Team No. 2484A

28TH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION 2023-2024

BEFORE

THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

ARINGUV

APPLICANT

v.

REPLOMUTÉ

RESPONDENT

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

Aringuv (Applicant) and Replomuté (Respondent) (collectively, the "**Parties**") have submitted the present dispute to the International Court of Justice ("**ICJ**") by Special Agreement signed on 16 June 2023. Both parties transmitted a copy of the Special Agreement to the ICJ Registrar pursuant to Article 40(1) of the Statute of the ICJ with a joint notification dated 24 July 2023. This joint notification was acknowledged by the ICJ Registrar on 31 July 2023. Both parties have accepted the jurisdiction of this Court under Article 36(1) of the Statute of the ICJ, and shall accept its judgement as final and binding and execute it in its entirety in good faith.

STATEMENT OF FACTS

I. Background

a. The Parties and DRI

Aringuv is a sovereign State in central Africa and shares an eastern border with the Democratic Republic of Ibirunga ("**DRI**"). It is a low-middle-income country per the World Bank's classification, with a growing mountain gorilla tourism industry.[1] Replomuté is a sovereign State in Europe with a high income being among the world's largest importers of crude oil.[2] The DRI is not a party to the present dispute. However, the key facts of the dispute involve DRI and occur in its territory. DRI is a coastal sovereign State in central Africa with low income and agrarian based economy but rich in oil.[3]

b. The Royal Mountain Gorilla

The Royal Mountain Gorilla was added to the International Union for the Conservation of Nature ("**IUCN**") Red List in 1980. Its southern population ("**RMG**") occupies a national park in DRI, migrates not too often to Aringuv, and is the affected population by the Lenoir Corporation ("**LC**")'s activities.[4]

[1] Record, ¶2.
[2] Record, ¶3.
[3] Record, ¶1.
[4] Record, ¶9.

c. The 1981 DRI-Replomuté Concession Agreement and Environmental Impact Assessment ("EIA")

In 1981, DRI and Replomuté signed a concession agreement, giving Replomuté's wholly-owned corporation, LC, the right to explore and extract oil from the southern population of the RMG's habitat. The agreement allowed LC to construct an oil pipeline and mandated arbitration as the sole method of dispute resolution. Before signing the agreement, DRI conducted an EIA that focused on the impact on human populations nearby, but not the impact on gorillas, their habitat, and climate change.[5]

d. LC's Activities in the DRI

LC started oil exploration in 1983 but was delayed by civil war and Ebola. LC began construction on the pipeline in 2008 but was delayed by labour challenges and Covid-19.[6] The pipeline is 98% complete in 2020[7] and LC plans to extract oil on completion. Since 2012, local and international NGOs have expressed serious concern to DRI, Replomuté and the CMS Secretariat about the negative impacts to the RMGs that would likely occur from LC's oil extraction.[8]

e. DRI's Attempt to Withdraw from the Concession Agreement

[5] Record, ¶17.
[6] Record, ¶18,19,24,32.
[7] Record, ¶32.
[8] Record, ¶21.

In 2012, DRI declared that it will withdraw from the concession agreement due to environmental concerns. However, Replomuté invoked the mandatory arbitration clause forcing DRI to permit LC's oil extraction or be subjected to more than USD$825 million in penalties.[9]

II. Applicable International Law

The Parties and DRI are Members of the United Nations ("**UN**") and parties to the Statute of the ICJ,[10] Vienna Convention on the Law of Treaties ("**VCLT**")[11], Convention of Migratory Species of Wild Animals ("**CMS**"),[12] and Convention on Biological Diversity ("**CBD**")[13].

Aringuv and DRI are parties to the United Nations Framework Convention on Climate Change ("**UNFCCC**"),[14] Agreement on the Conservation of Gorillas and Their Habitats ("**Gorilla Agreement**"),[15] and African Convention on the Conservation of Nature and Natural Resources ("**Algiers Convention**").[16]

Replomuté and DRI are parties to the Convention on Environmental Impact Assessment in a Transboundary Context ("**Espoo Convention**") and Aringuv has signed the Espoo Convention in 2017.[17]

[9] Record, ¶22,33.
[10] Record, ¶4.
[11] Record, ¶5.
[12] Record, ¶8.
[13] Record, ¶7.
[14] Record, ¶7.
[15] Record, ¶9.
[16] Record, ¶11.
[17] Record, ¶12.

QUESTIONS PRESENTED

I. Procedurally, whether Replomuté's failure to prepare an EIA regarding the proposed oil extraction activities in the region violates international law.

II. Substantively, whether Replomuté acts regarding the proposed oil extraction activities in DRI violate international law.

SUMMARY OF ARGUMENTS

I. Replomuté's failure to prepare an EIA with respect to the oil extraction activities in DRI violates international law. Firstly, Replomuté breached its obligation under the Espoo Convention to perform an EIA for oil extraction and construction of a pipeline. The proposed oil extraction activities occur within Replomuté's control, and are well known to risk potential harm to wildlife, including the RMG which is a transboundary migratory species. The EIA also needs to consider the effects of climate change on account of contemporary understandings. Secondly, Replomuté also breached its obligation under the CBD to introduce procedures requiring an EIA on biological diversity. Finally, Replomuté also breached its obligation under customary international law ("**CIL**") to perform an EIA before commencing its oil extraction and construction activities. DRI's 1981 EIA does not absolve Replomuté's liability for its breaches.

II. Replomuté's actions with respect to the proposed oil extraction activities in the DRI violate international law. Firstly, LC's activities are attributable to Replomuté as it is wholly owned and operated by the Replomuté government and demonstrably under Replomuté's control in carrying out the proposed activities. Replomuté has directly breached both general non-Range State and specific Range State obligations under the CMS by proceeding with oil extraction activities in the DRI. For specific obligations, Replomuté should be considered a Range State and thus owes specific obligations under the CMS by exercising extraterritorial jurisdiction in the RMG habitat through the concession agreement. Secondly, Replomuté is indirectly responsible for coercing DRI's

breach of Article III(2)(a) of the Gorilla Agreement with economic pressure. Article 18 of the Articles on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**") reflects CIL as supported by its *travaux préparatoires*. Alternatively, Article 18 has crystallised into CIL in light of the modern approach to CIL formation where less emphasis is placed on State practice.

ARGUMENTS

I. Replomuté's failure to prepare a new EIA with respect to the proposed oil extraction activities (the "Activity") in the region violates international law.

a. Replomuté breached its obligations under Article 2 of the Espoo Convention by failing to prepare the requisite EIA.

i. Replomuté is bound by the Espoo Convention with regards to the Activity.

Replomuté has been a party to the Espoo Convention since September 1997.[18] Therefore, it is bound by the Espoo Convention with regards to its activities, including any major change to an activity subject to a decision of its competent authority,[19] after September 1997.

Whilst Article 28 of the VCLT states the presumption of non-retroactivity of treaties, such a presumption is only applicable if there is no contrary intention which 'appears from the treaty or is otherwise established'.[20] The intention of the parties to relax non-retrospectivity is clearly seen from the Espoo Convention's declared purpose. The Espoo Convention seeks to 'give explicit consideration to environmental factors at an early stage', to foster 'cooperation' and '*preventing, mitigating and monitoring* significant adverse environmental impact *in general*' [emphasis added]. Further, the ICJ has noted that in the field of environmental protection, 'on account of the often irreversible character of damage to the environment', new norms and standards have to be considered 'not only when States contemplate new activities but also when continuing with

[18] Record, ¶12.
[19] Convention on Environmental Impact Assessment in a Transboundary Context, Art 1(v), September 10, 1997, 1989 U.N.T.S. 309 [hereinafter Espoo Convention].
[20] Vienna Convention on the Law of Treaties, Art 28, May 23, 1969, 1155 U.N.T.S 331.

activities begun in the past'.[21] Taken together, the context and purpose demands that the obligations under the Espoo Convention continue to apply to ongoing activities causing and which may continue to cause significant adverse environmental impact. There is also precedent for relaxing the presumption of non-retrospectivity in other areas of environmental law to adequately respond to present and continuing effects, foster cooperation and prevent future harm.[22]

In light of the above, the obligations under the Espoo Convention, in particular the obligation to prepare a comprehensive EIA satisfying the requirements at Appendix II, must apply to activities and their major changes which continue to run the risk of causing significant adverse transboundary impact. even if proposed or commenced prior to the Convention. Such an obligation would apply upon Replomuté becoming party to the Espoo Convention, or at the minimum, to the decision to begin construction of the pipeline in 2009[23] as a major change of the proposed Activity, and also the decision to continue construction in March 2015.[24] These decisions are comparable to the decision to renewal of consent for the operation of a nuclear powerplant already operating, as the decision itself may cause significant environmental impact and thus require a new EIA before such decisions are made.[25]

[21] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia),* Judgement. 1997 I.C.J. Rep 7 (Sept. 25) at para 140.
[22] The US Federal Court's interpretation of the 1980 Comprehensive Environmental Response, Compensation, and Liability Act to impose liability for incidents occurring prior to the passage of the Act in *United States v Shell Oil Co* 22 Env't Rep. Cas. (BNA) 1473 (D. Colo) [1985].
[23] Record, ¶19.
[24] Record, ¶23.
[25] Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaaderen*, Opinion of Advocate General Kokott, EU:C:2019:622.

ii. Under the Espoo Convention, the Activity occurs within Replomuté's jurisdiction.

Article 2(3) of the Espoo Convention requires Replomuté to conduct an EIA if it is the Party of Origin for the Activity, *i.e.* if the Activity takes place within its jurisdiction.[26] The Espoo Convention does not define the meaning of jurisdiction, and pursuant to Article 31 of the VCLT, "jurisdiction" must be interpreted according to its ordinary meaning in light of its context and purpose. "Jurisdiction" means, *inter alia*, the power or right of control.[27]

Such power to exercise control must not be limited to sovereign territory, given the objective of the Espoo Convention to foster international cooperation to address transboundary harm. Limiting jurisdiction under the Espoo Convention to that of territorial sovereignty would frustrate international cooperation. This is particularly evident in cases where the risky activity occurs within a State's sovereign territory, but the State has little effective control or supervision over the activity. In such situations, the State has no ability or opportunity to collaborate internationally to perform EIAs and prevent transboundary harm, rendering the Espoo Convention's goal nugatory. Any resultant liability for multiple states is also clearly permissible under international law, and even further emphasises and draws of State parties' obligation to cooperate in discharging their obligations under the Espoo Convention for the purposes of environmental protection.

[26] Espoo Convention, Art (1)(ii).
[27] OXFORD ENGLISH DICTIONARY (Oxford University Press 2023).

This is buttressed by Principle 21 of the Declaration of the Stockholm Conference on the Human Environment, which is referred to in the Espoo Convention[28] and has been acknowledged by all parties.[29] This principle highlights State responsibility for activities within their 'control',[30] and not merely for those within their sovereign territory. Thus, a Party under the Espoo Convention would be a Party of Origin not only if the proposed activity takes place within its sovereign territory, but also if it is within the Party's control.

On the facts, Replomuté's control over the activity is evident. First, the concession agreement with the DRI which granted LC the right to extract oil and construct a pipeline was entered into by Replomuté.[31] Secondly, LC, as the entity conducting the oil extraction and construction activities, is wholly owned and operated by Replomuté.[32] Thirdly, the government of Replomuté was the party that invoked arbitration under the DRI-Replomuté agreement.[33] Fourthly, the Activity is being carried out by Replomuté nationals without the involvement of DRI.[34] Taken together, these factors demonstrate that the Activity is under the control of Replomuté. Thus, the Activity is within Replomuté's jurisdiction and it is the Party of Origin of the Activity.

iii. The Activity is an Appendix I activity which is likely to cause significant transboundary harm for which an EIA must be conducted.

[28] Espoo Convention, Preamble 7.
[29] Record, ¶6.
[30] Declaration of the United Nations Conference on the Human Environment U.N. Doc A/Conf.48/14/Rev. 1 (1973).
[31] Record, ¶17.
[32] Record, ¶17.
[33] Record, ¶22.
[34] Clarifications, ¶A13.

The Activity involves the construction of a long oil pipeline from the site of extraction in the south of DRI to a coastal city. Article 2 and Clause 8 of Appendix I to the Espoo Convention when read together requires an EIA to be performed for the proposed construction of 'large diameter pipelines for the transport of oil'.

Oil extraction and pipeline projects are well-known to cause high negative impacts on wildlife habitats and biodiversity,[35] and long pipelines which cut through vegetation particularly fragment primate habitats which leads to biodiversity loss.[36] Further, similar oil pipelines and extraction sites in other African regions have caused severe and permanent damage to the environment due to leakage and other pipeline-related accidents.[37] The RMG inhabit areas where the Activity will be carried out,[38] and as the RMG is an endangered transboundary migratory species whose habitat straddles both DRI and Aringuv, any negative impact suffered by the RMGs will be transboundary.

Further, Clause 2 of Appendix III to the Espoo Convention expressly mandates EIAs to be conducted where it has the potential for significant transboundary effects distant from the development site, even if it is not located near international frontiers.[39] This is exactly the case here as the RMG has been sighted in Aringuv by crossing the border between Aringuv and DRI.[40] Accordingly, the Activity affects part of the biodiversity and environment of Aringuv as well.

[35] Adati Ayuba Kadafa, *Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria*, Global Journal of Science Frontier Research 12:3, at 26 (2012).
[36] Agbagwa, I. O. and B. C. Ndukwu, *Oil and gas pipeline construction-induced forest fragmentation and biodiversity loss in the Niger Delta, Nigeria*, Nat. Resour. 5, at 698-718 (2014).
[37] Ndenecho Emmanuel Neba & Banyuy Paul Ngeh, *Environmental assessment of the Chad-Cameroon oil and pipeline project in the Kribi region of Cameroon*, International NGO Journal 4(5), at 225-235 (2009).
[38] Record, ¶9,17.
[39] Espoo Convention, Appendix III, Clause 2.
[40] Record, ¶2,9.

Therefore, pursuant to Article 2(4) of the Espoo Convention, an EIA must be concluded by Reploumuté with regards to the Activity's environmental impact.

iv. The requisite EIA must take into account climate change and the potential impact on biodiversity.

The Espoo Convention has to be interpreted in light of legal and factual developments because parties are presumed 'to have intended [generic and broad terms] to have an evolutionary meaning'.[41] Such treaty terms are to be interpreted with reference to the meaning acquired in light of modern developments in international law. 'Transboundary impact' is defined as 'any impact, not exclusively of a global nature'[42] under the Espoo Convention, and 'impact' accordingly includes, non-exhaustively, 'any effect [...] on [...] flora, fauna, soil, air, water, climate, landscape [...]'.[43] This is especially so given the purpose and context of the Espoo Convention to 'address adverse environmental impact in general'.[44]

Particularly, Resolution 7.2 adopted by the Conference of the Parties to the CMS, which Replomuté is a party to, emphasises the importance of good quality EIA for the protection of migratory species and endangered migratory species, taking into particular account impacts on migratory patterns and rangers.[45] As such, Replomuté's obligation to perform an EIA must extend

[41] *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.),* Judgment, 2009 I.C.J. Rep. 213 (Jul. 13) at para 64-66.
[42] Espoo Convention, Art 1(viii).
[43] Ibid, Art 1 (vii).
[44] Ibid, Preamble 4.
[45] Resolution 7.2 of the CMS Conference of the Parties, U.N. Doc. UNEP/CMS/Resolution 7.2 (Rev.COP12) (2018), Art 1-2.

to the potential adverse impact on biodiversity of the Activity, including the RMGs and their habitats and migratory ranges, in light of both Parties being also parties to the CMS and contemporary understandings of the impact of the Activity on the RMS as an endangered migratory species.

Furthermore, Replomuté is also an Annex I Party to the UNFCCC, which obliges Annex I Parties to 'take climate change considerations into account' and 'employ appropriate methods, for example impact assessments, with a view to minimise adverse effects on the [...] quality of the environment'.[46] Therefore, the requisite EIA under the Espoo Convention must, in light of these legal developments, also take climate change considerations into account when assessing the effects of a proposed activity, such as how climate change may modify or aggravate any potential effects.

Replomuté has failed to perform any of the above at all material times and it cannot rely upon DRI's EIA conducted in 1981 to absolve its breach as the obligation is upon Replomuté to do so. Further, DRI's EIA is itself inadequate as it fails to consider potential impacts on gorillas, gorilla habitats, or climate change.[47]

b. Replomuté breached its obligations under Article 14 of the CBD.

i. The Activity is within Replomuté's jurisdictional scope under the CBD.

[46] United Nations Framework Convention on Climate Change, Art 4(1)(f), May 9, 1992, 1771 U.N.T.S. 107.
[47] Record, ¶13.

CBD provisions apply to processes and activities carried out under a Contracting Party's 'jurisdiction *or* control [emphasis added]', and is extended to those 'beyond the limits of national jurisdiction'.[48] As established above, the Activity is clearly within Replomuté's control. Thus, Replomuté's assertion that Article 14.1(a) of the CBD is 'best read to apply to proposed projects within a Party's own territory'[49] is unfounded and the relevant provisions of the CBD apply to it with regards to the Activity.

ii. Replomuté breached its obligations under Article 14.1(a) of the CBD in failing to introduce procedures requiring EIA of the Activity.

Under Article 14.1(a), Parties to the CBD must 'as far as possible and appropriate', 'introduce appropriate procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity'.[50] Replomuté has acknowledged the applicability of the CBD to its actions.[51] Moreover, Resolution 7.3 adopted by the CMS Conference of Parties was referred to in CBD COP 8 Decision VIII/28 on Impact assessment.[52] Resolution 7.3 expressly emphasises the need to 'take full account of the precautionary principle in the location of oil installations [...] in relation to migratory species habitats'.[53] This demonstrates that parties acknowledge a significant risk of adverse effects on migratory species habitats posed

[48] Convention on Biological Diversity, Art 4(b), June 6, 1992, 1760 U.N.T.S. 798.
[49] Record, ¶28.
[50] CBD, Art 14.1(a).
[51] Record, ¶28.
[52] Decision VIII/28 Adopted by the Conference of the Parties to the Convention on Migratory Species at its Twelfth Meeting, (2017) U.N. Doc. UNEP/CMS/COP/8/28
[53] Resolution 7.3 Adopted by the Conference of the Parties to the Conservation of Migration of Wild Animals at its 12th Meeting, (2017) U.N. Doc. UNEP/CMS/Resolution 7.3

by oil installations, such as the proposed Activity, and the need to comprehensively assess such risks in order to manage and mitigate them.

Plainly, this was not done. Replomuté did not carry out any EIA of its own and also took no attempt to introduce appropriate procedures requiring DRI to carry out an EIA with respect to the Activity's impact on biological diversity.[54] As such, Replomuté is in breach of its obligations under Article 14.1(a) of the CBD.

iii. Replomuté breached its obligation under Article 14.1(d) of the CBD to notify Aringuv of the danger to its biological diversity.

Under Article 14.1(d), Parties to the CBD must 'in the case of imminent or grave danger or damage, originating under its [...] control, to biological diversity within the area under jurisdiction of other States [...] notify immediately the potentially affected States of such danger or damage'.[55] The Activity commenced without the requisite EIA being performed and the pipeline is now 95% complete.[56] It clearly poses imminent danger or damage to the RMG population given the Activity's location, and such concerns have been repeatedly expressed by various NGOs since 2012.[57] However, Replomuté made no attempt to notify Aringuv of such danger to its biological diversity. Replomuté's lack of attempt constitutes a breach of Article 14.1(d).

[54] Record, ¶13.
[55] CBD, Art 14.1(d).
[56] Record, ¶28.
[57] Record, ¶21.

c. Further or in the alternative, Replomuté breached its obligation under CIL by failing to prepare the requisite EIA.

The prevention principle, which is the duty of States to avoid transboundary harm is recognised as a 'principle of general international law'[58] and 'forms a part of the corpus of international law relating to the environment'[59] to be applied as a rule of CIL.[60] Flowing from this principle, the ICJ has recognised the obligation of States to '[undertake] an [EIA] where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource' (in *Pulp Mills*)[61] or 'regions of shared environmental conditions' (in *Certain Activities*).[62] To fulfil such an obligation, a State must first ascertain if there is a risk of significant transboundary harm by conducting an EIA prior to commencing its activities.[63] The contents of the EIA are to be determined with reference to 'the nature and magnitude of the proposed development', the 'likely adverse impact on the environment' and the 'need to exercise due diligence'.[64]

In the present case, the requisite EIA of the Activity must similarly take into account the Activity's potential impact on the RMGs given that the Activities will be carried out in a national

[58] Wolfrum, R, 2010. General International Law (Principles, Rules and Standards). Max Planck Encyclopedia of Public International Law [www.mpepil.com]; International Law Commission, '*Sixth Report of the Special Rapporteur, Mr Eduardo Valencia-Ospina, on the protection of persons in the vent of disasters*' (2013) UN Doc. A/CN.4/662, at para. 41.
[59] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 1996 I.C.J. Rep 226 (July 8) at para 29 [hereinafter *Nuclear Weapons* Advisory Opinion].
[60] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* Advisory Opinion, 2011 ITLOS No. 17 (Feb. 1) at para. 145.
[61] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* 2010 I.C.J. 18 (Apr 20) at para. 204 [hereinafter *Pulp Mills*].
[62] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* 2015 I.C.J. 667 (December 16) at para 101 [hereinafter *Certain Activities*].
[63] Ibid, para. 104.
[64] Ibid.

park inhabited by the RMGs, and that the RMG is known to be a migratory species which crosses into Aringuv's borders.[65] The Activity is also a major undertaking, the construction of which spans from 2009 till present.[66] Being a critically endangered and protected species,[67] any impact on the RMGs is a significant adverse impact on the environment. Together with the scale of the project and the need to exercise due diligence given the contemporaneous understanding of the negative impacts of oil installations, it must be concluded that the requisite extent of EIA must encompass its potential impact on the RMGs.

Contrary to the parties in *Pulp Mills*[68] and *Certain Activities*,[69] Replomuté failed to conduct any EIA at all. DRI's 1981 EIA also does not conclude on the Activity's impact on the RMGs, which must be considered. Thus, Replomuté also breached its obligation under CIL to perform an EIA to ascertain if there is a risk of significant transboundary harm prior to the Activity.

II. Replomuté's actions with respect to the proposed oil extraction activities (again, the "Activity") in the DRI violate international law.

a. Replomuté is directly responsible for breaching its obligations under the CMS.

i. LC's activities are attributed to Replomuté.

Article 5 of the ARSIWA provides that the conduct of an entity is attributed to the State if the entity is: (i) not an organ of the State under Article 4 ARSIWA; (ii) empowered by the law of

[65] Record, ¶9; Clarifications, ¶A8.
[66] Record, ¶19,28.
[67] Record, ¶9; Clarifications, ¶A8; CMS, Annex I.
[68] *Pulp Mills*, at para 204-212.
[69] *Certain Activities,* at para 101-105,146-162.

that State to exercise elements of governmental authority; and (iii) acting in that capacity in the particular instance.[70]

Article 5 has been accepted 'as expressing current CIL'[71] and is meant to apply to public corporations.[72] The ILC does not identify the precise scope of "governmental authority" since this is a fact-specific inquiry. However, factors considered are (i) content of the powers; (ii) the way they are conferred on the entity; (iii) the purposes for which they are to be exercised; and (iv) the extent to which the entity is accountable to the government for their exercise.[73]

LC is not a State organ since it does not exercise legislative, executive, or judicial functions.[74] However, LC is a public corporation being wholly owned and operated by the government of Replomuté.[75] The concession agreement was entered between Replomuté and DRI where LC is the third party used precisely to exercise Replomuté's rights under the agreement.[76] Accordingly, LC's Activity in the RMG habitat is limited to rights conferred by the concession agreement. This means that LC's Activity is a clear instance of an exercise of governmental authority, attributed to Replomuté.

[70] General Assembly, '*Responsibility of States for Internationally Wrongful Acts'* (2002) U.N. Doc. A/RES/56/83. [hereinafter ARSIWA].
[71] *Bayindir v. Pakistan* Case No ARB/03/29, Award (Int'l Centre for Settlement of Investment Disputes, Aug. 27, 2009) at para 113.
[72] International Law Commission, '*Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries'* (2001) U.N. Doc A/56/10, Art 5, at para 1 [hereinafter ARSIWA Commentary].
[73] ARSIWA Commentary, Art 5, at para 6.
[74] ARSIWA, Art 4(1).
[75] Record, ¶17.
[76] Record, ¶17.

ii. Replomuté breached general obligations under Article II(3)(b) of the CMS by failing to endeavour to provide immediate protection for the RMG.

Under Article II(2) of the CMS, all parties must acknowledge the principled need to take action to avoid any migratory species becoming endangered.[77] In this regard, Article II(3)(b) of the CMS states that Parties to the CMS shall endeavour to provide immediate protection for migratory species included in Appendix I. This obligation applies even to non-Range States as 'wildlife is a part of biological diversity recognised as … a common heritage of mankind'.[78] Accordingly, this common obligation is required 'even if international law [insists on] … absolute territorial sovereignty'.[79] Although Article II(3)(b) is an obligation of conduct by the words 'endeavour', the type of conduct required is 'immediate'.[80]

Replomuté as a treaty party, failed to uphold this obligation to protect the RMG, an Appendix I species.[81] Despite numerous concerns expressed by Aringuv's Ministry of Foreign Affairs and NGOs since 2012,[82] Replomuté did not take any steps to mitigate the impact of LC's activities in the area inhabited by the RMG. Replomuté even sent Aringuv a diplomatic note on 22 April 2022, to 'immediately resume' LC's activities rather than to immediately protect the RMG

[77] Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S 333 [hereinafter CMS].
[78] Nele Matzm, *Chaos or Coherence? – Implementing and Enforcing the Conservation of Migratory Species through Various Legal Instruments*, at 197 (2005).
[79] Ibid.
[80] ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 652 (3D ED. 2021).
[81] Record, ¶7.
[82] Record, ¶9.

due to an increase in oil demand after Covid-19 has ebbed.[83] Hence, Replomuté breached its non-Range State obligations under the CMS.

iii. Replomuté breached specific obligations under Article III(4)(b) of the CMS.

1. Replomuté should be considered a Range State for exercising extraterritorial jurisdiction in the DRI

Under Article I(1)(h) of the CMS, a "Range State" is defined as 'any State that exercises jurisdiction over any part of the range of that migratory species. Even though the Record states that Replomuté is not a Range State,[84] "Range State" is not a fixed category because 'where [the situation is] appropriate, any Party [can be] referred to [as a Range State]'.[85]

The ICJ in its 2004 *Wall Opinion* stated that while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.[86] In the 2001 European Court of Human Rights case of *Bankovic v Belgium,* the court opined that such situations occur when a State has exercised effective control over a territory.[87] Effective control can be 'through the consent, invitation or acquiescence of the [territorial Government]' and 'exercises all or some of the public powers normally to be exercised by the [territorial Government]'.[88] Whilst the classic

[83] Record, ¶34.
[84] Record, ¶7.
[85] CMS, Art I(1)(h).
[86] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 2004 I.C.J. Rep (July 9) at para 109.
[87] *Bankovic v. Belgium* Case No 52207/99, Grand Chamber Decision as to Admissibility (Eur. Ct. H.R., Dec. 12, 2001) at para 71.
[88] Ibid.

example of effective control is military occupation, extension of jurisdiction extraterritoriality is not unheard of in international environmental law as seen under the Espoo Convention and CBD as discussed under parts I(a)(ii) and I(b)(i).

The concession agreement constitutes "consent, invitation or acquiescence" of the Government of the DRI given to Replomuté.[89] The right to explore and extract oil from the concerned area granted to LC constitutes an exercise of some public powers normally to be exercised by DRI's Government. These rights concern national development flowing from DRI's permanent sovereignty over natural resources.[90] Under the concession agreement, the DRI granted the exclusive right to Replomuté to build an asset and to operate and maintain it through a specified concession period, which amounts to effective control.[91] Accordingly, DRI does not have control over the RMG's habitat unless it withdraws from the agreement. Therefore, Replomuté exercises extraterritorial jurisdiction and is even the primary State exercising jurisdiction over the concerned activities in the protected habitat. As such, Replomuté should be considered a Range State in the present case.

2. Replomuté failed to prevent, remove, compensate for, or minimise the adverse effects of activities that seriously impede or prevent the migration of the species.

[89] Record, ¶8.
[90] General Assembly, '*Permanent sovereignty over natural resources'* (1962) U.N. Doc. A/RES/1803 at p.15.
[91] Record, ¶8.

Firstly, Replomuté permits and continues to support LC's activities.[92] Moreover, the establishment of a $10 million (USD) "Friendship Fund" for economic development activities in the DRI cannot constitute compensation under the CMS, since this fund has been explicitly made out for economic development activities and not to compensate for the adverse effects of LC's activities. With this, Replomuté has breached specific obligations under Article III(4)(b) of the CMS.

b. Replomuté is indirectly responsible for coercing DRI's breach of Article III(2)(a) of the Gorilla Agreement.

Under Article 18 of the ARSIWA, a State which coerces another State to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) the coercing State does so with knowledge of the circumstances of the act.

i. Article 18 of the ARSIWA is CIL.

1. Article 18 reflects CIL as it is consistent with State practice and *opinio juris.*

As stated by *North Sea Continental Shelf*, for a rule to be CIL, it must have (i) 'widespread and representative' State practice;[93] and (ii) *opinio juris*, where States must 'feel that they are

[92] Record, ¶9.
[93] *North Sea Continental Shelf*, Judgment, 1969 I.C.J. Rep (Feb. 20) at para 73.

conforming to what amounts to a legal obligation'.[94] In the *travaux préparatoires* of the ARSIWA, the ILC stated that the coercing State's responsibility of the coerced State's act is the "most realistic" reflection of CIL by considering diverse cases available.[95]

Two key cases used as evidence illustrating State practice are the 1911 *Shuster* case and the 1916 *Romano-Americana Company* case. Whilst *opinio juris* must be separately ascertained from State practice, the same material may be used as evidence of both.[96] States believe that the coercing State incurs international responsibility for the act coerced by pursuing claims on such ground in the cases above. Thus, Article 18 of the ARSIWA reflects CIL.

2. Alternatively, Article 18 has crystallised into CIL in light of the modern approach to CIL formation.

Modern CIL is formed through a deductive process where the CIL rule is derived from a compelling principle, with less emphasis given to State practice.[97] Particularly for novel issues, there is unsurprisingly less State practice. Accordingly, 'reliance by a State on a novel right […] might, if shared in principle by other States' form new CIL rules.[98] This is unlike the traditional inductive approach where State practice and *opinio juris* is derived from an empirical process and

[94] Ibid, at para 77.
[95] 2 UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 97 (1979) [hereinafter ILC Yearbook].
[96] International Law Commission, *'Draft conclusions on the identification of customary international law, with commentaries'* (2018) UN Doc. A/73/10 at Conclusion 3.
[97] Michael Scharf, *Accelerated Formation of Customary International Law,* ILSA J. Int'l & Comp. L. 305, at 314 (2014).
[98] *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.),* Merits, Judgment, 1986 I.C.J. Rep 14 (June 27) at para 207.

'not from preconceived ideas'.[99] The rationale for modern CIL is to respond to the needs of a 'rapidly evolving international community' where the legitimacy of international law shifts from State consent to normative values.[100]

In the recent *Nicaragua v Colombia* case, the ICJ held that under CIL, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State.[101] Judge Tomka in his dissenting opinion criticised this case for resting 'on a curated selection of State practice, and on little to no analysis of *opinio juris'*.[102] However, the ICJ ultimately made its decision on a matter of principle that States should not claim an extended continental shelf that encroaches into another State's exclusive economic zone which confers the State sovereign rights.[103] This reasoning of deriving CIL from principle is further defended by Judge Isawara in his separate opinion.[104]

The ICJ's willingness to derive CIL from a compelling principle can be traced to the *Nuclear Weapons* advisory opinion in 1996. Judge Weeramantry in his dissent opined that the 'use or threat of use of nuclear weapons is illegal in any circumstances whatsoever'[105] as 'no legal system can confer on any of its members the right to annihilate the community which engenders it

[99] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.),* Judgment, 1981 I.C.J. Rep. 246 (Nov. 25) at para 77.
[100] Benjamin Langille, *It's instant custom: How the Bush doctrine became law after the terrorist attacks of Sept 11, 2001*, 26 BC Int 7 Comp. L. Rev 145, at 146 (2003).
[101] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicar. v. Col.),* Judgment, 2023 I.C.J. Rep (July 13) at para 79.
[102] Ibid, at para 64.
[103] Ibid, at para 69.
[104] Ibid, at para 7.
[105] *Nuclear Weapons* Advisory Opinion, at p.226.

and whose activities it seeks to regulate'.[106] This view is shared by Judge Shahabuddeen's dissenting opinion by relying on the first preambular paragraph of the UN Charter which states 'save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'.[107]

The present case is the first case where Article 18 is directly invoked before the ICJ.[108] Article 18's basis is grounded on two compelling principles. Firstly, the "control theory" where responsibility is attributed to the coercing State because 'the coercing State is the *fons et origo* of the conduct, and the coerced State is its instrument'.[109] Secondly, holding the coercing State responsible for the coerced State's breach of obligations owed to a third State ensures that the third State will not be deprived of redress. This is given that the coerced State may rely on *force majeure* as a circumstance precluding wrongfulness.[110] Taken as a whole with examples of State practice and *opinio juris* discussed above in part II(b)(i)(1), Article 18 of the ARSIWA has crystallised into CIL.

ii. Replomuté coerced DRI to remain a party to the concession agreement.

"Coercion" is where the coercing State's act 'forces the will of the coerced State […] giving it no effective choice but to comply with the wishes of the coercing State'.[111] The coercing State

[106] Ibid, at p.522.
[107] Ibid, at p.381.
[108] International Law Commission, '*Responsibility of States for internationally wrongful acts'* (2007) UN Doc A/62/62; (2010) A/65/76; (2013) A/68/72; (2016) A/71/80; (2019) A/74/156; (2022) A/77/198
[109] JAMES CRAWFORD, STATE RESPONSIBILITY, 396-398 (Cambridge University Press 2013) [hereinafter *James Crawford*].
[110] ARSIWA Commentary, Art 18, at para 6.
[111] ARSIWA Commentary, Art 18, at para 2.

must also '[coerce] the very act which is internationally wrongful'.[112] Methods of coercion include the use of military, political, or even economic pressure.[113] Importantly, Article 18 was contemplated in a context where there is a *de jure* or *de facto* relationship of dependency between the coercing State and the coerced State.[114]

Replomuté applied economic pressure as a method to coerce DRI into remaining a party to the concession agreement, the act that is internationally wrongful. When DRI made a declaration to withdraw from the concession agreement to fulfil its environmental obligations, Replomuté invoked a mandatory arbitral clause,[115] thereby threatening DRI with an arbitral penalty of more than $825 million (USD) should DRI proceed to withdraw.[116] This penalty can only be seen as a serious economic threat to DRI given its low-income.

This was exacerbated by the fact that there is a clear imbalance of power between Replomuté and DRI. Replomuté being a high-income country[117] whereas DRI is low-income, with a history of European colonialism, civil war, and political corruption hindering economic growth.[118] Importantly, DRI's economic development was dependent on Replomuté given that DRI is rich in oil whilst Replomuté is the world largest importer of crude oil.[119] DRI therefore had no choice but to acquiesce in LC's activities in its territory.[120] Thus, Replomuté's legal and

[112] Ibid.
[113] *James Crawford*, at p.421.
[114] ILC Yearbook, at p.97.]
[115] Record, ¶22.
[116] Record, ¶23.
[117] Record, ¶3.
[118] Record, ¶1.
[119] Record, ¶1,3.
[120] Record, ¶23.

economic threat to DRI amounts to coercion and Replomuté used such threats to specifically stop DRI from withdrawing from the concession agreement.

iii. DRI by remaining as a party to the concession agreement would (but for Replomuté's coercion) be a breach of Article III(2)(a) of the Gorilla Agreement.

Under Article III(2)(a) of the Gorilla Agreement,[121] DRI must accord the same strict conservation for gorillas in the Agreement range as provided for under Article III(4)(b) of the CMS. LC's Activity occurs in RMG's primary habitat and is only possible with rights granted by the concession agreement.[122] As such, DRI's failure to withdraw from the concession agreement meant that DRI failed to prevent, remove, or minimise negative impacts to the RMG.

iv. Replomuté coerced DRI with knowledge of the circumstances of DRI remaining as a party to the concession agreement.

"Circumstances" refers to 'the factual situation rather than to the coercing State's judgement of the legality of the act'.[123] Replomuté had the required knowledge as NGOs from Aringuv, Replomuté and DRI had expressed serious concerns to Replomuté in 2012 about the

[121] Agreement on the Conservation of Gorillas and Their Habitat Resolution 3.1, U.N. Doc. UNEP/CMS/MOP3/Res 3.1 (June 2019).
[122] Record, ¶21.
[123] ARSIWA Commentary, Art 18, at para 5.

negative impacts to the RMG that would likely occur as a result of the Activity.[124] Replomuté was also a party in the arbitration which makes it impossible for Replomuté to not know of the factual situation.[125]

[124] Record, ¶21.
[125] Record, ¶23.

CONCLUSION AND PRAYER FOR RELIEF

In light of the above, Aringuv respectfully requests this Honourable Court to declare that:

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

RESPECTFULLY SUBMITTED,

AGENTS FOR THE APPLICANT