

**THE 2014 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION**



**IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS
CASE CONCERNING CERTAIN ACTIVITIES WITHIN THE MALACHI GAP**

THE STATE OF AMALEA

(APPLICANT)

v.

THE REPUBLIC OF RITANIA

(RESPONDENT)

2014

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE RESPONDENT

THE REPUBLIC OF RITANIA

TABLE OF CONTENTS

TABLE OF CONTENTS I

INDEX OF AUTHORITIES IV

STATEMENT OF JURISDICTION XV

QUESTIONS PRESENTED XVI

STATEMENT OF FACTS XVII

SUMMARY OF PLEADINGS XXIV

PLEADINGS 1

I. RITANIA’S CONDUCT WITH RESPECT TO THE EXCELSIOR ISLAND PROJECT COMPLIED IN ALL RESPECTS WITH HER OBLIGATIONS UNDER INTERNATIONAL LAW AND THE TERMS OF THE MALACHI GAP TREATY, AND RITANIA HAS NO OBLIGATION TO COMPENSATE AMALEA FOR ANY LOSS OR DAMAGE ALLEGEDLY CAUSED BY THE 2009 LANDSLIDE 1

A. RITANIA’S CONDUCT COMPLIED WITH INTERNATIONAL LAW 1

1. EIGP is not attributable to Ritania 1

2. Ritania did not breach MGT and international law 2

A. RITANIA CAUSED NO TRANSBOUNDARY HARM 3

i. The landslide did not cause the Dorian wrasse’s endangerment 3

ii. The impact of dredging is not severe 4

iii. Shared resource regime in the Gap precludes transboundary movement of harm 5

B. EVEN IF THERE WAS HARM, RITANIA HAS FULFILLED HER PROCEDURAL OBLIGATIONS TO PREVENT IT 5

i. Excelsior Project was conducted with due regard to Amalea 6

ii. Ritania properly exercised her due diligence obligation 7

C. IN ANY EVENT, AMALEA’S FISHING RIGHTS HAVE NOT BEEN INFRINGED 7

i. Amalea is not entitled to historic fishing rights 8

ii. Amalea’s fishing rights as granted by MGT were never affected by Excelsior Project 9

3. Furthermore, Ritania is not sine delicto liable 9

B. CONSEQUENTLY, RITANIA HAS NO DUTY TO MAKE REPARATION 10

II. AMALEA’S SALVAGE OF THE CARGAST IS UNLAWFUL, AND THE CARGO AND ARTIFACTS OF RITANIAN ORIGIN RECOVERED FROM THE WRECK PROPERLY BELONG TO RITANIA, WHICH HAS THE RIGHT TO PROTECT THEM 12

A. AMALEA’S SALVAGE OF RITANIA’S CULTURAL HERITAGE IS UNLAWFUL 12

1. Amalea’s salvage of Cargast is illegal under international law 12

A.	RITANIAN SOVEREIGN IMMUNITY OVER CARGO AND ARTIFACTS DISQUALIFIES APPLICATION OF THE INTERNATIONAL CONVENTION ON SALVAGE	13
i.	<i>Cargast is not protected under Amalean immunity</i>	14
ii.	<i>Alternatively, the cargo and artifacts of Ritanian origin are sovereign immunes</i>	15
B.	MOREOVER, THE APPLICATION OF SALVAGE LAW VIOLATES AMALEA’S DUTY TO PROTECT UNDERWATER CULTURAL HERITAGE.....	15
i.	<i>The application of salvage law over Cargast is incompatible with its status as UCH</i>	16
ii.	<i>Amalea’s unilateral act of salvage violated MGT</i>	17
2.	Amalea’s claim under law of finds infringes Ritania’s ownership rights	17
A.	RITANIA’S STATUS AS RIGHTFUL OWNER BARS THE APPLICATION OF LAW OF FINDS	18
B.	RITANIA HAS NOT ABANDONED THE CARGO AND ARTIFACTS OF RITANIAN ORIGIN	18
3.	In any event, Amalea has the duty to return Ritania’s cultural property	19
B.	CONSEQUENTLY, RITANIA HAS THE RIGHT TO PROTECT HER HEIRLOOM	19
1.	Deployment of Ritania’s Navy does not violate or threaten Amalea	20
2.	The patrol is recognized under the scope of freedom of navigation	20
III.	THE AMALEAN NAVY’S PURSUIT OF OSCAR DE LUZ INTO RITANIA’S EEZ, AND HIS SUBSEQUENT ARREST, WERE ILLEGAL	22
A.	AMALEA’S HOT PURSUIT OF <i>DAEDALUS</i> WAS UNLAWFUL	22
1.	No piracy <i>jure gentium</i> prompted Amalea’s pursuit of <i>Daedalus</i>	22
2.	<i>Prima facie</i> case of human trafficking did not justify Amalea’s hot pursuit	23
A.	HADDOCK DID NOT HAVE GOOD REASON TO BELIEVE VIOLATION OF AMALEAN IMMIGRATION LAW	24
B.	THE ORDER ISSUED OVER RADIO FREQUENCIES WAS INSUFFICIENT	25
3.	Subsequently, Amalea’s arrest of Luz was unlawful with unreasonable and excessive use of force	26
B.	ALTERNATIVELY, AMALEA’S VISIT OF <i>DAEDALUS</i> WAS UNWARRANTED	27
1.	No <i>prima facie</i> case of human trafficking justified Amalea’s visit	27
A.	HUMAN TRAFFICKING CANNOT BE EQUATED TO “SLAVE TRADE” WITHIN THE AMBIT OF ARTICLE 110(1)(B) LOSC	27
B.	ALTERNATIVELY, AMALEA’S MERE SUSPICION OF HUMAN TRAFFICKING WAS INSUFFICIENT TO VISIT <i>DAEDALUS</i>	28
2.	Amalea’s arrest without Ritania’s consent deprived Luz’s liberty	29
IV.	AMALEA WAS WITHOUT JURISDICTION TO TRY LUZ IN CONNECTION WITH THE <i>ROSEHILL</i> COLLISION, AND MUST RETURN HIM TO RITANIA IMMEDIATELY	31
A.	AMALEA HAD NO JURISDICTION OVER LUZ AS IT VESTS IN RITANIA	31
1.	Ritania has exclusive competence to prosecute Luz	31
A.	THE <i>ROSEHILL</i> INCIDENT FALLS UNDER ARTICLE 97 LOSC	31

B. LUZ’S NATIONALITY ACCORDS EXCLUSIVE JURISDICTION TO RITANIA	32
2. Alternatively, Amalea improperly relied on permissive basis of jurisdiction	32
A. THE ‘EFFECTS’ DOCTRINE BARS AMALEA’S EXERCISE OF JURISDICTION.....	33
<i>i. Amalea’s exercise of objective territoriality jurisdiction was unfounded.....</i>	<i>33</i>
<i>ii. Amalea could not ground exercise of jurisdiction on passive personality.....</i>	<i>34</i>
B. ALTERNATIVELY, UNIVERSAL JURISDICTION OVER ORDINARY CRIMES HAS NOT ATTAINED CUSTOMARY STATUS	35
C. ASSUMING PIRACY <i>JURE GENTIUM</i> , UNIVERSAL JURISDICTION IS STILL INVALID	35
<i>i. Universal jurisdiction over piracy is not customarily practiced.....</i>	<i>35</i>
<i>ii. Consequently, aut dedere aut judicare obliges extradition of Luz.....</i>	<i>36</i>
B. FURTHER, THE ILLEGALITY OF LUZ’S ARREST DIVESTED AMALEA’S COMPETENCE TO PROSECUTE LUZ.....	37
C. SUBSEQUENTLY, AMALEA MUST RETURN LUZ TO RITANIA IMMEDIATELY	37
1. Dual criminality requirement authorizes Luz’s extradition	38
2. Amalea’s refusal to extradite is unwarranted under <i>ne bis in idem</i>	39
PRAYER FOR RELIEF	40

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Sarah Dromgoole, “Legal Protection of the Underwater Cultural Heritage: Lessons from the Titanic” (2005) 61 Amicus Curiae 17	17
Tullio Scovazzi, “State Responsibility for Environmental Harm” (2001) 12 YB Int’l Env L 43	9

MISCELLANEOUS

Amnesty International, <i>Universal Jurisdiction: A Preliminary Survey of Legislation Around the World</i> (2012)	35
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STATEMENT OF JURISDICTION

The State of Amalea [**“Amalea”**] and the Republic of Ritania [**“Ritania”**] hereby submit the present dispute to the International Court of Justice [**“The Court”**] pursuant to Article 40(1) of the Court’s Statute, in accordance with Special Agreement for submission to the Court of the differences between the parties concerning certain activities within the Malachi Gap, signed in the Hague, the Netherlands, this 17th day of September in the year two thousand and thirteen. The parties have accepted the jurisdiction of the Court pursuant to Article 36(1) of its Statute.

QUESTIONS PRESENTED

- I. Whether Ritania has violated international law *vis-à-vis* the development of Excelsior Island, entitling Amalea to be compensated by Ritania.
- II. Whether Amalea retains exclusive ownership of the *Cargast* and all artifacts of Ritanian origin, and whether Amalea's salvage of the *Cargast* was unlawful to the extent Ritanian Navy's patrol on the site of the *Cargast* is justified.
- III. Whether Amalea has violated international law *vis-à-vis* her pursuit and arrest of Oscar de Luz in Ritania's EEZ.
- IV. Whether Amalea had jurisdiction to try Luz in relation to the *Rosehill* incident, obliging her to return Luz to Ritania.

STATEMENT OF FACTS

AMALEA AND RITANIA

Ritania, a developed peninsular State, is situated bordering the Strait of Malachi [**“The Strait”**] across Amalea, a developing island state.

THE STRAIT

Ranging from 217 to 386 nautical miles [**“nm”**], the Strait, traversed by an international sea lane, comprises the Amalean Trench reaching deeper than 5,000 meters as well as ridges and plateaus with water depth less than 20 meters. Other than its abundant fish, the Strait also contains reserves of petroleum and natural gas beneath its seabed such as the Erebus gas field.

BILATERAL NEGOTIATION

In 1946, Ritania and Amalea began discussing on appropriate control and regulation of the resources within and beneath the high seas beyond their territorial waters but eventually stalled over the Strait.

RITANIA’S UNILATERAL CLAIMS

On 19 September 1956, Ritania claimed rights to the natural resources of the subsoil and sea bed of the continental shelf contiguous to Ritanian coasts. In April 1983, Ritania also claimed 200 nm EEZ [**“EEZ”**] along with her ratification of the 1982 United Nations Convention on the Law of the Sea [**“LOSC”**]. Ritania further objected to Amalea’s promulgation of Coastal Fisheries Protection Act [**“CFPA”**] in 1986 through Note Verbale on the basis of unresolved overlapping EEZ.

MALACHI GAP TREATY [“MGT”**]**

Ritania and Amalea negotiated their EEZ demarcation extensively between 1988 and 1992, resulting in apportionment of rights under MGT with respect to a 1,200² nm area known as the Malachi Gap [**“The Gap”**]. MGT permits Ritania to protect her subsea resources such as the Erebus gas field with due regard to Amalea’s interests in fisheries resources therein.

CONSTRUCTION OF EXCELSIOR ISLAND [“EXCELSIOR PROJECT”**]**

In late 2006, Esmeralda Kali [**“Kali”**], a Ritanian billionaire, announced her plan to construct Excelsior Island through Excelsior Island Gas & Power Limited [**“EIGP”**] within Ritania’s uncontested EEZ, which entailed dredging in the Gap area. Excelsior Island was planned to facilitate the liquefied natural gas [**“LNG”**] production from the Erebus field powered sustainably with wind farms and hydroelectric plant, a proposal objected by Amalea.

ENVIRONMENTAL IMPACT ASSESSMENT [“EIA”]

Not long after EIGP’s submission of EIA for the Project in early 2008, Amalea gave a report by the International League for Sustainable Aquaculture [“ILSA”] on risk of damage to the Ritanian Ambassador. The Ambassador, however, could not forward it to the Ritanian Department of Resource Management [“RDRM”] since he was without authority to interfere with the independent regulatory role of the latter.

GRANT OF PERMIT AND REJECTED REQUEST FOR ORDER

After the year-long bilateral negotiations initiated by Ritanian reached a stalemate in late July 2009, EIGP was granted a permit to construct Excelsior island on 1 August 2009. Amalea’s subsequent request for this Court’s provisional measure requiring Ritanian to halt the project was denied.

LANDSLIDE AND ALLEGED ARISING EFFECTS

On 10 December 2009, there was a significant underwater landslide that led to a higher concentration of dissolved gases throughout the shallow waters of Sirius Plateau, negatively impacting the Dorian wrasse.

DISCOVERY OF *CARGAST*

In January 2010, a Ritanian oil and gas exploration vessel conducting sonar mapping operations in the Gap discovered the wreck of the schooner *Cargast*.

THE SACK OF HELIOS

Ritanian history books describe *Cargast*'s captain Baldric Verdigris [**“Verdigris”**] as a ruthless Amalean pirate responsible for the plunder and destruction of the Ritanian capital of Helios in 1510. Verdigris with his crew stole most of the town's prized religious and cultural icons, among others, the Sacred Helian Coronet [**“The Coronet”**], which was placed on the heads of Ritanian monarchs. The Coronet has mythical importance in Ritanian iconography, and its image occupies the center of Ritanian flag to the present day. The Coronet and other booty from Helios sunk with the *Cargast*.

SALVAGE OF *CARGAST*

On 4 March 2010, with the increasing amount of internationally known treasure hunters at Amalean airport, Ritania declared her intolerance to looting and warned to send patrol vessels to protect her birthright.

RITANIA’S PATROL

In January 2011, upon Amalea’s salvage contract with Milo Bellezza [“**Bellezza**”] being made, Ritania deployed naval vessels to prevent salvage. Even after the patrol had commenced, Bellezza still proceeded with his salvage between June and September 2011 and successfully recovered other artifacts that appeared to have been booty from the Sack of Helios. There have also been no reports of violent confrontations.

THE *ROSEHILL* COLLISION

On 13 February 2011, *Rosehill*, an Amalean cruise ship carrying 556 passengers, departed from Amalea and headed for Ritania. As *Rosehill* approached Excelsior Island, the captain saw that he was on a collision course with the fast-approaching *Daedalus*, a stolen Ritanian-flagged yacht under the control of Oscar de Luz [“**Luz**”], a Ritanian citizen. Attempting to avoid collision, *Rosehill*’s captain veered the cruise towards the island, causing a series of explosions and sinking of *Rosehill* that resulted in deaths of 127 passengers and crew of *Rosehill*.

SUSPECTED HUMAN TRAFFICKING ON BOARD

Within minutes of *Rosehill*’s distress call, the Amalean Coastal Protection Service [“**ACPS**”] issued an alert describing the incident as apparently caused by a yacht with suspected human trafficking on board that had hurriedly left to Amalea. As it sped away northwest and eventually drew within about 23 nm of Amalean coast, *Daedalus* was picked up on radar by

Icarus, an Amalean Navy Fast Response Cutter under the command of Captain Walter Haddock [**“Haddock”**].

PURSUIT AND ARREST OF LUZ

Haddock set out to intercept *Daedalus* and issued radio signal ordering it to stop when *Icarus* was within visual range, but Luz sped east instead. *Icarus* pursued Luz into Ritania’s uncontested EEZ. Trying to get *Icarus* to veer away, Luz suddenly steered the *Daedalus* straight towards *Icarus*. As Haddock kept his vessel on course, the two ships collided at high speed. Luz leapt overboard into a dinghy, where Haddock declared him under arrest before bringing him to Amalea.

LUZ’S TRIAL

Luz was charged on 127 entailing counts of murder, reckless endangerment, negligent operation of a seagoing vessel, and property crimes under Amalean Penal Code, established since 1995. These convictions were affirmed by the Court of Criminal Appeals in June 2012 and Amalea’s Supreme Court in January 2013. Luz is currently serving a life sentence in a medium-security prison in Amalea and will not be eligible for parole until 2032.

REQUEST FOR REPATRIATION OF LUZ

Ritania immediately filed a formal protest with the Amalean Embassy and demanded immediate return of Luz for investigation. Amalea declined to repatriate Luz on the basis that Ritania criminal law did not cover offenses committed outside the country's territorial waters.

RATIFICATION OF INTERNATIONAL TREATIES

Ritania is a party to both the 1958 Geneva Conventions on the Law of the Sea [**“1958 Conventions”**] and LOSC, whereas Amalea, although party to the former, is only signatory to the latter. Both States ratified the 1989 International Convention on Salvage [**“ICS”**]. Furthermore, Ritania signed the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage [**“UCHC”**], a convention Amalea has ratified. Ritania has ratified the 1910 Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea on its own.

REFERRAL TO THE COURT

Failing negotiations, Amalea and Ritania have agreed to a special agreement, referring every unresolved dispute before the Court.

SUMMARY OF PLEADINGS

RITANIA'S CONDUCT WITH RESPECT TO THE EXCELSIOR ISLAND PROJECT

There is absence of an internationally wrongful act as Ritania's involvement in the construction of Excelsior Project was limited to mere licensing precluding attribution and that such licensing complied with international law.

There was no transboundary harm, since the landslide was not the sole cause of the endangerment of Dorian wrasse, and the harm remains reparable and localized within the Sirius Plateau. Alternatively, Ritania's initiative to notify and later initiative to enter into a bilateral negotiation with Amalea, alongside its rigorous licensing process, comply with her international due diligence obligation. In any event, Ritania never unduly inhibited Amalea's fishing rights, as the loss of Dorian wrasse does not infringe her entire MGT rights. Even if such rights were deprived, EIPG is the one responsible to pay under the 'polluters pay' principle, and Ritania is not *sine delicto* liable in the absence of fault.

UNLAWFUL SALVAGE OF *CARGAST* AND ENTITLEMENT TO ARTIFACTS OF RITANIAN ORIGIN

In light of Ritania's ownership rights and the salvaged artifacts' status as her cultural heritage, Amalea's salvage violates Ritania's sovereign immunity. Even if the artifacts are not immune, Amalea cannot assert title under law of finds, as Ritania has never expressly or implicitly abandoned her ownership. In any event, regardless of the artifacts' current position, the duty to return stolen objects back to its owner has crystalized into a customary norm, obligating Amalea to return the artifacts back to Ritania. Consequently, Ritania's patrol on the

basis to protect her heirloom from unlawful looting was justifiable. Such patrol was moreover peaceful in nature and in compliance with international law.

THE ILLEGALITY OF AMALEA'S PURSUIT AND ARREST OF LUZ

Notwithstanding exceptions to flag-state jurisdiction, Amalea's pursuit and arrest of Luz were unlawful, since her basis to pursue on piracy *jure gentium* was unfounded. With regard to the suspected human trafficking on board *Daedalus*, Amalea failed to fulfill the procedural elements of 'good reason to believe' a violation of her domestic law and proper signal to commence her pursuit. Consequently, Luz's arrest in Ritania's EEZ was illegitimately undertaken with unreasonable and excessive force. Alternatively, Amalea's exercise of right to visit was unjustifiable by failing to equate human trafficking with "slave trade" and to meet the high threshold of "reasonable ground of suspicion". Subsequently, arrest of Luz, absent Ritania's consent, deprived his right of liberty. In any event, the pursuit and arrest were unjustified on the basis of necessity.

CRIMINAL JURISDICTION AND EXTRADITION OF LUZ

Amalea's exercise of criminal jurisdiction over Luz in connection to the *Rosehill* collision violated international law since Article 97 LOSC and active nationality of Luz exclusively accord such right to Ritania. Alternatively, Amalea's reliance on permissive basis of objective territoriality and passive personality principle must be held inapposite. Further, Amalea's universal jurisdiction based on ordinary crimes or piracy *jure gentium* was also unfounded, thus obliging her to fulfill her *aut dedere aut judicare* obligation in extraditing Luz to Ritania. Her prosecution of Luz also cannot be justified on the basis of *male captus bene detentus* doctrine.

Consequently, even in the absence of extradition and mutual legal assistance treaty, Amalea must return Luz to Ritania immediately with respect to Luz's right to fair trial on the basis of dual criminality and double jeopardy.

PLEADINGS

I. RITANIA’S CONDUCT WITH RESPECT TO THE EXCELSIOR ISLAND PROJECT COMPLIED IN ALL RESPECTS WITH HER OBLIGATIONS UNDER INTERNATIONAL LAW AND THE TERMS OF THE MALACHI GAP TREATY, AND RITANIA HAS NO OBLIGATION TO COMPENSATE AMALEA FOR ANY LOSS OR DAMAGE ALLEGEDLY CAUSED BY THE 2009 LANDSLIDE

In line with sustainable and equitable uses of sea,¹ Ritania’s exercise of rights over the construction of Excelsior Project (A) complied with international law, hence (B) precluding any duty to make reparation.

A. RITANIA’S CONDUCT COMPLIED WITH INTERNATIONAL LAW

Ritania is not accountable² for the conduct of EIGP, absent (1) attribution and (2) breach of international obligations, or is (3) *sine delicto* liable for harm arising from Excelsior Project.

1. EIGP is not attributable to Ritania

States are only responsible for the conduct of entities acting on its behalf.³ In this instance, as Ritania did not empower, control, or adopt and acknowledge Excelsior Project,⁴ EIGP’s conduct cannot be attributed to her.

¹ UNDoc A/RES/1323.

² Art.2(a), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UNDoc A/56/83 [ARSIWA].

³ Ian Brownlie, *System of the Law of Nations: State Responsibility* (Oxford: Clarendon Press, 1983) at 132–166.

⁴ ARSIWA, *supra* n.2, Art.5,8,11.

In *Schering*, the tribunal found that the formation of a supervisory Council by the operation of Iranian law was insufficient to attribute the Council's future actions to Iran.⁵ Moreover, in *Nicaragua*, where the United States' planning, directing, and supporting of the Contras were held inadequate to meet the high threshold for effective control.⁶ Similarly, Ritania's mere licensing of Excelsior Project establishes no clear nexus for attribution of actions⁷ and effective control over EIGP.⁸

As found in *Janes*,⁹ refusal to consider ILSA's report by Ritanian Ambassador does not amount to State complicity, as he did not represent the state organ legally authorized to acknowledge and approve the whole Project, an authority exclusively vested on RDRM.¹⁰ Moreover, Ritania never expressly adopted¹¹ the conduct post-landslide.¹²

2. Ritania did not breach MGT and international law

In addition, Ritania did not (a) cause transboundary harm; (b) fail to prevent harm; or (c) infringe Amalea's rights under both MGT and LOSC.

⁵ *Schering Corporation v. Iran*, (1984) 5 Iran-US CTR 361.

⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, [1986] ICJ Rep 14 ¶109,115.

⁷ *Compromis*, ¶27,23; Clarification, ¶6; Principle 17, *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, 11 ILM 1416 [Stockholm]; ARSIWA, *supra* n.2, Art.5¶(5),(7).

⁸ ARSIWA, *supra* n.2, Art.8.

⁹ *Laura M.B. Janes et al. (U.S.A.) v. United Mexican States*, (1926) 4 UNRIAA 82.

¹⁰ *Compromis*, ¶21,23,25; ARSIWA, *supra* n.2, Art.11¶6,9.

¹¹ *Compromis*, ¶30.

¹² ARSIWA, *supra* n.2, Art.8¶11; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] ICJ Rep 3 ¶74.

a. Ritania caused no transboundary harm

Pursuant to Articles 60 *vis-à-vis* 194(2) LOSC and the *sic utere tuo* principle,¹³ no transboundary harm to Amalea's environment or property¹⁴ arises from Excelsior Project,¹⁵ as three elements of (i) causation, (ii) severity, and (iii) movement¹⁶ are not cumulatively met.

i. *The landslide did not cause the Dorian wrasse' endangerment*

Causation between the landslide and the alleged harm causing Dorian wrasse' endangerment is absent due to the presence of temporal separation, multiple causes, and uncertainty.¹⁷ The considerable temporal separation between the landslide in 2009 and Dorian wrasse's endangered status in 2012 means that there exists no immediacy between the two, only mere tenuous assertion of linkage.¹⁸ Amalea's persistent commercial fishing post-landslide is also a deciding factor not to be disregarded in the decline of Dorian wrasse' population.¹⁹ Finally, although ILSA's report attached words such as "immediate" and "significantly negative" to the

¹³ Principle 2, *Rio Declaration on Environment and Development*, 14 June 1992, 31 ILM 874 [Rio]; Stockholm, *supra n.7*, Principle 21; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, [1949] ICJ Rep 4 at 22.

¹⁴ *Trail Smelter Case (United States, Canada)*, (1938/1941) 3 UNRIAA 1906 at 684.

¹⁵ Art.5(4), *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 [CSC]; Art.60(8), *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [LOSC]; *Compromis*, ¶8.

¹⁶ Xue Hanqin, *Transboundary Damage in International Law* (New York: Cambridge University Press, 2003) at 3 [Xue Hanqin].

¹⁷ Julia Barboza, *The Environment, Risk and Liability in International Law* (Leiden: Martinus Nijhoff Publishers, 2011) at 11 [Barboza].

¹⁸ *Compromis*, ¶18,30.

¹⁹ *Clarifications*, ¶4; René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague: Martinus Nijhoff Publishers, 1996) at 150 [Lefeber].

impact of the landslide, Amalea managed to continue her fishing activities persistently and unremittingly for the next two years,²⁰ thus casting uncertainty sufficient to rupture causal link.²¹

ii. The impact of dredging is not severe

Although the aforementioned ILSA report suggested ‘significant’ impact on the Dorian wrasse, this harm fails to meet the test of ‘severity’ for transboundary harm.²² The absence of severity is evident in Amalea’s failure to file for a follow-up provisional measure, her continuous exploitation of the Dorian wrasse post-landslide,²³ and the reparability of the decline.²⁴ This proves convincingly that the alleged harm was never immediately severe²⁵ and was, for a significant amount of time, ‘normally tolerable’.²⁶

Additionally, no ‘significant’ harm had affected Amalea, since the 2010 and 2011 decline (0.26%-0.3% GDP respectively) represented only minute percentages of her entire fishing industry and GDP.²⁷ The unreasonableness of an assertion of ‘significant’ harm is compounded

²⁰ *Compromis*, ¶¶29-30.

²¹ Barboza, *supra* n.17, at 11.

²² Xue Hanqin, *supra* n.16, at 8.

²³ *Compromis*, ¶27,30; Clarification, ¶6; Art.41, *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep 14 ¶46 [Pulp Mills].

²⁴ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, [1992] ICJ Rep 240; *Compromis*, ¶30.

²⁵ *Pulp Mills*, *supra* n.23, ¶62.

²⁶ Julia Barboza, “Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law” (1990) 2 UNYBILC 83 at 83,88-9,105 [Sixth Report].

²⁷ *Compromis*, ¶3,30.

further by the existence of close substitutes to the Dorian wrasse and abundant fish supply in the Strait.²⁸

iii. Shared resource regime in the Gap precludes transboundary movement of harm

There is no transboundary movement of damage, absent boundary-crossing harm coming from Ritania's territory to Amalea's.²⁹ The dredging was conducted exclusively within the Gap, and the damage confined within the shallow waters of Sirius Plateau, none of which is Amalea's territory.³⁰ Moreover, as MGT apportions rights,³¹ not territories, movement of the alleged harm from seabed to the fish in the superjacent waters does not match up to the language and intended meaning of 'transboundary'.³²

b. Even if there was harm, Ritania has fulfilled her procedural obligations to prevent it

Assuming transboundary harm existed, Ritania adhered to her obligation under Article 194(1) LOSC to prevent transboundary harm³³ by (i) paying due regard and (ii) properly assessing EIGP's EIA, thus freeing her from fault.

²⁸ *Compromis*, ¶3,18.

²⁹ Xue Hanqin, *supra* n.16, at 9.

³⁰ *Compromis*, ¶20,29.

³¹ *Compromis*, ¶6,9,16, Appendix B Art.12(c); Art.31(2), *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].

³² *Compromis*, ¶30; Xue Hanqin, *supra* n.16, at 9.

³³ Stockholm, *supra* n.7, Principle 7.

i. *Excelsior Project was conducted with due regard to Amalea*

Ritania has paid her due regard to Amalea pursuant to Article 60 LOSC, Continental Shelf Convention [“CSC”],³⁴ and MGT³⁵ by initiating cooperation and maintaining shared balance of interests,³⁶ duties essential to prevent transboundary harm.³⁷

In contrast to Singapore’s lack of cooperation with Malaysia in *Land Reclamation*,³⁸ Ritania has cooperated³⁹ in the forms of her notification to Amalea, initiative to enter into bilateral negotiations, and assurance to comply with international law.⁴⁰ Ritania was thus not obligated to pursue consent or further negotiations.⁴¹

Moreover, in *Pulp Mills*, the real increase of GDP and jobs in Uruguay outweighed Argentina’s concern on mere potential risks.⁴² Similarly, Ritania’s duty of due regard is confined to balancing between the benefits of Excelsior Project and its corresponding negative

³⁴ CSC, *supra* n.15, Art.5(2),(5).

³⁵ *Compromis*, Appendix B Art.12(c).

³⁶ Lefeber, *supra* n.19, at 27.

³⁷ *MOX Plant (Ireland v. United Kingdom)*, (2003) 42 ILM 1187 ¶82 [MOX Plant].

³⁸ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, (2005) 27 UNRIAA 133 ¶47.

³⁹ *Compromis*, Appendix B Art.12(d); LOSC, *supra* n.15, Art.242; Rio, *supra* n.13, Principle 7; Stockholm, *supra* n.7, Principle 24.

⁴⁰ *Compromis*, ¶21,22,26; Art.8,9, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UNDoc A/56/10 [Transboundary Articles]; *Lake Lanoux Arbitration (Spain, France)*, (1957) 12 UNRIAA 281 at 292.

⁴¹ *Gut Dam Arbitration (United States of America v. Canada)*, (1969) 8 ILM 118 at 128, 138 [Gut Dam].

⁴² *Pulp Mills*, *supra* n.23, ¶48,74.

environmental effects.⁴³ Since the former was found to outweigh the latter, Ritania's licensing has therefore sufficiently met this duty.⁴⁴

ii. *Ritania properly exercised her due diligence obligation*

Since international law and Article 206 LOSC leave the scope and content of EIA to be determined by domestic legislations, Ritania's issuance of permit⁴⁵ and review of EIA⁴⁶ subject to her domestic law suffice as preventive measures, fulfilling her due diligence obligation.⁴⁷ Even surpassing the *MOX Plant* standard where mere orchestration of EIA was found sufficient for purpose of due diligence,⁴⁸ Ritania in fact instituted a rigorous procedure for licensing, in the form of multiple reviews by RDRM and other government agencies.⁴⁹ As to the claim leveled by Amalea, this very Court's disapproval of her application for provisional measure against Excelsior Project⁵⁰ suggests that even this Court perceived that the EIA had sufficed.⁵¹

c. In any event, Amalea's fishing rights have not been infringed

Amalea's rights to fish in the Gap (i) do not include the so-called historic fishing rights and (ii) remain unaffected by Excelsior Project.

⁴³ *Compromis*, ¶5,20,23,29,30; *Gabčíkovo–Nagymaros Project Case (Hungary v. Slovakia)*, [1997] ICJ Rep 7 at 78 [Gabcikovo-Nagymaros].

⁴⁴ Rio, *supra* n.13, Principle 11.

⁴⁵ Clarification, ¶6; *Ibid*, Principle 17; Transboundary Articles, *supra* n.40, Art.5,7¶7.

⁴⁶ *Compromis*, ¶30.

⁴⁷ Rio, *supra* n.13, Principle.15; *MOX Plant*, *supra* n.37, ¶63; *Pulp Mills*, *supra* n.23, ¶205.

⁴⁸ *MOX Plant*, *supra* n.37, at 74-6.

⁴⁹ *Compromis*, ¶23.

⁵⁰ *Compromis*, ¶27.

⁵¹ *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, [2013] ICJ Rep 152 ¶39.

i. *Amalea is not entitled to historic fishing rights*

Despite contentions made by Australia, New Zealand, and Japan,⁵² the *sui generis* nature of EEZ supplants freedom of fishing beyond EEZ.⁵³ Hence, Amalea's 200 nm EEZ claim has effectively and automatically relinquished both her historic⁵⁴ and 1958 Conventions⁵⁵ fishing rights.⁵⁶

Assuming such rights are retainable, Amalea remains disentitled to claim such right absent recognition by Ritanian⁵⁷ and other states.⁵⁸ Moreover, in contrast to *Jan Mayen* for the *Capelin fish*,⁵⁹ Amalea's claim was not specific,⁶⁰ as her bounded conservation zone was inapplicable to Dorian wrasse but only to highly migratory fish stocks.⁶¹ In any event, the Court must find that this problematic claim for historic fishing rights represents mere *quasi-territorial* claim that does not amount to a claim of sovereignty, violable in the way Amalea is asserting them to be.⁶²

⁵² UNDoc A/8721.at 158-161,183-187,188-196.

⁵³ Barbara Kwiatkowska, *The 200-Mile Exclusive Economic Zone in the New Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1989) at XXV.

⁵⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18 ¶100 [Tunisia/Libyan].

⁵⁵ Art.3, *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 59 UNTS 285.

⁵⁶ *Compromis*, ¶11.

⁵⁷ *Compromis*, Appendix B Art.12(a).

⁵⁸ *Compromis*, ¶18.

⁵⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] ICJ Rep 38 ¶15.

⁶⁰ Tunisia/Libyan, *supra* n.54, ¶74.

⁶¹ *Compromis*, ¶3,7; Clarification¶,2; LOSC, *supra* n.15, Art.61; UNDoc A/RES/56/13.

⁶² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] ICJ Rep 40 ¶¶ 235-6.

ii. *Amalea's fishing rights as granted by MGT were never affected by Excelsior Project*

Since the gas dissociation occurred only in shallow waters of Sirius Plateau and Dorian wrasse's breeding ground only accounts for 0.12% of the entire fishable area,⁶³ Amalea's fishing rights under MGT were not infringed.⁶⁴ Not only was Amalea able to continue fishing post-landslide,⁶⁵ damage to the Dorian wrasse quantified to a loss of only 5% of her fishing industry, substitutable with the other species of the wrasse family.⁶⁶ Hence, such right remained intact and unviolated.

3. Furthermore, Ritania is not *sine delicto* liable

Assuming that significant harm does exist due to dredging activity,⁶⁷ Amalea may attempt to invoke a *sine delicto* mode of liability against Ritania.⁶⁸ Such application will be erroneous, however, because this norm does not reflect Customary International Law [“CIL”]⁶⁹ as evinced by practices of, *inter alia*, Canada, Romania, and Australia,⁷⁰ as well as the International Law

⁶³ *Compromis*, ¶15,19,29.

⁶⁴ *Compromis*, Appendix B Art.12(a); VCLT, *supra n.31*, Art.31(1).

⁶⁵ Clarification, ¶4.

⁶⁶ *Compromis*, ¶3,18; *Ohio v. United States*, 880 F 2d 432 (DC Cir 1989).

⁶⁷ Myron H. Nordquist, et al., *United Nations Convention on the Law of the Sea 1982: A Commentary* (The Hague: Martinus Nijhoff Publishers, 1993) ¶194.10(f) [LOSC Commentary].

⁶⁸ International Law Commission, “The Most-Favoured-Nation Clause” (1973) 2 UNYBILC 209 at 211; Transboundary Articles, *supra n.40*, at 370.

⁶⁹ Tullio Scovazzi, “State Responsibility for Environmental Harm” (2001) 12 YB Int'l Env L 43 at 47.

⁷⁰ UNDoc A/CN.4/543 at 128.

Commission's reluctance to promote it;⁷¹ or bind Ritania as a conventional obligation.⁷² Even if it is CIL, Canada in *Gut Dam* only paid due to her own consent to the liability and from its treaty obligation with the United States.⁷³

B. CONSEQUENTLY, RITANIA HAS NO DUTY TO MAKE REPARATION

Having complied with international law, Ritania is not obliged to compensate Amalea.⁷⁴ Amalea's claim of USD 250 million annually until 2018 remains disproportionate⁷⁵ in light of her contribution to the damage⁷⁶ and the scope of damage.⁷⁷

Even if compensation for Amalea is in order, Ritania is precluded from any obligation to compensate, since Ritania was not the main polluter. The 'polluter pays' principle, a CIL norm,⁷⁸ renders EIGP as the party liable for damages-claim,⁷⁹ similar to *Cherry Point* where United States relied on the private entity to compensate.⁸⁰ In the event that Ritania's procedural

⁷¹ Johan G. Lammers, "International Responsibility and Liability for Damage Caused by Environmental Interferences" (2001) 31 *Env'tl Pol'y & L* 42 at 103-4.

⁷² UNDoc A/CN.41 346, at 12.

⁷³ *Gut Dam*, *supra* n.41.

⁷⁴ ARSIWA, *supra* n.2, Art.35,36(2); Stockholm, *supra* n.7, Principle 22; Rio, *supra* n.13, Principle 13.

⁷⁵ *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F 2d 652 (1st Cir, 1980).

⁷⁶ *Compromis*, ¶51.

⁷⁷ *Pohnpei v. KSVI No. 3*, 10 FSM Intrm 53 (Pon. 2001).

⁷⁸ Rio, *supra* n.13, Principle 16.

⁷⁹ Sixth Report, *supra* n.26.

⁸⁰ *Cherry Point Oil Spill*, (1973) 11 *Can YB Int'l Law* 333 at 334.

obligations were unfulfilled, reflected in *Pulp Mills*,⁸¹ this Court's decision would suffice for satisfaction.

⁸¹ *Pulp Mills*, *supra* n.23, ¶282.

II. AMALEA’S SALVAGE OF THE *CARGAST* IS UNLAWFUL, AND THE CARGO AND ARTIFACTS OF RITANIAN ORIGIN RECOVERED FROM THE WRECK PROPERLY BELONG TO RITANIA, WHICH HAS THE RIGHT TO PROTECT THEM

Mutual recognition of state sovereignty proscribes one state from depriving another of its property.⁸² Accordingly, (A) Amalea’s salvage of *Cargast* is illegitimate as the artifacts of Ritania origin recovered therefrom belong to Ritania, (B) who has the right to protect them.

A. AMALEA’S SALVAGE OF RITANIA’S CULTURAL HERITAGE IS UNLAWFUL

Although right to salvage is internationally recognized for the prevention of loss of vessels at sea,⁸³ salvors must comply with salvage law⁸⁴ and defer to the claim of an identifiable owner.⁸⁵ Amalea’s salvage of *Cargast* (1) violates international law and (2) infringes upon Ritania’s ownership rights.⁸⁶ Even failing that, (3) Amalea must return Ritania’s cultural heritage just the same.

1. Amalea’s salvage of *Cargast* is illegal under international law

Amalea, as a party to UCHC and ICS,⁸⁷ is bound to regulate its exercise of salvage accordingly. However, as the *travaux préparatoires* of ICS indicates its application to be mainly

⁸² Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge: Cambridge University Press, 2013) at 245. [Dromgoole].

⁸³ *Merchant Shipping Act 1995* (UK), c 21 [Merchant Shipping Act].

⁸⁴ Art.8, *International Convention on Salvage*, 28 April 1989, 1958 UNTS 193 [ICS].

⁸⁵ *Koivusaari and others v. Finland*, App. No. 20690/06 at 10 [Koivusaari].

⁸⁶ *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 NE 2d 549 (Mass. 1988).

⁸⁷ *Compromis*, ¶52.

on navigable vessels⁸⁸ and properties found within it,⁸⁹ salvage over wrecks⁹⁰ and their cargo⁹¹ should be regulated more strictly. Based on this understanding, the Court must find that Amalea's salvage (a) is unlawful under ICS and (b) violates her duty to protect UCH.

a. Ritanian sovereign immunity over cargo and artifacts disqualifies application of the International Convention on Salvage

Although flag states are granted sovereign immunity over its vessels,⁹² a protection conferred by both High Seas Convention [“HSC”]⁹³ and LOSC, said protection is not applicable to wrecks.⁹⁴ Hence, as Amalea is not (i) granted sovereign immunity over her vessel,⁹⁵ (ii) her salvage over Ritanian cultural heritage is unlawful.⁹⁶

⁸⁸ Committee Maritime International, *The Travaux Préparatoires of the Convention on Salvage 1989* (Antwerp: CMI Headquarter, 2003) at 69.

⁸⁹ ICS, *supra* n.84, Art.1(b); Art.1, *International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature*, 23 September 1910, (1913) UKTS 4.

⁹⁰ ICS, *supra* n.84, Art.30(1)(d); *King and Chapman v. The Owners and All Persons Claiming an Interest in the 'La Lavia', 'Juliana' and 'Santa Maria de la Vision'*, (1996) 1 ILRM 194.

⁹¹ UNDoc LEG/CONF.7/VR.110; UNDoc LEG/CONF.7/VR.225.

⁹² Art.2(8), *Convention on the Protection of Underwater Cultural Heritage*, 2 November 2001, 2563 UNTS 158 [UCHC]; Dromgoole, *supra* n.82, at 97-8.

⁹³ Art.8-9, *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 [HSC].

⁹⁴ LOSC Commentary, *supra* n.67, ¶96.10(d).

⁹⁵ ICS, *supra* n.84, Art.4,5.

⁹⁶ *Compromis*, ¶38; R.R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999) at 152.

i. *Cargast is not protected under Amalean immunity*

Since sovereign immunity pertains only to recently sunken military vessels for reasons of national security,⁹⁷ *Cargast*'s continued state of submersion for over 500 years falls outside the scope of the said immunity.⁹⁸ Amalea may contest otherwise by relying on United States' jurisprudence, but even in *Mercedes* and *Sea Hunt*, immunity was granted on the basis bilateral treaty,⁹⁹ a factor absent in the present contention.

Mere government status of *Cargast* did not qualify for immunity, since it was not a warship belonging to¹⁰⁰ or operated by the navy and had displayed no warship marks.¹⁰¹ Moreover, its purpose under letter of marque remained commercial in nature, evinced by its trading mission,¹⁰² and its subsequent Sack of Helios as an *ultra vires* act beyond privateering.¹⁰³

As such, the Court must declare that, despite being a vessel bearing King of Amalea's escutcheon,¹⁰⁴ *Cargast* enjoys no immunity for its actual nature and purpose.

⁹⁷ Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*, 9th ed. (New York: Addison Wesley Longman Inc., 1996) at 1165.

⁹⁸ *Compromis*, ¶32; *Aqua Log, Inc. v. State of Georgia*, 594 F 3d 1330 (11th Cir 2010).

⁹⁹ Roberta Garabello & Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden: Martinus Nijhoff Publishers, 2004) at 59.

¹⁰⁰ HSC, *supra* n.93, Art.8; LOSC, *supra* n.15, Art.29,95.

¹⁰¹ *Compromis*, ¶¶31-32.

¹⁰² David Loades, *The Making of the Elizabethan Navy 1540-1590: From the Solent to the Armada* (Suffolk: Boydell Press, 2009) at 53.

¹⁰³ *Compromis*, ¶33; C.R. Pennell, *Bandits at Sea: A Pirates Reader* (New York: New York University Press, 2001).

¹⁰⁴ *Compromis*, ¶32; HSC, *supra* n.93, Art.9; LOSC, *supra* n.15, Art.96.

ii. *Alternatively, the cargo and artifacts of Ritanian origin are sovereign immunes*

The Coronet is a significantly important cultural heritage to Ritania, shown by its emblazonment in her flag and continuing annual commemoration.¹⁰⁵ Accordingly, since Article 25 ICS excludes “property forming part of the cultural heritage of the state” from subjection to salvage attempts, Amalea’s salvage of Ritania’s non-commercial artifacts¹⁰⁶ that is separate from *Cargast* is unlawful. Moreover, as the right to alienate such property is inherent to the owner,¹⁰⁷ Amalea may not subject¹⁰⁸ the recovered Ritanian property in her possession to her court to assert legal ownership over it.¹⁰⁹

b. Moreover, the application of salvage law violates Amalea’s duty to protect underwater cultural heritage

Since salvage law is antithetical to protection of UCH,¹¹⁰ (i) its application over *Cargast* and the artifacts therein is incompatible with their maximum protection.¹¹¹ Additionally, (ii) Amalea’s unilateral act of salvage violated MGT.

¹⁰⁵ *Compromis*, ¶34.

¹⁰⁶ Art.19,21, *Convention on Jurisdictional Immunities of States and Their Property*, UNDoc A/RES/59/38 [JIPC].

¹⁰⁷ Koivusaari, *supra n.85*, at 10.

¹⁰⁸ *Compromis*, ¶37.

¹⁰⁹ JIPC, *supra n.106*, Art.1.

¹¹⁰ Craig Forrest, *International Law and the Protection of Cultural Heritage* (London: Routledge, 2010) at 313 [Forrest].

¹¹¹ UCHC, *supra n.92*, Art.4(c).

i. *The application of salvage law over Cargast is incompatible with its status as UCH*

Shipwrecks lying on seabed¹¹² are not immediately in danger,¹¹³ as salvage is only permissible (i) when there is marine peril¹¹⁴ and (ii) it does not threaten the wreck's safety,¹¹⁵ in conjunction with the (iii) protection and preservation of UCH.¹¹⁶

First, information provided by Bellezza¹¹⁷ did not fulfill the restrictive test in *Subaqueous Exploration*,¹¹⁸ as Bellezza's continued salvage disproves real and evident marine peril.¹¹⁹

Second, the salvage operation over *Cargast* itself serves as a potential cause for marine peril, as affirmed in *Klein*¹²⁰ and *Mar-Dive*¹²¹ where human intervention disrupted and threatened the marine ecosystem surrounding the wrecks.¹²²

Third, Amalea's undue intrusion upon *Cargast* represents a reckless failure to disregard the possibility of *in situ* preservation through protection of the wreck.¹²³

¹¹² *Odyssey Marine Exploration, Inc. v. Kingdom of Spain*, 657 F 3d 1159 (11th Cir 2011) [Odyssey].

¹¹³ Forrest, *supra* n.110, at 301.

¹¹⁴ *Klein v. Unidentified Wrecked, etc., Vessel*, 758 F 2d 1511 (11th Cir) [Klein].

¹¹⁵ *Her Majesty the Queen in Right of Ontario v. Mar-Dive Corporation et al.*, 1997 AMC 1000 [Mar-Dive Corp].

¹¹⁶ LOSC, *supra* n.15, Art.303(1).

¹¹⁷ *Compromis*, ¶36.

¹¹⁸ *Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified, Wrecked and Abandoned Vessel*, 577 F Supp 597 (D Md 1983).

¹¹⁹ Clarification, ¶8.

¹²⁰ Klein, *supra* n.114.

¹²¹ Mar-Dive Corp, *supra* n.115.

¹²² Forrest, *supra* n.110, at 301.

ii. *Amalea's unilateral act of salvage violated MGT*

Article 12(d) MGT compels both States to give due regard to the other's interests "not limited to" those of natural resources in the Gap. Conforming to the letter of the law, Amalea is obliged to cooperate with Ritania in salvaging *Cargast*. Indeed, it is precisely this type of cooperation that the United States, United Kingdom, Canada, and France engaged in in the establishment of the R.M.S. Titanic Maritime Memorial Act regulating their concurrent jurisdictions over the *RMS Titanic*.¹²⁴ Accordingly, although Article 10(2) UCHC accords Amalea the right to protect *Cargast*, the said right must comply with the letter and spirit of MGT, the failure of which constitutes violation of MGT.¹²⁵

2. Amalea's claim under law of finds infringes Ritania's ownership rights

Under law of finds, an initial finder's right to take possession over lost or abandoned property nonetheless yields to the true owner's¹²⁶ right over it.¹²⁷ As such, (a) Ritania's identifiable status over the cargo and artifacts prohibits Amalea's invocation of law of finds, as reinforced in (b) absence of abandonment by Ritania.¹²⁸

¹²³ Luigi Migliorino, "In Situ Protection of the Underwater Cultural Heritage Under international Treaties and National Legislation" (1995) 10 Int'l Marine & Coastal L. 483.

¹²⁴ Sarah Dromgoole, "Legal Protection of the Underwater Cultural Heritage: Lessons from the Titanic" (2005) 61 *Amicus Curiae* 17.

¹²⁵ *Compromis*, ¶39,52, Appendix B; UCHC, *supra* n.92, Art.6; VCLT, *supra* n.31, Art.18,27.

¹²⁶ *Hener v. United States*, 525 F Supp 356 (SD NY 1981).

¹²⁷ Forrest, *supra* n.110, at 312.

¹²⁸ *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F 3d 634 (4th Cir 2000).

a. Ritania's status as rightful owner bars the application of law of finds

As a matter of fact, law of finds is inapplicable,¹²⁹ as Ritania retains constructive possession over her property in the *Cargast* wreckage as the owner.¹³⁰ Moreover, as Ritania's claim is specific and limited to her identifiable property,¹³¹ mere actual possession by Amalea does not confer constructive possession nor disentitle Ritania's ownership.¹³²

b. Ritania has not abandoned the cargo and artifacts of Ritanian origin

Ritania's express assertion at the moment of discovery of the *Coronet*,¹³³ her continuous cultural preservation, and the assignment of historical and mythical status to it, do not manifest express abandonment.¹³⁴ Even assuming that the lower standard of implied abandonment applies, its application still does not prevail over the rights of a claiming owner¹³⁵ irrespective of passage of time.¹³⁶ Conclusively, with Ritania as the rightful owner of the *Coronet* still actively claiming for it, Amalea cannot rightly claim for ownership simultaneously.

¹²⁹ ICS, *supra* n.84, Art.25; *Odyssey*, *supra* n.112.

¹³⁰ *Compromis*, ¶33.

¹³¹ *Correction*, ¶5.

¹³² *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F 2d 560 (5th Cir 1981).

¹³³ *Compromis*, ¶34,35,37.

¹³⁴ *Compromis*, ¶33; Kevin Berean, "Comments: *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels: How The Fourth Circuit Rocked the Boat*" (2002) 67 *Brook L Rev* 1249 at 1253-1254.

¹³⁵ *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F 2d 450 (4th Cir 1992) at 464-65.

¹³⁶ *Sea Hunt, Inc. v. Unidentified Vessels*, 177 F 3d 491 (6th Cir 1999) at 499-500.

3. In any event, Amalea has the duty to return Ritania's cultural property

The obligation to restitute cultural property is CIL,¹³⁷ as codified in Article 3(2) UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹³⁸ Manuscripts stolen by Napoleon from The Vatican during the Thirty Years War, for instance, were returned,¹³⁹ a practice¹⁴⁰ subsequently supported by, *inter alia*, United Kingdom and Germany.¹⁴¹ Lastly, consistent with *Neireide*,¹⁴² even objects acquired by legitimate privateering were still to be returned to their owners,¹⁴³ all objects stolen from Ritania should be returned to Ritania.¹⁴⁴

B. CONSEQUENTLY, RITANIA HAS THE RIGHT TO PROTECT HER HEIRLOOM

Despite inability to rely on Article 10(2) UCHC, Article 303(1) LOSC establishes Ritania's right to protect UCH in all maritime zones.¹⁴⁵ In her exercise, Ritania possesses the flag state right to set navigational regulation over her own patrol vessel,¹⁴⁶ precluding Amalea from

¹³⁷ *Italy v. J. Pail Getty Museum*, No. 2042/07 RGNR at 9-10.

¹³⁸ J.A.R. Nafzinger, "The Principles of Cooperation in the Mutual Protection and Transfer of Cultural Material" (2007) 8 *Chi J Int'l L* 147 at 147-150.

¹³⁹ Lyndel V. Prott & Patrick J. O'Keefe, *Law and the Cultural Heritage* (Abingdon: Professional Books Ltd., 1984) at 33.

¹⁴⁰ Article 1(c), *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231.

¹⁴¹ F. Shyllon, "Negotiations for the Return of Nok Sculptures from France to Nigeria – An Unrighteous Conclusion" (2003) 8 *Art Ant & L* 133 at 133-9.

¹⁴² *The Nereide*, 13 US 388 (1815).

¹⁴³ LOSC, *supra n.19*, Art.303(3); UNDoc A/RES/3187.

¹⁴⁴ *Compromis*, ¶33,34; S. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (New York: Oceana Publications, 1987) at 119–24.

¹⁴⁵ LOSC Commentary, *supra n.67*, at 161.

¹⁴⁶ LOSC, *supra n.19*, Art.58(2); *Message from the President of the United States*, 7 October 1994 at 24.

initiating creeping jurisdiction over *Cargast*¹⁴⁷ and Ritania's cultural heritage.¹⁴⁸ Contrary to Amalea's claims, the peaceful purpose¹⁴⁹ of Ritania's patrol (1) never poses any threat to Amalea, and (2) remains a lawful exercise of navigational freedom.

1. Deployment of Ritania's Navy does not violate or threaten Amalea

Peaceful use of sea must be consistent with the United Nation ["UN"] Charter and LOSC.¹⁵⁰ Not only is military patrol officially recognized by the 1985 UN Secretary-General report,¹⁵¹ Ritania's Navy patrol is also consistent with Article 1(2) of UN Charter, as it was aimed to solve an international cultural conflict. Furthermore, Ritania's two warnings in 2010 and 2011 and subsequent patrol cannot be construed as threats against Amalea, as confirmed by Bellezza's continuous and undisturbed salvage operation.¹⁵²

2. The patrol is recognized under the scope of freedom of navigation

Although *sui generis* EEZ regime may permit Amalea to restrict navigational freedom, this exercise can only be put into motion when there exists potential threat to her economic right.¹⁵³ However, since Amalea's economics right in EEZ do not include UCH,¹⁵⁴ but strictly natural

¹⁴⁷ LOSC, *supra* n.15, Art.59; UNDoc A/3159 at 295-6 [ILC Report].

¹⁴⁸ Francesco Francioni & James Gordly, *Enforcing International Cultural Heritage Law* (New York: Oxford University Press, 2013) at 128.

¹⁴⁹ *Compromis*, ¶40; UNDoc A/CONF.62/SR.67 at 62, ¶81.

¹⁵⁰ LOSC, *supra* n.15, Art.301.

¹⁵¹ UNDoc A/40/535 at 11.

¹⁵² *Compromis*, ¶35,37,40; Clarification, ¶8.

¹⁵³ LOSC Commentary, *supra* n.67, ¶58.10(b).

¹⁵⁴ Budislav Vukas, *Essays on the new Law of the Sea* (Zagreb: Sveučilišnanaklada Liber, 1985) at 246-249.

resources,¹⁵⁵ any assertion of navigation restriction is entirely illegitimate.¹⁵⁶ Further, Amalea's reliance on continental shelf jurisdiction would violate equitable principle¹⁵⁷ under Articles 3 UCHC *vis-à-vis* 78(1) LOSC.

In any event, Ritania's patrol is a permissible military activity¹⁵⁸ protected and sovereign immune pursuant to LOSC¹⁵⁹ and CIL.¹⁶⁰ Therefore, regardless of Amalea's claim for exclusion and increasing control of her EEZ, Ritania's right to patrol is legitimate as Article 310 LOSC prohibits States from reserving or modifying LOSC's legal effect.¹⁶¹

¹⁵⁵ LOSC, *supra* n.15, Art.56(1); *Compromis*, Appendix B Art.12(d).

¹⁵⁶ *Compromis*, ¶40; LOSC, *supra* n.15, Art.56(2).

¹⁵⁷ UCHC, *supra* n.92, Art.5; Clarification, ¶1; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3 [North Sea].

¹⁵⁸ Michel Boubonmier & Louis Haeck, "Military Aircraft and International Law: Chicago Opus 3" (2001) 66 J Air L & Com 885 at 958.

¹⁵⁹ LOSC, *supra* n.21, Art.95; HSC, *supra* n.93, Art.9.

¹⁶⁰ James Crawford, "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820.

¹⁶¹ LOSC, *supra* n.21, Art.90,309,310.

III. THE AMALEAN NAVY’S PURSUIT OF OSCAR DE LUZ INTO RITANIA’S EEZ, AND HIS SUBSEQUENT ARREST, WERE ILLEGAL

One of the hallmarks of international law of the sea is the exclusive jurisdiction of the flag state over its vessels on high seas.¹⁶² Although exceptions exist through (A) hot pursuit and (B) visit, Amalea has unlawfully exercised them against *Daedalus*. Furthermore, (C) such pursuit and arrest of Luz were unjustified by necessity.

A. AMALEA’S HOT PURSUIT OF *DAEDALUS* WAS UNLAWFUL

Right to exercise hot pursuit,¹⁶³ as codified in Articles 23 HSC and 111 LOSC, is prompted when there exists ‘reasonable ground to believe’ that violation of domestic law exists.¹⁶⁴ In this vein, Amalea’s justification to pursue *Daedalus* based on (1) Luz’s unfounded crime of piracy *jure gentium*¹⁶⁵ and (2) *prima facie* case of human trafficking was illegal, and rendered (3) Luz’s arrest within Ritania’s EEZ unlawful.

1. No piracy *jure gentium* prompted Amalea’s pursuit of *Daedalus*

Pursuant to Article 15 HSC and 101 LOSC, states have the customary¹⁶⁶ right to pursue perpetrators of piracy *jure gentium*,¹⁶⁷ a crime understood as illegal acts of violence by a private

¹⁶² HSC, *supra n.93*, Art.6(1); LOSC, *supra n.15*, Art.92(1).

¹⁶³ Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law*, 2nd ed. (The Hague: Martinus Nijhoff Publishers, 2002) at 39 [Poulantzas].

¹⁶⁴ LOSC, *supra n.15*, Art.111(1).

¹⁶⁵ LOSC Commentary, *supra n.67*, ¶105(e).

¹⁶⁶ HSC, *supra n.93*, Art.19; *Piracy Jure Gentium v. JCPC*, [1934] UKPC 54 at 213 [Piracy Jure Gentium].

¹⁶⁷ LOSC Commentary, *supra n.67*, ¶101.8(a); *United States v. Dire*, 680 F 3d 446 (4th Cir 2012) at 454.

vessel attacking another vessel¹⁶⁸ for private ends in EEZ.¹⁶⁹ The gravity of aforesaid attacks must nevertheless be severe.¹⁷⁰ Affirmed in *Said*, only cases of robbery, boarding of, and control-seizing of a ship would fulfill the high threshold of illegal act amounting to piracy *jure gentium*.¹⁷¹ Conversely, the stealing of *Daedalus* and the events that followed did not meet the threshold of such illegal acts. Moreover, in contrast to *Cetacean*'s ramming against ships¹⁷² and Somali pirates' attacks that were directed against vessels filled with cargo,¹⁷³ Luz's mere speeding towards Excelsior Island and escape to Amalea were not attack directed against *Rosehill* and other vessels in the Gap.¹⁷⁴ Failing the fulfillment of this test, Luz's arrest within Ritania's EEZ was hence unjustified absent consent from Ritania.¹⁷⁵

2. Prima facie case of human trafficking did not justify Amalea's hot pursuit

In the event of piracy *jure gentium*, procedural elements of hot pursuit are admittedly not required.¹⁷⁶ Should Amalea forward a basis of human trafficking, however, her pursuit still fails

¹⁶⁸ LOSC Commentary, *supra n.67*, ¶101.8(e).

¹⁶⁹ LOSC, *supra n.15*, Art.58(2).

¹⁷⁰ Stephen Macedo, *The Princeton Principles on Universal Jurisdiction* (New Jersey: Office of University Printing and Mailing Princeton University, 2001) at 23.

¹⁷¹ *United States v. Said*, 2010 WL 3893761 (ED Va 2010) at 32.

¹⁷² *Institute for Cetacean Research v. Sea Shepherd Conservation Society*, 43 ELR 20114 (9th Cir 2013) at 6.

¹⁷³ UNDoc S/RES/1918; UNDoc S/RES/1950; UNDoc S/RES/2015; UNDoc S/RES/2020.

¹⁷⁴ *Compromis*, ¶42,43.

¹⁷⁵ *Compromis*, ¶46.

¹⁷⁶ LOSC Commentary, *supra n.67*, ¶105.10(a).

to satisfy two procedural requirements of hot pursuit:¹⁷⁷ (a) reasonable ground to believe violation of immigration law and (b) proper signal order.

- a. Haddock did not have good reason to believe violation of Amalean immigration law

Amalea cannot argue that her exercise of hot pursuit was due to prevention of immigration law violation¹⁷⁸ within her contiguous zone.¹⁷⁹ Status of CIL has only been accorded to unilateral declaration of EEZ, but not of contiguous zone.¹⁸⁰ Being a party to 1958 Conventions but mere signatory to LOSC,¹⁸¹ Amalea cannot extend her contiguous zone farther than 12 nm and her 24 nm contiguous zone claim is unfounded.¹⁸² The assertion for the pursuit triggered by suspected human trafficking¹⁸³ aiming to prevent violation of Amalea's immigration law within her territorial waters is therefore illegitimate.¹⁸⁴

Even if Amalea's claim to contiguous zone is recognized, 'good reason to believe' cannot be established by mere suspicion.¹⁸⁵ In *Saiga*, the tribunal found that Guinean pursuing ship had "insufficient ground for hot pursuit where Guinea could have had no more than a suspicion that

¹⁷⁷ LOSC, *supra* n.15, Art.111.

¹⁷⁸ *Trafficking in Human Beings*, UN/POP/MIG/2005/15 at 3.

¹⁷⁹ Clarification, ¶3; LOSC, *supra* n.15, Art.111(1).

¹⁸⁰ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, [1985] ICJ Rep 13 at 33.

¹⁸¹ *Compromis*, ¶8,11.

¹⁸² Clarification, ¶3; Art.24, *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205.

¹⁸³ Clarification, ¶12.

¹⁸⁴ LOSC, *supra* n.15, Art.111(1).

¹⁸⁵ R.C. Reuland, "The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention" (1993) 33 Va J Int'l L 557 at 569.

Saiga had violated its law in EEZ.”¹⁸⁶ Similarly, before the commencement of pursuit,¹⁸⁷ ACPS alert that was acted upon by Haddock mentioned only that “persons on board are *suspected* of human trafficking,”¹⁸⁸ without providing any reasons and “tangible evidence”¹⁸⁹ of actual violation.¹⁹⁰ As such, the hot pursuit was illegal.

b. The order issued over radio frequencies was insufficient

Hot pursuit may only commence when the pursued vessel has been given adequate visual or auditory signal to stop¹⁹¹ for it to have the opportunity to heave to and await inspection.¹⁹² As affirmed by ILC,¹⁹³ the radio signals issued by Haddock over several radio frequencies, notwithstanding its common use in the Gap, must be found insufficient.¹⁹⁴

Moreover, Amalea cannot argue that signaling is immaterial, since as reinforced in *Postal*, the United States Court of Appeals emphasized the significance of signal since a pursuit only lawfully starts when it has been clearly given.¹⁹⁵

¹⁸⁶ *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, (1999) 38 ILM 1323 ¶146 [Saiga].

¹⁸⁷ *Compromis*, ¶45.

¹⁸⁸ Clarification, ¶12.

¹⁸⁹ LOSC Commentary, *supra* n.67, ¶111.9(b).

¹⁹⁰ Poulantzas, *supra* n.163, at 156-7.

¹⁹¹ LOSC, *supra* n.15, Art.111(1),(4).

¹⁹² *United States v. F/V Taiyo Maru, No. 28, SOI 600*, 395 F Supp 413 (D Me, 1975) ¶414.

¹⁹³ ILC Report, *supra* n.147.

¹⁹⁴ *Compromis*, ¶45.

¹⁹⁵ *Compromis*, ¶45; *United States v. Postal*, 589 F 2d 862 (5th Cir 1979).

3. Subsequently, Amalea's arrest of Luz was unlawful with unreasonable and excessive use of force

Amalea's attempt to arrest Luz involved unreasonable and excessive use of force¹⁹⁶ with no appropriate warning issued and no efforts made to avoid life endangerment.¹⁹⁷ In *Red Crusader*, the Commission of Inquiry found that the Danish warship's attempt to re-capture the vessel exceeded legitimate uses of gunshot, creating danger to human life on board.¹⁹⁸ This was further affirmed in *I'm Alone* where the Commissioners held that as "international law does not authorize intentionally sinking a vessel, the act of sinking the ship by officers of United States Coast Guard was an unlawful act."¹⁹⁹

Comparably, having spotted *Daedalus* within visual range,²⁰⁰ Haddock should have been aware that it was filled with people on board.²⁰¹ However, when Luz steered *Daedalus* straight towards *Icarus*, Haddock intentionally kept his naval vessel on course that both vessels eventually collided at high speed, causing *Daedalus* to sink rapidly.²⁰² By doing so, Haddock risked causing the supposedly arrested vessel²⁰³ to sink and injuring many people on board.²⁰⁴

¹⁹⁶ *Saiga*, *supra n.*186, ¶155.

¹⁹⁷ *S.S. "I'm Alone" (Canada, United States)*, (1933/1935) 3 UNRIAA 1609.

¹⁹⁸ *Investigation of certain incidents affecting the British trawler Red Crusader*, (1962) 29 UNRIAA 521.

¹⁹⁹ Reports of the Commissioners, "Claim of the British ship The I'm Alone v. United States" (1935) 29 AJIL 328.

²⁰⁰ *Compromis*, ¶45.

²⁰¹ *Compromis*, ¶42.

²⁰² *Compromis*, ¶46.

²⁰³ LOSC, *supra n.*15, Art.111(7).

²⁰⁴ *Compromis*, ¶46.

Conclusively, Amalea's exercise of hot pursuit was illegal and Ritania must be compensated for all damages incurred by *Daedalus*.²⁰⁵

B. ALTERNATIVELY, AMALEA'S VISIT OF *DAEDALUS* WAS UNWARRANTED

Amalea was also not entitled to intercept *Daedalus* without powers conferred by any treaty and reasonable ground to suspect (1) human trafficking under Articles 22 HSC *in toto* 110(1)(b) LOSC,²⁰⁶ which render (2) Luz's arrest in Ritania's EEZ illegitimate.

1. No *prima facie* case of human trafficking justified Amalea's visit

Right to interdict *Daedalus* could not be invoked, since a *prima facie* case of human trafficking (a) falls beyond the ambit of "slave trade" under Article 110(1)(b) LOSC, and (b) was not suspected beyond reasonable suspicion.

- a. Human trafficking cannot be equated to "slave trade" within the ambit of Article 110(1)(b) LOSC

Since LOSC expressly prohibits slave trade but not human trafficking, the latter cannot be presumed to be equal with the former.²⁰⁷ LOSC Commentary agrees with the definition of "slave trade" in the 1926 Slavery Convention, as capture of persons with intent to reduce them to items of ownership.²⁰⁸ In contrast, notwithstanding physical and psychological coercion, deception, or

²⁰⁵ LOSC, *supra* n.15, Art.111(3).

²⁰⁶ *Ibid*, Art.110(1),105; HSC, *supra* n.93, Art.19,22(1); Piracy Jure Gentium, *supra* n.166, at 213; Clarification,¶12.

²⁰⁷ LOSC, *supra* n.15, Art.99; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (New York: Cambridge University Press, 2009) at 228 [Guilfoyle].

²⁰⁸ LOSC Commentary, *supra* n.67, ¶99.2; Art.1, *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, 9 March 1927, 60 LNTS 253.

threats and control by their traffickers,²⁰⁹ victims of trafficking are not necessarily subjected to ownership.²¹⁰

This is further affirmed by the 2005 Protocol on Trafficking Persons, ratified by 159 states, which makes clear that “human trafficking” may be prostitution, forced labor, or slavery,²¹¹ meaning that it does not automatically amount to slavery. Therefore, despite being colloquially referred to as “modern day slavery”,²¹² human trafficking is not identical with slavery as put forth under Article 110(1)(b) LOSC.²¹³

b. Alternatively, Amalea’s mere suspicion of human trafficking was insufficient to visit *Daedalus*

Even if the Court were to agree with the Applicant that human trafficking is slave trade, Amalea’s interdiction was not based on any ground that goes beyond mere suspicion.²¹⁴ There was no concrete information that the people on board will indeed be exploited as slaves in the

²⁰⁹ UNODC, *Combating Trafficking in Persons in Accordance with the Principles of Islamic Law* (2010) at 17.

²¹⁰ Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012) at 39 [Boister].

²¹¹ Art.3(a), *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319.

²¹² Art.1, *Universal Declaration of Human Rights*, UNDoc A/810; *Slavery Convention*, 25 September 1926, 60 LNTS 253; Art.7(2)(c), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 30 April 1956, 266 UNTS 3.

²¹³ *Convention on Action against Trafficking in Human Beings and its Explanatory Report*, 16 May 2005, 45 ILM 12.

²¹⁴ Donald R. Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing Ltd., 2010) at 165.

destination country,²¹⁵ affirmed by the subsequent release of crews and passengers in Amalea's port. Amalea's visit thus, contravenes international law.

2. Amalea's arrest without Ritania's consent deprived Luz's liberty

An arrest by one state in the territory of another state is lawful only when it has been consented to by the latter.²¹⁶ Without consent, supremacy of an individual's right to liberty, as embedded in most existing human rights instruments, prevails.²¹⁷ In *Jin Yinn* for example, United States Coast Guard boarded and captured suspected alien smugglers only after receiving Taiwan's consent to arrest the vessel.²¹⁸ As Amalea arrested Luz in *Daedalus'* dinghy,²¹⁹ an extension of Ritanian territory,²²⁰ she has thus breached Ritania's territorial sovereignty and deprived Luz of his liberty.²²¹

Furthermore, comparable with *Saiga* where pursuit was commenced one day after alleged violation by an offending vessel,²²² Ritania's inaction in not pursuing *Daedalus* did not waive her claim for enforcement jurisdiction, since silence cannot be automatically construed as

²¹⁵ Efthymios Papastavridis, "Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law" (2009) 36 Syracuse J Int'l L & Com 145.

²¹⁶ ARSIWA, *supra* n.2, Art.20.

²¹⁷ Art.9, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 [ICCPR]; Art.5, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221; Art.7, *American Convention on Human Rights*, 21 November 1969, 1144 UNTS 123.

²¹⁸ Rachel Canty, "International Maritime Law: Limits of Coast Guard Authority to Board Foreign Flag Vessel on the High Seas" (1998) 23 Tul Mar LJ 123 at 134-6.

²¹⁹ *Compromis*, ¶46.

²²⁰ Merchant Shipping, *supra* n.83.

²²¹ Boister, *supra* n.210, at 178.

²²² *Saiga*, *supra* n.186, ¶61.

unawareness or inability to pursue.²²³ In any event, Ritania would have pursued *Daedalus* had proper prompt notification been given by Amalea.

C. IN ANY EVENT, AMALEAN NAVY’S PURSUIT AND ARREST WAS UNJUSTIFIED ON THE BASIS OF NECESSITY

Amalea could only invoke necessity²²⁴ to justify her unlawful pursuit and arrest if they were the only way to safeguard her ‘essential interest’ without contributing to the situation.²²⁵ However, as they were only to protect international sealane and her EEZ²²⁶ without meeting the test of “public emergency,”²²⁷ Amalea’s ‘essential interest’ was not threatened. The pursuit and arrest were also not the only means available, considering Amalea’s failure to notify Amalea. Moreover, upon spotting *Daedalus* in collision course before nightfall, *Rosehill*’s captain should have also seen Excelsior Island within close proximity of 500 metres, not veered towards it. *Rosehill*’s response to the approaching *Daedalus* thus constitutes contributory negligence, disentitling Amalea from invoking necessity.²²⁸

²²³ Guilfoyle, *supra* n.207, at 9.

²²⁴ Gabcikovo-Nagymaros, *supra* n.43, ¶¶51-2.

²²⁵ ARSIWA, *supra* n.2, Art.25, ¶1.

²²⁶ *Compromis*, ¶2.

²²⁷ ARSIWA, *supra* n.2, Art.25, ¶14.

²²⁸ *Compromis*, ¶¶42-44.

IV. AMALEA WAS WITHOUT JURISDICTION TO TRY LUZ IN CONNECTION WITH THE *ROSEHILL* COLLISION, AND MUST RETURN HIM TO RITANIA IMMEDIATELY

Every state may exercise jurisdiction over foreign nationals arising out of its interests only if it does not “overstep the limits international law places upon its jurisdiction”.²²⁹ Amalea’s exercise of jurisdiction over Luz was, however, (A) improper and (B) unwarranted by *male captus bene detentus*, (C) thus obliging her to immediately return Luz to Ritania.

A. AMALEA HAD NO JURISDICTION OVER LUZ AS IT VESTS IN RITANIA

Notwithstanding the extraterritorial nature of Luz’s crimes,²³⁰ (1) Ritania’s exclusive right to adjudicate Luz prohibits Amalea from relying on permissive basis of jurisdiction. Even absent such prohibitive rule, (2) Amalea was still without jurisdiction over him.

1. Ritania has exclusive competence to prosecute Luz

Amalea’s proceedings interfered with international adjudication,²³¹ as Ritania retains the exclusive competence to adjudicate Luz in connection to *Rosehill* collision²³² pursuant to (a) the subsumption of the incident under Article 97 LOSC and (b) Luz’s status as a Ritanian.

a. The *Rosehill* incident falls under Article 97 LOSC

Articles 97 LOSC and 11 HSC vest the flag state or national state the exclusive right to exercise penal jurisdiction over of a collision or other navigational incident occurring in EEZ *mutatis mutandis* high seas.²³³

²²⁹ *S.S. Lotus (France v. Turkey)*, [1927] PCIJ (Ser. A) No. 10 ¶47 [Lotus].

²³⁰ *Compromis*, ¶42.

²³¹ UNDoc A/3149 at 253, 281.

²³² LOSC, *supra* n.15, Art.221(2); LOSC Commentary, *supra* n.67, ¶97.8(b).

²³³ LOSC, *supra* n.15, Art.58(2),97; LOSC Commentary, *supra* n.67, ¶97.8(e); *Compromis*, ¶41.

Although it was not direct, the *Rosehill* strike against Excelsior Island constitutes a collision, since such artificial island possesses some salient characteristics of an “anchored” vessel²³⁴ as a fixed platform.²³⁵ Commentary on Article 97 LOSC also permits collision to only involve one ship.²³⁶ Alternatively, navigational incidents encompass death casualties and serious damage to foreign ships, all of which are present in the *Rosehill* incident.

b. Luz’s nationality accords exclusive jurisdiction to Ritalia

Consistently and uniformly adopted in state practice²³⁷ and treaties,²³⁸ active nationality principle confers jurisdiction on a state over its national who is accused of extraterritorial offense.²³⁹ As Luz is a Ritalian and the *Rosehill* collision was indisputably his doing,²⁴⁰ Ritalia maintains exclusive jurisdiction to prosecute Luz.

2. Alternatively, Amalea improperly relied on permissive basis of jurisdiction

Although *Lotus* doctrine permitted concurrent jurisdiction when multiple states have legitimate interests over same persons, the prohibitive rule of Articles 11 HSC and 97 LOSC has

²³⁴ Martinus W. Mouton, *The Continental Shelf* (The Hague: Martinus Nijhoff Publishers, 1952) at 235.

²³⁵ Art.2(4), *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 1340 UNTS 184.

²³⁶ LOSC Commentary, *supra* n.67, ¶97.8(b).

²³⁷ M. Akehurst, “Jurisdiction in International Law” (1972) BYBIL 153 [Akehurst].

²³⁸ Art.5(1)(b), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85; Art.12(2)(b), *Rome Statute of the International Criminal Court*, 1 July 2002, 2187 UNTS 90.

²³⁹ Cedric Ryngaert, *Jurisdiction in International Law* (New York: Oxford University Press, 2008) at 88.

²⁴⁰ *Compromis*, ¶¶42-3.

developed to reject it.²⁴¹ Accordingly, Amalea cannot invoke (a) ‘effects’ doctrine to prosecute Luz. Alternatively, Amalea’s reliance on universal jurisdiction over (b) ordinary crimes or (c) Luz’s piratical acts must be deemed inapposite.

a. The ‘effects’ doctrine bars Amalea’s exercise of jurisdiction

A state may assert jurisdiction over extraterritorial offenses only when they result in substantial effects within its territory.²⁴² Lacking prevalent interests arising from the effects of the *Rosehill* collision within her territory, Amalea could not base her jurisdiction over Luz on both (i) objective territoriality and (ii) passive personality.

i. Amalea’s exercise of objective territoriality jurisdiction was *unfounded*

Objective territoriality confers jurisdiction upon State in respect to offences commenced outside its territory but consummated within.²⁴³ Although Amalea may argue for the application of this principle due to the deaths on *Rosehill*, as extension to Amalea’s territory,²⁴⁴ the argument still cannot stand, since the effect felt by the state must be intended as “the primary and direct result” of the crime.²⁴⁵

²⁴¹ Harvard Research in International Law, “Jurisdiction with Respect to Crime” (1935) 29 AJIL 435 [Harvard Law].

²⁴² *United States v. Aluminum Co. of America*, 148 F 2d 416 (2d Cir 1945).

²⁴³ *Lotus*, *supra n.*229, ¶60.

²⁴⁴ *Ibid*, at 38.

²⁴⁵ *A. Ahlstrom Osakeyhto v. Commission*, 1988 ECR 5193.

Luz's intention to commit the alleged crime cannot be assumed, as he was merely "speeding towards the Island" and not *Rosehill*.²⁴⁶ Therefore, the effects felt by Amalea were not 'primary', 'direct', and 'intended,' resulting in failure of objective territoriality.

ii. *Amalea could not ground exercise of jurisdiction on passive personality*

Passive personality allows for conferral of jurisdiction upon foreign national by a state for offenses affecting its citizens committed abroad.²⁴⁷ Despite endorsement by several states, including France, Spain, Italy, and the United States,²⁴⁸ the principle lacks comprehensive support under international law, and, if any, its scope of application is limited to serious international crimes only, such as international terrorism.²⁴⁹

As a result, the charges imposed on Luz of murder, property crimes, and reckless endangerment were insufficient to trigger the strict scope of application.²⁵⁰ In any event, although there exist 89 Amalean deaths, 38 victims were non-Amaleans,²⁵¹ providing a procedural impracticality²⁵² should Amalea's contention be upheld, in which each of the other states demands exercise of jurisdiction over Luz.

²⁴⁶ *Compromis*, ¶42.

²⁴⁷ *S.S. Lotus (France v. Turkey)*, "Dissenting Opinion by M. Loder", (7 September 1927), (PCIJ Series A) No. 10, 34 at 35, 47.

²⁴⁸ Martin Dixon, et al., *Cases and Materials on International Law*, 5th ed. (New York: Oxford University Press, 2011) at 286.

²⁴⁹ *United States v. Fawaz Yunis*, 681 F Supp 896 (DC Cir 1988).

²⁵⁰ *Compromis*, ¶49; Clarification, ¶10.

²⁵¹ *Compromis*, ¶41, 43.

²⁵² Geoffrey R. Watson, "The Passive Personality Principle" (1993) 28 Tex Int'l LJ 1 at 7.

- b. Alternatively, universal jurisdiction over ordinary crimes has not attained customary status

Although around 91 states including Austria, Denmark, Germany, and Norway²⁵³ confer jurisdiction on their national courts to exercise universal jurisdiction, such jurisdiction has not been consistently and uniformly exercised over ordinary crime such as murder. Courts in practice tend to address such crimes only when they amount to offenses as heinous as genocide.²⁵⁴ Therefore, Amalea's prosecution of Luz on charges of ordinary crimes under her Penal Code cannot grant her exercise of universal jurisdiction.

- c. Assuming piracy *jure gentium*, universal jurisdiction is still invalid

In the event that Luz's crime constitutes piracy *jure gentium*, Amalea still has no (i) universal jurisdiction to prosecute Luz. Consequently, (ii) Amalea must abide to its customary *aut dedere aut judicare* obligation to extradite Luz to Ritania.

- i. *Universal jurisdiction over piracy is not customarily practiced*

To repress piracy *hostis humani generis*,²⁵⁵ Amalea, as state arresting Luz,²⁵⁶ may invoke Articles 105 LOSC *in toto* 19 HSC in prosecuting him.²⁵⁷ However, universal jurisdiction has not

²⁵³ Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2012) at 14.

²⁵⁴ *Dusko Cyjekoviic*, Landesgericht (1994); *Public Prosecutor v. N.N.*, (1994) Ostre Landsrets 3d Div.

²⁵⁵ Karl M. Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (The Hague: Kluwer Law International, 1996) at 110.

²⁵⁶ LOSC, *supra* n.15, Art.103,105; HSC, *supra* n.93, Art.17,19; LOSC Commentary, *supra* n.67, ¶101.8(c).

²⁵⁷ *United States v. Ali*, 885 F Supp 2d 17 (DC Cir 2012); *United States v. Yousef*, 327 F 3d 56 (2d Cir 2003).

been customarily exercised.²⁵⁸ Belgium, for example, had to restrict its scope of municipal law on universal jurisdiction.²⁵⁹ Only in cases from the four countries of China, India, Kenya, and Yemen²⁶⁰ as well as five known piracy prosecutions prior to 2009, is prosecution based purely on universal jurisdiction.²⁶¹ Provided this lack of state practice in prosecuting pirates *jure gentium*,²⁶² CIL is still not established.²⁶³

ii. *Consequently, aut dedere aut judicare obliges extradition of Luz*

Should universal jurisdiction be founded, the customary²⁶⁴ obligation of *aut dedere aut judicare*, as supported by 30 conventions²⁶⁵ and *opinio iuris*,²⁶⁶ obliges Amalea to prosecute or extradite Luz.²⁶⁷ The latter duty shall be fulfilled when a requesting state is able and willing to prosecute.²⁶⁸ Since Ritania's primary active nationality claim and prompt objection to Amalea's charges on Luz prove ability and willingness to adjudicate Luz, Amalea must extradite Luz.

²⁵⁸ UNDoc A/49/10 [46th Session Report]; UNDoc A/61/10 [58th Session Report].

²⁵⁹ George P. Fletcher, "Against Universal Jurisdiction" (2003) 1 JICJ 580 at 580-2.

²⁶⁰ Eugene Kontorovich & Steven Art, "An Empirical Examination of Universal Jurisdiction for Piracy" (2010) 104 AJIL 436 at 436-8, 441, 444-5, 448, 450.

²⁶¹ *United States v. Hasan*, 747 F Supp 2d 599 (ED Va 2010) at 609.

²⁶² *North Sea*, *supra n.157*, ¶77.

²⁶³ Akehurst, *supra n.237*, at 163.

²⁶⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [2012] ICJ Rep 144.

²⁶⁵ M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, (The Hague: Martinus Nijhoff Publishers, 1995) at 73.

²⁶⁶ R.R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" (1965) 41 BYBIL 275 at 285-286.

²⁶⁷ 46th Session Report, *supra n.258*; 58th Session Report, *supra n.258*, at 397.

²⁶⁸ André da Rocha Ferreira, et al., "The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)" (2013) 1 UFRGS Model United Nations Journal 202 at 205.

**B. FURTHER, THE ILLEGALITY OF LUZ'S ARREST DIVESTED AMALEA'S
COMPETENCE TO PROSECUTE LUZ**

Male captus bene detentus asserts that illegality of arrest does not divest the court of jurisdiction,²⁶⁹ however, this has been rejected by numerous national²⁷⁰ and international²⁷¹ courts. Past decisions applying this doctrine, such as *Kerr*,²⁷² *Frisbie*,²⁷³ and *Alvarez-Machain*,²⁷⁴ have also been widely criticized and even overruled in *Mazel Tov*, where the United States refused to exercise jurisdiction based on the illegality of the seizure a foreigner. Similarly, the unlawful arrest of Luz divested Amalea of jurisdiction to try him.²⁷⁵

C. SUBSEQUENTLY, AMALEA MUST RETURN LUZ TO RITANIA IMMEDIATELY

Despite absence of extradition and mutual assistance treaty between both States,²⁷⁶ Amalea must return Luz to Ritania.²⁷⁷ Luz's right to fair trial would not be impeded on the basis of (1) dual criminality and (2) double jeopardy.

²⁶⁹ *Attorney-General (Israel) v. Eichmann*, (1968) 36 I.L.R. 291.

²⁷⁰ *Regina v. Horseferry Road Magistrates Court, ex Parte Bennett*, [1993] UKHL 10; *Matta-Ballesteros v. Henman*, 697 F Supp 1036 (SD Ill 1988).

²⁷¹ *Prosecutor v. Dragan Nikolić*, IT-94-2-Pt, (9 October 2002).

²⁷² *Ker v. Illinois*, 119 US 436 (1886).

²⁷³ *Frisbie v. Collins*, 342 US 519 (1952).

²⁷⁴ *United States v. Alvarez-Machain*, 504 US 655 (1992) at 658-670.

²⁷⁵ Alexander Zahar & Goran Sluiter, *International Criminal Law: A Critical Introduction* (New York: Oxford University Press, 2007) at 290.

²⁷⁶ *Compromis*, ¶52; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, "Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley" [1992] ICJ Rep 136.

²⁷⁷ Ivan Anthony Shearer, *Extradition in International Law* (Manchester: The University Press, 1971) at 24.

1. Dual criminality requirement authorizes Luz's extradition

Dual criminality²⁷⁸ requires for Luz's alleged offenses to be punishable in both Amalea and Ritania²⁷⁹ and for Amalea to recognize²⁸⁰ the jurisdictional basis of Ritania.²⁸¹ Dual criminality must be broadly construed,²⁸² such as in *Wright v. Henkel*, where both United States and British laws were found "substantially analogous" despite different elements of crime.²⁸³

Amalea's ground for refusal to extradite Luz was that her concern that Ritanian criminal law does extend beyond Ritania's territorial waters, not that the alleged offenses are governed under it.²⁸⁴ Since there has been no dispute that Ritanian law governs the actions of Luz substantively, Amalea must have tacitly recognized this. Moreover, as party to the 1958 Geneva Conventions²⁸⁵ and signatory to LOSC,²⁸⁶ Amalea should in good faith have recognized Ritania's jurisdictional basis over the crimes within the LOSC regime, hence fulfilling the dual criminality requirements.

²⁷⁸ *In re Nielsen*, 131 US 176 (1889).

²⁷⁹ *Factor v. Laubenheimer, United States Marshal, et al.*, 290 US 276 (1933); *Oen Yin-Choy v. Robinson*, 858 F 2d 1400 (9th Cir 1988) ¶¶15-6.

²⁸⁰ Christopher L. Blakesley, "Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes" (1984) 4 Utah L Rev 685 at 744.

²⁸¹ *Republic of France v. Moghadam*, 617 F Supp 777 (ND Cal 1985) ¶¶786-7.

²⁸² *Collins v. Loisel*, 259 US 309 (1922); Art.2(2), UNDoc A/RES/45/116.

²⁸³ *Wright v. Henkel*, 190 US 40 (1903).

²⁸⁴ *Compromis*, ¶49.

²⁸⁵ *Compromis*, ¶8.

²⁸⁶ *Compromis*, ¶11.

In any event, Amalea's contention on Ritania's limited scope of criminal law should be found immaterial, because Ritania has the sovereign discretionary power to investigate and charge her own nationals based on her existing domestic law.²⁸⁷

2. Amalea's refusal to extradite is unwarranted under *ne bis in idem*

Double jeopardy dictates that an offender must not be tried or punished for an offense for which he has already been convicted.²⁸⁸ Notwithstanding adoption of domestic laws,²⁸⁹ the application of said principle does not exist at transnational level.²⁹⁰ For instance, Article 14(7) ICCPR limits the application of *ne bis in idem* to prosecutions in one state and not as between states.²⁹¹ Thus, Amalea cannot rely on double jeopardy to justify her refusal to extradite Luz.

In any event, such duty to return fugitives must be acknowledged as between the two Sovereigns and in good faith,²⁹² finding support in *Fiocchini*,²⁹³ *Paroutian*,²⁹⁴ and *Accardi*.²⁹⁵ Hence, Amalea must return Luz to Ritania immediately.

²⁸⁷ Harvard Research, *supra* n.241, at 519.

²⁸⁸ *A.P. v. Italy*, UNDoc CCPR/C/OP/2 ¶7.3.

²⁸⁹ *Criminal Code Act Compilation Act 1913* (WA); *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, (UK), 1982, c 11; Art 6 C proc pén.; *Constitution of India, 1950*.

²⁹⁰ M. Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1993) 3 Duke LJ 289.

²⁹¹ ICCPR, *supra* n.217, Art.14(7).

²⁹² Satya Deva Bedi, *Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries* (New York: William S. Hein & Company Inc., 2002).

²⁹³ *United States v. Fiocchini*, 462 F 2d 475 (2d Cir 1972).

²⁹⁴ *United States v. Paroutian*, 299 F 2d 486 (2d Cir 1962).

²⁹⁵ *United States v. Accardi*, 241 F Supp 119 (SD NY 1964).

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests this Honorable Court to find, adjudge, and declare that:

- I. Ritania's conduct with respect to the Excelsior Island project complied in all respects with its obligations under international law and the terms of the Malachi Gap Treaty, and Ritania has no obligation to compensate Amalea for any loss or damage allegedly caused by the 2009 landslide;
- II. Amalea's salvage of the *Cargast* is unlawful, and the cargo and artifacts of Ritanian origin recovered from the wreck properly belong to Ritania, which has the right to protect them;
- III. The Amalean Navy's pursuit of Oscar de Luz into Ritania's EEZ, and his subsequent arrest, were illegal; and
- IV. Amalea was without jurisdiction to try Luz in connection with the *Rosehill* collision, and must return him to Ritania immediately.

Respectfully submitted,

Agents for Ritania, 274R