

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

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



THE CASE CONCERNING CERTAIN ACTIVITIES WITHIN THE MALACHI GAP

THE STATE OF AMALEA

APPLICANT

v

THE REPUBLIC OF RITANIA

RESPONDENT

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The State of Amalea ('Amalea') and the Republic of Ritania ('Ritania') have consented to submit this dispute to the International Court of Justice ('this Court'), in accordance with Articles 36(1) and 40(1) of the *Statute of the International Court of Justice* ('the Statute'), by way of *Compromis* transmitted to the Registrar on 17 September 2013. Amalea and Ritania have undertaken to accept this Court's decision as final and binding on them and commit to comply with it in its entirety and in good faith.

QUESTIONS PRESENTED

- I. Whether Ritania's conduct concerning the Excelsior Island project was in contravention of international law and whether Ritania is liable to compensate Amalea for the economic losses caused by the landslide.
- II. Whether Amalea has exclusive ownership of the *Cargast* and all artifacts recovered from it and whether Ritania's deployment of naval patrol vessels to the *Cargast* was in contravention of international law.
- III. Whether Amalea's pursuit of Luz into Ritania's uncontested EEZ, and his subsequent arrest, were in compliance with international law.
- IV. Whether Amalea had jurisdiction to prosecute and convict Luz for criminal conduct in connection with the *Rosehill* incident and whether Amalea is required to return Luz to Ritania.

STATEMENT OF FACTS

Amalea, Ritania and the Strait of Malachi

Amalea, a developing State, and Ritania, a developed State, are separated by the Strait of Malachi, which is between 217 and 386 nautical miles ('nm') wide. In 1958, Amalea claimed a 12 nm contiguous zone, which it extended to 24 nm in 1984. In 1983 and 1984, the States claimed overlapping 200 nm exclusive economic zones ('EEZs') in the Strait of Malachi.

Natural Resources in the Strait of Malachi

The waters of the Strait of Malachi contain fish stocks of critical importance to Amalea. Amalean fishing vessels historically plied almost all of the Strait of Malachi. The Amalean fishing industry contributes 40% of Amaleans' protein intake, its exports comprise 5% of Amalea's GDP, and it employs over 250,000 people. The Dorian wrasse is a non-migratory fish which breeds in a 50 square kilometre area of the Sirius Plateau, which is located in the Strait of Malachi. Amaleans traditionally consume the Dorian wrasse at cultural ceremonies. Amalea's Dorian wrasse exports were projected to generate USD 250 million annually between 2013 and 2018. The seabed of the Strait of Malachi contains natural gas reserves of interest to Ritania. In 1988, a natural gas deposit in the Strait of Malachi, the Erebus gas field, was discovered.

The Malachi Gap Treaty

In 1992, to manage their overlapping EEZ claims, the States concluded the *Malachi Gap Treaty*. The *Malachi Gap Treaty* apportioned each State's rights within an area called the Malachi Gap. Amalea was entitled to the natural resources of the waters and Ritania was entitled to the natural

resources of the seabed and subsoil. The area claimed by each State outside the Malachi Gap was considered its uncontested EEZ.

The Development of Excelsior Island

Esmeralda Kali ('Kali') is a Ritanian billionaire. In 2006, Kali announced that her company, Excelsior Island Gas & Power ('EIGP'), planned to create an artificial island to facilitate production of liquefied natural gas ('LNG') sourced from the seabed of the Malachi Gap. The island, called Excelsior Island, was to be constructed in Ritanian's uncontested EEZ using two billion cubic metres of sand and rock dredged entirely from the Malachi Gap. Ritanian's Ambassador confirmed to Amalea's Foreign Minister that Ritanian was considering the feasibility of the development. Amalea disputed any development of Excelsior Island without its consent.

EIGP submitted an environmental impact assessment ('EIA') to the Ritanian Department of Resource Management ('DRM') for approval of the Excelsior Island development. That EIA did not consider the effects of dredging on the waters or fish of the Malachi Gap. Amalea protested any development of Excelsior Island without a comprehensive EIA being conducted. After the DRM received the EIA, the International League for Sustainable Aquaculture ('ILSA'), a non-governmental organisation, published a report characterising the effects of dredging in the Malachi Gap as potentially 'catastrophic'. Ritanian's Ambassador refused Amalea's Foreign Minister's request to forward this report to the DRM.

Amalea cautioned Ritanian that if the dispute could not be resolved through negotiations, it would request provisional measures from this Court. Negotiations commenced and continued for a year.

Within weeks of the negotiations stalling, the DRM authorised EIGP's development of Excelsior Island. This Court declined Amalea's request for provisional measures.

The Landslide and Endangerment of the Dorian Wrasse

In December 2009, the dredging in the Malachi Gap caused an unprecedented landslide in the Sirius Plateau. That landslide increased water turbidity and gas concentration in the Sirius Plateau, harming the Dorian wrasse population. By 2011, Amalea's Dorian wrasse catch had reduced to 15% of its catch in 2000. In February 2012, ILSA declared the Dorian wrasse endangered. In March 2012, following ILSA's recommendation, Amalea ceased commercial fishing.

The Discovery and Salvage of the *Cargast*

In January 2010, the *Cargast* was discovered in the Malachi Gap on Amalea's continental shelf. The *Cargast* was an Amalean schooner bearing the escutcheon of the King of Amalea, equipped with cannons and weapons provided by the King and purchased by the Treasury. The *Cargast* was granted to Baldric Verdigris ('Verdigris'), an Amalean explorer who held a letter of marque from the King of Amalea 'to bring glory to the Kingdom'. In March 1510, after a successful overseas trading mission, Verdigris and his crew sacked Ritania's capital, Helios, seizing cultural artifacts, including the Sacred Helian Coronet ('Coronet'). The *Cargast* sank in the Strait of Malachi during her return to Amalea.

Amalea claimed ownership of the *Cargast* and its cargo, 'to be held in trust for all humankind.' A Swiss diver, Milo Bellezza ('Bellezza'), conducted an exploratory dive to the *Cargast*, where

he recovered five objects, one of which appeared to be the Coronet. Bellezza provided information that persuaded Amalea's Cultural Affairs Ministry ('ACMA') that the *Cargast's* hull structure was at risk of catastrophic collapse. Amalea contracted with Bellezza to explore the *Cargast* and recover objects, granting him the status of salvor. Ritania protested the salvage of the *Cargast* and counter-claimed ownership of the artifacts, threatening to commence naval patrols to prevent further interference. From June to September 2011, Bellezza conducted further dives, recovering items for Amalea from both the trading mission and the Sack of Helios. In September 2011, Ritania commenced naval patrols around the *Cargast*.

The *Rosehill* Incident

The *Rosehill* was an Amalean-registered cruise ship carrying 771 people. The *Daedalus* was a stolen Ritanian-flagged yacht, operated by Oscar de Luz ('Luz'), a Ritanian citizen. In February 2011, as the *Rosehill* approached Excelsior Island, the *Daedalus* was speeding on a collision course with the *Rosehill*. The captain of the *Rosehill* was forced to swerve into Excelsior Island to avoid a collision. The impact caused the death of 127 people, including 89 Amaleans; 117 people died on board the *Rosehill* and 10 Amaleans were found dead in the water nearby. The *Rosehill* captain immediately radioed Amalean authorities.

The Pursuit, Apprehension and Prosecution of Luz

Following the *Rosehill* incident, Luz navigated the *Daedalus* towards Amalea. The Amalean Coastal Protection Service ('ACPS') issued an alert that the *Daedalus* was stolen, endangering Amalean fishing vessels and suspected of human trafficking. Captain Haddock, the commander of the *Icarus*, an Amalean Navy Cutter, received that alert. The *Icarus* identified the *Daedalus*

on radar within about 23 nm of Amalea and set out to intercept her. When the vessels were within visual range, Captain Haddock issued a radio broadcast ordering the *Daedalus* to stop. Instead, the *Daedalus* turned towards Ritania, where she was pursued by the *Icarus* into Ritania's EEZ. In an attempt to force the *Icarus* to veer away, Luz steered the *Daedalus* into a head-on collision with the *Icarus*. Luz leapt into a dinghy, where he was arrested.

Amalea prosecuted and convicted Luz for murder, reckless endangerment, negligent operation of a vessel and property crimes. Amalea's criminal legislation specifically includes offences committed in the Malachi Gap. Amalea declined a request by Ritania to repatriate Luz, commenting that Ritanian criminal legislation does not apply extraterritorially.

Relevant Conventions

The States are both Parties to the *Salvage Convention* and the *Geneva Conventions*. Amalea is a Party to the *UCHC* and a signatory to *UNCLOS*. Ritania is a signatory to the *UCHC* and a Party to *UNCLOS*. There is no extradition treaty between the States.

SUMMARY OF PLEADINGS

PLEADING I

As Ritania has not challenged Amalea's standing, for the Court to decide that issue would be *non ultra petita*. In any case, Amalea has standing to make claims concerning Ritania's conduct.

PLEADING II

Ritania's conduct concerning the Excelsior Island development contravened international law.

Ritania contravened the *Malachi Gap Treaty* both because it exercised its treaty rights in a way which unduly inhibited Amalea's capacity to exercise its treaty rights and because it did not cooperate with Amalea giving due regard to Amalea's interests. Further, Ritania breached the obligation to exercise due diligence to ensure that the development of Excelsior Island did not cause reasonably foreseeable and significant damage to the Malachi Gap. Additionally, Ritania contravened the abuse of rights doctrine because it exercised its rights in a way which impaired the capacity of Amalea to exercise its rights, and contravened the principle of sustainable development because it did not integrate environmental considerations into its development approval process.

Ritania is liable to compensate Amalea for the economic losses caused by the landslide. Ritania is liable on an at-fault basis because it has committed internationally wrongful acts. In the alternative, Ritania is liable on an objective basis even if it has not committed internationally wrongful acts.

PLEADING III

Amalea has exclusive ownership of the *Cargast* and all artifacts recovered from it. Amalea owned the *Cargast* and its artifacts and did not abandon them. The *Cargast* was a State vessel and Amalea remained her lawful owner despite her sinking in 1510. As Amalea acquired the artifacts lawfully according to the rules governing warfare in 1510, they remained Amalean property. Further, as Amalea is the owner of the *Cargast*, it was entitled to authorise the salvage of the *Cargast* and was not prevented by any rule of international law from contracting with Bellezza to recover items from the wreck.

Ritania's deployment of naval patrol vessels to the *Cargast* contravened international law. Ritania violated the prohibition on the threat of force and other *Charter* obligations. Ritania's actions were not valid law enforcement measures. Ritania violated the freedom of navigation in the EEZ and cannot rely on any *UCHC* provisions to justify its conduct.

PLEADING IV

Amalea's pursuit of Luz into Ritania's EEZ was in compliance with international law. Amalea satisfied the requirements for hot pursuit in the *High Seas Convention*. The proper interpretation of the relevant convention provisions does not require the *Daedalus* to have committed an offence within Amalea's territorial sea to justify the commencement of pursuit by the *Icarus*. Accordingly, it was lawful for Amalea to pursue the *Daedalus*, as it had good reason to believe that the *Daedalus* had violated Amalean immigration law in its contiguous zone or was about to do so in its territorial sea. The *Icarus* also complied with the requirement to issue a signal to stop, for which the use of radio is not prohibited and all other conditions for pursuit were satisfied.

Alternatively, Amalea validly exercised the customary right of hot pursuit from the EEZ for suspected navigational offences within Amalea's EEZ.

Following its hot pursuit, Amalea was lawfully entitled to arrest Luz. In the alternative, Amalea had adequate grounds to arrest Luz on suspicions of piracy. Luz's intentional navigation of the *Daedalus* into a collision course with the *Icarus* constituted an illegal act of violence against another vessel, providing adequate grounds to suspect the vessel of piracy.

PLEADING V

Amalea had jurisdiction to prosecute and convict Luz for criminal conduct in connection with the *Rosehill* incident. Amalea's exercise of jurisdiction over Luz was lawful. Even if the Court finds that Luz's arrest was unlawful, Amalea was not precluded from prosecuting him.

No rule of international law prohibited Amalea from exercising jurisdiction over Luz in connection with the *Rosehill* incident. Additionally, Amalea can show existing permissive grounds in international law to support its prescriptive jurisdiction. Amalea has no obligation to make reparation to Ritania. However, if the Court should find that reparation is due, repatriation of Luz would not be the proper form of restitution. This is because Amalea may continue to hold Luz for his offences in connection with the *Icarus*, which Ritania has not challenged.

PLEADINGS

I. AMALEA HAS STANDING TO MAKE CLAIMS CONCERNING RITANIA'S CONDUCT

Ritania cannot contest Amalea's standing. Given that Ritania has not challenged Amalea's standing, for the Court to decide this issue would be *non ultra petita*.¹ In any case, Amalea has standing as it is an injured State. As to the Excelsior Island development, Ritania owed obligations to Amalea individually under the *Malachi Gap Treaty*, and to a group of States including Amalea under customary international law and general principles of law.² As to the *Cargast*, Ritania owed obligations to Amalea individually under the *Salvage Convention*, and to a group of States including Amalea under the *Charter* and customary international law.³ Regarding the obligations of a collective character, Amalea was specially affected by their breach.⁴

II. RITANIA'S CONDUCT CONCERNING THE DEVELOPMENT OF EXCELSIOR ISLAND CONTRAVENED INTERNATIONAL LAW AND RITANIA IS LIABLE TO COMPENSATE AMALEA FOR ECONOMIC LOSSES CAUSED BY THE LANDSLIDE

¹ *Statute* art 36(1).

² *ASR* art 42(a).

³ *ASR* art 42(a).

⁴ *ASR* art 42(b)(i).

**A. RITANIA’S CONDUCT CONCERNING THE DEVELOPMENT OF EXCELSIOR ISLAND
CONTRAVENED CONVENTIONAL INTERNATIONAL LAW**

**1. Ritania’s conduct concerning the development of Excelsior Island
contravened the *Malachi Gap Treaty***

**a. Ritania contravened Article 12(c) because it ‘unduly inhibited’
Amalea’s rights**

Articles 12(a) and 12(b) of the *Malachi Gap Treaty* entitle Amalea to ‘explore, exploit, and protect the natural resources of the waters superjacent to the seabed’ and entitle Ritania to ‘explore, exploit, and protect the natural resources of the seabed and subsoil’ of the Malachi Gap.⁵ Further, Article 12(c) of the *Malachi Gap Treaty* provides that neither Party is to exercise those rights ‘in a manner which unduly inhibits the exercise of the rights of the other Party’.⁶ The development of Excelsior Island was an exercise of Ritania’s Article 12(b) *Malachi Gap Treaty* rights and so enlivened the responsibilities imposed on it by Article 12(c) of that treaty.

‘Unduly inhibit’ is not defined in the *Malachi Gap Treaty*. Interpretation of that phrase shall be ‘in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’⁷ The object and purpose of the *Malachi Gap Treaty* was ‘to balance, and ... to promote, the interests of the States Parties in respect of

⁵ *Compromis*, Appendix B.

⁶ *Compromis*, Appendix B.

⁷ *VCLT* art 31(1).

exploration, exploitation, and protection of [the Malachi Gap].⁸ An undue inhibition, in the context of dredging for the Excelsior Island development, is one where the disadvantages to Amalea outweigh the advantages to Ritania. For Ritania, the Excelsior Island development would have economic advantages.⁹ For Amalea, the Excelsior Island development caused the Dorian wrasse to become endangered, threatened the continuation of its cultural customs and destroyed the Dorian wrasse industry.¹⁰ The imbalance between the advantages to Ritania and the disadvantages to Amalea was so considerable that Ritania's exercise of its right to develop Excelsior Island constituted an undue inhibition of Amalea's exercise of its rights, in contravention of Article 12(c) of the *Malachi Gap Treaty*.

b. Ritania contravened Article 12(d) because it did not 'cooperate' with Amalea and accord Amalea's interests 'due regard'

Article 12(d) of the *Malachi Gap Treaty* requires the Parties to 'cooperate with each other in relation to the exercise of their respective rights giving due regard to each Party's unique interests in the Malachi Gap'.¹¹ Neither 'cooperate' nor 'due regard' are defined in the *Malachi Gap Treaty*. Interpretation of those phrases shall be in accordance with the general rule of treaty interpretation set out above.¹² The ordinary meaning of the word 'cooperate' is to engage in co-ordinated action so as to attain a certain objective.¹³ Cooperating with Amalea required Ritania to engage in co-ordinated communications, consultations and negotiations to achieve the parties'

⁸ *Compromis*, [16]. The preamble also forms part of the treaty's context: *VCLT* art 31(2).

⁹ *Compromis*, [20].

¹⁰ *Compromis*, [18], [30], [50].

¹¹ *Compromis*, Appendix B.

¹² *VCLT* art 31(1).

¹³ Wolfrum (2012) 783.

common goal of balancing and promoting their interests in the Malachi Gap. The ordinary meaning of the phrase ‘due regard’ is comparable with that of the phrase ‘reasonable regard’.¹⁴ Giving reasonable regard to Amalea’s interests required Ritania to be cognisant of Amalea’s interests, consider Amalea’s interests in its decision-making,¹⁵ and reconcile the States’ interests so that they could co-exist.¹⁶

Ritania did not engage in negotiations with Amalea so as to achieve the parties’ common goal. Ritania only initiated negotiations with Amalea after Amalea advised Ritania of its intention to apply for provisional measures from this Court. Ritania was not cognisant of Amalea’s unique interests in the Dorian wrasse and other fish, nor did it consider those interests in its decision-making and reconcile those interests so that they could co-exist. Despite Amalea informing Ritania of its concerns about the effect of the dredging on the Dorian wrasse,¹⁷ Ritania refused to take the ILSA report into account in its development approval process, and approved an EIA that did not contemplate the impact of dredging activities on the Dorian wrasse.¹⁸ Ritania did not cooperate with Amalea, giving due regard to Amalea’s unique interests, in contravention of Article 12(d) of the *Malachi Gap Treaty*.

**B. RITANIA’S CONDUCT CONCERNING THE DEVELOPMENT OF EXCELSIOR ISLAND
CONTRAVENED CUSTOMARY INTERNATIONAL LAW**

¹⁴ *Annotated US Naval Operations Handbook* (1997) 2-21-2-22; Beckman and Davenport (2012) 14.

¹⁵ *UNCLOS Commentary*, vol 3, 86; Walker, G. (2011) 187.

¹⁶ *Fisheries Jurisdiction*, [69].

¹⁷ *Compromis*, [24].

¹⁸ *Compromis*, [23]-[25].

1. Ritania's conduct concerning the development of Excelsior Island contravened its obligation to exercise due diligence

a. Ritania had an obligation to exercise due diligence

At custom, States have a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.¹⁹ This 'no-harm' rule²⁰ is an accepted 'part of the corpus of international law [concerning] the environment.'²¹ The 'no-harm' rule obliges States to exercise due diligence concerning activities within their jurisdiction or control where there is a likelihood that those activities will cause reasonably foreseeable and significant damage to areas beyond their national control.²² Ritania had an obligation to exercise due diligence to ensure that the development of Excelsior Island did not cause reasonably foreseeable and significant damage to the Malachi Gap.

'Reasonable foreseeability' is contingent on the magnitude and probability of harm,²³ which is conditioned by 'the state of knowledge regarding the risk posed by the activity in question'²⁴ at the date of decision-making. Significant harm is more than minor or 'detectable but less than

¹⁹ *Nuclear Weapons*, [29]; *Pulp Mills*, [101]; *Trail Smelter*, 1965; *Corfu Channel*, 22.

²⁰ The 'no-harm' rule is a manifestation of *sic utere*, the good neighbourliness principle and abuse of rights: Beyerlin and Maruhn (2011) 40.

²¹ *Nuclear Weapons*, [29]; Koivurova (2010) [15].

²² *Trail Smelter*, 1965; *Corfu Channel*, 22; *Nuclear Weapons*, [29]; *Pulp Mills*, [101]; *Activities in the Area*, [110].

²³ *Draft Articles on Prevention of Transboundary Harm* arts 1-2; Birnie, Boyle and Redgwell (2009) 153.

²⁴ Birnie, Boyle and Redgwell (2009) 153.

serious or substantial.²⁵ Further, the effect of the precautionary principle is that a State cannot excuse its failure to mitigate or avoid significant environmental damage on the basis of a lack of complete scientific certainty.²⁶

At the time of EIA approval, the proposed dredging for the development of Excelsior Island consisted of two billion cubic metres of sand and rock,²⁷ and was the world's largest dredging activity.²⁸ Prominent marine scientists had predicted that 'any major dredging activity in the Malachi Gap ... could potentially prove catastrophic for native species and ecosystems ... [and] could threaten particularly grave damage.'²⁹ The dredging was proximate to the only known breeding ground of the non-migratory Dorian wrasse.³⁰ Collectively, these facts meant that harm both to the Malachi Gap generally, and to the Dorian wrasse specifically, was reasonably foreseeable and significant.

The fact that the Court rejected Amalea's application for provisional measures does not mean that damage to the Malachi Gap was not reasonably foreseeable and significant. A criterion for the indication of provisional measures is that there is a necessity for this Court to prevent 'irreparable damage'.³¹ That test constitutes a higher threshold than 'significant' damage. This

²⁵ *Draft Articles on Prevention of Transboundary Harm* art 2.

²⁶ *Request for an Examination of the Situation in the Nuclear Tests*, 342-343.

²⁷ *Compromis*, [20].

²⁸ *Ouis* (2011) 1413.

²⁹ *Compromis*, [25].

³⁰ *Compromis*, [19], [24]; *Clarifications*, [2].

³¹ *Statute* art 41; *Fisheries Jurisdiction*, 12, 16, 30, 34; *Nicaragua v Costa Rica (Provisional Measures)*, [24]-[25]; *Rosenne* (2006) 1383.

Court's previous denial of provisional measures³² does not necessitate the conclusion that damage to the Malachi Gap was not reasonably foreseeable and significant.

As the damage to the Malachi Gap was both reasonably foreseeable and significant, Ritania had an obligation to exercise due diligence. The procedural implications of Ritania's obligation to exercise due diligence were conditioned by the circumstances: '[t]oute détermination du degré de diligence exigé par le droit international doit tenir compte: a) de l'organisation du droit interne exigée par le droit international, b) de l'emploi des moyens dont l'Etat dispose, c) des soins que l'Etat doit apporter à la mise en œuvre de ces moyens.'³³ At a minimum, to fulfil the obligation to exercise due diligence, Ritania had to have had the legal and administrative infrastructure necessary to ensure compliance with its international environmental responsibilities and use that infrastructure with diligence appropriate in the circumstances.³⁴ However, as Ritania was a developed State with the capacity to take precautions against environmental damage, the standard of due diligence required increased commensurately. Due diligence required Ritania to use 'all the means at its disposal'³⁵ to ensure the development of Excelsior Island did not cause significant damage to the Malachi Gap. Ritania, a developed and industrialised State with considerable means at its disposal did not utilise those means, as set out below.

³² *Statute art 75(3); Compromis*, [27].

³³ *Zannas (1952)* 85-86.

³⁴ *Tehran Hostages*, [63]; *Dupuy (1977)* 372-374; *Zannas (1952)* 85.

³⁵ *Nuclear Weapons*, [29].

b. Ritania breached its obligation to exercise due diligence because it approved a deficient EIA for the development of Excelsior Island

The fact that Ritania required an EIA for the Excelsior Island development was not sufficient to satisfy its due diligence obligation.³⁶ To satisfy its due diligence obligation, the content that Ritania needed to require of that EIA had to reflect ‘the nature and magnitude of the proposed development [of Excelsior Island] and its likely adverse impact on the environment’ of the Malachi Gap.³⁷ The nature and magnitude of the proposed development of Excelsior Island were so considerable that non-contemplation of the impact of the dredging on the waters and fish species of the Malachi Gap³⁸ rendered EIGP’s EIA deficient. Ritania’s approval of this deficient EIA was inconsistent with its obligation to exercise due diligence. Further, Ritania could not approve an EIA which did not consider alternative locations for the dredging activities.³⁹ There is no indication that the EIGP EIA considered any other locations for the dredging activities, especially locations less proximate to the breeding ground of the Dorian wrasse.

³⁶ The requirement to conduct an EIA can also be conceived of as a discrete obligation in customary international environmental law: *Pulp Mills*, [204].

³⁷ *Pulp Mills*, [205].

³⁸ *Compromis*, [23].

³⁹ *Pulp Mills*, [207]-[214].

c. Ritania breached its obligation to exercise due diligence because it did not notify and inform Amalea of the proposal for the development of Excelsior Island

Due diligence required Ritania to directly notify and inform Amalea of the pertinent details of the proposal⁴⁰ for the Excelsior Island development as soon as this proposal was referred to Ritania ‘with the aim of obtaining initial environmental authorisation’.⁴¹ Kali’s announcement⁴² cannot be considered a sufficient substitute for inter-governmental notification and information. Ritania did not directly notify and inform Amalea of the proposal until after the feasibility of the proposal was already ‘under review’ by the Ritanian government.⁴³

d. Ritania breached its obligation to exercise due diligence because it did not cooperate with Amalea concerning the proposal for the development of Excelsior Island

Due diligence required Ritania to cooperate⁴⁴ (through consultation and negotiation) in good faith with Amalea about the proposed construction of Excelsior Island.⁴⁵ Although this did not require the States to reach an agreement,⁴⁶ it did oblige them to negotiate with a view to reaching an agreement and to conduct themselves so that negotiations were meaningful. This could not

⁴⁰ *Pulp Mills*, [110].

⁴¹ *Pulp Mills*, [105].

⁴² *Compromis*, [20].

⁴³ *Compromis*, [21].

⁴⁴ The requirement to cooperate can also be conceived of as a discrete obligation in customary international environmental law: *MOX Plant*, [82].

⁴⁵ *MOX Plant*, [82]; *Lake Lanoux*, [101].

⁴⁶ *Railway Traffic*, [31]; *Application of CERD*, [158].

have been the case if Ritania ‘insist[ed] upon its own position without contemplating any modification of it’.⁴⁷ Ritania’s conduct did not indicate that it contemplated any modification of its position: it was non-responsive to Amalea’s concerns conveyed following Kali’s announcement of the development; it refused to consider the ILSA report; it did not initiate negotiations until it was notified of Amalea’s intent to seek provisional measures from the Court; and it prevented any recommencement of the negotiations by approving the EIA within weeks of the negotiations stalling.⁴⁸

e. Ritania breached its obligation to exercise due diligence because it did not conduct environmental monitoring during the development of Excelsior Island

After authorising the Excelsior Island development, due diligence required Ritania to conduct continuous environmental monitoring.⁴⁹ There is no evidence that Ritania conducted any environmental monitoring during the development of Excelsior Island.

⁴⁷ *North Sea Continental Shelf*, [85]; *Gabčíkovo-Nagymaros*, [141].

⁴⁸ *Compromis*, [21], [25]-[27].

⁴⁹ *Gabčíkovo-Nagymaros*, 111-112 (Separate Opinion of Vice-President Weeramantry).

**C. RITANIA’S CONDUCT CONCERNING THE DEVELOPMENT OF EXCELSIOR ISLAND
CONTRAVENED GENERAL PRINCIPLES OF LAW**

1. Ritania’s conduct constituted an abuse of rights

The doctrine of abuse of rights is a general principle of law⁵⁰ and is typically applied in cases of shared resources.⁵¹ An abuse of rights occurs, *inter alia*, if one State exercises its rights in a way that impairs the capacity of a second State to exercise its rights, and the disadvantages caused to the second State exceed the advantages received by the first State.⁵² By authorising dredging in the Malachi Gap that caused significant harm to at least one fish species of critical cultural and economic importance to Amalea, Ritania exercised its rights to exploit the natural resources of the seabed in a way that impaired the capacity of Amalea to exploit the natural resources of the waters. There is doubt as to whether the Dorian wrasse population will recover before the end of this century,⁵³ so the effect of this abuse of rights is long-lasting. As Amalea is a developing State, the disadvantages to Amalea are considerable; the Dorian wrasse is central to Amalean cultural customs and the Amalean economy.⁵⁴ These disadvantages exceed the unspecified economic advantages to Ritania of the development of Excelsior Island.

⁵⁰ *Gabčíkovo-Nagymaros*, 95 (Separate Opinion of Vice-President Weeramantry); *US-Shrimp*, [158]; Cheng (1953) 121; Byers (2002) 397.

⁵¹ Byers (2002) 424.

⁵² Oppenheim (1955) 345; Byers (2002) 406.

⁵³ *Compromis*, [30].

⁵⁴ *Compromis*, [1], [3], [18], [50].

2. Ritania contravened the principle of sustainable development

The principle of sustainable development is a general principle of law which requires States to balance ‘environmental considerations [with] developmental considerations’.⁵⁵ The principle of sustainable development is ‘a part of modern international law [both because of] its inescapable logical necessity ... [and] its wide and general acceptance by the global community.’⁵⁶ The principle of sustainable development required Ritania to integrate environmental considerations into its economic development approval process⁵⁷ and adopt ‘appropriate environmental measures’.⁵⁸ Ritania’s approval of the EIGP EIA, which failed to address the waters or fish species of the Malachi Gap, constituted a failure to integrate environmental protection into its development approval process. As Ritania was not cognisant of the environmental effects of the Excelsior Island development, it was necessarily incapable of taking appropriate environmental measures.

⁵⁵ *Gabčíkovo-Nagymaros* (Separate Opinion of Vice-President Weeramantry), 88-95.

⁵⁶ *Gabčíkovo-Nagymaros* (Separate Opinion of Vice-President Weeramantry), 88-95.

⁵⁷ *Gabčíkovo-Nagymaros* (Separate Opinion of Vice-President Weeramantry), 88.

⁵⁸ *Iron Rhine Arbitration*, [59].

D. RITANIA IS LIABLE TO COMPENSATE AMALEA FOR ECONOMIC LOSSES CAUSED BY THE LANDSLIDE

1. Ritania is liable to compensate Amalea on an at fault basis

Ritania is obliged to make full reparation for any injury caused by its internationally wrongful acts,⁵⁹ provided that those acts were the proximate cause of Amalea's losses.⁶⁰ The connection between the landslide and Amalea's economic losses was sufficiently proximate to be considered causative: the EIGP dredging caused the landslide in the Sirius Plateau; that landslide increased water turbidity and gas dissociation in the breeding ground of the Dorian wrasse; which in turn reduced the Dorian wrasse population.⁶¹ Further, Amalea is entitled to full compensation as it has not contributed to its loss. In fact, Amalea has mitigated⁶² its loss by ceasing commercial exploitation of the Dorian wrasse to allow population regeneration.⁶³

2. Ritania is liable to compensate Amalea on an objective basis

In the alternative, if Ritania has not committed an internationally wrongful act, it is still liable to compensate Amalea on a *sine delicto stricto sensu* basis. For liability to arise on a *sine delicto stricto sensu* basis, a State must have known that a certain activity was being carried on within its jurisdiction and control, and accepted the risk of liability (this is to be assumed if a State has or should have knowledge of an activity and has not prohibited it); the activity should be ultra-

⁵⁹ *Factory at Chorzów (Jurisdiction)*, 19; ASR art 31(1).

⁶⁰ *Administrative Decision No II*, 30.

⁶¹ *Compromis*, [19], [28]-[30].

⁶² *Gabčíkovo-Nagymaros*, [80]; ASR art 39.

⁶³ *Clarifications*, [4].

hazardous (by being ‘abnormally dangerous’ or involving a ‘significant risk’); and there should be a causal link between the activity, the environmental interference, and the harm.⁶⁴ Ritania permitted the development of Excelsior Island to occur by granting EIGP a permit; the dredging involved a ‘significant risk’ to the Malachi Gap; and there was a causal link between the dredging, the landslide and the reduction in the Dorian wrasse population.

III. AMALEA HAS EXCLUSIVE OWNERSHIP OF THE WRECK OF THE *CARGAST* AND ALL ARTIFACTS RECOVERED FROM IT, AND RITANIA’S DEPLOYMENT OF NAVAL PATROL VESSELS TO THE SITE OF THE *CARGAST* CONTRAVENED INTERNATIONAL LAW

A. AMALEA HAS EXCLUSIVE OWNERSHIP OF THE WRECK OF THE *CARGAST* AND ALL ARTIFACTS RECOVERED FROM IT

1. Amalea owns the *Cargast* and all artifacts recovered from it, and did not abandon them

a. Amalea owns the *Cargast*

The King of Amalea retained title to the *Cargast*. Although the *Cargast* was ‘granted’ to Verdigris, this was for a specified use, ‘to bring glory to the Kingdom of Amalea’.⁶⁵

⁶⁴ *Draft Principles on Hazardous Activities*; Lefeber (1996) 149-150, 154; Crawford, Pellet and Olleson (2010) 104.

⁶⁵ *Compromis*, [32].

Accordingly, it remained Amalean property.⁶⁶ The mere effluxion of time and lack of actual possession following the sinking of a State vessel does not constitute abandonment by its State owner.⁶⁷ As the *Cargast* remained State property following its grant to Verdigris, and was equipped for war by the State, there is a strong presumption against dereliction.⁶⁸ In these circumstances, proof of abandonment of the *Cargast* would have required an express statement of abandonment by Amalea.⁶⁹ There has been no such statement. To the contrary, immediately after the discovery of the *Cargast*, Amalea expressly reasserted its ownership of her.⁷⁰ Accordingly, Amalea did not abandon the *Cargast* and the wreck of the *Cargast* remains Amalean property.

b. Amalea owns the artifacts recovered from the *Cargast*

UNCLOS, the *Salvage Convention* and the *UCHC* do not affect ownership of property found at sea. Instead, according to intertemporal law, the laws governing ownership of the artifacts at the time of the *Cargast*'s sinking in 1510 must be considered; a 'juridical fact must be appreciated in the light of the law contemporary with it'.⁷¹ According to the contemporaneous *de jure belli*, Verdigris acquired lawful ownership of the artifacts.

⁶⁶ Moore (1906) vol 2, [252].

⁶⁷ Oppenheim (1992) 1165; *Mercedes*, 1182; Institute of International Law (2007) 144, 151.

⁶⁸ O'Connell (1984) vol 2, 913.

⁶⁹ O'Connell (1984) vol 2, 913.

⁷⁰ *Compromis*, [34].

⁷¹ *Island of Palmas*, [845]; Elias (1980) 288.

In the 16th century, according to Grotius,⁷² de Victoria⁷³ and Ayala,⁷⁴ any booty seized by a belligerent in warfare became the lawful property of the captor State,⁷⁵ provided it was acquired following an authorisation of hostilities and for a just cause. As to the requirement of just cause, Brownlie states that between 1494 and 1648, the theory of just war developed, ‘according to which a war might be just on both sides, [with] one prince believing in good faith that his cause was just when objectively justice lay with the other party ... in substance therefore the just war doctrine [was] deprived of any limiting effect.’⁷⁶ Consequently, the legality of Verdigris’ hostilities in Helios were not open to substantive challenge according to the law in 1510 provided that he held valid authorisation on behalf of the King of Amalea.⁷⁷ Verdigris’ letter of marque constituted such an authorisation.⁷⁸ Letters of marque were historically only issued in connection with an authorisation of hostilities against a sovereign⁷⁹ and consisted of a commission by a sovereign to pursue hostilities individually.⁸⁰ As Verdigris had authorisation from the King of Amalea to commit hostilities when he sacked Helios, the artifacts he seized became the lawful property of Amalea.⁸¹

Subsequent change in the law regarding booty cannot affect Amalea’s initial acquisition of title.⁸² Intertemporal law cannot be relied upon to deny Amalea’s ownership of the vessel and the

⁷² Grotius (1646) 663-671.

⁷³ De Victoria (1557) 427-429.

⁷⁴ Ayala (1582) 33.

⁷⁵ Grotius (1646) 644; Gentili (1612) 315; Brownlie (1963) 11-12.

⁷⁶ Brownlie (1963) 11-12.

⁷⁷ Bynkershoek (1737) 136-137; Elagab (1988) 6-7.

⁷⁸ *Compromis*, [32].

⁷⁹ Moore (1906) vol 7, [1215]; Elagab (1988) 6-7.

⁸⁰ Grotius (1604) 43; Grotius (1646) 788-789.

⁸¹ *Island of Palmas*, [845].

⁸² *Island of Palmas*, [845].

artifacts. As stated above, where a sunken State vessel is concerned, lack of actual possession does not undermine continuation of title over time. A State's title to its sunken vessel encompasses both the wreck, as well as the cargo, since these are inextricably linked.⁸³

B. AMALEA WAS ENTITLED TO SALVAGE THE *CARGAST* AND THE ARTIFACTS

1. Amalea has the right to salvage the *Cargast* and the artifacts because there is no relevant prohibitive rule

States' rights over wrecks in the EEZ are not regulated by *UNCLOS* or the customary EEZ regime.⁸⁴ Amalea is free, therefore, to exercise its right to salvage wrecks in the EEZ provided there is no relevant prohibitive rule.⁸⁵

a. Amalea's right to salvage was not affected by Article 59 of *UNCLOS*

For the purpose of *UNCLOS*, rights over wrecks in the EEZ are unallocated, residual rights.⁸⁶ Article 59 of *UNCLOS* proposes resolution of conflicting claims to unallocated rights in the EEZ on an equitable basis. Ritanian cannot claim the benefit of having its interests taken into account on an equitable basis in accordance with Article 59, as Amalea, a non-Party to *UNCLOS*, is not bound by that provision. Further, Article 59 is not customary.⁸⁷

⁸³ *Mercedes*, 1182; *The Brother Jonathan*, 388-389.

⁸⁴ Churchill and Lowe (1999) 175; Brown (1977) 244.

⁸⁵ *Lotus*, 19.

⁸⁶ *UNCLOS* art 303(3); Caflisch (1982) 31.

⁸⁷ Shearer (1986) 334.

Even if Article 59 is reflective of custom, any equitable resolution of conflicting interests would privilege Amalea's sovereign immunity over the *Cargast* as a warship above any interest Ritania may have.⁸⁸ The *Cargast* was entitled to sovereign immunity as a warship because it was armed and employed in the service of the King of Amalea to conduct hostilities.⁸⁹ Amalea's rights would therefore prevail over Ritania's interests.

b. Amalea's right to salvage was not affected by underwater cultural heritage provisions in *UNCLOS*

UNCLOS contains two provisions concerning underwater cultural heritage: Article 149 and Article 303. As Amalea is not a Party to *UNCLOS* it cannot be bound by either of those provisions.⁹⁰ Even if those provisions are reflective of custom, they are not applicable in the circumstances. Article 149 only concerns underwater cultural heritage located in 'the Area', which refers to the deep seabed beyond a State's national jurisdiction.⁹¹ This article is inapplicable as the *Cargast* was located in the Malachi Gap, an area over which Amalea and Ritania share jurisdiction.⁹² Article 303(1) requires States to cooperate with respect to the protection of archaeological and historical objects at sea. The duty to cooperate in Article 303(1) is not of a 'fundamentally norm creating character'⁹³ and so cannot reflect custom.⁹⁴ Even if it is customary, the scope and content of the duty to cooperate is not defined in Article 303(1) and is

⁸⁸ Migliorino (1985) 257; Strati (1995) 287; Vadi (2013) 370.

⁸⁹ See section II.A.1.b; *Schooner Exchange*, 117-118.

⁹⁰ *UNCLOS* art 303(1); *Compromis*, [11]; *VCLT* art 18.

⁹¹ *UNCLOS* arts 1, 134, 149.

⁹² *Compromis*, [31], Appendix B.

⁹³ *North Sea Continental Shelf*, 43.

⁹⁴ Caflisch (1982) 20.

‘far too general and vague to have any significant normative content’.⁹⁵ Moreover, *UNCLOS* provides that ‘nothing in this article affects the rights of identifiable owners [or] the law of salvage’.⁹⁶ Therefore, no relevant rule in *UNCLOS* affected Amalea’s right to salvage.

c. Amalea’s right to salvage was not affected by underwater cultural heritage provisions in the *UCHC*

As a non-party to the *UCHC*, Ritania cannot enforce the provisions of that convention against Amalea.⁹⁷ Further, no relevant provisions of the *UCHC* have yet attained customary status.⁹⁸ In any case, Amalea’s activities directed at the *Cargast* were in conformity with the objectives and general principles of the *UCHC*.⁹⁹ First, preservation of the artifacts *in situ* was not possible due to the danger posed by the imminent collapse of the hull of the *Cargast*.¹⁰⁰ Second, Amalea did not recover the objects for commercial gain; to the contrary, it made a unilateral declaration that it would hold the objects ‘in trust for all humankind.’¹⁰¹

⁹⁵ Caflisch (1982) 20.

⁹⁶ *UNCLOS* art 303(3).

⁹⁷ *Compromis*, [52]; *Free Zones*, 96; Chinkin (1993) 54-56.

⁹⁸ Dromgoole (2013) 359, 367; Forrest (2010) 361.

⁹⁹ *UCHC* art 2.

¹⁰⁰ *Compromis*, [36].

¹⁰¹ *Compromis*, [34].

d. Amalea's right to salvage was not affected by the *Malachi Gap Treaty*

Ritania's right under the *Malachi Gap Treaty* to 'explore, exploit and protect the natural resources of the seabed and subsoil'¹⁰² does not encompass non-natural resources, including shipwrecks.¹⁰³ Consequently, the *Malachi Gap Treaty* does not affect Amalea's entitlement to salvage the *Cargast*.

2. Amalea's salvage was lawful because it complied with the *Salvage Convention*

The *Salvage Convention* applies in this case. A State may make a reservation under that convention to exclude 'maritime cultural property of prehistoric, archaeological or historic interest'¹⁰⁴ from its ambit. Neither Amalea nor Ritania have made such a reservation, therefore the artifacts are subject to the law of salvage.¹⁰⁵ Under the *Salvage Convention*, Amalea, the sovereign owner of the *Cargast*, was solely entitled to control and direct recovery of the wreck and its artifacts.¹⁰⁶ Further, Amalea conducted a valid salvage operation under the ambit of the *Salvage Convention*. The *Cargast* met the requirement in the convention that the property be 'in danger', as her hull structure was at risk of catastrophic collapse.¹⁰⁷

¹⁰² *Compromis*, Appendix B.

¹⁰³ *VCLT* art 31(3)(c); *ILC Yearbook, 1956, vol II*, 298; Caflisch (1982) 14.

¹⁰⁴ *Salvage Convention* art 30(1)(d).

¹⁰⁵ *Salvage Convention* arts 1, 2; *VCLT* art 26.

¹⁰⁶ *Salvage Convention* arts 4, 19.

¹⁰⁷ *Salvage Convention* art 1; *Simon v Taylor*, 344; Brice (2011) 44.

**C. RITANIA’S DEPLOYMENT OF PATROL VESSELS TO THE SITE OF THE *CARGAST*
CONTRAVENED INTERNATIONAL LAW**

At custom, military activities in another State’s EEZ are only permitted to the extent that those activities do not violate any relevant rules of international law.¹⁰⁸ As set out below, Ritania has violated such rules.

1. Ritania’s actions were not valid law enforcement measures

In *Guyana v Suriname* it was held that force used in law enforcement activities must have a lawful jurisdictional base and be ‘unavoidable, reasonable and necessary’ in the circumstances.¹⁰⁹ In these circumstances, Ritania had no protective jurisdiction over the wreck¹¹⁰ and the deployment was not unavoidable, reasonable and necessary. The patrols therefore must be assessed according to the laws concerning the use of force.

2. Ritania violated the prohibition on the threat of force and the obligation to settle disputes peacefully

Ritania’s deployment of naval patrol vessels constituted a threat of force directed against Amalea. A threat of force ‘against the territorial integrity or political independence of any [S]tate, or in any other manner inconsistent with the purposes of the UN’ is prohibited by the

¹⁰⁸ *UNCLOS* art 87; *Charter* art 2(4); *Corfu Channel*, 35.

¹⁰⁹ *Guyana v Suriname*, [445]; *M/V Saiga*, [156].

¹¹⁰ *Guyana v Suriname*, [445].

Charter and custom.¹¹¹ The phrases ‘political independence’ and ‘territorial integrity’ should not be read as qualifying the general prohibition on the use of force in Article 2(4).¹¹² In the absence of the exceptions of Chapter VII authorisation, or self-defence, the prohibition on the threat of force is absolute.¹¹³

Ritania’s threatened interference with Amalea’s sovereign right to exercise dominion over its property, the *Cargast*, constituted a threat of force against Amalea.¹¹⁴ The Permanent Court of Arbitration held in *Guyana v Suriname*,¹¹⁵ that Suriname’s deployment of naval patrols to an area of overlapping EEZs to remove rig workers operating under a Guyanese licence constituted a threat of force. Similarly, Ritania’s deployment, coupled with governmental statements that the patrols would be aimed at physically preventing any access to the *Cargast*,¹¹⁶ constituted a threat of force. That the governmental statements were made prior to the commencement of the actual patrols does not detract from their threatening nature. Ritania cannot rely on any exceptions to the threat of force to excuse its conduct. Further, the patrols were necessarily a violation of the obligation to settle disputes peacefully because Ritania had not engaged in negotiations with Amalea in relation to the *Cargast* prior to the deployment of the vessels.¹¹⁷

¹¹¹ *Charter* art 2(4); *Nuclear Weapons*, [47]-[48]; *Nicaragua (Merits)*, [188].

¹¹² *Charter* art 2(4); Brownlie (1963) 265-268; Franck (2002) 12; Guilfoyle (2009) 273.

¹¹³ *Charter* art 2(4), cf arts 42, 51; *Corfu Channel*, 35.

¹¹⁴ *Corfu Channel*, 35; *Friendly Relations Declaration*.

¹¹⁵ *Guyana v Suriname*, [445].

¹¹⁶ *Compromis*, [35].

¹¹⁷ *Charter* art 2(3).

3. Ritania violated the freedom of navigation in the EEZ

Article 2 of the *High Seas Convention* obliges States to give ‘reasonable regard’ to the interests of all other States in exercising their freedom of navigation on the high seas. The subsequent development of custom extended this freedom of navigation to the EEZ.¹¹⁸ Ritania’s deployment of naval vessels subjected the area of the *Cargast* to interference inconsistent with the customary freedom of navigation in the EEZ.¹¹⁹ As Bellezza ceased salvage of the *Cargast* after the Ritanian naval patrols commenced,¹²⁰ it can be inferred that these patrols interfered with Amalea’s salvage. Even if Ritania owned the artifacts and had a legal interest in their protection, Amalea as owner of the *Cargast*, was still entitled to access the wreck of the ship in order to recover its own property.¹²¹ Therefore, Ritania’s patrols infringed upon Amalea’s freedom of navigation by inhibiting Amalea’s access to the *Cargast*.

4. Ritania cannot rely on any provision of the UCHC to justify its deployment of naval vessels to the Cargast

The *UCHC* provides that a State Party may take emergency measures to prevent any immediate danger being caused to underwater cultural heritage on its continental shelf.¹²² The *Cargast* is not on Ritania’s continental shelf. Even if Ritania has subsoil rights in the Malachi Gap sufficient for the purposes of the *UCHC*, Ritania cannot invoke any right under that convention as a non-party. Further, neither the text of the *UCHC* nor its *travaux préparatoires* indicate that this right

¹¹⁸ *UNCLOS* arts 58(2), 87, reflecting custom.

¹¹⁹ *UNCLOS* arts 58, 87, reflecting custom; *Continental Shelf*, [34].

¹²⁰ *Clarifications*, [8].

¹²¹ *Salvage Convention* arts 4, 5.

¹²² *UCHC* art 10(4).

was intended to be available for exercise by third States.¹²³ Finally, as stated above, the *UCHC* is not reflective of custom.¹²⁴

IV. AMALEA'S PURSUIT OF LUZ INTO RITANIA'S UNCONTESTED EEZ, AND HIS SUBSEQUENT ARREST, WERE IN COMPLIANCE WITH INTERNATIONAL LAW

A. AMALEA'S PURSUIT OF LUZ WAS IN COMPLIANCE WITH THE CONVENTIONAL REQUIREMENTS FOR HOT PURSUIT

States are prohibited from taking enforcement measures against foreign-flagged vessels on the high seas, subject to limited exceptions, which include the right of hot pursuit. Article 23 of the *High Seas Convention* provides that hot pursuit of a foreign-flagged vessel from the contiguous zone is lawful when five conditions are satisfied:

1. the competent authorities had 'good reason to believe' that there was a 'violation of the rights for the protection of which the [contiguous] zone was established';
2. the pursuing ship was a warship;
3. the pursuing ship 'satisfied itself by such practicable means as [were] available' that the pursued ship was within the contiguous zone;
4. the pursuing ship had given the pursued ship a signal to stop; and
5. the pursuit was not interrupted.

The *Icarus*' pursuit of the *Daedalus* satisfied each of these conditions.

¹²³ *UCHC* art 10(4); *Free Zones*, 96; Chinkin (1993) 54-56.

¹²⁴ Dromgoole (2013) 359, 367; Forrest (2010) 361.

1. **The competent Amalean authorities had good reason to believe that there had been a violation of the rights for the protection of which the contiguous zone was established**
 - a. **Amalean authorities had good reason to believe that the *Daedalus* had violated Amalean immigration laws**

The ‘good reason’ criterion does not require the competent authority to have actual knowledge that a violation of laws or regulations has occurred,¹²⁵ only that it has reasonable suspicion of such a violation.¹²⁶ The relevant laws in this instance are Amalean immigration laws. The ACPS alert stated that the *Daedalus* was ‘stolen and persons on board are suspected of human trafficking,’¹²⁷ a *prima facie* violation of Amalean immigration laws.

Amalea’s suspicion of human trafficking was reasonable. Although the basis for the suspicion that the *Daedalus* was engaged in human trafficking is not disclosed, it is likely that this suspicion was based on information provided by Ritanian authorities and the captain of the *Rosehill*. Ritanian authorities were the most probable source of the information contained in the alert as the *Daedalus* was a Ritanian-flagged vessel, Luz was a Ritanian national and the *Daedalus* was first sighted from Ritanian’s uncontested EEZ. Further, the brevity of the alert is consistent with contemporary maritime communication practices¹²⁸ and cannot be relied upon by Ritanian to challenge the ACPS’ suspicion of immigration offences. In that regard, there is a

¹²⁵ O’Connell (1984) vol 2, 1088; *Annotated US Naval Operations Handbook*, 3-22 n 77.

¹²⁶ McDougal and Burke (1962) 896; Poulantzas (2002) 157.

¹²⁷ *Clarifications*, [12].

¹²⁸ *IMO Standard Marine Communication Phrases*.

presumption under general international law that ‘public officers perform their official duties and that their official acts are regular.’¹²⁹ This presumption of regularity applies to the ACPS officials who issued the alert.

b. A contravention of Amalean law in the contiguous zone, outside of Amalea’s territorial sea, was sufficient for the commencement of hot pursuit

Article 23 of the *High Seas Convention* provides that pursuit from the contiguous zone may be commenced if there has been ‘a violation of the rights for the protection of which the zone was established.’¹³⁰ Article 24 of the *Territorial Sea and Contiguous Zone Convention* empowers the coastal State to exercise control within its contiguous zone to ‘prevent’ and ‘punish’ infringement of ‘customs, fiscal, immigration, or sanitary regulations within [a State’s] territory or territorial sea.’¹³¹ Pursuit of the *Daedalus* was commenced within Amalea’s contiguous zone, which was established in conformity with Article 24 of the *Territorial Sea and Contiguous Zone Convention*.¹³²

Although it is clear that hot pursuit may be commenced from the contiguous zone, Article 23 of the *High Seas Convention* does not specify where the violation giving rise to pursuit must have occurred. According to O’Connell, ‘on its face [Article 23] appears to allow for the right of hot pursuit to commence from the contiguous zone when the pursued vessel has breached a law of

¹²⁹ *Friedrich & Co*, 53; Cheng (1953) 305.

¹³⁰ *High Seas Convention* art 23(1).

¹³¹ *Territorial Sea and Contiguous Zone Convention* art 24(1).

¹³² *Compromis*, [45]; *Clarifications*, [3].

the coastal State *there* relating to one of the four categories of laws that may be enacted for the contiguous zone.¹³³ It is recognised, however, that the cross-reference to Article 24 of the *Territorial Sea and Contiguous Zone Convention* presents a problem of interpretations as this article refers to violations within a State's territory or territorial sea.¹³⁴ In light of such ambiguity, recourse to the *travaux préparatoires* is necessary.¹³⁵

During the Geneva Conference, the Netherlands proposed an amendment that would have expressly restricted pursuit from the contiguous zone to violations occurring within the internal waters or territorial sea of the coastal State.¹³⁶ However, this formulation was overwhelmingly rejected.¹³⁷ Instead, the Conference adopted, 'by a substantial majority',¹³⁸ an alternative proposal¹³⁹ which 'was offered to make it clear, expressly and not by implication, that hot pursuit was permissible for acts committed within the contiguous zone.'¹⁴⁰ Even though this formulation did not entirely remove the problem of interpretation referred to above, the intention of the majority of delegations was nonetheless clear.¹⁴¹ Further, as observed by O'Connell, 'the current of opinion and practice is against [the] narrow technical view of the scope of Article 23 and of customary law'.¹⁴² *Amalea* was therefore entitled to commence pursuit of the *Daedalus* for its violation of immigration laws in the contiguous zone.

¹³³ O'Connell (1984) vol 2, 1083 (emphasis added).

¹³⁴ Fitzmaurice (1959) 115-117.

¹³⁵ *VCLT* art 31(2).

¹³⁶ *Official Records to the High Seas Convention*, 142.

¹³⁷ *Official Records to the High Seas Convention*, 91.

¹³⁸ McDougal and Burke (1962) 922.

¹³⁹ *Official Records to the High Seas Convention*, 121.

¹⁴⁰ McDougal and Burke (1962) 923.

¹⁴¹ Oda (1962) 158; Poulantzas (2002) 164; McDougal and Burke (1962) 913.

¹⁴² O'Connell (1984) vol 2, 1084.

- c. **Alternatively, the pursuit was justified on the basis that a violation of Amalean immigration laws was about to be committed within its territorial sea**

Even if a narrow interpretation of Article 23 is adopted, restricting pursuit to violations occurring within the territorial sea, Amalea's pursuit was valid. During drafting, a proposal specifying that a 'violation' included one which was 'about to be committed'¹⁴³ was considered to already be encompassed within the scope of the provision.¹⁴⁴ Therefore, the term 'violation' includes acts which are about to be committed. The *Daedalus* was 'speeding' towards Amalea, had already entered Amalea's contiguous zone and was suspected of human trafficking.¹⁴⁵ In these circumstances, an offence within Amalea's territorial sea was 'about to be' committed by the *Daedalus*. Therefore, Amalea's pursuit was lawful.

2. **The *Icarus* was a warship**

As the *Icarus* was an Amalean Navy Fast Response Cutter under the command of Captain Haddock, it was a warship.¹⁴⁶

¹⁴³ *Summary of Comments by Governments (Regime of the High Seas)*, 40 (emphasis added).

¹⁴⁴ *ILC Yearbook, 1956, Summary Records*, 49; Poulantzas (2002) 155; O'Connell (1984) vol 2, 1089.

¹⁴⁵ *Compromis*, [44]-[45]; *Clarifications*, [12].

¹⁴⁶ *High Seas Convention* art 8(2).

3. The *Icarus* satisfied itself by such practicable means as were available that the *Daedalus* was within Amalea's contiguous zone

The *Icarus* located the *Daedalus* on its radar as it drew within about 23 nm of Amalea's coastline, within Amalea's contiguous zone.¹⁴⁷ The drafting history of the *High Seas Convention* indicates that the use of modern technology, including radar, was a permissible means of ascertaining a ship's location.¹⁴⁸

4. The *Icarus* gave the *Daedalus* a signal to stop

When the *Icarus* was within visual range of the *Daedalus*, Captain Haddock issued an order to stop over multiple radio frequencies.¹⁴⁹ Article 23 of the *High Seas Convention* does not expressly preclude the use of radio signals. Nonetheless, the *travaux préparatoires* to the convention indicate a reluctance to consider radio signals as an acceptable signal to stop.¹⁵⁰ This reluctance was based on concerns that radio signals could be issued over great distances and were therefore open to abuse by States.

Subsequent State practice¹⁵¹ and the writings of jurists¹⁵² have, however, considered radio transmissions to be permissible signals to stop.¹⁵³ This reflects the increasing reliability of radio

¹⁴⁷ *Compromis*, [45].

¹⁴⁸ *Official Records to the High Seas Convention*, 80-82, 91, 141 (India's proposal, adopted in part).

¹⁴⁹ *Compromis*, [45].

¹⁵⁰ *Second Report of the Special Rapporteur (High Seas Regime)* (1951) 89; *Third Report of the Special Rapporteur (High Seas Regime)* (1952) 48.

¹⁵¹ *R v Mills; Volga; M/V Saiga*.

¹⁵² Allen (1989) 323; Baird (2009) 10-11; Gilmore (1995) 956-958.

communications¹⁵⁴ and their universal use by vessel operators.¹⁵⁵ Vessel operators have also developed the practice of keeping records of radio transmission which renders the use of radio signals less open to abuse.¹⁵⁶

Amalea is not required to establish that the *Daedalus* received the radio broadcast, only that the signal was issued at a distance which enabled it to be heard.¹⁵⁷ Ritania does not contest that the broadcast was issued and that it was made when the vessels were in close range.¹⁵⁸ In any event, it is implausible that the signal was not received by the *Daedalus* as it was issued over several different radio frequencies commonly used by vessels in the Strait of Malachi and because following the signal, the *Daedalus* changed course away from the Amalean coast.¹⁵⁹

5. The *Icarus*' pursuit of the *Daedalus* was uninterrupted

The *Icarus*' pursuit of the *Daedalus* was both 'hot' and uninterrupted. The *Icarus* commenced pursuit of the *Daedalus* immediately upon locating it within Amalea's contiguous zone and continued that pursuit until the ships collided.

¹⁵³ *VCLT* art 31(3)(b).

¹⁵⁴ Baird (2009) 11.

¹⁵⁵ Allen (1989) 323.

¹⁵⁶ Baird (2009) 11.

¹⁵⁷ *High Seas Convention* art 23(3); Allen (1989) 319.

¹⁵⁸ *Compromis*, [45].

¹⁵⁹ *Compromis*, [45]-[46].

6. The entrance of the *Daedalus* into Ritania’s EEZ did not preclude the *Icarus* from continuing pursuit

The right of hot pursuit does not cease when the pursued vessel enters another State’s EEZ,¹⁶⁰ it ceases only when the pursued vessel enters another State’s territorial sea.¹⁶¹ As the *Daedalus* never reached Ritania’s territorial sea, the *Icarus*’ entrance into Ritania’s EEZ did not preclude its continuation of pursuit.

7. The *Icarus* did not use excessive force in arresting the *Daedalus*

The *Icarus* did not use force against the *Daedalus*. To the contrary, Luz ‘suddenly steered’ the *Daedalus* ‘straight towards’ the *Icarus* ‘[i]n an attempt to get the *Icarus* to veer away’.¹⁶² Consequently, the sinking of the *Daedalus* was caused by the actions of Luz, rather than the actions of the *Icarus*. These circumstances can therefore be distinguished from the actions of the pursuing vessels in the *I’m Alone*, *Red Crusader* and *M/V Saiga* cases. Excessive force was not used in Luz’s subsequent arrest on the dinghy.

¹⁶⁰ *UNCLOS Commentary*, vol 3, 253, 255.

¹⁶¹ *High Seas Convention* art 23(2).

¹⁶² *Compromis*, [46].

B. AMALEA’S PURSUIT OF LUZ WAS IN COMPLIANCE WITH THE REQUIREMENTS FOR CUSTOMARY HOT PURSUIT FROM THE EEZ

Pursuit of the *Daedalus* commenced when it was at least 23 nm from Amalea’s coastline, within Amalea’s EEZ.¹⁶³ At custom, there is a right of hot pursuit from the EEZ, the requirements of which are the same as those listed above, applying *mutatis mutandis* to violations of coastal State laws and regulations in the EEZ. Amalea has the right to regulate and enforce maritime safety and navigation in the EEZ for the protection of its EEZ rights to the water column under the *Malachi Gap Treaty*. Accordingly, the extension of Amalea’s Penal Code to encompass negligent operation of a seafaring vessel in the Malachi Gap was a lawful basis for the exercise of hot pursuit.¹⁶⁴ As the ACPS alert noted that the *Daedalus* was ‘fleeing Excelsior Island towards Amalea’ ‘creating a danger for other vessels’,¹⁶⁵ there was a *prima facie* violation of Amalean laws applicable to navigation in the Gap. Further, Amalea had a ‘good reason’ to believe that the *Daedalus* had committed such violations; for instance it received a radio transmission from the *Rosehill*’s captain following the *Rosehill* incident which was likely to have detailed the *Daedalus*’ erratic movements.¹⁶⁶ As detailed above,¹⁶⁷ the other requirements for pursuit were also satisfied. Amalea was therefore entitled to commence pursuit from its EEZ in respect of suspected navigational offences, and to continue that pursuit into Ritania’s uncontested EEZ where Luz was ultimately arrested.

¹⁶³ *Compromis*, [10], [15], [45].

¹⁶⁴ *Clarifications*, [47].

¹⁶⁵ *Compromis*, [44]; *Clarifications*, [12].

¹⁶⁶ *Compromis*, [42], [45].

¹⁶⁷ Section IV.A.2-5 (applies *mutatis mutandis* to the EEZ).

C. AMALEA’S ARREST OF LUZ WAS IN COMPLIANCE WITH INTERNATIONAL LAW

1. The *Icarus*’ lawful hot pursuit entitled it to arrest Luz

The right of hot pursuit under customary and conventional international law encompasses a power to arrest the pursued ship at the conclusion of pursuit.¹⁶⁸ As Amalea’s pursuit of the *Daedalus* was a valid pursuit, either from the contiguous zone, or the EEZ, it was entitled to arrest Luz.

2. In the alternative, Amalea had adequate grounds to arrest Luz on suspicion of piracy

Amalea had reasonable grounds to arrest Luz on suspicion of piracy. Under Article 15 of the *High Seas Convention*, piracy includes illegal acts of violence between two ships on the high seas for private ends.¹⁶⁹ When the *Daedalus* intentionally veered straight towards the *Icarus*, causing the vessels to collide, this provided Captain Haddock with a reasonable suspicion of piracy. Based on this unlawful act of violence alone, the *Icarus* could arrest the *Daedalus* and bring it into port.

¹⁶⁸ *UNCLOS* art 105; Crawford (2012) 310.

¹⁶⁹ *UNCLOS* art 58(2) reflecting custom.

V. AMALEA HAD JURISDICTION TO PROSECUTE AND CONVICT LUZ FOR CRIMINAL CONDUCT IN CONNECTION WITH THE *ROSEHILL* INCIDENT, AND HAS NO OBLIGATION TO RETURN HIM TO RITANIA

A. AMALEA’S EXERCISE OF JURISDICTION OVER LUZ WAS LAWFUL, IRRESPECTIVE OF THE LAWFULNESS OF HIS ARREST

Even if Amalea unlawfully arrested Luz, the effect of the *male captus bene detentus* principle is that Amalean courts were not precluded from exercising jurisdiction over him.¹⁷⁰ This principle has received broad acceptance in national courts¹⁷¹ and international criminal tribunals.¹⁷² This principle applies to unlawful arrests both on land and at sea.¹⁷³ Notwithstanding Ritania’s protestations, Amalea was not precluded from exercising jurisdiction over Luz.¹⁷⁴

B. NO RULE OF INTERNATIONAL LAW PROHIBITED AMALEA’S EXERCISE OF JURISDICTION

In accordance with *Lotus*, Amalea was entitled to exercise jurisdiction to prosecute and convict Luz for criminal conduct in connection with the *Rosehill* incident unless there was an applicable

¹⁷⁰ Crawford (2012) 483; Oppenheim (1992) vol 1, 389; Selleck (1985) 239.

¹⁷¹ See generally Belgium: *Geldof v Meulemeester and Steffen*, 385; France: *Barbie*, 126; Germany: *Extradition (Jurisdiction)*, 349-350; Israel: *Eichmann*, 305-307; United States: *Ker*, 444; *Alvarez-Machain*, 664-670.

¹⁷² See generally *Dokmanović*, [57]-[80]; *Milosević*, [51]; *Nikolic*, [70], [95], [104].

¹⁷³ *Williams*, 1090; *Royal Caribbean Cruises*, 16.

¹⁷⁴ *Alvarez-Machain*, 667-668.

prohibitive rule of international law.¹⁷⁵ Amalea's exercise of jurisdiction over Luz was not prohibited by any such rule.

1. Ritania did not have exclusive flag-State jurisdiction

To exercise exclusive flag-State jurisdiction under Article 11 of the *High Seas Convention*, Ritania must establish that Luz was the 'master' of a Ritanian-flagged vessel and that the *Rosehill* grounding was an 'incident of navigation'. First, the status of a master, as referred to in the *High Seas Convention*, is only obtained after the relevant qualification, licensing or certification scheme has been completed.¹⁷⁶ Article 11 has only been considered in the context of masters with these professional qualifications. There is no evidence that Luz had satisfied these regulatory requirements. Second, to be an 'incident of navigation', the *Rosehill* grounding could not 'involve a criminal act in [any] circumstances.'¹⁷⁷ Subsequent agreement between the parties to the *High Seas Convention* as to the interpretation of 'incident of navigation' clarifies that exclusive flag-State jurisdiction over the master does not apply in cases of intentional (as opposed to accidental) conduct.¹⁷⁸ This interpretation is consistent with the purpose for which Article 11 was enacted, which was to rectify the mischief created by *Lotus*, a case which involved acts which were *negligent* but not *intentional*.¹⁷⁹ In contrast to the circumstances of *Lotus*, Luz's conduct concerning the *Rosehill* was intentional. Luz operated the *Daedalus* at an

¹⁷⁵ *Lotus*, 19; *Arrest Warrant*, 54 (Joint Separate Opinion of Judges Higgins, Koojijmans and Buergenthal); *Kosovo (Advisory Opinion)*, [79]-[84].

¹⁷⁶ Dear and Kemp (2005) 358; Cartner, Fiske and Leiter (2009) § 1.0, § 6.2; Gold (2003) 3-4.

¹⁷⁷ *Enrica Lexie*, [94].

¹⁷⁸ VCLT art 31(3)(b); *IMO Casualty Investigation Code*, [2.9]; *UNCLOS Commentary*, 94; Kanehara (2011) 217-218.

¹⁷⁹ *Lotus*, 19, 82 (Dissenting Opinion of Judge Moore). See also Brierly (1958) 145-147; Beckett (1927); *Franconia*, 98-99, 107, 158, 234; *ILC Yearbook, 1956, vol II*, 281.

excessive speed, failing to give way to a much larger ship which would have had difficulty manoeuvring to avoid the smaller yacht.¹⁸⁰

2. The Amalean Penal Code does not contravene the *Malachi Gap Treaty* or the EEZ regime

In addition to the specific customary EEZ rights reflected in *UNCLOS*, coastal States have ‘innate and unspecified rights’ insofar as they are necessary for the protection of those specific rights.¹⁸¹ A State may be entitled to regulate navigation if this is necessary for the protection and preservation of natural resources in the EEZ, such as the protection of fishing industries.¹⁸² Exclusive flag-State jurisdiction does not exclude Amalea’s right as a coastal State to regulate navigation in a manner consistent with the EEZ regime.¹⁸³

Amalea’s customary EEZ entitlements are retained insofar as they are not inconsistent with the *Malachi Gap Treaty*. The *Malachi Gap Treaty* delineates jurisdiction within the Malachi Gap, so that Amalea has the competence to ‘explore, exploit and protect the natural resources of the waters’ of the Malachi Gap. To protect this maritime area and the Amalean fishing vessels operating within the Malachi Gap, it was essential for Amalea to regulate activities that posed a threat to seafaring vessels, and those on board such vessels. Ritania does not prescribe similar laws in this area, heightening the importance of Amalea’s regulation. Moreover, Amalea’s assertion of jurisdiction here does not render the ‘Malachi Gap or any portion thereof’ the

¹⁸⁰ *Compromis*, [41]-[42]; *COLREGS*, [3], [6], [18].

¹⁸¹ O’Connell (1984) vol 2, 577.

¹⁸² Oxman (1971) 260-264; Burke (1983) 608; Brown (1977) 334.

¹⁸³ Robertson (1984) 880; Beckman and Davenport (2012) 11; *UNCLOS Commentary*, vol 2, 565.

sovereign territory of Amalea in contravention of Article 12(c) of the *Malachi Gap Treaty*. As recognised in *Lotus*, ‘the territoriality of criminal law... is not an absolute principle of international law and by no means coincides with territorial sovereignty’.¹⁸⁴ Accordingly, Amalea was not prohibited by the *Malachi Gap Treaty* from exercising jurisdiction over navigational crimes within the Malachi Gap.

3. It would be *non ultra petita* for this Court to determine any issue regarding Amalean jurisdiction unrelated to the *Rosehill* collision

The Court is confined to considering the legal points laid down by the parties in the special agreement.¹⁸⁵ The respondent, in its prayer for relief, has specifically asked the Court to adjudge and declare that ‘Amalea was without jurisdiction to try Luz in connection with the *Rosehill* collision’. It therefore follows that the Court cannot make a ruling on Amalea’s jurisdiction to try Luz for offences unrelated to the *Rosehill* collision, including those related to the *Icarus* collision.

C. AMALEA CAN RELY ON PERMISSIVE BASES PROVIDED FOR IN INTERNATIONAL LAW TO PROSECUTE AND CONVICT LUZ IN CONNECTION WITH THE *ROSEHILL* INCIDENT

Amalea did not require a permissive basis to exercise jurisdiction to prosecute and convict Luz in connection with the *Rosehill* incident, as its exercise of jurisdiction over the *Rosehill* did not

¹⁸⁴ *Lotus*, 20.

¹⁸⁵ Rosenne (2006) vol 2, 578.

conflict with the sovereignty of Ritania.¹⁸⁶ In the alternative, if Amalea did require a permissive basis for its exercise of jurisdiction, Amalea can establish such a basis for each offence.

1. Amalea had universal jurisdiction over Luz

As noted above, both at custom and in the *High Seas Convention*,¹⁸⁷ piracy includes any illegal act of violence or depredation committed for private ends on the high seas or in the EEZ¹⁸⁸ against another ship.¹⁸⁹ As piracy is a continuous crime,¹⁹⁰ ships already guilty of acts of piracy remain ‘pirate ships’ for as long as they remain under the control of the same person.¹⁹¹

The *Daedalus* was stolen by Luz before the *Rosehill* incident occurred.¹⁹² If the theft of the vessel occurred on the high seas, then the *Daedalus* was a ‘pirate vessel’ from the moment it was stolen and throughout its subsequent encounters with the *Rosehill* and *Icarus*. Luz’s actions were for private ends, as they were not ‘State sponsored’.¹⁹³ The ‘illegal’ character of his violent acts is to be determined by the ‘courts of the State which seizes [the] pirate ship’.¹⁹⁴ Even if the theft of the *Daedalus* did not occur on the high seas, the *Daedalus*’ intentional ‘ramming’ of the *Icarus*,¹⁹⁵ the endangerment of vessels in the Malachi Gap, and murder of the passengers on

¹⁸⁶ Cassese (2013) 50; Higgins (1994) 77.

¹⁸⁷ Rayfuse (2004) 53.

¹⁸⁸ *UNCLOS* art 58(2).

¹⁸⁹ *High Seas Convention* art 15; Bassouini (2001-2002) 110.

¹⁹⁰ Reuland (1989) 1182.

¹⁹¹ *High Seas Convention* art 14.

¹⁹² *Compromis*, [42].

¹⁹³ Guilfoyle (2009) 36-37.

¹⁹⁴ *UNCLOS Commentary*, vol 2, 200.

¹⁹⁵ Symmons (2011) 182.

board the *Rosehill*, constituted piracy. The definition of piracy was therefore satisfied, providing Amalea with universal jurisdiction over Luz.

2. Amalea had flag-State jurisdiction over Luz because deaths occurred on board the *Rosehill*

Under Article 6 of the *High Seas Convention*, Amalea, as the flag-State of the *Rosehill*, had flag-State jurisdiction over all 127 deaths that occurred on board the *Rosehill*.¹⁹⁶ Although the subjective elements of the offence of murder occurred on the *Daedalus*, the objective elements of the offence of murder, as a matter of law, were completed on the *Rosehill*, where the deaths occurred.¹⁹⁷ Amalea's entitlement to assert jurisdiction over the deaths of 127 passengers and crew on board derives not from a 'floating territory' argument,¹⁹⁸ but from the special character of the flag-State's 'regulatory responsibility for and jurisdiction over'¹⁹⁹ the 'internal economy'²⁰⁰ of the ship. Amalea may therefore exercise flag-State jurisdiction in relation to the deaths that occurred on board the *Rosehill*.

¹⁹⁶ *M/V Saiga*, [106].

¹⁹⁷ *Lotus*, 82 (Dissenting Opinion of Judge Moore); *Franconia*, 98-99; *Kanehara* (2011) 218.

¹⁹⁸ Crawford (2012) 464; O'Connell (1984) vol 2, 661; *First Report of the Special Rapporteur (High Seas Regime)* (1950) [2].

¹⁹⁹ Crawford (2012) 464; *Registration Convention* arts 91-94.

²⁰⁰ Crawford (2012) 464; Churchill and Lowe (1999) 66-67.

3. Amalea had passive personality jurisdiction over Luz due to the deaths of Amalean nationals

As recognised by this Court, the passive personality principle ‘today meets with relatively little opposition’ in relation to serious crimes.²⁰¹ Claims based on the ‘passive personality’ principle are well established in international law.²⁰² As the State of nationality of 89 passengers who died on board the *Rosehill*, and of the 10 passengers who died in the waters,²⁰³ Amalea may exercise passive personality jurisdiction in relation to their deaths.

D. AMALEA HAS NO OBLIGATION TO RETURN LUZ TO RITANIA

1. Amalea has no primary obligation to return Luz to Ritania

Ritania cannot invoke any customary obligation or conventional provision, such as an extradition treaty, to require Luz’s repatriation to Ritania. Ritania’s request for Luz’s return does not create any primary obligation for Amalea to comply.

2. Amalea has no secondary obligation to return Luz to Ritania

Amalea has not contravened any of its obligations and thus has no obligation to make any form of reparation, including repatriation.²⁰⁴

²⁰¹ *Arrest Warrant*, [47] (Joint Separate Opinion of Judges Higgins, Kooijmans, Buergenthal).

²⁰² McCarthy (1989-1990) 308-312 (France, Israel, Turkey, US); *Third Restatement*, § [402]; Australia: *Criminal Code Act 1995* (Cth) Pt 5.4; *Benitez*, 1316; *Yunis*, 899; *Eichmann*, [11].

²⁰³ *Compromis*, [43]; Clarifications, [9].

²⁰⁴ *Factory at Chorzów (Jurisdiction)*, 21.

3. Alternatively, Amalea is not obliged to return Luz to Ritania as it is materially impossible

Amalea concedes that if it has committed an internationally wrongful act, it is required to make full reparation and that restitution is the primary form of reparation.²⁰⁵ However, Amalea is not obliged to make restitution and reinstate the situation before the internationally wrongful act was committed if restitution would be ‘materially impossible’.²⁰⁶ Restitution is materially impossible in these circumstances, as Amalea is entitled to incarcerate Luz for criminal offences in connection with the *Icarus*, which are unrelated to the *Rosehill* collision. Return of Luz would prevent Amalea from exercising its entitlement to incarcerate him for the full length of his sentence for crimes concerning the *Icarus*.²⁰⁷ Further, if Amalea’s exercise of its jurisdiction to prosecute and convict Luz in connection with the *Rosehill* incident constituted an internationally wrongful act, Amalea could reinstate the situation before that act occurred by releasing Luz, rather than returning him to Ritania.²⁰⁸ Therefore, even if Amalea is required to make reparation to Ritania, repatriation is not the appropriate remedy in this case.

²⁰⁵ ASR arts 34-35; *Factory at Chorzów (Merits)*, 29.

²⁰⁶ ASR art 35(a).

²⁰⁷ *Clarifications*, [10].

²⁰⁸ Moore (1906) vol 7, 1091.

PRAYER FOR RELIEF

Amalea respectfully requests the Court to:

- I. **DECLARE** that Ritania's conduct with respect to the development of Excelsior Island was in contravention of international law and that Ritania is liable to compensate Amalea for economic losses caused by the landslide;
- II. **DECLARE** that Amalea has exclusive ownership of the wreck of the Cargast and all artifacts recovered from it, and Ritania's deployment of naval patrol vessels to the site of the Cargast contravened international law;
- III. **DECLARE** that Amalea's pursuit of Luz into Ritania's uncontested EEZ, and his subsequent arrest, were in compliance with international law; and
- IV. **DECLARE** that Amalea had jurisdiction to prosecute and convict Luz for criminal conduct in connection with the Rosehill incident, and has no obligation to return him to Ritania.