

Team 1645

**IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE, THE HAGUE, NETHERLANDS**

Questions Relating to Cultural Property and the Protection of Elephants

The Federal States of Aliya,

Applicant.

v.

The Republic of Rincossi,

Respondent.

Fall 2015

Memorial for the Respondent

I

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STATEMENT OF JURISDICTION

The Federal States of Aliya (“Aliya”) and the Republic of Rincossi (“Rincossi”) submit the following dispute to the International Court of Justice. Pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice, States may bring cases before the Court by special agreement. Statute of the International Court of Justice, art. 40, T.S. No. 993 (1945). On 25 June 2015, the Parties signed a special agreement and submitted it to the Registrar of the International Court of Justice. *See Special Agreement Between the Federal States of Aliya and the Republic of Rincossi for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Cultural Property and the Protection of Elephants.* On the 19 of June 2015, the Registrar addressed notification to the Parties regarding this matter.

QUESTIONS PRESENTED

I. WHETHER RINCOSSI VIOLATED INTERNATIONAL LAW WHEN IT ELECTED NOT TO PROSECUTE AMBASSADOR CUSI AND TWENTY MEMBERS OF BARNUM URITOVSKY FOR ILLEGALLY TRAFFICKING IVORY FROM ALIYA.

II. WHETHER RINCOSSI VIOLATED INTERNATIONAL LAW BY ELECTING NOT TO RETURN THE CONFISCATED ILLEGAL IVORY TO ALIYA.

STATEMENT OF FACTS

The Republic of Rincossi (hereinafter “Rincossi”) and the Federal State of Aliya (“Aliya”) are coastal nations located respectively on the continents of Thorno and Rabab. (R. 5, ¶ 1). Rincossi and Aliya are completely separated by the Bomud Ocean. (R. 5, ¶ 1). Rincossi is a rapidly developing country, and Aliya is a developing country. (R. 5, ¶ 3,4). Over the last fifteen years, Rincossi has helped established many infrastructure projects in Aliya, stimulating Aliya’s economy. (*see* R. 7, ¶ 20).

Rincossi and Aliya are members of the United Nations, parties to the Statute of the International Court of Justice (“ICJ”), parties to the Convention on Biological Diversity (“CBD”), parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), parties to the Convention of the Conservation of Migratory Species of Wild Animals (“CMS”), parties to the Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property (“Cultural Property Convention”), parties to the United Nations Convention against Corruption (“UNCAC”), and parties to the United Nations Convention against Transnational Organized Crime (“UNTOC”). (R. 5-6, ¶ 5-12).

In 1977, the year the Thornon elephant was listed on Appendix I of CITES, Rincossi enacted the Rincossi Flora and Fauna Trafficking Act (“Trafficking Act”) providing for the confiscation of, and penalization for, illegally traded specimens of ivory. (R. 7, ¶ 18). In 2010, recognizing the growing need to protect the Thornon elephant, Rincossi amended and strengthened the Trafficking Act by increasing the maximum penalty for the CITES violations to eight years in prison, and implementing a policy to destroy confiscated ivory when practicable. (R. 7, ¶ 21). Over the past five years, Rincossi has made numerous confiscations of illegal ivory, prosecuted two cases ivory trafficking, and publicly destroyed several tonnes of illegal ivory. (R. 7, ¶ 22).

VIII

In July of 2014, through Rincossi's monitoring and enforcement efforts, Rincossi officials discovered that Pam C. Cusi, an ambassador of Rincossi ("Ambassador Cusi") had transported twenty-five kilograms of illegal ivory from Aliya to Rincossi. (R. 8, ¶ 23). Rincossi officials immediately confiscated the illegal ivory and graciously notified Aliya officials. (R. 8, ¶ 23). Additionally, Rincossi and Aliya promptly launched a joint investigation to halt the illegal ivory trade between the countries. (R. 8, ¶ 23).

In November 2014, during the joint investigation, investigators discovered that Ambassador Cusi's illegal ivory purchase was part of a larger criminal operation. (R. 8, ¶ 24). Specifically, evidence revealed that twenty members of a private group called Barnum Uritovsky were involved in the criminal operation and had been trafficking Thronon elephants from Aliya to Rincossi for approximately three years. (R. 8, ¶ 25- 26). Upon learning this information, Rincossi officials promptly confiscated 1,500 kilograms of illegal ivory from Barnum Uritovsky, issued members a serious written warning assuring future prosecution should they violate the law again. (R. 8, ¶ 26; R. 9, ¶ 28). Additionally, Rincossi continues to closely monitor their activities. (R. 9, ¶ 28). Last, to further deter ivory traffickers, Rincossi scheduled a public destruction of the ivory on July 7, 2015. (R. 13, ¶ 34).

IX

SUMMARY OF THE ARGUMENT

Rincossi has fully complied with its international law obligations. As a rapidly developing nation, Rincossi has taken appropriate and effective steps to halt the illegal ivory trade.

Rincossi has not violated its treaty obligations by electing not to prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky under the Trafficking Act. First, Rincossi has complied with its CITES obligations by taking “appropriate measures” against Ambassador Cusi and the twenty members of Barnum Uritovsky. Second, Rincossi has complied with its CBD obligations by acting “as far as possible and appropriate” to halt ivory trafficking, and by cooperating with Aliya. Third, Rincossi has complied with its UNTOC and UNCAC obligations by effectively implementing the Trafficking Act through the confiscation of the Thornon elephant ivory, issuance of written warnings, and continued monitoring of Ambassador Cusi and the twenty members of Barnum Uritovsky. Finally, Ambassador Cusi is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations.

Rincossi’s confiscation and planned destruction of illegally traded ivory fully complies with its treaty obligations. Aliya’s assertion that Rincossi violated international law by destroying the confiscated ivory is incorrect for several reasons. First, Rincossi did not violate the Cultural Property Convention when it destroyed the illegally traded ivory because the ivory in question was not subject to the provisions of the Convention. Second, Aliya’s contention that Rincossi violated CITES is incorrect because Article VIII(1)(b) as well as Resolutions 9.9 and 9.10 of CITES encourage the destruction of illegally traded ivory rather than the return of ivory to its state of origin. Third, by destroying the ivory, Rincossi has not violated UNTOC Article 14 or UNCAC

Articles 51 and 57 (3)(c). For these reasons, Rincossi has complied with its international treaty obligations.

Last, Rincossi's decision not to prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky, and decision to destroy the confiscated Thornon elephant ivory comply with customs and general principles of international law. First, there is no international customary law requiring prosecution of ivory traffickers. Second, Rincossi has complied with the general international law principle of cooperation. Third, Rincossi's actions are protected by the general international law principle of non-intervention. For these reasons, Rincossi has not violated international law.

ARGUMENT

I. RINCOSSI DID NOT VIOLATE INTERNATIONAL LAW WHEN IT CHOSE NOT TO PROSECUTE AMBASSADOR CUSI AND TWENTY MEMBERS OF BARNUM URITOVSKI

A. *Rincossi has complied with its international treaty obligations*

A treaty creates binding legal obligations between states that are parties to it.¹ Rincossi and Aliya are parties to the Convention on International Trade in Endangered Species (“CITES”),² the Convention on Biological Diversity (“CBD”),³ United Nations Convention against Transnational Organized Crime (“UNTOC”),⁴ the United Nations Convention against Corruption (“UNCAC”),⁵ and the Vienna Convention on Diplomatic Relations.^{6,7}

i. Rincossi fulfilled its obligations under CITES

CITES is an international framework agreement, which creates a three-appendix listing regime to monitor, restrict, or halt the trade of listed species.⁸ As a framework agreement, CITES

¹ Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331. [VCLT].

² Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [CITES].

³ Convention on Biological Diversity, 1760 U.N.T.S. 79 (Jun. 6, 1992) [CBD].

⁴ United Nations Convention Against Corruption, G.A. Res. 58/4 (Oct. 31, 2003) [UNCAC].

⁵ United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Soc. A/RES/55/25 (Jan. 8, 2001) [UNTOC].

⁶ Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95 [Vienna Convention on Diplomatic Relations].

⁷ R. 5, ¶ 5-9.

⁸ See CITES.

is not self-executing. Rather, each member state is required to “take *appropriate measures* to enforce the provisions . . . and to prohibit trade in specimens in violation thereof (emphasis added).”⁹ Specifically, CITES Article VIII requires member states to “(a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens.”¹⁰ The trade of elephant ivory is explicitly banned under CITES,¹¹ and thus Rincossi must take “appropriate measures” against Ambassador Cusi and the twenty members of Barnum Uritovsky. Aliya incorrectly asserts that Rincossi must prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky under CITES, however, the clear standard is “appropriate measures[;]” nothing in the text of CITES or CITES Resolution 10.10 requires prosecution.¹² Additionally, guidance documents support Rincossi’s sovereign right to determine the penalty imposed.

First, the text of CITES requires that the member state a) confiscate the illegal specimen, and b) penalize the violator.¹³ Rincossi fulfilled its obligations under CITES by confiscating the illegal ivory, and penalizing Ambassador Cusi and the twenty members of Barnum Uritovsky through the issuance of serious written warnings with assured prosecution for any future violation

⁹ CITES, art. VIII.

¹⁰ CITES, art. VIII.

¹¹ *CITES set strict conditions for any possible future ivory sales*, CITES (Nov. 12, 2002), https://cites.org/esp/news/pr/2002/021112_ivory_decision.shtml.

¹² *See* CITES and Resolution Conf. 10.10 Trade in Elephant Specimen (Rev. CoP16), CITES, <https://www.cites.org/eng/res/10/10-10R16.php> (last visited Nov. 19, 2015) [CITES Res. 10.10].

¹³ CITES, art. VIII.

of the Trafficking Act.¹⁴ Additionally, Rincossi plans to publicly destroy the illegal ivory to deter future trafficking.

Second, CITES Resolution 10.10, a non-binding document, recommends that parties improve enforcement measures.¹⁵ Here, Rincossi is in compliance with Resolution 10.10 by effectively halting illegal ivory trade in Rincossi through proactive enforcement efforts. Rincossi's monitoring and enforcement led directly to the discovery of, and successfully halted, Ambassador Cusi's and the twenty members of Barnum Uritovsky's ivory trafficking operation. Additionally, Rincossi deterred future ivory trafficking by issuing written warnings containing assured prosecution for any future misconduct, and continued monitoring of the Ambassador Cusi and the twenty members of Barnum Uritovsky.¹⁶ Rincossi's enforcement measures have proven to be effective and invaluable to halting ivory trafficking, the primary goal of CITES Resolution 10.10.¹⁷

The United Nations Office on Drugs and Crime ("UNODC") Wildlife Analytic Toolkit, supports Rincossi's right to determine the "appropriate measure" imposed under CITES. According to the Wildlife Analytic Toolkit, "[CITES] Article VIII does not in itself create a criminal offence and it does not provide any guidance as to the design of criminal offences under domestic law. The creation of the offence . . . [is] left to the signatories."¹⁸ Through this system,

¹⁴ R. 7, ¶ 23; R. 8, ¶ 26, R. 9, ¶ 28.

¹⁵ See CITES Res. 10.10.

¹⁶ R. 7, ¶ 23; R. 8, ¶ 26, R. 9, ¶ 28.

¹⁷ CITES, Res. 10.10.

¹⁸ United Nations Office on Drugs and Crime, *Wildlife and Forest Crime Analytic Toolkit*, (May 2012) available at https://www.unodc.org/documents/Wildlife/Toolkit_e.pdf [Wildlife Analytic Toolkit]; See also *The Black Market for Wildlife: Combating Transnational Organized Crime in*

CITES grants member states broad discretion over the type and strength of measures that are “appropriate” under CITES.¹⁹ Thus, Rincossi did not violate CITES when it determined that confiscation, the issuance of written warnings, and continued monitoring were “appropriate measures” against Ambassador Cusi and the twenty members of Barnum Uritovsky.

ii. Rincossi has fulfilled its obligations under the CBD

Rincossi has also fulfilled its obligations under CBD. CBD is a multilateral treaty with three main objectives: to conserve biological diversity, the sustainable use of biological diversity, and the fair and equitable sharing of genetic resources.²⁰ Rincossi and Aliya both recognize that halting ivory trafficking of the Thornon elephant, a keystone species, is important to the preservation of biodiversity. Rincossi has complied with CBD by enacting and enforcing the Trafficking Act to halt illegal ivory trade and is thus doing its part to preserve biodiversity. Additionally, Rincossi has fully cooperated with Aliya to investigate and halt the illegal ivory trade between the countries.

Aliya incorrectly asserts that Rincossi has violated Article 8 of CBD by failing to prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky. In contrast to Aliya’s assertion, the plain language of Article 8 contains no requirement of prosecution.²¹ Article 8 states, in

the Illegal Wildlife Trade, 36 Vand. J. Transnat'l L. 1657 (2003) (“The lack of international standards for wildlife crime and penalties means that national legislation is primarily responsible for determining the nature, scope and consequences of wildlife crime.”).

¹⁹ *Id.* at 58.

²⁰ *Introduction*, Convention on Biological Diversity, <https://www.cbd.int/intro/default.shtml> (last visited Nov. 18, 2015).

²¹ CBD, art. 8.

pertinent part, that “[e]ach Contracting Party shall, as far as possible and as appropriate . . . (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.”²² Here, Rincossi has acted “as far as possible and appropriate.”²³ Rincossi’s enactment and enforcement of the Trafficking Act exceed Rincossi’s CBD Article 8 obligations by *not only* “protect[ing] threatened species and populations” through halting Ambassador Cusi’s and the twenty members of Barnum Uritovsky’s ivory trafficking operation, *but also* by mandating confiscation of illegal specimens, creating a framework to penalize traffickers.²⁴

Additionally, Rincossi has fulfilled its CBD obligations by fully cooperating with Aliya. Under CBD Article 5, “[e]ach Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties.”²⁵ Here, Rincossi fully cooperated with Aliya by notifying Aliya of the ivory trafficking operation, spearheading a joint-investigation, helping Aliya trace the source of the illegal ivory by conducting a DNA analysis,²⁶ and by taking affirmative action against Ambassador Cusi and the twenty members of Barnum Uritovsky.²⁷ Through these efforts, Rincossi complied with, and exceeded, its obligations under the CBD.

²² CBD, art 8.

²³ CBD, art. 8.

²⁴ R. 7, ¶ 23; R 8, ¶ 26; R. 9, ¶ 28.

²⁵ CBD art. 5.

²⁶ It is presumed that Rincossi conducted the DNA analysis because Rincossi has maintained possession of the confiscated ivory.

²⁷ R. 7-8, ¶ 23-26; R. 11, ¶ 31.

iii. Rincossi did not violate UNTOC or UNCAC

UNTOC and UNCAC are “international cooperation frameworks”²⁸ overseen by the UNODC. UNCAC came into effect two years after UNTOC, in 2005, and thus contains many of the same, and builds upon, UNTOC provisions.²⁹ Rincossi does not contest that Ambassador Cusi and the twenty members of Barnum Uritovsky violated the Trafficking Act by smuggling illegal Thronon elephant ivory from Aliya to Rincossi. Further, Rincossi does not contest that Cusi is likely a “public official”, and that Barnum Uritovsky is likely an “organized criminal group” under UNCAC and UNTOC respectively.³⁰ Rather, Rincossi maintains that it lawfully and effectively handled the violations of the Trafficking Act domestically.

1. Article 4 of UNTOC and Article 4 UNCAC support Rincossi’s sovereign right to oversee its domestic affairs

Article 4 of UNTOC and Article 4 of UNCAC emphasize “non-intervention in domestic affairs of other states” and recognize that nothing under the conventions “entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”³¹ Here, Rincossi properly exercised its sovereign right to make a domestic determination to issue a written warning, rather than prosecuting Cusi and the twenty members of Barnum Uritovsky to the fullest

²⁸ Wildlife Analytic Toolkit at 31.

²⁹ *Id.*

³⁰ *See* UNTOC; *See* UNCAC.

³¹ UNTOC art. 4, UNCAC art. 4.

extent allowed under the Trafficking Act. This domestic determination is supported by UNCAC and UNTOC, and effectively halted the ongoing, and deterred future, ivory trafficking.

2. Article 11(2) of UNTOC and Article 30(3) of UNCAC support Rincossi's sovereign right to oversee its domestic affairs

Article 11(2) of UNTOC and Article 30(3) of UNCAC support Rincossi's sovereign right to oversee its domestic affairs. Article 11(2) of UNTOC, and Article 30(3) of UNCAC require that member states “. . . ensure that any *discretionary legal powers* under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to *maximize the effectiveness* of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences (emphasis added).”³² Here, Aliya incorrectly asserts that Rincossi has violated these provisions. In contrast, Article 11(2) of UNTOC and Article 30(3) of UNCAC support Rincossi's sovereign right to oversee the Trafficking Act violations domestically for two reasons. First, Article 11(2) of UNTOC and Article 30(3) of UNCAC specifically provide that member states have “*discretionary legal powers* under its domestic law (emphasis added).”³³ Second, Article 11(2) of UNTOC and Article 30(3) of UNCAC are fulfilled so long as the member state's actions “maximize the effectiveness” of the law, here, the Trafficking Act.

Nothing in UNTOC or UNCAC requires a member state to prosecute its citizens to the fullest extent allowed under domestic law in order to “maximize effectiveness.” Rather, “maximum effectiveness” connotes achieving the purposes of the law, here, halting and deterring

³² UNTOC art 11(2); UNCAC art. 30(3).

³³ UNTOC art 11(2); UNCAC art. 30(3).

wildlife trafficking. Rincossi has achieved this “maximum effectiveness” by confiscating the Thornon elephant ivory, issuing written warnings, and continuing to monitor Ambassador Cusi and the twenty members of Barnum Uritovsky.³⁴

Additionally, Legislative Guidance for UNTOC and UNCAC support Rincossi’s sovereign right to determine appropriate penalties.³⁵ When discussing Article 11(2) and Article 30(3) of UNTOC and UNCAC respectively, Legislative Guidance states “[t]he severity of the punishment for the offences mandated by the Convention is left to the States parties,”³⁶ and “it is up to the State party concerned to determine the appropriate sanctions[.]”³⁷ Here, Rincossi lawfully exercised its sovereign right to determine the severity of Ambassador Cusi’s and the twenty members of Barnum Uritovsky’s punishment. The issuance of written warnings is effective and utilized by other nations, including the United States, Canada, and Tanzania.³⁸ Further, Aliya itself

³⁴ R. 7-8, ¶ 23-26; R. 9, ¶ 28.

³⁵ United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime, 2004, available at https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf [UNTOC Legislative Guide]; United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention Against Corruption, Second Revised Edition 2012, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf [UNCAC Legislative Guide].

³⁶ UNTOC Legislative Guide ¶ 46; UNCAC Legislative Guide ¶ 383.

³⁷ UNTOC Legislative Guide ¶ 35; UNCAC Legislative Guide ¶ 34.

³⁸ *Investigation into Illegal Internet Wildlife Trafficking Results in 33 Written Arrests and 40 Warnings*, THE HUMANE SOCIETY OF THE UNITED STATES, (Oct. 2, 2013) http://www.humanesociety.org/news/press_releases/2013/10/illegal-internet-wildlife-trafficking-investigation-arrests-made.html; *See also Review of Progress, Kasane Conference on the Illegal Wildlife Trade* (Mar. 25, 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415690/review-

exercises its own sovereign discretion by not prosecuting all violators of its illegal Trafficking Law, the Aliyan Ivory Trade Prohibition Act (“Ivory Act”).³⁹ Overall, it is clear that Rincossi was in compliance with UNTOC and UNCAC when it exercised discretion over Ambassador Cusi’s and the twenty members of Barnum Uritovsky’s penalty for ivory trafficking.

iv. Ambassador Cusi is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations

In addition to the argument set forth above, Ambassador Cusi is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations.⁴⁰ Under the Vienna Convention on Diplomatic Relations, Rincossi maintains the sovereign right, and sovereign discretion, to prosecute Ambassador Cusi.⁴¹ Further, Aliya is preempted from prosecuting Cusi because, as an ambassador, Cusi is a “head of mission” and thus, a “diplomatic agent” under the Vienna Convention on Diplomatic Relations.⁴² As a “diplomatic agent,” Cusi “shall not be liable to any form of arrest or detention.”⁴³

II. RINCOSSI HAS NOT VIOLATED ITS TREATY OBLIGATIONS BY ELECTING NOT TO RETURN THE CONFISCATED THORNON ELEPHANT IVORY

progress-kasane-conf-150317.pdf (listing a variety of actions taken against wildlife traffickers) [Kasane Conference]; *Tanzania: Wildlife Officials Fired for Animal Trafficking*, NO ANIMAL POACHING (Aug. 15, 2012) <http://www.noanimalpoaching.org/animal-poaching-news/category/officials%20fired%20for%20trafficking>.

³⁹ R. 7, ¶ 19; R. 11, ¶ 31.

⁴⁰ Vienna Convention on Diplomatic Relations.

⁴¹ Vienna Convention on Diplomatic Relations, art. 31(4).

⁴² Vienna Convention on Diplomatic Relations, art 1(e).

⁴³ Vienna Convention on Diplomatic Relations, art 29.

A. Rincossi has complied with its international treaty obligations

i. Rincossi fulfilled its obligations under the Cultural Property Convention

Aliya's contention that Rincossi violated the Cultural Property Convention is incorrect because the ivory in question is not protected under the Convention. The Cultural Property Convention does not, on its own, prohibit the export of cultural property.⁴⁴ Instead, the treaty consists of non self-executing rules and relies on state parties to implement national legislation prohibiting the export of cultural property.⁴⁵ As a result of its non self-executing nature, the Cultural Property Convention contains specific procedures allowing parties to designate certain items as cultural property.⁴⁶ These procedures, and Aliya's failure to adhere to them, are examined in depth below.

First, States must protect their own cultural property against the "dangers of theft, clandestine excavation, and illicit export."⁴⁷ States are instructed to protect the cultural property within their territories using whatever means they may possess.⁴⁸ The Cultural Property Convention, which entered into force in 1970, does not contemplate the modern principle of

⁴⁴ Zsuzsanna Veres, *The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 Santa Clara J. Int'l L. 91, 97 (2014) available at <http://digitalcommons.law.scu.edu/scujil/vol12/iss2/4>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 98; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl., Nov. 14, 1970, 823 U.N.T.S. 231 [Cultural Property Convention].

⁴⁸ Cultural Property Convention, art. 2.

“common but differentiated responsibilities” and thus, the treaty charges both wealthy and poor countries alike with the responsibility of protecting their cultural property.⁴⁹

Aliya failed to meet the first cultural component of the Convention, because it failed to sufficiently protect Thornon elephants within its borders from poachers. The record indicates that despite rangers, guards, and a series of fences protecting the park, “poachers still manage to kill elephants and remove their tusks within the park.”⁵⁰ The allowance of poachers into Thornon Elephant National Park indicates that Aliya has failed to protect its own cultural property as required by the Cultural Property Convention. Thus, because of its own partial violation of the treaty, Aliya should not be permitted to invoke the Cultural Property Convention against Rincossi.

Additionally, the Cultural Property Convention espouses the importance of national institutions, such as museums and libraries to increase the preservation of cultural property.⁵¹ The Convention only prohibits importing countries from accepting cultural property that has been stolen from museums, monuments, or other such institutions.⁵² The Thornon National Park does not fit any of these descriptions - it is not a museum, monument, or library where cultural property is kept. Thus, this ivory in question is not protected under the Cultural Property Convention because it was not stolen from an institution covered by the treaty.

⁴⁹ See Boyte, *Common but Differentiated Responsibilities: Adjusting the Developing/Developed Dichotomy in International Environmental Law*, 14 N.Z. J. ENVTL. L. 63, 64 (2010); See also *The Principle of Common but Differentiated Responsibilities: Origins and Scope*, CISDL LEGAL BRIEF (Aug. 26, 2002), available at http://cisdl.org/public/docs/news/brief_common.pdf.

⁵⁰ R. 6, ¶ 16.

⁵¹ Cultural Property Convention, Art. 5.

⁵² Cultural Property Convention, Art. 7.

Even if the Thornon Elephant National Park is somehow classified as a national institution equivalent to a museum, the elephants within the park will still lack protection under the Cultural Property Convention because the individual elephants are not specifically inventoried as cultural property.⁵³ The record reveals that individual elephants in the national park were not accounted for, but only that a specific strain of DNA was recognized as present in some elephants from the park.⁵⁴ It was not until Rincossi conducted a DNA test on the confiscated ivory that its origins were discovered.⁵⁵ Thus, Rincossi inventoried the origins of the confiscated ivory after the illegal transport had taken place. This fact strongly indicates that the Cultural Property Convention does not apply to the ivory in question because, according to scholars, “[u]nder the UNESCO Convention, states are only required to prohibit the import of cultural property that has been stolen from a museum, public monument, or similar institution, and that has been properly inventoried *prior* to illegal exportation (emphasis added).”⁵⁶

Finally, Aliya’s insistence that Rincossi bear the expense of returning the ivory to its country of origin stands in direct contravention to the Convention’s text. Article 7(ii) of the Cultural Property Convention states: “[a]ll expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.”⁵⁷ Because Aliya, the requesting party,

⁵³ Zsuzsanna Veres, *supra* note 41, at 104.

⁵⁴ *See* R. 6, ¶ 16.

⁵⁵ R. 11, ¶ 31.

⁵⁶ Zsuzsanna Veres, *supra* note 41, at 104.

⁵⁷ Cultural Property Convention, Art. 7.

is reluctant to furnish the funds needed to return the ivory to its borders, it has not adhered to the Cultural Property Convention.⁵⁸ In conclusion, Aliya cannot invoke the Cultural Property Convention against Rincossi because Aliya itself has failed on multiple levels to implement the provisions of the treaty within its own borders.

- ii. Rincossi has not violated CITES Article VIII(1)(b) and Resolutions 9.9 and 9.10

Aliya incorrectly asserts that Rincossi violated CITES Article VIII(1)(b) and CITES Resolution 9.9 and 9.10 by destroying the illegal ivory rather than returning it. Return of ivory is not required under CITES.⁵⁹ Additionally, state practice demonstrates that destruction of ivory by the importing state is consistently carried out around the world as a preferable method to disincentive the illegal trade in ivory and curb demand for ivory products.⁶⁰

CITES Article VIII(1)(b) states, in pertinent part that parties must “provide for the confiscation *or* return to the State of export of such specimens.” (Emphasis added).⁶¹ Contrary to Aliya’s contention, Article VIII(1)(b) expressly allows state parties to choose between confiscation of the specimens or return of the specimens to the state of export. The plain meaning of Article VIII(1)(b) indicates that either method may be undertaken by the importing country.

⁵⁸ Cl. 2; Q15.

⁵⁹ CITES, art. VIII(1)(b).

⁶⁰ Brandon Keim and Emma Howard, *African Blood Ivory Destroyed in New York to Signal Crackdown on Illegal Trade*, The Guardian, <http://www.theguardian.com/environment/2014/feb/13/global-accord-illegal-wildlife-trade-london-46-nations> (last visited Nov. 19, 2015); Kasane at 11.

⁶¹ CITES, art. VIII(1)(b).

Furthermore, the destruction of the ivory in Rincossi comports with international norms because many other countries around the world engage in the public destruction of ivory as a way to decrease overall demand for the product.⁶² For example, in June 2015, the United States Fish and Wildlife Service destroyed more than one ton of illegally imported ivory in Times Square, New York City.⁶³ According to one official, the destruction of the ivory was carried out in a public place to send a message that they “are crushing the bloody ivory market,” and “any hopes by the poachers that they will profit by killing off our Earth’s majestic elephants.”⁶⁴ Other countries that have publicly destroyed illegal ivory include France, Belgium, the United Kingdom, China, Malawi, Ethiopia, Gabon, and Japan.⁶⁵

Furthermore, at the Kasane Conference on the Illegal Wildlife Trade, state signatories to the London Declaration on the Illegal Wildlife Trade discussed the issue of destroying illegal ivory.⁶⁶ A Review of Progress document produced at the meeting specifically states that all 46 signatories to the Declaration should “endorse the action of governments which have destroyed seized wildlife products being traded illegally.”⁶⁷ Thus, state practice affirms that confiscating and publicly destroying illegal ivory is an international norm, and many states agree that this

⁶² Kasane Conference at 11; CITES, art. VIII(1)(b).

⁶³ Brandon Keim and Emma Howard, *supra* note 57.

⁶⁴ *Id.*

⁶⁵ *Id.*; Kasane Conference at 11.

⁶⁶ Kasane Conference.

⁶⁷ Kasane Conference at 11.

practice is an effective way to decrease the overall demand for ivory.⁶⁸ As a result, it is clear that Rincossi was in full compliance with CITES and international norms when it confiscated the illegally imported ivory from Aliya and planned to publicly destroy it.

Additionally, CITES Resolutions 9.9 and 9.10 explicitly encourage the destruction of confiscated ivory. CITES Resolution 9.9 enunciates the downfalls of re-exporting illegally traded ivory to the country of origin by emphasizing that return of the ivory to the state of export may result in specimens being re-entered into illegal trade.⁶⁹ CITES Resolution 9.10 further confirms this notion stating that parties should “dispose of confiscated and accumulated dead specimens of Appendix I species, including parts and derivatives”⁷⁰ In this case, Rincossi is disposing of the illegally imported ivory for enforcement purposes because its own domestic law requires the destruction of ivory confiscated during illegal trade.⁷¹ Therefore, Rincossi acted in compliance with CITES.

- iii. Rincossi did not violate UNTOC Article 14 when it elected not to return the ivory to Aliya

⁶⁸ Kasane Conference at 11.

⁶⁹ See CITES Resolution Conf. 9.9 Confiscation of specimens exported or re-exported in violation of the Convention (Rev. CoP15), CITES, <https://cites.org/sites/default/files/eng/res/all/09/E09-09.pdf> (last visited Nov. 19, 2015) [CITES Res. 9.9].

⁷⁰ See CITES Resolution Conf. 9.10 Disposal of confiscated and accumulated specimens (Rev. CoP15), CITES, <https://www.cites.org/eng/res/09/09-10R15.php> (last visited Nov. 19, 2015) [CITES Res. 9.10].

⁷¹ R. 7, ¶ 2.

Aliya stated that Rincossi violated Article 14 of UNTOC by opting to destroy the illegally imported ivory rather than returning it to Aliya. This assertion is incorrect because Article 14 of UNTOC clearly leaves disposal of property to the discretion of states.

Under Article 14, “[p]roceeds of crime or property confiscated by a State Party. . . shall be disposed of by that State Party *in accordance with its domestic law and administrative procedures* (emphasis added).”⁷² Thus, Article 14 allows Rincossi’s proposed disposal of ivory in accordance with its domestic laws. This stance is reiterated in Paragraph 2 of Article 14, which encourages states to return confiscated property to a requesting state, “to the extent permitted by domestic law.”⁷³ Therefore, under UNTOC, Rincossi has the discretion to abide by its domestic laws and destroy the ivory from Aliya.⁷⁴

- iv. Rincossi did not violate UNCAC Articles 51 and 57(3)(c) by not returning the ivory to Aliya

Aliya claims that Rincossi violated Article 51 of UNCAC when it confiscated and planned to destroy the illegally trafficked ivory. Article 51 of UNCAC is a general provision stating: “[t]he return of assets pursuant to this chapter is a fundamental principle of this Convention, and State Parties shall afford one another the widest measure of cooperation and assistance in this regard.”⁷⁵ At first glance, Article 51 may seem to provide credence to Aliya’s assertion that Rincossi violated

⁷² UNTOC, art.14.

⁷³ UNTOC, art. 14.

⁷⁴ R. 12, ¶ 34.

⁷⁵ UNCAC, art. 51.

the provision by planning to destroy the confiscated ivory rather than returning it. However, a closer look at the treaty reveals that this assertion is inaccurate.

Article 51 does not state that parties “shall” return all confiscated assets. Rather, it states that the return of assets is an important fundamental principle, and obligates parties to cooperate with each other regarding the return of assets.⁷⁶ An interpretive note authored by parties to the Convention clarifies that “the expression ‘fundamental principle’ would not have legal consequences” on provisions of the Convention that deal with asset recovery.⁷⁷ This clarification indicates that the only obligation found in Article 51 is to cooperate on the terms of asset recovery. Rincossi cooperated with Aliya on the issue of the confiscated ivory, and it was Rincossi’s investigatory powers that allowed Aliya to locate the illegal Thornon elephant ivory (and culprits), and identify the DNA strain from Thornon Elephant National Park.⁷⁸ Without Rincossi’s cooperation, Aliya would not have been aware of the Thornon elephant ivory, and Aliya would not have been certain that it was the rightful owner of the illegally traded ivory. For these reasons, Rincossi has fully complied with Article 51 of UNCAC.

Rincossi is also in compliance with Article 57(3)(c) of UNCAC, despite Aliya’s claims. Article 57, paragraph 1 states: “[p]roperty confiscated by a State Party . . . shall be disposed of,

⁷⁶ UNCAC, art. 51.

⁷⁷ United Nations General Assembly, *Report of the Ad Hoc Committee for the Negotiation of Convention against Corruption on the work of its first to seventh sessions, Interpretive Notes for the Official Records of the Negotiation of the United Nations Convention Against Corruption*, (Oct. 7, 2003) available at https://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf [UNCAC Ad Hoc Committee Report].

⁷⁸ R. 11, ¶ 31.

including by return to its prior legitimate owners . . . by that State Party in accordance with the Provisions of this Convention and its domestic law.”⁷⁹ This article indicates that confiscated ivory *shall* be disposed of, and *may* include the return to its prior legitimate owners. Rincossi’s domestic law requires that elephant ivory be disposed of through public destruction, a method accepted under UNCAC.

In case Rincossi is somehow obligated to adhere to Article 57, despite its own domestic laws requiring the destruction of confiscated ivory, it still has not violated the Article 57’s requirements. Article 57 (3)(c) of UNCAC states that parties should “give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners, or compensating the victims of the crime.”⁸⁰ Importantly, Parties to UNCAC have interpreted the “return of confiscated property” to mean “return of title or value” in some cases.⁸¹ This means that Rincossi could compensate Aliya for the damage done by Ambassador Cusi and still be in compliance with its own domestic legislation requiring the destruction of ivory and UNCAC’s requirement of asset recovery. In some circumstances, compensation for the value of the property may be preferable. For example, the Legislative Guide for UNCAC indicates that the request for the return of property is stronger in some cases than in others.⁸² There is nothing in

⁷⁹ UNCAC, art. 57, 31.

⁸⁰ UNCAC, art. 57, 31.

⁸¹ UNCAC Legislative Guide; UNCAC Ad Hoc Committee Report.

⁸² UNCAC Legislative Guide.

the record to suggest that Rincossi would be opposed to compensating Aliya for the harm caused by Ambassador Cusi and the twenty members of Barnum Uritovsky.

Overall, Rincossi acted in compliance with Articles 51 and 57(3)(c) of UNCAC because Article 51 of UNCAC merely requires states to cooperate on the issue of return of assets, which Rincossi has done. Similarly, Rincossi has not violated Article 57(3)(c) because this Article allows for the disposal of assets. Even if Article 57(3)(c) does apply in Rincossi, the Article's requirements have been met because nothing in the record suggests that Rincossi is opposed to compensating Aliya for the value of the confiscated ivory.

III. RINCOSSI HAS NOT VIOLATED CUSTOMS AND GENERAL PRINCIPLES OF INTERNATIONAL LAW THROUGH ANY OF ITS ACTIONS

A. Rincossi has not violated its obligations under customary international law

While Rincossi supports efforts to halt ivory trafficking, there is no customary international law (“CIL”) requiring the prosecution of ivory traffickers. Legally binding CIL obligations are created through two compulsory elements: state practice – the “rule of consistent and uniform usage” and *opinio juris* – a showing that states’ actions stem from the belief that such practice is required by law.⁸³ The movement to require the prosecution of ivory traffickers, while emerging, does not meet the requisite widespread state practice and *opinio juris* necessary to create a binding legal obligation.

⁸³ Lal Kurukulasuriya & Nicholas Robinson, *Training Manual on International Environmental Law, IUCN Academy of Environmental Law*, (2006), available at <http://www.iucnael.org/online-resources/unep-training-manual.html>.

State practice can be demonstrated in various forms: national legislation, diplomatic correspondences, government statements etc.,⁸⁴ and must be “both extensive and virtually uniform in the sense of the provision invoked.”⁸⁵ Many countries (including both Rincossi and Aliya), intergovernmental organizations (e.g. the International Consortium on Combating Wildlife Crime),⁸⁶ and multilateral agreements (e.g. the Trans Pacific Partnership Agreement)⁸⁷ aim to stop the illegal wildlife trade, however, the methodologies to achieve this goal are not uniform in any way. Approaches to halting the illegal ivory and wildlife trade range from administrative sanctions, to fines, to lengthy prison terms.⁸⁸ This range of penalties does not constitute state practice. In contrast, the range of penalties supports Rincossi’s sovereign right to choose whether or not to prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky.

Even if the differing penalties imposed upon ivory traffickers were construed as state practice, the second requisite, *opinio juris*, has not been met. “If a practice is regarded as discretionary . . . rather than obligatory, it is an example of usage that does not possess the critical element of *opinio juris* and therefore is not considered customary law.”⁸⁹ The absence of a uniform

⁸⁴ LAKSHMAN GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL, 16 (4th Ed. 1997).

⁸⁵ North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 20.

⁸⁶ *International Consortium on Combating Wildlife Crime, CITES*, <https://www.cites.org/eng/prog/iccwc.php> (last visited Nov. 19, 2015).

⁸⁷ Trans Pacific Partnership Agreement, United States Trade Representative, <https://ustr.gov/tpp/#text> (last visited Nov. 19, 2015).

⁸⁸ See *The Black Market for Wildlife: Combating Transnational Organized Crime in the Illegal Wildlife Trade*, *supra* note 16.

⁸⁹ GURUSWAMY, *supra* note 80, at 17.

penalty for ivory trafficking, mentioned *supra*, evidences a clear lack of obligation to prosecute. Additionally, many states, including Aliya, selectively prosecute wildlife traffickers based on the circumstances of the incident and resources available.⁹⁰ Thus, Rincossi has not violated customary international law by electing not to prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky.

B. Rincossi has not violated general principles of international law

i. Rincossi has not violated the duty to cooperate

Rincossi has complied with the duty to cooperate by entering into a joint investigation regarding the illegally trafficked ivory. The duty to cooperate is a binding principle of international law requiring states to cooperate with one another to solve international issues.⁹¹ The duty to cooperate is found in the UN Charter, and in the realm of international environmental law the duty to cooperate is couched in the text of the Rio Declaration.⁹² According to Principle 27 of the Rio Declaration, “[s]tates and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of . . . the further development of international law in the field of sustainable development.”⁹³ The ICJ has recognized the duty to cooperate on multiple occasions, including in

⁹⁰ R. 7, ¶ 19.

⁹¹ David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, 491 (4th. Ed. 2011)

⁹² *Id.*

⁹³ Rio Declaration on Environment and Development, Principle 2, UN Doc.A/CONF. 151/26 (1992).

Argentina v. Uruguay (commonly called Pulp Mills on the River Uruguay) and Australia v. Japan, an ICJ case on whaling.⁹⁴

Rincossi's actions, including spearheading a joint investigation with Aliya regarding the ivory, and acting quickly against the perpetrators of the crime, conform to the duty to cooperate because they show Rincossi's eagerness to work with Aliya and to take the crimes committed by its citizens in Aliya seriously.

- ii. Ruling in favor of Aliya violates the general international law principle of non-intervention

The principle of non-intervention is a fundamental norm of state relations and a general principle of international law. This general principle of international law is viewed as “a corollary of every state's right to sovereignty, territorial integrity and political independence.”⁹⁵ The International Court of Justice (“ICJ”) extensively recognized this principle in *Nicaragua vs. United States*. *Nicaragua* involved a dispute over an armed intervention in Nicaragua by the United States. The ICJ ruled in favor of Nicaragua and affirmed the principle of non-intervention. Specifically, the ICJ stated: “[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. Expressions of an *opinio juris*

⁹⁴ Cymie R. Payne, *Australia v. Japan: ICJ Halts Antarctic Whaling*, *American Society of International Law Insights* (April 8, 2014) <https://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling>; Cymie R. Payne, *Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty Under International Law*, *American Society of International Law Insights* (April 22, 2010) <https://www.asil.org/insights/volume/14/issue/9/pulp-mills-river-uruguay-international-court-justice-recognizes>.

⁹⁵ L. OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* (Robert Jennings & Arthur Watts, eds.), 9th ed. 1992 at 428.

of States regarding the existence of this principle are numerous. The Court notes that this principle, stated in its own jurisprudence, has been reflected in numerous declarations and resolutions adopted by international organizations and conferences”⁹⁶ Here, the ICJ should again recognize the international law principle of non-intervention. Aliya’s attempt to force Rincossi to prosecute its own public officials and citizens directly violates this principle. As a whole, it is clear that Rincossi’s actions comport with its obligations under customary international law and international law principles.

CONCLUSION AND PRAYER

For the foregoing reasons, the Republic of Rincossi respectfully requests that this Honorable Court:

1. **Declare that the Republic of Rincossi did not violate international law when it chose not to prosecute Ambassador Cusi and the twenty members of Barnum Uritovsky.**
2. **Declare that the Republic of Rincossi did not violate international law by electing not to return the confiscated ivory to Aliya.**

⁹⁶ Nicaragua vs. United States, 1986 I.C.J. 14.

