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

THE CASE CONCERNING

THE VESSEL THE *MAIRI MARU*

The Philip C. Jessup International Law Moot Court Competition

2005

THE REPUBLIC OF APPOLLONIA
APPLICANT

V.

THE KINGDOM OF RAGLAN
RESPONDENT

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Republic of Appollonia (Applicant) and the Kingdom of Raglan (Respondent) have agreed *ad hoc* to submit the present dispute concerning the "Vessel the *Mairi Maru*" to the International Court of Justice, pursuant to article 40, paragraph 1 of the Statute of this Court and by virtue of a Special Agreement (*Compromis*) signed in Washington, DC on May 15, 2004, and jointly notified to the Court on June 1 of the same year. Both parties have expressly agreed that no other State is a necessary party for the resolution of any of the issues that are the subject of the *Compromis*.

QUESTIONS PRESENTED

1) Whether Thomas Good became an agent of Raglan when he exercised the authority granted to him by that State, and, therefore, his acts are imputable to it;
2) Whether Raglan also assumed responsibility *ex post facto* by immunizing the acts of Good;
3) Whether Raglan has displayed lack of due diligence in providing security within its archipelagic waters, particularly in light of its own unilateral pledge to combat piracy;
4) Whether Raglan violated international law by extraterritorially and disproportionately intervening in the scuttling of the *Mairi Maru* and her cargo;
5) Whether such abusive act may be justified by a presumed state of necessity spawned by Raglan itself;
6) Whether Raglan has standing to entertain a claim for compensation for private damages incurred outside its territory and EEZ, without first having exhausted any local remedies;
7) Whether Raglan may derive standing on behalf of the international community absent an *erga omnes* breach, and, in any event, whether it may reserve for itself the exclusive right to receive monetary compensation for damages on the high seas;
8) Whether Appollonian vessels are entitled to exercise innocent passage through the Raglanian Archipelago without notifying or obtaining consent thereto;
9) Whether any obligations –be they conventional or customary- were opposable to Appollonia relating to its MOX shipments;
10) Whether Appollonia can be held liable to pay compensation for the pollution to the Norton Shallows in the absence of any fault on its part.

STATEMENT OF FACTS

The Republic of Appollonia (Applicant) is a small, coastal nation, which has been trying to come to terms with its growing needs by developing nuclear energy for peaceful purposes. In 1997, it concluded a five-year agreement to sell surplus MOX, a type of fuel produced with the by-products of nuclear reaction, to MARC, a privately-owned company based in Maguffin. Such agreement was duly reported to the IAEA, of which Appollonia is a member, while every MOX shipment which ensued between Appollonia and Maguffin conformed to its terms.

Deplorably, the archipelagic waters of Raglan, i.e. the State situated amid Appollonia and Maguffin, were in effect ravaged by pirates, who had been attacking ships passing through. This was not only conceded by Raglan but was also reported by international organizations concerned, such as ILSA, which issued the strongest warning possible to avert ships from using the Raglanian archipelago. Such agitation, as well as the subsequent financial slump in the archipelago, led to the adoption of measures by the Prime Ministry of Raglan, to guarantee safe passage of ships through Raglan's waters, by virtue of a team of "anti-piracy" pilots who would be available on request. These pilots, whether navy officers or private contractors, would be subjected to the same training and perform the same functions (among which to mobilize the Royal Navy of Raglan, if need be), and be paid by the Government of Raglan.

Having relied on this pledge, third States, including Appollonia, continued to conduct shipments in the area. Nonetheless, when the captain of the *Mairi Maru*, an Appollonian vessel carrying MOX, deemed it necessary to apply for such a Raglanian pilot, all he got was a person who –though hired and trained under the nose of the Royal Navy of Raglan- proved to be nothing less than a ruthless pirate, who hijacked and abandoned the vessel. Despite the fact that

the Raglanian Navy was supposed to electronically monitor the vessel, it was not until two days later that a patrol located it by a quirk of fate, lying ashore on a sandbar out on the high seas, in an area called the Norton Shallows, causing pollution.

Although Raglanian firms were engaging in certain activities in that area, which had only begun no earlier than the mid-'90s, Raglan as such was not ever involved in these, other than taxing its citizens. Nevertheless, Raglan acted as if it was itself affected by the pollution, and also impudently demanded that Appollonia compensate it, threatening to scuttle both the vessel and its cargo. In fact, this last threat materialized even before Appollonia had time to respond. As for the pollution, it is stipulated that even at the time of the signing of the *Compromis*, i.e. almost two years after the incident, it has yet to affect Raglan's EEZ, let alone its territorial waters.

As Raglan's anti-piracy program had proved to be more than ineffective, and as it was but a fair inference that the undue delay in tracking down the *Mairi Maru* was responsible for the pollution and the deaths of some crew-members, Appollonia accused Raglan of both the incident itself and the scuttling of the *Mairi Maru*, while at the same time recapping Appollonia's compliance with its international obligations, including the IAEA standards.

With Raglan insisting on the invocation of international instruments to which it is not a party, the subsequent negotiations proved fruitless, thus leading to the signing of a *Compromis* and the initiation of these proceedings before this Court.

SUMMARY OF PLEADINGS

I. Raglan is responsible for the attack upon the *Mairi Maru* –which caused the deaths of Appollonian crewmen and resulted in the heavy pollution to the Norton Shallows- for two reasons, namely: a) having been cloaked with the governmental authority of Raglan, Good became its agent, and hence his acts are imputable to it, even if regarded as *ultra vires* ones. This was in effect conceded by the competent courts of Raglan, which shielded him with immunity; b) Raglan exhibited outrageous lack of due diligence in averting piracy within its archipelagic waters, despite the fact that it had also unilaterally undertaken an obligation of extra caution by virtue of the declaration of its Prime Minister, which Appollonia and other States relied upon.

II. In scuttling the *Mairi Maru* in international waters, Raglan interfered with the exclusive jurisdiction of the flag State, Appollonia, paying no regard to the proprietary entitlements over both the ship and her cargo. Such breach may not be justified under any rule of international law, and categorically not under any perceived state of necessity, which, even if assumed clear and present, was engendered by no one else but Raglan itself. In any event, scuttling the vessel constituted an *abus de droit*, and hence Raglan owes full compensation for the destruction of the property of both Appollonia and its nationals.

III. As regards Raglan's claim for compensation it is inadmissible, since Raglan lacks standing to pursue it. First of all, the Norton Shallows are nothing but sandbars on the high seas, and Raglan has not and may not claim sovereignty over them. Second, in any event Raglan may not take up the pertinent claims of its nationals either, since local remedies have not been exhausted. Third, Raglan may not derive standing on the basis of an *erga omnes* breach, as marine pollution

is not classified as such a breach under any enumeration, and this type of breach is in any event inadequate to sustain compensatory claims. Fourth, Raglan lacks standing to invoke international treaties to which it is not a party, and, fifth, its claim is inadmissible due to lack of clean hands.

IV. In any event, Appollonia has not violated any presumed obligations owed to Raglan. All its vessels did was exercise their right to innocent passage through the Raglanian Archipelago, such right not being subject to any need to notify or obtain the consent of the coastal State. The freedom of navigation may not be curtailed by made-up rules, such as the so-called precautionary principle, particularly since Appollonia has abided by every conventional duty opposable to it and there is no State practice or *opinio iuris* to support the existence of customary law on the subject. Even if that were the case, Appollonia was at the very least entitled to an exception in order to ensure the safety of its vulnerable MOX shipments, and Raglan had indeed been acknowledging that for years, by virtue of its acquiescence. Furthermore, international law does not know of strict liability, and there can definitely not exist liability for lawful actions of a State, regardless of their nature. Therefore, Appollonia cannot be held responsible on any valid basis.

WRITTEN PLEADINGS

I. RAGLAN IS RESPONSIBLE FOR THE ACT OF PIRACY PERPETRATED BY ITS AGENT, THOMAS GOOD, ON *MAIRI MARU*, BOTH BECAUSE THE ACT *PER SE* IS ATTRIBUTABLE TO IT AND BECAUSE OF ITS LACK OF DUE DILIGENCE

A. THE ACTS OF GOOD, AN AGENT OF RAGLAN, ARE ATTRIBUTABLE TO IT, EVEN IF COMMITTED *ULTRA VIRES*

1. Good was cloaked with governmental authority by Raglan, and, therefore, his acts were no less than acts of Raglan itself

States are responsible not just for the actions and omissions of their *stricto sensu* organs, but also for those of any person who exercises governmental authority on their part (*de jure* agents).[1] This tenet is well-established in customary law, codified as such in article 5 of the ILC Draft Articles on State Responsibility,[2] as well as supported by State practice.[3] According to the authoritative commentary to the DASR, governmental authority would be construed as the "performance of functions of a public character normally exercised by State organs",[4] while the act of policing an area within a given State is furnished as a pertinent example of an act

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[1] C.Chinkin, *A Critique of the Public/Private Dimension*, 10 EJIL 1999, p.387.

[2] ILC Draft Articles on State Responsibility (hereinafter DASR), 53rd Sess., UN Doc. A/CN.4/L.602/Rev.1 (2001); *cf.* ILCYb 1978, Vol.II, Part Two, p.81; State Responsibility: Comments and Observations Received From Governments, UN Doc.A/CN.4/488, 25.3.1998 March 1998.

[3] ALI Restatement (Third) of the Foreign Relations Law of the US (hereinafter US Restatement), s.207; ILCYb 1974, Vol II, Part One, p.282.

[4] Commentary to the ILC Draft Articles on State Responsibility, ILCYb 2001, p.92; R.Ago (Special Rapporteur), Third Report on State Responsibility, UN Doc.A/CN.4/246, Add.1-3, 2 ILCYb 1971, p.199.

attributable to that State,[5] even when the agent does not bear any insignia to denote their position.[6]

In the present case, Good was hired by Raglan to play the dual role of a pilot and an enforcer of the maritime security of the archipelago. Like every other private contractor, he was trained and assigned by the Royal Navy of Raglan, and he was being used interchangeably with naval officers (*Cmps.* § 13), which is indicative of the absence of any distinction between these two categories of pilots. Moreover, he had the same rights and duties as did the naval officers, including to mobilize the Royal Navy at will. It must be underscored that Good was actually acting in his official capacity as regards the *Mairi Maru*, since: a) he responded to the captain's call for assistance on behalf of the anti-piracy program and boarded the vessel in that capacity; b) for at least one hour, he was piloting the vessel in performance of his duties as an agent of Raglan (*Cmps.* § 17, *Clar.* 3). It is then clear that his acts –as well as their consequences- are directly attributable to Raglan itself.

2. Even if the acts of Thomas Good are classified as *ultra vires* ones, they are still attributable to Raglan under the law on State responsibility

Raglan could not take refuge behind the premise that Good's acts were not condoned by its central administration. It is by now a customary rule of international law that State responsibility also extends to acts carried out by State agents even in excess of their authority or in contravention of instructions. Indeed, "if such unauthorized or *ultra vires* acts could not be

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[5] *Id.*, p.93.

[6] *Zafiro* Case, RIAA 1925, pp.160-165; *Stephens* Case, RIAA 1927, pp.265-267; D.Kaufman, *Don't Do What I Say, Do What I Mean!: Assessing A State's Responsibility For The Exploits Of Individuals Acting In Conformity With A Statement From A Head Of State*, 70 Ford.LR 2002, p.2616.

ascribed to the State, the whole concept of State responsibility would be rendered illusory."[7] Such rule is not only embraced in article 7 of the DASR, but is also supported by case-law,[8] State practice,[9] and the writings of eminent publicists.[10]

In the case at hand, Good would have never been onboard the *Mairi Maru* had it not been for his position in the Royal Navy of Raglan. International jurisprudence indicates that States were held responsible in the past, even when their organs acted by mistake or in defiance of specific orders on the part of their superiors.[11] *A fortiori*, Raglan must assume responsibility for the deeds of its agent.

3. By immunizing the acts in question, Raglan in effect assumed responsibility for them

Article 11 of the DASR states, in so many words, that a State shall be responsible for certain conduct "to the extent that it acknowledges and adopts the conduct in question as its own".[12] Indeed, the doctrine of *ex post facto* responsibility, molded by this very Court in the *Tehran Hostages* Case,[13] has become an intrinsic part of international law.[14] Raglan, though verbally

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[7] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ILM 1993, p.933; D.Ott, PUBLIC INTERNATIONAL LAW IN THE MODERN World (1987), p.169.

[8] *Caire* Case, RIAA 1929, p.516; *Youmans* Case, RIAA 1916, p.110; *Velasquez Rodriguez Case*, I/ACt.HR (1988), OAS/Ser.L/V/III.19, doc.13; *Petrolane, Inc. v. Islamic Republic of Iran* (1991) 27 Iran-USCl.Tr. 64, p.92.

[9] US Restatement, s. 207, com. c, d; *cf.* ILC Commentary, p.101.

[10] M.Shaw, INTERNATIONAL LAW, 4th ed. (1997) p.549; I.Shearer (ed.), STARKE'S INTERNATIONAL LAW, 11th ed. (1994) pp.267,276; M.Sørensen (ed.), MANUAL OF PUBLIC INTERNATIONAL LAW, (1968), pp.548-550; ILC Commentary, p.101.

[11] *Youman's Claim*, RIAA 1926, p.110; *Union Bridge Company* Case, RIAA 1924, p.170; Opinion of Commissioner Verzijl in the *Caire Claim*, RIAA 1929, p.516.

[12] *Lighthouses* Arbitration, RIAA 1956, p.155.

condemning the acts in question, in essence shielded Good with immunity, at the same time negating the pertinent claims of his victims. It goes without saying that the courts of a given State bind the latter internationally and their pronouncements may *per se* generate State responsibility.[15] It follows that, by associating the "immunity traditionally enjoyed by the armed forces of Raglan" with the acts of Good, more than once indeed (*Cmps.* §§ 30-31), the courts of Raglan in effect admitted that he was part of the Raglanian military hierarchy, and, hence, his acts are attributed to Raglan on that basis also.

B. ALTERNATIVELY, RAGLAN IS RESPONSIBLE BY VIRTUE OF ITS LACK OF DUE DILIGENCE WHICH LED TO THE *MAIRI MARU* DISASTER

1. Raglan displayed scandalous negligence in hiring and employing, as well as in failing to apprehend Thomas Good

Even in the unlikely event that Good were not deemed its agent, still Raglan may not be vindicated. Although States are not *prima facie* duty-bound to prevent any crime from occurring within their territory, they are at least responsible for "negligently falling short of their reasonably expected diligence in the protection of the life and property of aliens",[16] including their failure to prosecute the offenders of such acts.[17] In the present case, however, Raglan

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[13] *US Diplomatic and Consular Staff in Tehran* Case, ICJ Rep.1980, pp.34-35.

[14] I.Shearer, *op. cit.*, p.275.

[15] Art.4 § 1 DASR; *cf.* ILC Commentary, p.84.

[16] *Corfu Channel* Case (*UK v. Albania*), ICJ Rep. 1949 (Merits), pp.22-23; *Neer* Claim, RIAA 1926, p.60; P.Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 7th ed. (1997), p.259; R.Boed, *Attribution Issues In State Responsibility*, 84 ASIL Procs. 1990, p.52; *Sevey* Case, RIAA 1929, p.474; *Boyd* Case, RIAA 1928, p.380; *Mead* Case, RIAA 1930, p.653; *Kennedy* Case, RIAA 1927, p.194; *Smith* Case, RIAA 1929, p.468; *Ermerins* Case, RIAA 1929, p.476; *Cibich* Case, RIAA 1926, p.58; *Mallén* Case, RIAA 1925, p.173; *Chapman* Case, RIAA 1930, p.632.

[17] R.-J.Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 Mich.JIL 1989, pp.105, 110; R.Lillich, *The Current Status of the Law of State Responsibility for*

proved its ineptitude by not only hiring and training a pirate to fulfill its anti-piracy aspirations, but also by failing to track down and salvage the *Mairi Maru* before it ultimately ran aground on the Norton Shallows, allowing her to wander adrift for two whole days (*Cmps.* §§ 17-20). Moreover, even to this day there is no indication whatsoever that the perpetrators have been brought to justice or that any steps have been taken to that end, while the total number of convicted pirates by Raglanian courts throughout these years is but two (*Clar.* 7). Under these circumstances, Raglan should at least be held responsible for lack of due diligence.

2. Raglan's lack of due diligence is compounded by the fact that it unilaterally undertook the obligation of protecting foreign ships from piratical acts within its archipelagic waters

The threshold of due diligence required in a given case depends on the overall circumstances, foremost among which are the unilateral declarations of the State in question. As this Court eloquently stated in the *Nuclear Tests* Case: "Unilateral declarations may be, and often are, very specific. A [legal] undertaking of this kind, if made publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding".[18] Such conclusion has indeed been iterated on several other occasions,[19] while it has also been acknowledged by other court decisions, eminent publicists,[20] as well as by the ILC Special Rapporteur on Unilateral Acts of States.[21] In fact, it is widely supported that unilateral undertakings of a State

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Injuries to Aliens, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1983), p.1; C.Amerasinghe, STUDIES IN INTERNATIONAL LAW (1969), pp.205-245.

[18] *Nuclear Tests* Cases *(Australia v. France and New Zealand v. France)* ICJ Rep. 1974, p.43.

[19] *Frontier Dispute* Case *(Burkina Faso v. Mali)* ICJ Rep.1986; *Military and Paramilitary Activities in and Against Nicaragua* Case (*Nicaragua v. USA*), ICJ Rep.1986, pp.130-131 (hereinafter *Nicaragua* Case); *Eastern Greenland* Case (*Denmark v. Norway*), PCIJ Ser.1933, No.53; *Beagle Channel Arbitration* (1977), 52 ILR, p.93.

[20] R.Jennings & A.Watts (eds.), OPPENHEIM'S INTERNATIONAL LAW, 9th ed. (1996), p.1188; G.Schwarzenberger & E.Brown, A MANUAL OF INTERNATIONAL LAW, 6th ed. (1976), p.141.

are of particular weight when associated with a general customary or conventional duty which it purports to itemize. Such is the case of the declaration made by the Prime Minister of Raglan (*Cmps.* § 11), by which he vowed to protect foreign vessels passing through the Raglanian archipelago. While the duty to combat piracy is of a general nature, Raglan's Prime Minister made sure to publicize in detail what steps would be taken to ensure the safe passage of vessels, including, among other things, their electronic surveillance. Since none of these measures were fulfilled in the *Mairi Maru* incident, it is perceptible that Raglan has failed to abide even by its self-imposed standards of diligence, and therefore is in any event responsible for the ensuing disaster.

II. SCUTTLING THE *MAIRI MARU* WAS AN INTERNATIONALLY WRONGFUL ACT WHICH MAY NOT BE JUSTIFIED BY ANY MEANS

A. DESTROYING FOREIGN VESSELS IS STRICTLY PROHIBITED IN INTERNATIONAL LAW, PARTICULARLY WHEN COMMITTED EXTRATERRITORIALLY

No State may enforce its jurisdiction extraterritorially,[22] and, in any event, it may not do so in breach of the proprietary rights of third States or their nationals.[23] By scuttling the *Mairi Maru*, Raglan flouted both these customary prohibitions. Indeed, it is irrefutable that the flag State retains the exclusive jurisdiction over its vessels on the high seas and elsewhere.[24] In fact, even the detention of a vessel and its crew is exclusively reserved to her flag State,[25] while any

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[21] ILC Report for the Commission's fifty-fifth session (2004), p.222; *cf.* ILC Report for the Commission's fifty-fourth session (2003), pp.134-155.

[22] *Lotus* Case (*France v. Turkey*), PCIJ Ser.A, No.10, 1927, p.25; D.Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BYIL 1982, p.1.

[23] M.Rajan, UNITED NATIONS AND DOMESTIC JURISDICTION, 2nd ed. (1961), p.407.

[24] Art.6 of the 1958 High Seas Convention; Art. 92 of the 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS); *Nottebohm* Case (*Liechtenstein v. Guatemala*), ICJ Rep.1955, p.4; *Anglo-Norwegian Fisheries* Case (*UK v. Norway*), ICJ Rep.1951, p.116.

attempt of a third State to prescribe or enforce its jurisdiction over foreign vessels is condemnable as encroaching upon the duty of non-intervention.[26]

In the present case, the *Mairi Maru* never ceased to be an Appollonian-flagged vessel (*Cmps.* § 14), even after its submission to Raglan's "anti-piracy program" (*Clar.* 9). Furthermore, it is stipulated that the cargo of the vessel was the sole property of the Appollonian Government, as the ownership was only to be transferred once the vessel reached its destination in Maguffin (*Cmps.* § 5). Thus, the *Mairi Maru* was a government-operated vessel, "completely immune from the jurisdiction of any other State" than Appollonia.[27] Under customary international law, third States, like Raglan, are duty-bound to release detained vessels and their cargo forthwith, even when their arrest has taken place within their territorial waters or EEZ.[28] *A fortiori*, Raglan should have returned the *Mairi Maru* and her cargo to their rightful owners, and hence its decision to destroy her instead generates State responsibility.

B. IN THE ABSENCE OF A CLEAR AND PRESENT DANGER, RAGLAN MAY NOT INVOKE A STATE OF NECESSITY, PARTICULARLY SINCE ANY PERCEIVED "NECESSITY" IN THE PRESENT CASE WAS BUT THE PRODUCT OF ITS OWN MISDEEDS

1. No actual state of necessity existed, and the scuttling of the Mairi Maru was but a unilateral choice freely made by the Government of Raglan

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[25] Art.11 of the 1958 High Seas Convention; Art.97 of UNCLOS.

[26] Draft Declaration on the Rights and Duties of States, ILCYb 1949, p.287; Declaration On The Inadmissibility Of Intervention In The Domestic Affairs Of States, GA Res. 2131 (XX) 1965; A.Bardin, *Coastal State's Jurisdiction Over Foreign Vessels*, 14 PaceILR 2002, p.28.

[27] Art.9 of the 1958 High Seas Convention; art.96 of UNCLOS.

[28] *The Camouco* Case *(Panama v. France)*, ITLOS Rep.2000, para.3; EC Note Verbale to Canada on the *Estai* Case, 10.3.1995; Arts. 73, para.4 & 292, para.1 of UNCLOS; European Parliament Report A4-0151/97, Apr. 21, 1997, on the Ratification of the Agreement for the Implementation of the Provisions of UNCLOS.

Both the DASR[29] and international law in general only recognize state of necessity –in its various forms- as a circumstance precluding wrongfulness in exceptional cases,[30] and thus as one being subject to narrow interpretation.[31] Specifically, this Court has emphatically enunciated that the "grave and imminent peril", i.e. the fundamental prerequisite to a state of necessity, must not only have an impact on a concrete and essential interest of the State invoking it,[32] but also that such impact must be ascertained by the submission of the case (which in our case would coincide with the joint notification of the *Compromis* to the Court on June 1, 2004), and "be more than a mere possibility".[33] The facts of this case, nevertheless, do not even indicate any remote peril –let alone an imminent one- to Raglan's essential interests. Even under the supposition that Raglan is entitled to a 200 nm EEZ (which Appollonia cannot be expected to subscribe to, since it is not a party to UNCLOS), it still remains visible that, two whole years after the accident, Raglan's EEZ has yet to be affected by the pollution (*Clar.* 12). From a clearly scientific point of view, this is hardly surprising, as it is elementary knowledge that

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[29] Art.25 DASR; *cf.* ILC Commentary, p.194.

[30] R.Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YHRDLJ 2000, p.23; O.Akiba, *International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai)*, 37 Nat.Res.J'l (1997), pp.809,812; M.Keiver, *The Pacific Salmon War: The Defence of Necessity Revisited*, 21 Dalh.LJ 1998, pp.408,413; D.Greig, INTERNATIONAL LAW (1970), p.677; A.Van Zwanenberg, *Interference with Ships on the High Seas*, 10 ICLQ 1961, p.795.

[31] *Rainbow Warrior* Case (*New Zealand v. France*), RIAA 1990, p.217; ILC Commentary, p.195.

[32] *Gabcíkovo-Nagymaros Project* Case (*Hungary v. Slovakia*), ICJ Rep.1997, p.53 (hereinafter *Gabcíkovo-Nagymaros* Case) Addendum to 8th Report on State Responsibility by R.Ago, [1980] 2 ILCYb 51, p.53, UN Doc.A/CN.4/318/ADD.5-7.

[33] *Gabcíkovo-Nagymaros* Case, p.54; A.Laursen, *The Use of Force and (the State of) Necessity*, 37 Vand.JTL 2004, p.500.

MOX is barely soluble in water,[34] and thus constitutes much less of a hazard to the ocean as opposed to oil and other polluting factors.[35] In sum, Raglan's hastiness in resorting to ruinous means to address its imaginary consternation may not be justified, and its responsibility remains untainted.

2. In the alternative, even if such state of necessity is *prima facie* acknowledged, Raglan is barred from invoking it, having at least contributed to its naissance

Necessity may not be relied upon if the State invoking it has been part of its cause.[36] In the words of this Court, the State which claims to have acted under a state of necessity "must not itself have provoked it" or "have contributed by act or omission to bring it about".[37] The Court is also familiar with the clean hands doctrine as a general principle of international law,[38] and in fact it has treated it as a procedural obstacle, which may render a given claim inadmissible.[39] Part I of this Memorial has already made it unambiguous that Raglan, by all accounts, has not

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[34] World Nuclear Transport Institute, *Nuclear Fuel Cycle Transport - The IAEA Regulations and their relevance to severe accidents (Information paper no. 4)*, p.1, at http://www.wnti.co.uk/attachment/publications/informationpapers.

[35] Statement by Prof. H.Lewis, Professor Emeritus of Physics, University of California, Former Chairman of the US Nuclear Regulatory Commission's Risk Assessment Review Group, August 1997, at http://www.japannuclear.com.

[36] *Eastern Greenland* Case, *op.cit.*, p.95; *Diversion of Water from the Meuse* Case (*Netherlands v. Belgium*), (Judges Anzilotti's and Hudson's dissenting opinions), PCIJ, Ser.A/B, No.70, 1937, pp.50,77; *Rights of Britons in Spanish Morocco* Case, RIAA 1925, p.13; *I'm Alone* Case *(Canada v. USA)*, RIAA 1935, pp.1609,1618.

[37] *Gabcíkovo-Nagymaros* Case, p.57.

[38] *Appeal Relating to the Jurisdiction of the ICAO Council* Case (*India v. Pakistan)*, ICJ Rep.1972, p.46; *cf. Namibia*, Advisory Opinion, ICJ Rep.1971, paras.93-95.

[39] S.Rosenne, BREACH OF A TREATY (1985), pp.1 *et seq.*; B.Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), p.155; G.Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RCADI, p.119.

merely contributed to but solely generated any perceived state of necessity, by virtue of both the acts of its agent, Good, and its own lack of due diligence. It therefore lacks clean hands and may presently not invoke any state of necessity.

C. IN ANY EVENT, SCUTTLING THE *MAIRI MARU* CONSTITUTED AN *ABUS DE DROIT*

Even if Raglan were granted some entitlement to take measures preventing further harm to the environment, its conduct in this case must be deemed totally disproportionate to the goal it purported to serve.[40] Indeed, it is stipulated that, prior to scuttling the *Mairi Maru*, the Raglanian Royal Navy secured and encased the MOX canisters to prevent any further leakage (*Clar.* 2). Given the additional fact that not every MOX canister had been damaged during the accident (*Cmps.* § 19), it is hardly discernible why Raglan saw it fit to sink the vessel and all its cargo into the ocean. Furthermore, it must not be overlooked that Raglan resorted to the scuttling of the vessel without further ado, not even allowing Appollonia adequate time to retrieve the cargo or suggest other possible means of addressing the problem (*Cmps.* § 24). Since the scuttling would have only been justified as a last resort,[41] it is obvious that Raglan committed an abuse of any perceived right to protect the marine environment.

D. IN CONCLUSION, RAGLAN OWES FULL COMPENSATION IN THE AMOUNT OF THE DAMAGES INCURRED BOTH BY APPOLLONIA ITSELF AND BY ITS NATIONALS

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[40] Art.22 of the 1958 High Seas Convention; *Certain German Interests in Polish Upper Silesia* Case (*Germany v. Poland*), 1926 PCIJ Ser.A, No.7, p.30; *Free Zones* Case (*France v. Switzerland*), PCIJ Ser.A/B, No.46, 1932, p.167; *Trail Smelter* Case, RIAA 1941, p.1905; H.Lauterpacht, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933), p.286; J.Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac.LJ 1995, pp.39,47; G.Taylor, *The Content of the Rule Against Abuse of Right in International Law*, 46 BYIL 1972, p.322; G.Triggs, *Japanese Scientific Whaling: An Abuse Of Right Or Optimum Utilisation*, 5 APJEL 2000, p.33.

[41] *Fisheries Jurisdiction* Case (*Spain v. Canada*), ICJ Rep.1998, para.82; ITLOS, *Saiga Decision No. 2*, 38 ILM 1999, 1323; G. Schwarzenberger, E.Brown, A MANUAL OF INTERNATIONAL LAW, 6th ed. (1976), p.78.

Having established the breach of international obligations on the part of Raglan, the compensation awarded must wipe out the consequences of its unlawful acts and omissions.[42] Such compensation will have to cover: (a) the losses suffered by the State of Appollonia as such, which consist in the destruction of the undamaged MOX canisters; (b) the injury incurred by the nationals of Appollonia who owned or worked onboard the *Mairi Maru*. It is incontrovertible that Appollonia may take up the claims of its individuals –with which it enjoys a genuine link by definition[43]- in the exercise of diplomatic protection, since it is stipulated in the *Compromis* that all available local remedies within Raglan have been exhausted (*Cmps.* §§ 30-31).[44] Therefore, full compensation is due.

III. RAGLAN MAY NOT CLAIM COMPENSATION FOR DAMAGE SUFFERED WHOLLY OUTSIDE ITS TERRITORY, PARTICULARLY IF SUCH CLAIM IS BASED ON TREATIES IT IS NOT A PARTY TO AND LOCAL REMEDIES HAVE NOT BEEN EXHAUSTED

A. THE NORTON SHALLOWS, WHICH ARE NOT ISLANDS AND HAVE NOT BEEN CLAIMED BY ANY NATION, ARE PART OF THE HIGH SEAS, AND THUS RAGLAN MAY NOT ITSELF DEMAND COMPENSATION FOR THEIR POLLUTION

1. Low-tide elevations are not *terra firma* and –when located on the high seas- are not subject to acquisition of any kind

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[42] *Factory at Chorzów (Claim for Indemnity)* Case *(Germany v. Poland)* (*Merits*), PCIJ Ser. A, No.17, 1928, p.29; *Certain Phosphates in Morocco* (*Italy v. France*) (Preliminary Objections), PCIJ Ser.A/B, No.74, 1938, p.28; *Borchgrave* Case (*Belgium v. Spain*), PCIJ Ser.A/B, No.72, 1937, p.165; B.Graefrath, *Responsibility and Damage Caused: Relations between Responsibility and Damages*, RCADI 1984 (II), p.95; I.Brownlie, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) (1983), pp.53-88.

[43] *Nottebohm* Case (*Liechtenstein v. Guatemala*), ICJ. Rep. 1955, pp.4,13; *Mavrommatis Palestine Concessions* Case (*Greece v. UK*), PCIJ Ser.A, No.5, 1929; *Barcelona Traction* Case, ICJ Rep. 1970, p.42; *Panevezys-Saldutiskis Railway* Case (*Estonia v. Lithuania*), PCIJ Ser. A/B, No. 76, 139; *Petrolane, Inc. v. Islamic Republic of Iran* (1991), 27 Iran-US Cl.Tr., 64.

[44] *Interhandel* Case (*Switzerland v. United States*) (Preliminary Objections), ICJ Rep. 1959, p.27; art. 22 DASR; US Restatement, s.713; *Ambatielos Claim*, 12 RIAA 1958, p.83; *Finnish Shipowners Arbitration*, 3 RIAA 1934, p.1503.

No State may assert a claim for environmental damage inflicted on the high seas, absent some tangible legal interest of its own.[45] Such well-respected norm knows no exception, and categorically not in the case of low-tide elevations, which are considered *res communis*[46] when located on the high seas.[47] In fact, the traditional position of this Court is that low-tide elevations are not subject to appropriation.[48] In its recent *Qatar v. Bahrain* judgment,[49] the Court rejected yet again the assertion that low-tide elevations are quasi-islands and pronounced instead that their status is to be assimilated to that of their surrounding waters, leaving no room for doubt that State practice does not support any other conclusion.[50] That the Norton Shallows are low-tide elevations at best is a fair inference from the *Compromis* (§ 19; *cf. Clar.* 4), as well as by the very use of the term "sandbar", which by definition describes some formation that remains

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[45] F. Orrengo Vicuña, *Current Trends in Responsibility and Liability for Environmental Harm*, Thes.Acroas., Vol.XXXI, p. 174; *cf. Northern Cameroons* Case (*Cameroon v. UK*), ICJ Rep. 1963, para.46 (Judge W.Koo).

[46] M.Shaw, *op.cit*,, p.342; O.Schachter, *General Course in Public International Law*, 178 RCADI 1982 (V), pp.287 *et seq.*

[47] 1958 Convention on the High Seas, arts.1,2; 1958 Convention on the Territorial Sea and Contiguous Zone, art.11; UNCLOS, arts.13,89.

[48] *Minquiers and Ecrehos* Case (*France v. United Kingdom*), ICJ Rep.1953, p.53; *Land, Island and Maritime Frontier Dispute* Case *(El Salvador v. Honduras)*, ICJ Rep.1992, para.356; Sir G.Fitzmaurice, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, vol.I (1993), p.287; Y.Tanaka, *Reflections on Maritime Delimitation in the Qatar/Bahrain Case*, 52 ICLQ 2003, p.73.

[49] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* Case *(Qatar v. Bahrain)*, ICJ Rep.2001, paras.204-205; H.Llanos, *Low-Tide Elevations: Reassessing their Impact on Maritime Delimitation*, 14 PaceILR 2002, p.270; Y.Tanaka, *Reflections on Maritime Delimitation in the Qatar/Bahrain Case*, 52 ICLQ 2003, pp.71-72; B.Oxman, G.Plant, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 96 AJIL 2002, pp.198 *et seq.*

[50] R.Jennings & A.Watts (eds.), *op.cit.*, p.688; C.Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations between China and Taiwan*, 32 N.Eng.LR 1998, pp.819 *et seq.*; D.Bederman, *US State Boundaries-Submerged Lands Act*, 92 AJIL 1998, p.82.

submerged at high tide.[51] It is then clear that this matter can only be viewed as a case of pollution on the high seas, thus depriving Raglan of standing to raise any pertinent claim.

2. If the Norton Shallows are deemed land, they are *terra nullius*, and thus Raglan may still not assert a claim for their pollution

Even if the Norton Shallows were considered islands, they were never acquired by Raglan. It is stipulated in the *Compromis* (§ 2) that they "are unclaimed by *any* nation", (emphasis added), and hence they are no more than *terra nullius*. In the words of this Court, the only method of establishing sovereign rights over *terra nullius* would be occupation.[52] Furthermore, such occupation would have to be made by a State itself –not private individuals-,[53] and it would have to last for a sufficient period of time.[54] Last but not least, it would have to be accompanied by the respective *animus*, i.e. be intended as an act of sovereignty,[55] which is usually associated with symbolic acts, such as the raising of a flag.[56]

As regards the Norton Shallows, the only activities in the area, namely fishing and eco-tourism, were carried out by individuals (*Cmps.* § 2, *Clar.* 6) and are in fact acts purely private in nature. Raglan has indicated no intention to claim the sandbars as its own, and there is no indication that it has tried to regulate the above-mentioned activities or proceeded to any

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[51] *Vide* ENCYCLOPAEDIA BRITANNICA 2004, under "sandbar".

[52] *Western Sahara* Advisory Opinion, ICJ Rep.1975, pp.12,39.

[53] *Anglo-Norwegian Fisheries* Case (*United Kingdom v. Norway*), ICJ Rep. 1951, Judge McNair's diss.op., pp.116,184; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia v. Malaysia*), ICJ Rep. 2002, p.140.

[54] *Island of Palmas* Case, RIAA 1928, pp.829,840.

[55] *Eastern Greenland* Case, *op.cit.*, p.46; M.Shaw, *op. cit.*, p.349.

[56] *Clipperton Islands* Arbitration, 26 AJIL 1932, p.390.

symbolic acts whatsoever to demonstrate its sovereignty. The fact that Raglan has been taxing the activities of its nationals on the Norton Shallows (*Cmps.* § 2) is of absolutely no importance, since taxation is merely a means to establish personal and not territorial jurisdiction,[57] and it could have taken place even for activities in a foreign country. Finally, the time elapsed from the commencement of these activities in the mid-'90s (*Clar.* 6) until the crystallization of the present dispute in 2002 is so minimal that even musing on acquisition of territorial rights is comical, to say the least. It follows that Raglan may not derive standing based on any perceived sovereign rights over the Norton Shallows.

B. RAGLAN MAY NOT REPRESENT THE INTERNATIONAL COMMUNITY EITHER, AND IT MAY CERTAINLY NOT CLAIM COMPENSATION BASED ON A HYPOTHETICAL *"ERGA OMNES"* BREACH

1. International law and this Court consistently reject every notion of an *actio popularis*, which could shore up Raglan's claim

Absent some special legal interest that would anchor it to the present case, Raglan might endeavor to derive standing on behalf of the international community as a whole, based on the premise that an *erga omnes* breach has occurred. Be that as it may, this very Court has never upheld any claim based on such notion, while it has explicitly pronounced that "any form of *actio popularis* is unknown in international law".[58] Indeed, it is commonplace that there exists no *locus standi* for a State bringing an action concerning damages to the global commons.[59] Even in the extremely rare occasions that the Court made some reference to the theory of *erga*

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[57] US Restatement, s.414; *Container Corp. of America v. Franchise Tax Board*, 463 US 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983).

[58] *South West Africa* Case (*Ethiopia/Liberia v. South Africa*), ICJ Rep.1966, at 47; *cf.* Report of the Commission to the GA on the Work of its 32nd Session, ILCYb 1980-II, p.32, UN Doc.A/CN.4/SER.A/1980/Add.1; M.Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the "Injurious State" and its Legal Status*, 35 NILR 1988, p.284.

[59] P.Birnie, A.Boyle, INTERNATIONAL LAW AND THE ENVIRONMENT (1994), pp.154-157; R.Ramlogan, *The Environment and International Law: Rethinking the Ttraditional Approach*, 3 Res Communes: Vt'sJ.Env't 2001-2002, p.100.

omnes breaches, it only did so abstractly, while at the same time it judiciously steered clear of applying it.[60]

2. Even if some types of *erga omnes* breaches suffice to confer *locus standi* to the claimant State, marine pollution is definitely not among them, particularly when not committed willfully

Even if the theory of *erga omnes* breaches were to be applied for the first time in the present dispute, Raglan's assertions would call for yet another extension. Indeed, this Court clearly identified the breaches which are considered as *erga omnes* ones in *Barcelona Traction*,[61] strictly confining its enumeration to genocide, aggression, slavery, and racial discrimination.[62] Any modification of these peremptory norms would require acceptance by the international community as a whole,[63] which is precisely why the Court has remained faithful to such enumeration even in more recent cases, such as *East Timor*,[64] thus leaving no room for undue expansions based on the whims of any given State. Even the ILC Draft Articles on "serious breaches of obligations under peremptory norms of general international law" have been introduced, in the words of the Special Rapporteur, merely as a "framework for the *progressive development*, within a narrow compass, of a concept which *ought to be* broadly acceptable"

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[60] R.Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, 11 Virg.JIL 1971, p.327; R.Seidl-Hohenveldern, *Der Barcelona-Traction-Fall*, 22 ÖZöR 1971, p.255.

[61] *Barcelona Traction* Case (*Belgium v. Spain*) (Second Phase), ICJ Rep.1970, paras.32,33.

[62] P.Weil, *Cour général de droit international public*, RCADI 1992 (VI), p.291; *Baena Ricardo* Case (*Merits*), I/ACt.HR, Ser.C, No.72, para.126.

[63] L.Hannikainen, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW (1988), p.270; R.Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994), p.57.

[64] *East Timor* Case, *op.cit.* p.102; *cf. Namibia* Advisory Opinion ICJ Rep.1971, p.58; *Genocide* Case (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Provisional Measures), ICJ Rep.1993, p.30.

(emphasis added).[65] Marine pollution has yet to be elevated to the status of a breach *erga omnes*,[66] and hence may not support *locus standi*, even when it is committed willfully. *A fortiori*, it should be dismissed as meager in the case at hand, since the pollution could not even be labeled willful on the part of Thomas Good, let alone Appollonia.

3. In any event, an *erga omnes* breach is unfit to sustain a claim for compensation, such as the one put forward by Raglan

Even under the dual concession that an *erga omnes* breach does confer *locus standi* to the State invoking it and that marine pollution has been elevated to that status, still the claim for compensation raised by Raglan is inadmissible. Indeed, the above-cited judgments of this Court, while having alluded to the notion of *erga omnes* breaches, never even dwelled on associating it with reparation claims.[67] Undeniably, granting any State which saw it fit the right to seek compensation for *erga omnes* breaches would ultimately lead to nothing less than uncertainty, contradictory or competing claims, and large-scale abuses.[68] Were the Court to open this box of Pandora, there is no telling where potential claims for compensation would peter out, since every State would plead for its own share. This is why even the few publicists who have advocated for the theory of *erga omnes* breaches single-mindedly disassociate it from the

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[65] UN Doc.A/CN.4/517, para.52; I.Scobbie, *The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'*, 13 EJIL 2002, p.1202.

[66] M.Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 Colo.J.Int'lEnv.L&Pol'y 2002, p.380; U.Beyerlin, *State Community Interests and Institution-Building in International Environmental Law*, 56 ZaöRV 1996, p.608.

[67] *Barcelona Traction* Case, *op.cit.*; *East Timor* Case, *op.cit.*

[68] P.Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 1983, pp.431-433; Remarks of X.Hanqin, in *The State of State Responsibility*, 96 ASIL Procs. 2002, p.173.

remedy of compensation,[69] and this is also why this Court should deny Raglan the right to represent the international community as a whole, at least as regards this particular remedial type.

C. HAVING FAILED TO EXHAUST LOCAL REMEDIES WITHIN APPOLLONIA, RAGLAN MAY NOT EVEN EXERCISE DIPLOMATIC PROTECTION OVER ITS CITIZENS

Raglan could theoretically base its standing on the exercise of *parens patriae*[70] over its nationals, at least for the injuries they suffered other than the cost of decontaminating the area (which was incurred by Raglan itself). However, it is well-established that the fundamental prerequisite to exercising diplomatic protection before an international *forum*, including this Court,[71] is the prior exhaustion of all local remedies available.[72] In the present case, unlike the citizens of Appollonia (*Cmps.* §§ 30-31), there is no indication whatsoever that Raglan or its citizens have even resorted to any domestic remedies, let alone exhausted them. The burden of proof lies with Raglan and cannot be discharged,[73] since Appollonia's courts could have easily and effectively dealt with the compensation sought as a regular tort claim. All the more so, the exhaustion of local remedies would have been an absolute prerequisite in the present case, as the

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[69] E.-Jiménez de Aréchaga/A.Tanzi, *International State Responsibility*, in M.Bedjaoui (ed.), INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (1991), p.349.

[70] *Mavromatis Palestine Concessions* Case *(Greece v. UK)*, PCIJ 1924, p.50; E.Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS (1915), pp.817-818; M.Whiteman, DAMAGES IN INTERNATIONAL LAW (1943), vol.III, p.1558.

[71] *Interhandel* Case, *op.cit.*, p.27; *Elettronica Sicula S.p.A. (ELSI)* Case, ICJ Rep. 1989, at 15,52.

[72] Art. 44(b) DASR; US Restatement, s.713; *Ambatielos Claim*, 12 RIAA 1958, p.83; *Finnish Shipowners Arbitration,* 3 RIAA 1934, p.1503.

[73] *Certain Norwegian Loans* Case (*France v. Norway*), ICJ Rep.1957, pp.952-954; Report of the Commission to the GA, 8th Sess., ILCYb 1956, p.173, UN Doc.A/CN.4/SER.A/1956/Add.1; R.Joseph, NATIONALITY AND DIPLOMATIC PROTECTION: THE COMMONWEALTH OF NATIONS (1969), p. 6.

international trend in environmental law points to the direction that the State only bears subsidiary liability, insofar as the ship owner is unable to cover the full cost of the damage.[74] Since international law recognizes flexibility in the type of remedies that should have previously been sought,[75] it follows that Raglan may not take up the claim of its nationals either.

D. FURTHERMORE, RAGLAN IS WITHOUT STANDING TO RAISE ANY CLAIM BASED ON TREATIES IT HAS NOT EVEN SIGNED

According to the time-honored precept *pacta tertiis nec nocent nec prosunt*,[76] which is enshrined in article 34 of the VCLT and has been prayed to by this Court on several occasions,[77] States may not seek to gain benefit from treaties they have not signed, inasmuch as they are not bound by the respective obligations.[78] Such customary rule of international law seems to be overlooked by the Prime Minister of Raglan, who defiantly and repeatedly accused Appollonia (*Cmps.*, §§ 22, 28) of disobeying its own obligations under treaties Raglan is not a party to (*vide Cmps.*, § 35). It must be underscored that conventions such as the CPPNM persistently employ the term "State-party" as the bearer of rights and duties referred to therein, while organizations

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[74] J.Brunée, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 ICLQ 2004,pp.354-355; G.Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AJIL 1980, pp.561-562.

[75] E.-Jiménez de Aréchaga, *General Course in Public International Law*, 159 RCADI 1978 (I), p.285; M.Adler, *The Exhaustion of the Local Remedies Rule after the International Court of Justice Decision in ELSI*, 39 ICLQ 1990, pp.642-643; H.Thirlway, *The Law and Procedure of the International Court of Justice (1960-1990)*, 66 BYIL 1995, pp.80-85.

[76] P.Reuter, INTRODUCTION TO THE LAW OF TREATIES (1995), pp.101-128; ILCYb 1964-I, pp.115-121; ILCYb 1966-I, pp.100-104; ILCYb 1966-II, pp.227-230.

[77] *Vide, inter alia, North Sea Continental Shelf* Cases (*Germany v. Denmark, Germany v. Netherlands*), ICJ Rep.1969, p.44.

[78] A.de Hoogh, OBLIGATION ERGA OMNES AND INTERNATIONAL CRIMES (1996), p.27; G.Hafner, *Bemerkungen zur Funktion und Bestimmung der Betroffenheit im Völkerrecht anhand des Binnenstaates*, 31 GYIL 1989,p.195.

such as the IAEA provide for specific ways of inter-State dispute resolutions. Recognizing Raglan the same rights as member-States to the IAEA would in effect nullify the purpose of introducing streamlined procedures to safeguard the development and transportation of nuclear materials, and hence Raglan's claim should be rejected on that basis as well.

IV. APPOLLONIA HAS ABIDED BY EVERY CONCEIVABLE OBLIGATION OPPOSABLE TO IT, AND HENCE OWES NO COMPENSATION TO RAGLAN FOR ANY ALLEGED BREACHES, INCLUDING ITS CONJECTURAL FAILURE TO MAKE KNOWN THE MOX SHIPMENTS

A. APPOLLONIAN VESSELS ARE ENTITLED TO EXERCISE INNOCENT PASSAGE THROUGH THE RAGLANIAN ARCHIPELAGO BASED ON THE FREEDOM OF NAVIGATION PRINCIPLE AND WITHOUT A NEED TO OBTAIN CONSENT

Freedom of navigation is the cornerstone of the law of the sea and the most time-honored among its customary principles.[79] One of its corollaries, perhaps the most crucial one, is the right of innocent passage through other States' territorial waters. State practice on innocent passage specifically covers transportation of nuclear materials much more hazardous than MOX, while the accompanying *opinio iuris* is evident not just from the tolerance habitually displayed by coastal States towards shipments of that kind for peaceful purposes,[80] but also from the respective positive measures adopted by them so as to allow for unfettered commerce-at-sea.[81] A case in point is the INF Code, which specifically alludes to ships carrying nuclear cargo as

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[79] H.Grotius, THE FREEDOM OF THE SEAS (transl. by R.Magoffin, 1916), p.7; A.Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised*, 19 Ford.LR 1950, p.243.

[80] Bureau of Oceans and International Environmental and Scientific Affairs, US Dep't of State, Pub. No.112, Limits in the Seas: United States Responses to Excessive National Maritime Claims (1992), pp.1-2; G.Galdorisi, *The United Nations Convention on the Law of the Sea: A National Security Perspective*, 89 AJIL 1995, p.208; R.Osgood, *U.S. Security Interests in Ocean Law*, 2 ODIL 1974,p.1; M. Leigh, *Freedom of Navigation and Overflight*, 78 AJIL 1984, p.884.

[81] Bureau of Public Affairs, US Dep't of State, Current Pol'y No.471, Oceans Policy and the Exclusive Economic Zone (10.3.1983); L.Alexander, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT (1986), *passim*; W.Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 46 NWCR 1993, p.59; E.Richardson, *Law of the Sea: Navigation and Other Traditional National Security Considerations*, 19 SanDiegoLR 1982, p.553.

being entitled to innocent passage like any other vessel.[82] In addition, most pertinent conventions contain disclaimer provisions so as to not affect navigational rights and freedoms.[83] For instance, declarations to that effect were made upon signature and ratification of the Basel Convention by Germany, Japan, Singapore, UK, USA, the Netherlands and Italy,[84] as well as by the European Community and France following the adoption of the 1996 Izmir Protocol.[85] Even UNCLOS, which Raglan presumably seeks to observe, expressly provides for a general duty to allow for innocent passage, specifically swathing archipelagic States, such as Raglan;[86] on the other hand, no obligation for the State of export to acquire the prior consent of the transit State is to be traced therein, lest freedom of navigation be affected. In fact, the only germane circumstance among those disqualifying the passage of a vessel would be "the *serious and willful* pollution *within* the territorial waters of the transit State" (emphasis added).[87] Such exemption is not relevant here since no actual pollution has ever taken place within the Raglanian archipelago itself, while even the pollution which did occur in the Norton Shallows was anything but willful. Since every Appollonian vessel –including the *Mairi Maru* itself, until it was looted by Raglan's agent- had ensured safe transport through the Raglanian archipelago, it

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[82] INF Code, art.23; S.Poulin, *Is Freedom of Navigation Reaching Critical Mass for Nuclear Cargos?*, 42 Fed.Law. 1995, p.17.

[83] Bamako Convention, art.4§4(c); 1992 Panama Agreement, art.2(4); Waigani Convention, art.2(4); Basel Convention, art.4(12).

[84] http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty18.asp.

[85] T.Scovazzi, *The Transboundary Movement of Hazardous Waste in the Mediterranean Regional Context*, 19 UCLA J.Env.L.Pol'y 2000/2001,p.242.

[86] UNCLOS, arts.17-26,52.

[87] UNCLOS, art. 19 § 2 (h); J.Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MLR 1992, pp.149-150.

follows that it is Raglan, and not Appollonia, which –through its Prime Minister (*Cmps.* § 28)- has violated international law by hampering the innocent passage of foreign vessels.

B. APPOLLONIA CANNOT BE BOUND TO THE FULFILLMENT OF ANY SHAM OBLIGATIONS VIS-À-VIS RAGLAN, INASMUCH AS SUCH OBLIGATIONS ARE NOT OPPOSABLE TO IT EITHER IN THE FORM OF CONVENTIONAL OR CUSTOMARY LAW

1. Given the relative effect of international treaty law, no conventional obligations may be imposed upon Appollonia beyond the ones it has already assumed

It has already been conclusively demonstrated that Raglan lacks standing to raise any claim based on treaties it is not a party to (*supra*, under III/D). On the merits of this case, article 34 of the Vienna Convention on the Law of Treaties would further thwart any effort of Raglan to compel Appollonia to the observance of any treaty not signed by it (*Cmps.* § 35). No exception to the relative application of treaty law may apply,[88] as Appollonia has not consented to the creation of any duties beyond its contractual obligations, while all the treaties Raglan has ratified are unfit to establish an objective regime that would bind Appollonia. Specifically: the 1972 London Convention has been modified from top to bottom so many times, that even its initial parties have failed to adhere to its amendments. As regards the Basel Convention, article 1 § 3 specifically excludes radioactive wastes (such as MOX) from its field of application.[89] As for UNCLOS, the immense divergence which surfaced during its drafting process,[90] as well as the fact that major maritime powers have not become parties to it yet, all but indicate even

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[88] *North Sea Continental Shelf* Cases, *op.cit.*, p.44; ILCYb 1964-I, pp.115-121; *ibid.*, 1966-I, pp.100-104,195-198; *ibid.*, 1966-II, pp.227-230,251.

[89] B.Kwiatkowska & A.Soons, *Comment, Plutonium Shipments—A Supplement*, 25 ODIL 1994, p.426.

[90] S.Oda, THE INTERNATIONAL LAW OF THE OCEAN DEVELOPMENT, BAS. DOC.-I (1976), pp.73-114,347-366; *ibid.*, II, pp.29-53,217-235; Center for Ocean Law and Policy, University of Virginia, UN CONVENTION ON THE LAW OF THE SEA, 1982- A COMMENTARY (1995), pp.57-66,70-113; P.-M.Eisemann, LA CONVENTION DES NATIONS UNIES SUR LE DROIT DE LA MER (1983), pp.14-24.

rudimentary consensus,[91] let alone the uniformity required to establish an objective regime or customary international law.[92]

Furthermore, Appollonia has fully conformed to its contractual obligations, including – but not limited to- the ones stemming from its membership to the IAEA. Under both the NPT and the CPPNM, it has been duly and constantly notifying the only competent authority, namely the IAEA itself, of every MOX shipment (*Cmps.* §§ 5, 9), so as to achieve the highest standards of safe transportation possible. It must be emphasized that even the 1997 Joint IAEA Convention, which specifically alludes to radioactive waste and fuel, only requires that export States notify the recipient State (in this case: Maguffin), and not the transit State.[93] The rationale of such rider is plain: since transit States are not entitled to exclude vessels exercising innocent passage through their waters, notifying those States of the respective shipments would serve no purpose whatsoever.[94] It follows that no concrete obligation –opposable to Appollonia under article 38 § 1(a) of this Court's Statute- has been breached in the present case, and hence Raglan's assertions to the contrary should be dismissed on their merits also.

2. Furthermore, freedom of navigation may not be curtailed by any hypothetical new rule of customary international law, and categorically not by dubious concepts, such as the so-called "precautionary principle" and its concomitants

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[91] P.Dailler-A.Pellet, DROIT INTERNATIONAL PUBLIC (1999), pp.1164-1165.

[92] P.Cahier, *Les effets des traités a l'égard des États tiers*, 143 RCADI 1974 (III), pp.661-662; ILCYb, 1964-I, pp.102-115; *ibid.*, II, p.31; C.Rousseau, PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC (1944),p.136; Harvard Law School, *Research in International Law-The Law of Treaties*, AJIL, Supp., 1935, pp.923-924.

[93] Arts. 27 § 1(i), 27 § 1(ii) of the IAEA Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 5/9/1997.

[94] See Declaration of South Africa reprinted in M.Roscini, *La zone dénuclearisée du sud-est asiatique: problèmes de droit de la mer*, RGDIP 2001, p. 630.

No customary duties under article 38 § 1(b) of the Statute of this Court are opposable to Appollonia either, and especially none among the ones supposedly derived from the so-called "precautionary principle". Although the "precautionary notion" has received some recognition in recent times,[95] neither the time elapsed since its conception nor any State practice –let alone *opinio iuris*- are sufficient to support its elevation to the status of customary international law, particularly in view of its elusiveness.[96] Indeed, according to the prevailing view among eminent publicists,[97] the ultimate objective of establishing cooperation at a customary level has not been attained yet, the particulars of such cooperation being left to conventional international law, while newer efforts to that end have reached but the level of *ius constituendum*. It is noteworthy that reference to the very precautionary concept not only is absent from the final text of UNCLOS, but was simply not on the table throughout the Third Conference on the Law of the Sea.[98] On the contrary, the practice of maritime powers, coastal nations, and even developing archipelagic States, as diverse and important as, for instance, UK,[99] Germany,[100] Italy,[101] the

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[95] J.Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 ODIL 1996, p.379.

[96] J.Macdonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management*, 26 ODIL 1995, p.262; J.Hickey, V.Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 Virg.Env.L.J. 1995, p.424.

[97] P-M.Dupuy, *Où en est le droit international de l'environnement à la fin du siècle?*, 101 RGDIP 1997, pp.888-890; D.Bodansky, *Customary (and not so Customary) International Environmental Law*, 3 Ind.JGLS 1995, p.112; E.Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 I'lLaw. 1997, pp.761 *et seq.*

[98] M.Nordquist, *The Changing International Law of High Seas Fisheries*, 40 Virg.JIL 2000, pp.1160-1161.

[99] Declaration made upon accession to the UNCLOS (25.7.1997), 35 Law of the Sea Bulletin 1997, p.14.

Netherlands,[102] Venezuela,[103] Croatia,[104] Thailand,[105] Indonesia,[106] Jamaica[107] indicates that ships carrying nuclear materials may and actually do exercise the right of innocent passage without any prior consent or notification, provided only that they follow any designated sea lanes, carry the necessary documentation and observe those safety measures established for such ships by international agreements.[108] Within the IMO, every measure adopted to the benefit of coastal States stops short of permitting a general exclusion of a particular class of ships from enjoying innocent passage or even requiring prior consent thereto. In a similar vein, in the recent *MOX Plant* Judgment rendered by ITLOS, which presents palpable similarities to the case at hand, it was subtly observed that it would be premature to impose undue restrictions to freedom of navigation, and thus place industrial development into jeopardy,[109] by virtue of some vague

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[100] Declaration made upon accession to the UNCLOS (14.10.1994), 27 Law of the Sea Bulletin 1995, p.6.

[101] Declaration made upon signature (7.12.1984) and confirmed upon ratification (13.1.1995) of the UNCLOS, 27 Law of the Sea Bulletin 1995, p.5.

[102] Declaration made upon ratification of the UNCLOS (28.6.1996), 32 Law of the Sea Bulletin 1996, p.8.

[103] 1978 Venezuela/the Netherlands Boundary Delimitation Treaty, art. 4 paras. 5, 6(c), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/VEN-NLD1978BD.PDF

[104] Maritime Code of 27.1.1994, art.28, 42 Law of the Sea Bulletin 2000, p.33.

[105] Statement of the Ministry of Foreign Affairs, UN Doc.A/48/90 (22.2.1993).

[106] Indonesian Government Regulation No.37 (28.6.2002), 52 Law of the Sea Bulletin 2002, p.23.

[107] Maritime Areas Act of 1996, art.17(1), 34 Law of the Sea Bulletin 1996, p.37.

[108] M.Lehardy, *Le naufrage du "Prestige" et accord sur le controle de la navigation dans la zone economique exclusive*, RGDIP 2003, p.133.

precautionary concept.[110] To put respondent itself to the test, one might observe that the 1996 Protocol to the 1972 London Convention is among the few documents that make any mention to some "precautionary idea". However, Raglan –though a full party to the initial London Convention- has not as yet adopted this Protocol (*Cmps.* § 35). Therefore, prior to resorting to fictitious customary rights and duties, Raglan had better endeavour to establish some State practice and *opinio iuris* of its own.

C. IN THE ALTERNATIVE, EVEN IF SUCH A CUSTOMARY NORM DID EXIST, ITS APPLICATION IN THE PRESENT CASE WOULD BE PRECLUDED BY VIRTUE OF APPOLLONIA'S REASONABLE INTEREST TO ENSURE MAXIMUM SAFETY OF THE MOX SHIPMENTS

Even assuming, *arguendo*, that some customary rule requiring notification could be invoked against Appollonia, it would only be fair that such norm apply alongside with the exceptions which also limit its conventional form. Foremost among these exceptions is the situation in which notifying third States about certain shipments would place their very safety in jeopardy or contradict with other obligations duty-binding the exporting State. Such exception is explicitly provided for in article 6 § 2 of the CPPNM, as well as in article 7 § 3 of the Draft International Convention for the Suppression of Acts of Nuclear Terrorism,[111] while there is also ample State practice supporting it,[112] and would even be in line with prevailing pronouncements within the framework of the UN.[113] Thus, the MOX shipments, which were initiated in 1997 (*Cmps.* § 5,

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[109] P.Martin-Bidou, *Le principe de précaution en droit international de l'environnement*, 101 RGDIP 1997, p.646.

[110] *Cf. The MOX Plant* Case, ITLOS Rep. 2001, Separate Opinion of Judge Anderson, p.3.

[111] UN Doc.A/AC.252/L.13, 28.6.2004.

[112] M.Roscini, *La zone dénuclearisée du sud-est asiatique: problèmes de droit de la mer*, 105 RGDIP 2001, p.630; J.Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 77 ODIL 2002, p.85.

[113] E.g., SC Resolution 1540 of 28.4.2004.

Corr. 2), presented a situation in which Appollonia was not only entitled but actually required to withhold all relevant information from third States,[114] lest the vital cargo be exposed to the peril of piratical attacks for terrorist purposes. In the case of Raglan, withholding information came to be an absolute precondition for conducting the shipments, as that particular State had proved its ineptitude by allowing its archipelagic waters to turn into a playground for pirates (*Cmps.* §§ 6, 7). Under any reasonable balancing of interests, there could be no other conclusion but to justify Appollonia's vigilance over such a sensitive issue.

D. IN THE FURTHER ALTERNATIVE, RAGLAN IS BARRED FROM INVOKING ANY BREACH ON THE PART OF APPOLLONIA BECAUSE OF ITS ACQUIESCENCE DURING THE PERIOD IN QUESTION

The jurisprudence of this Court has eloquently demonstrated that silence or lack of protest within a reasonable period may be treated as acquiescence in a claim or a position taken by another State.[115] In the present case, it is stipulated in the *Compromis* that the IAEA had not only publicized Appollonia's MOX transportation program, but also distinctively identified Raglan as the primary State through which these shipments passed. Such announcement, as well as the official response on the part of Appollonia, were released as early as 1999 (*Cmps.* §§ 9, 10), and thus Raglan had ample time to follow the appropriate procedures and possibly take any measures it deemed apposite to the situation. However, for years Raglan was allowing the innocent passage of Appollonian vessels through its specially-designated sea lanes (*Clar.* 10), not even requesting information as to their cargo and destination, and it was only after Ms. Ybarra accused Raglan of the *Mairi Maru* incident that Mr. Price resorted to tardy and falsified

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[114] *Cf. The MOX Plant* Case, ITLOS Rep. 2001, Written Response of the United Kingdom, para.69.

[115] *Temple of Preah Vihear* Case (*Cambodia v. Thailand*), ICJ Rep.1962, at 23; *Fisheries* Case (*UK v. Norway*), ICJ Rep.1951, at 139; Sir I.Sinclair, *Estoppel and Acquiescence*, in V.Lowe & M.Fitzmaurice (eds.), FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE (1996), p.116.

allegations against Appollonia (*Cmps.* § 28). It only stands to reason that Appollonia relied on Raglan's continuing acquiescence to conduct the MOX shipments, and thus Raglan may not voice any disapproval at the present time.

E. IN ANY EVENT, ABSENT FAULT ON ITS PART, APPOLLONIA MAY NOT BE HELD LIABLE TO COMPENSATE RAGLAN FOR POLLUTION CAUSED BY ACTIONS WHICH IT DID NOT CONTROL

The requirement of fault has been predominant in the law of State responsibility ever since the judgment of this Court in the landmark *Corfu Channel* Case,[116] and the need to establish fault in order to entertain a claim for compensation has never been seriously questioned ever since. Even in the case of international environmental law, a regime that would recognize strict liability, aside from being unmerited on its face,[117] has yet to be arrived at.[118] Indeed, the charade of "strict liability" for nuclear damage is only introduced in few and scantily ratified conventions, namely the 1960 Paris OECD Convention on Third Party Liability in the Field of Nuclear Energy[119] and its 1963 Brussels Supplementary Convention, both amended by two Protocols of 1964 and 1982 (with only 15 States parties),[120] the 1963 IAEA Vienna Convention on Civil Liability for Nuclear Damage[121] (32 States parties) amended by a 1997 Protocol (with only five States parties),[122] the Brussels Convention on the Liability of Operators of Nuclear Ships[123]

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[116] *Corfu Channel* Case (*United Kingdom v. Albania*), ICJ Rep. 1949, paras.22-23.

[117] Comments of A.Kiss, *New Develpoments in International Environmental Law*, 85 ASIL Procs. 1991, p.423.

[118] T.Berwick, *Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes*, 10 Geo.Int'l Env.L.Rev. 1998, p.257.

[119] 29.6.1960, 956 UNTS 251.

[120] http://www.nea.fr/html/law/paris-convention-ratification.html .

[121] 21.5.1963, 1063 UNTS 265.

(which is not yet in force having been ratified by only seven States!),[124] and the recent IMO 1996 Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (also not yet in force having been ratified by seven States representing no more than 1.73% of the world tonnage!).[125] Additionally, last November (in the discussion on the ILC "draft principles on liability for transboundary harm" before the UN General Assembly) delegates of leading maritime nations, such as USA, Japan, China and India, expressed their reluctance[126] to accept strict liability even in principle, let alone adhere to its underlying duties. Finally, the small number of *ex gratia* payments following certain accidents are poor evidence of State practice, and, in any event, they lack by definition any *opinio iuris*.[127]

International jurisprudence also hints at the rejection of strict liability.[128] Even the famous passage in *Trail Smelter* that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction",[129] though erroneously interpreted as supporting strict liability, may well constitute an additional basis for the responsibility of Raglan to protect the *Mairi Maru* from the acts of Good within its archipelagic

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[122] http://www.iaea.org/Publications/Documents/Conventions/protamend_status.pdf .

[123] 25.5.1962, 57 AJIL (1963), p.268.

[124] http://www.diplomatie.be/fr/word/treaties/i13.doc .

[125] At www.imo.org .

[126] GA Press Releases, GA/L/3263-3265, 1-3.11.2004, 17th-20th mtgs., 6th Comm., 59th Sess.

[127] J.Charme, *Transnational Injury and Ultra-hazardous Activity: An Emerging Norm of International Strict Liability*, 4 J.L&Tech. 1989, pp..89-90.

[128] Note, *After Chernobyl: Liability for Nuclear Accidents under International Law*, 25 Col.JTL 1987, p.652.

[129] *Trail Smelter* Arbitration, (*USA v. Canada*), 3 RIAA 1941, p.1963.

waters.[130] Indeed, it is stipulated that the vessel was not only subjected to Raglan's anti-piracy program (*Cmps.* § 16), but was also directed to a specially-designated sea lane within the jurisdiction of Raglan (*Clar.* 11), and hence it is Raglan which ought to have averted the accident from ever occurring.

On the other hand, Appollonia has done everything in its power to achieve and sustain high standards of safety in its MOX shipments. In the case of the *Mairi Maru*, it made sure to lade one of its largest and most trustworthy double-hulled ships (*Cmps.* § 14), which had been used before on no less than six occasions, steered by a master particularly experienced at transporting nuclear materials (*Clar.* 11). Furthermore, it maintained close communication with the IAEA (*Cmps.* § 15), while even the fact that it did not notify Raglan shows conscientiousness, as explained above (under IV/C). Finally, even in the unlikely event that the piratical attack against the *Mairi Maru* is not attributed to Raglan, the acts of Good still remain a fortuitous event as regards Appollonia. Even the most fervent advocates of strict liability, as well as the pertinent international instruments, vindicate the operator in case of intentional or grossly negligent acts or omissions of a third party.[131] It is therefore clear that, absent fault on its part, Appollonia may in any event not be held responsible for any damage resulting from the wreck of the *Mairi Maru*.

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[130] C.Tinker, *Strict Liability of States for Environmental Harm: An Emerging Principle of International Law*, 3 Touro JTL 1992, pp.159-160.

[131] Institut de Droit International, Resolution on Responsibility and Liability under International Law for Environmental Damage, Strasbourg Session, 4.9.1997, art.22(2); Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, art.8, 21.6.1993, ETS No.150; Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, 21.4.2004, art.8(3), OJ L143, p.56, 30.4.2004.

CONCLUSION AND PRAYER FOR RELIEF

In accordance with the arguments and authorities presented herein, the Republic of Appollonia respectfully requests that this Court adjudge and declare that:

(a) Raglan is responsible for the attack upon and wreck of the *Mairi Maru*;

(b) Raglan is responsible and owes compensation for the unlawful scuttling of the *Mairi Maru* and her cargo;

(c) Raglan lacks standing to seek compensation for the pollution incurred on the high seas;

(d) Appollonia has violated no obligations owed to Raglan in transporting MOX through the Raglanian Archipelago.

Respectfully submitted on this day,

January 17, 2005

Agents for the Applicant