TEAM 128R

THE 2005 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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

Case Concerning *The Mairi Maru*

THE REPUBLIC OF APPOLLONIA
APPLICANT

v.

THE KINGDOM OF RAGLAN
RESPONDENT

SPRING TERM 2005

On Submission to the International Court of Justice

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Governments of the Republic of Appollonia and the Kingdom of Raglan have agreed to submit the present controversy for final resolution by the International Court of Justice by Special Agreement pursuant to Article 36, paragraph 1, in relation to Article 40, paragraph 1, of the Statute of this Court. In accordance with Article 36, the jurisdiction of the Court comprises all cases that the parties refer to it.

STATEMENT OF THE FACTS

The controversy at issue surrounds the hazard caused by pirates in the waters around the Kingdom of Raglan (Respondent in this case), and the inherent dangers of the Republic of Appollonia's (Applicant) shipping of ultra-hazardous material. In October 1999, Raglan instituted a highly successful program to combat the high incidence of piracy. Under the program, Raglan provides a Royal Naval officer to serve as pilot upon the request of any ship. The Insurers of Lading and Shipping Association (ILSA) lowered their risk assessment of Raglan's waters due to the success of the program. Because of the high demand for its pilots, Raglan expanded the program by subcontracting the work to private individuals – Mr. Thomas Good was such a subcontractor. Raglan has actively prosecuted pirates, convicting at least two individuals.

Since 1997, the Appollonian Ministry of Energy has been selling mixed oxide fuel (MOX) produced by Appollonia to Maguffin Atomic Recycling Company, Ltd. (MARC), a private company incorporated in the Democratic Republic of Maguffin (not a party to this case). Appollonia has routinely shipped MOX aboard private vessels to its agent in Maguffin through Raglanian archipelagic waters. Though Appollonia has informed the International Atomic Energy Agency (IAEA) of these shipments, Appollonia insists it owes no duty to notify Raglan and asserts that withholding notification is necessary "to maintain the highest level of security."[a] On 31 July 1999, the IAEA issued its final report on Appollonia's nuclear program, noting its concern that "Appollonia gives no notice to affected States such as Raglan that MOX will be transported through their . . . waters."[b]

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[a] *Compromis*, para. 10.

[b] *Compromis*, para. 9.

On the occasion of one such shipment, the captain of *The Mairi Maru* called upon Raglan to provide a pilot. Raglan was not notified that MOX was on board the ship by either its captain or Appollonia. Mr. Good, a private contractor in Raglan's anti-piracy program, presented himself on *The Mairi Maru* while the ship was still on the high seas. Mr. Good piloted the ship into Raglanian waters, where he allegedly seized control of the vessel by revealing an explosive device. Mr. Good directed *The Mairi Maru* out of Raglanian sea lanes, and set the ship adrift prior to disembarking. On the night of 28 July 2002, the vessel ran aground on the Norton Shallows, unclaimed lands on the high seas historically exploited only by Raglan. The crash contaminated the surrounding area with MOX, which severely damaged the environment surrounding the Shallows.

On 29 July 2002, a Raglanian Royal Navy patrol boat discovered the crash while conducting a training exercise. Subsequently, Prime Minister Price of Raglan and President Stark of Appollonia attempted to resolve the issue through diplomatic channels. On 31 July 2002, Prime Minister Price notified his counterpart that the contamination would quickly spread into Raglan's exclusive economic zone (EEZ). Receiving no response, a second note was sent on 4 August, observing that impending weather left Raglan no choice but to sink this material deep to the ocean floor to prevent its spread to Raglan's EEZ and inhabited territory. Later that week, a Raglanian destroyer sank *The Mairi Maru* to a depth of 9,000 meters. Following the scuttling, Raglan notified the appropriate authorities per its obligations under the London Convention. Raglan has attempted to capture Mr. Good, but he remains at large.

QUESTIONS PRESENTED

1. Is Raglan responsible for the attack upon *The Mairi Maru*?

2. Is Raglan responsible for scuttling *The Mairi Maru*?

3. Did Appollonia commit an internationally wrongful act by failing to notify or obtain prior consent from Raglan prior to shipping MOX on *The Mairi Maru*?

4. Does Appollonia have an obligation to compensate Raglan for the cost of decontaminating the area around the Norton Shallows and for Raglan's lost income from fishing and ecotourism?

SUMMARY OF THE PLEADINGS

The Kingdom of Raglan is not responsible for the attack on *The Mairi Maru*. Mr. Good's illegal activity does not amount to piracy under international law, as it occurred wholly within Raglan's territorial jurisdiction. Accordingly, Raglan's response to the illegal activities occurring within and around its archipelagic waters was entirely consistent with its international obligations. The matter is one of a domestic character and does not engender Raglan's obligation *erga omnes* to repress piracy. Assuming, *arguendo*, such activity falls within the definition of piracy, Raglan's efforts to combat piracy remain commensurate with its obligations.

The actions of Mr. Good are not attributable to Raglan. Mr. Good is not an agent of Raglan, and his illegal conduct was not carried out under Raglan's direction or control. Even if Mr. Good were an agent of Raglan, Mr. Good's actions cannot be attributed to Raglan because they were not carried out within the scope of his employment, nor under color of law. Raglan is therefore not obligated to compensate Appollonia for any injury arising from the attack on or wreck of *The Mairi Maru*.

Raglan's scuttling of *The Mairi Maru* was consistent with its international obligations. States have a legal entitlement to protect vital interests and intervene extraterritorially. Raglan also has a customary obligation to protect the marine environment, and the scuttling was carried out pursuant to this duty. Even if the scuttling were *per se* unlawful, necessity justified Raglan's actions and precludes any finding of wrongfulness.

International law places on all states a duty to notify or seek consent from potentially affected states when shipping ultra-hazardous material such as MOX. Reflecting customary international law, UNCLOS requires states to comply with IAEA regulations regarding the shipment of nuclear materials. Those regulations explicitly impose a duty to notify through states whose territory such material will cross. Under international law more generally, the duty

to notify is derived from both the prevention principle and the precautionary principle. Though similar in nature, each constitutes a separate origin from which the duty stems. The duty to notify of hazardous shipments requires notification to each potentially affected state of each shipment. Appollonia has failed to meet this obligation. Second, Appollonia violated its duty to obtain consent from Raglan to ship MOX through its territory. Under international law, consent may not generally be given implicitly – at no point did Raglan explicitly grant its consent.

Because Appollonia failed to give notice to, or obtain consent from, Raglan prior to shipping MOX, Appollonia is responsible for the resulting damage. Assuming, *arguendo*, the harm Appollonia caused is too remote, Appollonia is to be held strictly liable for failing to notify Raglan of the MOX shipment. Indeed, international law recognizes strict liability for ultra-hazardous activities and when severe pollution is involved. Therefore, even if Appollonia owes Raglan no duty of prior notice, Appollonia must still compensate Raglan. Raglan has standing to bring a claim because (1) Appollonia has breached an obligation owed directly to Raglan, and (2) Appollonia's failure to prevent pollution constitutes a breach of an obligation *erga omnes* by which Raglan is specially affected. Appollonia must restore the *status quo ante* and compensate Raglan for the costs of decontaminating the Norton Shallows as well as for Raglan's lost income.

PLEADINGS

I. Raglan is not not responsible for the attack upon or wreck of *The Mairi Maru* because Raglan fulfilled all international obligations by responding appropriately to illegal conduct in its archipelagic waters

A. The illegal activity that occurred in Raglanian archipelagic waters with respect to *The Mairi Maru* was not piracy as defined by customary international law

Despite common usage of the term, this Court must apply the definition of piracy set out under customary international law. That definition is codified identically in the Geneva Convention on the High Seas[1] and the United Nations Convention on the Law of the Sea.[2] Both agreements reflect customary international law with respect to all matters related to this dispute.[3] The international crime of piracy consists of: *i)* any illegal acts of violence or detention, or any act of depredation; *ii)* committed for private ends; *iii)* by the crew or the passengers of a private ship; *iv)* and directed against another ship or persons or property on board such a ship; *v)* on the high seas or in a place outside the jurisdiction of any State.[4]

The Mairi Maru entered Raglanian archipelagic waters at 22:00 on 27 July 2002,[5] prior to any act of illegal violence. At this point it was in waters subject to Raglanian sovereignty, not on

[1] Geneva Convention on the High Seas, 29 Apr. 1958, art. 15, 450 U.N.T.S. 11 [hereinafter High Seas Convention].

[2] United Nations Convention on the Law of the Sea, 10 Dec. 1982, art. 101, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

[3] *See* High Seas Convention, *supra* note 1, Preamble; *Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 294; *Case Concerning the Continental Shelf* (Libya v. Malta), 1985 I.C.J. 13, 30; *Case Concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v. Sen.), 1990 I.C.J. 64, 72, (separate opinion of Judge Evensen); *Case Concerning Passage through the Great Belt* (Fin. v. Den.), 1991 I.C.J. 12, 13; Restatement (Third) of Foreign Relations Law of the United States, Part V, Introductory Note [hereinafter Restatement of Foreign Relations].

[4] UNCLOS, *supra* note 2, art. 101.

[5] *Clarifications*, para. 3.

the high seas nor outside the jurisdiction of any state.[6] Mr. Good's acts of violence began at 23:00 when he threatened to detonate an explosive device.[7] His conduct fails to satisfy the jurisdictional elements of piracy under international law. Mr. Good's actions constitute only domestic crimes, including armed robbery,[8] within the territorial jurisdiction of Raglan. Raglan has prosecuted several such crimes, resulting in two convictions. It pursued these prosecutions under its domestic laws and not international law.[9]

Because Mr. Good's conduct constitutes only a domestic crime, Raglan has not violated any obligation *erga omnes* to cooperate in the repression of international crimes.[10] Nor has Raglan breached its customary duty to cooperate in the repression of piracy.[11] Consequently, Raglan owed Appollonia only those duties set out in Article 24 of UNCLOS. In particular, Raglan must adequately publicize any known danger to navigation within its territorial sea.[12] Certainly, the attacks occurring in Raglanian waters were well publicized. As early as 1999, Raglan publicly announced affirmative steps to combat and reduce the threat.[13]

B. Assuming, arguendo, that Mr. Good's conduct constitutes piracy under customary international law, Raglan has fulfilled all international obligations

[6] UNCLOS, *supra* note 2, art. 49(1).

[7] *Compromis*, para. 17.

[8] Djalal, H., The Center for Strategic and International Studies, "Piracy In South East Asia: Indonesian and Regional Responses," 1 (2004).

[9] *Clarifications*, para. 7.

[10] *Case concerning the Arrest Warrant of 11 April 2000* (Congo v. Belg.), 2000 I.C.J. 182, 230-31 (declaration of Judge Van Den Wyngaert).

[11] UNCLOS, *supra* note 2, art. 100.

[12] *Id.* arts. 24(2), 44, 54.

[13] *Compromis*, para. 11.

Customary international law places a duty upon all states to cooperate in the repression of piracy.[14] In addition, this Court has recognized that no state has the right to knowingly permit the use of its territory in such a manner as to cause injury to the territory of another state.[15] This is not such an instance. Liability depends on the nuance of the particular case,[16] and this Court has distinguished those situations that generate the international responsibility of states. The *Corfu Channel* case is particularly instructive. Knowledge of the presence of mines in its territorial waters and failure to warn others conferred responsibility on Albania for the damage they caused.[17] In the *Diplomatic and Consular Staff* case, Iran failed to control private actors in its territory and stated its approval of the wrongful conduct.[18] Such omissions may, as easily as affirmative acts, give rise to international responsibility.[19]

Raglan, however, did not fail to warn of any known dangers in its waters or fail in its due diligence in repressing piracy. At no point has Raglan approved of or endorsed the illegal activity of private individuals in its territory. To the contrary, in successfully instituting an anti-

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[14] UNCLOS, *supra* note 2, art. 100.

[15] *See Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 [*Corfu Channel*]. *See also Trail Smelter*, 3 R.I.A.A. 1905 (U.S.-Can. 1941) [hereinafter *Trail Smelter*].

[16] Brownlie, I., *System of the Law of Nations: State Responsibility (Part I)* 47 (1983) [hereinafter Brownlie, *State Responsibility*].

[17] *Corfu Channel*, *supra* note 15, at 22-23.

[18] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 31-32.

[19] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, art. 2, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *State Responsibility*].

piracy program,[20] Raglan met its international obligations.[21] Raglan's activity in capturing and prosecuting alleged pirates is further evidence to this effect.

II. Raglan is not responsible for the attack upon *The Mairi Maru* because the acts of Mr. Good are not attributable to Raglan

As recognized in *Phosphates in Morocco*, conduct can only give rise to state responsibility if it is attributable to the state under international law and if that conduct constitutes a breach of a state's international obligations.[22] These elements must be considered separately. The question of attributing conduct to the state must not be colored by the international wrongfulness of that conduct.[23]

Conduct is attributable to a state if it is carried out either by an official state organ,[24] by some other entity that exercises elements of governmental authority,[25] or by entities within the state's direction or control.[26] Mr. Good's conduct does not fall within any of these categories, and cannot be attributed to Raglan as a matter of international law.[27]

A. Mr. Good is not an agent or officer of Raglan

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[20] *Compromis*, para. 12.

[21] UNCLOS, *supra* note 2, arts. 24, 100.

[22] *Phosphates in Morocco* (Italy v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74, at 10. *See also* ILC, *State Responsibility*, *supra* note 19, art. 2.

[23] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 81, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *Commentaries on State Responsibility*].

[24] ILC, *State Responsibility*, *supra* note 19, art. 4.

[25] *Id.* art. 5.

[26] *Id.* art. 8.

[27] *See* ILC, *Commentaries on State Responsibility*, *supra* note 23, at 83.

The ILC Articles on State Responsibility define a state organ as "any person or entity which has that status in accordance with the internal law of the state."[28] No rule of international law governs what is to be considered a state organ; the question is essentially one of fact.[29] It is crucial to identify precisely the actor's "association with the state."[30] Mr. Good was a private contractor under Raglanian law and not an organ of the state.[31] He is a private individual contracted to perform a service; he does not hold, nor has he held, any office within any body exercising public authority.[32] Even where an agency relationship *does* exist, many states explicitly exclude vicarious liability for the wrongful conduct of private contractors.[33] In fact, employers of private contractors are frequently not liable even for conduct carried out *within* the scope of their employment, much less for conduct drastically exceeding that scope.[34]

Mr. Good did not exercise governmental authority.[35] "In special cases," the conduct of private entities may be attributable to the state "*provided that* ... the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs,

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[28] ILC, *State Responsibility*, *supra* note 19, art. 4(2).

[29] Brownlie, *State Responsibility*, *supra* note 16, at 136.

[30] *Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, 101-2 (1987).

[31] *Compromis*, paras. 13, 16.

[32] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 91.

[33] *See, e.g.*, *Scott v. Davis* (2000) 204 C.L.R. 333, 346 (Austl.); *Canadian Pacific Railway Co. v. Lockhart* [1942] A.C. 591, 599 (citing *Salmond on Torts* 95 (9th ed. 1936)); *Momoivalu v. Nauru Air & Shipping Agency*, Civ. Action No. 819 of 1985 (High Ct. of Fiji at Suva, 1992); *Michael John Bottomley v. Todmorden Cricket Club*, 2004 P.I.Q.R. P18 (C.A. 2003) (U.K.); *Gass v. Virgin Islands Telephone Corp.*, 311 F.3d 237, 240-41 (3d Cir. 2002). *See also* Restatement (Second) of Torts, § 409 [hereinafter Restatement of Torts].

[34] *See supra* note 33.

[35] ILC, *State Responsibility*, *supra* note 19, art. 5.

and the conduct of the entity relates to the exercise of the governmental authority concerned"[36] (emphasis added). Though naval officers also were used, piloting private ocean vessels is not "normally exercised by state organs."[37] It is also not inherently public in character, as would be the conduct of a private militia employed in interstate combat.[38] As a courtesy, Raglan put at the disposal of private ships individuals skilled at navigating its archipelagic waters. Raglan did not confer governmental authority upon those individuals. Mr. Good was at no point operating on Raglan's behalf.

B. <u>The illegal conduct of Mr. Good was not under Raglan's direction or control</u>

The illegal acts of Mr. Good are not attributable to Raglan under a theory of direction or control. Individual conduct can be so attributed under ILC Article 8 if the person is "in fact acting on the instructions of, or under the direction or control of," the state.[39] Attributing conduct in this way requires a "specific factual relationship" between the person and the state.[40] "In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way."[41] A state is responsible for all actions it explicitly authorizes,[42] but can only be responsible under Article 8 for the *specific operation* that it instructed, directed or controlled. The conduct to be

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[36] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 92.

[37] *Id.* at 92.

[38] *See* Brownlie, *State Responsibility*, *supra* note 16, at 160; ILC, *Commentaries on State Responsibility*, *supra* note 23, at 92.

[39] ILC, *State Responsibility*, *supra* note 19, art. 8.

[40] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 104.

[41] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 108.

[42] *See, e.g.*, *Earnshaw and Others: The Zafiro*, 6 R.I.A.A. 160 (U.K.-U.S. 1925); *Stephens*, 4 R.I.A.A. 265, 267 (U.S.-Mex. Gen. Claims Comm'n 1927).

attributed must be an "integral part of that operation."[43] Raglan clearly did not instruct or direct Mr. Good to commit acts of armed robbery, and these acts cannot reasonably be considered "an integral part" of the operation of piloting *The Mairi Maru.*

The concept of control is more complex, and is also lacking here. This Court closely considered the concept in the *Nicaragua* case.[44] Though it found the United States to be generally responsible for the *contras*, this was insufficient to justify the attribution of all illegal conduct of such operatives on the basis of control. A "high degree of dependency" alone was not sufficient.[45] To impart responsibility, the United States must have either expressly directed the acts or possessed effective control over the paramilitary operations in the course of which they were committed.[46]

Raglan had no such effective control over Mr. Good's illegal acts. Mr. Good did not commit them under the direct command of any Raglanian officer, nor is there any evidence of Raglan's participation in his illegal conduct. Indeed, Raglan was unaware of such activity until two days after it occurred.[47]

C. Assuming, arguendo, Mr. Good is an agent of Raglan, his conduct is not attributable to it because it was neither within the scope of his employment nor under the apparent authority of Raglan

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[43] ILC, *Commentaries on State Responsibility, supra* note 23, at 104.

[44] *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 14.

[45] *Id.* at 51.

[46] *Id.* at 51.

[47] *Compromis*, para. 20.

States may sometimes be responsible for the unauthorized or *ultra vires* acts of state entities.[48] Whether the illegal conduct was performed in an official capacity is the central issue.[49] "Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is *so removed from the scope of their official functions* that it should be assimilated to that of private individuals, not attributable to the state"[50] (emphasis added). There is hardly conduct farther removed from safely piloting a ship than the illegal acts of Mr. Good. The distinction between official and private conduct sets apart isolated instances, such as this, of "outrageous conduct on the part of persons who are officials."[51] The strict rules of agency do not apply when such outrageous conduct occurs,[52] and the "mere recognition of a link of factual causality"[53] does not generate state responsibility.

Mr. Good's illegal acts were not committed in his official capacity as an agent of Raglan. Determining one's official capacity is analogous to determining the scope of employment for purposes of vicarious liability in common law systems.[54] Accordingly, illegal conduct should be attributable to the state when carried out either with express state authority or when it involves

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[48] ILC, *State Responsibility*, *supra* note 19, art. 7; ILC, *Commentaries on State Responsibility*, *supra* note 23, at 99.

[49] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 102. *See also* Point V, No.2(b), Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, League of Nations Doc. C.75 M69 1929 V (1929), vol. III, 74.

[50] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 102.

[51] *Id.* at 102.

[52] Freeman, A., *Responsibility of States for Unlawful Acts of Their Armed Forces*, 18 (1957) [hereinafter Freeman].

[53] ILC, *Commentaries on State Responsibility*, *supra* note 23, 81.

[54] Brownlie, *State Responsibility*, *supra* note 16, at 37-38, 148.

"unauthorized acts that are so connected with acts that the employer *has* authorized that they may rightly be regarded as modes—although improper modes—*of doing what has been authorized*"[55] (emphasis added). The courts of many states employ the same test.[56]

Raglan submits that this test be applied here and that relevant international case law supports such an application. In the *Mallén* case, a deputy constable twice attacked a man for reasons of personal revenge. The first, merely a private assault on the street, was not attributable to the state. During the second, however, the constable committed the assault in the course of arresting and imprisoning the man. The tribunal held the state responsible in this instance. Only the second personally motivated attack was committed as a mode of exercising apparent state authority.[57]

The *Caire* and *Youmans* cases both address illegal conduct like the second attack in *Mallén*. In the former, where Mexican officials ordered the shooting of a man when their demands for money went unsatisfied, those officials exercised their authority wrongfully. The tribunal attributed their actions to the state on the basis that, in carrying out the killing specifically, the officials had purportedly acted under the color of law.[58] If the act had not been a mode of fulfilling their official functions, the state would not have been responsible.[59] Also

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[55] *Bazley v. Curry*, [1999] 2 S.C.R. 534 (Can.) (quoting *Canadian Pacific Railway Co.*, *supra* note 33, at 599).

[56] *Pettersson v. Royal Oak Hotel Ltd.*, [1948] N.Z.L.R. 136. *See also Poland v. John Parr & Sons* [1927] 1 K.B. 236 (U.K.); *Warren v. Henleys Ltd.* [1948] 2 A.E.R. 935 (U.K.); *Daniels v. Whetstone Entertainments Ltd.* [1962] 2 Lloyd's Rep. 1 (U.K.); *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*, [1974] 1 W.L.R. 1082 (P.C.) (U.K.); *Kofowei v. Siviri, et al.*, [1983] PNGLR 449 (Papua N.G.).

[57] *Mallén*, 4 R.I.A.A. 173, 174-77 (U.S.-Mex. Gen. Claims Comm'n 1927).

[58] *Caire*, 5 R.I.A.A. 516 (Fr.-Mex. Claims Comm'n 1929).

[59] *Id.* at 531.

distinct from the case at hand is the *Youmans* case, where armed officers sent to quell mob violence directed at three foreigners instead shot the men they were sent to protect. There, not only did the state violate its obligation to protect aliens from harm, the officials acted under the direct supervision of a commanding officer. The officials' improper conduct therefore took place under the apparent authority of the state.[60]

In contrast, there is no evidence that Mr. Good ever presented himself as an agent of Raglan.[61] Upon reaching the ship and revealing the explosive device, he effectively abandoned his official duties. At that point, there is affirmative evidence that the ship's captain knew Mr. Good was not acting under Raglanian authority but for private, criminal ends.[62] Unlike in *Caire* and *Youmans*, his illegal acts were not carried out under any apparent authority of Raglan. While Mr. Good may have used state-provided means, this alone is insufficient to hold Raglan responsible.[63]

His *ultra vires* conduct was not merely an improper mode of carrying out otherwise authorized acts. An unauthorized mode is still an "act performed ostensibly in the interest of the State (*acte de fonction*)."[64] Mr. Good's illegal conduct constituted the precise evil he was sent to prevent. The ship's captain could not have reasonably believed Mr. Good was acting under Raglan's authority. Such criminal acts did not fall within Mr. Good's limited scope of authority

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[60] *Youmans*, 4 R.I.A.A. 110, 116 (U.S.-Mex. Gen. Claims Comm'n 1926).

[61] *Compromis*, para. 16.

[62] *Id.* para. 17.

[63] [1975] 2 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/SER.A/1975/Add.1 (76.V.4).

[64] Freeman, *supra* note 52, at 30.

to pilot a private ship, and they cannot be attributed to Raglan under international law.[65] Raglan does not bear responsibility for the wreck of *The Mairi Maru* and does not owe Appollonia any compensation for the damage incurred.

III. Raglan did not violate any obligation owed to Appollonia under international law in scuttling *The Mairi Maru*

A. Raglan was legally entitled to scuttle *The Mairi Maru* pursuant to its rights under conventional and customary international law

The Convention on the Prevention of Marine Pollution ("London Convention") requires Raglan to cooperate in the prevention of such pollution and to prohibit the dumping of any such wastes within their jurisdiction.[66] While radioactive material such as MOX is covered under the London Convention,[67] and the scuttling of ships is a means of prohibited dumping,[68] the Convention provides *explicitly* for applicable exceptions. Article V stipulates that prohibitions on dumping shall not apply "in any case which constitutes a danger to human life . . . if dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur."[69]

Upon discovering the wreck, Raglan engaged in recovery efforts for over one week. Raglan sequestered survivors and attempted to isolate the radioactive hazard.[70] Imminent and significant changes in weather patterns threatened to spread the damage to inhabited islands of

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[65] ILC, *State Responsibility*, *supra* note 19, art. 2.

[66] The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 Dec. 1972, art. IV(1), 1046 U.N.T.S. 138 [hereinafter London Convention].

[67] *Id.* Annex I, para. 6.

[68] *Id.* art. III(1)(a)(2).

[69] *Id.* art. V(1).

[70] *Compromis*, paras. 20-21.

the Raglanian archipelago.[71] It being impossible to prevent the further spread of contamination without scuttling *The Mairi Maru*,[72] Raglan's conduct falls squarely within the provided exception. Scuttling was the only way to avert serious harm to human life.[73] Prior to scuttling, Raglan secured the MOX canisters and fulfilled its duty to minimize hazards to human and marine life.[74]

Raglan's right to intervention under customary international law further supports the lawfulness of scuttling the ship. The affirmative right of self-protection arises out of the general practice of states and not merely from the right of self defense.[75] Courts applied the right to intervene just outside a state's maritime jurisdiction as early as 1804.[76] A rule of international law now exists "which permits a coastal State to make reasonable assertions of . . . control in areas of the high seas contiguous to [areas of its jurisdiction] in order to protect vital interests [in those areas]."[77] The *Torrey Canyon* incident proved a seminal event in this area of international law. There, the United Kingdom bombed a wrecked oil tanker off of its coast to prevent

[71] *Id.* para. 21.

[72] *Id.* para. 24.

[73] London Convention, *supra* note 66, art. V(1).

[74] *Id.*

[75] Bowett, D.W., *Self-defense in International Law*, 105 (1958). *See also* Utton, A., "The Arctic Waters Pollution Prevention Act and the Right of Self-protection," *in International Environmental Law* (Teclaff and Utton eds., 1974); Van Dyke, J., "The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials," 33 Ocean Dev. & Int'l Law 77 (2002) [hereinafter Van Dyke, "Legal Regime"].

[76] *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 2 L.Ed. 249 (1804).

[77] Hydeman and Berman, *International Control of Nuclear Maritime Activities* 236 (1960).

continued environmental damage to its territorial waters.[78] The event's aftermath led directly to the International Convention on Intervention on the High Seas, and the following Protocol.[79] The international community's ready acceptance of these treaties confirms the existence of a customary international law establishing the right of intervention against vessels threatening coastal pollution.[80] Finally, Article 221 of UNCLOS specifically protects states' right under international law to take extraterritorial measures to protect their coasts and related interests from damage from pollution.[81]

The customary right is thus well established,[82] and comports with the international jurisdictional principles of objective territoriality and the effects doctrine.[83] The principle does

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[78] *See* Smith, B., *State Responsibility and the Marine Environment*, 219 (1988) [hereinafter Smith].

[79] International Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 Nov. 1969, 970 U.N.T.S. 211; Protocol Relating to Intervention on the High Seas in Cases of Substances Other than Oil, 2 Nov. 1973, 1313 U.N.T.S. 3.

[80] *See* Churchill, R.R. and A.V. Lowe, *The Law of the Sea*, 262 (2d ed. 1991). *See also* Nadelson, R., "After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea," 15 Int'l J. Marine & Coastal L. 193, 205 n.68 (2000) [hereinafter Nadelson].

[81] UNCLOS, *supra* note 2, art. 221(1).

[82] *See* Goldie, "A General View of International Environmental Law: A Survey of Capabilities, Trends, and Limits," *in Académie de Droit International Colloque: The Protection of the Environment and International Law*, 47 (1973) [hereinafter Goldie]; Ago, Eighth Report on State Responsibility, [1979] 2 Y.B. Int'l L. Comm'n 3, 51, U.N. Doc. A/CN4/318/1979/Add. 1-4; Apollis, L'Emprise maritime de l'état côtier 222, 224 (1981).

[83] *See Case of the S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 [hereinafter *S.S. Lotus*]. *See also* Damrosch, et al., *International Law*, 1096 (2001 4th Ed.).

not grant states *carte blanche* in interpreting what interests are essential.[84] States must take only measures proportional to the threat concerned and to any resulting harm to other states.[85]

Raglan's actions were proportional to the threat to both territory and population, particularly given the immediacy created by pending weather changes.[86] The scuttling of *The Mairi Maru* was lawful under conventional and customary international law. Not being internationally wrongful, it was not a violation of any obligation owed to Appollonia.

B. Raglan's affirmative duty to protect the marine environment obligated Raglan to scuttle *The Mairi Maru*

Article 192 of UNCLOS codifies the obligation under customary international law to protect and preserve the marine environment.[87] Article 194 stipulates that states shall take those measures "necessary" in fulfilling that obligation, and to use "the best practicable means at their disposal."[88] Scuttling *The Mairi Maru* was a necessary and good-faith effort to comply with this obligation. Indeed, Raglan would have been vulnerable to a claim of failure of due diligence in preventing marine pollution if it had not promptly reacted to the situation.[89]

Moreover, Appollonia violated this same duty to protect the marine environment. As the flag state of *The Mairi Maru*,[90] and given its direct involvement in shipping and receiving the

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[84] *See* Goldie, *supra* note 82, at 47.

[85] Smith, *supra* note 78, at 221.

[86] *See* supra, section II(A).

[87] UNCLOS, *supra* note 2, art. 192.

[88] *Id.* art. 194(1).

[89] Smith, *supra* note 78, at 251.

[90] UNCLOS, *supra* note 2, art. 217.

MOX,[91] Appollonia's failure even to attempt to exercise control over the wreck and the resultant harm constitutes a failure of due diligence. Even if Appollonian interests were harmed by Raglanian conduct, this Court has explicitly recognized an injured state's duty to mitigate damages resulting from that harm.[92] At no point during the period following the wreck did Appollonia make any attempt to contain or mitigate the damage or assist Raglan in its efforts.[93]

C. Assuming, *arguendo*, this Court finds the scuttling of *The Mairi Maru* to be unlawful, Raglan did not violate any international obligation owed to Appollonia because a condition of necessity precludes the wrongfulness of its conduct

ILC Article 25 explicitly precludes wrongfulness in those cases where an act "not in conformity with an international obligation"[94] is necessary. The principle is well-established and excuses the performance of an international obligation.[95] In the *Caroline* incident, Britain used the concept to justify its incursion into the territory of the United States and attack on an American-owned ship poised to harm British interests in Canada.[96] Of even greater import is the Russian government's unilateral ban on sealing in an area of the high seas. Russia used the justification of necessity to protect an essential, yet extraterritorial, interest in the natural

[91] *Compromis*, para. 5.

[92] *Gabčíkovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. 7, 55 [hereinafter *Gabčíkovo-Nagymaros*].

[93] *Compromis*, paras. 20, 24.

[94] ILC, *State Responsibility*, *supra* note 19, art. 25(1).

[95] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 152-53.

[96] *Id.* at 196.

environment.[97] The *Torrey Canyon* incident further supports the claim and led to its codification in the London Convention to cover cases exactly as that which faced Raglan.[98]

The validity of a claim of necessity is not affected by the legal origins of the obligations allegedly breached.[99] This Court expressly accepted the principle's existence in the *Gabčíkovo-Nagymaros Project* case.[100] The judgment also elaborates upon the conditions set out in Article 25: the interests safeguarded must be "essential," the peril "grave and imminent," and the interests of other states not seriously impaired.[101]

Raglan's conduct meets all of these criteria required to preclude wrongfulness. While necessity applies only in exceptional circumstances,[102] the circumstances here are precisely that. The protection of nationals and territory are essential state interests. The impending spread of MOX to Raglan's inhabited coastline constituted a grave and imminent threat to that interest. This Court noted that the imminence criterion "does not exclude . . . a 'peril' appearing in the long term [to] be held to be 'imminent' as soon as it is established . . . ."[103] Given the oncoming weather, the scuttling was the only means by which Raglan could protect its coasts and population. The certainty of peril was "clearly established on the basis of the evidence

[97] *Id.* at 197.

[98] Smith, *supra* note 78, at 219; London Convention, *supra* note 66, art. V(1).

[99] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 202.

[100] *Gabčíkovo-Nagymaros*, *supra* note 92, at 40-2. *See also Fisheries Jurisdiction* (Spain v. Can.), 1998 I.C.J. 431 [hereinafter *Fisheries*].

[101] ILC, *State Responsibility*, *supra* note 19, art. 25(1); *Gabčíkovo-Nagymaros*, *supra* note 92, at 46.

[102] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 195.

[103] *Gabčíkovo-Nagymaros*, *supra* note 92, at 42.

reasonably available at the time."[104] As weather currents directed the contamination toward Raglan, the evidence at the time could only be reasonably interpreted to pose a direct and immediate threat. Finally, the essential interests protected outweighed the potential harm to the interests of other states.[105] While Appollonia's interests were affected detrimentally, it cannot seriously be contended that the protection of human life and environmental well-being do not easily outweigh minor property loss.

Raglan recognizes that a state may not invoke such a necessity claim if it is found to have contributed to the harm it seeks to avoid,[106] and relies on its submissions above to preclude any finding of such responsibility.

IV. Appollonia violated its duty to notify Raglan of its MOX shipments under international law

A. UNCLOS requires that Appollonia abide by IAEA regulations requiring notification of its MOX shipments

Notice under the customary regime of UNCLOS is a logical necessity. Article 22(2) gives states the right to confine ships carrying nuclear materials to particular sea lanes established for navigational safety.[107] To exercise this right, coastal states must be aware that a ship carrying nuclear material is about to enter their territorial sea.

Moreover, UNCLOS Article 23 requires that "ships carrying nuclear . . . substances [in innocent passage] shall . . . observe special precautionary measures established for such ships by

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[104] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 203.

[105] *Gabčíkovo-Nagymaros*, *supra* note 92, at 46.

[106] *Id.* at 41.

[107] UNCLOS, *supra* note 2, art. 22(2).

international agreements."[108] The IAEA, whose safety regulations[109] are essential guidelines for regulating nuclear material, has called for member states to adopt its transportation standards in domestic law.[110] Treaties reflecting custom confer greater legal standing on such regulations.[111] The 1958 High Seas Convention requires states to take IAEA regulations into account to prevent radioactive pollution of the seas,[112] as does UNCLOS. By virtue of its IAEA membership and customary international law, Appollonia must abide by IAEA regulations on the transport of nuclear material.

The IAEA has promulgated two applicable regulations. The first advises shipping and receiving states to inform transit states and "secure[e] in advance their cooperation and assistance for adequate physical protection measures and for [potential] recovery actions."[113] The second requires the consignor, seven days prior to a shipment of nuclear material, to "notify the competent authority of each country through or into which the consignment is to be transported."[114] Appollonia has abided by neither.

An even higher standard of care is required in archipelagic waters than in ordinary innocent passage. UNCLOS Article 39(2)(b) requires ships in archipelagic sea lanes to comply

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[108] *Id.* art. 23.

[109] Statute of the International Atomic Energy Agency, 26 Oct. 1956, art. IX(I)(3), 276 U.N.T.S. 3.

[110] Szasz, P., *The Law and Practice of the International Atomic Energy Agency*, 682 (1970).

[111] *Id.* at 682-83.

[112] *Id.* ; High Seas Convention, *supra* note 1, art. 25(2).

[113] The Physical Protection of Nuclear Material and Nuclear Facilities, IAEA Doc. INFCIRC/225/Rev.4, para. 4.2.6.3 (1999).

[114] IAEA Regulations for the Safe Transport of Radioactive Material, IAEA Doc. No. TS-R-1 (ST-1, Revised), paras. 557-58, (1996).

with "*generally accepted* international regulations, procedures and practices for the prevention, reduction and control of pollution from ships" (emphasis added).[115] Even if IAEA regulations are deemed non-binding under UNCLOS Article 23, they must apply in the current circumstances. Indeed, it has been suggested that vessels must comply with IAEA safety provisions during transit passage notwithstanding flag state membership.[116]

B. Appollonia owes Raglan a duty to notify because of the duty to prevent harm

The maxim *sic utere tuo, ut alienum non laedas* requires that states prevent harm to other states.[117] This Court has confirmed states' obligation under international law "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."[118] Moreover, this principle of prevention entails a duty both to warn generally of danger as well as to notify specifically those who may be in harm's way.[119] The *Lac Lanoux* arbitration affirmed this customary duty as part of a greater duty to negotiate in good faith with potentially affected states.[120]

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[115] UNCLOS, *supra* note 2, arts. 54, 39(2)(b).

[116] Nadelson, *supra* note 80, at 210.

[117] Boyle, A., "Nuclear Energy and International Law: An Environmental Perspective," 1989 Brit. Y.B. Int'l L. 258, 269.

[118] *Legality of the Threat or Use of Nuclear Weapons* 1996 I.C.J. 226, 241-42 (advisory opinion). *See also Gabčíkovo-Nagymaros, supra* note 92, at 41.

[119] *Corfu Channel, supra* note 15, at 22.

[120] *Lac Lanoux Arbitration*, 12 R.I.A.A. 285, 289, 315 (Fr.-Spain 1957) [hereinafter *Lac Lanoux*].

Treaty practice indicates widespread acceptance of the customary duty to notify.[121] States are required to "take all appropriate measures to prevent [or minimize the risk of] significant transboundary harm."[122] Significant risk is defined, *inter alia*, as a "low probability of causing disastrous transboundary harm."[123] The associated risks of transporting nuclear material are inherently included within this definition. The ILC notes that "[t]he requirement of notification is an indispensable part of any system designed to prevent" such harm.[124]

In 1972, the Stockholm Declaration codified the prevention principle.[125] The General Assembly subsequently approved this principle and called for the sharing of information "with a view to avoiding significant harm."[126] This resolution was adopted without opposition,[127]

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[121] *See, e.g.*, Convention on Long Range Transboundary Air Pollution, 13 Nov. 1979, art. 5, 1302 U.N.T.S. 217; Convention on the Transboundary Effects of Industrial Accidents, 17 Mar. 1992, arts. 3, 10, 2105 U.N.T.S. 460; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 Mar. 1992, art. 13, 31 I.L.M. 1312 [hereinafter TWIL Convention].

[122] *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, arts. 3, 8, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *Transboundary Harm*].

[123] ILC, *Transboundary Harm, supra* note 122, art. 2(a); *Commentaries to the Articles on Prevention of Transboundary Harm from Hazardous Activities*, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 381, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *Transboundary Harm Commentaries*].

[124] ILC, *Transboundary Harm Commentaries, supra* note 123, at 406. *See also* Restatement of Foreign Relations, *supra* note 3, §603 cmt. e.

[125] Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, princ. 21, U.N. Doc. A/CONF.48/14 (1972) [hereinafter Stockholm].

[126] G.A. Res. 2995, U.N. GAOR, 27th Sess., U.N. Doc A/RES/2995 (1972); Partan, D., "The 'Duty to Inform' in International Environmental Law," 6 B.U. Int'l L.J. 43, 47 (1988).

[127] *See* Sohn, L., "The Stockholm Declaration on the Human Environment," 14 Harv. Int'l L.J. 423, 502 (1973).

indicating the customary nature of these duties.[128] The 1994 Rio Declaration went farther, requiring states to "provide prior and timely notification ... to potentially affected States [of] activities that may have a significant adverse transboundary environmental effect and [to] consult with those States at an early stage and in good faith."[129]

The potential transboundary harm that could result from a nuclear accident is enormous. The loss of life and severe environmental damage that bring the parties before this Court is but one example.[130] Because this disaster was foreseeable,[131] Appollonia was at least required to take the preventative measures states take when shipping far less hazardous cargo.

C. Appollonia has a duty to notify Raglan according the precautionary principle

The precautionary principle requires states to engage in conduct with prudence and to take precautions to prevent harm even where the conduct's effects are scientifically uncertain.[132] In the *Gabcíkovo-Nagymaros Project* case, this Court expressly recognized the need to take precautionary measures with regard to environmental concerns.[133] Moreover, in the *Southern Bluefin Tuna* case, the International Tribunal for the Law of the Sea implicitly applied the

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[128] Brownlie, I., *Principles of Public International Law*, 14 (3d ed. 1979) [hereinafter Brownlie, *International Law*].

[129] Rio Declaration of the U.N. Conference on Environment and Development, 14 June 1992, princ. 19, U.N. Doc. A/CONF.151/26/Rev.1(Vol.I) [hereinafter Rio].

[130] *Compromis*, paras. 20-21.

[131] *See, e.g.*, Van Dyke, J., "Sea Shipment of Japanese Plutonium under International Law," 24 Ocean Dev. & Int'l Law 399, 399 (1993).

[132] Rio, *supra* note 129, princ. 15; ILC, *Transboundary Harm Commentaries*, *supra* note 123, at 415.

[133] *Gabčíkovo-Nagymaros*, *supra* note 92, at 68.

principle in granting relief to Australia and New Zealand, who argued for its application as customary law.[134]

Extensive treaty law recognizes the concomitant duties stemming from the precautionary principle.[135] Customary law of the sea requires states to take "all measures . . . necessary to prevent, reduce and control pollution of the marine environment from any source, using . . . the best practicable means at their disposal and in accordance with their capabilities."[136] It also requires ships carrying nuclear materials to take "special precautionary measures."[137]

State practice overwhelmingly supports applying the precautionary principle in this instance. At a minimum, this principle implies a duty to notify potentially affected states prior to shipping nuclear material. Both international[138] and regional[139] agreements impose this

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[134] *Southern Bluefin Tuna* (Austl. And N.Z. v. Japan), 38 I.L.M. 1624 (1999). *See also* Marr, S., "The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources," 11 Eur. J. Int'l L. 815, 826-27 (2000).

[135] Vienna Convention for the Protection of the Ozone Layer, 22 Mar. 1985, art. 2, 1513 U.N.T.S. 323; Consolidated Version of the Treaty Establishing the European Community, 10 Nov. 1997, art. 174(2), 1997 O.J. (C 340) 2; Bamako Convention on the Ban of the Import and the Control of Transboundary Movement of Hazardous Wastes within Africa, 29 Jan. 1991, art. 4(3), 30 I.L.M. 773 [hereinafter Bamako Convention]; TWIL, *supra* note 121, art. 5(a); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal 1 Oct. 1996 (not yet in force), art. 8(3), *available at* http://www.unepmap.gr/pdf/hazardous.pdf (last visited 16 Jan. 2005) [hereinafter Izmir Protocol]. *See also* ILC, *Transboundary Harm Commentaries*, *supra* note 123, at 415.

[136] UNCLOS, *supra* note 2, art. 194(1).

[137] *Id.* art. 23.

[138] OECD Decision-Recommendation of the Council on Transfrontier Movements of Hazardous Waste, 1 February 1984, princ. 5.1. OECD Doc. C(83)180/Final; Convention on the Physical Protection of Nuclear Material, 23 Feb. 1987, art. 4(5), 1456 U.N.T.S. 101; Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal, 22 Mar. 1989, arts. 6, 7, 1673 U.N.T.S. 125 [hereinafter Basel Convention].

[139] Council Directive on Shipments of Radioactive Waste Between Member States and into and out of the Community, 3 Feb. 1992, art. 4, Council Directive 92/3, 1992 O.J. (L 35) (Euratom)

requirement. Nearly thirty states have adopted legislation or supported declarations requiring notification of hazardous shipments through their EEZs or territorial seas.[140] Moreover, source states have disclosed their planned routes and consulted with transit states regarding these shipments.[141]

The nearly universal practice of requiring environmental impact assessment (EIA) also supports the duty to notify and share information with affected states.[142] There is no evidence that Appollonia undertook an EIA prior to its shipments of MOX. A federal court in the United States has explicitly applied the law of EIA to shipments of MOX.[143] Raglan urges this Court to do the same.

Regardless of the foreseeability of the potential harm, Appollonia had a duty to take "effective measures to prevent environmental degradation."[144] Appollonia did not notify Ragan and is in breach of this duty.

[hereinafter Council Directive]; Bamako Convention, *supra* note 135, art. 6; Izmir Protocol, *supra* note 135, art. 6.

140 *See* Marr, S., *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law*, 1, 197-99 (2003) [hereinafter Marr, *Precautionary Principle*]; Hakapää, K. and E. J. Molenaar, "Innocent Passage – Past and Present," 23 *Marine Policy* 131, 142.

141 *See* Van Dyke, "Legal Regime," *supra* note 79 at 78, 85; Molenaar, E., "Navigational Rights and Freedoms in a European Regional Context," in *Navigational Rights and Freedoms and the New Law of The Sea*, 22, 30 (Rothwell & Bateman, eds. 2000) [hereinafter Molenaar]; Marr, *Precautionary Principle*, *supra* note 140, at 188.

142 Knox, J. "The Myth and Reality of Transboundary Environmental Impact Assessment," 96 Am. J. Int'l L. 291, 297 (2002). *See, e.g.*, Convention for the Protection of the Marine Environment of the Wider Caribbean Region, 24 Mar. 1983, 22 I.L.M. 227; Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, 4 Apr. 1978, 1140 U.N.T.S. 133; Convention on Environmental Impact Assessment in a Transboundary Context, 25 Feb. 1991, 30 I.L.M. 800; UNCLOS, *supra* note 2, arts. 205, 206.

143 *Hirt v. Richardson*, 127 F.Supp.2d 833, 843 (W.D.Mich. 1999).

144 *Rio*, *supra* note 129, princ. 15.

D. General notification of MOX shipments is not sufficient, Appollonia owed Raglan a duty to notify of each MOX shipment

The purpose of the duty to notify is to minimize the risk of harm. Had Appollonia notified Raglan of specific shipments, Raglan could have enhanced both its own security and that of the MOX by preparing for potential emergencies and ensuring that *The Mairi Maru* traveled along special sea lanes accompanied by naval escorts.

This Court recognized the importance of specific notification in the *Corfu Channel* case.[145] The ILC clearly envisions direct notification between states, in addition to notification of international agencies.[146] IAEA regulations call for specific notification of each shipment of nuclear material.[147] And, according to UNCLOS Article 199, states logically require notification to "jointly develop . . . contingency plans for responding to pollution incidents."[148] It is therefore clear that Appollonia may not claim that an IAEA report, which itself criticized Appollonia's failure to notify Raglan, constituted sufficient notice of its MOX shipments.

V. Appollonia violated its duty to obtain consent from Raglan

The need to take precautionary measures to protect the environment encompasses a duty to obtain consent from affected parties in extreme circumstances. Though the *Lac Lanoux* tribunal held such a duty had *not yet* been established,[149] Raglan contends that the current case requires a reassessment of this right. Most cases in this area involve transboundary land

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[145] *Corfu Channel, supra* note 15, at 22

[146] ILC, *Transboundary Harm, supra* note 122, art. 8; ILC, *Transboundary Harm Commentaries, supra* note 123, cmt. 421.

[147] *Supra* notes 113, 114.

[148] UNCLOS, *supra* note 2, art. 199.

[149] *Lac Lanoux, supra* note 120, at 380.

pollution where both the polluting state and the neighboring state suffer relatively equal harm from the relevant pollution.[150] In contrast, shipping ultra-hazardous material through another's territory is replete with issues of moral hazard. In this case, Raglan bore a severely disproportionate share of the risk for Appollonia's benefit, skewing Appollonia's incentives to minimize the risks of harm. Such misaligned interests have resulted in catastrophic damage to Raglan's economy and the environment; Appollonia merely lost its ship and cargo.

The need for consent in extraordinary circumstances is supported by the *Nuclear Tests* case, where Australia asserted that "each sovereign country" had "the right to decide" whether "its people shall be exposed to the effects of . . . radiation."[151] In granting Australia provisional relief, this Court essentially agreed.[152]

State practice also supports the right to consent to hazardous shipments through a state's territory and EEZ. Numerous treaties require the prior informed consent of transit states.[153] More than forty states either ban or require consent for transit shipments of hazardous material.[154] In 1995, Chile cited the precautionary principle as justification for preventing the *Pacific Pintail* from carrying nuclear waste through its EEZ.[155] In 2004, an Argentine court employed the principle when ruling that the Basel Convention authorized states to prevent the

[150] *See, e.g.*, *Trail Smelter*, *supra* note 15.

[151] *Nuclear Tests* (Austl. v. Fr.), ICJ Pleadings (1 *Nuclear Tests*) 187-88.

[152] *Nuclear Tests* (Austl. v. Fr.) (Interim Protection Order of June 22), 1973 I.C.J. 99, 105 [hereinafter *Nuclear Tests* (Interim Order)].

[153] Basel Convention, *supra* 138, art. 6(4); Bamako Convention, *supra* 135, art. 6(4); IAEA Code of Practice on the Control of Transboundary Movement of Radioactive Wastes, 21 Sept. 1990, princ. 5, 30 I.L.M. 556 (1991); Council Directive, *supra* note 139, art. 6.

[154] *See supra* note 140.

[155] Van Dyke, "Legal Regime," *supra* note 79, at 88.

transit of hazardous shipments through their EEZs.[156] Moreover, source states have responded to such acts by designing routes to attempt to mitigate transit state objections.[157]

It is well-established under international law that state consent may not generally be given implicitly;[158] Raglan never explicitly granted its consent to any MOX shipments.

VI. Appollonia is responsible for the damage resulting from its unlawful MOX shipment under a theory of fault

Having committed an internationally wrongful act by breaching its duties to notify and obtain prior consent, Appollonia is responsible for the damage it caused,[159] both "directly"[160] and "foreseeably."[161] Appollonia is obligated to compensate Raglan.

VII. Irrespective of the remoteness of the harm, Appollonia must compensate Raglan for its wrongful act on the basis of strict liability

Should this Court find the damage too remote under a fault-based theory, this Court should impose strict liability on the basis of Appollonia's breach of its obligation to notify Raglan. "The controlling state's noncompliance with a duty of prior information ... engage[s]

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[156] Van Dyke "Balancing Navigational Freedom with Environmental and Security Concerns," 2003 *Colo. J. Int'l Envtl. L. & Pol'y* 19, 21.

[157] *See* Molenaar, *supra* note 141, at 30; Marr, *Precautionary Principle*, *supra* note 140, at 188; Van Dyke, "Legal Regime," *supra* note 79 at 78, 85.

[158] Vienna Convention on the Law of Treaties, 23 May 1969, arts. 34-37, 1155 U.N.T.S 331 [hereinafter VCLT].

[159] ILC, State Responsibility, *supra* note 19, art. 1.

[160] *See In Re Polemis and Furness Withy & Co Ltd*, 3 K.B. 560 (1921) (U.K.).

[161] *See Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., (The Wagon Mound)*, 1 Lloyd's Rep. 1 (P.C. (Aus.) 1961). *See also* ILC, *Commentaries on State Responsibility*, *supra* note 23, at 227-28.

on its own the state's strict liability."[162] The inherent threat from ultra-hazardous substances warrants the imposition of strict liability when such a breach occurs.[163] The failure to notify Raglan is equivalent to a "guarantee"[164] from Appollonia that Raglan would be reimbursed for any harm.

VIII. Assuming, *arguendo*, that Appollonia owes Raglan no obligation of notice or consent, Appollonia is strictly liable

International law imposes liability upon a state "by reason of . . . having undertaken or permitted . . . an activity"[165] presenting "a risk of serious harm . . . which cannot be eliminated by the exercise of the utmost care."[166] Indeed, states have compensated each other when no wrong has been alleged in such incidents as the *Cosmos 954*,[167] *Juliana* tanker,[168] and *Fukuryu Maru*.[169] The preponderance of multilateral treaties adopting strict liability[170] for such diverse

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[162] Handl, G., "State Liability for Accidental Transnational Environmental Damage By Private Persons," 74 Am. J. Int'l L. 525, 557 (1980) [hereinafter Handl, "State Liability"].

[163] *Id. See also* Scott, A. and C.B. Bramson, "Draft Guiding Principles Concerning Transfrontier Pollution," *in Problems in Transfrontier Pollution*, 299, 304 (OECD, ed. 1972).

[164] Handl, "State Liability," *supra* note 162, at 559 n.156.

[165] Jenks, "Liability for Ultrahazardous Activities in International Law," 117 Recueil de Cours 99, 182 (1966) [hereinafter Jenks].

[166] Jenks, *supra* note 165, at 195.

[167] Letter from Dept. of External Affairs to the USSR Ambassador, reprinted in 18 I.L.M. 899, 907 (1979).

[168] Handl, "State Liability," *supra* note 162, at 547.

[169] O'Keefe, C., "Transboundary Pollution and the Strict Liability Issue," 18 Denv. J. Int'l L. & Pol'y 145, 177 (1990) [hereinafter O'Keefe].

[170] *See, e.g.*, Jenks, *supra* note 165, at 178.

activities as space exploration,[171] oil pollution,[172] and nuclear damage,[173] indicates states consensually adopt strict liability when the hazards are great.

Publicists are in general agreement. De Aréchaga noted: "If a nuclear test produces fall-out beyond the territorial limits of the State . . . [it] should be absolutely liable under the normal rules of State responsibility."[174] Further, Smith observed: "[E]ven publicists generally resistant to . . . strict liability . . . have acknowledged the responsibility of flag states for ultrahazardous conduct."[175] Indeed, Handl noted this standard was "a principle of present general international law."[176] In municipal law, strict liability has long been applied for ultra-hazardous activities.[177] Some municipal laws require "absolute" liability for nuclear damage and permit no defense.[178]

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[171] Convention on International Liability for Damage Caused by Space Objects, 29 Mar. 1972, 961 U.N.T.S. 187.

[172] International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, 973 U.N.T.S. 3.

[173] Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251; Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, reprinted in 57 Am. J. Int'l L. 268 (1963); Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255.

[174] De Aréchaga, J., "International Responsibility," *in Manual of Public International Law*, 533, 540 (M. Sorensen, ed. 1968).

[175] Smith, *supra* note 78, at 162-63. *See, e.g.*, Handl, G., "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited," 1975 Canadian Y.B. Intl. L. 156, 170 (1976).

[176] Handl, "State Liability," *supra* note 162, at 553. *See also* Kelson, John, "State Responsibility and the Abnormally Dangerous Activity," 13 Harv. Int'l L.J. 197, 242-43 (1972); Brownlie, *International Law, supra* note 128, at 285.

[177] *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (U.K.). *See also* Restatement of Torts, *supra* note 33, §519; O'Keefe, *supra* note 169, at 186 n.214.

[178] Law No. 68-943 of 30 Oct. 1968, J.C.P. 1968, III, No. 34776 (Fr.).

The international community also imposes strict liability for significant pollution.[179] The "polluter pays" principle has been recognized as a "general principle of international law."[180] International jurisprudence supports this contention, especially the *Trail Smelter*, *Lac Lanoux*, *Corfu Channel*, and *Gut Dam* cases.[181] The OECD encourages nations to implement the "polluter pays" principle in domestic regulation,[182] a directive widely followed.[183]

Accordingly, Appollonia is liable irrespective of fault. Knowingly shipping nuclear material through pirate infested water is an ultra-hazardous activity. Additionally, Appollonia failed to prevent "severe" pollution. Under both theories, Appollonia is strictly liable for the harm to the sandbar and surrounding waters. Such a finding comports with the general policies[184] behind strict liability and ensures that costs are born by those who profit from the ultra-hazardous activity.[185]

IX. Appollonia owes Raglan compensation for the injury to Raglanian industry and the costs of decontamination

179 Xue, *Transboundary Damage in International Law*, 304 (2004) [hereinafter Xue]; Smith, *supra* note 78, at 125-26.

180 1990 Convention on Oil Pollution Preparedness, Response and Cooperation, 30 Nov. 1990, Preamble, 30 ILM 733. *See, e.g.*, Single European Act, Feb. 17 & 28, 1986, art. 25, 19 Bull. Eur. Comm. Supp. (No. 2), at 5 (1986), 25 I.L.M 506 (1986).

181 *See, e.g.*, Springer, A., *The International Law of Pollution*, 133-34 (1983); Smith, *supra* note 78, at 112.

182 Birnie, P, "Protection of the Marine Environment—The Public International Law Approach," *in Liability for Damage to the Marine Environment*, 1, 9 (De la Rue, ed. 1993).

183 *See, e.g.*, Cass. civ., 15 Jun. 1972, D. 1973 312, note Michel Despax (Fr.); General Principles of the Civil Law of the People's Republic of China, art. 124; RS 814, 8 Oct. 1971, arts. 36(1), 36(4) (Switz.).

184 *First Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, para. 54, U.N. Doc. A/CN.4/402 (1986).

185 Handl, "State Liability," *supra* note 162, at 559.

In *Chorzów Factory*, the Court declared that "reparation must . . . wipe out all the consequences of the illegal act and re-establish the situation which would . . . have existed if that act had not been committed."[186] Appollonia's obligation to reinstate the *status quo ante* requires compensation for costs of environmental cleaning and damage to Raglan's economic interests.[187] "With regard to marine . . . areas [on the high seas], environmental damage is . . . confined to injury to natural resources that can be measured in [damage] suffered by other States, e.g. loss of tourism or damage to fishing industry, or in terms of the costs of removal and restoration."[188]

A. That Appollonia's acts or omissions occurred outside of Raglan's territory or EEZ is irrelevant to standing and compensation

"The principle *sic utere tue et alienum non laedas* is a feature of law both ancient and modern."[189] Firmly entrenched in international law,[190] the principle prohibits states from using or permitting the use of their territory to "unreasonably harm" the rights or "the *interests* of other states" (emphasis added).[191] In *Nuclear Tests*, Australia was granted provisional relief even

[186] *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (Ser.A) No.17, 47. *See also* Restatement of Torts, *supra* note 33, §903.

[187] Jenks, *supra* note 165, at 195.

[188] Xue, *supra* note 179, at 253.

[189] *Nuclear Tests* (Austl. v. Fr.) (Judgment), 1974 I.C.J. 253, 388 (dissenting opinion of Judge de Castro).

[190] *See, e.g.*, Stockholm, *supra* note 125, princ. 21; Rio, *supra* note 129, prin. 2; Restatement of Foreign Relations, *supra* note 3, §207; Iran Const., princ. 40.

[191] Magraw, D., "Transboundary Harm: The International Law Commission's Study of 'International Liability,'" 80 Am. J. Int'l L. 305, 308-9 (1986).

though France tested nuclear weapons 6000km away.[192] That Appollonia's acts occurred outside Raglan's EEZ is inapposite.

B. Raglan has standing to seek compensation from Appollonia

1. That the harm occurred outside Raglan's territory is irrelevant to standing and compensation

International law views ships bearing a nation's flag as "in the same position as national territory."[193] Harm from ships neatly fits into the *sic utere tue et alienum non laedas* principle. In *Corfu Channel*, although the harm to a British vessel occurred in Albania's territorial waters,[194] it was deemed an affront to English "territory." A better reading of the case suggests that the harm was to a legally recognized property or right, rather than to English territory.[195] This reading is in keeping with the earlier purposes of the law of state responsibility as relating to the protection of aliens. If a state wrongfully damages property belong to aliens in its territory, states have standing to recover compensation.[196] *A fortiori*, states have standing to recover when damage occurs on the high seas. Indeed, states may recover for damages to artificial structures, platforms, and pipelines[197] on the high seas, even though no state may claim

[192] *Nuclear Tests* (Interim Order), *supra* note 152, at 133.

[193] *S.S. Lotus*, *supra* note 83, at 25.

[194] *Corfu Channel*, *supra* note 15.

[195] UNCLOS, *supra* note 2, art. 89.

[196] *See, e.g.*, *Martini*, 10 R.I.A.A. 644 (Italy-Venez. 1930).

[197] UNCLOS, *supra* note 2, arts. 113, 114, 115.

sovereignty on the high seas.[198] Thus, standing does not relate to the locus of the harm. Rather, it is derived from each state's non-exclusive right to exploit the resources of the high seas.[199]

2. Raglan has standing because Appollonia breached an obligation owed to Raglan specifically

Appollonia had a duty to notify Raglan of its shipment of MOX and failed to do so. This duty was owed specifically to Raglan. As noted in *Barcelona Traction*: "only the party to whom an international obligation is due can bring a claim in respect of its breach."[200] In that case, this Court rejected Belgium's claim because the harm was to a Canadian company, not the Belgian nationals who happened to hold shares of this company.[201] In the present case, the harm was to Raglanian industry, and it was directly caused by a breach of obligation owed specifically to Raglan. Raglan's right to exploit the resources of the high seas was infringed, and Appollonia has the obligation to make full reparations. Raglan clearly has standing to bring its claim.[202]

3. Raglan has standing because Appollonia breached an obligation erga omnes

Appollonia breached its duty to prevent pollution to the marine environment.[203] The ILC provides that "an injured State [is entitled] to invoke the responsibility of another State if the obligation breached is owed to ... [a] group of States including that State, or the international

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[198] *Id.* art. 89.

[199] *Id.* art. 86.

[200] *Barcelona Traction Light & Power Co. Ltd* (Belg. v. Spain), 1970 I.C.J. 4, 32 (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 181-82) [hereinafter *Barcelona Traction*].

[201] *Id.*. *See also* Xue, *supra* note 179, at 248.

[202] ILC, *State Responsibility*, *supra* note 19, art. 42(a).

[203] UNCLOS, *supra* note 2, art. 194.

community as a whole, and the breach of the obligation . . . [s]pecially affects that State."[204] The ILC contemplated exactly the present situation in drafting article 42(b)(1): "[f]or example a case of pollution of the high seas in breach of article 194 of [UNCLOS] may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed."[205] As MOX is headed in the direction of Raglan's EEZ, slowed only by Raglan's prudent scuttling, Raglan has standing. Further, our rightful exploitation of the Norton Shallows was injured, resulting in a direct economic injury to Raglan.

Further, Judge Jessup noted in *South-West Africa* that "states are [sometimes] given a right of action without any showing of individual substantive interest as distinguished from the general interest."[206] Subsequently, this Court recognized the existence of obligations *erga omnes* in the *Barcelona Traction* case.[207] The international community recognizes certain obligations *erga omnes* that are owed to each state bilaterally.[208] A breach of this type of obligation would give rise to a cause of action for all states.[209] "The obligation of states to prevent harm to the high seas environment is properly characterized as lying within [this] subset of duties."[210]

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[204] ILC, *State Responsibility*, *supra* note 19, art. 42(b)(1).

[205] ILC, *Commentaries on State Responsibility*, *supra* note 23, at 299.

[206] *South West Africa* (Eth. and Liber. v. S. Afr.), 1966 ICJ 6, 388 (dissenting opinion of Judge Jessup).

[207] *Barcelona Traction*, *supra* note 200, at 32.

[208] *Nuclear Tests* (N.Z. v. Fr.), ICJ Pleadings (2 *Nuclear Tests*) 265-67.

[209] *Id.*

[210] Smith, *supra* note 78, at 97. *See also* Kirgis, F.L., "Standing to Challenge Human Endeavors That Could Change the Climate," 84 Am. J. Int'l L. 525 (1990); Restatement of Foreign Relations, *supra* note 3, §601(2)(b), Part VI, Introductory Note.

Because Appollonia has breached this obligation *erga omnes*, Raglan has standing to seek reparation.

C. Appollonia must compensate Raglan for its cleanup costs notwithstanding the nature of the harm

Awarding "costs of measures of reinstatement or restoration"[211] would accord with the principle of *restitutio ad integrum*.[212] Appollonia must restore the high seas to their condition prior to Appollonia's wrongful act.[213] Such cleanup is necessary so that Raglan may again economically exploit this area. The requested relief is the minimum required under the circumstances (i.e., it accords with the principle of proportionality),[214] and follows the lead taken by civilized nations domestically,[215] in treaties,[216] and in international incidents such as the *Mont-Louis*[217] and *Juliana*[218] incidents.

D. Appollonia must compensate Raglan for its lost income

"The ... principles of State responsibility" suggests "harm caused by contamination of resources [on the high seas] may ground a claim for economic loss."[219] The United States and

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[211] Xue, *supra* note 179, at 253.

[212] Stone, *The Gnat is Older than Man: Global Environment and Human Agenda*, 71 (1993).

[213] *See generally* Xue, *supra* note 179, at 215-57.

[214] *Com. of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652 (C.A.Puerto Rico 1980).

[215] *See, e.g.*, *Id.*; Romy, I., Les pollutions transfrontières des eaux: l'exemple du Rhin, 269, 301-9 (1990); 42 U.S.C. §9607.

[216] *See, e.g.*, Antarctic Mineral Resources Convention, 2 June 1988, 402 U.N.T.S. 71; International Convention on Salvage, 28 Apr. 1989, 1953 U.N.T.S. 193.

[217] Smith, *supra* note 78, at 251.

[218] Handl, "State Liability," *supra* note 162, at 547.

[219] Brownlie, I., "A Survey of International Customary Rules of Environmental Protection," *in International Environmental Law*, 4 (Teclaff and Utton eds., 1974).

Japan abided by the rule in the *Fukuryu Maru* incident, where Japan's high seas fishing interests were harmed.[220] The non-exclusivity of Raglan's rights does not bar Raglan's claim.

This Court has recognized the preferential rights of coastal states to high seas fisheries when the "economic well being" of that coastal state is in play.[221] Further, "as regards fisheries, the high seas are no longer the province of *laissez-faire*."[222] Under UNCLOS, coastal states must take into accounts the rights of states historically fishing on the high seas when straddling fish stocks are harvested,[223] and states fishing on the high seas may[224] and do[225] regulate high seas fisheries. That states may enter into regional agreements regulating fishing on the high seas, notwithstanding the consent regime of the Vienna Convention of the Law of Treaties,[226] is further evidence that Raglan's right to its historical fisheries is recognized. Raglan's claim is strengthened by the fact that historically only Raglan has exploited the area. Lastly, domestic cases (e.g., the "affaires des boues rouges"[227] and Exxon-Valdez cases[228]) and domestic

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[220] *Id. See also* Nanda, V., "The Establishment of International Standards for Transnational Environmental Injury," 60 Iowa L. Rev. 1089, 1098 (1975).

[221] *Fisheries, supra* note 100, at 34.

[222] T. Scovazzi, "The Applications of the United Nations Convention on the Law of the Sea in the Field of Fisheries: Selected Questions," *in* Annuaire de droit maritime et océanique, 201, 202 (1997) . *See also Fisheries, supra* note 100, at 31.

[223] UNCLOS, *supra* note 2, art. 63(2).

[224] UNCLOS, *supra* note 2, art. 118.

[225] *See, e.g.*, Balton, D., "The Bering Sea Doughnut Hole Convention: Regional Solution, Global Implications," *in Governing High Seas Fisheries*, 143 (Stokke, Ed. 2001).

[226] VCLT, *supra* note 158, arts. 34, 35.

[227] T.G.I. Bastia, 4 July 1985 (unpublished opinion) (Fr.).

[228] *In re Exxon Valdez*, 270 F.3d 1215, (C.A.9 2001).

statutes[229] have permitted recovery for commercial fishermen, notwithstanding the status of fish as *res nullius*. There, as here, pollution caused economic damage to non-exclusive fishing interests.

The principles applicable to fishing also apply to ecotourism. Raglan's ecotourism exploited living and non-living resources on the high seas in an environmentally-friendly way. That Raglan's economic activities did not consume such resources is irrelevant. Further, had Raglan built a structure on the Norton Shallows, or if they were part of Raglan's continental shelf,[230] then Raglan's claim clearly would be permissible.[231] Legally, Raglan's ability to recover its lost income should not rest on the fortuity of having built a dock.

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[229] *See, e.g.*, FF 1973 I 645, art. 51 (Switz.).

[230] UNCLOS, *supra* note 2, Part VI.

[231] Smith, *supra* note 78, at 252.

CONCLUSION AND PRAYER FOR RELIEF

For all the aforementioned reasons argued in this memorial, the Kingdom of Raglan respectfully requests that this honorable Court:

1) **DECLARE** that Raglan is not responsible for the attack upon *The Mairi Maru*;

2) **DECLARE** that Raglan fulfilled its international obligations in its response to piracy;

3) **DECLARE** that the scuttling of *The Mairi Maru* was not contrary to international law;

4) **DECLARE** that Appollonia breached its obligation to notify or obtain consent from Raglan;

5) **DECLARE** that Appollonia must compensate Raglan for the cost of decontaminating the Norton Shallows area and its lost income.

Respectfully submitted,

Team 128R