRAYER FOR RELIEF | 40 |

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

| | |
|--|-----------------------------|
| Agreement on the Conservation of Gorillas and Their Habitats, 26 October 2007, 2545 UNTS 333 | 39 |
| Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 | 17,18,19,27, 29,31,32,33 |
| Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 U.N.T.S. 309 | 21,22 |
| Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333 | 20, 27,28, 29, 31,33 |
| Convention on the Conservation of African Wildlife and Habitat, Algiers, March 18, 1968, 1137 U.N.T.S. 3. | 39 |
| Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 | 34 |
| U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Aug., 12, 1992) | 26 |
| United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 | 22, 27, 34 |
| United Nations, Statute of the International Court of Justice, 18 April 1946 | 26, 29 |
| Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 | 19,22,29,31, 33 |

OTHER INTERNATIONAL DOCUMENTS

| | |
|---|----|
| CBD, Conference of the Parties, Decision VI/20(19 April 2002). | 29 |
| CBD, Conference of the Parties, Decision VIII/28, 2006, Curitiba, Brazil | 17 |
| CMS, Conference of the Parties, Resolution 11.33, 2014, Quito, Ecuador | 20 |
| CMS Conference of the Parties, Resolution 7.2, 2002, Manila, Philippines | 21 |
| CMS Conference of the Parties, UNEP/CMS/Conf.9.16 (Nov. 19, 2008) | 29 |
| CMS Conference of the Parties 13, Doc.24.1, Amendment of CMS Appendices (Feb. 2020) | 32 |

| | |
|--|-------------|
| CMS Secretariat, Report on the conservation status of Gorillas (2008) | 20,24,27,32 |
| Committee of the Americas Flyway, Arctic Migratory Bird Initiative (AMBI)– Americas Flyway Implementation Strategy (2017). | 29 |
| European Union, The update of the nationally determined contribution of the European Union and its Member States. COM (2020) 627 final, 17 December 2020. | 34 |
| International Court of Justice, Rules of Court (1978) | 24 |
| IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, 67th Meeting, Gland, Switzerland (IUCN 2007) | 28 |
| IUCN Red List, Version 3.1 Second edition (2001). | 29 |
| ILC, Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E., Nov. 2001 | 37 |
| Miguel Guariguata, CBD Technical Series No. 10: Interlinkages Between Biodiversity and Climate Change, Secretariat of the Convention on Biological Diversity (2003) at https://www.cbd.int/doc/publications/cbd-ts-10.pdf | 24 |
| ILC, Draft conclusions on identification of customary law, with commentaries, p.6, Yearbook of the ILC(2018), A/73/10 | 38,39 |

JUDICIAL DECISIONS

| | |
|--|-------------|
| Australia v. Tasmania (1983)158 C.L.R. 1 (Mason, <i>J.</i>) | 29 |
| Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment, 2015 I.C.J. Reports, 655 (Dec. 16) | 23,24 |
| Certain Questions of Mutual Assistance in Criminal Matters(Djibouti v. France), 2008 I.C.J. 141 | 20 |
| Gabcikovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. 3 (Feb. 5) | 18,26,33,36 |
| North Sea Continental Shelf Cases (Ger. v. Den.), 1969 I.C.J. 3 (Feb. 20) | 33,35 |
| Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (1957). | 33 |
| Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14 | 37 |
| Pulp Mills on the River Uruguay (Arg. v. Nicar.), Judgment, 2010 I.C.J. 14, | 24,25,26 |

| | |
|--|----|
| para. 101 (Apr. 20) | |
| Reg. v. Justices of Berkshire, 4 Q. B. Div. 471(1878) (Cockburn, C. J.) | 29 |
| Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 2011 ITLOS 10 (Feb. 1). | 36 |

BOOKS

| | |
|---|----|
| ARIE TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES (Martinus Nijhoff Publishers 2006) | 27 |
| BLACK'S LAW DICTIONARY (2nd ed.) | 29 |
| MERRIAM-WEBSTER'S LAW DICTIONARY(10th ed., 1996). | 38 |
| PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, (3rd. ed. 2012). | 27 |
| XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW (2003). | 23 |

ESSAYS, ARTICLES, AND JOURNALS

| | |
|---|----|
| A. Michael Spence, Economic Decline is Leading to Political Instability. WORLD ECONOMIC FORUM,. www.weforum.org/agenda/2016/03/economic-decline-is-leading-to-political-instability-whats-the-solution/ | 37 |
| Alan Boyle, Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention, 20 REV. EUR. COM. & INT'L ENTL. L. (2011). | 21 |
| Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AM. J. INT'L L. 777 (2001) | 36 |
| Arie Trouwborst, Transboundary Wildlife Conservation in A Changing Climate: Adaptation of the Bonn Convention on Migratory Species and Its Daughter Instruments to Climate Change, 4 DIVERSITY 258(2012) | 27 |
| Berggorilla & Regenwald Direkthilfe e.V., History of Mountain Gorilla Research, www.berggorilla.org/en/gorillas/general/history/articles-history/history-of-mountain-gorilla-research/ | 27 |
| CBD, What is the CBD?., www.cbd.int/impact/whatis.shtml . | 17 |

| | |
|--|----------------|
| Chao Chen et al., Safety and Security of Oil and Gas Pipeline Transportation: A Systematic Analysis of Research Trends and Future Needs Using WoS, 279 J. CLEANER PROD.123,583 (2020). | 17 |
| Christiana Kayinwaye Omorede, Assessment of the Impact of Oil and Gas Resource Exploration on the Environment of Selected Communities in Delta State, Nigeria, 3 INT’L J. MGMT. ECON. SOC. SCI. 79 (2014) | 23,24,27,30,32 |
| Clement L. Bouve, Russia's Liability in Tort for Persia's Breach of Contract, 6 AM. J. INT’L L. 389(1912). | 35 |
| CMS Secretariat, Threats Posed by Energy Demand to Gorilla Conservation, sdg.iisd.org/news/cms-secretariat-highlights-threats-posed-by-energy-demand-to-gorilla-conservation/ | 29 |
| Daniel Bodansky,The United Nations Framework Convention on Climate Change: A Commentary, 18 YALE J. INT’L L. 451 (1993) | 22 |
| Diane Garcia-Gonzales et al.,Hazardous Air Pollutants Associated with Upstream Oil and Natural Gas Development: A Critical Synthesis of Current Peer-Reviewed Literature, 40 ANNU. REV. PUBLIC HEALTH (2019) | 23 |
| European Commission, Democratic Republic of the Congo,international-partnerships.ec.europa.eu/countries/democratic-republic-congo_en | 31 |
| European Environment Agency, The European environment: State and outlook 2022 (2022), at www.eea.europa.eu/publications/92-9157-2020/3.4.pdf . | 25 |
| Fry, Coercion, Causation, and the Fictional Elements of Indirect State Responsibility, 634, 40 VANDERBILT LAW REVIEW 611 (2021) | 36 |
| Golden Arrow, A Mountain Gorilla’s Journey Through Climate Change, www.goldenarrow.com/blog/mountain-gorillas-journey-through-climate-change . | 27 |
| Hadhek Zouhaier and Mrad Fatma, Debt and Economic Growth, 4 INT’L J. ECON. FIN. ISSUES 440 (2014). | 37 |
| International Gorilla Conservation Programme, Covid-19 and Mountain Gorillas, igcp.org/tourism/covid-19-and-mountain-gorillas | 25 |
| International Gorilla Conservation Programme, Mountain Gorillas: Threats, igcp.org/mountain-gorillas/threats . | 24 |
| J.E. Johnston, et al.,Impact of Upstream Oil Extraction and Environmental Public Health: A Review of the Evidence (2019). | 19 |

| | |
|--|----------|
| J. Lambert, Primate frugivory in Kibale National Park, Uganda, and its implications for human use of forest resources, 36 AFR. J. ECOL. 234 (1998) | 17 |
| John P. Dawson, Duress through Civil Litigation, 45 MICH. L. REV. 571 (1947). | 36 |
| Luisa Rabanal et al., Oil prospecting and its impact on large rainforest mammals in Loango National Park, Gabon, 143 BIOLOGICAL CONSERVATION (2010) | 29 |
| Lyle Glowka, et al. A Guide to the Convention on Biological Diversity, IUCN Environmental Law Center (1994) | 18,19 |
| Marc Thibault & Sonia Blaney, The Oil Industry as an Underlying Factor in the Bushmeat Crisis in Central Africa, 17 CONSERVATION BIOLOGY 6 (2003) | 24,33 |
| Melissa Fung, A World Heritage Species Case Study: The Virunga Mountain Gorillas 8 (2005) | 17,28,32 |
| Michael Harfoot, et al. Present and future biodiversity risks from fossil fuel exploitation. Conservation Letters, 11(4), 1-2 (2018). | 23 |
| Michelle Foster, Causation in Context: Interpreting the Nexus Clause in the Refugee Convention, 23 MICH. J. INT'L L. 265 (2002) | 38 |
| Nayantara Ravichandran, Restricting Sovereignty-Transboundary Harm in International Environmental Law, 2 ENV'T. L. & SOC'Y J. 101(2014) | 24 |
| N.K.Advani, WWF Wildlife and Climate Change Series: Mountain Gorilla (2014) | 30 |
| Oliver Dörr & Kirsten Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary (Berlin, Heidelberg 2018) | 22 |
| Paul Gragl & Malgosia Fitzmaurice, The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties, 68 INT'L & COMP. L.Q. 699 (2019). | 21 |
| Pedro Conceição, Milorad Kovacevic & Tanni Mukhopadhyay, Human development: A perspective on metrics, in MEASURING HUMAN CAPITAL (2021) | 37 |
| Petruta & Bica, Analysis of the Pollution Degree of the Geological Environment on a Petroleum Product Storage & Distribution Site, 664 IOP Conf. Ser.: EARTH ENVRION. SCI. 12, 70(2021). | 29 |
| Rachel Albrecht et al., Where are The lightning hotspots on earth?, 97 | 17 |

| | |
|--|------------|
| BULL. AM. METEOROL. SOC 2051–2068 (2016). | |
| R. Sheldon, et al., Potential groundwater contamination from oil drilling in the Okavango, 131 PHYS. & CHEM. EARTH, parts A/B/C (2023) | 23 |
| Richard Caddell, Biodiversity Loss and the Prospects for International Cooperation: EU Law and the Conservation of Migratory Species of Wild Animals, 8 Y.B.EUR.ENVTL.L. 218 (2008) | 28 |
| Richard Caddell, International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention, 16 COLO. J. INT. ENVT. L. & POL'Y 116 (2005) | 28 |
| SEI, IISD, ODI, E3G, and UNEP, The Production Gap Report 2021. | 30 |
| Séverin Mbog Mbog et al., Environmental Impact Assessment of Civil Engineering Project on the Distribution of Gorillas and Chimpanzees in Deng Deng National Park Cameroon, 10 INT. J. ENVTL. PROT. & POL. 146 (2022) | 29 |
| Solomon Fabricant, The "Recession" of 1969—1970, 1 Economic Research: Retrospect and Prospect 89 (1972). | 37 |
| Stéphanie Muller et al., No Mining Activities, No Environmental Impacts?, 22 SUSTAINABLE PRODUCTION AND CONSUMPTION. 24 (2020) | 34 |
| Surungan & Safitri, The Effect of Financial Leverage on Profitability with Corporate Social Responsibility as Moderating Variable, 7 INT'L J. ECON., COM. & MGMT. (2019) | 37 |
| Tatjana Paulauskiene, Petroleum Extraction Engineering. RECENT INSIGHTS IN PETROLEUM SCIENCE AND ENGINEERING 33 (2017). | 18 |
| WWF, Holding the Line in Virunga, www.wwf.org.uk/what-we-do/projects/how-were-holding-line-virunga | 31 |
| WWF, Mountain Gorilla Facts, www.worldwildlife.org/species/mountain-gorilla | 31 |
| WWF, Oil Exploration and Exploitation: The Potential Impacts on Mountain Gorillas (2013), assets.wwf.org.uk/downloads/mountain_gorillas_virunga_final_formatted.pdf | 23, 27 |
| WWF, Oil exploration in Virunga is illegal, wwf.panda.org/discover/knowledge_hub/where_we_work/congo_basin_fo_rests/oil_extraction/virunga_under_threat | 31, 33, 34 |

QUESTIONS PRESENTED

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

STATEMENT OF JURISDICTION

On 16 June 2023, Aringuv and Replomuté submitted the following dispute to the International Court of Justice (ICJ) by Special Agreement, in accordance with Article 40(1) of the Statute of the ICJ. The Registrar of the ICJ addressed notification to the parties on 31 July 2023. Aringuv and Replomuté have accepted jurisdiction of the ICJ pursuant to Article 36(1) of the Statute and request that the Court adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

STATEMENT OF FACTS

Aringuv and the Democratic Republic of Ibirunga (“the DRI”) are neighboring lower-middle income and low-income Central African States, respectively.¹ The 935 remaining Royal Mountain Gorillas (“Gorillas”) can only be found in these States.² The northern population occupies a transboundary national park and frequently migrates between Aringuv and the DRI.³ Its southern population has similarly been sighted crossing the border to Aringuv from their habitat, a national park in the DRI.⁴

Replomuté, a high-income EU member-State,⁵ wholly owns and operates Lenoir Corporation.⁶ In 1981, Replomuté signed a concession agreement with the DRI, authorizing Lenoir to explore and extract oil from the southern population’s habitat.⁷ It was also allowed to construct an oil pipeline from the national park to a DRI coastal city.⁸ Replomuté did not conduct an Environmental Impact Assessment (“EIA”) before it commenced its oil activities, and the DRI-commissioned EIA failed to account for impacts on the gorillas, their habitats, and climate change.⁹

Oil exploration activities started in 1983,¹⁰ the same year all States became Parties to the CMS, which listed the Gorilla as an Appendix I species.¹¹ Exploration was suspended in 1987 due

¹ R¶¶1-2.

² R¶9.

³ *Id.*

⁴ *Id.*

⁵ R¶¶3&15.

⁶ R¶¶17.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ R¶20.

¹¹ *Id.*

to civil war and insurgency in the DRI.¹² In the interim, all States became Parties to the CBD¹³ and the UNFCCC,¹⁴ while Replomuté became an Espoo Convention Party.¹⁵ While oil exploration resumed in 2003,¹⁶ an Ebola outbreak in 2006 led to a second suspension.¹⁷ Meanwhile, Aringuv and the DRI became Parties to the Gorilla Agreement.¹⁸

In 2009, oil exploration resumed and pipeline construction began.¹⁹ In 2012, Lenoir announced its plans to begin oil extraction upon the completion of the pipeline,²⁰ prompting outcry regarding the project's negative impact on the Gorillas.²¹ Similarly, the DRI's president declared a desire to withdraw from the concession agreement, unless Replomuté established a USD50 million fund to compensate for its activities' impacts.²² Thus, Replomuté invoked the agreement's mandatory arbitration clause, which resulted in an arbitral award ordering the DRI to enforce the agreement or face the staggering USD825 million penalty.²³ In 2015, pipeline construction was 80% complete but was delayed due to labor and supply chain issues.²⁴ All States then became Parties to the Paris Agreement,²⁵ and Aringuv signed the Espoo Convention.²⁶

¹² R¶18.

¹³ R¶7.

¹⁴ R¶13.

¹⁵ R¶12.

¹⁶ R¶18.

¹⁷ R¶19.

¹⁸ R¶9.

¹⁹ R¶19.

²⁰ R¶20.

²¹ R¶21.

²² R¶22.

²³ *Id.*

²⁴ R¶24.

²⁵ R¶13.

²⁶ R¶12.

In 2018, Aringuv highlighted Replomuté’s failure to prepare an EIA that considered potential transboundary environmental effects.²⁷ Aringuv also alleged that the activities violate Replomuté and the DRI’s international obligations to protect the Gorilla and the environment.²⁸ Replomuté nonetheless continued pipeline construction.²⁹ Replomuté only voluntarily suspended its activities after the States agreed to bring the matter before the ICJ, when the pipeline was already 98% complete.³⁰

²⁷ R¶27.

²⁸ R¶¶29,31,34.

²⁹ R¶33.

³⁰ R¶¶32&35.

SUMMARY OF ARGUMENTS

- I. Replomuté violated its treaty obligations under the CBD, CMS, Espoo Convention, and UNFCCC in failing to conduct an EIA factoring potential impacts to the Gorillas and the environment. The DRI-conducted EIA was insufficient under these conventions' standards. Replomuté similarly violated CIL.
- II. Replomuté is directly responsible for violating its obligations under the CMS and CBD, in light of the PP. Replomuté also violated the principle of CBDR. Furthermore, Replomuté is indirectly responsible for coercing the DRI to violate its treaty obligations, including the Gorilla Agreement and Algiers Convention.

ARGUMENTS

I. REPLOMUTÉ VIOLATED INTERNATIONAL LAW WHEN IT FAILED TO PREPARE AN EIA WITH RESPECT TO THE ACTIVITIES.

A. REPLOMUTÉ VIOLATED ITS TREATY OBLIGATIONS.

1. *Replomuté violated its obligations under the CBD.*

a) *Replomuté failed to account for biodiversity.*

Article 14(1)(a) requires Parties to ensure that their projects' EIAs account for biodiversity.³¹ The CBD COP guidelines further provide that EIAs must consider all factors affecting biodiversity and explain the expected consequences of biodiversity loss.³²

The DRI-conducted EIA does not satisfy CBD requirements. It did not account for the potential impacts of the activities on Gorillas and their habitat.³³ This omission is critical as Gorillas are keystone species that play a vital role in maintaining biodiversity.³⁴ Declining numbers would disrupt seed dispersal, thus triggering catastrophic environmental loss.³⁵ Moreover, the DRI's location in Central Africa³⁶ is particularly prone to lightning.³⁷ As oil is a flammable and explosive substance, lightning strikes cause accidents at oil pipeline sites such as fire, explosion, and toxic release.³⁸

³¹ Convention on Biological Diversity, art. 14(a), June 5, 1992, 1760 U.N.T.S. 79[hereinafter "CBD"].

³² CBD, COP Decision VIII/28, 2006, ¶31(d), (f), (i).

³³ R¶17.

³⁴ Melissa Fung, A World Heritage Species Case Study: The Virunga Mountain Gorillas 8 (2005)[hereinafter "Fung"].

³⁵ J. Lambert, Primate frugivory in Kibale National Park, Uganda, and its implications for human use of forest resources, 36 AFR. J. ECOL. 234(1998).

³⁶ R¶1.

³⁷ Rachel Albrecht et al., Where are The lightning hotspots on earth?, 97 BULL. AM. METEOROL. SOC 2051–2068(2016).

³⁸ Chao Chen et al., *Safety and Security of Oil and Gas Pipeline Transportation: A Systematic Analysis of Research Trends and Future Needs Using WoS*, 279 J. CLEANER PROD.123,583(2020).

(1) Article 14(1)(a) applies to projects beyond Replomuté's national jurisdiction.

Article 14(1)(a) is not limited to proposed projects within a Party's own territory, provided that the activities are under its control.³⁹ Here, the activities are undertaken by Lenoir Corporation, an entity wholly owned and operated by Replomuté.⁴⁰ Furthermore, the work has been conducted by Replomuté nationals,⁴¹ and the extracted oil will be shipped to Replomuté.⁴² Thus, Article 14(1)(a) applies.

b) Replomuté failed to consider its activities' biodiversity impacts.

Article 14(1)(b) further requires Parties to introduce arrangements to factor in significant biodiversity impacts.⁴³ This extends to existing government programs with potential consequences.⁴⁴ Thus, Parties must incorporate biodiversity considerations when implementing existing projects,⁴⁵ and consider new environmental standards.⁴⁶ However, Replomuté never accounted for biodiversity and repeatedly ignored concerns raised since 2012.⁴⁷

³⁹ R¶28, CBD, art.4(b).

⁴⁰ R¶17.

⁴¹ C¶13.

⁴² R¶17.

⁴³ CBD, art.14(1)(b).

⁴⁴ Lyle Glowka, et al. A Guide to the CBD, IUCN Environmental Law Center, 72 (1994)[hereinafter "Glowka"].

⁴⁵ *Id.*, 73.

⁴⁶ Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, ¶140[hereinafter "Gabčíkovo"]

⁴⁷ R¶¶21,28,30,33.

(1) Replomuté cannot proceed with oil extraction without an EIA.

An EIA aims to predict a project's environmental impact before commencement.⁴⁸ Here, the oil extraction has not yet commenced⁴⁹ as it is a separate phase.⁵⁰ However, oil extraction inflicts unique ecosystem damage such as habitat alteration, contamination, and soil degradation.⁵¹ When oil exploration resumed in 2003,⁵² Replomuté was already bound by the CBD.⁵³ Hence, Replomuté must undertake an EIA before proceeding.

c) CBD Article 14(1)(c) does not control.

Article 14(1)(c) only addresses procedural obligations to promote notification, information exchange, and consultation on activities that could significantly affect the biodiversity of other countries.⁵⁴ The CBD's main objective is biodiversity conservation.⁵⁵ Art. 14(1)(a) and 14(1)(c) are non-mutually exclusive obligations that apply to areas beyond national jurisdiction to achieve such a purpose.⁵⁶ Thus, Replomuté cannot assert that Article 14(1)(c) exclusively controls.⁵⁷

d) CBD obligations apply to the concession agreement.

CBD obligations supersede rights under existing international agreements where the exercise of such rights would seriously damage or threaten biodiversity.⁵⁸ While the concession

⁴⁸ CBD, What is the CBD?, www.cbd.int/impact/whatis.shtml.

⁴⁹ R¶¶21,32,34

⁵⁰ Tatjana Paulauskiene, Petroleum Extraction Engineering. RECENT INSIGHTS IN PETROLEUM SCIENCE AND ENGINEERING 33(2017).

⁵¹ Petruta & Bica, *Analysis of the Pollution Degree of the Geological Environment on a Petroleum Product Storage & Distribution Site*, 664 IOP Conf. Ser.: EARTH ENVRION. SCI. 012070(2021).

⁵² R¶18.

⁵³ R¶7.

⁵⁴ Glowka, 74.

⁵⁵ CBD, art.1; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art.31[hereinafter "VCLT"];

⁵⁶ Glowka, 74.

⁵⁷ R¶28.

⁵⁸ CBD, art.22.

agreement preceded the CBD's effectivity,⁵⁹ Replomuté consented to the CBD's limitation of its rights under the agreement. Replomuté's activities within the national park⁶⁰ may pose serious threats to biodiversity,⁶¹ including the further endangerment of the critically endangered ("CR") Gorillas. Hence, they must be recalibrated or even abandoned to protect biodiversity.

2. Replomuté violated Article II(2) of the CMS.

Article II(2) is a fundamental principle on taking action to avoid migratory species endangerment⁶² and is an obligation of conduct⁶³ which does not distinguish between Range States and Non-Range States. To fulfill its purpose, Parties must employ certain procedures and make institutional arrangements.⁶⁴

a) The Gorilla is a migratory species.

"Migratory species" are those with at least a significant proportion of its population cyclically and predictably crossing one or more national jurisdictional boundaries.⁶⁵ A species' movement is "cyclical" when it relates to a cycle of any nature, and is "predictable" when it can be anticipated to recur, though not regularly.⁶⁶

The Gorilla qualifies as a migratory species that must be protected under Article II(2). Both its populations cross the boundaries of Aringuv and the DRI.⁶⁷ Its movement, similar to that of the

⁵⁹ R¶¶7&17.

⁶⁰ R¶7.

⁶¹ J.E. Johnston, et al., Impact of Upstream Oil Extraction and Environmental Public Health: A Review of the Evidence, 193, Tb.2 (2019).

⁶² Convention on the Conservation of Migratory Species of Wild Animals, art.II(2), 23 June 1979, 1651 UNTS 333[hereinafter "CMS"].

⁶³ Certain Questions of Mutual Assistance in Criminal Matters(Djibouti v. France), 2008 I.C.J. 141, ¶104.

⁶⁴ *Id.*

⁶⁵ CMS, art.I(1)(a).

⁶⁶ CMS, COP Resolution 11.33, 2014.

⁶⁷ CMS, art.I(1)(a); R¶7.

Gorilla beringei beringei,⁶⁸ is influenced by food abundance and rainfall patterns.⁶⁹ Hence, their movement is cyclical and predictable,⁷⁰ in addition to its uncontested classification as an endangered migratory species under Appendix I.⁷¹

b) *Replomuté failed to employ measures to anticipate Gorilla impacts.*

Article II(2) implies a need to anticipate and predict effects,⁷² which includes preparing an EIA.⁷³ However, Replomuté relied on the insufficient DRI-conducted EIA which failed to consider the Gorilla's movement patterns, possible impediments to migration, and effects on the migratory ranges of the species.⁷⁴ Hence, Replomuté violated Article II(2).

3. *Replomuté violated the Espoo Convention.*

The Espoo Convention requires Parties to prepare an EIA as a minimum requirement⁷⁵ for Appendix I activities,⁷⁶ which are presumed to cause harm to the environment.⁷⁷ Appendix I includes large-diameter oil pipelines.⁷⁸ Here, large-diameter pipelines are necessary to transport the crude oil from the national park to the coastal city of the DRI.⁷⁹

⁶⁸ C9.

⁶⁹ CMS Secretariat, Report on the conservation status of Gorillas, 26 (2008)[hereinafter "CMS Report"].

⁷⁰ CMS, art I(1)(a); CMS COP Res.11.33.

⁷¹ R¶9.

⁷² CMS COP Res.7.2, pmb¶4, 2002.

⁷³ *Id.* no.(1).

⁷⁴ *Id.* ¶2.

⁷⁵ Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 U.N.T.S. 309, art.2(7)[hereinafter "Espoo Convention"].

⁷⁶ *Id.*, art.2(2).

⁷⁷ Alan Boyle, Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention, 20 REV. EUR. COM. & INT'L ENTL. L. 227(2011).

⁷⁸ Espoo Convention, Appendix I(1), (8), (16).

⁷⁹ R¶17.

Appendix II of the Convention prescribes an EIA that describes the potential impacts of a proposed activity on flora, fauna, soil, air, water, and climate.⁸⁰ Nonetheless, the DRI-conducted EIA was limited to potential impacts on the nearby human population.⁸¹

a) Replomuté's defense of non-reciprocity is unavailing.

Signatory States must refrain from acts which defeat a treaty's object and purpose.⁸² A treaty is defeated when its performance is rendered meaningless and it loses its object.⁸³ This duty is implied in the principle of *pacta sunt servanda*.⁸⁴ Hence, it applies to both Parties and signatory States that are awaiting ratification.

The Espoo Convention's objective is to prevent transboundary harm.⁸⁵ Replomuté's refusal to conduct an EIA, citing Aringuv's non-ratification,⁸⁶ undermines the treaty's objective. Hence, Replomuté's defense concerning the lack of reciprocity⁸⁷ does not cancel its EIA obligation.

4. *Replomuté violated the UNFCCC.*

Article 4(1)(f) requires Parties to incorporate climate change considerations in their environmental policies and actions.⁸⁸ It must be interpreted in light of the precautionary principle in Article 3(3), which requires Parties to consider climate change risks when making development

⁸⁰ Espoo Convention, arts.II&I(vii).

⁸¹ R¶17.

⁸² VCLT, art.18.

⁸³ Paul Gragl & Malgosia Fitzmaurice, *The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties*, 68 INT'L & COMP. L.Q. 699(2019).

⁸⁴ Oliver Dörr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*(Berlin, Heidelberg 2018), 484, part III; VCLT, art.26.

⁸⁵ Espoo Convention, art.2(1).

⁸⁶ R¶28.

⁸⁷ *Id.*

⁸⁸ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, art.4(1)(f) [hereinafter "UNFCCC"].

decisions.⁸⁹ EIAs incorporate climate change in policy-making.⁹⁰ Thus, the oil activities' EIAs must account for the project's effect on the climate. Here, the DRI-conducted EIA did not consider potential climate impacts.⁹¹ Furthermore, despite repeated concerns⁹² and several opportunities to prepare an EIA,⁹³ Replomuté failed to do so, violating its UNFCCC obligations.

B. REPLOMUTÉ VIOLATED CUSTOMARY INTERNATIONAL LAW.

1. Replomuté failed to prepare an EIA despite a risk of significant transboundary impact.

CIL requires States to undertake an EIA when a proposed activity has a risk of significant adverse transboundary impact.⁹⁴ Transboundary harm occurs when an activity in one State causes harm to the environment of another State.⁹⁵ To trigger the EIA obligation, it must be shown that there is: (1) a potential adverse effect on the environment of another State, (2) convincing evidence, and (3) a causal link between the activity and the potential harm.⁹⁶ Here, all elements are present.

⁸⁹ UNFCCC; VCLT, art.31(1).

⁹⁰ Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 510 (1993).

⁹¹ R¶17.

⁹² R¶21;C10.

⁹³ R¶¶13,19,21;C10.

⁹⁴ *Certain Activities Carried out by Nicaragua in the Border Area*(Costa Rica v. Nicar.), Judgment, 2015 I.C.J. 655(Dec. 16), ¶104[hereinafter "Certain Activities"].

⁹⁵ XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW*, 1(2003).

⁹⁶ *Certain Activities*, ¶119.

a) Replomuté's activities have a potential adverse effect on Aringuv's environment.

Oil activities release hazardous air pollutants into the atmosphere.⁹⁷ They also discharge liquid into the soil,⁹⁸ which may contaminate groundwater⁹⁹ and migrate to Aringuv considering the States' shared border.¹⁰⁰ Oil activities have also degraded ecosystems,¹⁰¹ increased human presence in animal habitats,¹⁰² and fueled Africa's bushmeat crisis.¹⁰³ Since Replomuté's activities are undertaken within the Gorilla's habitat, the Gorillas may suffer from habitat loss, disease, and poaching.¹⁰⁴

The extinction of a migratory species has transboundary impacts¹⁰⁵ since they fall under the jurisdiction of multiple States.¹⁰⁶ Here, both Aringuv and the DRI have jurisdiction over the Gorilla. The Gorilla's northern population occupies a transboundary national park while members

⁹⁷ Diane Garcia-Gonzales et al., *Hazardous Air Pollutants Associated with Upstream Oil and Natural Gas Development: A Critical Synthesis of Current Peer-Reviewed Literature*, 40 ANNU. REV. PUBLIC HEALTH 283-304(2019).

⁹⁸ Christiana Omorede, Assessment of the Impact of Oil and Gas Resource Exploration on the Environment of Selected Communities in Delta State, Nigeria, 3 INT'L J. MGMT. ECON. SOC. SCI. 79, 83 (2014)[hereinafter "Omorede"].

⁹⁹ R. Sheldon, et al., *Potential groundwater contamination from oil drilling in the Okavango*, 131 PHYS. & CHEM. EARTH, parts A/B/C(2023).

¹⁰⁰ R¶2.

¹⁰¹ Michael Harfoot, et al. *Present and future biodiversity risks from fossil fuel exploitation*. Conservation Letters, 11(4), 1-2 (2018).

¹⁰² World Wildlife Fund(WWF), *Oil Exploration and Exploitation: The Potential Impacts on Mountain Gorillas* (2013), assets.wwf.org.uk/downloads/mountain_gorillas_virunga_final_formatted.pdf [hereinafter "Oil Impacts Report"].

¹⁰³ Marc Thibault & Sonia Blaney, *The Oil Industry as an Underlying Factor in the Bushmeat Crisis in Central Africa*, 17 CONSERVATION BIOLOGY 6, 1807-1813(2003)[hereinafter "Thibault"].

¹⁰⁴ International Gorilla Conservation Programme, *Mountain Gorillas: Threats*, igcp.org/mountain-gorillas/threats.

¹⁰⁵ Nayantara Ravichandran, *Restricting Sovereignty-Transboundary Harm in International Environmental Law*, 2 ENV'T. L. & SOC'Y J. 101(2014).

¹⁰⁶ *Id.*

of its southern population have been sighted in Aringuv.¹⁰⁷ As keystone species, their extinction could lead to catastrophic effects on ecosystems.¹⁰⁸

b) *There is convincing evidence to establish the project's potential harm to the environment.*

Evidence is convincing when it is substantiated by empirical data.¹⁰⁹ Thus, in formulating its findings, the ICJ has relied on expert evidence.¹¹⁰ Experts have come to a general consensus that oil activities harm the environment.

Crude oil contains complex compounds which enter and harm the environment throughout the different stages of oil exploitation.¹¹¹ Oil exploitation also causes liquid discharges, oil spills, and gas flaring, resulting in soil infertility, water contamination, and organism extermination.¹¹² Moreover, pollution reduces biodiversity, thus impairing the ability of terrestrial ecosystems to regulate the climate.¹¹³ Thus, biodiversity loss or the extinction of the endangered Gorillas would have detrimental effects.

Studies have shown that impacts of altered climate regimes are often felt regionally.¹¹⁴ Due to a shared border,¹¹⁵ the environmental degradation in the DRI, combined with the impacts of pollution, could exacerbate climate-mediated biodiversity loss in Aringuv, thus affecting migration patterns and wildlife.

¹⁰⁷ R¶9.

¹⁰⁸ See Part I(A)(1)(a).

¹⁰⁹ Certain Activities, ¶203.

¹¹⁰ ICJ Rules of Court, arts. 62-64 (1978); Pulp Mills on the River Uruguay (Arg. v. Nicar.), Judgment, 2010 I.C.J. 14, ¶167(Apr. 20)[hereinafter "Pulp Mills"]; Certain Activities, ¶105.

¹¹¹ Omorede, 83.

¹¹² *Id.*

¹¹³ Miguel Guariguata, CBD Technical Series No. 10: Interlinkages Between Biodiversity and Climate Change, Secretariat of the Convention on Biological Diversity, 9 (2003); see also CMS Report, 10.

¹¹⁴ European Environment Agency, The European environment: State and outlook 2022, 133(2022), at www.eea.europa.eu/publications/92-9157-202-0/3.4.pdf.

¹¹⁵ R¶2.

c) *There is a causal link between Replomuté’s activities and the significant risk of environmental harm.*

The risk of significant transboundary harm is directly linked to Replomuté’s activities, which directly pose the harm. By engaging in these, Replomuté, through Lenoir, has engaged in activities that have been shown to have a detrimental effect on the environment.

d) *The DRI-conducted EIA cannot satisfy Replomuté’s CIL obligation.*

EIAs must consider the nature and magnitude of a proposed project’s environmental impact.¹¹⁶ Although the DRI-conducted EIA assessed the project’s impact on nearby human populations,¹¹⁷ evidence shows that the magnitude of oil extraction activities is much greater.¹¹⁸ Oil extraction activities also impact biodiversity.¹¹⁹ Hence, the DRI-conducted EIA cannot satisfy Replomuté’s customary obligations.

2. Replomuté failed to continuously monitor the project’s environmental effects.

CIL requires States to continually assess and monitor a project’s environmental impact.¹²⁰ Current relevant environmental standards must be applied to an undertaking, even when it has commenced decades ago.¹²¹

At the time when the DRI conducted its EIA in the 1980s, research on the Gorilla was mostly limited to their social and behavioral patterns.¹²² It was only in the 1990s when researchers

¹¹⁶ Pulp Mills, ¶204.

¹¹⁷ R¶17.

¹¹⁸ Omerede (impacts on the Niger Delta).

¹¹⁹ See Part I(A)(1).

¹²⁰ Gabčikovo, ¶112; Pulp Mills, ¶205.

¹²¹ Gabčikovo, ¶11 (Weeramantry, *J.*, sep. op.); UN, Statute of the International Court of Justice, art.38(1)(d), 18 April 1946 [hereinafter “ICJ Statute”].

¹²² Berggorilla & Regenwald Direkthilfe e.V., History of Mountain Gorilla Research, www.berggorilla.org/en/gorillas/general/history/articles-history/history-of-mountain-gorilla-research/.

focused on how human proximity affects the gorillas.¹²³ New research methods, such as genetic census, can generate more accurate data that may affect the project's environmental assessment.¹²⁴

Thus, Replomuté's refusal to undertake an EIA violates its CIL duty.

II. REPLOMUTÉ'S ACTIONS WITH RESPECT TO ACTIVITIES IN THE DRI VIOLATE INTERNATIONAL LAW.

A. REPLOMUTÉ IS DIRECTLY RESPONSIBLE FOR VIOLATIONS OF INTERNATIONAL LAW.

1. *Replomuté violated the precautionary principle ("PP").*

The PP provides that where there are threats of serious or irreversible damage, lack of full scientific certainty does not justify postponing measures to prevent environmental degradation.¹²⁵

This obligation is codified in the UNFCCC and the CBD.¹²⁶ It is also customary law.¹²⁷ Moreover, the CMS applies the PP to migratory species conservation.¹²⁸

This principle requires: (1) threat of environmental damage (2) that is serious or irreversible and (3) scientific uncertainty.¹²⁹ Each element is present.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N.Doc.A/CONF.151/26/Rev.1(Aug. 12, 1992), princ. 15[hereinafter "Rio Declaration"]. *See also:* R¶7(Replomuté's participation in the Rio Declaration).

¹²⁶ CBD, pmb1(9).

¹²⁷ PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 220(3rd. ed. 2012) [hereinafter "Sands"].

¹²⁸ CMS, art.II(2); Arie Trouwborst, *Transboundary Wildlife Conservation in A Changing Climate: Adaptation of the Bonn Convention on Migratory Species and Its Daughter Instruments to Climate Change*, 4 DIVERSITY 258, 287 (2012).

¹²⁹ IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, 67th Meeting, Gland, Switzerland(IUCN 2007).

a) The activities pose a threat to the environment.

The oil extraction activities threaten the Gorillas with habitat loss and deadly diseases.¹³⁰ They may also exacerbate climate change, causing food insecurity.¹³¹ Furthermore, oil extraction involves processes which may damage the ecosystems within the DRI's national park.¹³² History shows that these activities devastate environments, as in Nigeria, where oil activities caused widespread ecosystem damage.¹³³

b) The activities cause harm of serious and irreversible character.

Damage is irreversible when it is grave and imminent and causes biodiversity loss.¹³⁴ Only 935 Gorillas remain.¹³⁵ Their listing as CR on the IUCN Red List¹³⁶ indicates population reduction, restricted geographic range, and population decline.¹³⁷ Thus, they face the highest extinction risk.¹³⁸ The southern population is a significant portion of the entire Gorilla population.¹³⁹ Also, as keystone species, the Gorilla is indispensable to forest health.¹⁴⁰

c) There exists scientific uncertainty, such that no causal link between the activities and environmental damage can be established.

There is a lack of conclusive scientific evidence on the possible effects specific to the activities in the DRI's national park due to Replomuté's refusal to conduct an EIA. Requiring proof

¹³⁰ CMS Report, 10.

¹³¹ Golden Arrow, A Mountain Gorilla's Journey Through Climate Change, www.goldenarrow.com/blog/mountain-gorillas-journey-through-climate-change.

¹³² Oil Impacts Report.

¹³³ Omorede, 80.

¹³⁴ Sands, 219; CBD, pmbl(9).

¹³⁵ R¶9.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ IUCN Red List, Version 3.1 Second edition (2001).

¹³⁹ R¶9.

¹⁴⁰ Fung, 8.

of a causal link between such activities and environmental damage before taking action is impractical, if not impossible, allowing grave environmental harm to go unchecked.

Replomuté violated the PP by not taking cost-effective measures to prevent environmental degradation resulting from the activities. Furthermore, this violation of the PP extends to all Replomuté’s treaty violations for the PP serves as an interpretative tool in applying treaty obligations.¹⁴¹ The PP is a “lens with which to view existing obligations.”¹⁴² Thus, this principle underlies the interpretation of the terms qualifying’ obligations.

2. Replomuté violated its obligation to protect the Gorillas.

The CMS has the primary objective of protecting migratory species on a cross-national basis, with Article II emphasizing its fundamental principles.¹⁴³ Parties, including non-Range States, are thus required to take action, individually or collectively, through: (1) conserving migratory species and their habitats; (2) preventing migratory species endangerment; and (3) providing immediate protection to Appendix I species.¹⁴⁴

Meanwhile, Article 8(d) of the CBD mandates States to protect the Gorilla’s natural habitat and maintain viable populations in their natural surroundings.¹⁴⁵ Having been designated as the CBD’s “lead partner” on all issues concerning migratory species,¹⁴⁶ the CMS supplements the CBD.

¹⁴¹ ARIE TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES 297(Martinus Nijhoff Publishers 2006).

¹⁴² *Id.*

¹⁴³ CMS, art.II.

¹⁴⁴ *Id.*; Richard Caddell, *International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention*, 16 COLO. J. INT. ENV'T. L. & POL'Y 116(2005).

¹⁴⁵ CBD, art.8(d).

¹⁴⁶ CBD COP Decision VI/20(19 April 2002).

a) Replomuté failed to provide immediate protection to Gorilla under the CMS.

Replomuté must provide immediate protection for Appendix I migratory species,¹⁴⁷ which includes the Gorilla.¹⁴⁸ The use of “shall endeavour to provide immediate protection”¹⁴⁹ indicates “a command requiring each party to endeavour to bring about the matters dealt with.”¹⁵⁰ “Immediate” means occurring without delay,¹⁵¹ and considers a party’s proximity to the threat.¹⁵² Replomuté clearly failed to comply with this obligation.

First, Replomuté failed to act immediately. As early as 2007, scientific studies on the detrimental impacts of oil extraction on mountain gorillas have surfaced.¹⁵³ CMS COP Resolution 7.3 on the impact of oil pollution was released in 2002,¹⁵⁴ and in 2007, the CMS Secretariat drew particular attention to the threats of fossil fuel extraction to gorilla forests.¹⁵⁵ As communicated by Aringuv, threats to Gorillas are better understood now vis-a-vis at the commencement of the Agreement.¹⁵⁶ However, mitigation measures, such as relocation of oil activities or population monitoring were still not undertaken.

¹⁴⁷ CMS, art.II.3(b).

¹⁴⁸ R¶9.

¹⁴⁹ CMS, art.II.3(b).

¹⁵⁰ *Australia v. Tasmania* (1983)158 C.L.R. 1(Mason, J.); ICJ Statute, art.38(1)(d).

¹⁵¹ BLACK’S LAW DICTIONARY (2nd ed.); VCLT, art.31(1). *See also:* *Reg. v. Justices of Berkshire*, 4 Q. B. Div. 471(1878) (Cockburn, C. J.); ICJ Statute, art.38(1)(d).

¹⁵² CMS COP9 Conf.9.16(Nov. 19, 2008), *see:* “The CMS Secretariat is circulating herewith (...) an independent commentary.”[hereinafter “CMS independent commentary”]; ICJ Statute, art.38(1)(d). *See also:* Committee of the Americas Flyway, Arctic Migratory Bird Initiative (AMBI)–Americas Flyway Implementation Strategy (2017).

¹⁵³ Luisa Rabanal et al., *Oil prospecting and its impact on large rainforest mammals in Loango National Park, Gabon*, 143 BIOLOGICAL CONSERVATION(2010); Séverin Mbog Mbog et al., *Environmental Impact Assessment of Civil Engineering Project on the Distribution of Gorillas and Chimpanzees in Deng Deng National Park Cameroon*, 10 INT. J. ENVTL. PROT. & POL. 146(2022).

¹⁵⁴ CMS Secretariat, *Threats Posed by Energy Demand to Gorilla Conservation*, sdg.iisd.org/news/cms-secretariat-highlights-threats-posed-by-energy-demand-to-gorilla-conservation/.

¹⁵⁵ CMS COP12 Res.7.3, 1(Nov. 2008).

¹⁵⁶ R¶29.

Second, Replomuté failed to protect the Gorilla based on the CMS standards. Over the years, the Gorilla has remained CR¹⁵⁷ and has not been delisted from Appendix I.¹⁵⁸ Socio-political instability and zoonotic transmission are existing threats to all endangered gorilla species.¹⁵⁹ From 1987 to 2002, the DRI was beset with a civil war.¹⁶⁰ From 2006 to 2008, an Ebola outbreak occurred.¹⁶¹ In 2020, COVID-19 affected the DRI.¹⁶² All these are threats to Gorilla numbers. Moreover, the *Gorilla beringei beringei* has a low reproductive rate, with its females producing only three offspring during their lifetime.¹⁶³ A similar rate for the Gorilla¹⁶⁴ has been insufficient to lift their CR status due to these threats. Oil drilling poses a high threat to the species.¹⁶⁵ Seismic surveys, deforestation, gas flaring, and oil spills that may result from the activities will also have devastating consequences on the Gorillas.¹⁶⁶ Oil leaks also affect vegetation and reduce the biomass of available food.¹⁶⁷ The introduction of new threats by Replomuté is counterproductive to its protection obligation.

Replomuté cannot invoke its non-Range State status¹⁶⁸ to evade responsibility. Even so, Replomuté must contribute to the conservation or restoration of the Gorillas or their habitats for it is in the position to do so.¹⁶⁹ Moreover, Replomuté is bound to the strict protection of the Gorilla to an extent similar to that of a Range State. This interpretation is made in light of the CMS' object

¹⁵⁷ R¶9.

¹⁵⁸ CMS COP13 Doc.24.1, Amendment of CMS Appendices (Feb. 2020).

¹⁵⁹ R¶9; C9; N.K.Advani, *WWF Wildlife and Climate Change Series: Mountain Gorilla* (2014)[hereinafter “WWF Mountain Gorilla Report”].

¹⁶⁰ R¶18.

¹⁶¹ R¶19.

¹⁶² R¶32.

¹⁶³ R¶9; C9; Mountain Gorilla Report, 2.

¹⁶⁴ R¶9; C9.

¹⁶⁵ Mountain Gorilla Report, 3.

¹⁶⁶ Omorede, 83.

¹⁶⁷ *Id.* 84.

¹⁶⁸ R¶30.

¹⁶⁹ CMS independent commentary, 5.

and purpose to conserve migratory species¹⁷⁰ and *pacta sunt servanda*.¹⁷¹ Also, Replomuté’s recognition of the importance of Range States taking action to conserve such species and their habitat means that it must not act in any way to hinder the DRI’s conservation efforts.¹⁷² However, Replomuté even prevented the DRI from complying with its CMS obligations.¹⁷³

b) *Replomuté failed to protect the Gorillas’ habitat.*

The CBD mandates the protection of species’ natural habitat.¹⁷⁴ Oil exploration and extraction directly harm Gorillas by disrupting their habitat and food sources through land clearing, drilling, and pipeline construction.¹⁷⁵ This is similar to the case of the Virunga National Park— in Central Africa¹⁷⁶ —where oil exploration was considered a threat to mountain gorillas.¹⁷⁷

The high personnel requirement of the activities¹⁷⁸ also increases human disturbances in the Gorilla’s habitat,¹⁷⁹ thus disrupting Gorilla movement.¹⁸⁰ In fact, humans have historically pushed gorillas to higher altitudes, forcing them into dangerous or even deadly conditions.¹⁸¹ Activities within the DRI national park will inflict direct harm on the species and their habitat.

¹⁷⁰ VCLT,art.31(1).

¹⁷¹ VCLT,art.26.

¹⁷² *Id.*; CMS, art.II(1).

¹⁷³ *See infra* Part II(B)(1)(b).

¹⁷⁴ CBD, art.8(d).

¹⁷⁵ WWF, Oil exploration in Virunga is illegal, wwf.panda.org/discover/knowledge_hub/where_we_work/congo_basin_forests/oil_extraction/virunga_under_threat [hereinafter “WWF Virunga report.”].

¹⁷⁶ European Commission, Democratic Republic of the Congo,international-partnerships.ec.europa.eu/countries/democratic-republic-congo_en.

¹⁷⁷ WWF, Holding the Line in Virunga, www.wwf.org.uk/what-we-do/projects/how-were-holding-line-virunga.

¹⁷⁸ R¶24.

¹⁷⁹ Thibault,1807-1813.

¹⁸⁰ *Id.*

¹⁸¹ WWF Mountain Gorilla Facts, www.worldwildlife.org/species/mountain-gorilla.

3. *Replomuté failed to protect ecosystems and maintain viable populations of species under the CBD.*

Parties must ensure the conservation and sustainable use of biological resources.¹⁸² Article 8(d) further provides that Parties must protect ecosystems and maintain viable populations of species in natural surroundings.¹⁸³ Replomuté acted contrarily by engaging in activities that disrupt the ecosystem and contribute to the decline of the Gorilla population.

a) Oil activities disrupt the entire ecosystem.

The activities pressure the ecosystem. In the Niger Delta, oil activities in its forests led to devastating impacts on the environment, human life, flora, and fauna: all of which could also occur in the DRI.¹⁸⁴ First, social conflict makes the enforcement of conservation measures more difficult due to rebel and civilian occupations of the forests.¹⁸⁵ The DRI is vulnerable given its past political instability.¹⁸⁶ Second, oil pollution harms biodiversity.¹⁸⁷ Experts found that oil activities in the Virunga National Park could harm many fragile species, including primates.¹⁸⁸

b) The activities threaten the health of Royal Mountain Gorilla populations.

Oil activities facilitate unnecessary contact between humans and the Gorilla's southern population.¹⁸⁹ Contact may cause the zoonotic transmission of human diseases that all gorilla species are susceptible to, such as the common cold, pneumonia, and smallpox.¹⁹⁰ Furthermore,

¹⁸² CBD, art.8.

¹⁸³ *Id.*, art.8(d).

¹⁸⁴ Omorede, 80

¹⁸⁵ CMS Report, 58-59.

¹⁸⁶ ¶¶1&9.

¹⁸⁷ CBD Technical Series No.10, 9.

¹⁸⁸ WWF Virunga report.

¹⁸⁹ ¶24.

¹⁹⁰ CMS Report, 27.

highly contagious human diseases such as Ebola and COVID-19, which have caused outbreaks in the DRI,¹⁹¹ have a 95-99% higher mortality rate among gorillas.¹⁹²

All great apes are keystone species that play a vital role in forest regeneration and tree species diversity.¹⁹³ A diminished Gorilla population would be a devastating loss to the ecosystem.¹⁹⁴ Hence, Replomuté contravened the CBD's mandate by engaging in these activities.

4. Replomuté violated its obligation to cooperate under the CMS and the CBD.

Article 5 of the CBD¹⁹⁵ and Article II(3)(a) of CMS¹⁹⁶ mandate cooperation between Parties to conserve biological diversity and to research on their conservation, respectively.¹⁹⁷ The duty to cooperate must be carried out in good faith and must be genuine and not formalistic.¹⁹⁸ Good faith entails efforts to allow for compromise.¹⁹⁹ Thus, systematic refusals to take reasonable adverse proposals into consideration evince bad faith.²⁰⁰ Moreover, the Parties must agree on a solution that considers treaty objectives and international obligations.²⁰¹ Replomuté's lack of engagement with Aringuv and the DRI, and refusal to consider alternatives, render the periodic informal discussions, negotiations, and exchange of diplomatic notes with Aringuv insufficient to fulfill its obligation to cooperate.²⁰²

¹⁹¹ R¶¶20&32.

¹⁹² International Gorilla Conservation Programme, Covid-19 and Mountain Gorillas, igcp.org/tourism/covid-19-and-mountain-gorillas.

¹⁹³ Fung, 8.

¹⁹⁴ *Id.*

¹⁹⁵ CBD, art.5.

¹⁹⁶ CMS, art.II(3)(a).

¹⁹⁷ Richard Caddell, *Biodiversity Loss and the Prospects for International Cooperation: EU Law and the Conservation of Migratory Species of Wild Animals*, 8 Y.B.EUR.ENVTL.L.218(2008).

¹⁹⁸ VCLT, art.3(3)(c).

¹⁹⁹ North Sea Continental Shelf Cases(Ger. v. Den.), 1969 I.C.J. 3, ¶85(Feb. 20)[hereinafter "North Sea"].

²⁰⁰ Lake Lanoux Arbitration(Fr. v. Spain), 12 R.I.A.A. 281, 300(1957).

²⁰¹ Gabčíkovo, ¶141.

²⁰² *Id.*

5. Replomuté is bound by the principle of Common But Differentiated Responsibility (“CBDR”).

CBDR requires States to contribute differently based on their capabilities. The UNFCCC and the Paris Agreement (“PA”) require developed States to shoulder heavier burdens due to pressures they have placed on the environment and the resources at their disposal.²⁰³ The CBD similarly requires special consideration to developing States.²⁰⁴

Replomuté is covered by the EU NDC which guarantees at least a 40% reduction in greenhouse gas (GHG) emissions as compared to 1990 levels and the general obligation to limit global warming to below 2°C.²⁰⁵ As an Annex I Party,²⁰⁶ Replomuté must adopt the necessary policies and measures to achieve this guarantee.²⁰⁷ However, Replomuté is presently engaged in inherently GHG-contributing activities, including mining, metal production, and crude oil importation and consumption.²⁰⁸ Engaging in oil activities, which contributes to around 25% of global anthropogenic GHG emissions, is contrary to the EU NDC’s directives.²⁰⁹

Notably, the UNFCCC mandates responsibility for activities within one’s control, even if done outside their jurisdiction.²¹⁰ Thus, Replomuté’s attempt to evade its UNFCCC and PA

²⁰³ UNFCCC, arts.3&4.

²⁰⁴ *Id.* arts.20(4)&(7).

²⁰⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, art.2[hereinafter “Paris Agreement”]; R¶15; European Union, The update of the nationally determined contribution of the European Union and its Member States.COM(2020) 627 final, ¶25, 17 December 2020.

²⁰⁶ R¶13.

²⁰⁷ UNFCCC, art.4(2)(a); Paris Agreement, art.4.

²⁰⁸ R¶13; Stéphanie Muller et al., *No Mining Activities, No Environmental Impacts?*, 22 SUSTAINABLE PRODUCTION AND CONSUMPTION. 24 (2020); Surungan & Safitri, *The Effect of Financial Leverage on Profitability with Corporate Social Responsibility as Moderating Variable*, 7 INT’L J. ECON., COM. & MGMT. 1315-1327 (2019).

²⁰⁹ R¶¶18-19, 32-33; SEI, IISD, ODI, E3G, and UNEP, *The Production Gap Report 2021*.

²¹⁰ UNFCCC pmb1(8); *See infra* Part II(B)(1)(b).

obligations to lead the fight against climate change by engaging in activities within the DRI is a clear violation of Replomuté's CBDR.²¹¹

Replomuté's participation in the activities required compensation in light of its CBDR under its treaty obligations. However, Replomuté refused to provide a USD50 million fund to compensate for the harmful impacts of its activities, and instead established a meager "friendship fund" which was still subject to Replomuté's control.²¹² This fund was also not compensatory in nature and was deemed "economic".²¹³

B. REPLOMUTÉ IS INDIRECTLY RESPONSIBLE FOR THE DRI'S VIOLATIONS OF INTERNATIONAL LAW.

1. Replomuté is derivatively responsible for the DRI's acts.

a) Derivative responsibility from coercion is part of CIL.

State practice and *opinio juris*²¹⁴ must be separately assessed.²¹⁵ ARSIWA Article 18, which mandates responsibility for a coerced state's acts, exhibits both.

(1) Article 18 of the ARSIWA fulfills the two-fold requirements of CIL.

State practice must be both (1) representative and (2) consistent.²¹⁶ Representative requires application only by specially affected States.²¹⁷ Inaction by deliberate abstention is "negative" practice,²¹⁸ and seen in the *Shuster* and *Romano-Americana* cases. In *Shuster*,²¹⁹ the St. Petersburg

²¹¹ UNFCCC, art.3(2); Paris Agreement, art.3.

²¹² R¶¶23&24.

²¹³ *Id.*

²¹⁴ North Sea, ¶77.

²¹⁵ ILC, Draft conclusions on identification of customary law, with commentaries, p.6, Yearbook of the ILC(2018), A/73/10, at 127 [hereinafter "DCICL"].

²¹⁶ *Id.* 135-136.

²¹⁷ *Id.*

²¹⁸ *Id.* 133.

²¹⁹ Clement L. Bouve, Russia's Liability in Tort for Persia's Breach of Contract, 6 AM. J. INT'L L. 389, 391-92 (1912).

government coerced Persian authorities to breach a contract with the US. While Persia paid compensation before a case was filed, experts argue that without it, the US could have invoked Article 18.²²⁰ Similarly, in *Romano-Americana*, the UK coerced Romania to destroy US facilities. Here, the US insisted on invoking coercion. In both cases, Parties adjusted their behavior thus constituting negative practice. Additionally, state conduct vis-a-vis its nationals also constitutes state practice.²²¹ Contract law in both common and civil law jurisdictions hold coercers responsible for the acts of those coerced.²²² There is also consistency as no case suggests divergence from this practice.²²³

Deliberate inaction constitutes *opinio juris* when a State consciously refrains from acting in a particular situation, believing that it is obligatory.²²⁴ In *Shuster* and *Romano-Americana*, States believed that if coercion were proven, the coercing state would have been liable.²²⁵ Hence, Article 18 of the ARSIWA meets *opinio juris*.

(2) *The ILC's ARSIWA merits special consideration in the identification of custom.*

The ICJ has considered the ILC's opinion in determining whether custom has crystallized,²²⁶ being a UNGA subsidiary organ which promotes the development of international law.²²⁷ Hence, the ARSIWA and the Draft Articles merit consideration.

²²⁰ Fry, Coercion, Causation, and the Fictional Elements of Indirect State Responsibility, 634, 40 VANDERBILT LAW REVIEW 611,622 (2021) [hereinafter "Fry"].

²²¹ Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95(4) AM. J. INT'L L. 777(2001).

²²² John P. Dawson, *Duress through Civil Litigation*, 45 MICH. L. REV. 571,579-586(1947).

²²³ *Supra* at note 226.

²²⁴ DCICL, 142.

²²⁵ Fry, 623.

²²⁶ Gabčíkovo ¶51 *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 2011 ITLOS 10, ¶169(Feb. 1).

²²⁷ DCICL, 142-143.

b) Replomuté has coerced the DRI into committing violations of international law.

A State is responsible for acts of another if: (1) the State coerced another to commit an internationally wrongful act; (2) there is no breach but-for the coercion, and (3) the coercing State is aware of the circumstances of the act.²²⁸

(1) *Due to serious economic pressure, the DRI was coerced into continuing the concession agreement.*

The coerced state must have no effective choice but to comply with the coercing State.²²⁹ Coercion may be through serious economic pressure²³⁰ and need not be unlawful to warrant liability.²³¹ Hence, the arbitral penalty may indicate coercion. Gross national income (“GNI”) indicates standards of living and welfare.²³² The USD825 million arbitral penalty is more than 2% of the DRI’s 2020/21 GNI,²³³ equivalent to a mild recession²³⁴ and hampered economic development.²³⁵ Given the DRI’s history of civil unrest and corruption,²³⁶ economic decline could aggravate social tensions.²³⁷ Thus, the DRI had no effective choice but to concede to Replomuté’s demands.

²²⁸ ILC, Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E., Nov. 2001.

²²⁹ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), Nov. 2001,69[hereinafter “DARIO”].

²³⁰ Military and Paramilitary Activities in and against Nicaragua(Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶205.

²³¹ DARIO, 70.

²³² Pedro Conceição, Milorad Kovacevic & Tanni Mukhopadhyay, Human development: A perspective on metrics, in MEASURING HUMAN CAPITAL 83–115(2021).

²³³ R¶¶1,34.

²³⁴ Solomon Fabricant, *The "Recession" of 1969—1970*, 1 Economic Research: Retrospect and Prospect 89, 111 (1972).

²³⁵ Hadhek Zouhaier and Mrad Fatma, *Debt and Economic Growth*, 4 INT’L J. ECON. FIN. ISSUES 440, 445 (2014).

²³⁶ R¶¶1,22.

²³⁷ A. Michael Spence, Economic Decline is Leading to Political Instability. WORLD ECONOMIC FORUM, www.weforum.org/agenda/2016/03/economic-decline-is-leading-to-political-instability-whats-the-solution/.

(2) Replomuté's insistence to enforce the Agreement passes the but-for test of legal causation.

The but-for test asks whether the outcome would have happened without the condition.²³⁸ Hence, it involves a factual determination of probable circumstances had there been no coercion.²³⁹

Replomuté intended to withdraw from the concession agreement because of the Gorilla Agreement.²⁴⁰ Had there been no threat of an exorbitant penalty, the DRI would have freely withdrawn. Hence, but-for the coercion, the DRI would not have violated international law.

(3) Replomuté was aware why the DRI attempted to withdraw from the agreement.

Based on General Mina's declaration²⁴¹ and the diplomatic correspondence with Aringuv,²⁴² Replomuté is clearly aware of the DRI's treaty obligations. Moreover, NGOs have even expressed serious concerns regarding the oil activities' negative impact on the Gorillas.²⁴³

2. Replomuté is responsible for the DRI's violations of international law.

a) Replomuté is responsible for the DRI's violations of its CMS Range State obligations.

The DRI is a CMS Range State.²⁴⁴ It must conserve Gorilla habitats and reduce factors that endanger the species.²⁴⁵ Replomuté's activities open the habitat to risks of deforestation, pollution,

²³⁸ MERRIAM-WEBSTER'S LAW DICTIONARY(10th ed., 1996).

²³⁹ Michelle Foster, Causation in Context: Interpreting the Nexus Clause in the Refugee Convention, 23 MICH. J. INT'L L. 265, 314-315(2002);

²⁴⁰ R¶22.

²⁴¹ R¶22.

²⁴² R¶¶27&31.

²⁴³ R¶21.

²⁴⁴ R¶9; CMS, art.I(1)(h).

²⁴⁵ CMS, art.III(4)(a)&(c).

oil leaks, and explosions.²⁴⁶ Since Replomuté coerced the DRI, it is derivatively responsible for the latter's breach of Range State obligations.

b) Replomuté is responsible for the DRI's violations of the Gorilla Agreement and the 1968 Algiers Convention.

The Gorilla Agreement requires Range States to protect gorilla habitats and take appropriate land-use measures to prevent human-gorilla conflicts.²⁴⁷ Similarly, the Algiers Convention requires special protection for endangered species.²⁴⁸ The Activities threaten the Gorillas.²⁴⁹ Hence, Replomuté is indirectly responsible for the DRI's acts violating the Gorilla Agreement and the Algiers Convention.

²⁴⁶ See Part II(A)(2)(b).

²⁴⁷ Agreement on the Conservation of Gorillas and Their Habitats, Sept. 24, 2007, 47 I.L.M. 1196, art.III(2)(b)&(j).

²⁴⁸ Convention on the Conservation of African Wildlife and Habitat, Algiers, March 18, 1968, 1137 U.N.T.S. 3, art.8(1).

²⁴⁹ See Part II(A)(2)(b).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Aringuv respectfully requests that this Court declare that:

1. Replomuté has violated international law with its failure to prepare an EIA; and
2. Replomuté has violated international law with respect to the oil extraction activities.

Respectfully Submitted,

Agents for Aringuv