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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 RESPONDENT**

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<u>WRITTEN PLEADINGS</u>

**I.RAGLAN IS NOT RESPONSIBLE FOR THE WRECK OF THE MAIRI MARU, SINCE IT HAS DISPLAYED DUE DILIGENCE AND THE ACTS OF GOOD CANNOT BE ATTRIBUTED TO IT** *1*

<u>A.THE ACTS OF A COMMON CRIMINAL LIKE GOOD MAY NOT POSSIBLY BE ATTRIBUTED TO RAGLAN UNDER STATE RESPONSIBILITY LAW</u> *1*

**1.Absent some public nature of his duties or any exercise of actual governmental authority, a private contractor, such as Good, may not be regarded as an organ or even a *de jure* agent of Raglan** *1*

*<u>a)Good was never appointed as an organ of Raglan, and, hence, article 4 may not apply in the case at hand</u>* *1*

*<u>b)No actual governmental authority was bestowed to Good, and thus he may not be regarded as a de jure agent of Raglan</u>* *2*

**2.If Thomas Good is regarded as an agent or Raglan, his acts are still not attributable to Raglan both because of his position at the time of their occurrence and their nature** *3*

*<u>a)Thomas Good committed his acts after he had been placed at the disposal of Appollonia, and thus Raglan may not assume any responsibility for them</u>* *3*

*<u>b)An atypical act such as the one perpetrated by Thomas Good by definition goes even beyond the spectrum of ultra vires acts, and thus cannot be imputed to Raglan</u>* *4*

**3.No other basis of imputability under customary international law may confer responsibility to Raglan for the acts of Good** *6*

*a)Since Raglan exercised no effective control over the acts in question, Good cannot be classified as its de facto agent* *6*

*b)Raglan has all but adopted the acts in question subsequent to their commission, and thus may not assume responsibility ex post facto* *6*

B.RAGLAN HAS DISPLAYED THE MAXIMUM DEGREE OF DUE DILIGENCE POSSIBLE CONCERNING PIRATICAL ATTACKS WITHIN ITS WATERS *7*

**1.Under the circumstances, Raglan could not have been expected to perform any better in safeguarding its archipelagic waters** *7*

**2.Raglan's good will in unilaterally offering to provide foreign ships with technical assistance protecting them from pirates may not serve as grounds for liability** *8*

**II.RAGLAN OWES NO COMPENSATION FOR THE SCUTTLING OF THE *MAIRI MARU*, WHICH WAS A LEGITIMATE OR, AT THE VERY LEAST, JUSTIFIABLE ACT UNDER THE CIRCUMSTANCES** *9*

A.APPOLLONIA MAY NOT PROTEST FOR THE SCUTTLING OF THE *MAIRI MARU*, SINCE IT LACKS CLEAN HANDS *9*

B.THE SCUTTLING OF ANY WRECK –LET ALONE OF A HAZARDOUS ONE SUCH AS THE *MAIRI MARU*- IS NOT ONLY PERMITTED BUT ACTUALLY REQUIRED IN INTERNATIONAL LAW *10*

C.IN ANY EVENT, THE SCUTTLING OF THE *MAIRI MARU* MUST BE EXONERATED BY VIRTUE OF THE STATE OF NECESSITY RAGLAN FOUND ITSELF IN *12*

**III.BY CONDUCTING THE MOX SHIPMENTS THROUGH THE RAGLANIAN ARCHIPELAGO ABSENT PRIOR NOTIFICATION THEREOF, APPOLLONIA HAS BREACHED CUSTOMARY INTERNATIONAL OBLIGATIONS** *14*

A.APPOLLONIA'S MOX SHIPMENTS, INCLUDING –BUT NOT LIMITED TO– THE ONE CONDUCTED BY THE *MAIRI MARU*, CONSTITUTED NON-INNOCENT PASSAGE THROUGH RAGLAN'S ARCHIPELAGIC WATERS *14*

B.APPOLLONIA HAS FAILED TO ABIDE BY THE PRECAUTIONARY PRINCIPLE, WHICH HAS OBTAINED CUSTOMARY STATUS, AND ITS CONCOMITANTS *15*

**1.The precautionary principle has already been elevated to the status of customary international law** *15*

**2.Appollonia has violated its customary obligation to notify Raglan of the MOX shipments** *16*

**3.Additionally, Appollonia has defied its obligation to conduct an environmental impact assessment *à propos* its MOX shipments** *18*

**4.Last but not least, Appollonia has also breached its duty to cooperate with Raglan in good faith in the attainment of high standards of safety for the marine environment** *19*

C.IN THE ALTERNATIVE, RAGLAN SUBMITS THAT THE ABOVE-CITED OBLIGATIONS EMANATE FROM AN OBJECTIVE REGIME CREATED BY MULTIPLE INTERNATIONAL INSTRUMENTS *19*

D.NO POSSIBLE EXCEPTION TO APPOLLONIA'S DUTY TO NOTIFY RAGLAN MAY APPLY IN THE CASE AT HAND, AND CATEGORICALLY NONE AMONG THE ONES INVOKED BY APPOLLONIA *20*

**IV.APPOLLONIA BEARS STRICT LIABILITY TO COMPENSATE RAGLAN FOR THE LOSSES RESULTING FROM THE POLLUTION TO THE NORTON SHALLOWS, AND RAGLAN HAS STANDING TO PURSUE THE PERTINENT CLAIM ON SEVERAL BASES** *21*

A.RAGLAN HAS STANDING TO PUT FORWARD A CLAIM FOR COMPENSATION EITHER ON ITS OWN BEHALF OR IN THE EXERCISE OF DIPLOMATIC PROTECTION OVER ITS CITIZENS OR, IN ANY EVENT, AS A SPECIALLY AFFECTED STATE FROM AN *ERGA OMNES* BREACH *22*

**1.Raglan's multiple *effectivités* in the Norton Shallows are ample to institute a special legal interest and, hence, confer *locus standi* to Raglan** *22*

**2.Raglan is at least entitled to pursue a claim for the pollution of the Norton Shallows as a State specially affected by an *erga omnes* breach** *24*

**3.In the alternative, Raglan may exercise diplomatic protection over its citizens who incurred damages because of the pollution in the Norton Shallows, regardless of the fact that no local remedies have been pursued** *25*

B.HAVING ESTABLISHED ITS STANDING AND THE UNLAWFULNESS OF APPOLLONIA'S CONDUCT, RAGLAN IS ENTITLED TO COMPENSATION FOR THE POLLUTION TO THE NORTON SHALLOWS *27*

**1.Appollonia retained effective control over the *Mairi Maru* shipment, and hence is primarily liable to award compensation for the pollution incurred in the Norton Shallows** *27*

**2.Being the State of origin, Appollonia bears strict liability for the pollution caused by its MOX shipment** *28*

**3.Finally, the damages suffered by Raglan and its citizens are concrete and thus call for just compensation** *29*

**CONCLUSION AND PRAYER FOR RELIEF** *30*

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M.Pratt, The Maritime Boundary Dispute Between Honduras and Nicaragua in the Caribbean Sea, http://www.gmat.unsw.edu.au/ablos/ABLOS01Folder/PRATT.PDF, p.5 *22*

M.Valencia, J.Van Dyke, N.Ludwig, Sharing the Resources of the South China Sea (1999), Appendix 1, http://cat.middlebury.edu/southchinasea/macand/alfabetical.htm *23*

Territorial and Maritime Dispute Case (Nicaragua v. Colombia), Application instituting proceedings, 6 December 2001, para. 8, http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_iapplication_20011206.pdf *23*

Waigani South Pacific Convention, art.4(1),(2b), 16.9.1995, http://www.ban.org/Library/waigani_treaty.html *14*

http://www.gesource.ac.uk/worldguide/html/825.html *22*

**I. MISCELLANEOUS SOURCES**

*Torrey Canyon* Case, Cmnd.3246 (London, Her Majesty's Stationery Office, 1967) *13*

American Law Institute, Restatement (Third) of the Foreign Relations Law of the US *5, 6, 11, 17, 26*

1987 London Declaration adopted by the Second International North Sea Conference *16*

World Commission on Environment and Development, OUR COMMON FUTURE (1987) *19*

US General Accounting Office, *US Insular Areas: Application of the US Constitution*, Report to the Chairman, Committee on Resources, House of Representatives, 7.11.1997, GAO/OGC-98-5 *22*

Institut de Droit International, Resolution on Responsibility and Liability under International Law for Environmental Damage, 4.9.1997 *28*

Statement in the House of Commons, 8.6.1972, 11 Can.YIL (1973) *29*

## STATEMENT OF JURISDICTION

The Kingdom of Raglan (Respondent) and the Republic of Appollonia (Applicant) 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, a private person hired as pilot, may be considered an organ or agent of Raglan absent any exercise of governmental authority on his part and any effective control over his acts;

2) Whether, in any event, Good was placed at the disposal of Appollonia, and hence his acts after he started serving the vessel may not be attributed to Raglan;

3) Whether Raglan exercised the diligence required by a developing State to combat piracy within its archipelago;

4) Whether the scuttling of a wreck may be labeled as an internationally wrongful act and whether, in any event, Appollonia lacks clean hands to pursue a claim concerning the scuttling of the *Mairi Maru*;

5) Whether, further, the scuttling may be justified by the state of necessity engendered by the spreading of the pollution;

6) Whether the obligation to notify Raglan of the impending MOX shipments through its maritime zones is of customary nature, and thus binding on Appollonia;

7) Whether other duties emanating from the precautionary principle, such as the duty to cooperate in good faith and the duty to conduct an environmental impact assessment, have also been elevated to the status of customary law, thus being opposable to Appollonia;

8) Whether Raglan may pursue a claim for compensation as a *per se* injured State, based on its *effectivités* in the Norton Shallows or, alternatively, on the existence of an *erga omnes* breach specially affecting it;

9) Whether Raglan may exercise diplomatic protection over its nationals who also suffered injuries from the pollution to the Norton Shallows;

10) Whether Appollonia bears strict liability to compensate Raglan for the above losses.

## STATEMENT OF FACTS

Raglan is a small, poor archipelagic nation, located between two technologically-advanced States, namely Appollonia and Maguffin. One of the areas which are of vital economic interest to Raglan are the Norton Shallows, a cluster of sandbars that Raglanian firms have been exploiting for years, unchallenged by anyone.

In 1999, Appollonia and Maguffin entered into an agreement that entailed transportation of MOX, an ultra-hazardous nuclear substance, from the former to the latter. In doing so, Appollonia never notified Raglan either of the agreement as such or of the subsequent shipments. The IAEA itself, to which Appollonia is a party, deprecated such indiscretion by means of a report dated July 31, 1999, making particular reference to Raglan as a State entitled to notification.

In the meanwhile, Raglan was doing its utmost to combat piracy within its archipelagic waters. By virtue of a comprehensive anti-piracy program exclusively funded by it, it managed to significantly increase the safety of ships passing through its waters, and in fact such progress was acknowledged both by third States and pertinent international organizations, such as ILSA. That program would provide a pilot at the request of each ship's captain. The duties of these pilots, among which were private contractors, were confined to advising the captain and signaling a distress message, if need be.

Though tremendously successful, it was virtually impossible for the anti-piracy program to prevent every single piratical attack. In July of 2002, the captain of the *Mairi Maru*, an Appollonian vessel carrying MOX, decided to request a pilot literally at the eleventh hour, i.e. as he was entering the Raglanian archipelago. Unfortunately, the pilot proved to be an impostor,

who had misled both Raglan and the Appollonian captain into believing he would assist them. What he did instead was take the *Mairi Maru* off its course, where it could not be tracked down by the Raglanian Royal Navy, and then set it adrift after he had looted its safe.

The ship ran aground on the Norton Shallows, which was followed by MOX leakage into the surrounding waters. After spotting it, Raglan immediately took action to prevent the pollution from spreading, at the same time accusing Appollonia of being responsible for having created undue risk to Raglan's interests. Despite the dramatic situation that unfolded –illustrated by the very fact that two years later the pollution has yet to recede-, Appollonia remained silent, not even requesting that the wreck be salvaged or suggesting any possible means to that end. That being the case, Raglan took the only measure that could prevent further harm to the environment, which was to scuttle the wreck.

Raglan and Appollonia accused each other of being responsible for the damage; as subsequent negotiations led to a dead-end, both parties signed a *Compromis* to submit their differences to this Court.

## SUMMARY OF PLEADINGS

**I.** Raglan is not responsible for the attack upon the *Mairi Maru.* The unforeseeable acts of a private contractor, such as Thomas Good, cannot be attributed to it under any form of agency, and, in any event, their atypical nature precludes any correlation with the exercise of governmental authority on the part of Raglan. Even if such agency did *prima facie* exist, Good had been placed at the disposal of Appollonia which assumed control over him prior to his acts, and hence Raglan may in any event not be held responsible for them. Furthermore, Raglan displayed the maximum level of diligence required by a poor, developing State in safeguarding its waters. Its vow to protect foreign ships from pirates was fulfilled to the fullest extent possible, and thus Raglan is not responsible on such basis either.

**II.** In scuttling the *Mairi Maru*, Raglan did nothing but dispose of a hazardous wreck, which did not constitute protected property under the law of the sea anymore. Such act was further justified, because it was carried out under a state of necessity engendered by the grave and imminent peril of further pollution. In any event, Raglan lacks clean hands to pursue a claim for compensation, having itself breached its own obligations to avert the accident or at least decontaminate the area subsequent to it.

**III.** The unwarranted transportation of MOX through the Raglanian Archipelago not only fell short of being labeled as innocent passage, but also gave rise to a series of continuing breaches of duties owed to Raglan, namely the duty of notification, emanating from the precautionary principle, the duty to cooperate in good faith, and the duty to conduct an environmental impact assessment. Such duties are indeed opposable to Appollonia in the form of customary international law, and are subject to no exceptions applicable in the case at hand.

**IV.** Based, among other things, on the above-mentioned violations, Raglan is entitled to pursue a claim for compensation for the pollution to the Norton Shallows. Raglan derives standing to put forward such claim: first, on the fact that it itself is an injured party, because of its multiple *effectivités* in the Norton Shallows area; second, as a specially affected State by an *erga omnes* breach, such as marine pollution; third, as a transit State to which the above obligations were owed; fourth, in the exercise of diplomatic protection over its nationals. On the merits, that Appollonia is responsible for the heavy pollution not only follows from the breaches already cited, but also from its status as an exporting of ultra-hazardous nuclear materials, which sheathes it with strict liability. Therefore, it must fully compensate Raglan for all the losses incurred both by itself and its nationals.

## WRITTEN PLEADINGS

### I. RAGLAN IS NOT RESPONSIBLE FOR THE WRECK OF THE MAIRI MARU, SINCE IT HAS DISPLAYED DUE DILIGENCE AND THE ACTS OF GOOD CANNOT BE ATTRIBUTED TO IT

### A. THE ACTS OF A COMMON CRIMINAL LIKE GOOD MAY NOT POSSIBLY BE ATTRIBUTED TO RAGLAN UNDER STATE RESPONSIBILITY LAW

Under customary international law, a State may not be held responsible for a certain unlawful act of a person unless such act is imputable to it.[1] Concerning the condemnable acts of Thomas Good, Raglan denies that it is responsible for them, as none among the given bases of imputability under customary international law –as codified in the Draft Articles on State Responsibility (hereinafter DASR)[2]- exists. Specifically:

#### 1. Absent some public nature of his duties or any exercise of actual governmental authority, a private contractor, such as Good, may not be regarded as an organ or even a *de jure* agent of Raglan

*a) Good was never appointed as an organ of Raglan, and, hence, article 4 may not apply in the case at hand*

It is generally accepted –as confirmed also in article 4 DASR- that each State is primarily competent to appoint its own organs according to its domestic laws, such competence being subject to no review by other States.[3] Furthermore, State practice suggests that such contractors are regarded as State organs only if they perform a limited number of public functions essential to the very existence of the State,[4] such as the incarceration of criminals.[5]

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[1] L.Condorelli, *L'imputation à l'État d'un fait internationalement illicite: Solutions classiques et nouvelles tendances*, 189 RCADI 1984(VI), pp.24-26; *Phosphates in Morocco Case*, Preliminary Objections, PCIJ 1938 Ser.A/B, No.74, pp.10,28.

[2] 53rd Sess., UN Doc.A/CN.4/L.602/Rev.1 (2001); *cf.* ILC Commentary, ILCYb 201, pp.68-74.

[3] R.Ago (Special Rapporteur), *Third Report on State Responsibility*, UN Doc.A/CN.4/246, Add.1-3, 2 ILCYb 1971, pp.439-449; *Nationality Decrees Issued in Tunis and Morocco* Case, PCIJ, Ser.B, No.7,p.7.

In the present case, Raglan promptly made it clear, through the public statement of its Prime Minister (*Cmps.*§13), that private contractors hired to serve as pilots were not to be incorporated in its navy or be regarded as naval officers, refusing to label them as public employees. That a clear line was drawn between those two categories is also suggested by the absence of any indication that the private contractors enjoyed any State privileges, a prerequisite to identifying a person as an organ of State. Thus, it is obvious that the organ basis may not impose responsibility on Raglan.

*b) No actual governmental authority was bestowed to Good, and thus he may not be regarded as a de jure agent of Raglan*

The acts of *de jure* State agents –i.e. persons beyond the strictly confined array of State organs- may only be attributed to the State inasmuch as they involve the exercise of some form of governmental authority (DASR 5).[6] More to the point, the authority entrusted with Article 5 agents must involve functions in the State's public interests, must be authorized by law,[7] must be of a public character, and must include a concrete and sufficient degree of accountability of the private person to the State.[8]

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[4] S.Ellmann, *A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors*, 45 NYULR 2000-2001,p.21.

[5] A.Robeda, *The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort Jurisprudence: Correctional Services Corp. v. Malesko*, 33 NewMex.LR 2003, p.421, *Street v. Corr. Corp. of Am.*, 102 F.3d 810,814 (6th Cir.,1996), *Kesler v. King*, 29 F.Supp.2d 356,370-371 (SD Tex.,1998).

[6] I.Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th ed. (2003), pp.435-436; J.Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), pp.92-95; Arts.4,5-7,9 DASR.

[7] E.Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS (1915),pp.213-218.

In the case at hand, Good merely entered into a private contract with Raglan in order to perform a minor and strictly defined task to the benefit of third States, and it would be clearly excessive to regard the purpose of such contract as pertaining to the public interest of Raglan itself. Indeed, each pilot's call to duty was left to the discretion of the foreign vessel seeking protection (*Cmps.*§11), which is uncharacteristic of any type of governmental authority.[9] Good was absolutely not empowered to police the waters of Raglan, and he was certainly provided with no means or at any point received orders for such a purpose by the Raglanian Government, while even the vessel he used to board the *Mairi Maru* was both privately owned and operated (*Clar.* 3). Moreover, it is stipulated that, in the case of an emergency, Good's only task was to call for the intervention of the Royal Navy, which alone would exercise any perceived governmental authority (*Cmps.*§11). It is then clear that the acts of Good may not be attributed to Raglan under Draft Article 5 either.

**2. If Thomas Good is regarded as an agent or Raglan, his acts are still not attributable to Raglan both because of his position at the time of their occurrence and their nature**

*a) Thomas Good committed his acts after he had been placed at the disposal of Appollonia, and thus Raglan may not assume any responsibility for them*

Even if Thomas Good is considered to have obtained the status of a *de jure* agent of Raglan, he was not acting as such in the case at hand, and therefore his acts are still not imputable thereto. Customary international law, as codified in Draft Article 6, indicates that, whenever an agent of a given State is placed at the disposal of another State to provide some sort of assistance, it is the

[8] Judge El-Kosheri in *Lockerbie* Case *(Libya v. USA)*, ICJ Rep.1992, pp.199-202; *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. USA)* (hereinafter *Nicaragua* Case), ICJ Rep.1986,pp.181,188-189; *Estate II of Ferdinand Marcos*, 25F.3d, pp.1467,1472-1474 (9th Cir.,1994).

[9] S.Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility may be Applied within the WTO Dispute Settlement System*, 5 J.Int'lEcon.L 2002,pp.393 *et seq.*

latter (i.e. the receiving State) which is responsible for that person's acts,[10] provided the organ was acting with the consent, under the authority of[11] and for the purposes of the receiving State.[12] All three conditions are met in the case at hand. More specifically: Good boarded the vessel not only with the consent but also at the request of the Appollonian captain (*Cmps.*§16). Subsequent to his arrival and until 23:00 hours (*cf. Clar.*3), not only was he performing his duties under the orders of the Appollonian captain, but he was also subjected to the jurisdiction of the flag State, i.e. Appollonia, as is the case with every pilot under the law of the sea.[13] Finally, it is self-evident that the purpose of his deployment on the *Mairi Maru* was exclusively associated with the interests of Appollonia itself, as the ship was hired to transfer State-owned cargo,[14] albeit in secrecy, and it is stipulated that ownership was only to be transferred once it reached its destination in Maguffin (*Cmps.*§5). Finally, the fact that Raglan undertook to pay for the salary of private contractors is immaterial for the purposes of article 6, as specifically mentioned in the Commentary of the ILC.[15] Hence, it becomes lucid that Good was no more an agent of Raglan than of Appollonia, and Raglan should not have to carry the burden of his acts.

*b) An atypical act such as the one perpetrated by Thomas Good by definition goes even beyond the spectrum of ultra vires acts, and thus cannot be imputed to Raglan*

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[10] Art.6 DASR; Civil Court of Tunis, *Trochel Case*, Recueil Dalloz de doctrine, de jurisprudence et de législation, Paris 1953, p.564.

[11] *Chevreau* Case, RIAA 1949, vol.I, pp.1115-1116.

[12] ILC Commentary, p.95.

[13] British Pilotage Act 1913, Halsbury' s Laws of England, Vol.43, para.868; Art.17,para.7 of Greek law No.3142/1955; Art. 330-5,330-6 of the Monaco Law of the Sea Code.

[14] T.Nunes, *Charterer's Liabilities under the Ship Time Charter*, 26 Houst.J.Int'lL 2004, p.561.

[15] ILC Commentary, p.98.

Although in principle States are responsible even for *ultra vires* acts of their organs or agents, such responsibility recedes whenever the act was completely extraneous to the specific authority granted by the State.[16] In the present case, however, Good was acting so much without any conceivable type of authority, that it is hardly conceivable how his acts can be attributed to Raglan even if he is dubbed as its "agent". Indeed, his act, namely piracy,[17] is by definition a private act[18] incompatible with any State authorization,[19] and goes far beyond any perceived scope of Good's "official" duties. A multitude of judgments rendered by international courts and tribunals, as well as the ILC Commentary itself, make the distinction between *ultra vires* acts that should be ascribed to the State on the one hand, and purely private acts incidentally committed in the course of one's duties on the other, which are by no means imputable to the State.[20] Even in the case of public officials of a State –let alone private contractors, such as Good- unlawful acts are not attributed to their State unless the agents/organs have at least used

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[16] C.Finkelstein, *Changing Notions of State Agency in International Law: The Case of P.Touvier,* 30 Tex.ILJ, p.261; Hackworth, "*Shine and Milligen*", DIGEST OF INTERNATIONAL LAW, Vol.V, p.575; *Maal* Case, RIAA 1903, p.730; *Mallén* Case, RIAA 1925, p.173; *Stephens* Case, RIAA 1927, p.265.

[17] UNCLOS, arts.101-105; E.Kontorovich, *The Piracy Analogy: Modern Universal Jurisdictions' Hollow Foundation*, HILJ 2004, pp.190-192.

[18] *US v. Smith,* 18 U.S. (5 Wheat) 1820, pp.153,162; *Dole v. New England Mut. Marine Ins. Co,* C.C.D. Mass.1864, 7F.Cas.837-847.

[19] S.Menefee, *The New Jamaica Discipline: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 Conn.JIL 1990, pp.127,141-147; G.Constantinople, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 Virg.JIL 1986, pp.723-748.

[20] ALI Restatement (Third) of the Foreign Relations Law of the US (hereinafter US Restatement), p.96; *Castelains Case*, Moore, INTERNATIONAL ARBITRATIONS, Vol.III, p.2999 (1880); *Petrolane Inc. v. Islamic republic of Iran* (1991), 27 Iran-USCl.Tr. 64,p.92; ILC Commentary, pp.91,102.

their weapons or carried out their unlawful acts continually.[21] Good was never granted any coercive powers by Raglan to begin with, and his plan was pursued by purely private means in excess of his authority; moreover, his act was not only incidental but also totally unforeseeable. Finally, this Court should take into account that the more discrete the task assigned by the State to the agent is, the more limited State responsibility for his acts becomes:[22] in the case of Good, the task of assisting in the piloting of ships for a short period of time and with no power whatsoever to compel the captain of the ship to his instructions could not have been more limited in nature. Therefore, Raglan should not be held responsible under Draft Article 7 either.

**3. No other basis of imputability under customary international law may confer responsibility to Raglan for the acts of Good**

*a) Since Raglan exercised no effective control over the acts in question, Good cannot be classified as its de facto agent*

In the absence of governmental authority, there remains only one kind of agency in customary international law, namely the *de facto* agency, also enshrined in Draft Article 8. Nonetheless, such link may not function either in the case at hand. As indicated by this very Court on the merits of the *Nicaragua* Case, applicant would need to prove the exercise of effective control over the specific acts in question, while the mere presence of a general relationship between the perpetrator and the State is not enough.[23] Even though the degree of control required has been debated ever since this Court's judgment on *Nicaragua*, the core of such pronouncement has never been disputed, the central requirement of *de facto* agency being that the State direct and

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[21] *Caire Case*, RIAA 1929, Vol.V, p.531; *La Masica Case*, RIAA 1916, Vol.XI, p.560; *Youmans Case*, RIAA 1916, Vol.IV, p.116.
[22] US Restatement, s.207, com.c.

[23] *Nicaragua* Case (Merits), ICJ Rep.1986, pp.62-65.

guide the unlawful acts in question.[24] In the present case, it is undisputed, even by applicant itself, that Raglan, if anything, did not order or guide any of the acts committed by Good. It is then clear that imputability may not be substantiated on that basis either.

*b) Raglan has all but adopted the acts in question subsequent to their commission, and thus may not assume responsibility ex post facto*

In the *Iranian Hostages* Case, this Court stated, in so many words, that the assumption of *ex post* facto responsibility would at least require the adoption of a given act as one's own.[25] In the present case, however, not only has Raglan not adopted the acts of Good, but it has also categorically denounced them as repulsive, at the same time denying responsibility for them (*Cmps.*§27). As for the invocation of sovereign immunity by the domestic courts of Raglan (*Cmps.*§§30-31), it cannot serve as basis for *ex post facto* responsibility either: indeed, sovereign immunity is traditionally sanctioned in international law, and it would make no sense to refuse Raglan's courts the right to dismiss civil claims on procedural grounds. Besides, both lawsuits filed by Appollonian citizens were against the State of Raglan itself, not Thomas Good. It then follows that their rejection cannot even implicitly amount to adoption of the acts in question by Raglan.

B. RAGLAN HAS DISPLAYED THE MAXIMUM DEGREE OF DUE DILIGENCE POSSIBLE CONCERNING PIRATICAL ATTACKS WITHIN ITS WATERS

**1. Under the circumstances, Raglan could not have been expected to perform any better in safeguarding its archipelagic waters**

Lack of due diligence would result from the failure of a State to take the reasonable measures of prevention or punishment of crimes within the areas under its jurisdiction that a well-

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[24] ICTY, *Prosecutor v. Tadić*, IT-94-1 (1999), 38 ILM, p.1518.
[25] Art.11 DASR; *Hostages* Case *(Iran v. USA)*, ICJ Rep.1980; G.Townsend, *State Responsibility for Acts of De Facto Agents*, 14 Ariz.J.Int'l.&Comp.L. 1997, p.635.

administered government would be expected to take under similar circumstances.[26] In the landmark *Corfu Channel* Case, it was clarified by this Court that the State should not necessarily have anticipated any harm that could possibly occur within its territorial waters.[27] In addition, it is accepted that no State shall be responsible for purely private harm[28] caused by fortuitous events that could not have been reasonably foreseen.[29] All the more so, a State may not be held liable for private conduct that only occurred once. Such was the case of the uncalled-for attack against the Mairi Maru. This unexpected incident, in its singular context, only occurred once, and is *per se* poor evidence of any lack of due diligence. Within the last two years, Raglan has gone beyond its contractual obligations in safeguarding its archipelagic waters, doing much more towards decreasing piratical attacks than any poor State would have been expected to do under the given circumstances. In fact, Raglan's proficiency in its efforts to combat piracy was certified by a number of third States, as well as by ILSA itself (*Cmps.*§12). Moreover, it is stipulated that Raglan has also been quite diligent in arresting and trying individuals for piratical acts (*Clar.*7), although it is widely known that the particular crime knows no boundaries, and hence the apprehension of its perpetrators entails great difficulties. It becomes apparent that the conduct of Raglan in its entirety has been one that abides by the standards of due diligence, and, hence, Appollonia's claim should be rejected on that basis as well.

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[26] *Alabama Claims (USA v. UK),* 1 Malloy 717 (1872); *Velasquez Rodriguez case*, I/ACt.HR (1988), OAS/Ser.L/V/III.19, doc.13; D.Shelton, *Private Violence, Public Wrongs and the Responsibility of States*, 13 Ford.ILJ (1990),p.1; G.Christenson, *Attributing Acts of Omission to the State*, 12 Mich.ILJ 1991, p.312.

[27] *Corfu Channel* Case *(UK v. Albania)*, ICJ Rep.1949, p.23.

[28] *Noyes Case (Panama v. USA)*, RIAA 1933, pp.308,311.

[29] E.Borchard, *op.cit.*, p.213.

**2. Raglan's good will in unilaterally offering to provide foreign ships with technical assistance protecting them from pirates may not serve as grounds for liability**

In the *Nuclear Tests* Case,[30] this Court stated that unilateral declarations or statements on behalf of a State are not a source of a binding international obligation, unless there is a respective intention to that effect, expressly resulting from the statement.[31] In any event, the legal effect of such statements is to be determined by their substance and context, as well as by the addressee.[32]

In the case at hand, the Prime Minister of Raglan generously offered to create an anti-piracy program aimed at the increased protection of foreign ships from pirates. The announcement was not made before an international institution or court, or addressed specifically to other States, and it was certainly not addressed to Appollonia. Furthermore, the creation of the anti-piracy program was not founded on any international obligation of Raglan to provide such increased protection to ships in its territory, nor did it intend to bind Raglan in providing this kind of protection indefinitely, as this was a program financed and organized solely by Raglan's resources and regulated by Raglan's internal legal order. Finally, even if Raglan were deemed to have assumed some obligation through its PM's statement, such obligation only covered certain conduct to be displayed, and could in no way extend to an open-ended promise that no piratical attacks would ever occur in the Raglanian archipelago again.[33] Hence, PM Price's statement may not serve as grounds for Raglan's responsibility either.

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[30] ICJ Rep.1974; *Eastern Greenland* Case *(Denmark v. Norway)*, PCIJ Ser.1933, No.53,p.45.

[31] A.Rubin, *The International Legal effects of Unilateral Declarations*, 71 AJIL 1977, p.1.

[32] S.Bhuiyan, *Mandatory and Discretionary Legislation: The Continued relevance of the Distinction under the WTO,* J.Int'lEcon.L 2002,p.571.

[33] *Cf.* D.Shelton, *op.cit.*, pp.22-23; F.García-Amador, L.Sohn, R.Baxter, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974), p.27.

## II. Raglan Owes No Compensation for the Scuttling of the *Mairi Maru*, Which was a Legitimate or, at the Very Least, Justifiable Act under the Circumstances

### A. Appollonia may not Protest for the Scuttling of the *Mairi Maru*, Since it Lacks Clean Hands

Under the clean hands doctrine, which is well-established in international law and has also been applied by this Court[34] as well as other international tribunals,[35] a State shall be barred from invoking a breach of an international obligation by another State when it itself has failed to abide by its own obligations.[36] Such principle most definitely bars the claim of Appollonia regarding the scuttling of the *Mairi Maru*. Indeed, as will be conclusively demonstrated below (under Part III of this Memorial), this particular State paid no heed to its own obligations as an exporting State of nuclear materials, which were owed to Raglan under customary law, and thereby became responsible for the accident and the subsequent pollution. Even after the accident, Appollonia turned its back to the crisis which unfolded in the Norton Shallows and the ever-expanding pollution caused by its treasured cargo (*Cmps.*§§21 *et seq.*). This conduct is at odds with the status of Appollonia as a flag State and the duties emanating from such status, foremost among which would be the duty to at least cooperate in decontaminating the area.[37]

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

[35] *Rights of Britons in Spanish Morocco* Case, RIAA 1925, p.13; *I'm Alone* Case, RIAA 1935, pp.1609,1618; *Short v. Iran* Case, Iran–USCl.Tr. 1987,p.6.

[36] 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.

[37] US Restatement, sec.502; T.Bruha, *Internationale Regelungen zum Schutz vor technisch – industriellen Umweltnotfallen*, 44 ZaöRV 1984, pp.1-63.

Having failed to respect its own obligations, Appollonia must be stripped of its right to claim any compensation.

B. THE SCUTTLING OF ANY WRECK –LET ALONE OF A HAZARDOUS ONE SUCH AS THE *MAIRI MARU*- IS NOT ONLY PERMITTED BUT ACTUALLY REQUIRED IN INTERNATIONAL LAW

Even if Appollonia were in fact entitled to pursue a claim regarding the scuttling of the *Mairi Maru*, still it could not establish any breach of an international obligation on the part of Raglan. Indeed, the special protection afforded to ships,[38] i.e. navigable transports,[39] may not extend to other objects at sea, and definitely not to shipwrecks.[40] Quite the contrary in fact, as shipwrecks not only fall short of meriting such protection, but are also subject to the right of coastal or neighbouring States to scuttle them, so as to maintain the safety of navigation.[41] With respect to Raglan, in particular, such right would artlessly derive from the combination of articles 33, 220§2 and 221§1 of UNCLOS, which allow for the enforcement of any appropriate measure even in situations arising beyond its territorial waters and EEZ.[42] These provisions, apart from being regarded as itemizing already existing rules under the CHS (which Appollonia is a party

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[38] Arts.73, para.4 & 292, para.1 of UNCLOS; *The Camouco* Case *(Panama v. France)*, ITLOS Rep.2000, para.3.

[39] *Vide*, e.g., art.1§1 of the 1989 IMO International Convention on Salvage (4.28.1989), S.Treaty Doc.No. 102-12.

[40] R.Churchill, A.Lowe, THE LAW OF THE SEA (1983),p.232; J.Allain, *Maritime Wrecks*, 38 Virg.JIL 1998, *passim*.

[41] *Nachfolger Navigation Company Ltd. and Others* Case, 89 ILR 1987, pp.3-5; A.Boyle, *Marine Pollution under the Law of the Sea Convention*, 79 AJIL, p.369; A.Tan Khee Jin, *The Regulation of Vessel-source Marine Pollution: Reconciling the Maritime and Coastal State Interests*, 1 Sing.J.Int'l.&Comp.L., p.355; Act No.1.198 Code of the Sea of Monaco, arts.L.720-1,720-7, 27.3.1998, 40 Law of the Sea Bulletin 1998, pp.142-143.

[42] *Cf.* Art. III(d) of the International Convention on Intervention on the High Seas (1969); Arts.2, 6, 10, 24 of the Convention on the High Seas 1958.

to: *Cmps.*§35), are part of customary international law,[43] and are thus in any event opposable to Appollonia.

It naturally follows that Appollonia's allusion to the alleged "scuttling of its vessel" is but a euphemism, since the *Mairi Maru* had long ceased to be a vessel by the time it ran aground on the Norton Shallows (*Cmps.*§19). Indeed, it is stipulated that Good set her adrift after he and his accomplices had removed "*all* the technical navigation equipment", thus "making it *impossible* to steer the ship under *her own power*" (*Cmps.*§18, emphasis added). Besides, both parties, having chosen their words attentively, agreed to identify the *Mairi Maru* as a "wreck" not just once but indeed four times in the *Compromis*, namely in its preamble (p.3), in its main body (§21), in Appollonia's claims themselves (§37a), and in the Annex (p.19). Furthermore, neither Appollonia nor its citizens claimed the wreck –or its cargo- until after it had been scuttled, despite the fact that Raglan repeatedly alerted the Appollonian government to its intentions (*Cmps.*§§21-24). That being the case, Raglan has violated no obligations, but rather offered good services in scuttling an abandoned wreck, and hence the claim of Appollonia should be dismissed on that basis also.

### C. In any Event, the Scuttling of the *Mairi Maru* Must be Exonerated by Virtue of the State of Necessity Raglan Found Itself In

Even assuming, *arguendo*, that Raglan did *prima facie* violate some obligation owed to Appollonia in scuttling the shipwrecked *Mairi Maru*, it must be pardoned by virtue of a state of necessity. Such doctrine is a time-honoured, customary circumstance precluding the wrongfulness of acts committed to avert a grave and imminent peril threatening the essential

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[43] R.Reuland, *Interference with Non-National Ships on the High Seas: Peace-time Exceptions to the Exclusivity Rule of Flag State Jurisdiction*, 22 Vand.JTL 1989,p.1161; D.Magraw, *Transboundary Harm: The ILC's Study of International Liability*, 80 AJIL 1986, p.305; J.Roach, *Sunken Warships and Military Aircraft*, 20 Mar.Pol'y 1996, p.352.

interests of a given State.[44] As such, it is codified in article 25 of the DASR,[45] and has been upheld as customary rule both by this Court[46] and its predecessor,[47] as well as in other international cases.[48] In fact, the judgment rendered by this Court in *Gabcíkovo-Nagymaros* made it crystal-clear that even "long-term perils can be imminent",[49] thus giving rise to a state of necessity, "however far they may appear to be".[50]

In the present case, the situation which unfolded subsequent to the *Mairi Maru* incident posed a grave and imminent peril to Raglan's essential interests by definition, since it involved the spilling of an ultra-hazardous nuclear material. Aside from the instant damage to the economic interests of Raglan and its citizens in the Norton Shallows themselves (*Cmps.*§§20-21), it must be highlighted that the pollution is still spreading westward, i.e. towards the Raglanian Archipelago (*vide* annexed map, *Cmps.* p.19) because of the ocean currents (*Clar.*13), having reached on the doorstep of Raglan's EEZ (*Clar.*12), which illustrates vividly why Raglan had to proceed with drastic measures. It must also be accentuated that scuttling the wreck was not in the slightest an excessive means to address such severe crisis. Indeed, the remains of the

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[44] A.Boed, *State of Necessity as a Justification for internationally Wrongful Conduct*, 3 YHRDLJ 2000, p.1; A.Laursen, *The Use of Force and the State of Necessity*, 37 Vand.JTL 2004, p.485.

[45] *Cf.* ILC Commentary, pp. 194 *et seq.*

[46] *Gabcíkovo-Nagymaros Project* Case *(Hungary v. Slovakia),* ICJ Rep. 1997, p.7; *Fisheries Jurisdiction* Case *(Spain v. Canada)*, ICJ Rep. 1998,p.431.

[47] *Société Commerciale de Belgique*, PCIJ Ser.A/B, No.87, 1939, p.141; *Serbian Loans*, PCIJ Ser. A, No.20, 1929.

[48] *I'm Alone* Case, *op.cit.*, p.1609; *Russian Fur Seals Controversy* (1893), BFSP, vol.86, p.220.

[49] *Gabcíkovo-Nagymaros Project*, p.42.

[50] *Ibid.*

*Mairi Maru* had already been contaminated by the leaking MOX, thus being not only hazardous but useless as well, while the cargo itself was essentially spilled into the ocean (*Cmps.*§19), leaving hardly anything to retrieve. In the *Torrey Canyon* incident,[51] Great Britain bombed the remains of an oil tanker (which, absent a nuclear polluting factor, were obviously not contaminated *per se*), outside its territorial waters, and yet no single State dared voice any objection to such measure, indicating their utter conviction that this is precisely what international law dictates in similar cases.[52] *A fortiori*, a poor, developing State, such as Raglan, must be vindicated for the scuttling of a useless and hazardous wreck.

## III. By Conducting the MOX Shipments through the Raglanian Archipelago absent Prior Notification thereof, Appollonia has Breached Customary International Obligations

### A. Appollonia's MOX Shipments, Including –but not Limited to– the One Conducted by the *Mairi Maru*, Constituted Non-Innocent Passage Through Raglan's Archipelagic Waters

Free passage through the archipelagic waters of a third State may only be authorized to the extent such passage is innocent.[53] Such circumstance is by definition ruled out to the extent a given shipment would jeopardize the safety of the transit State.[54] A case in point is the transportation of ultra-hazardous materials, such as MOX, which are nothing less than a grave peril to human health and the environment.[55] That the transportation of nuclear materials in

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[51] *Torrey Canyon* Case, Cmnd.3246 (London, Her Majesty's Stationery Office, 1967).

[52] P.Malanczuk, Akehurst's Modern Introduction to International Law, 7th ed. (1997), p.190.

[53] Art.17 UNCLOS; M.Shaw, International Law, 4th ed., (1997), p.403.

[54] Art. 19 UNCLOS; R.Churchill & A.Lowe, The Law of the Sea, 2nd ed. (1991), pp.68–76.

general –and of MOX in particular– are excluded from the shipments which merit the prerogative of innocent passage is to be traced in a number of regional conventions, which ban the import of radioactive cargo into areas under the jurisdiction of contracting States[56] or require the written consent of transit States thereto.[57] It is also supported by the relevant practice of archipelagic (e.g. Seychelles[58]) and other coastal States (among many others Bangladesh,[59] Egypt,[60] Malta,[61] Oman[62]), which in fact treat ships carrying nuclear materials in the vein of warships, precluding innocent passage for both. It hence becomes perceptible that it is a sovereign right of every State to prohibit such non-innocent passage of vessels through its waters.[63]

In the present case, Appollonia has been conducting MOX shipments through the Raglanian archipelago for years without ever having notified Raglan, let alone obtained its consent thereto (*Cmps.*§5). Moreover, every single shipment among these was conducted with

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[55] G.Wardley, *Passage of Nuclear Powered Ships and Ships Carrying Nuclear Material: International and South African Perspectives*, 17 Sea Changes 1995-1996, pp.112–114.

[56] Waigani South Pacific Convention, art.4(1),(2b), 16.9.1995, http://www.ban.org/Library/waigani_treaty.html .

[57] OAU Bamako Convention, art.6(4), 30.1.1991, 30 ILM 1991, p.775.

[58] Maritime Zones Act of 25 March 1999, art.16(4), 48 Law of the Sea Bulletin 1999, p.22.

[59] 27.7.2001, 46 Law of the Sea Bulletin 2001, p.14.

[60] 26.8.1983, 3 Law of the Sea Bulletin 1984, p.13.

[61] 20.5.1993, 23 Law of the Sea Bulletin 1993, p.6.

[62] 17.8.1989, 14 Law of the Sea Bulletin 1989, p.8.

[63] Paras.3,5 of the IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste, resolution GC(XXXIV)/RES/530, 21.9.1990; J.van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 ODIL 1993, p.408.

absolutely no safeguards, as would be the armed escort of the vessels.[64] In fact, the shipments were carried out in the face of the objections of the IAEA itself, which in so many words admonished Appollonia for its demeanor *vis-à-vis* Raglan (*Cmps.*§9). As if this were not enough, Appollonia was oblivious to Raglan's pleas for assistance in the cleaning-up of the Norton Shallows after the *Mairi Maru* accident (*Cmps.*§§21-25). These acts and omissions not only divest Appollonian vessels carrying MOX of their right to invoke innocent passage, but also amount to a whole series of breaches of international obligations emanating from customary international law. Specifically:

## B. APPOLLONIA HAS FAILED TO ABIDE BY THE PRECAUTIONARY PRINCIPLE, WHICH HAS OBTAINED CUSTOMARY STATUS, AND ITS CONCOMITANTS

### 1. The precautionary principle has already been elevated to the status of customary international law

The precautionary principle is not only embraced in numerous international instruments, both global[65] and regional,[66] as well as in the ILC Draft Articles on Prevention of Trans-boundary Harm by Hazardous Activities (hereinafter DAPTHHA),[67] but has by now become an intrinsic part of customary international law.[68] This was also the conclusion of ITLOS in the *Southern*

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[64] Annex I to the CPPNM.

[65] See, *i.a.*, art.206 of UNCLOS; art.2§5(a) of the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes; paras.8,9 of the 1992 Rio Convention on Biological Diversity; princ.15 of the 1992 Rio Declaration; Chapter 17 of the 1992 Rio Agenda 21.

[66] See, *i.a.*, Art.VII of the 1987 London Declaration adopted by the Second International North Sea Conference; art.2§2 of the 1992 Paris Convention on the Protection of the Marine Environment of the North-East Atlantic; art.4§3(f)-(u) of the Bamako Convention; art.3§2 of the 1992 Convention on the Protection of the Marine Environment in the Baltic Sea Region..

[67] GAOR, 56th Sess., Supp.No.10 (A/56/10), art.3.

*Bluefin Tuna* Case,[69] which was in fact reaffirmed in its more recent judgment on *MOX Plant*,[70] a case which presents palpable similarities to the one at hand. Having gone beyond the boundaries of conventional law, into the realm of customary international law, it becomes apparent that the precautionary principle is opposable to Appollonia.

**2. Appollonia has violated its customary obligation to notify Raglan of the MOX shipments**

The duty to promptly notify transit States of an impending hazardous shipment is not only enshrined in numerous instruments,[71] ratified by the vast majority of States worldwide, but is also identified as the fundamental prerequisite to the exercise of every other duty emanating from the precautionary principle.[72] Indeed, it is hardly imaginable how States may assist each other in the preservation of the marine environment or, for instance, exercise their right to designate sea lanes for such shipments, when some of them withhold vital information from others.[73] The underlying State practice and *opinio juris* to this norm is massive, with practically

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[68] P.Martin-Bidou, *Le principe de précaution en droit international de l'environnement*, 101 RGDIP 1997, p.665; J.Cameron, J.Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C.Int'l & Comp.L.Rev. 1991,pp.20-21; O.McIntyre, T.Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J.Env.L (1997), p.235.

[69] *The Southern Bluefin Tuna* Case, ITLOS Rep.1999, para.77.

[70] *MOX Plant* Case, ITLOS Rep.2001, paras.82,84.

[71] Arts. 2§13 and 6§4 of the Basel Convention; Principle 19 of the Rio Declaration; arts.1 and 2 of the 1986 IAEA Convention on the Early Notification of a Nuclear Accident; arts.2§§1,3 of the IAEA CPPNM; art.310 of UNCLOS; art.6§4 of the Izmir Protocol, 1.10.1996, UN Doc.UNEP(OCA)/MED/IG.9/4.

[72] US Restatement, s.601, com.e; U.Beyerlin, T.Barsche, *Transboundary Environmental Co-operation: Prior information, consultation, environmental impact assessment*, Yb.IEL 1993, pp.105-111.

[73] T.Scovazzi, *The Transboundary Movement of Hazardous Waste in the Mediterranean Regional Context*, 19 UCLA J.Env.L.Pol'y 2000/2001, p.243.

all transit States –sometimes in unison– demanding notification concerning MOX shipments.[74] Such practice is not confined to developing coastal States,[75] but is also prevalent in the framework of intergovernmental organizations comprised of developed States, such as the OECD[76] and the EU.[77] Even exporting States, such as the UK and Japan, have conceded that such duty does exist, by selectively notifying transit States of their MOX shipments.[78] Had Raglan known about the MOX shipments, it would have either taken additional protective measures or exercised its right to forbid such non-innocent passage through its archipelagic waters. By failing to notify Raglan, Appollonia has thus breached yet another one of its customary duties, and is thus responsible on that basis also.

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[74] Resolution 12600/67 of the Chilean Maritime Authority, 16.3.1995; M.Roscini, *La zone dénucléarisée du sud-est asiatique: problèmes de droit de la mer*, RGDIP 2001, p.629; J.Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 ODIL 1996, p.386-387; K.Hakapaa, E.Molenaar, *Innocent Passage- Past and Present*, 23 Mar.P'y 1999, p.142.

[75] *Pakistan*: Territorial Waters and Maritime Zones Act, art.3(3), 22.12.1976, www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PAK_1976_Act.pdf; *Yemen*: Act No.45 concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and Other Marine Areas, art.8, 17.12.1977, www.un.org/Depts/los/LEGISLATION ANDTREATIES/PDFFILES/YEM_1977_Act.pdf; *Saudi Arabia*, Declaration made upon ratification of UNCLOS, 24.4.1996, 31 Law of the Sea Bulletin 1996, p.10; *Basel Convention State-parties*: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/ chapterXXVII/treaty18.asp.

[76] OECD Council decision/recommendation on transfrontier movements of hazardous wastes, 1.2.1984, C(83)180(Final); OECD decision/recommendation on exports of hazardous wastes from the OECD area, 5.6.1986, C(86)64(Final).

[77] EU Directive No.84/631 of 6.12.1984 (OJ L326) and Council Regulation No.259/93 of 1.2.1993 on the control of transboundary movements of hazardous wastes within the Community and to third States.

[78] J.Van Dyke, *The Legal Regime Governing the Sea Transport of Ultrahazardous Materials*, 77 ODIL 2002, p 85.

**3. Additionally, Appollonia has defied its obligation to conduct an environmental impact assessment *à propos* its MOX shipments**

Foremost among the customary obligations of a State of origin (in this case: Appollonia) is to conduct an EIA prior to undertaking the transportation of hazardous materials. It has already been several years since this Court rendered its judgment on *Gabcíkovo-Nagymaros*, thereby laying emphasis on the absolute need to "assess the environmental impact of hazardous activities".[79] Such pronouncement was a prelude to momentous developments on the issue. Indeed, there exists by now a clear-cut international consensus on the need to follow environmental impact assessment (EIA) procedures prior to embarking on hazardous activities.[80] Developed States, such as the US, have actually been conducting EIAs for hazardous activities overseas,[81] even if they are not parties to relevant international instruments.[82] Since there is no indication that Appollonia has taken any steps to conduct an EIA –not even subsequent to the submission of this case– it becomes apparent that it has fallen foul of yet another violation against Raglan.

**4. Last but not least, Appollonia has also breached its duty to cooperate with Raglan in good faith in the attainment of high standards of safety for the marine environment**

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[79] *The Gabcikovo-Nagymaros Project* Case, paras.140 *et seq.*

[80] Art.7 DAPTHHA; GA Resolution 37/7 "World Charter for Nature", art.11(c), 22 ILM 1983, p.455; World Commission on Environment and Development, OUR COMMON FUTURE (1987), pp.59-62; D.Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 Ga L.Rev 1995,p.629.

[81] U.S.C. para.4332 (2)(C)(F); *Environmental Defense Fund, Inc. v. Massey,* 986 F.2d 528 (D.C. Cir.1993), *Greenpeace USA v. Stone*, 748 F.Supp.749 (D.Haw.1990), 924 F.2d 175 (9th Cir.1991).

[82] ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 25.2.1991, 1989 UNTS 809; Directive 85/337/EEC as amended by the Directive 97/11/EC.

The duty to cooperate in good faith with transit States so as to preserve the marine environment is a corollary of the precautionary principle, and thus by definition also forms part of customary international law.[83] The DAPTHHA not only explicitly provide for this duty,[84] but also codify a comprehensive set of guidelines, which shall govern a reasonable balancing of interests between the exporting and transit States, respectively.[85] In the *Lac Lanoux* Arbitration, it was clarified that cooperation in good faith is not merely some abstract vow but actually creates enforceable rights.[86] Such assertion is further in line with the jurisprudence of this Court.[87] It artlessly follows that this duty is also opposable to Appollonia.

C. IN THE ALTERNATIVE, RAGLAN SUBMITS THAT THE ABOVE-CITED OBLIGATIONS EMANATE FROM AN OBJECTIVE REGIME CREATED BY MULTIPLE INTERNATIONAL INSTRUMENTS

Even if this Court were to find that the above norms have not yet been elevated to the status of customary international law, the respective obligations –and notably the duty of notification– would at least bind Appollonia by virtue of an objective regime molded by the multiple instruments either Raglan or Appollonia are parties to and aimed at the collective protection of the environment. Indeed, the duty to notify transit States of hazardous shipments is ubiquitous, appearing in every major multi-lateral convention on the matter, including the ones either

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[83] P.-M.Dupuy, DROIT INTERNATIONAL PUBLIC, 2nd ed. (1994), p.493.

[84] Art.4 DAPTHHA.

[85] Art.10 DAPTHHA.

[86] *Lac Lanoux* Case, 24 ILR 1957, p.140; P.Daillier, A.Pellet, DROIT INTERNATIONAL PUBLIC, 6th ed. (1999),p.432.

[87] *Fisheries Jurisdiction* Case (*United Kingdom v. Iceland*), ICJ Rep.1974, para. 31; *North Sea Continental Shelf* Cases (*Germany v. Denmark, Germany v. Netherlands*), ICJ Rep.1969, para.85.

Raglan[88] or Appollonia[89] are parties to (*Cmps.*§35), and it is clear that the parties to these conventions did not merely intend to agree on such code of behavior among themselves, but purported to establish a global array of rights specifically covering third States. The sum total of these provisions is so pervasive that it would be unreasonable to cast it off on the premise that none among these conventions happens to have been ratified by both parties to the dispute. Such objective regime by no means contradicts article 34 of the VCLT, but is actually in line with it. If truth be told, the nuclear conventions generate a situation in which transit States, such as Raglan, by definition have to assume obligations and thereby tolerate restrictions to their sovereign rights, particularly in the form of undergoing risk from hazardous shipments through their territorial waters and EEZ. This means that conventions such as the CPPNM and NPT are fundamentally in breach of article 34 of the VCLT, and the only possible way to counter this is to grant third States the respective rights cited therein. Therefore, Raglan is entitled to invoke the duty of notification against Appollonia.

### D. No Possible Exception to Appollonia's Duty to Notify Raglan May Apply in the Case at Hand, and Categorically none Among the Ones Invoked by Appollonia

Although the Appollonian Energy Minister attempted to absolve her State of its duty to notify Raglan of the MOX shipments by hazily invoking "security reasons" (*Cmps.*§10), such ruse may in fact not remove the burden off Appollonia's shoulders. Indeed, an exception to the duty of notification could only apply in the presence of a concrete peril to the shipment,[90] and only as a last resort, i.e. inasmuch every other effort had failed, while even in that case it would have to

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[88] Art.4§2(f) of the Basel Convention.

[89] Art.4§5 of the CPPNM.

[90] Art.6§2 of the CPPNM; art.7§3 of the Draft International Convention for the Suppression of Acts of Nuclear Terrorism, 28.6.2004, UN Doc.A/AC.252/L.13.

apply only temporarily. Appollonia, however, never tried to address its presumed "security concerns" by any other means, while its failure to notify was perpetual, and continued even after the Government of Raglan had managed to undermine the threat of pirates (*Cmps.*§12). Under these circumstances, Appollonia is not entitled to conjure up any exception, and hence its responsibility remains.

Furthermore, Appollonia's assertion that Raglan "was aware of the MOX shipments" (*Cmps.*§29) is ludicrous, not only because Raglan had no actual means to obtain such information, but also because the conditions of *estoppel*, as pronounced by this Court in numerous cases, are anything but present in the case at hand. In particular, there was no "clearly and consistently evinced acceptance"[91] of the shipments by Raglan, nor did Appollonia "detrimentally change position or suffer some prejudice in reliance of such conduct".[92] On the contrary, it is Appollonia which has been benefiting to the detriment of the environment, and thus its allegations are to be dismissed.

## IV. APPOLLONIA BEARS STRICT LIABILITY TO COMPENSATE RAGLAN FOR THE LOSSES RESULTING FROM THE POLLUTION TO THE NORTON SHALLOWS, AND RAGLAN HAS STANDING TO PURSUE THE PERTINENT CLAIM ON SEVERAL BASES

### A. RAGLAN HAS STANDING TO PUT FORWARD A CLAIM FOR COMPENSATION EITHER ON ITS OWN BEHALF OR IN THE EXERCISE OF DIPLOMATIC PROTECTION OVER ITS CITIZENS OR, IN ANY EVENT, AS A SPECIALLY AFFECTED STATE FROM AN *ERGA OMNES* BREACH

#### 1. Raglan's multiple *effectivités* in the Norton Shallows are ample to institute a special legal interest and, hence, confer *locus standi* to Raglan

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[91] *North Sea Continental Shelf* Cases, *op.cit.* p.26, para.30; *Nicaragua* Case (*Jurisdiction and Admissibility*), ICJ Rep.1984, p.51.

[92] *Ibid.*

Raglan qualifies as an injured State, and thus may entertain a claim for compensation in its own right with respect to the environmental devastation caused in the Norton Shallows by virtue of its multiple *effectivités*. Such notion encompasses a wide range of activities, which demonstrate effective control over previously unclaimed territory. Low-tide elevations (LTEs) may well be considered territory in that sense. Although they differ *in effects* from islands and cannot "be *fully* assimilated" with them[93] (in the sense, e.g., of generating their own territorial sea), the silence of treaty law and the lack of a customary rule unequivocally precluding their appropriation (as attested by this Court in the recent *Qatar v. Bahrain* Case[94]) simply do not prohibit States from advancing claims over such insular formations. There is abundant State practice to that effect, even when LTEs are located beyond the territorial waters of any State: US sovereignty over the Kingman Reef in the North Pacific Ocean,[95] the French possession of Bassas da India in the Indian Ocean,[96] Colombia's claims of sovereignty over the keys of Quitasueno, Serrana and Serranilla (recognized in treaties with Honduras and the US[97] and also claimed by Nicaragua in a case pending before this Court[98]) and the claims of China, Vietnam,

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[93] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* Case (*Qatar v. Bahrain*), ICJ Rep.2001, para.206 (emphasis added).

[94] *Id*, para.205.

[95] US General Accounting Office, *US Insular Areas: Application of the US Constitution*, Report to the Chairman, Committee on Resources, House of Representatives, 7.11.1997, GAO/OGC-98-5, pp.39,57-58.

[96] http://www.gesource.ac.uk/worldguide/html/825.html .

[97] M.Pratt, *The Maritime Boundary Dispute Between Honduras and Nicaragua in the Caribbean Sea*, http://www.gmat.unsw.edu.au/ablos/ABLOS01Folder/PRATT.PDF, p.5.

[98] *Territorial and Maritime Dispute* Case (*Nicaragua v. Colombia*), Application instituting proceedings, 6 December 2001, para. 8, http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_iapplication_20011206.pdf.

Malaysia and the Philippines over dozens of reefs and cays in the South-China Sea –known as 'Spratly Islands'- which are above water only at low-tide.[99] The validity of such claims was subtly upheld in the 1998 Award of the Permanent Court of Arbitration in the *Eritrea/Yemen* case, which recognized Yemen's sovereignty over LTEs well beyond its territorial sea.[100] In the present case, it is stipulated that certain sandbars in the Norton Shallows were only partially submerged (*Cmps.* § 19); even assuming that this were the case for only part of the year, such insinuation would still render them low-tide elevations at worst (if not islands), as also indicated by the very use of the term "sandbar" in the *Compromis*.[101]

Besides, both this Court and its predecessor have uttered that the threshold of required *effectivités* is in fact lower in the case of very small islands which are uninhabited or not permanently inhabited[102] (*a fortiori* then, in the case of LTEs), especially when no other State could assert a superior claim.[103] Raglan's *effectivités* surpass by far the low threshold required: Raglanian firms have effectively and exclusively been exploiting this area for years (*Cmps.*§2, *Clar.*6). Raglan itself has been exercising its jurisdiction over these activities –as per by the fact that it has been taxing them heavily-, such *status quo* being challenged by no State to this day

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[99] M.Valencia, J.Van Dyke, N.Ludwig, SHARING THE RESOURCES OF THE SOUTH CHINA SEA (1999), Appendix 1, http://cat.middlebury.edu/southchinasea/macand/alfabetical.htm; C.Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations between China and Taiwan?*, 32 NewEng.L.Rev.1998, p.824.

[100] Award of 9.10.1998, paras.509,524, available at http://pca-cpa.org/ENGLISH/RPC/EY/ch11ER-YE.htm .

[101] *Vide* ENCYCLOPAEDIA BRITANNICA (2004), under "sandbar".

[102] *Sovereignty over Pulau Ligitan and Pulau Sipadan* Case (*Indonesia v. Malaysia*), ICJ Rep. 2003, para. 134; *Eastern Greenland* Case, *op.cit.*, pp.45-46.

[103] *Ibid.*

(*Cmps.*§2). Moreover, it is illustrated that the Royal Navy of Raglan engaged in military activities in the area, which is precisely why it was able to salvage the crew-members of the *Mairi Maru* right after the accident (*Cmps.*§20). Most importantly, the Kingdom of Raglan has itself solemnly displayed the intention to act with *animus occupandi* and ensure the protection of the environment[104] in the Norton Shallows by exercising State functions in assuming the burden of decontaminating the area all by itself (*Cmps.*§§21 *et seq.*), an exertion which continues to this day (*Clar.*12). Having amply demonstrated its copious and unremitting *effectivités* over the Norton Shallows, Raglan has established at least an inchoate title, which is sufficient to confer standing to it for the purposes of these proceedings.

**2. Raglan is at least entitled to pursue a claim for the pollution of the Norton Shallows as a State specially affected by an *erga omnes* breach**

Even if this Court does not recognize any entitlement of Raglan over the Norton Shallows, which would then be considered part of the high seas, Raglan may still qualify as an "injured State" by being, in the words of Article 42(b)(i) DASR, "specially affected" by the breach of an obligation owed to "the international community as a whole". This Court has time and again acknowledged the concept of obligations *erga omnes*,[105] conferring standing to otherwise disinterested parties (*a fortiori* then in the case of specially affected States).[106] In fact, although the Court tentatively started out with a limited enumeration in *Barcelona Traction*,[107] it has

[104] *Cf. Sovereignty over Pulau Ligitan and Pulau Sipadan* Case, *op.cit.*, paras.129,145,149.

[105] M.Ragazzi, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (1997), p.100.

[106] F.Kirgis, *Standing to Challenge Human Endeavors that Could Change the Climate*, 84 AJIL 1990, pp.527-528; P.Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GYIL 1996,pp.296, 299; O.Schachter, *General Course on Public International Law,* 178 RCADI 1982, pp.195-196.

progressively expanded such list in more recent judgments.[108] Besides, international law has reached a point in which the pollution of the environment is no longer considered the interest of States individually, but affects the international community as a whole, while the respective obligations have risen to the level of *erga omnes* ones.[109] Raglan's special and exclusive interests in the Norton Shallows are ample to "distinguish it from the generality of other States"[110] –to which the breach of *erga omnes* obligations is also owed- and hence enable it to claim compensation on such basis also.[111]

**3. In the alternative, Raglan may exercise diplomatic protection over its citizens who incurred damages because of the pollution in the Norton Shallows, regardless of the fact that no local remedies have been pursued**

Every State is entitled to exercise *parens patriae* and protect its own subjects, when unlawfully injured by acts of another State.[112] In fact, injury of any person, natural or juridical, that bears the nationality of a State, amounts to harm to the State itself.[113] It follows that, even in the unlikely event that Raglan were denied *locus standi* to raise a claim on its own behalf, it could

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[107] *Barcelona Traction* Case (*Belgium v. Spain*), ICJ Rep.1970, p.32, para.33; L.Hannikainen, PEREMPTORY NORMS OF INTERNATIONAL LAW (1988), p.452.

[108] *East Timor* Case (*Portugal v. Australia*), ICJ Rep.1995, p.102; *Genocide Convention* Case (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Preliminary Objections), ICJ Rep.1996, p.616.

[109] P.Weil, *Le droit international en quête de son identité*, 237 RCADI 1992(I), p.290; K.Zemanek, *State Responsibility and Liability*, in W.Lang *et al.* (eds.), ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW (1991), p.192.

[110] ILC Commentary, p.294.

[111] ILC Commentary, p.300; E.Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AJIL 2002, p.802.

[112] *Nottebohm* Case (*Liechtenstein v. Guatemala*), ICJ Rep.1955,p.4.

[113] *Mavrommatis Palestine Concessions* Case (Jurisdiction) (*Greece v. UK*), PCIJ Ser. A, No.2, 1924, p.12; *Iran-United States* Case No.A/18 (1984), 5 Iran-US Cl.Tr.251.

still not be divested of its inherent right to represent its nationals, who were irrefutably victimized by the pollution to the Norton Shallows, and thus its claim is admissible on that basis also.

Furthermore, customary law and the practice of this Court both recognize the rule of exhaustion of local remedies only as a prerequisite to pursuing non-interstate claims.[114] Even in that case, such rule would apply on the condition that, if in fact available, local remedies were reasonably expected to be effective.[115] Accordingly, Raglan submits that the rule of exhaustion of local remedies –though of customary nature– is irrelevant in the present dispute, since all claims feature an essentially interstate dispute between Appollonia and Raglan. In any event, even with respect to the claims of individuals taken up by Raglan in the exercise of *parens patriae*, it was reasonably expected that any domestic remedies would be ineffective and, hence, futile, for three reasons: i) Appollonia itself concedes that the damages were incurred on the high seas, and thus it was dubious whether any domestic court could compel Appollonia to satisfy the victims. In fact, this Court has recognized that the rule of exhaustion of local remedies recedes when the injury occurred beyond the boundaries of any given jurisdiction;[116] ii) it was only realistic to anticipate that Appollonia's courts would shield their own government with the doctrine of sovereign immunity, which is omnipresent in domestic legal orders

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[114] *Interhandel* Case (*Switzerland v. US*) (Preliminary Objections), ICJ Rep.1959, p.27; art.22 DASR; US Restatement, sec.713; *Ambatielos Claim*, 1958, RIAA 12, p.83.

[115] Art.44(b) DASR; *Panevezys-Saldutiskis Railway Co.* Case, PCIJ Ser.A/B, No.76, 1939, p.18; *Johnston v. Ireland*, Eur.Ct.HR, Ser.A, No.112 (1986); *Advisory Opinion OC-11/90 of the IACHR on Exceptions to the Exhaustion of Local Remedies*, 1990, 12 HRLJ 1991,p.20.

[116] *Elettronica Sicula S.p.A. (ELSI)* Case (*USA v. Italy*), ICJ Rep.1989, p.52.

worldwide;[117] iii) even absent sovereign immunity, it must be underscored that, since final responsibility lies with the government of Appollonia itself, its courts would not display great zeal in administering justice. Therefore, Raglan cannot possibly be barred from pursuing the present claim before this Court.

## B. Having Established its Standing and the Unlawfulness of Appollonia's Conduct, Raglan is Entitled to Compensation for the Pollution to the Norton Shallows

### 1. Appollonia retained effective control over the *Mairi Maru* shipment, and hence is primarily liable to award compensation for the pollution incurred in the Norton Shallows

In international law generally,[118] and the field of trans-boundary marine pollution specifically, proximity would be affirmed in connection with the State which retained the effective control of the polluting vessel.[119] Principle 21 of the Stockholm Declaration,[120] which crystallizes pre-existing customary international law,[121] declares that States are responsible to ensure that activities within their *jurisdiction* or *control* do not cause damage to areas beyond the limits of national jurisdiction (emphasis added).[122] In the present case, it goes without saying that

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[117] H.Fox, *Jurisdiction and Immunities*, in V.Lowe, M.Fitzmaurice (eds.), FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE (1996),pp.210 *et seq.*

[118] *Island of Palmas* Case, RIAA 1928, p.839; C.Eagleton, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928), p.6-7.

[119] G.Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AJIL 1980, p.527.

[120] Report of the UN Conference on the Human Environment, 16.6.1972, UN Doc.A/CONF.48/14.

[121] R.Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GYIL 1990,p.309; L.Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harv.ILJ 1973, p.493.

[122] A.Boyle, *Marine Pollution under the Law of the Sea Convention*, 79 AJIL 1985,p.349; M.Tanaka, *Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine*

Appollonia did in fact retain the effective control over the MOX shipment conducted by the *Mairi Maru*, since: a) it is stipulated that, apart from being an Appollonian-flagged vessel (which did not even change when Thomas Good boarded it: *Cmps.*§14, *Clar.*9), the *Mairi Maru* was operated by the government of Appollonia, while even the ownership over its cargo was only to be transferred once in Maguffin (*Cmps.*§5); b) as already analyzed, Appollonia not only refused to hand over its control over the vessel, but also jealously withheld every piece of information as to the shipment, and it would be absurd to assume that Raglan could exercise any control over a vessel whose cargo it ignored. Having retained the effective control over its vessel, Appollonia must now assume its respective obligations.

**2. Being the State of origin, Appollonia bears strict liability for the pollution caused by its MOX shipment**

Although normally the award of compensation would have to rely on the establishment of fault, in the field of ultra-hazardous activities or substances posing an inherent risk to the environment strict liability becomes the foundation supporting the pertinent claims.[123] In essence, this means that the State which operates and profits from a given hazardous shipment shall be liable to compensate any injured party for damages resulting therefrom, regardless of the legality of its actions.[124] It was actually the *Trail Smelter* Arbitration which elucidated that State responsibility

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*Environmental Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 Mich.JIL 2004, p.352.

[123] Institut de Droit International, Resolution on Responsibility and Liability under International Law for Environmental Damage, 4.9.1997, art.4; 1993 Lugano Convention, art.6, 21.6.1993, ETS No.150; L.Ortiz Ahlf, *Liability for Transboundary Damage*, 6 NAFTA:L&B Rev.Am 2000, pp.249,253; J.Charme, *Transnational Injury and Ultra-hazardous Activity: An Emerging Norm of International Strict Liability*, 4 J.L&Tech. 1989, p.76.

[124] J.Schneider, WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANISATION, (1979), pp.163-167; W.Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RCADI 1966(I), p.122; C.Tinker, *Strict Liability*

for trans-boundary pollution cannot be founded on fault,[125] lest compensation for the resulting damages become a pipe dream.[126] Such conclusion was reaffirmed in the similar *Cherry Point Oil Spill* dispute[127] and in numerous voluntary settlements, while it is widely supported by eminent publicists[128] and has been adopted in one form or another by all modern legal systems, hence qualifying as a general principle of law[129] applicable under article 38 § 1(c) of this Court's Statute.

In the case at hand, it has already been demonstrated that Appollonia not only breached a number of its international obligations, but also exhibited monumental negligence in conducting its MOX shipments. However, even in the unlikely event that the Court were to dismiss the above assertions of Raglan, the doctrine of strict liability would still sustain the right of Raglan to receive due compensation, and thus Appollonia is deprived of any defense.

**3. Finally, the damages suffered by Raglan and its citizens are concrete and thus call for just compensation**

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*of States for Environmental Harm: An Emerging Principle of International Law*, 3 Touro JTL 1992, p.159.

[125] *Trail Smelter* Case, RIAA 1938, p.1907.

[126] J.Brunée, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 ICQL 2004, p.358; R.Churchill, *Facilitating Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems and Prospects*, 12 Yb.IEL 2001, pp.9-10,19.

[127] Statement in the House of Commons, 8.6.1972, 11 Can.YIL (1973), pp.333-334.

[128] E.Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RCADI 1978(I), p.272; P.-M.Dupuy, *International Liability of States caused by Transfrontier Pollution*, in OECD Legal Aspects of Transfrontier Pollution (1977), p.357; T.Treves, *Les tendances récentes du droit conventionnel de la responsabilité et le nouveau droit de la mer*, 21 AFDI 1975, p.781.

[129] Hardy, *Nuclear Liability: The General Principles of Law and Further Proposals*, 36 BYIL (1960), p.237.

It has been conclusively demonstrated that the concrete damage to the Norton Shallows has been suffered –and is being suffered to this day– by Raglan itself, and hence is *per se* ample to sustain a claim for compensation (*supra*, under IV/A). This Court and its predecessor have repeatedly iterated that the compensation awarded must wipe out the consequences of the unlawful act or omission,[130] including, where appropriate, loss of future profits.[131] In addition, modern international law also explicitly provides for reparation covering the costs of environmental restoration.[132]

In the present case, the damages incurred by Raglan were both concrete and gargantuan, which is not even disputed by Applicant itself (*Cmps.*§34). Such damages consist in the annihilation of the fauna and flora of the Norton Shallows area (*Cmps.*§§20-21), the eradication of every economic activity thereon, and the resulting loss of tax revenue for Raglan (*Cmps.*§2), not to mention the burden of decontamination for at least five years to come (*Cmps.*§34). It must be highlighted that the pollution has already reached Raglan's EEZ (*Clar.*12), and the full upshot of the accident has yet to be felt. It only stands to reason that, contrary to Appollonia's assertions, the damages suffered are all but hypothetical, and hence call for full compensation.

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130 *Factory at Chorzów (Claim for Indemnity)* Case *(Germany v. Poland)* (Merits), PCIJ Ser.A, No.17, 1928, p.29; 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.

131 Art.36§2 DASR & ILC Commentary, pp.258 *et seq.*; *Cape Horn Pigeon* Case (*United States of America v. Russia*), RIAA 1902, p.63; *The Montijo* Case, in Moore, International Arbitrations, (1875), vol.II, p.1421.

132 Directive 2004/35/CE of the European Council, 21.4.2004, art.2(14)-(16), OJ L143, p.56; 1993 Lugano Convention, art.2(8); IAEA 1997 Protocol, art.2(2) and (4), 12.9.1997, 36 ILM 1997, p.1454; T.Berwick, *Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes*, 10 Geo.Int'l Env.L.Rev. 1998, pp.265-266.

## CONCLUSION AND PRAYER FOR RELIEF

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

(a) Raglan is not responsible for the attack upon and wreck of the *Mairi Maru*;

(b) Raglan did not violate any presumed obligations towards Appollonia by scuttling the *Mairi Maru*;

(c) Appollonia violated obligations owed to Appollonia in transporting MOX through the Raglanian Archipelago;

(d) Appollonia owes compensation to Raglan for the damages suffered in the Norton Shallows.

Respectfully submitted on this day,

January 17, 2005

Agents for the Respondent