
IN THE INTERNATIONAL COURT OF JUSTICE

**THE CASE CONCERNING THE
VESSEL *THE MAIRI MARU***

2005

Republic of Appollonia

v.

Kingdom of Raglan

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Republic of Appollonia and the Kingdom of Raglan submit their differences concerning *The Mairi Maru* to this Court by Special Agreement, dated May 15, 2004, pursuant to article 40(1) of the Court's Statute. The parties have agreed to the contents of the Compromis submitted as part of the Special Agreement. In accordance with article 36(1) of the Court's Statute, each party shall accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.

QUESTIONS PRESENTED

1. Whether Raglan is responsible for the attack on *The Mairi Maru*.
2. Whether Raglan owes Appollonia compensation for any injury resulting from the attack on *The Mairi Maru*.
3. Whether Raglan violated any obligation owed to Appollonia under international law by scuttling *The Mairi Maru*.
4. Whether Appollonia violated international law by shipping MOX through Raglan's archipelagic waters without giving Raglan prior notification or receiving its consent.
5. Whether Appollonia is responsible for the damage to the Norton Shallows and surrounding waters.
6. Whether Appollonia must compensate Raglan for the injury to its fishing and tourist industries and the cost of decontaminating the area.

STATEMENT OF FACTS

The Kingdom of Raglan is a small, developing archipelagic nation lying roughly halfway between the Republic of Appollonia, a nuclear nation, and the Democratic Republic of Maguffin. In 1990, Appollonia discovered uranium deposits below its soil and developed a significant nuclear energy program. Following its construction of a nuclear reactor, Appollonia reached a “safeguards agreement” with the International Atomic Energy Agency (IAEA) regarding the operation of the plant in 1996. (Compromis ¶¶ 1, 3).

Appollonia’s nuclear reactor produced, as a by-product, a significant amount of plutonium, which can be used to make mixed oxide fuel (MOX). In 1997, Appollonia entered into a 5-year sales agreement with the Maguffin Atomic Recycling Company, Ltd. for the surplus MOX. Appollonia shipped the MOX via private carriers through the Raglanian Archipelago to Maguffin. (Compromis ¶¶ 4-5, 8).

From 1995 to 1999, several groups of technologically-advanced pirates routinely attacked ships in Raglan’s archipelagic straits. By 1998, the Insurers of Lading and Shipping Association (ILSA) recognized the danger presented by the attacks and issued, a “five-point warning,” (ILSA’s strongest warning) to insurers and re-insurers of ships traveling the archipelago. As a result, shipping traffic through the archipelago decreased dramatically. Appollonia, however, continued its MOX shipment through the archipelago. (Compromis ¶¶ 6-8).

In a July 1999 report, the IAEA criticized Appollonia’s transport of MOX, noting that Appollonia “gives no notice to . . . Raglan that MOX will be transported through [its] territorial waters or exclusive economic zones. MOX is shipped without adequate safeguards on private vessels through waters known to be frequented by pirates.” Appollonia responded that its navy

was ill-equipped to protect its MOX shipments, that the private carriers provided better security, and that the security of the shipments required secrecy. (Compromis ¶¶ 8-10).

To combat the continuing pirate attacks in its straits, Raglan announced its anti-piracy program in October 1999. The voluntary program provided requesting ship captains with a Raglanian naval officer to steer the ship through Raglan's archipelago. The naval pilot would maintain constant contact with the Raglanian navy, which could respond to an attack within 30 minutes. The program was highly successful: during the program's first two years, no vessel utilizing the program was attacked. In response to the reduction in attacks in the archipelago, ILSA reduced its alert level to a "four-point warning." By November 2001, the success of the piloting program created a demand that Raglan's navy was unable to meet with its own personnel. Raglan hired one hundred private contractors to supplement its program. (Compromis ¶¶ 11-13, Clarifications ¶ 9).

The Mairi Maru, a large, double-hulled ocean-going cargo ship, set sail for Maguffin on July 26, 2002, carrying several canisters of MOX. Only the Appollonian government, the IAEA, the captain and first officer of the vessel were aware of the shipment. A storm delayed *The Mairi Maru* several hours past its scheduled departure time, and it did not approach the archipelago until near dusk on July 27, 2002. The ship's captain radioed Raglan requesting a pilot. Shortly thereafter, one of Raglan's private contractors was transported to the ship by a privately-owned and operated vessel hired by the Raglanian navy. He arrived on the ship with two assistants and identified himself as Thomas Good. (Compromis ¶¶ 14-16, Clarifications ¶¶ 3, 9, 11).

Good boarded the ship on the high seas. *The Mairi Maru* entered Raglanian waters at 2200 hours. At 2300 hours, Good informed *The Mairi Maru*'s captain that he had explosives he would detonate unless the ship was surrendered to his control. The captain capitulated, and he

and the crew were locked in the ship's galley. Good took control of the vessel, navigating it to a location where he met with fellow confederates. Good's group removed all of the ship's navigation equipment, disabled the aft propeller shaft, and then disembarked, leaving *The Mairi Maru* to drift on a south-easterly course toward international waters. The MOX was left undisturbed in a locked hold. (Compromis ¶¶ 17-18, Clarifications ¶¶ 3, 11).

The next day, July 28, 2002, a storm pushed *The Mairi Maru* into the Norton Shallows, a region of uninhabited sandbars located 250 nautical miles from Raglan's archipelagic baseline and used exclusively by Raglan-incorporated firms for sport fishing and eco-tourism, which provide Raglan with more than 80 million Euro of tax revenue annually. *The Mairi Maru* ran aground in the Shallows. Its hull was breached, and the compartment containing the MOX canisters was ruptured, causing damage to the canisters. The canisters began to leak into the surrounding area, and over fifty kilograms of highly radioactive MOX pellets spilled out onto the sandbar and into the surrounding water. A Raglanian naval patrol boat spotted the wreckage on July 29, 2002. Upon arrival, the naval medical support team found several crew members dead, and the rest suffering from acute radiation syndrome. (Compromis ¶¶ 2, 19-20, Corrections ¶ 4, Clarifications ¶ 4).

Raglan's Prime Minister Robert Price notified the President of Appollonia, Judith Stark, that *The Mairi Maru* had crashed, and was leaking radioactive material, severely damaging the entire region. Further, impending storms threatened to spread the radioactive material toward Raglan's inhabited islands. Mr. Price noted that Appollonia failed to give Raglan notice of the MOX shipments, which he maintained violated Appollonia's duties as a member of the IAEA. Had notice been given, Raglan would have either denied *The Mairi Maru* access to the straits, or taken greater efforts to protect the ship and its cargo. Lastly, Mr. Price informed Appollonia that

Raglan expected Appollonia to pay for the cleanup of the area, and compensate Raglan for its lost tourism revenue. (Compromis ¶¶ 21, 22, 24, 25).

On August 4, 2002, Raglan announced its intention to sink the ship and the MOX to the ocean floor. Raglan maintained that scuttling *The Mairi Maru* was its only option to minimize the danger presented by the ship. Later that week, Raglan encased the MOX in canisters, towed *The Mairi Maru* to Sand Deep and sunk the vessel 9000 meters. (Compromis ¶¶ 21-24, Corrections ¶ 4, Clarifications ¶¶ 4, 12).

Appollonia responded, claiming it had met its obligations regarding the shipments, and that Raglan must bear responsibility “for the crash and its consequences.” Regarding the shipping, Appollonia maintained that Raglan was aware of the shipping, it did not breach its obligations as a member of the IAEA, and that Raglan has no standing to raise issues regarding IAEA obligations. (Compromis ¶¶ 25-29).

Regarding the scuttling, Appollonia insisted Raglan was responsible for the attack on *The Mairi Maru*, and that its negligence in screening pilots made Raglan liable for the loss of the ship, and harm to its crew. Appollonia also announced that it considered Raglan’s actions a violation of the London Convention. (Compromis ¶¶ 28-30)

Taking notice of the increased tension between the two nations, the Regional Organization of Nations (RON), in a July 1, 2003 session, called upon Raglan and Appollonia to bring this case before the International Court of Justice. The nations agreed, and the submissions of both parties followed. (Compromis ¶¶ 30-33)

SUMMARY OF PLEADINGS

I. Raglan incurred no liability for Thomas Good's attack on *The Mairi Maru* because no international obligation owing to Appollonia was breached. Piracy was codified as a crime under international law solely to provide states with an extraterritorial basis for jurisdiction over crimes that occurred on the high seas. As such, international law delineates no basis for a claim of piracy in a case such as this, where criminals hijack ships within sovereign waters. Additionally Raglan's successful anti-piracy program, with the full force of the Raglanian Navy behind it, met the general international law obligation of all states to cooperate fully in suppressing piracy. In any event, the hijacking of *The Mairi Maru* was in direct contravention of Good's duties as a safety officer and wholly outside Raglan's control. Because international law distinguishes between acts committed under a state's direction, and acts outside the scope of state control, refusing to hold states responsible for the latter, Good's actions cannot be attributable to Raglan.

II. Raglan acted reasonably and in accordance with international law in scuttling *The Mairi Maru*. Due to Raglan's treaty and customary international law obligations requiring protection of the marine environment, Raglan had no choice but to scuttle the vessel. Though the radiation-leaking ship already posed a grave threat to the Norton Shallows and surrounding waters, the impending rainy season threatened catastrophic exposure to the entire region. Cleanup was impossible. Although time was of the essence, Raglan abided by all applicable international obligations prior to and during the scuttling the vessel. Raglan's lack of alternatives in the matter justifies its actions under the necessity doctrine, which precludes wrongfulness where a state must take actions that may be considered unlawful in less demanding circumstances.

III. Appollonia violated international law by shipping MOX through Raglan's archipelago without providing prior notification of the transit. Raglan's right to require notification and/or

consent is consistent with the provisions governing navigational regimes and nuclear transport in the 1982 Convention on the Law of the Sea, widely recognized as a codification of international law. Further evidence of the right to require prior notification exists in the significant amount of domestic legislation that requires prior notification of ships carrying ultra-hazardous cargo, and, more importantly, in the number of shipping states that understand their legal obligation to comply with this legislation. Furthermore, regulations promulgated by the International Atomic Energy Agency require Appollonia to notify “pass-through” states like Raglan of the shipment of nuclear materials. Any claims that the secrecy of the transit was required for security purposes demonstrates Appollonia’s unabashed disregard not only for the safety of the region’s inhabitants but for the region’s entire eco-system.

IV. Raglan has standing to bring a claim for compensation for the cost of decontaminating the Norton Shallows and the injury to its fishing and tourism industries based on an *erga omnes* duty to protect the marine environment. Appollonia is liable to Raglan under several theories of liability. First, Appollonia violated its customary international legal obligation to prevent transboundary environmental harm. Second, international law recognizes a strict-liability system of fault for injury arising from ultra-hazardous activity, including the shipment of hazardous nuclear material. Lastly, even under a “due diligence” system of fault, Appollonia cannot plausibly maintain that it met its duty of general care to prevent transboundary environmental harm when it launched *The Mairi Maru* and its nuclear cargo without notifying Raglan of the ship’s contents.

PLEADINGS

I. RAGLAN IS NOT RESPONSIBLE FOR THE ATTACK ON *THE MAIRI MARU* AND OWES NO COMPENSATION FOR ANY RESULTING INJURY

A. Raglan met any obligation under international law to prevent piracy, and is not responsible for the attack and its aftermath.

Thomas Good's hijacking of *The Mairi Maru* was criminal and reprehensible. However, under international law, Raglan incurs no liability based upon Good's actions. Although pirates have long been considered *hostis humanis generis*,¹ the duty of nations regarding piracy is less obligatory than that term suggests. The 1932 Harvard Draft Articles on Piracy, which served as the foundation for the piracy sections of both the 1958 Geneva Convention on the High Seas (hereinafter 1958 Convention) and 1982 United Nations Convention on the Law of the Sea (hereinafter 1982 Convention),² explains that the establishment of piracy as a crime is intended to permit states to exercise extraterritorial jurisdiction to prosecute and punish pirates, but does not require them to do so.³

Moreover, any obligation imposed by either treaty or customary international law is far from absolute. Under article 101 of the 1982 Convention, to which Raglan is a party,⁴ and which

¹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 238 (2003); P.W. Birnie, *Piracy Past, Present and Future*, 11 *MARINE POL'Y* 163, 165, 170 (1987).

² George Smith, *From Cutlass to Cat-O'-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas*, 10 *MICH. J. INT'L L.* 227, 230 (1989); Barry H. Dubner, *Human Rights and Environmental Disaster, Two Problems that Defy the "Norms" of the International Law of Sea Piracy*, 23 *SYRACUSE J. INT'L L. & COM.* 1, 16-17 (1997).

³ Harvard Research in International Law, *Commentary to the Draft Convention on Piracy*, 26 *AM. J. INT'L L. SUPP.* 749, 760 (1932) [hereinafter "Harvard Research, Piracy"].

⁴ Compromis, ¶ 35; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 101, 1833 *U.N.T.S.* 397 [hereinafter "UNCLOS"].

codifies customary international law,⁵ “States shall co-operate to the fullest possible extent in the repression of piracy on the high seas.”⁶ This obligation echoes article 18 of the Harvard Draft, which proposed that parties “agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.”⁷ Raglan’s highly successful anti-piracy program represented the fullest extent of its capabilities to prevent such attacks. Raglan hired one hundred independent contractors to supplement a program that already employed all available naval officers to pilot ships through the archipelago.⁸ As a developing nation, Raglan did all it could with the limited resources available to it.

B. Thomas Good’s actions do not constitute piracy under international law and are not an appropriate basis for an international legal claim.

Thomas Good’s actions do not constitute piracy under international law. As established in several international legal instruments, the offense of piracy requires the following elements: (1) illegal acts of violence or detention; (2) committed for private ends; (3) by the crew or passengers of a ship; (4) against another ship or against persons or property on board the other ship; and (5) on the high seas.⁹ The element requiring that piracy occur on the high seas is

⁵ See P.W. Birnie, *supra* note 1, at 165, 170 (1987); D.P. O’CONNELL, THE INTERNATIONAL LAW OF THE SEA 970 (1989); J.N. Moore, *Customary Law After the Convention*, in ROBERT E. KRUEGER & STEFAN A. RISENFELD, THE DEVELOPING ORDER OF THE OCEANS 41 (1985).

⁶ UNCLOS, art. 101; 1958 Geneva Convention on the High Seas, Apr. 27, 1958, art. 14, 450 U.N.T.S. 82 [hereinafter 1958 Convention].

⁷ Harvard Research, Piracy, *supra* note 3, at 746.

⁸ Compromis, ¶13.

⁹ 1958 Convention, art. 14; UNCLOS, art. 100; Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 1678 U.N.T.S. 22, art. 13; Robert Beckman, *Combating Piracy and Armed Robbery against Ships in Southeast Asia: the Way Forward*, 33 OCEAN DEV. & INT’L L. 317 (2002); Malvina Halberstam, *Terrorism on the High*

fundamental because initial codification of the crime was to provide extra-territorial jurisdiction to states seeking to prosecute pirates.¹⁰ Although Good boarded *The Mairi Maru* on the high seas, his crimes were committed within Raglan's territorial jurisdiction.¹¹ While this Court has never definitively addressed the question regarding the treatment of crimes, the elements of which are committed in multiple jurisdictions, this Court may refer under article 38(1)(c) of its statute¹² to general principles of law to support the proposition that where any element of an offense is committed within the jurisdiction of a state, that state may consider itself the territorial state and may assert jurisdiction over the offender.¹³ Thus, although Good may be prosecuted by Raglan for armed robbery, hijacking, or a similar offense, he may not be charged with piracy.

C. Thomas Good's actions are not attributable to Raglan.

Raglan is not legally responsible for the events surrounding the attack and crash of *The Mairi Maru*. As explained in article 2 of the International Law Commission's ("ILC") Draft Articles on State Responsibility, which this Court may consider as evidence of customary international law, states are only liable for conduct (1) attributable to the state that (2) constitutes

Seas: The Achille Lauro, Piracy, and IMO Convention on Maritime Safety, 82 AM. J. INT'L L. 269, 272 (1988).

¹⁰ Harvard Research, Piracy, *supra* note 3.

¹¹ Compromis, ¶ 16; Clarifications, ¶ 3.

¹² Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1733, art. 38(1)(c).

¹³ See e.g., U.S. MODEL PENAL CODE §1.03(1)(a) (1962); GEORGE A. BERMAN & VIVIAN GROSSWALD CURRAN, FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION (1998) Code of Criminal Procedure, art. 693; MI ZHOU & SHIZHOU WANG, *China* 59, in INT'L ENCYCLOPEDIA OF LAWS, Vol. 2 (Dupont & Fijnaut eds., 1993); D.D.N. NSEREKO, *Uganda* 280-1, in INT'L ENCYCLOPEDIA OF LAWS, Vol. 4 (Dupont & Fijnaut eds., 1993); HR 6 April 1915, NJ 1915 (Netherlands), p. 427 (cited in J.A.W. Lensing, *The Netherlands* 51, in 3 INT'L ENCYCLOPEDIA OF LAWS, (Dupont & Fijnaut eds., 1993).

a breach of an international obligation.¹⁴ Raglan breached no obligation with regard to piracy. Good did not commit piracy under the internationally recognized definition, and, in any event, Raglan met any duty to prevent and suppress the same. Good's attack on *The Mairi Maru* certainly violated municipal law. However, the attack breached no international legal obligation owing to Appollonia.¹⁵ This Court recognized in the *ELSI* case that "[c]ompliance with municipal law and compliance with the provisions of a treaty are different questions."¹⁶ Good's actions cannot legally be attributed to Raglan, and thus do not give rise to Raglan's responsibility for the loss of *The Mairi Maru*.

1. Thomas Good acted contrary to Raglan's instruction and outside Raglan's control.

Under international law, a state is not responsible for all acts performed by its nationals,¹⁷

¹⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 2, International Law Commission, U.N. GA 56th Sess., Supp. No. 10 (2001) [hereinafter "Draft Articles on State Responsibility"]. *See also*, Military and Paramilitary Activities In and Against Nicaragua (Nic. v. U.S.), Merits 1986 I.C.J. 4, at 23 (June 27)[hereinafter *Nicaragua*]; Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at p.47 (Feb. 5) [hereinafter *Gabcikovo*]; Velasquez Rodriguez, Inter-American Court of Human Rights, Series C, No. 4 (1989), ¶ 170; The Rainbow Warrior Case (New Zealand v. France), XX R.I.A.A. 217 (1990).

¹⁵ MALVINA HALBERSTAM, *International Maritime Navigation and the Installations on the High Seas*, in M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 819 (1999); Beckman, *supra* note 12, at 320.

¹⁶ Elettronica Sicula S.p.A. (ELSI), (U.S. v. Italy), 1989 I.C.J. 15, at 51 (July 20); *See also* Norwegian Shipowners' Claims Case (Nor. v. U.S.), I R.I.A.A. 309, 331 (1922); The Tinoco Case (U.K. v. Costa Rica), I R.I.A.A. 371, 386 (1923); The Wollemborg Case (Italy v. U.S.), XIV R.I.A.A. 283, 289 (1956).

¹⁷ *See e.g.* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, 132-66 (1983); D.D. CARON, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109 (R. LILICH & D. MAGRAW eds. 1998); HARITINI DIPLA, LA RESPONSABILITÉ DE L'ÉTAT POUR VIOLATION DES DROITS DE L'HOMME – PROBLÈMES D'IMPUTATION (1994); F. Prezetacznik, *The International Responsibility of States for the Unauthorized Acts of their Organs*, 1 SRI LANKA J. OF INT'L L. 151 (1989).

and the state must direct or control the activity attributed to it.¹⁸ In *Nicaragua*, this Court refused to attribute the activities of Nicaraguan *contras* to the United States, even though it recognized the substantial role of the U.S. in “financing, organizing, training, supplying and equipping the *contras*,” as well as “the selection of its military or paramilitary targets, and the planning of the whole of its operation.”¹⁹ Instead, this Court required Nicaragua prove that the U.S. directed the perpetration of the acts which formed the basis of Nicaragua’s complaint. Absent such proof, this Court held that the *contras*’ acts were not attributable to the U.S.²⁰ Under this test, Good’s actions are clearly not attributable to Raglan. Indeed, unlike the U.S. in *Nicaragua*, Raglan’s purpose in employing Good was to prevent attacks, not to direct individuals like Good to carry them out. Because he acted contrary to Raglan’s direction and outside of its control, his acts are not attributable to Raglan under standards established by this Court.

2. Raglan is not responsible for Thomas Good’s *ultra vires* actions

Under international law, state responsibility for *ultra vires* actions only attaches when individuals act so that they appear “as competent officials” using “powers or methods appropriate to their official capacity.”²¹ As the ILC recognized, “[c]ases 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

¹⁸ Draft Articles on State Responsibility, *supra* note 14, at 104; *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 143 (1983); *Loizidou v. Turkey*, Merits, 1996-VI Eur. Ct. H. R. 2216, 2235-36.

¹⁹ *Nicaragua*, *supra* note 14, at 64.

²⁰ *Id.*

²¹ *The Caire Case*, (Fr. v. Mex.), V R.I.A.A. 516, 530 (1929)(*cited in* MALCOLM N. SHAW, *INTERNATIONAL LAW* 703 (5th Ed. 2003)); *The Mosse Case*, XIII R.I.A.A. 494 (1953).

assimilated to that of private individuals, not attributable to the State.”²² Though he appeared as an official when boarding the ship, within an hour it was clear that Good was acting far outside his capacity as a Raglanian pilot. When Good and his associates threatened the crew with explosives and commandeered the vessel, they ceased to be “competent officials or agents” of Raglan.

Significantly, the Iran Claims Tribunal recognized in the *Yeager Case*²³ that an individual’s *ultra vires* conduct is not attributable if the individual or organ acts in a “purely private” rather than an official capacity, even if the individual or organ “used means placed at its disposal by the State for the exercise of its function.”²⁴ In *Yeager*, an Iran Air agent commandeered the ticket office of Iran Air, a government-owned airline, and illegally required passengers to pay extra money for plane tickets already purchased. In determining that the agent’s acts were not attributable to the Iranian government, the Tribunal noted that the Iran Air agent was not “acting for any other reason than personal profit,” and there was no indication that he had “passed on the payment to Iran Air.”²⁵ Similarly, Good abused his position as a privately-contracted ship pilot. His actions were undertaken entirely for his own personal gain and that of his confederates. Therefore, Good’s acts are not attributable to Raglan under international law.

II. RAGLAN IS NOT LIABLE TO APPOLLONIA FOR SCUTTLING *THE MAIRI MARU*

²² Draft Articles on State Responsibility, *supra* note 16, at 102; *see also* Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT’L L. POL. 265, 270 (2004).

²³ *Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987); *cf.* *Petrolane, Inc. v. Islamic Republic of Iran* 27 Iran-U.S. Cl. Trib. Rep. 64, 92 (1991).

²⁴ *Id.* at 110-11.

²⁵ *Id.*

A. Raglan is obligated to protect the marine environment.

As a party to the 1982 Convention, Raglan is required to protect and preserve the marine environment.²⁶ In addition, customary international law recognizes the rights of coastal states to intervene where their shores and citizens are threatened by pollution.²⁷ The radiation leaking from *The Mairi Maru* presented a grave risk to the marine environment and human safety throughout the region. Raglan had no option but to scuttle the vessel. As Raglan's Prime Minister Price explained, "[w]ith every passing day, more noxious material leak[ed] into the open waters."²⁸ Further, the impending rainy season made it entirely likely that the pollution, then only 25 kilometers from Raglan's exclusive economic zone, would soon spread to Raglan's western islands.²⁹

B. Raglan's actions were necessary for the protection of the region's inhabitants, as well as the surrounding waters and marine life.

The scuttling of *The Mairi Maru* was justified under the doctrine of necessity. International law recognizes that actions that may be considered breaches under certain circumstances are justified when the situation presents "nothing less than a clear and absolute necessity."³⁰ In the *Gabcikovo-Nagymoros* case,³¹ this Court recognized that the ILC's

²⁶ UNCLOS, art. 221

²⁷ See International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 278 [hereinafter "SOLAS"]; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships of November 2, 1973, Feb. 17, 1978, 1341 U.N.T.S. 2484 [hereinafter "MARPOL 73/78"]; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29 1969, 970 U.N.T.S. 14049.

²⁸ Compromis, ¶ 24.

²⁹ Compromis, ¶ 21; Clarification ¶ 12.

³⁰ R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 91 (1938); Russian Fur Seals Controversy of 1893, in *British and Foreign State Papers*, vol. 86, p. 220; Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4); Okon Akiba, *International Law of*

codification of necessity in article 25 of its Draft Articles on State Responsibility “reflect[s] customary international law.”³² The recognized elements are as follows: “Necessity may be invoked only when the act “(a) [i]s the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole.”³³ Further, a state may only invoke necessity provided it has not “contributed to the situation of necessity.”³⁴

1. The nuclear materials emanating from *The Mairi Maru* presented a grave and imminent peril.

The radioactive material emanating from *The Mairi Maru* presented a grave risk to the crew of the ship, several of whom are dead, the marine environment surrounding the ship, and any cleanup crew dispatched to the area. The impending rainy season and its accompanying winds threatened to spread radiation throughout the region, endangering not only the Shallows, but the nations of Raglan and Maguffin as well.³⁵ Cleanup before the rainy season was

the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai), 37 NAT. RESOURCES J. 809 (1997); see generally Andreas Laursen, *The Use of Force and the State of Necessity*, 37 VAND. J. OF TRANSNAT'L L. 485 (2004).

³¹ *Gabcikovo*, *supra* note 14, at 7.

³² *Id.* at 40, ¶ 51; see also Roman Boed, *State of Necessity as a Justification for International Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 4-12 (2000); *The M/V "Saiga" Case (St. Vincent v. Guinea)*, ITLOS, Case No. 2 (Order of July 1, 1999).

³³ Draft Articles of State Responsibility, *supra* note 14, art. 25(2)(b); See also, *Gabcikovo*, *supra* note 14, at 46, ¶ 57.

³⁴ Draft Articles of State Responsibility, *supra* note 14, § 2; Roberto Ago, Addendum to the Eighth Report on State Responsibility, U.N. Doc. A/CN.4/318/ADD.5-7, reprinted in 1980 Y.B. INT'L L. COMM'N vol. II, ¶ 77.

³⁵ *Compromis*, ¶ 21.

impossible.

International law recognizes the importance of human safety and environmental health.³⁶ The harm implicated by a nuclear accident is unmatched in human experience. Not only do nuclear materials cause immediate and mass destruction to the area in which the accident occurs, but the harm continues for generations. Chromosomal damage and birth defects are an irreversible consequence of nuclear exposure.³⁷ *The Mairi Maru*, stranded upon the Shallows and emanating radiation, presented the gravest, most imminent threat possible to the surrounding environment and the human community in the region. These dangers would increase exponentially if the radioactive materials were allowed to remain in the water long enough for a cleanup crew to attempt to salvage the ship and detoxify it. Scuttling was the only means of avoiding a catastrophe.

2. Raglan's interest in protecting the region at large outweighs any competing interests in salvaging the wreckage.

Raglan's scuttling was consistent with state practice on this question. In the *Torrey Canyon* incident, the Liberian oil tanker *Torrey Canyon* went aground outside British territorial waters, spilling large amounts of oil that threatened the English coastline.³⁸ The British Government bombed the ship and burned the remaining oil,³⁹ "stress[ing] the existence of a

³⁶ Russian Fur Seals Controversy of 1893, *supra* note 30; Akiba, *supra* note 30.

³⁷ See generally, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of July 8) (separate opinion of Judge Weeramantry) [hereinafter *Nuclear Weapons Case*].

³⁸ The "*Torrey Canyon*," Cmnd. 3246 (London, Her Majesty's Stationery Office, 1967); see also Ann Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 PACE INT'L L. R. 27, 63 (2002); P. J. Griggs, *Toward a Third Party Liability Convention*, 22 TUL. MAR. L. J. 119, 122 (1997).

³⁹ The "*Torrey Canyon*," Cmnd, *supra* note 38; see generally E. COWAN, OIL AND WATER: THE TORREY CANYON DISASTER (1968); C. GILL, F. BOOKER & T. SOPER, THE WRECK OF THE

situation of extreme danger.” No international protest resulted.⁴⁰ This Court should view Raglan’s actions with similar deference, as its coastline was also threatened by a crash outside its territorial waters. Just as Britain’s interests in protecting its coastline outweighed Liberia’s interest in recovering the *Torrey Canyon*, this Court should recognize Raglan’s analogous interest in this matter. Appollonia cannot plausibly assert that its interest in *The Mairi Maru* and its cargo was greater than Raglan’s interest in protecting human life and the marine environment. Raglan concedes Appollonia’s interest in preserving its flag vessels;⁴¹ however, the interest of the entire international community in avoiding a nuclear disaster clearly justifies Raglan’s actions.

3. Raglan did not substantially contribute to the situation requiring the scuttling.

Subparagraph 2(b) of article 25 is a narrow exception preventing states from relying upon the necessity plea if they substantially contributed to the harm. As the commentary explains, “[f]or a plea of necessity to be precluded . . . the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral.”⁴² Given Raglan’s lack of knowledge about the ship’s nuclear cargo,⁴³ and its ongoing efforts to safeguard ships from attack,⁴⁴ it would be unjust to preclude Raglan’s invocation of the necessity defense, considering

TORREY CANYON (1967).

⁴⁰ *The “Torrey Canyon,”* Cmnd., *supra* note 38.

⁴¹ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., Ser. A, No. 10 [hereinafter *Lotus*].

⁴² Draft Articles on State Responsibility, *supra* note 14, at 205; *See also, Gabcikovo*, *supra* note 16.

⁴³ *Compromis*, ¶ 22.

⁴⁴ *Compromis*, ¶ 11-13.

the catastrophic harm it prevented by scuttling *The Mairi Maru*.

III. APOLLONIA VIOLATED INTERNATIONAL LAW WHEN IT FAILED TO PROVIDE RAGLAN WITH PRIOR NOTIFICATION OF ITS CLANDESTINE MOX SHIPMENTS

In the last decade, several shipments of nuclear materials have circumnavigated the globe,⁴⁵ posing a threat to coastal nations' environmental, ecological and economic security. Consequently, these states have protested and claimed a right to deny permission to enter their national waters. The attack on *The Mairi Maru* illustrates the hazardous outcomes that can occur when states disregard the rights of nations along their shipping routes.

A. Apollonia violated the 1982 Convention by failing to notify Raglan of the transportation of ultra-hazardous materials through its archipelago.

1. The archipelagic regime permits Raglan to demand prior notification of the transport of ultra-hazardous material through its archipelagic waters.

As an archipelagic nation, Raglan's very existence depends on the sea. The 1982 Convention represents an important development in the environmental law of the sea that recognized and addressed the unique difficulties facing archipelagic nations.⁴⁶ Under the 1982 Convention, archipelagic waters are submitted to the same regime as the territorial sea, *i.e.* the suspendible right of innocent passage for foreign vessels.⁴⁷ However, the archipelagic state may

⁴⁵ See The United Nations and Nuclear Non-Proliferation, The United Nations Blue Books Series, Vol. III, 187 *et seq.* (1995).

⁴⁶ See Moira L. McConnell & Edgar Gold, *The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment*, 23 CASE W. RES. J. INT'L L. 83, 99 (1991); see also, Rachel Zajacek, *The Development of Measure to Protect the Marine Environment from Land Based Pollution: The Effectiveness of the Great Barrier Reef Marine Park Authority in Managing the Effects of Tourism on the Marine Environment*, 3 JAMES COOK U. L. REV. 64, 65 (1996).

⁴⁷ UNCLOS, art. 52(2).

designate sea lanes to be used for expeditious passage through the archipelago.⁴⁸ Such sea lanes are submitted to a regime that is essentially identical to “transit passage” through straits used for international navigation.⁴⁹ All ships enjoy the right of “archipelagic sea lanes passage” and no distinctions may be made according to the nature of the vessel or its cargo.⁵⁰ However, The enjoyment of these freedoms does not limit the rights of the archipelagic state to require ships carrying ultra-hazardous material to pass through specific sea lanes, and to observe precautionary measures established by international agreements⁵¹ and generally accepted international regulations.⁵² One such fundamental regulation provides archipelagic nations the right to demand notice of ultra-hazardous shipments traversing these sea lanes.⁵³

Notification requirements do not impinge upon Appollonia’s right to continuous and expeditious passage through the archipelago,⁵⁴ and are consistent with the provisions of the 1982 Convention requiring the flag state have due regard for archipelagic states' rights and duties.⁵⁵ Furthermore, a requirement of notification does not constitute discrimination based on the

⁴⁸ UNCLOS, art. 53.

⁴⁹ UNCLOS, art. 54; B. Kwiatkowska, *The Archipelagic Regime in the Practice of the Philippines and Indonesia – Making or Breaking International Law?*, 6 INT’L J. OF ESTUARINE AND COASTAL L. 25–26 (1991).

⁵⁰ UNCLOS, arts. 41-42, 44, 53(2); Cf. H.W. JAYEWARDENE, *THE REGIME OF ISLANDS IN INTERNATIONAL LAW* 161–162 (1990); See also T. TREVES, *La navigation*, in *TRAITÉ DU NOUVEAU DROIT DE LA MER* 800–802 (R.J. Dupuy & D. Vignes eds., 1985).

⁵¹ UNCLOS, art. 38.

⁵² UNCLOS, arts. 22, 23; E.g., MARPOL 73/78, *supra* note 27; SOLAS, *supra* note 27; Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 UST 3459, TIAS NO. 8587.

⁵³ See discussion *infra* sec. III., B.

⁵⁴ UNCLOS, art. 23.

⁵⁵ UNCLOS, arts. 58(3), 87(2).

characteristics of a vessel's cargo, which would contravene articles 24 and 26 of the 1982 Convention.⁵⁶ Raglan stresses that prior notification by the originating state does not hamper a vessels passage, and does not violate the 1982 Convention's non-discrimination provisions. This notification is vital for archipelagic states, whose waters are often marked by shoals, rocks and coral reefs. Navigation through these waters is far more dangerous and the risk of accidents higher than in the territorial sea.⁵⁷ Without notice that the transit of ultra-hazardous material is pending, an archipelagic nation cannot take the safety precautions necessary to protect all potentially affected parties from harm.⁵⁸

2. The archipelagic regime in the 1982 Convention is customary international law binding upon Appollonia.

International law recognizes that provisions of multilateral treaties can bind third party states by either incorporating or giving recognition to a customary rule, or as being *fors at ariso* of an area of international law that subsequently secured the general assent of states and thereby was transformed into custom.⁵⁹ Rapid crystallization into customary law is possible where "state practice, including that of States whose interests are specially affected, [was] both extensive and virtually uniform in the sense of the provision invoked," and if the provision reflected "settled

⁵⁶ UNCLOS, arts. 24, 26.

⁵⁷ M. MUNAVVAR, OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA 166 (1995).

⁵⁸ See Declaration of the Secretary of State for Foreign Affairs of the Dominican Republic, (Dominican Republic, Secretary of State for Foreign Affairs, Press Release, 2 January 1998).

⁵⁹ Vienna Convention on the Law of Treaties, May 23, 1969 art. 38, U.N. Doc. A/CONF. 39/26, 63 A.J.I.L. 875, 8 I.L.M. 679 (1969) [hereinafter *Vienna Convention*]; *Nicaragua*, *supra* note 16, at ¶ 276; *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Ice), 1969 I.C.J. 3 at 43 (Feb. 20) [hereinafter *Continental Shelf*]; see also R.R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27, 64 (1970); Anthony D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970).

practice, [and]...evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁶⁰

Raglan submits that the provisions relating to archipelagic waters in the 1982 Convention, ratified by over 145 nations, are a codification of customary international law.⁶¹ Chapter IV of the 1982 Convention reflects long-standing practice of archipelagic nations and regional agreements proscribing rights in the waters surrounding archipelagos.⁶² Moreover, although several maritime nations, including the United States, have yet to ratify the convention, none based their opposition on the provisions governing archipelagos. For example, the United States initially withheld ratification because of the provisions dealing with the deep sea-bed mining regime, but it nonetheless recognized that the 1982 Convention otherwise expressed customary international law; in fact, the treaty has been submitted to the U.S. Senate for ratification.⁶³ According to the U.S. State Department, “the convention...contains provisions with respect to traditional uses of the oceans which generally confirm maritime law and practice and fairly balance the interests of all states.”⁶⁴

⁶⁰ *Continental Shelf*, *supra* note 59, at ¶ 74, 77.

⁶¹ *Gulf of Maine (Can v. U.S.)* 1984 I.C.J. 246 (October 12); Christopher Joyner, *The Southern Ocean and Marine Pollution: Problems and Prospects*, 17 CASE W. J. INT’L L. 165, 180 (1985).

⁶² U.N. Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea* (ST/LEG/SER.B/6), at 39 (Note of 12 December 1955); Republic Acts 3046 (1961) and 5446 (1968), reprinted in U.N. Legislative Series, *National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea* (ST/LEG/SER.B/15), at 105 and 106; *Note verbale* dated 20 January 1956 from the Philippines, reproduced in II YB ILC 1956, at 69; Announcement on the Territorial Waters of the Republic of Indonesia of 14 December 1957, reprinted in M. WHITEMAN, IV DIGEST OF INTERNATIONAL LAW 284 (1965).

⁶³ *The UN Convention on the Law of the Sea: Hearings on T.Doc.103-39 Before the Senate Committee on Foreign Relations*, 108th Cong. 1 (2003).

B. Appollonia violated the customary international law obligation requiring prior notification for the transportation of ultra-hazardous materials through the waters of third party states.

1. Widespread state practice reflects the existence of a norm requiring prior notification for the transport of ultra-hazardous materials.

Regardless of the 1982 Convention's applicability to Appollonia, widespread state practice and *opinio juris* evince a clear duty to provide notification under customary international law. Many coastal states and archipelagic nations require notice from shipping states regarding the contents of ultra-hazardous cargoes. Countries on the most important shipping routes, including Oman,⁶⁵ Iran,⁶⁶ Egypt,⁶⁷ Guinea,⁶⁸ Malaysia,⁶⁹ Malta,⁷⁰ Spain,⁷¹ Peru,⁷² Saudi Arabia,⁷³

⁶⁴ Third United Nations Convention on the Law of the Sea, White House Office of Policy Information, Issue Update No. 10 at 8 (April 15, 1983); 83 U.S. Dep't State Bull. No. 2075 at 70 (1983).

⁶⁵ See Declaration of Oman Issued upon Ratification of UNCLOS (17 August 1989), in K.R. SIMMONDS, NEW DIRECTIONS IN THE LAW OF THE SEA, Binder IV, U.5, 34.

⁶⁶ Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea (1993), Sec. 9, 24 Law of the Sea Bulletin 10 (December 1993).

⁶⁷ See Declaration of Egypt Issued upon Ratification of UNCLOS (26 August 1983), in K.R. Simmonds, *supra* note 74, Binder IV, U.5, 29.

⁶⁸ Presidential Decree of Papua New Guinea, no. 336, 30 July 1980.

⁶⁹ See Declaration of Malaysia Issued upon Ratification of UNCLOS in Lee & Hayashi, NEW DIRECTIONS IN THE LAW OF THE SEA: REGIONAL AND NATIONAL DEVELOPMENTS, Binder 1, II.1.b(4).

⁷⁰ Act no. XXVIII (Malta, 1981), UN Doc. LE 113 (3-3) (16 November 1981).

⁷¹ Law no. 25, art. 69 *et seq.* (Spain, 1964), in U.N. Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, at 45 (1974).

⁷² Decree no. 027-77-EM, (Peru, 1977).

and Yemen⁷⁴ require not only notification but also prior consent. These states face a high risk of pollution from accidents at sea. Other states, including the Philippines,⁷⁵ Venezuela,⁷⁶ Haiti, Fiji and several Caribbean states⁷⁷ go even further, forbidding the transit of any vessel carrying dangerous materials through their waters. The United Arab Emirates,⁷⁸ Yemen,⁷⁹ Djibuti,⁸⁰ Pakistan,⁸¹ Poland⁸² and Canada⁸³ expressly require nuclear propelled vessels and ships carrying

⁷³ Declaration of Saudi Arabia Issued upon Ratification of UNCLOS (24 April 1996), *in* Lee & Hayashi, *supra* note 78, Binder 1, IV.1.b (3).

⁷⁴ Declaration of Yemen Issued upon Ratification of UNCLOS (*in* Simmonds, *supra* note 74, Binder IV, U.5, 22–23).

⁷⁵ Philippines Republic Act no. 6969 of 1990.

⁷⁶ Art. 54 of Presidential Decree no. 2/211 on Norms on the Control of the Generation and Management of Hazardous Wastes (Venezuela, 1992).

⁷⁷ *See the note verbale* dated 18 February 1988 from Haiti's Ministry of the Interior, Decentralization, the General Police Force and the Civil Service, *in* 11 LAW OF THE SEA BULLETIN 13 (July 1988).

⁷⁸ United Arab Emirates, Law no. 19/1993, Art. 5(4) *in* 25 LAW OF THE SEA BULLETIN 95 (1994).

⁷⁹ Yemen, Act no. 45/1977, Art. 8 *in* U.N. Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea* 21, at 24 (1980).

⁸⁰ Djibuti, Law no. 52/AN/79, Art. 7, *in* R. W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 112 (1986).

⁸¹ Pakistan, Territorial Waters and Maritime Zones Act, 1976, Sec. 3(3), United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea* 22, 85 at 86 (1980).

⁸² Act Concerning the Maritime Areas of the Polish Republic and the Marine Administration, 21 March 1991, arts. 10 and 11.

⁸³ Transportation of Dangerous Goods Regulations (Canada, 1989).

dangerous substances to notify transit states of their passage.⁸⁴ Finally, France requires ships transiting through its territorial waters to report the nature of their cargo before entering them.⁸⁵

Further evidence of state practice is indicated by the strident objections voiced by the international community during the recent voyages of ships carrying ultra-hazardous materials. Several Caribbean and Latin American states, as well as Malaysia, forbade the entrance of the *Pacific Pintail* into their territorial waters.⁸⁶ In July 1999, South Africa ordered two ships carrying MOX to Japan not to enter its territorial sea.⁸⁷ In January 2001, an Argentine court ordered the Argentinean government to prevent a British ship (the *Pacific Swan*) carrying an 80-ton cargo of highly radioactive nuclear fuel to Japan from entering waters under its control, arguing it would put the country's shoreline at risk from a toxic spill.⁸⁸

In 2001, Ireland came before the International Tribunal for the Law of the Sea, seeking provisional measures against the United Kingdom to suspend its decision to construct a MOX plant. Ireland's objections were based on the risks involved in the transport of radioactive

⁸⁴ E.J. MOLENAAR, *Navigational Rights and Freedoms in a European Regional Context*, in *NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA* 22, at 30 (D.R. Rothwell & S. Bateman eds., 2000).

⁸⁵ Decree no. 78-421 on Sea Pollution Caused by Shipping Incidents (France, 1978), art. 1.

⁸⁶ *Shipment of Vitriified High Level Nuclear Waste Must Respect Concerns of Forum Islands Countries*, Press Release, 24 January 1997, at <http://www.nci.org/c/cs-png.htm>; *Malaysia Bans Ship Carrying Nuclear Waste to Japan*, Reuter News Service, 15 January 1997, at <http://www.nci.org/c/cs-malay.htm>.

⁸⁷ *UK Nuclear Fuel Ships Asked to Stay Out of South Africa's Waters*, BBC Summary of World Broadcasts, Report by the South African news agency, 26 July 1999, at <http://www.nci.org/k-m/moxbox.htm>.

⁸⁸ *Court Blocks Nuclear Ship from Argentine Waters*, Reuter News Service, 11 January 2001, at http://www.enn.com/news/wirestories/2001/01/01112001/reu_nukeship_41289.asp.

material to and from the plant.⁸⁹ The Tribunal ultimately rejected Ireland's application because it found the situation was not urgent,⁹⁰ however, there was no contest as to the potential for environmental harm.⁹¹

2. *Opinio juris* reflects the existence of a norm requiring prior notification for the transport of ultra-hazardous materials.

States provide notice because of a sense of legal obligation. Virtually all states have accepted specific obligations to notify potentially affected states of the transport of nuclear material through their waters. Over 200 states are party to the 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,⁹² the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa,⁹³ and the 1996 Izmir Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal, all of which require notification to potentially affected

⁸⁹ The MOX Plant Case (Ir. v. U.K.), ITLOS, Case No. 10 (Memorial of Ir.); Maki Tanaka, *Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 MICH. J. INT'L L. 337 (2004).

⁹⁰ See The MOX Plant Case (Ir. v. U.K.), ITLOS, Case No. 10 (Order of Dec. 3, 2001); See also, Richard Nadelson, *After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea*, 15 INT'L J. OF MARINE & COASTAL L. 132 (2000).

⁹¹ *Id.*

⁹² Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, art. 6, *reprinted in* 28 I.L.M. 657-686 (1989) [hereinafter Basel Convention]; B. KWIATKOWSKA & A.H.A. SOONS, TRANSBOUNDARY MOVEMENTS AND DISPOSAL OF HAZARDOUS WASTES IN INTERNATIONAL LAW: BASIC DOCUMENTS 32 (1993).

⁹³ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, January 29, 1990 *reprinted in* 30 I.L.M. 773-799 (1991).

states. In addition, the Rio and Stockholm Declarations, as well as the International Atomic Energy Agency's ("IAEA") Code of Practice on the International Transboundary Movement of Radioactive Material, recognize the existence of a customary notification obligation.⁹⁴

C. Appollonia's failure to provide notification to Raglan also constitutes a breach of the regulatory regime established by the IAEA for safe transport of nuclear material.

Appollonia is a party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") and a member of the IAEA.⁹⁵ Under the NPT, Appollonia was obligated to conduct its nuclear activities in accord with a safeguards agreement with the IAEA.⁹⁶ In administering the safeguards system, the IAEA is authorized to require members to "observ[e] any health and safety measures prescribed by the Agency."⁹⁷ Because Appollonia is a member of the IAEA and its nuclear program is subject to the IAEA safeguards system, any IAEA rules or regulations relating to health and safety are binding.

The IAEA has adopted specific regulations obligating Appollonia to notify Raglan of its MOX shipments. Section 820 of the IAEA's Regulations for the Safe Transport of Radioactive

⁹⁴ See Rio Declaration on Environment and Development, U.N. Doc. A/Conf. 151/26, princ. 19 reprinted in 31 I.L.M. 874, 876 (1992) [hereinafter *Rio Declaration*]; IAEA Code of Practice on the International Transboundary Movement of Radioactive Material, sec. (III)(5), in 276 U.N.T.S. 3 (1988) [hereinafter *IAEA Code of Practice*]; Stockholm Declaration of the U.N. Conference on the Human Environment, June 16, 1972, princpl. 21, U.N. Doc A/CONF.48/14/Rev. 1 at 3 (1973); 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*].

⁹⁵ Compromis, ¶ 35.

⁹⁶ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, art. III.121 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

⁹⁷ International Atomic Energy Agency, Statute of the International Atomic Energy Agency, as Amended up to June 1, 1973, art. XII.A.2 (1973).

Material requires “multilateral approval” for shipments containing radioactive material.⁹⁸ The term “multilateral approval” means obtaining approval from “each country through” which the radioactive material is to be transported.⁹⁹ Here, Appollonia failed to comply with these regulations, as confirmed by the IAEA in its final report on Appollonia’s nuclear program: “Appollonia gives no notice to affected States such as Raglan that MOX will be transported through their territorial waters or exclusive economic zones.”¹⁰⁰

Because the regulations require the approval of “each country” through which the material is transported, obligations clearly run to third states not party to the IAEA regime. Both Appollonia and Raglan are parties to the Vienna Convention on the Law of Treaties (“VCLT”).¹⁰¹ While a treaty generally only creates reciprocal rights between parties to the treaty, article 36 of the VCLT provides that rights in a treaty can arise for third parties if the parties to the treaty so intend and the third party state assents thereto.¹⁰² The assent of the third party state “shall be presumed” so long as nothing contrary is indicated.¹⁰³ Because there is no indication of contrary intent, Raglan has the right to raise Appollonia’s violation of the IAEA regulations under Article 36 of the Vienna Convention on the Law of Treaties, even though it is not party to the NPT or a member of the IAEA.

⁹⁸ IAEA Regulations for the Safe Transport of Radioactive Material, No. TS-R-1 (ST-1, Revised 1996) § 820 [hereinafter IAEA Regulations].

⁹⁹ *Id.* at § 204.

¹⁰⁰ *Compromis*, ¶ 9.

¹⁰¹ *Compromis*, ¶ 35.

¹⁰² Vienna Convention, *supra* note 59, at art. 34

¹⁰³ *Id.* at art. 36; SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98-106 (1984).

IV. APPOLLONIA IS RESPONSIBLE FOR ALL ENVIRONMENTAL DAMAGE TO THE NORTON SHALLOWS AND MUST COMPENSATE RAGLAN FOR THE RESULTING INJURY TO ITS FISHING AND TOURIST INDUSTRIES AND THE COST OF DECONTAMINATING THE AREA

A. Raglan has standing under international law to seek redress on behalf of the international community for a violation of the *erga omnes* obligation to protect the marine environment.

Raglan's claim for damage to the Shallows relies upon the *erga omnes* doctrine. This Court has recognized that there are certain obligations owed to the international community *erga omnes* and that all states have a legal interest in upholding them.¹⁰⁴ Customary international law recognizes the obligation on the part of all states to "protect and preserve the marine environment." All nations have accepted the obligation to ensure against activities that "cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."¹⁰⁵

Appollonia may argue that the international community has never recognized the ability to bring a claim *actio popularis*, on behalf of all people. This argument is misguided. In the *Southwest Africa* case, this Court, while refusing to recognize a claim *actio popularis*, intimated it was emerging.¹⁰⁶ Subsequently, in *Barcelona Traction*, this Court considered that, in view of the importance of obligations owed to the international community as a whole, "all states can be held to have a legal interest in their protection."¹⁰⁷ Additionally, distinguished publicists have

¹⁰⁴ Nuclear Test Case (Austl. v. Fr., N.Z. v. Fr.) 1974 I.C.J. 3, 32, 253, 267, 312 (June 22); [hereinafter *Nuclear Test Cases*]; Barcelona Traction Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter *Barcelona Traction*].

¹⁰⁵ Stockholm Declaration, *supra* note 94.

¹⁰⁶ *Barcelona Traction*, *supra* note 104, at ¶ 47; *Southwest Africa Case (Second Phase) (Ethiopia and Liberia v. South Africa)* 1966 I.C.J. 6 (18 July).

repeatedly urged this Court to recognize *actio popularis* in various contexts, particularly as a technique to ensure protection of the environment.¹⁰⁸

If the concept of *actio popularis* were ever to be recognized by this Court, surely this is the case. The damage to the Shallows was proximate to Raglan and resulted in serious economic consequences. Additionally, Raglan is party to numerous treaties establishing the duty to protect the marine environment. While no singular injury may be sufficient to confer standing upon Raglan, the totality of the circumstances in this case point towards this Court's recognition of an *actio popularis*. Without this extension, no state may legally protect the interests of the high seas. To require a territorial injury to states seeking to uphold the duty to protect the marine environment renders that norm a virtual nullity. In such circumstances, the cost to each state of damaging common spaces would be externalized,¹⁰⁹ and the earth's common spaces would be severely abused.

B. Appollonia breached the internationally recognized obligation to prevent transboundary injury.

The customary international law obligation to prevent transboundary environmental harm is rooted in Principle 21 of the Stockholm Declaration, which establishes state responsibility for transboundary environmental harm.¹¹⁰ Although the drafters opted for a non-binding declaration

¹⁰⁷ *Barcelona Traction*, *supra* note 104, at ¶ 33; *see also Nuclear Test Cases*, *supra* note 104, Vol. I, 14, Vol. II, 8.

¹⁰⁸ IAN BROWNLIE, *A Survey of International Customary Rules of Environmental Protection*, in INTERNATIONAL ENVIRONMENTAL LAW 1, 5 (1974).

¹⁰⁹ L.F.E. GOLDIE, *The Management of Ocean Resources: Regimes for Structuring the Maritime Environment*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 172 (1972).

¹¹⁰ Stockholm Declaration, *supra* note 94, princ. 21; John Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 296 (2002).

of principles, various treatises,¹¹¹ textbooks,¹¹² and scholars¹¹³ state that Principle 21 reflects customary international law. Indeed, it has been called the cornerstone of international environmental law.¹¹⁴

1. Appollonia incurs liability for damage to the Shallows under the *sic utere tuo* principle.

The principle of *sic utere tuo ut alienum non laeda* (one must use his own so as not to damage that of another) imposes an obligation on states to prevent transboundary environmental injury.¹¹⁵ Raglan submits that *sic utere tuo* is customary law in the area of transnational environmental injury, as evidenced by its incorporation into a number of international treaties¹¹⁶ and declarations,¹¹⁷ including the 1982 Convention, and international decisions holding states

¹¹¹ ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 130 (1991); PHILLIPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 190 (1995).

¹¹² EDITH BROWN WEISS, STEPHEN C. MCCAFFREY, DANIEL BARSTOW MAGRAW, PAUL C. SZASZ, AND ROBERT E. LUTZ, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 317 (1998) [hereinafter WEISS ET AL].

¹¹³ David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 620 (1995); Rudiger Wolfrum, *Purposes and Principles of International Environmental Law*, GER. Y.B. INT'L L. 308, 310 (1990)

¹¹⁴ SANDS, *supra* note 111, at 186; WEISS ET AL., *supra* note 112, at 316.

¹¹⁵ Armin Rosencranz, *The Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT'L & COMP. L. REV. 309, 315 (2003); Bernard A. Weintraub, *Science, International Environmental Regulation, and the Precautionary Principle: Setting Standards and Defining Terms*, 1 N.Y.U. ENV'T L. J. 173, 204-09 (1992).

¹¹⁶ See UNCLOS, art. 194(2); Convention on Biological Diversity, 5 June 1992, prmb., U.N.E.P./Bio.Div./N7 - INC5/4, *reprinted in*, 31 I.L.M. 818.

¹¹⁷ *Rio Declaration*, *supra* note 94, princpl. 2; *Stockholm Declaration*, *supra* note 94.

responsible for extraterritorial environmental harm regardless of fault.¹¹⁸

Several cases illustrate the *sic utere tuo* principle. In the 1941 *Trail Smelter Arbitration*,¹¹⁹ the tribunal applied the principle in holding Canada responsible for agricultural damage in the United States resulting from sulphur dioxide fumes emitted from a private smelter in British Columbia.¹²⁰ Likewise, in *Corfu Channel*¹²¹ this Court held that every state has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of States.”¹²² In the 1974 *Nuclear Test Cases* before this Court, Judge de Castro confirmed the obligation to prevent transboundary harm as a principle of international law.¹²³ More recently, the decision of this Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*¹²⁴ evidences the existence of the obligation to prevent transboundary environmental harm arising from hazardous activities. Other arbitral awards, including the *Lac Lanoux*¹²⁵ and *Gut Dam*¹²⁶ arbitrations, confirm the existence of this obligation. While Appollonia has a right to pursue its own economic and environmental policies, in accordance with international law,¹²⁷ it has an obligation to ensure that activities within its control do not damage the environment

¹¹⁸ See *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905 (1938), 3 U.N. Rep. Awards, 1095 reprinted in 35 Am. J. Int'l L. 684 (1941) [hereinafter *Trail Smelter*]; *Nuclear Weapons Case*, supra note 48, at ¶ 29; *Gabcikovo*, supra note 16, at ¶ 53.

¹¹⁹ *Trail Smelter*, supra note 125.

¹²¹ *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 4, 22 (9 April).

¹²² *Id.*

¹²³ *Nuclear Test Cases*, supra note 104, at 389.

¹²⁴ *Nuclear Weapons Case*, supra note 37, at ¶ 29.

¹²⁵ *Affaire du Lac Lanoux* (Spain v. Fr.), XXII R.I.A.A. 281, 314-317 (1957).

¹²⁶ *Gut Dam Arbitration*, 7 CAN. Y.B. INT'L L. 316-18, (1969).

¹²⁷ *Rio Declaration*, supra note 104, princ. 2.

beyond the limits of national jurisdiction.¹²⁸

2. Appollonia incurs liability for damage to the Shallows under the precautionary principle.

Appollonia's failure to take adequate precautions to safeguard its MOX shipments violates the precautionary principle. A number of present day international legal instruments enshrine this doctrine,¹²⁹ evidencing its general acceptance as a norm of customary international law.¹³⁰ Indeed, in the environmental context, there are no instances of nations refusing to apply the precautionary principle.¹³¹ The European Union promulgated the precautionary principle as a binding principle of their environmental policy.¹³²

The 1992 Rio Declaration on Environment and Development provides that it is necessary for states to "apply preventive, precautionary and anticipatory approaches so as to avoid degradation of the marine environment, as well as to reduce the risk of long-term or irreversible adverse effects upon it."¹³³ The principle recognizes that states using the oceans must err on the

¹²⁸ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, International Law Commission, 56th Sess., Supp. No. 10 (2001).

¹²⁹ See Rio Declaration, *supra* note 104, princpl. 15; London Convention On Prevention Of Marine Pollution By Dumping Of Wastes And Other Matter, November 13, 1972, 11 I.L.M. 1294; See U.N. Framework Convention on Climate Change, art. 3 *reprinted in* 31 I.L.M. 849 (1992).

¹³⁰ *Nuclear Weapons Case*, *supra* note 37, at 258; Commission of the European Communities, Communication on the Precautionary Principle, COM (2000).

¹³¹ See Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT'L L. 379 (1996).

¹³² See DAVID HUNTER, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 103 (2003).

¹³³ Agenda 21, Chapter 17, 17.22, in Report of the United Nations Conference on Environment and Development, Rio De Janeiro, June 3-14, 1992, U.N. Doc. A/CONF.151/26 (Vol. II), *reprinted in* 31 I.L.M. 874.

side of protecting the environment.¹³⁴ A state that fails to assess the extraterritorial environmental impact of its proposed activities can hardly claim that it has taken all practical measures to prevent environmental damage.¹³⁵ Accordingly, the precautionary principle shifts the burden of proof in environmentally risky activities to the state that engages in the activity.¹³⁶

Appollonia had a customary international law obligation to evaluate the possible effects of transporting nuclear materials through the Raglanian archipelago and to determine the deadly consequences that could result from an accident. Appollonia's failure to reassess its plan of action after being delayed by storms is but one example of Appollonia's failure to take the necessary precautions. These failures incur Appollonia liable for the damages to the Norton Shallows caused by *The Mairi Maru*.

C. Appollonia is strictly liable for the damage to the Norton Shallows.

1. Strict liability for ultra-hazardous activities is a general principle of law.

The principle of strict liability for ultra-hazardous activities is a general principle of international law and may be applied in this case.¹³⁷ The principle of strict liability has its roots in antediluvian law,¹³⁸ and is found in the modern legal systems of most states.¹³⁹ Strict liability

¹³⁴ Van Dyke, *supra* note 131, at 383.

¹³⁵ Phoebe N. Okowa, *Procedural Obligations in International Environmental Agreements*, BRIT Y.B. INT'L L. 275, 279 (1996).

¹³⁶ DANIEL BODANSKY, *THE PRECAUTIONARY PRINCIPLE IN U.S. ENVIRONMENTAL LAW – INTERPRETING THE PRECAUTIONARY PRINCIPLE* 203, 228 (Timothy O'Riordan & James Camerdon eds., 1994).

¹³⁷ UNCLOS, at §IA, part 1 & n.8 pp.2-3; See PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 92-98 (1994); PIERRE-MARIE DUPUY, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in *INTERNATIONAL LAW AND POLLUTION* 12 61, 63-4 (1991).

of states, even in conducting “not unlawful” ultra-hazardous activities, has been accepted in conventions concerning nuclear activities, outer space activities, and marine oil pollution.¹⁴⁰ These conventions articulate the principle that a state may be liable even though its activities were not wrongful.¹⁴¹ The ILC approved this general concept of liability without unlawfulness.¹⁴²

State practice supports this proposition. Several multilateral treaties hold states operating nuclear ships strictly liable for nuclear damage caused by an accident involving nuclear fuel or wastes from the ship.¹⁴³ The Organization for Economic Cooperation and Development, whose

¹³⁸ See, e.g., LUDOVIC BEAUCHET, 4 HISTOIRE DU DROIT PRIVÉ DE LA RÉPUBLIQUE ATHÉNIENNE 384-405 (1969); CODE OF MAINMONIDES (BOOK OF TORTS) (H. Klein trans. 1954); HAMMURABI CODE, arts. 195-246 (Edwards trans. 1904).

¹³⁹ Vernon Palmer, *A General Theory of The Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 TUL. L. REV. 1303, 1309 (1988); see also GK RSFSR 1964 (Civil Code) § 454 (Soviet Union); Code. civ. art. 1384 (France); Restatement (Second) of Torts § 519 (1965) (United States). See also, *Ryland v. Fletcher*, L.R. 1 H.L. 330 (1868); Francis Bohlen, *The Rule in Ryland v. Fletcher*, 59 U. PA. L. REV. 298, 310 (1911).

¹⁴⁰ See, e.g. Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, *reprinted in* 2 I.L.M. 727; Convention on Liability for Damage Caused by Objects Launched into Outer Space, March 21, 1972, *reprinted in* 10 I.L.M. 965 (1971).

¹⁴¹ Constance O'Keefe, *Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, 18 DENV. J. INT'L L & POL'Y 145, 147 (1990).

¹⁴² International Liability for Injurious Consequences Arising Out of Acts Not Prohibited By International Law, U.N. Doc. A/CN.4/373 (1983); ALAN BOYLE, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 61, 76-79 (Alan Boyle & David Freestone eds., 1999).

¹⁴³ See Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, and its Additional Protocol of January 28, 1964, 956 U.N.T.S. 264 ; Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, January 31, 1963.

members include the United States, United Kingdom, and Japan, adopted the “polluter pays” principle in relation to routine accidental pollution.¹⁴⁴ The European Union moved toward formal adoption of strict liability for environmental pollution in June 2003.¹⁴⁵ A recent survey showed that the doctrine of strict liability applies in such diverse legal systems as the Federal Republic of Germany, the U.S., Mexico, Venezuela, Egypt, Libya, Senegal, Madagascar, Ethiopia, India, Thailand, Syria, Kuwait, Iraq, Lebanon, Turkey, and Japan and is part of the civil codes of Russia and France.¹⁴⁶ Even publicists generally resistant to the notion of strict liability acknowledge the responsibility of flag states for ultra-hazardous vessel conduct.¹⁴⁷ Appollonia is strictly liable for any damage caused by the transportation of ultra-hazardous waste through the Raglanian archipelago.

2. Appollonia is strictly liable for any damage caused by the transportation of ultra-hazardous waste through the Raglanian Archipelago.

For strict liability to attach to a state in connection with private activity, international law requires (1) an ultra-hazardous activity (2) of transnational character (3) under the control of the state.¹⁴⁸ These conditions are clearly met in this case. First, transportation of radioactive material,

¹⁴⁴ The Implementation of the Polluter-Pays Principle, Org. for Econ. Cooperation and Dev., Doc. C(74)223 (Nov. 14, 1974).

¹⁴⁵ EEC Treaty Article 130R Regulation 75/436/Euratom.

¹⁴⁶ See, e.g., JOHAN LAMMERS, *TRANSFRONTIER POLLUTION AND INTERNATIONAL LAW* 102 (1985); J.M. Kelson, *State Responsibility and the Abnormally Dangerous Activity*, 13 HARV. INT’L J. 209, 216 (1972).

¹⁴⁷ Wilfred Jenks, *Liability for Ultra-hazardous Activities in International Law*, in *Recueil des Cours* 100 (1966); Comments of Ushakov, ILC, 1974 Sum. Rec; Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT’L L. 525, 565 (1980).

¹⁴⁸ Kelson, *supra* note 146, at 209; See generally, Jenks, *supra* note 147, at 151.

such as MOX, is an ultra-hazardous activity.¹⁴⁹ Second, the injury is of transnational character because Appollonia's actions caused damage beyond the area of its national jurisdiction. Finally, Appollonian officials commissioned *The Mairi Maru* to transport the ultra-hazardous material.

Appollonia may argue that the decision by the crew of *The Mairi Maru* to transit through the Raglanian archipelago was that of a private vessel and is thus not attributable to Appollonia. However, conduct of private individuals may be directly imputable to a state where the individuals acted on behalf of the state, having been charged to carry out a specific operation.¹⁵⁰ When a state assumes legal authority over a ship by grant of its flag, the state also assumes an obligation to take measures to ensure that the vessel acts in a fashion consistent with international law.¹⁵¹ Here, the Appollonian government charged *The Mairi Maru*'s captain and crew with the transportation of MOX. As a result, Appollonia was responsible for insuring that the vessel complied with its obligations under international law and is obliged to make reparations for the injuries suffered by Raglan.

D. Assuming a fault-based standard applies to the incident involving *The Mairi Maru*, the damage caused to the Norton Shallows was foreseeable and imputable to Appollonia.

Appollonia may argue for a due diligence approach to liability.¹⁵² Under this approach,

¹⁴⁹ Jenks, *supra* note 147, at 193.

¹⁵⁰ Roberto, *Third Report on State Responsibility*, U.N. Doc. A/CN.4/246 and Add. 1-3 (1971); *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 29 (May 24).

¹⁵¹ BOLESŁAW BOCZEK, *FLAGS OF CONVENIENCE* (1962); ROBERT RIENOW, *THE TEST OF NATIONALITY OF A MERCHANT VESSEL* (1937).

¹⁵² Alan Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP L.Q. 1, 14-15 (1990); David D. Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 536 (1999).

each state has a duty to exercise “due diligence” to ensure suitable protection of the rights of other states.¹⁵³ The standard of due diligence required depends upon the particular situation; protection of the environment requires an especially high degree of diligence.¹⁵⁴ It is a general principle of law that the exact nature of the ensuing damage need not be foreseeable; it is sufficient if that type of harm ought to have been foreseen.¹⁵⁵ Each state has a duty to take steps to prevent any vessel flying its flag from engaging in conduct harmful to the environment of another state.¹⁵⁶

Appollonia must have been aware that its MOX shipments presented a serious risk of danger: the substances that leaked into the waters off the Norton Shallows were highly noxious, and the ship’s path led straight through the shallow waters of Raglan’s archipelago. Given Appollonia’s inability to adequately protect these shipments, and the transnational risks associated with transporting it, due diligence required some control over the way in which *The Mairi Maru* went about its transport.

¹⁵³ RICCARDO MAZZESCHI, *Forms of International Responsibility for Environmental Harm*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 15, 21 (F. Francioni and Tullio Scovazzi eds., 1991); OECD SECRETARIAT, *Observations on the Concept of the International Response of States in Relation to the Protection of the Environment*, in LEGAL ASPECTS OF TRANS-FRONTIER POLLUTION, at ¶ 11(a) (OECD 1977).

¹⁵⁴ *Id.* at 371.

¹⁵⁵ *Hughes v. Lord Advocate* (1963) A.C. 837, at 847.

¹⁵⁶ *Jenks*, *supra* note 147, at 141.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Respondent, the Kingdom of Raglan, respectfully requests this Honorable Court to find, adjudge, and declare as follows:

1. That Raglan is not responsible for the attack on *The Mairi Maru*, and owes no Appollonia no compensation for any injury arising from the attack.
2. That Raglan breached no obligation owed to Appollonia under international law by scuttling *The Mairi Maru*.
3. That Appollonia violated international law by shipping MOX through Raglan's archipelagic waters without giving Raglan prior notice or receiving its consent.
4. That Appollonia is responsible for the damage to the Norton Shallows and must compensate Raglan for the injury to its fishing and tourist industries and the cost of decontaminating the area.

