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28TH STETSON INTERNATIONAL ENVIROMENTAL MOOT COURT COMPETITION 2023-24

INTERNATIONAL COURT OF JUSTICE

THE HAGUE, THE NETHERLANDS



2023 GENERAL LIST No. 303

QUESTIONS RELATING TO MOUNTAIN

GORILLAS AND IMPACT ASSESSMENT

ARINGUV

(APPLICANT)

v.

REPLOMUTÉ

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

MEMORIAL ON BEHALF OF THE APPLICANT

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TABLE OF ABBREVIATION

1.	&	And
2.	¶	Paragraph
3.	ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
4.	Art.	Article
5.	Algiers Convention	African Convention on the Conservation of Nature and Natural Resources
6.	Bonn Convention	The Convention on the Conservation of Migratory Species of Wild Animals
7.	Clarifications	Clarifications to the 28 th Stetson International Environmental Moot Court Competition Record
8.	CBD	Convention on Biological Diversity
9.	CIL	Customary International Law
10.	CITES	The Convention on International Trade in Endangered Species of Wild Fauna and Flora
11.	CMS	The Convention on the Conservation of Migratory Species of Wild Animals, 1983
12.	COP	Conference of Parties
13.	DRI	Democratic Republic of Ibirunga
14.	EIA	Environmental Impact Assessment

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15.	Espoo Convention	Convention on Environmental Impact Assessment in a Transboundary Context
16.	EU	European Union
17.	GHG	Green House Gas
18.	ICJ	International Court of Justice
19.	ICT	International Courts and Tribunals
20.	IGCP	International Gorilla Conservation Programme
21.	ILC	International Law Commission
22.	IUCN	International Union for Conservation of Nature
23.	MG	Mountain Gorillas
24.	NDC	Nationally Determined Contribution
25.	No.	Number
26.	OECD	Organization for Economic Cooperation and Development
27.	Record	28 th Stetson International Environmental Moot Court Competition Record
28.	Revised Algiers Convention	Revised African Convention on the Conservation of Nature and Natural Resources
29.	Ramswar Convention	Wetland of International Importance
30.	Rio Declaration	United Nations Conference on Environment and Development at Rio de Janeiro, 1992
31.	Stockholm Declaration	United Nations Conference on the Human Environment at Stockholm, 1972

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32.	UNFCCC	United Nations Framework Convention on Climate Change
33.	UN	United Nations
34.	UNGA	United Nations General Assembly
35.	UNEP	United Nations Environment Programme
36.	v.	Versus
37.	VCLT	Vienna Convention on Law of Treaties
38.	Vol.	Volume
39.	WWF	World Wildlife Fund

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QUESTIONS PRESENTED

I

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

II

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

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STATEMENT OF JURISDICTION

Pursuant to Article 40 paragraph 1 of the Statute of International Court of Justice, the Aringuv and the Replomuté have submitted to ICJ by Special Agreement, questions relating to Mountain Gorilla and Impact Assessment as contained in Record, including the Clarifications. The parties transmitted a copy of the Special Agreement to the Registrar of the ICJ on July 24, 2023.

The Registrar of the Court addressed a notification of receipt of the Special Agreement to the parties on July 31, 2023.

The parties have accepted the jurisdiction of the ICJ under Article 36(1) of the Statute. Consequently, they request the Court to adjudge the merits of this matter based on the rules and principles of general international law, as well as any applicable treaties. The parties further request this Court to determine the legal consequences, including the rights and obligations of the Parties arising from any judgment on the questions presented in this matter.

The parties have agreed to respect the decision of this Court

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STATEMENT OF FACTS

Background of Parties

The Democratic Republic of Iburunga (DRI) is a low-income sovereign state in Central Africa. Aringuv is a lower-middle income sovereign state in Central Africa sharing its eastern border with DRI. Replomuté is a high-income sovereign state in Europe which is among the world's largest importer of crude oil.

Royal Mountain Gorillas in DRI and Aringuv

The Royal Mountain Gorilla (*Gorilla ibirungai royali*) is a species of mountain gorilla found only within the territories of DRI and Aringuv. The northern population of the Royal Mountain Gorillas are present in a transboundary national park between Aringuv and DRI and members of this population frequently cross boundaries. The southern population of the Royal Mountain Gorillas occupy a national park in DRI. Both populations have no contact with each other. The Royal Mountain Gorilla is included in Appendix 1 of CMS and is classified as critically endangered under IUCN Red list.

Oil exploration and extraction activities by Replomuté

In 1981, the DRI and Replomuté signed a concession agreement granting Lenoir Corporation a corporation wholly owned by the government of Replomuté, the right to explore, extract oil, and construct pipelines to transport oil from the area inhabited by the southern population of the Royal Mountain Gorillas. Prior to signing the agreement which contained a mandatory binding arbitration clause, DRI conducted an EIA, which was compliant with its national laws. However, the EIA failed to take into consideration the impacts to gorillas, gorilla habitat and climate change.

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Gorilla agreement and invocation of arbitration

After years of civil war, Ebola outbreak and riots etc., local and international NGOs expressed serious concerns of the project's impact on the Royal Mountain Gorilla. The Gorilla Agreement is an international agreement signed and ratified by DRI and Aringuv. The DRI's new President declared that in light of the Gorilla Agreement, DRI was compelled to withdraw from the concession agreement, unless Replomuté established a \$50 million (USD) fund. The Replomuté accused the president of having renegotiated the deal for personal profits and invoked the binding arbitration clause.

Arbitral order in favour of Replomuté

Replomuté prevailed in the binding arbitration proceedings and the panel ordered DRI to permit the Lenoir corporation to proceed with its oil exploration and extraction or be subject to more than \$825 million (USD) in penalties. The DRI acquiesced to the oil exploration activity and a friendship fund was exchanged.

Negotiations and Dispute

Periodic informal discussions and negotiations took place between Aringuv and Replomuté from December 2018 to May 2022 on the transboundary impact, EIA decision needing to be revised, and direct and indirect international law obligations. As a result of negotiations, Aringuv and Replomuté agreed to submit certain questions to the ICJ.

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SUMMARY OF ARGUMENTS

I

The failure of Replomuté to prepare or revise the EIA with respect to the proposed oil extraction activity violates international law. Firstly, the said activity is likely to cause significant transboundary harm to Aringuv. Secondly, the initial EIA failed to comply with Algiers Convention's provisions on protected species. Thirdly, the Espoo convention is applicable to Aringuv, due to which Replomuté has a direct obligation under Art. 2 of Espoo convention. Further, failure to comply with procedural obligations of duty to consult and cooperate with Aringuv under Art. 5 and Art. 6 of Espoo convention has been established. Obligation under Art. 14 of CBD, 4(1)(f) of UNFCCC and CIL establishes non-compliance on part of Replomuté in the preparation of EIA.

II

The Oil exploration and extraction activity has a significant impact on the Royal Mountain Gorillas which are Appendix 1 species under CMS. The project undertaken by Replomuté violates international law obligations under Article II and III of CMS, provisions of CBD, and Climate Change laws. Replomuté is also indirectly responsible for the actions of DRI in violation of Article III(2)(a) of the Gorilla Agreement as it is coercing DRI to commit an Internationally wrongful act under Art. 18 of ILC Draft Articles of State Responsibility.

ARGUMENTS ADVANCED

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

It is respectfully submitted that the International Conventions such as CBD¹, UNFCCC², and Espoo Convention³ imposes an obligation thereunder to prepare an EIA when there is a likelihood of transboundary harm. The same is contented under the following arguments; i.e., 1. The proposed oil extraction activity in DRI is likely to cause significant transboundary harm 2. Replomuté breached its legal obligation to prepare an EIA; 3. Replomuté is in violation of duty to cooperate and consult.

1. THE PROPOSED OIL EXTRACTION ACTIVITY IN DRI IS LIKELY TO CAUSE SIGNIFICANT TRANSBOUNDARY HARM

The Principle of Transboundary Harm which evolved to become a crystallized CIL, states that “the State has a responsibility to not harm the environment of other states”⁴. In such cases, an EIA is required to be prepared. The transboundary harm is proved under the following elements i.e., A.

¹ *Convention on Biological Diversity*, art.3, Jun. 5, 1992, 1760 U.N.T.S. 79[hereinafter, CBD].

² *United Nations Framework Convention on Climate Change*, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]

³ *Convention on Environmental Impact Assessment in a Transboundary Context* art. 2, March 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention]

⁴ *Stockholm Declaration on the Human Environment*, Principle 21, UN Doc. A/CONF. 48/14/Rev.1 (1973) [Stockholm Declaration]

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There should be a physical relationship between the activity and the harm caused; B. there should be transboundary movements of harmful effects; C. The Harm must meet the threshold⁵.

A. There should be a physical relationship between the activity and the harm caused

Firstly, there must be a physical relationship and proximate cause between the activity in question and the damage caused by it⁶. Whereas, to establish a physical element in the relationship, there should be an environmentally harmful act caused solely by human activities⁷. Here, the oil extraction activity is a human activity⁸, conducted by Replomuté's nationals⁹, thereby satisfying this element.

B. There should be a transboundary movement of harmful effects

Secondly, when more than one state is affected by the activity, it should directly contribute to the transboundary damage¹⁰. Beyond DRI, there is a direct consequence on Aringuv because of the migration of Royal Mountain Gorillas¹¹. The burning of fossil fuel has a negative impact on the gorillas and amounts to significant raise in GHG emissions. Many eminent scholars have emphasized the issue of de-investment in the fossil fuel industry is the needed action to improve

⁵ Xue Hanquin, *Transboundary Damage In International Law*, (New York: Cambridge University Press, 2003).

⁶ Id.

⁷ O. Schachter, *International Law in Theory and Practice*, at 336-368 (Brill Academic Publishers 1991).

⁸ Record ¶ 17.

⁹ Clarification, A.13.

¹⁰ Supra 5.

¹¹ Record ¶9

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climate progress.¹² Therefore, the element of transboundary movement of harmful effect is satisfied.

C. The Harm must meet the threshold

The threshold set is that the damage caused should at least be '*greater than the mere nuisance or insignificant harm which is normally tolerated*'¹³. The term significant is something more than detectable but need not be at the level of serious or substantial¹⁴. The said activity's harm is more detectable on the environment of biodiversity of the Gorilla, Gorilla habitat, Climate Change¹⁵. The Mountain Gorillas which is classified as critically endangered on IUCN Red List of Threatened Species¹⁶ will have a devastating impact.

Thus, all the elements of transboundary harm to Aringuv is satisfied thereby making Replomuté liable to prepare an EIA.

¹² McDonald, F. (2013). Two-thirds of energy sector will have to be left undeveloped, Bonn conference told. Irish Times, Oct 5 2023, < <http://www.irishtimes.com/news/world/europe/two-thirds-of-energy-sector-will-have-to-be-left-undeveloped-bonn-conference-told-1.1425009> >.

¹³ J, Barboza, "*Sixth Report on International Liability for Injurious Consequences Arising Out of Acts not Prohibited International Law*" March 15, 1990, UN Doc. A/CN.4/428 (Article 2(b)).

¹⁴ *Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries* (2001), 56th Session, UN doc. A/56/10.

¹⁵ Tutilo Mudumba, *The implications of global oil exploration for the conservation of terrestrial wildlife*, Environmental Challenges 11 (2023).

¹⁶ Record ¶ 8.

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2. FAILURE OF REPLOMUTÉ TO PREPARE AN EIA UNDER ITS INTERNATIONAL OBLIGATIONS

When Replomuté's project poses a risk of transboundary harm, it has an obligation to conduct an EIA¹⁷ under the following; A. Obligation under the Algiers Convention and Revised Algiers Convention is not duly followed; B. The EIA requirements mandated under Espoo is not met; C. Replomuté failed to comply with the procedures of EIA under CBD; D. The EIA failed to include Climate Change Obligations; E. EIA is a Customary International Law; F. Replomuté in breach of its due diligence and precautionary principle.

A. Obligation under the Algiers convention and Revised Algiers convention is not duly followed

Article VIII of the Algiers Convention accords special protection to those animals that are threatened with extinction and are placed in Class A of this Convention¹⁸. By this, the Royal Mountain Gorillas confer stricter protection to them¹⁹. When the States are committed to such type of protection, the initial EIA taken did not consider the Gorillas. Thereby failing in its duty to protect²⁰.

¹⁷ *UN Conference on Environment and Development, Rio Declaration, Principle 17*, 14 June 1992, 31 ILM 874, UN doc. A/conf.151/5/Rev. 1.

¹⁸ *African Convention on the Conservation of Nature and Natural Resources* was adopted by the OAU in Algiers in July 1968 and entered into force on 16 June 1969 art. 8 (the 'Algiers Convention').

¹⁹ Id, Class A,.

²⁰ Record ¶ 17.

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Further, Article XIV of Revised Algiers Convention²¹ imposes a duty to take all necessary measures to ensure that the project is undertaken under sound environmental policies. Though Replomuté is not a party to the Revised Algiers Convention, the principle to conduct an EIA is an established CIL, that was reiterated in few other Judgements such as Pulp Mills case²², and Nicaragua case²³. Therefore, Replomuté was under an obligation to perform an EIA under the Algiers and Revised Algiers Convention.

B. The EIA requirements mandated under Espoo is not met

With respect to the Espoo Convention's applicability on Aringuv, Article 34 states that every state which acceded to VCLT might become subject to rights and obligations stemming from other Treaties that have not yet entered into force for that State, due to its status as a ‘contracting’ or ‘negotiating’ State with its consent²⁴. Aringuv, though not ratified the Espoo Convention, had expressly stated about its intention to accede to it²⁵, thereby establishing its intention.

²¹ African Convention on the Conservation of Nature and Natural Resources (2016) CAB/LEG/24.1.

²² *Pulp Mills on the River Uruguay (Argentina v. Uruguay.)*, Judgment, 2010 I.C.J. 156, ¶14 (Apr. 20) [hereinafter “Pulp Mills”].

²³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, 665, (hereinafter Costa Rica)

²⁴ Vienna Convention On The Law Of Treaties, A Commentary 611 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

²⁵ Record ¶ 25

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Article 2 states that the state should ensure an EIA is undertaken prior to the proposed activity²⁶. The assessment should be wide enough to cover the transboundary implications²⁷. The Royal Mountain Gorilla and Climate Change were not taken into consideration thereby resulting in failure of Replomuté's obligation under the Espoo Convention²⁸.

C. Replomuté failed to comply with the procedures of EIA under CBD

The parties shall follow appropriate EIA procedures for its projects that are likely to have significant effects on biological diversity²⁹. The term 'biodiversity' includes variability among living organisms from all sources which includes Gorilla and its subspecies³⁰. The condition was not complied by Replomuté as it did not take gorillas into the subject matter³¹.

D. The EIA failed to include Climate Change Obligations

An emerging norm of CIL is requiring the States to carry out an EIA before authorizing a proposed activity that more likely considers climate change³². It requires the states to take climate change considerations into account, and impact assessments, with a view to minimize the adverse effects

²⁶ Espoo, art. 2.3

²⁷ H. Abaza, R. Hamwey, *Integrated Assessment as a Tool for Achieving Sustainable Trade Policies*, 2(3) Environmental Impact Assessment Review 481, 498 (2001).

²⁸ Record ¶ 17

²⁹ CBD, art. 14.1(a)

³⁰ CBD, art. 2

³¹ Record ¶ 17

³² Mayer, 'Climate Assessment as an Emerging Obligation' (n. 1) 282

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on the quality of the environment³³. Further, the said activities' GHG emission is alarming to the Global Environment.

E. EIA is a Customary International Law

EIA is an obligation under CIL when the planned activities are likely to cause significant transboundary damage which has been affirmed in Pulp Mills³⁴, Costa Rica³⁵. The ITLOS Seabed Disputes Chamber clearly expressed that customary international law requires States to fulfill the obligation of EIA³⁶. The relevant State practice could be traced back to the National Environmental Policy Act adopted by the United States in 1969, and since then, the requirement of EIA has been established in domestic legislation worldwide, including in China, the United Kingdom, Canada, Japan, Australia, India, and other countries³⁷. Therefore, EIA is an established CIL binding on all states.

E.1 EIA is a Continuing obligation under CIL

The content of EIA is not completely dependent on domestic legislation but is to be assessed against international standards³⁸. The EIA is not merely an assessment prior to the commencement

³³ Art. 4.1(f)

³⁴ Pulp Mills ¶204

³⁵ Costa Rica ¶ 104

³⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10–78

³⁷ UN Environment. *Assessing Environmental Impacts—A Global Review of Legislation*; UN Environment: Nairobi, Kenya, 2018

³⁸ Costa Rica, Separate Opinion of Judge ad hoc Dugard, ¶18.

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of the project but is a continuing assessment and evaluation as long as the project is in operation which was pointed out in *Trail Smelter Arbitration*³⁹. It is a dynamic principle not confined to pre-project evaluation of possible environmental consequences⁴⁰. Thus, Replomuté has a continuing obligation to prepare an EIA under any stage of the project.

F. Replomuté in breach of its due diligence and precautionary principle

The ‘requirement to exercise due diligence, as the governing norm, is an obligation of conduct that applies to all phases of a project’.⁴¹ Replomuté failed to observe due diligence by not conducting an EIA. The state needs to act diligently and with foresight when it comes to activities in their jurisdiction that may cause significant harm to the environment or the risk thereof. The Royal Mountain Gorilla is a migratory species, despite their mobility from one place to other, portray vulnerabilities to climate change⁴².

The principle of prevention is a principle of general international law and respectively a customary rule⁴³. The state is required to take action to prevent environmental harm before damage actually

³⁹ *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (1938/1941) [hereinafter “Trail Smelter”].

⁴⁰ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1. C. J. Reports 1997, p. 7 (Separate Opinion Weeramantry)

⁴¹ Costa Rica, ¶9

⁴² Robinson, R.A, et.al.,. *Travelling through a warming world: Climate change and migratory species. Endanger. Species Res.* 2009, 7, 87–99. 12; *Zoological Society of London. Climate Change Vulnerability of Migratory Species. Species Assessments—Preliminary Review*; UNEP/CMS/ScC17/Inf.9 (final version, June 2011); Zoological Society of London: London, UK, 2011

⁴³ *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between The Kingdom of Belgium and The Kingdom of the Netherlands*, Award of 24 May 2005, UNRIAA XXVII 35 ¶ 59; Pulp Mills ¶ 101.

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occurs. Further, the lack of scientific proof shall not be used as a justification to postpone the taking of preventive measures⁴⁴. Therefore, Replomuté would be held accountable if it didn't demonstrate its best efforts to prevent the environmental harm.⁴⁵

3. REPLOMUTÉ DID NOT COMPLY WITH ITS DUTY TO COOPERATE UNDER ITS INTERNATIONAL OBLIGATIONS

The duty to co-operate as a means to effectively control, prevent, and reduce adverse effects on the environment⁴⁶. The same is contended under the following circumstances i.e., A. The procedural requirements under ESPOO had been infringed; B. The duty to cooperate is not complied under CBD; C. The duty to consult and cooperate with affected party is a CIL.

A. The procedural requirements under ESPOO had been infringed

If additional information on the significant transboundary impact of a proposed activity which was not available at the time a decision was made with respect to that activity, which could have materially affected the decision becomes available before work on that activity commences, then consultation should be held on whether the decision needs to be revised⁴⁷.

⁴⁴ Rio Declaration, Principle 15

⁴⁵ Malaihollo, M. *Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights*. *Neth Int Law Rev* 68, 121–155 (2021).

⁴⁶ Stockholm, Principle 24

⁴⁷ Espoo, art. 6.3

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After the EIA was conducted in 1981, the DRI and Replomuté signed various conventions such as CBD, CMS, UNFCCC, ESPOO, and Gorilla Agreement⁴⁸. This falls under the ambit of Additional information that was not available at the time the decision was made, which materially affects the final decision. Such failure of Replomuté to perform consultations under the decision-making process, breaches its duty to consult.

B. The duty to cooperate under CBD is not established

Replomuté breached Article 14.1(c) of CBD which states the duty to cooperate. Replomuté, did not enter into consultations with Aringuv as an affected party, which failed to comply with these provisions.

C. The duty to consult and cooperate with affected party is a CIL

The duty to cooperate is an enforceable obligation to notify and consult⁴⁹ in the event of potential transboundary environmental harm. The breach of which would engage state's responsibility⁵⁰. In the case of *Lac Lanaoux*⁵¹, the Tribunal held that the State has a duty to consult over certain projects likely to affect its interest must be genuine, made in good faith, and not be mere formalities. The Replomuté failed to cooperate when it disregarded Aringuv's claim and concern over the harm caused to the Royal Mountain Gorilla and Climate Change.

⁴⁸ Record ¶ 7, 8, 9, 13.

⁴⁹ *France v. Spain* (1957) 24 ILR 101; Stockholm , Principle 24; Rio Declaration, Principle 7.

⁵⁰ Stephen McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* 403 New York: Oxford University Press, 2001

⁵¹ *Lac Lanoux Arbitration (France V. Spain)* (1957) 12 R.I.A.A. 281; 24 I.L.R. 101

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Thus, concluding that Replomuté has violated International law under International Conventions and Customary International law.

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

The activity of oil exploration, extraction and construction of pipeline in the DRI has a significant impact on the environment and further violates international law obligations. Replomuté's breach of international law obligations have been put forth based on the following contentions; 1. The Royal Mountain Gorillas are migratory species under CMS; 2. Replomuté's direct responsibility and obligations under CMS; 3. Replomuté violated direct responsibility under the CBD; 4. Replomuté violated climate change laws and obligations; 5. Indirect responsibility of Replomuté through coercion of DRI.

1. THE ROYAL MOUNTAIN GORILLAS ARE MIGRATORY SPECIES UNDER CMS

The Royal Mountain Gorillas are considered as migratory species under the CMS based on the following contentions, i.e., A. The Mountain Gorillas are Appendix 1 species under CMS, B. The Royal Mountain Gorillas are covered under the Definition of Migratory Species under CMS, C. The northern and southern population of the mountain gorillas shall be treated species as a whole

A. The Mountain Gorillas are Appendix 1 species under CMS

One of the main objectives of CMS is to provide strict protection of species listed in Appendix 1⁵². As the CMS Appendix 1 species are broadly defined as 'endangered'⁵³, the IUCN Red List criteria

⁵² *Convention on Migratory Species*, art. 2., June 23, 1979, 1651 U.N.T.S. 333 [CMS] .

⁵³ *Id.*, art.1(1)(e).

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of ‘Critically Endangered’ is eligible for the listing consideration⁵⁴. The Royal Mountain Gorillas are similar in size, appearance and behaviour to the *Gorilla Beringei Beringei*.⁵⁵ The Mountain gorillas (*Gorilla beringei beringei*) is a lower classification under the Primate Eastern Gorillas (*Gorilla beringei*) which is listed in the Appendix 1⁵⁶. Hence the Royal Mountain gorilla is a species protected under Appendix 1 of the CMS.

B. The Royal Mountain Gorillas are covered under the Definition of Migratory Species under CMS

Defining a species as migratory if a “*significant portion*”⁵⁷ of its members migrate, allows the inclusion of relatively sedentary species in the appendices⁵⁸. In the present case, despite the presence of Royal Mountain Gorillas in two geographically separate national parks⁵⁹, a significant proportion of the species i.e., the northern population⁶⁰ of the species cyclically and predictably crosses the national jurisdiction boundaries between Aringuv and the DRI. These species of

⁵⁴ CMS Conference of the Parties, UNEP/CMS/Resolution 11.33(Rev.COP12) *Guidelines For Assessing Listing Proposals To Appendices I And II Of The Convention*, 12th meeting (October 2017).

⁵⁵ Clarifications, 9.

⁵⁶ CMS, Appendix.

⁵⁷ Id, art.1(1)(a).

⁵⁸ Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention)*, 29 Nat. Resources J. 979 (1989).

⁵⁹ Record ¶ 9.

⁶⁰ Id.

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mountain gorillas occur in troops for reasons such as decrease in food abundance, to expand their home range, male mating pattern etc.,⁶¹ establishing cyclic and predicable movement.

Therefore, considering the precautionary principle and the COP's broad interpretation of "migratory species," the Convention's scope may be best understood as encompassing transboundary species conservation rather than only migratory species in the classical sense.⁶² The flexibility and pragmatism of CMS's COP lead to the listing of several species which are not considered migratory in typical sense. These include Seven large carnivore that are not migratory in the most typical sense.⁶³ Thus, assuming the mountain gorillas are not considered migratory in the classical sense, species are yet added in the Appendix 1 with an intention to strictly protect them.

C. The northern and southern population of the mountain gorillas shall be treated species as a whole

Splitting gorillas and other primate taxa into subspecies should be done cautiously and conservatively, and should be based on a consensus of biogeographic, genetic, morphological,

⁶¹ Proposal For The Inclusion Of Species On The Appendices Of The Convention On The Conservation Of Migratory Species Of Wild Animals, Available at:

https://www.cms.int/sites/default/files/document/I_1_Gorilla_gorilla_COG.pdf

⁶² Lewis M and Trouwborst A *Large Carnivores and the Convention on Migratory Species (CMS)— Definitions, Sustainable Use, Added Value, and Other Emerging Issues*. Front. Ecol. Evol. 7:491. (2019)

⁶³ Id.,

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behavioural, and ecological factors⁶⁴. Therefore, there is no sufficient scientific evidence on whether such geographical separation alone should warrant taxonomic reassignment.⁶⁵ Infact, these two populations are naturally one, made allopatric only by very recent human activity.⁶⁶

In the case of mountain gorillas, biogeographic and genetic data argue most strongly against splitting.⁶⁷ Therefore, till date, the Royal Mountain Gorillas have no scientific evidence to prove further categorisation of sub species. Hence, the geographical separation does not characterise different subspecies and shall be considered species as a whole.

2. REPLOMUTÉ'S DIRECT RESPONSIBILITY AND OBLIGATIONS UNDER CMS

Replomuté is a party to the CMS⁶⁸ which creates a direct responsibility under the Convention. By undertaking the project in DRI, Replomuté is in violation of CMS based on the following contentions, i.e., A. The Royal Mountain Gorillas are negatively impacted by the oil exploration and extraction activities; B. Replomuté has violated its non-range state obligations under CMS.

⁶⁴ Stanford, C.B. The subspecies concept in primatology: The case of mountain gorillas. *Primates* 42, 309–318 (2001).(Stanford).

⁶⁵ Id.,

⁶⁶ Id.,

⁶⁷ Id.,

⁶⁸ Record ¶ 8

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A. The Royal Mountain Gorillas are negatively impacted by the oil exploration and extraction activities

The Royal Mountain Gorillas are species that are critically endangered under the IUCN,⁶⁹ thus fitting into the definition of “endangered” under CMS.⁷⁰ Major oil exploitation could involve disruptive seismic testing in the national park, forest clearing, deep underground drilling and the laying of vulnerable oil pipelines, increase in human interference in the natural habitat⁷¹. This would devastatingly impact the Royal Mountain Gorillas pushing it to the verge of extinction as the project is undertaken in the area inhabited by the southern population of the gorillas.⁷²

The real-life incident of a similar Virunga National Park’s Mountain gorillas being affected by the oil exploration and extraction, depicts how international organizations such as WWF, complained to the OECD and through mediation successfully stopped the project in the national park⁷³.

⁶⁹ Record ¶8

⁷⁰ CMS Conference of Parties UNEP/CMS/ScCAP/Inf.4 Resolution 5.3 *Interpretation Of Certain Terms Of The Convention*, Fifth Meeting (April 1997).

⁷¹ *Virunga under threat, WWF conserves our planet, habitats, & species like the Panda & Tiger |*

WWF, <https://wwf.panda.org/discover/knowledge_hub/where_we_work/congo_basin_forests/oil_extraction/virunga_a_under_threat/> (Oct. 29, 2023).

⁷² Record ¶17

⁷³ John Vidal, *Congo's rare mountain gorillas could become victims of oil exploration*, THE GUARDIAN (Aug. 1, 2013), < <https://www.theguardian.com/environment/2013/aug/01/congo-mountain-gorillas-virunga-wwf>. >

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B. Replomuté violated non-range state obligations under CMS

Replomuté has the duty to acknowledge the need to take action to avoid any migratory species becoming endangered.⁷⁴ Additionally, under CMS, the Parties shall endeavor to provide immediate protection for migratory species included in Appendix I⁷⁵. A legal obligation arises to comply with the conservation provisions of the convention notwithstanding that they are prefaced by qualifying words such as “endeavour”⁷⁶

Additionally, the exceptions to taking of species⁷⁷ state that exceptions can be made only if they are "precise as to content and limited in space and time" and that taking pursuant to one of the exceptions "should not operate to the disadvantage of the species". Even in the Whaling case⁷⁸, the exception of “for scientific research” was not considered sufficient grounds for killing, taking and treating of whales. An ecologically destructive activity, such as oil drilling is an oddity especially in an environmentally critical area⁷⁹. Thus, Replomuté has a direct responsibility under CMS to protect the migratory species which are critically endangered.

⁷⁴ CMS, art.2.

⁷⁵ CMS Article II paragraph iii (b), art. 2 (iii) (b).

⁷⁶ *The commonwealth of Australia v. The State of Tasmania* [1983] HCA 21-158 CLR 1

⁷⁷ CMS, art.3

⁷⁸ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, 226

⁷⁹ *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Secretary Angelo Reyes*, G.R. No. 180771 (April 21, 2015)

3. REPLOMUTÉ VIOLATED DIRECT RESPONSIBILITY UNDER CBD

It is humbly submitted that Replomuté is a party to the CBD in 1993⁸⁰, which imposes a direct obligation under CBD based on the following contentions, i.e., A. CBD obligations of Replomuté to protect and conserve biodiversity; B. High level initiatives undertaken by Central African states for the Gorilla and biodiversity protection.

A. Replomuté's obligation to protect and conserve biodiversity

Migratory species of wild animals are a part of the world's natural heritage. The 1992 Convention of Biological Diversity affirms that 'conservation of biological diversity is a common concern of humankind'⁸¹. The sovereign right principle is limited when such activity causes environmental damages to the other states⁸². Article 7(a) creates a legal obligation to identify and monitor components of biological diversity important for its conservation and sustainable use having regard to the list set down in Annex 1. Annex 1 paragraph 2 specifies threatened species in which the Royal Mountain Gorilla is included due to its IUCN status. Under Article 8 (f) parties are obliged to promote recovery of threatened species and every party has a commitment to promote recovery of the threatened species. Therefore, Replomuté as a party to CBD has a direct obligation which is violated due to the project of the Lenoir corporation as it affects the Royal Mountain Gorillas.

⁸⁰ Record ¶7

⁸¹ CBD, Preamble

⁸² CBD, art.3

B. High level initiatives undertaken by Central African states for the Gorilla and biodiversity protection

As part of their CBD obligations, African states such as Aringuv and DRI has taken noteworthy conservation measures to protect their biodiversity and tackle climate change. Great Apes Survival Project⁸³ and other prominent initiatives by African States have been significant actions that are taken in the African states. Working through the IGCP, the WWF has promoted mountain gorilla tourism since it benefits the local community⁸⁴. An effective transboundary collaboration and strategic plan is essential in improving the scenario of the gorillas and the project of Replomuté would do more harm than good to the people and planet.

4. REPLOMUTÉ VIOLATED CLIMATE CHANGE LAWS AND OBLIGATIONS

Aringuv, Replomuté and the DRI have submitted their respective NDCs under the Paris Agreement⁸⁵. By undertaking the project of oil extraction, Replomuté is in violation of its international obligation w.r.t. climate change laws established under the following contentions; A. Burning of fossil fuel would significantly increase the GHG emissions; B. Replomuté's violation of binding NDC Obligations under Paris Agreement

⁸³ United Nations Environment Programme World Conservation Monitoring Centre (1970) The great apes-the road ahead. A Globio perspective on the impacts of infrastructural development on the Great Apes, UN Environment Document Repository Home..

⁸⁴ Nina Foster, *How gorilla tourism can benefit wildlife and people*, (Sept 22, 2023)

<<https://www.worldwildlife.org/stories/how-gorilla-tourism-can-benefit-wildlife-and-people>>

⁸⁵ Record ¶14,15,16

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A. Burning of fossil fuel would significantly increase GHG emissions

In the COP 23, the world's 47 least developed countries requested that the Talanoa Dialogue include "managing a phase out of fossil fuels"⁸⁶ As temperatures are expected to rise faster in Africa than in the rest of the world, it is estimated that climate change could result in the loss of over 50 percent of some birds and other animal species by 2100.⁸⁷ Additionally, scientific evidences favour the fact that the Royal Mountain Gorillas are negatively impacted by Climate Change. The project by Replomuté's Lenoir corporation will therefore have a devastating impact on the state as a whole.

B. Replomuté's violation of binding NDC Obligations under Paris Agreement

The Paris Agreement sets standards for state behaviour and lends itself to assessments of compliance or non-compliance and the resulting consequences⁸⁸. Article 4.2 of the Paris agreement imposes both procedural as well as substantial obligation for parties to pursue domestic measures with an aim of achieving the objectives⁸⁹. The EU and its Member States, acting jointly, are committed to a binding target of a net domestic reduction of at least 55% absolute, economy-wide

⁸⁶ Cleo Verkuijl, et.al., *Aligning fossil fuel production with the Paris Agreement, Insights for the UNFCCC Talanoa Dialogue*, Stockholm Environment Institute 2018.

⁸⁷ *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, The Regional Assessment Report on Biodiversity and Ecosystem Services for Africa* (Bonn, Germany: IPBES Secretariat, March 2018).

⁸⁸ Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations: Table 1*, 28 *Journal Of Environmental Law* 337, (2016).

⁸⁹ *Paris Agreement to the United Nations Framework Convention on Climate Change*, art.4.2, Dec. 12, 2015, T.I.A.S. No. 16-1104., [Paris Agreement]

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reduction in greenhouse gas emissions by 2030 compared to 1990.⁹⁰ The downstream emissions, i.e., emissions coming from a product's use or disposal⁹¹, occurs to Replomuté since the oil that is extracted is by end exported to Replomuté where it is ultimately used. Thus, as an Annex-1 party, Replomuté is violating the Paris Agreement. This obligation breached is owed to the international community as a whole.⁹²

5. INDIRECT RESPONSIBILITY OF REPLOMUTÉ THROUGH COERCION OF DRI

The establishment of state responsibility through coercion for the breach of the Gorilla Agreement is based on the following contentions i.e., A. ILC's mandate on draft articles is reflection of CIL; B. Uniform state practice and opinio juris to constitute custom; C. Establishment of indirect state practice under Article 18; D. Replomuté is indirectly responsible for the violation of the Gorilla Agreement and other Conventions.

A. ILC's mandate on draft articles is reflection of CIL

ILC has a twofold mandate i.e. to Codify, and Progressively develop International Law. The former mandate is defined as the formulation of rules in international law, which has extensive

⁹⁰ *CEC - Council of the European Union (2020b). Submission to the UNFCCC on behalf of the European Union and its Member States on the update of the nationally determined contribution of the European Union and its Member States (Doc 14222/1/20 REV1). Council of the European Union. Brussels, 18 Dec 2020.*

⁹¹ Joel Faramitti, *Regulation at the Source? Comparing upstream and downstream climate policies*, Technology Forecasting and Social Change, 172, Nov 2021.

⁹² *Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 42 cmt. 2, U.N. Doc. A/56/10, (2001) [hereinafter Draft Articles].

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state practice⁹³. Thus, as a codified law, ARSIWA has sufficient state practice. Also, ARSIWA has been considered to be a methodological shortcut, which states it as a reflection of CIL⁹⁴.

B. Uniform state practice and opinion juris to constitute custom

More than the inherited state practice acquired by ARSIWA, there is a positive acceptance of states, as 1400⁹⁵ judgments were relied by the ICTs. Moreover, with respect to Art.18, the cases such as the Romano-Americano case, support the notions of coercion in State Responsibility⁹⁶. This arises at exceptional circumstances⁹⁷, as the state already assumed to have a customary obligation, hence the affirmative actions of the states abiding by this rule itself constitutes state practice.

ARSIWA is considered to have a vast acceptance of law that constitutes opinio juris at the same time. It was also adopted by the UNGA resolution, that establishes opinio juris⁹⁸. Moreover, when there is a 'legal vacuum' courts tend to rely on ARSIWA⁹⁹, as it's the only source of law available with respect to State Responsibility for Internationally wrongful acts.

⁹³ Draft Article, art. 18.

⁹⁴ Gabčíkovo-Nagymaros.

⁹⁵ UN Report 2017

⁹⁶ Draft Articles, art. 18.

⁹⁷ Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, London, 208-14 (Cambridge Univ. Press 2006) (1953).

⁹⁸ Hugh Thirlway, *The Sources of International Law*, in *International Law* 95, 106 (Malcolm D. Evans ed., 3d ed. 2010)

⁹⁹ D Canon - See Christian Tomuschat, *International Law*, in *THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* 281,296

C. Establishment of indirect state practice under Article 18

The term ‘colonial extortion’ refers to the essentials of coercion on state responsibility. It describes that the threat in the form of extortion by Replomuté, leads to the colonialism on DRI. Hence, Art.18 requires two elements i.e. 1. Use of Threat 2. The sovereignty of the state should be affected¹⁰⁰.

C.1 Threats arose in the form of extortion

The threat in the following case, is in the form of extortion, i.e. “*Threat to obtain money or property*”¹⁰¹. The intention of the threat to obtain money is sufficient to constitute extortion. When Replomuté invoked the mandatory arbitration clause, with an absolute knowledge that DRI will breach the Gorilla Agreement constituted a form of threat under coercion¹⁰². The coercive action of states may not only limit to unlawful coercion, it might also amount to legal threat¹⁰³. This proves that, even though the concession agreement is valid, it amounts to coercion under Art.18.

C.2 Retainment of DRI’s Sovereign power

Colonialism is termed as affecting the sovereignty of other states¹⁰⁴. Sovereign states have the inherent power to regulate in public interest¹⁰⁵. The right to regulate is affected when DRI is not allowed to enforce the Gorilla Agreement, with a fear of arbitration. This term is defined as

¹⁰⁰ Charter of the United Nations, art 2.1, 1 U.N.T.S. XVI (1945)

¹⁰¹ UNODC

¹⁰² Record ¶22

¹⁰³ P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. 271–274 (London, Kegan Paul International, 1995).

¹⁰⁴ <https://plato.stanford.edu/entries/colonialism/>

¹⁰⁵ Crawford, J., *Brownlie’s Principles of Public International Law*, Oxford University Press, 2012, p. 624.

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‘regulatory chills’. In a similar case, when a state was compelled to accept the EIA procedure by the company with a fear of arbitration, the company withdrew from the arbitration case. The company realized that it was a form of pressure on the coerced state to accept the EIA that was previously rejected by the government¹⁰⁶. Hence, this proves that Replomuté is coercing DRI by affecting its sovereignty power to enforce the Gorilla agreement.

C.3 The ‘But-For’ Test Is Satisfied To Establish State Responsibility For The Breach Of The Gorilla Agreement

The legal causation test to find out the Responsibility of the coercing state is known as ‘But-for’ test. It states, that the responsibility of the coercing state arises with respect to the third State and derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State¹⁰⁷. With respect to this, it is stated that ‘If not for the coercing actions of Replomuté, DRI would have withdrawn from the Concession agreement as it was compelled to do so in light of the Gorilla Agreement¹⁰⁸. As the indirect state responsibility is established, its further discusses under which conventions, the actions of Replomuté is being breached.

D. Replomuté is indirectly responsible for the violation of the Gorilla Agreement and other Conventions

¹⁰⁶ *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6.

¹⁰⁷ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc.A/CN.4/L.602/Rev.1 (2001)

¹⁰⁸ Record ¶22

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The "AGREEMENT" under CMS, means an international agreement relating to the conservation of one or more migratory species. As both the DRI and Aringuv are covered under the Agreement range,¹⁰⁹ DRI has a strict legally binding obligation under Article III of the Gorilla Agreement i.e., accord to the same strict conservation for gorillas in the Agreement range as provided for under Article III Paragraph 4 and 5 (excluding the exceptions from (a) to (d)) under the CMS¹¹⁰. The CMS also obligated DRI to prevent, reduce or control facts that are endangering or likely to endanger the species¹¹¹.

Therefore, Replomuté is coercing DRI to violate Gorilla Agreement and CMS which amounts to an internationally wrongful act.

¹⁰⁹ Agreement on the Conservation of Gorillas and their Habitats, art 1(1), (2007). (Gorilla Agreement).

¹¹⁰ Gorilla Agreement, art. III.

¹¹¹ CMS, art III.

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CONCLUSION AND PRAYER

Aringuv respectfully requests the court to adjudicate and declare that:

1. To Declare that Replomuté has failed to prepare an EIA with respect to proposed oil extraction activities
2. The actions of Replomuté with respect to proposed oil extraction activities in DRI violated international law.
3. To pass an order that the Replomuté is liable for reparation for the transboundary harm caused.

Place: The Hague

S/d _____

Date : 10th November 2023

(Agents for the Applicant)