**473A**

**INTERNATIONAL COURT OF JUSTICE**

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2005 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

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

**REPUBLIC OF APPOLLONIA**
(APPLICANT)

v.

**KINGDOM OF RAGLAN**
(RESPONDENT)

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# MEMORIAL FOR THE APPLICANT

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## Statement of Facts

In April of 2001, an agreement was entered into between Appollonia (Applicant) and Maguffin (not party to this case) for the exportation of MOX, produced by an Appollonian State-owned power plant. Since then, Appollonia has exported MOX to Maguffin via shipments traveling through the waters of Raglan (Respondent), located halfway between Appollonia and Maguffin.

Between 1995 and 1999 international organizations issued warnings regarding the danger that pirate activity in the area surrounding Raglanian waters could represent to ships. The IAEA determined that Appollonia's shipment of MOX was in compliance with international standards.

In October 1999 Raglan put into practice an anti-piracy program in order to guarantee the safety of the ships traveling through its waters reducing the risk associated with shipping in the region. In November 2001, Raglan began using private contractors to serve as pilots since the Raglanian Navy was no longer able to provide the escorting service to all incoming ships.

On July 26 2002, *The Mairi Maru*, a privately owned Appollonian-flagged vessel headed for Maguffin and laden with MOX, requested an escort in accordance with the requirements of Raglan's anti-piracy program. The vessel was boarded by the assigned pilot, Good and two of his assistants.

Hours later, Good threatened the crew and locked them in the ship's galley. Good and his confederates removed the navigation and communication equipment disabling the vessel, making it impossible to steer. They disembarked the ship leaving it adrift on a course toward international waters.

On July 28 an intense storm altered the course of *The Mairi Maru* which ran aground on the Norton Shallows causing damage to the ship's hull resulting in the leakage of MOX pellets in

the surrounding waters. Hours later, the Raglanian Royal Navy rescued the surviving crew members.

Diplomatic notes and official statements were exchanged between July 31 and August 2 of that same year, in which Raglan and Appollonia, respectively, denied responsibility for the damages caused. Appollonia pointed out that Good was an agent of Raglan, and was responsible due to its failure to police its waters for pirate activities. Raglan denied responsibility under the presumption that MOX was being shipped illegally.

On August 4, Raglan sent a diplomatic note to Appollonia informing it of the decision to scuttle *The Mairi Maru.* Later that week the vessel was scuttled with the remaining MOX onboard.

The following week, diplomatic notes were exchanged. Raglan alleged Appollonia had violated its duties as an exporter of MOX under the guidelines of the IAEA and Appollonia pointed out that Raglan had violated anti-dumping provisions.

In October 2002, the owners and insurers of *The Mairi Maru* and the members and families of the crew that had died initiated lawsuits in Raglan for their respective losses. These claims were taken to Raglan’s maximum judicial authority without avail.

On April 5 2003, the legislative enactment, *COMMA*, which recited the events surrounding the attack on *The Mairi Maru* was signed into law.

In July, both parties agreed to submit their differences to the ICJ.

## Statement of Jurisdiction

The Republic of Appollonia and the Kingdom of Raglan have submitted by Special Agreement their differences concerning the Vessel *The Mairi Maru*, and transmitted a copy thereof to the Registrar of the Court pursuant to article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute of the Court.

## Summary of Pleadings

I. The Court should declare that Raglan is responsible for the attack upon and wreck of *The Mairi Maru* since (i) the acts of Good are attributable to Raglan; and (ii) Raglan failed to respond appropriately to pirate activities in its waters. Firstly, the attack on *The Mairi Maru* does not constitute piracy *jure gentium* and Good was acting as an empowered agent of Raglan, thus his acts are attributable to Raglan under customary law. Secondly, Raglan had the obligation of protecting Appollonians and their property from harm within its jurisdiction, clearly failing to do so. Even if this Court were to decide that the attack constitutes piracy *jure gentium,* Raglan had the obligation of repressing piracy and failed to do so. Accordingly, Raglan owes compensation to Appollonia for the attack upon and wreck of *The Mairi Maru*.

II. Raglan violated international law by scuttling *The Mairi Maru*. Firstly, the scuttling was a violation of the principle of flag state jurisdiction and there exists no rule under customary international law that would have allowed Raglan to scuttle the vessel. Secondly, Raglan has breached customary rules prohibiting the dumping of radioactive waste by scuttling the vessel with MOX onboard. Thirdly, a state of necessity cannot be alleged in the present case as (i) scuttling was not the only means available to Raglan and (ii) Ranglan contributed to the alleged state of necessity. Accordingly, compensation is owed for the loss of *The Mairi Maru* and the remaining MOX.

III. This Court should find that Appollonia's shipment of MOX was lawful under international law since the right of archipelagic sea lane passage applies to all ships and hence is applicable in this case. Additionally, Appollonia was not bound to notify Raglan of its shipment since there is no treaty in force between both parties in this regard, and in any case the obligation to notify is not a rule of customary international law. Moreover, the Precautionary Principle was not breached since Appollonia complied with international standards pertaining to the shipment of MOX and the non-notification of the MOX shipments

was indeed a precautionary measure. Alternatively, Raglan cannot contest the shipment of MOX as it acquiesced to the shipments formulating no protest to recurrent shipment of MOX through its waters.

IV. Raglan's claim in this case is inadmissible since remedies were not exhausted. In any case, Raglan does not have standing to seek compensation for acts that occurred outside its jurisdiction as its legal interests have not been affected nor does its right to exercise freedom on the high seas grant it standing. Additionally, Appollonia bears no responsibility for the damage caused to the Norton Shallows since it may not be subject to the strict liability doctrine, which only applies when accorded under a treaty, and in any event, the damage may not be attributed to Appollonia's shipment of MOX as a proximate cause. Even if found responsible, Appollonia would not owe Raglan compensation since the losses it claims are not subject to compensation and additionally Raglan's contributory negligence shall in any case reduce the amount to be paid.

## Questions Presented

1. Whether the acts of Thomas Good and Raglan's failed efforts to respond appropriately to pirate activities in its waters make Raglan responsible for the wreck of *The Mairi Maru* and all consequences thereof;

2. Whether the scuttling of *The Mairi Maru* is illegal and whether this act would entail an obligation to pay compensation for the loss of *The Mairi Maru* and the MOX;

3. Whether Appollonia violated obligations owed to Raglan under international law in transporting MOX through Raglanian waters; and

4. Whether Raglan would have standing to seek compensation for economic losses resulting from acts that occurred outside its territorial waters and exclusive economic zone.

## I. RAGLAN IS RESPONSIBLE FOR THE ATTACK UPON AND WRECK OF *THE MAIRI MARU* AND ALL CONSEQUENCES THEREOF BY VIRTUE OF (1) ITS FAILURE TO RESPOND APPROPRIATELY TO PIRATE ACTIVITIES IN ITS ARCHIPELAGIC WATERS AND (2) THE ACTS OF THOMAS GOOD, WHICH ARE IMPUTABLE TO RAGLAN.

### A. Appollonia's Claim Is Admissible Since Local Remedies Have Been Exhausted.

For a claim to be admissible before an international court, the alien on whose behalf the claim is brought must have pursued the essence of the claim as far as permitted by the local law of the State that committed injury,[1] as recognized in international treaties and decisions.[2]

In this case, Appollonians injured by the attack upon and wreck of *The Mairi Maru* pursued until the court of last resort, without avail, a claim seeking compensation for Raglan's responsibility for such events, exhausting local remedies. Thus, Appollonia has the right to invoke the responsibility of Raglan and seek compensation on behalf of its nationals.

### B. Raglan Is Responsible For The Illegal Acts Of Good.

International responsibility of a State arises from acts which (i) are attributable to that State, and (ii) constitute a breach of its international obligations.[3] The acts of Good fulfill both of these requirements, as proven *infra*.

#### 1. The Acts of Good are Attributable to Raglan.

#### a. The acts of Good do not constitute piracy *jure gentium*.

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[1] Articles on the Responsibility of States for Internationally Wrongful Acts (ARS), UNGAR 56/83, 2001, Art. 44; Brownlie, Principles of Public International Law, 5th ed., 1998, 496-506.

[2] ICCPR, in force Mar. 1976, Art. 41 (I)(c); ACHR, in force July 18, 1978, Art. 46, (1)(a); ECHR, in force Sept. 1953, Art. 2; AFHR, in force Oct. 1986, Art. 56(5); *Electtronica Sicula SpA Case*, (*ELSI Case*), (Second Phase), ICJ Rep., 1989, ¶50; *Finnish Ships Arbitration*, 2 RIAA, 1934, 1479.

[3] *Phosphates in Morocco Case*, (Preliminary Objections), PCIJ, 1938, 28; *United States. Diplomatic and Consular Staff in Tehran Case*, ICJ Rep., 1979, 56.

Raglan may attempt to elude responsibility for Good's acts by claiming that they constitute acts of piracy *jure gentium*, which may not be attributable to any State.[4] Piracy *jure gentium* may consist of any illegal act of violence or depredation, committed for private ends by crew or passengers of a private ship on the high seas[5] against another ship, or against persons or property on board such ship.[6] The customary character of this definition derives from national decisions[7] and its inclusion in treaties[8] and legislation.[9]

Based on the above definition, piratical attacks occurring within the territorial waters of a State are not deemed piracy *jure gentium*.[10] For instance, in *US v. Smith*[11] the US Supreme

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[4] *S.S. Lotus Case*, PCIJ, 1927, Ser.A, No. 10, at 71 (Moore, J., diss.); Reuland, Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag State Jurisdiction, 22 Vand. J. Transnat'l L., 1989, 1188; Rogers, The Alien Tort Statute and How Individuals 'Violate' International Law, 21 Vand. J. Transnat'l L., 1988, 50.

[5] Dubner, The Law of International Sea Piracy, The Hague, 1980, 42; Sunga, Individual Responsibility in International Law for Serious Human Rights Violations, 1992, 102, In: Steven, Genocide and The Duty to Extradite or Prosecute: Why The United Status is in Breach of its International Obligations, 39 Va. J. Int'l L., 1999, 435.

[6] Keyuan, Enforcing the Law of Piracy in the South China Sea, 31 J. Mar. L. & Com., 110; Smith, From Cutlass to Cat-O'-Nine Tails: The Case for International Jurisdiction of Mutiny on The High Seas, 10 Mich. J. Int'l L., 1989, 300-1.

[7] *Castel John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, Belgium Court of Cassation, 19 December 1986, in Lauterpacht, International Law Reports, Grotius, 77, 537-9; Starkle, Piraterie en Haute Mer et Compétente Pénale. A propos de l'arrêt de la Cour d'appel d'Anvers du 19 juillet 1985, RDPC soixante-septième année (1987), núm. 8-9-10, Août, Septembre, Octobre 1987, p. 738-41.

[8] United Nations Convention on the Law of the Sea (UNCLOS), in force Nov. 16, 1994, Art.101; Convention on the High Seas (CHS), in force Sept. 1962, Art. 15.

[9] UK: Territorial Waters Jurisdiction Act, 1878, para.6, and S.26(1) Merchant Shipping and Maritime Security Act, 1997; Can: Criminal Code of Canada R.S.C. 1985, c. C-46, §74(1); US: US Code, Title 18, §1651; Cyprus: Constitution, 1960, Art.7, para. 2, Criminal Code, §69; Código de Bustamante, 1932, Art.308; Criminal Codes of: Ven: Art. 4(9) & 153; Arg.: Art.198; Kiribati: Cap. 67, §63(A) and Annex; Cook Islands: Part V, §103; South Africa: Defense Act 42 of 2002, Cap. 4, §24.

[10] Buhler, New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy, 8-WTR Currents Int'l Trade L.J., 1999, 65; Garmon, International Law of The Sea:

Court condemned Thomas Smith and others, for piracy *jure gentium*, because the acts of plunder against the Spanish vessel were committed on the high seas. In this case, *The Mairi Maru* entered Raglanian archipelagic waters at 2200 hours and at 2300 hours Good threatened the Captain with an explosive device and took control of the vessel. He then committed robbery, disabled the aft propeller shaft, and disembarked *The Mairi Maru*, all within Raglanian waters. Thus, the acts of violence and depredation in this case occurred within Raglanian waters, and not on the high seas.

**b. Good is an empowered agent of Raglan.**

It is a general principle of law that States can only act through agents and representatives.[12] This means that conduct of persons empowered to exercise elements of governmental authority acting in such capacity, are attributable to the State even if the persons acted in excess of authority or contrary to instructions.[13] Indeed, when States offer public piloting services, the individuals performing them are deemed State agents exercising public prerogatives.[14]

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Reconciling the Law of Piracy and Terrorism in the wake of September 11th, 27 Tul. Mar. L.J., 2002, 264; Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, 45 Harv. Int'l L.J., 2004, 191.

[11] *U.S. v. Smith*, U.S. Supreme Court, 18 U.S. 5 Wheat, 1820, 153-55.

[12] *Questions relating to settlers of German Origin in Poland*, (Ad.Op.), PCIJ, 1923, 22; Oppenheim, International Law, 9th ed., 1996, 540.

[13] ARS, *supra* note 1, Art. 7; Finkelstein, Changing Notions of State Agency in International Law: The Case of Paul Touvier, 30 Tex. Int'l L.J., 1995, 278.

[14] Committee on Advances in Navigation and Piloting, Marine Board, Commission on Engineering and Technical Systems, National Research Council, Minding the Helm: Marine Navigation and Piloting, National Academy Press, 1994, 87, 73, 408, 414; Cyprus Port Authority, Maritime Services, at: http://www.cpa.gov.cy/; China Marine Department, The Government of The Hong Kong Special Administrative Region, Public Services, Port Services, Pilotage, at: http://www.mardep.gov.hk/en/pub_services/ ocean/pilot.html; Port a Sète, Services, Piloting, France at: http://www.sete.port.fr/ partenaires_en /pilotage.php

To identify an individual empowered to exercise elements of governmental authority the following must be examined (i) if the functions have been normally exercised by State organs; [15] (ii) how they were conferred on the person;[16] (iii) the purposes for which they were exercised; and (iv) the extent of the person's accountability *vis-à-vis* the government.[17]

The above conditions were met in this case since (i) Good was empowered by the Raglanian Royal Navy (RRN) to carry out official functions normally exercised by Raglanian naval officers; (ii) powers were conferred through a contract between him and Raglan, made official by its Prime-Minister, delegating public functions normally exercised by the RRN; (iii) powers granted to him through the anti-piracy program are part of national defense activities; and (iv) private contractors were accountable as they responded directly to the RRN.

Furthermore, States may be responsible for unauthorized acts and omissions of organs or agents committed with apparent authority[18] -as recognized by international decisions and publicists-[19] or in use of means placed at their disposition by such authority,[20] even if the individual concerned has overtly committed unlawful acts under the cover of its official

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[15] Villalpando, Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied Within the WTO Dispute Settlement System, 5 J. Int'l Econ. L., 2002, 403.

[16] Dolzer, The Settlement of War-related claims does International Law Recognize a victims's Private Right of Action? Lessons after 1945, 20 Berkeley J. Int'l L., 296; Brownlie, System of the Law of Nations: State Responsibility, Part I, 1983, 136.

[17] Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, 2002, 101; Villalpando, *supra* note 15, 404.

[18] *Caire Claim*, Fr.-Mex. Mixed Cl.Comm., 5 RIAA, 1929, 516, 530; *Sandline International Inc./ Papua New Guinea Arbitration*, Interim Award, ICSID, 117 ILR, 552, 561.

[19] *Velásquez Rodríguez Case*, (Merits), I/ACt.HR, 1988, ¶170; Arechaga, Responsabilidad Internacional, in Manual de Derecho Internacional Público, Sorensen ed., 1992, 519-21.

[20] *Youmans Claim*, U.S.-Mex. Gral. Cl.Comm., 4 RIAA, 1926, 110-6; *Mallen Case*, U.S.-. Mex. Gral. Cl.Comm., 4 RIAA, 1927, 173-77.

status.[21] Indeed, in *Youmans Claim*,[22] Mexico was found responsible for the acts of troops sent to protect aliens, but which in contravention of instructions and outside the scope of their competence, joined the attackers killing the aliens they had to protect. The same reasoning applies to this case, since Good boarded the ship as planned and through a privately-owned vessel regularly employed by Raglan for that purpose; brought the specially-designed flag of Raglanian naval protection, which was flown on *The Mairi Maru*; and seemingly performed the piloting of the vessel without perceivable irregularities, until he threatened the Captain for control of the ship. Thus, he clearly acted within the apparent authority of a Raglanian agent deployed to pilot the vessel.

As regards the means put at his disposal, in *Mallen*[23] the Commission found that an officer showing his badge evidences that he is acting in an official capacity. In this case, Good, by virtue of the authority assigned to him as a pilot, was able to board the vessel and commit robbery.

Therefore, Good's acts are attributable to Raglan since (i) he was empowered by Raglan to exercise elements of governmental authority, and (ii) he acted within the apparent authority conferred to him by Raglan.

## 2. Raglan Breached Its International Obligation Of Abstaining From Causing Harm To Foreign Citizens And/Or Their Property.

States have the obligation to abstain from ill-treating directly, or through their agents, foreign nationals in their territory.[24] The customary character of this rule is evidenced by its

[21] Commentary to Art. 10 of the ILC Draft ASR, YBILC, 1975, II, p. 67, In: Harris, Cases and Materials on International Law, 5th ed., 1998, 505; Crawford, *supra* note 17, 107.

[22] *Youmans Claim*, *supra* note 20, 110-6.

[23] *Mallen Case*, *supra* note 20, 173-177.

[24] Sperduti, Responsibility of States for Activities of Private Law Persons, EPIL 10, 1987, 373-50.

recognition in various instruments[25] and international decisions,[26] encompassing also a duty of abstention from physical harm or destruction of property.[27] As shown *infra*, Good -acting as agent of Raglan- caused the wreck of *The Mairi Maru*, Appollonian property, and the death and severe illness of innocent Appollonians. Therefore Raglan, through Good's actions, breached its duty of not causing harm and is responsible for the injury caused.

### C. Raglan Failed To Respond Appropriately To Pirate Activities In Its Archipelagic Waters.

Irrespective of whether the acts of Good are attributable to Raglan, Raglan is responsible for the attack upon and the wreck of *The Mairi Maru*, due to its failure to respond appropriately to pirate activities in its waters.

States have a duty to protect other States and their nationals against injurious acts by individuals within their jurisdiction,[28] with a correlative duty to (i) prevent injury, and (ii) punish wrongdoers.[29] This rule's customary character is evidenced by international decisions,

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[25] UDHR, in force 1948, art.3 & 17(1); American Declaration of the Right and Duties of Man, in force 1965, art. I & XXIII; ICCPR, *supra* note 2, Art. 6(1); ECHR, *supra* note 2, Art. 2; ACHR, *supra* note 2, Art.4(1) and 21; AFHR, *supra* note 2, art. 4, 14 & 29.

[26] *Roberts Claim*, Mex.-U.S. Gral. Cl. Comm., 4 RIAA, 1926, 77; *Youmans Claim*, *supra* note 20110-106.

[27] Pisillo-Mazzeschi, The Due Diligence Rule and the Nature of the International Responsibility of States, 35 Germ.Y.I.L., 1992, 22.

[28] *Trail Smelter Arbitration*, 1941, 3 RIAA, 1963; *Island of Palmas*, PCA, 1928, 2 RIAA, 829, 831; *ELSI Case*, *supra* note 2, 15; Lillich and Paxmann, State Responsibility for Injuries to Aliens Occasioned by Terrorist Attacks, 26 Am. U. L. Rev., 1997, 225-30.

[29] Christenson, Attributing Acts of Omission to the State, 12 Mich. J. Int'l L., 1991, 324; Eagleton, The Responsibility of States in International Law, 1928, 87-89; Pisillo-Mazzeschi, *supra* note 27, 22-26.

national decisions and legislation,[30] as well as governmental statements.[31] States shall pay damages if they fail to exercise due diligence in discharging such duties.[32]

**1. Raglan Failed to prevent harm being caused to Appollonians and their Property.**

Even the utmost efforts of a State may result insufficient if it fails to measure up to a minimum international standard in its duty to prevent.[33] Indeed, in *Neer* the Tribunal held that the treatment of aliens breaches international law when governmental action is below international standards, allowing any reasonable and impartial man to recognize its insufficiency.[34]

In this case, Raglan, despite the measures taken through the so-called anti-piracy program, clearly failed to meet the minimum international standards since: (i) the screening of the civilian pilots was so inefficient that the civilians hired, carried out the attacks they were assigned to prevent, and (ii) the piloting of *The Mairi Maru* should have been electronically monitored by the RRN, according to the anti-piracy program, yet when the ship was steered

[30] *Morissette v. US*, US Supreme Court, No. 12, 1952; *US v. Arjona*, US Supreme Court, 120 U.S., 1888, 479; Restatement (Third) of Foreign Relations Law of the United States, American Law Institute, 1987, §711, 184; Cohen, China's Practice of International Law: Some Case Studies, 1972, 268-320; Cohen and Chiu, People's China and International Law, 1974, 828.

[31] Note from the Secretary of State of the US in the Negrete Affair, In: Moore, History and Digest of International Law, 1906, VI, 962; Soviet News, London, 1 Apr. 1963, 31 Aug., 1964, 20 Apr. 1961, 6 Jan. 1981, In: Brownlie, *supra* note 16, 135; Diplomatic Note from the Italian Minister of Foreign Affairs to the US, dated 28 January 1927, In: Hackworth, Digest of International Law, 1943, 659-60.

[32] Sorensen, Drug Trafficking on The High Seas: A Move Toward Universal Jurisdiction Under International Law, 4 Emory Int'l L. Rev., 1990, 530.

[33] Yates, State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era, In: International Law of State Responsibility for Injuries to Aliens, Lillich ed., 1983, 214-5; *Neer Case*, Mex.-U.S. Gral. Cl.Comm., 1926, 4 RIAA, 61-62.

[34] *Neer Case*, *supra* note 33, 61-2.

out of the sea lanes designated by Raglan for international navigation, the RRN took no action to investigate such deviation.

Raglan cannot claim that it was incapable of employing more efforts, since States are presumed to have the power of fulfilling their international obligations, and may be held responsible for failing in their duties, even if they are incapable of performing them.[35] For instance, in *Montijo*,[36] the arbitrator held that where States promise protection to those they admit to their territory, they must find the means of making it effective. Hence, Raglan may not justify its impossibility to fully protect Appollonians and their property after it promised such protection.

**2. Raglan failed to exercise due diligence in apprehending and punishing the wrongdoers.**

International standards demand that governmental authorities take affirmative actions to investigate and apprehend wrongdoers.[37] For instance, in *Janes*,[38] the Mexican government was found liable for not having diligently pursued and properly punishing the offender. In this case, Raglan has neither located nor apprehended Good, nor is there evidence whatsoever that any measures have been taken to such effect, evidencing either unwillingness to apprehend Good, or undue delay, failing to exercise due diligence in its duty to apprehend and prosecute Good and his confederates.

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[35] *Montijo Case*, U.S.-Col. Cl.Trib., 1875, In: Moore Arb. II, *supra* note xx, 1444; Eagleton, *supra* note 29, 90.

[36] *Montijo Case*, *supra* note 35, 1444.

[37] *Janes Claim*, U.S.-Mex. Gral. Cl.Comm., 4 RIAA, 1926, 87; Gurulé, Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad, 17 Hastings Int'l & Comp. L. Rev., 1994, 474; Amerasinghe, State Responsibility for Injuries to Aliens, 1967, 54.

[38] *Janes Case*, *supra* note 37, 87.

## D. In The Alternative, If This Court Considers The Acts Of Thomas Good To Be Piracy *Jure Gentium,* Raglan Failed Its Duty To Repress Piracy.

Under emerging customary law States must cooperate for the repression of piracy.[39] This is evidenced by the inclusion of this rule in international instruments,[40] regional agreements,[41] UN Resolutions,[42] national decisions and legislation,[43] and governmental statements.[44] Indeed, the International Law Commission ("ILC") stated that States having an opportunity of taking measures against piracy, and neglecting to do so, would be failing their duty.[45]

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[39] Sundberg, Piracy: Air and Sea, 20 De Paul L. Rev., 1970, 385; RAAF, Peacetime Operations, at http://www.raaf.gov.au/airpower/publications /doctrine/aap1003/lowres/Ch3-RAAF_Peacetime_Operations.pdf; Kahn, Pirates, Rovers, and Thieves: New Problems with an Old Enemy, 20 Mar. Law, 1996, 306.

[40] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, in force March 1992, (SUA), Art. 13.

[41] Agreement Among the Governments of the Black Sea Economic Cooperation Participating Status on Cooperation In Combating Crime, In Particular In Its Organized Forms, in force Mar. 2003, Art.1; Regional Cooperation Agreement on Prevention and Suppression of Piracy and Armed Robbery Against Ships in Asia, adopted Nov. 2004.

[42] Oceans and the Law of the Sea: Report of the Secretary-General, UNGAOR, 56th Sess., at 37, U.N.Doc. A/56/58 (2001); Oceans: the Lifeline of our Planet, Anniversary of the United Nations Convention on the Law of the Sea: 20 Years of Law and Order on the Oceans and Seas, (1982-2002), http://www.un.org/Depts/los/convention_agreements/convention_20 years/oceansthelifeline.htm.

[43] *US v. Klintock*, 18 US (5 Wheat.), 1820, 147-8; *US v. Palmer*, 16 U.S. (3 Wheat.), 1818, 610, 620; US Code, Title 33, Cap. 7; Constitution of the Independent State of Papua New Guinea, 1975, Art.35 (b)(5); Hong Kong Regulations, Cap. 200-A, Suppression of Piracy Regulations.

[44] US: Walker, Acting Deputy Director, Office of Oceans Affairs, U.S. Statement to the United Nations Open-ended Informal Consultative Process on Oceans and Law of the Sea, Piracy and Armed Robbery at Sea, NY, May 10, 2001, http://www.state.gov/g/oes/ rls/rm/4994.htm; China: Statement by Liu Zhenmin, Head of Delegation of China at Panel B, The Second Meeting of The United Nations Opened Informal Consultative Process on Oceans and the Law of the Sea, http://www.china-un.org/eng/zghlhg/flsw/t28537.htm; Japan: Diplomatic Blue Book, Cap. 3 (c) Efforts in Global Issues, http://www.mofa.go.jp/ policy/other/bluebook/ 2003/chap3-c.pdf.

Furthermore, when the prohibition of a certain offense attains the status of *jus cogens*, such as in the case of piracy,[46] it imposes on all States a duty to act to suppress it.[47]

Positioning naval units in piracy-prone regions has proven the only effective method to combat piracy.[48] For example, the US uses its Navy for high seas law enforcement and suppression of piracy,[49] and attacks on Russian vessels in the East China Sea ceased when Moscow deployed a naval flotilla.[50] Accordingly, in the five piracy-prone regions of the world (Far East, South America and the Caribbean, the Indian Ocean, West Africa, and East Africa),[51] affected States employ naval patrols to combat piracy.[52] Thus, States affected by

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[45] Commentary ILC's Draft Article 38, Y.B. Int'l L. Comm'n, 1956, 282, UN Doc. A/CN.4/SER.A/1956/Add.1; Harvard Draft Convention on Piracy, Art 18, 26 AJIL Supp., 1932, 743.

[46] Bassiouni, International Crimes: *Jus Cogens* and Obligation *Erga Omnes*, 59 Law & Contemp. Probs., 1996, 68.

[47] Barry, The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of The Proliferation Security Initiative, 33 Hofstra L. Rev., 2004, 327; Bassiouni, Universal Jurisdiction for International Crimes: Historic Perspectives and Contemporary Practice, 42 Va. J. Int'l L., 2001, 108; Schwarzenberger, International *Jus Cogens*?, In: The Concept of Jus Cogens in International Law: Papers and Proceedings, 1967, 126.

[48] Vatikiotis, Gunboat Diplomacy, Far E. Econ. Rev., 1994, 24; Goodman, Leaving the Corsair's Name to Other Times: How To Enforce the Law of Sea Piracy in the 21st Century through Regional International Agreements, 31 Case W. Res. J. Int'l L., 1999, 164; The Pirates That Hollywood Does Not Portray, Lloyd's List, Nov. 27, 1995.

[49] Fokas, The Barbary Coast Revisited: The Resurgence of International Maritime Piracy, 9 U.S.F. Mar.L.J., 1997, 460; Abel, Note, Not Fit for Sea Duty: The Posse Comitatus Act, The United States Navy, and Federal Law Enforcement at Sea, 31 WM. & Mary L.Rev. 1990, 477.

[50] Vatikiotis, *supra* note 48, 24.

[51] Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report-2003, IMO MSC.4/Circ.50, 27 April 2004.

[52] Beckman *et al.*, Acts of Piracy in the Malacca and Singapore Straits, 1 IBRU Maritime Briefing, 1994, 16; Piracy and Armed Robbery Against Ships, Piracy Reporting Centre, Report of Jan.-June 30, 1998, 1; Joint anti-piracy patrols of the Straits of Malacca, ABC Online, 20 July, 2004, at: http://www.abc.net.au/pm/content/2004/s1158181.htm; Japanese

piracy have employed resources available to combat piracy, implementing effective naval patrols in their waters and on the high seas. In this case, Raglan solely applied a deficient piloting system in its waters that evidently fails to provide appropriate protection. Therefore, Raglan did not fulfill its duty to repress piracy, being no evidence that it invested any efforts to apprehend and prosecute Good and his assistants.

### E. Raglan Owes Compensation To Appollonia For The Attack Upon And Wreck Of The Mairi Maru And All Consequences Thereof.

A State responsible for an internationally wrongful act, which damage cannot be made good by restitution, owes compensation for the financially assessable damage caused.[53] As proven *supra*, Raglan is responsible for the attack and wreck of *The Mairi Maru* and all consequences thereof. Therefore, this Court must award compensation for said losses.

## II. RAGLAN IS RESPONSIBLE FOR THE LOSS OF *THE MAIRI MARU* AND THE MOX AND OTHER CARGO THAT SHE CARRIED, BECAUSE ITS SCUTTLING OF THE VESSEL WAS ILLEGAL, AND THEREFORE OWES COMPENSATION TO APPOLLONIA ON BEHALF OF ITS CITIZENS WHO SUFFERED DIRECT FINANCIAL AND OTHER LOSSES.

### A. Raglan Violated International Law By Scuttling *The Mairi Maru.*

#### 1. Pursuant to the Rule of Flag-State Jurisdiction the Scuttling of *The Mairi Maru* was in Violation of International Law.

It is a general principle of law – and a pillar of the freedom of the high seas-[54] that vessels on the high seas are only subject to the authority of the State whose flag they fly, precluding

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Coast Guard, and Philippine Coast Guard Hold Drill to Combat Terrorism, Piracy, VLCC participates in South China Sea Exercise, MOL, 21 Dec. 2004, at: http://www.mol.co.jp/pr-e/2004/e-pr-2482.html.

[53] *Case Concerning the Factory at Chorzów*, (Jurisdiction), PCIJ, 1927, 47; *Corfu Channel Case*, (Merits), ICJ Rep. 1949, 49.

[54] Brownlie, *supra* note 1, 234; Oppenheim, *supra* note xx, 248; Churchill & Lowe, The Law of the Sea, 3rd Ed., 1999, 208.

other States from exercising jurisdiction without prior consent.[55] Accordingly, when maritime casualties occur, affected States must notify the flag State,[56] as without prior consent, only the flag State may intervene.[57] In this case, Raglan made no effort to seek prior consent or consult Appollonia before scuttling, simply sending a diplomatic note the day before the action was taken, to inform Appollonia its intention to scuttle the vessel, violating the flag State jurisdiction principle.

### 2. Intervention to Prevent, Mitigate and Eliminate a Grave and Imminent Danger to a State's Essential Interest cannot be accepted Under Customary International Law

Raglan may claim that when a maritime casualty occurs on the high seas, the threatened State may intervene to eliminate, prevent and mitigate a threat of pollution to its essential interests. However, this rule is not customary,[58] being only expressly included in one international treaty,[59] not ratified by either party to this case. Additionally, there is no evidence of a widespread and general State practice supporting custom. Indeed, Russia's proposal to

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[55] *MV "Saiga" (No. 2) Case*, ITLOS, 1999, ¶106; CHS, *supra* note 8 Arts.4-6; UNCLOS, *supra* note 8, Arts.91-92.

[56] International Convention for the Prevention of Marine Pollution from Ships, in force Oct. 1983 (Annexes I and II); International Convention on Oil Preparedness, Response and Cooperation Convention, in force May 1995, Arts. 3, 4 and 6; Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances, in force Mar. 2000, Art.1; Bonn Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, IELMT 983:68, in force 1 Sept. 1989, Arts.1 & 5.

[57] Kiss and Shelton, International Environmental Law, 3rd. Ed., 2004, 552; 186; O'Connell, The International Law of The Sea, Vol. II, 1984, p.800; Hanqin, Transbounadry Damage in International Law, 2003, 11.

[58] Smith, State Responsibility and the Marine Environment: The Rules of Decision, 1988, 202, 220.

[59] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, (Intervention Convention) in force May 1975.

include this rule in the UNCLOS was rejected, in absence of acceptance by States.[60] Consequently, Raglan cannot invoke custom to justify the scuttling of *The Mairi Maru*.

### 3. The Scuttling of *The Mairi Maru* breached the Customary Prohibition against the Dumping of MOX.

Dumping is defined as the deliberate disposal of wastes or other matter from vessels at sea.[61] Although there is debate as to whether the general prohibition to dump has acquired customary status, there is consensus on the customary status of the prohibition to dump high-level radioactive material such as MOX,[62] as evidenced from the rule's inclusion in international[63] and regional treaties,[64] as well as its recognition by international organizations.[65] Moreover, Raglan ratified The London Convention without reservations to

[60] Russia's Proposal to Include Intervention on the High Seas During the Occurrence of a Maritime Casualty, UN Doc. A/CONF.62/C.3/L.25 (1975), 4 Official Records, 212.

[61] UNCLOS, *supra* note 8, Art. 1 (5); Convention on the Prevention of the Marine Pollution by Dumping of Wastes and Other Matters, (London Convention), in force Aug., 1975, Art. IV.

[62] Birnie and Boyle, International Law and The Environment, 2nd Ed., 2002, 422; Redgwell, International Environmental Law, In: Evans, International Law, 1st Ed., 2003, 668; Morrison and Wolfdrum, International, Regional and National Environmental Law, 2004, 276.

[63] Antarctic Treaty, in force June 1961, Art.V; Protocol to the Antarctic Treaty, 1991, Annex III, in force Jan. 1998, Art. 2; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, in force May 1992, Art.9.

[64] Convention on the Protection of the Marine Environment of the Baltic Sea Area, in force Jan. 2000, Art. 11; Convention for the Protection of the Marine Environment of the North-East Atlantic, in force Sept. 1992; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region by Dumping, in force Aug. 1990, Art.10; Convention on the Protection of the Black Sea Against Pollution, in force Jan. 1994, Art.2 and Annex 1.

[65] IAEA Information Circular, Doc.INFCIRC/205.Add. 1, (1975); IAEA Information Circular Doc. INFCIRC/205/Add. 1/Rev. 1 (1978); IAEA Safety Series, No.78, Definition and Recommendations for the Convention on the Prevention of Marine Pollution, 1986, 10th Consultative Meeting, London Draft Convention.

the rule that expressly prohibits the dumping of radioactive material.[66] In this case, Raglan intentionally scuttled *The Mairi Maru* laden with MOX, placing this radioactive material at the bottom of the ocean floor in breach of the customary rule that prohibits dumping high-level radioactive material.

The fact that Raglan secured and encased the MOX canisters prior to scuttling has no bearing, since Raglan cannot guarantee that with the passing of time, the changes in temperature and currents, and other circumstances, the MOX will not cause damage to the environment.[67] Indeed, no security measures regarding the storage of radioactive material are absolutely risk-free.[68]

Raglan may also argue that the scuttling of *The Mairi Maru* was taken under the exception provided for under Article V(1) of the London Convention that applies when dumping is necessary to save threatened human lives at sea.[69] However, this exception is to be interpreted narrowly to prevent the unregulated dumping of prohibited substances,[70] only operating when it involves ships in distress at sea. In this case, human lives aboard *The Mairi*

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[66] Amendment to the London Convention, 1993, Res. LC.49(16), adopted Nov. 1993, Preamble; Protocol to the London Convention, not in force, 1997, Art. 4(1)(2), Annex 2; London Convention, *supra* note 61, Art. 7 (b), Art. 10 (1).

[67] Smith and Glover, The Deep Seafloor Ecosystem: Current Status and Prospectus for Change by the year 2025, at: www.icef.eawag.ch/abstracts/smithglover.pdf; Collie and Russo, Deep-Sea Biodiversity and the Impacts of Ocean Dumping, 2000, http://oceanexplorer.noaa. gov/explorations/deepeast01/background/dumping/dumping.html.

[68] Tanaka, Lessons from a Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea, 25 Mich. J. Int'l L. 337, 367; Waczewski, Legal, Political, and Scientific Response to Ocean Dumping and Sub-Seabed Disposal of Nuclear Waste, 7 J. Transnat'l L. & Pol'y 97, 103.

[69] London Convention, *supra* note 61, Art. V; Interpretation of the "Force Majeure" and "Emergencies" Exceptions Under Article V of the Convention 1972, IMO LC.2/Circ. 343 5.1,Oct. 25, 1994.

[70] Murakami, The Dumping of the New Carrisa: An Analysis of the Emergency Provisions of The London Convention, 8 Pac. Rim L. & Pol'y J. 705, Sept. 1999, 707.

*Maru* were not at risk at the time of the scuttling since the crew had already been rescued. Thus, Raglan breached customary law prohibiting the dumping of MOX.

## C. The Wrongfulness Of The Scuttling Cannot Be Precluded By Invoking Necessity.

### 1. The conditions for necessity are not met.

Raglan may not argue that the wrongfulness of the scuttling of *The Mairi Maru* was precluded due to a state of necessity. Indeed, to claim necessity certain conditions established in the ILC Articles on State Responsibility, and recognized by this Court, must be fulfilled,[71] which in this case were not met.

### a. The Scuttling was not the only Means available to Reduce the Environmental Damage.

In order to plea necessity, it must be impossible to proceed by any means other than the one contrary to international law.[72] Hence, the state of necessity only applies when all legitimate means to mitigate the possible damage have been exhausted and proved to be of no avail.[73] Indeed, Raglan had several legitimate methods which were not considered before scuttling the vessel, as has been done in other cases (*e.g.*, the *Prestige*, *Acushnet*, *Hua Ding Shan*, and *Kursk* incidents)[74]. Moreover, international practice places scuttling among the least employed methods of controlling pollution at sea, as its effects on the marine environment

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[71] ARS, supra note 1, Art. 25; Case *Concerning the Gabcikovo-Nagymaros Project*, (Gacikovo-Nagymaros Case), ICJ Rep. 1997, ¶52.

[72] *Oscar Chinn Case*, (Diss.Op. Anzilotti), PCIJ, 1934, 113; *S.S Wimbledon Case*, PCIJ 1923, 306.

[73] *Neptune Case*, Jay Treaty (Art. VII) Arb., 1974, 433; Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1994, 71.

[74] The Prestige Oil Tanker Disaster, Nov.20, 2002, Guardian Unlimited Network, www.guardian.co.uk/theissues/article/0,6512,843781.00.html; Kursk Victim's Slow Death, 26 Oct 1999, BBC News, http.news.bbc.co.uk/1/hi/ world/Europe/1989680.stm.

have proven negative and violate ocean dumping prohibitions.[75] In this case, Raglan may have employed other lawful measures, particularly considering that Raglan (i) was able to secure and encase the MOX, which requires similar technical capabilities as discharging the cargo, and (ii) towed *The Mairi Maru* to the location of its scuttling, a process which involves similar techniques as taking it to shore. Accordingly, it is evident that scuttling was not the only means available to Raglan.

**b. Raglan Contributed to the State of Necessity.**

Necessity may not be relied upon when the State claiming it has contributed, by act or omission, to the situation of alleged necessity.[76] In this case, Raglan contributed to the situation of necessity by failing to police its waters and -through Good acting as a State agent- setting the *The Mairi Maru* off course. Both of these circumstances caused the wreck of *The Mairi Maru,* subsequently producing the leakage of MOX. Hence, Raglan contributed to the alleged state of necessity and may not argue that the scuttling of *The Mairi Maru* was taken under necessity since the conditions for its application are not met.

**2. Alternatively, even if acting under necessity, Raglan owes compensation to Appollonia.**

Even if this Court determines that the scuttling of the vessel was done under necessity, the State that has taken measures under necessity, causing damage to another State, is bound to pay compensation.[77] Thus, in this case, compensation must be paid to Appollonia for the material losses caused.

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[75] Sheen, Admiralty Law Institute: Symposium on American and International Maritime Law: Comparative Aspects of Current Importance: Conventions on Salvage, 57 Tul. L. Rev. 1387, June 1983; Sweeny, Collisions Involving Tugs and Tows, 70 Tul. L. Rev. 581, 1995.

[76] *Gabcikovo-Nagymaros Case*, *supra* note 71, ¶57; ARS, *supra* note 1, Art. 25(b).

[77] ARS, *supra* note 1, Art. 27(b); Cassese, International Law, 2001, 197; Shaw, International Law, 5th Ed, 2003, 708.

### D. This Court Must Award Compensation For The Loss Of *The Mairi Maru* And The MOX.

As explained *supra*, when damage from an international wrong cannot be made good by restitution, compensation is owed for the financially assessable damage caused. As already proven, the scuttling of *The Mairi Maru* was an internationally wrongful act which caused Appollonia and its nationals to suffer direct financial damage from the loss of MOX and the vessel, a damage which cannot be restituted. Therefore, this Court must award compensation for said losses.

## III. APOLLONIA DID NOT VIOLATE ANY OBLIGATIONS OWED TO RAGLAN UNDER INTERNATIONAL LAW IN TRANSPORTING MOX THROUGH THE WATERS OF THE RAGLANIAN ARCHIPELAGO.

### A. Appollonia's Passage Through Raglan's Archipelagic Waters Was A Lawful Exercise Of The Right Of Archipelagic Sea-Lane Passage.

An archipelagic State may designate sea-lanes to establish the extensive right of other States to exercise archipelagic sea-lane passage,[78] which is analogous to transit passage through straits.[79] Transit passage is the exercise of freedom of navigation solely for the continuous and expeditious transit between one area of the high seas or economic zone and another.[80] This right applies to all ships, regardless of type, cargo, means of propulsion or sovereign

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[78] Churchill and Lowe, *supra* note 54, 127; UNCLOS, *supra* note 8, Art. 53.

[79] Larson, National Security Aspects of the United States Extension of The Territorial Sea to twelve Nautical Miles, 2 Terr.Sea J., 1992, 189-90; Stephens, The Impact of the 1982 Law of The Sea Convention on the Conduct of Peacetime Naval/Military Operations, 29 Cal W. Int´l L.J. 283, 1999, 289.

[80] UNCLOS, *supra* note 8, Art. 38(2); Carter and Trimble, International Law, 3rd Ed., 1999, 962; Dixon, Textbook on International Law, 2nd Ed., 1993, 189; Janis, An Introduction to International Law, 2nd Ed., 1993, 209-10.

immunity status.[81] The mere transit of ships carrying High Level Plutonium, Irradiated Nuclear Fuel and High Level Radioactive Waste (*e.g.* MOX) through the territorial sea of a State is not prejudicial to the peace, good order, or security of the coastal State.[82] In this case, Raglan by designating its sea-lanes, granted the right of archipelagic sea-lane passage to all ships regardless of cargo, including Appollonia's MOX shipment. Therefore, the passage of *The Mairi-Maru* through Raglanian waters was a valid exercise of its right of archipelagic sea-lane passage.

## B. Appollonia Was Not Bound To Notify Raglan Of Its MOX Shipments.

### 1. Appollonia Was not Bound to Notify Raglan under Treaty Law.

Under the Convention of Physical Protection of Nuclear Materials and The Basel Convention, States must notify the transport of nuclear materials and hazardous wastes to other States through which said transport takes place. However, neither of them bind Appollonia to notify Raglan, as Raglan has not signed nor ratified any such treaty. According to Article 34 of the VCLT, ratified by both states, treaties cannot create obligations or rights for third non-party States.[83] Hence, Appollonia was not bound to notify Raglan of the shipment of MOX under treaty law.

### 2. Appollonia was not Bound to Notify Raglan under Customary International Law.

Shipment of nuclear substances, including MOX, is a widespread practice among States such as US, Japan, France, and UK (the principal shippers of radioactive materials).[84] For instance,

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[81] Bernhardt, The Right of Archipelagic Sea Lanes Passage: A Primer, 35 Va. J. Int'l L. 719, 1995, 768-9.

[82] Pedrozo, Transport of Nuclear Cargoes by Sea, 28 J. Mar. L. & Com. 207, 1997, 223.

[83] VCLT, in force Jan. 1980, Art. 34; Chinkin, Third Parties in International Law, 1993, 34, Cassese, *supra* note 77, 119; Reuter, Introduction to the Law of Treaties, 1995, 140.

in September 2004, the *Pacific Pintail* and the *Pacific Teal*, two British vessels, carried 140kg of weapons grade plutonium from South Carolina to France, arriving on October 8, 2004.[85] The shipment of radioactive materials is not likely to be reduced in the future, as evidenced from France's and Japan's contracts to ship radioactive waste until 2011.[86] The practice of these States is of utmost importance for the purpose of assessing the customary obligation surrounding such shipments.[87]

For a rule of international law to acquire customary status, a widespread, consistent and actual State practice is required.[88] With respect to the notification of MOX, plutonium and other radioactive waste shipments, such practice does not exist.[89] For example, Japan kept the route of the *The Akatsuki Maru*, a vessel carrying 1700kg of plutonium, secret.[90] France, Japan and the UK, never revealed the routes of The *Pacific Pintail* and *Pacific Teal*.[91] Hence,

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[84] Currie, The International Law of Shipments of Ultrahazardous Radioactive Materials: Strategies and Options to Protect the Marine Environment, South Pacific Regional Workshop on Criminal Law and its Administration in International Environmental Conventions, June, 1998, http://www.globelaw.com/Nukes/Nuclear%20Shipment %20Paper.htm.

[85] Greenpeace, Nukes on vacation: Activists lie in wait for nuclear shipment, http://www.greenpeace.org/international_en/news/details?item_id=593488.

[86] Marin, Oceanic Transportation of Radioactive Materials: The Conflict Between The Law of the Seas´ Right of Innocent Passage and Duty to the Marine Environment, 13 Fla. J. Int'l L., 2001, 369.

[87] Starke, Introduction to International Law, In: Carter and Trimble, *supra* note 80, 138; Cassese, *supra* note 77, 123.

[88] Shaw, *supra* note 77, 80, Akehurst, Modern Introduction to International Law, 7th Rev. Ed., 39.

[89] Fidell, Maritime Transportation of Plutonium and Spent Nuclear Fuel, 31 Int'l Law 757, 771.

[90] Fredericks, Plutonium Ship Endangers Millions, http://www.greenleft.org.au/back/1992/76/76p5.htm; Greenpeace Condemns Japanese Plutonium Shipment, Protests at Japanese Embassy, Nov.12, 1992, http://www.ratical.org/radiation/inetSeries/plutoBoat.html.

[91] Plutonium Ships begin Sea Trials before Secret Voyage to Japan, Nuclear Press Release, 24 Jun. 1999, www.archivegreenpeace.org/pressreleases/nuctreans/1999jun24.htm; Leaked

although treaties may establish the duty to notify, the element of state practice is lacking. Consequently, since the notification of MOX shipments has not acquired customary law status, Appollonia was not bound to notify Raglan.

### C. Appollonia Did Not Breach The Precautionary Principle.

#### 1. Appollonia's lack of notification of MOX shipments was a precautionary measure.

The Precautionary Principle, a general principle of law, defines the duty of states to take all necessary precautions to avoid damage to the environment when the threat of damage is serious and irreversible.[92] With regard to its MOX shipment, Appollonia complied with said principle by taking safety measures, including not notifying. Indeed, lack of notification of MOX shipments, is precisely a precaution to avoid damage to the environment, because the threat of the damage is serious and irreversible, MOX being considered a high-level radioactive waste capable of causing a grave environmental incidents and classified as a possible object for terror attack, due to the high level of plutonium in MOX fuel.[93] Therefore, it is essential and appropriate to limit information regarding MOX shipments to ensure that the environment, the ship and its crew, as well as the cargo, are secure.[94] Indeed, the public

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Document Reveals Deadly N-Waste Wouldn't be Salvaged, Greenpeace, 18 Feb. 1997, http://archive.greenpeace.org/majordomo/index-pressreleases/1997/msg00034.html; Greenpeace Activist occupy Cherbourg Granes Prior to Imminent Plutonium Shipment, Nuclear Press Release, 11 July 1999, http://archive.greenpeace.org/press releases/nuctrans/1999jul11. html.

[92] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, ILC, 53rd session, Supp. No. 10, UNGAOR A/56/10, 2001, Arts. 3 and 15; Thornton and Beckwith, Environmental Law, 1997, 35.

[93] Erik Martiniussen, New MOX-transports from Japan to UK, 2002, http:// www.bellona.no/en/energy/nuclear/sellafield/24269.html; Roche, Sellafield MOX Plant Struggles Onwards, 22 Safe Energy E-Journal, Sept.-Oct.-Nov., 2001, http://www.kare-uk.org/safe-energy-no22.htm.

[94] *MOX Plant Case*, Request for Provisional Measures and Statement of Case of Ireland, 150-55, ITLOS, 2001; Pedrozo, *supra* note 82, 221; Tanaka, *supra* note 68, 366.

opinion has been aware for some time now that well-known terrorists (*e.g.* Al Qaeda, Osama Bin-Laden) have been trying to get this kind of nuclear fuel since scientists have confirmed that it would be easy to create nuclear bombs from fresh MOX.[95] Hence, to avoid a terrorist attack against a vessel carrying MOX, the secrecy principle governs shipments containing plutonium.[96] Accordingly, as already mentioned (*e.g.* the *Pacific Pintail* and *Pacific Teal*) MOX shipment routes throughout the world remain secret.[97] Moreover, due to matters of national security and commercial confidentiality a State may withhold vital information.[98] Therefore, before crediting this standard of secrecy with having caused attacks or wrecks of shipments of radioactive materials, it is pertinent to mention that under this standard no such attacks or wrecks have occurred and radioactive materials have been safely transported by sea since the 1960s.[99] Accordingly, Appollonia complied with the precautionary principle by not notifying Raglan of the MOX shipments.

**a. Appollonia complied with international standards pertaining to the shipment of MOX.**

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[95] Green challenge on UK nuclear plant reaches Court, Planet Ark, http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=13189; Edwards, Nuclear Power: Exploding the Myths, March 2001, http://www.ccnr.org/encompass.html; Chalk River Test to Inaugurate Basin "Plutonium Economy", Mar. 1998, http://www.glu.org/english/information/newsletters/12_1-winter-spring-1998/ChalkRiverMOXtest.html.

[96] Marin, *supra* note 86, 373.

[97] Plutonium Ships begin Sea Trials before Secret Voyage to Japan, Nuclear Press Release, June 24. 1999, http://archive.greenpeace.org/pressreleases/nuctrans/1999jun24.html; Stormy Waters for Nuclear Shipments, BBC News, UK, 1999, http://news.bbc.co.uk/1/hi/uk/398387.stm; Radioactivity, Route of Plutonium fuel (MOX) Shipment Kept Secret, Greenpeace, http://www.greenpeace.se/norway/english/9camp/3nuces/93main.htm.

[98] Draft Articles on Prevention of Transboundary Harm form Hazardous Activities, *supra* note 92, Art.14; Mellor, Missing the Boat: The Legal and Practical Problems of Prevention of Maritime Terrorism, 18 Am. U.Int´l Rev., 2002, 369.

[99] Japan's Nuclear Power Program: Power for the Future of Japan: Safety and Security First, http://www.japannuclear.com/nuclearpower/transportation/safety.html; Transporting Nuclear Materials, BNFL, http://www.bnfl.co.uk/index.aspx?page=609.

Activities deriving from fissionable materials, such as the shipment of radioactive materials **(**e.g. MOX), are subject to certain international standards arising from the Treaty on the Non Proliferation of Nuclear Weapons, to which Appollonia is a party. Appollonia fully complied with these standards, established in Article III.1 of said Non Proliferation Treaty, since it (i) concluded a safeguard agreement with the IAEA; (ii) entered into separate Safeguard Agreements with the IAEA concerning the transfer of MOX from Appollonia to Maguffin; (iii) entered into an agreement with MARC and reported this agreement to the IAEA; and (iv) reported its shipments of MOX to the IAEA. In any case, Raglan may not invoke any duties or obligations arising from the Non-Proliferation Treaty as basis for its claim, since Raglan is not a party to it and thus lacks any rights to invoke its provisions, under Article 34 of the VCLT. Therefore -even though Appollonia has indeed complied with international standards- had it failed to comply with such standards, Raglan would not be able to invoke such failure before this Court.

### D. Alternatively, Raglan Cannot Contest The Legality Of The Shipment of MOX - Since It Acquiesced To Said Shipments.

Acquiescence, a recognized general principle of law,[100] has been defined as silence or absence of protest in circumstances generally calling for a positive reaction of objection.[101] When States acquiesce to the conduct of other states without protesting against them, the assumption must be that such behavior is accepted, therefore, said State cannot subsequently

[100] Brown, A Comparative and Critical Assessment of Estoppel in International Law, 50 U. Miami L. Rev., 1996, 401.

[101] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, (*Gulf of Maine Case*), ICJ Rep., 1984, 305; *Case Concerning The Frontier Dispute*, ICJ Rep., 1986, 597.

claim the illegality of such conduct.[102] The IAEA noted, in its July 31, 1999 report, that Appollonia shipped MOX through Raglan's waters without notifying. Accordingly, by the time of the accident, in July 28, 2002, Raglan was aware that MOX was being shipped through its waters without notification and not once did it protest, complain or object to such shipment. As a result, Raglan acquiesced to Appollonia's shipments of MOX and is barred from claiming the illegality of such conduct.

## IV. RAGLAN DOES NOT HAVE STANDING TO SEEK COMPENSATION FOR ECONOMIC LOSSES RESULTING FROM ACTS THAT OCCURRED WHOLLY OUTSIDE OF ITS TERRITORIAL WATERS AND EXCLUSIVE ECONOMIC ZONE.

### A. Raglan's Claim Is Inadmissible Since Local Remedies Were Not Exhausted.

As established *supra*, before international claims are brought against a State, all effective and available local remedies need to be exhausted.[103] In this case, Raglanian tourism and sport fishing industries did not bring claims before Appollonian courts as a result of the wreck of *The Mairi Maru*. Hence, Raglan's claim is inadmissible.

Raglan may argue that it currently brings a mixed claim, primarily for the losses caused to the State directly, and hence, would not need to exhaust local remedies. However, when a mixed claim is brought before the Court and it is not made preponderantly for direct damages to the State,[104] local remedies must be exhausted. The test used to determine preponderance is based on the nature of the claim and whether it is brought to secure the interest of the State's

[102] *Gulf of Maine Case*, *supra* note 101, 246; *Anglo-Norwegian Fisheries Case*, ICJ Rep, 1951, 116; Shaw, *supra* note 77, 85.

[103] *Finnish Ships Arbitration*, *supra* note 2, 1479; *Ambatielos Arbitration*, 12 RIAA, 1956, 83; *Interhandel Case*, ICJ Rep., 1959, ¶ 6.

[104] *ELSI Case*, *supra* note 2, 52; Amerasinghe, *supra* note 37, 188

nationals or that of the State itself.[105] In *Interhandel Case*, this Court decided that the nature of the claim brought by the Swiss Government was indeed a case adopted on behalf of its national, and hence, local remedies needed to be exhausted.[106] In this case, Raglan's claim for compensation for losses to its fishing and tourism industries evidences the exercise of diplomatic protection. Hence, Raglan's claim is inadmissible as local remedies have not been exhausted by such corporations.

## B. Raglan Lacks Standing Since Its Legal Interests Have Not Been Affected.

### 1. The Damages to the Sandbars and its Surrounding Waters has not Affected any of Raglan's Individual Legal Interests.

A State only has standing to seek remedies for the commission of an internationally wrongful act when it is injured on its own legal rights or interests,[107] which, as recognized in the *South West Africa Case*, must be vested in some text, instrument or rule of law.[108]

Raglan seeks compensation for the injury suffered by fishing and tourist corporations due to damage caused to the Norton Shallows, an area located outside its jurisdiction. The fact that this area has not been claimed by any nation renders it *terra nullius*,[109] making it available for the use and enjoyment of all nations, which holds true for the waters surrounding it, regarded as high seas.[110]

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[105] Second Report on Diplomatic Protection by Dugard, Special Rapporteur, ILC, UN Doc. A/CN.4/1514, 2001, 167; Amerasinghe, *supra* note 37, 198.

[106] *Interhandel Case*, *supra* note 103, ¶28.

[107] ARS, *supra* note 1, Art. 31; Crawford, *supra* note 17, 202, 254; Hanqin, *supra* note 57, 236-37; Damrosch, et. al., International Law: Cases and Materials, 4th ed., 2001, 733.

[108] *South West Africa Case*, (Second Phase), ICJ Rep. 1966, 32-4.

[109] Akerhurst, *supra* note xx, 148; Wallace, International Law, 1997, 93; Brownlie, *supra* note 1, 174.

[110] Brownlie, *supra* note 1, 174.

In relation to incidents occurring in common areas such as the high seas, States' individual legal interests are restricted to their flagships, nationals and property,[111] none of which were affected in this case. Indeed, States have been only held responsible in similar cases when one of the aforementioned interests has been affected.[112]

For instance, in the *Fukuryu Maru* incident (involving the US and Japan), when the US exploded a test hydrogen bomb in the Marshall Islands, injuring Japanese fishermen on the high seas and a fishing resource customarily exploited by Japan with radioactive fallout,[113] the US did not manifest any intention to allocate any part of its *ex gratia* payment for the incident to Japan's losses resulting from the impairment of the area's environment.[114] In the 1989 *Bahia Paraiso* incident, an Argentinean ship grounded off the Antarctic Peninsula causing an oil spill which affected US research activities carried out for 20 years in the area.[115] However, no claim was made either by the US or any other State to the Argentinean government claiming compensation for damages suffered. Further, in the *Amoco Cádiz Case*

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[111] Smith, *supra* note 58, 87-9.

[112] *I'm Alone Case*, 3 RIAA, 1935, 1609; *Lusitania Case*, 7 RIAA, 1923, 32; The Jessie, The Thomas F. Bayard, The Pescawha Case, British-American Claims Arbitral Tribunal, 6 RIAA, 1921, 57; *Cape Horn Pigeon Case*, 9 RIAA, 1902, 51.

[113] Whiteman, Digest of International Law, 1968, 578-86; Hanqin, *supra* note 57, 20; O'Keefe, Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, 18 Denv. J. Int'l. L. & Pol'y, 1990, 178.

[114] Agreement on Personal and Property Damage Claims, Jan. 4, 1955, US–Japan, 6 UST 1, TIAS 3160; Margolis, The Hydrogen Bomb Experiments and International Law, 64 Yale L. J., 1995, 638-39; Sands, Principles of International Environmental Law, 2nd ed., 2002, 887.

[115] Charney, Third State Remedies for Environmental Damage to the World's Common Spaces, In: Francioni And Scovazzi, International Responsibility for Environmental Harm, 1991, 149-50; Wilford, Ship's Oil Leak may Imperil Antarctic Wildlife, New York Times, February 2, 1989, at A9, col. 1.

a US Court expressly recognized that since damage was done to *res nullius*, no one had standing to claim compensation for environmental impairment.[116]

These cases evidence States' lack of standing to sue for damage caused in these areas,[117] implying that when activities are carried out therein, States and their nationals are at their own risk.

Therefore, since the MOX spill has not caused any damage to Raglan's territorial waters or EEZ -and thus no injury to its individual legal interests- it lacks standing to seek compensation.

### 2. Raglan's Right to Exercise its High Seas' Freedoms in the Norton Shallows do not Grant it Standing.

Raglan may base its standing on the claim that the damage caused to the marine environment of the Norton Shallows has impaired its exercise of the freedoms of the high seas in the area. However, given the high seas' quality of *res communis*,[118] any damage caused to its environment would be suffered by the international community as a whole as all States would be deprived from their equal rights over it.[119] Accordingly, standing to seek due compensation in this regard belongs to the international community, not to States individually,[120] which bars Raglan from pursuing an action based on individual interests.

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[116] *In Re Oil Spill by the "Amoco Cadiz" off the Coast of France on March 16*, 1978, 1988 U.S. Dist. Lexis 16832, 29-30.

[117] Mclaughlin, Improving Compliance: Making Non-State International Actors Responsible For Environmental Crimes, 11 Colo. J. Int'l Envtl. L. & Pol'y, 2000, 388; Kiss, *Droit International de L'environnement*, 3 Études Internationales 1989, 105.

[118] Damrosch, *supra* note 107, 1558; Hanqin, *supra* note 57, 193.

[119] *Nuclear Tests Case*, ICJ Rep. 1974, 253 and 457; Charney, *supra* note 115, 166.

[120] Birnie and Boyle, *supra* note xx, 196; Kiss and Shelton, *supra* note xx, 325.

## C. Alternatively, Appollonia Is Not Responsible For the Damage To The Norton Shallows.

### 1. Appollonia is not Subject to the Strict Liability Doctrine.

Raglan may argue that Appollonia is liable for the damage to the Norton Shallows based on a regime of strict liability applicable to the carrying out of hazardous activities. However, the strict liability doctrine may only apply if expressly convened by States.[121] In this case, since no such agreement exists between the parties, the standard of strict liability may not be invoked.

### 2. The Damage to the Sandbar and its Surrounding Waters is not Attributable to Appollonia.

Should this Court find Appollonia's shipment of MOX unlawful or accept to apply the strict liability doctrine, Appollonia may still not be held responsible since the damage to the Norton Shallows was not caused by any conduct attributable to it. In this regard, States only owe reparation when the damage suffered is the proximate cause of the State's act,[122] which requires (i) a clear and unbroken connection between the act complained of and the loss suffered,[123] and (ii) that the latter be either a normal or foreseeable consequence of the former.[124] Failure to meet these criteria renders the damages not subject to compensation.[125] As proven *infra*, none of these criteria is met in this case.

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[121] Second Report on International Liaiblity for Injurious Consequences Arising Out of Acts Not Prohibited by International Law by Mr. Robert Quentin-Baxter, Special Rappoerteur, UN Doc. A/CN.41 346, 1986 ¶12; Barboza, The ILC and Environmental Damage, In : Wetterstein, Harm to the Environment: The Right to Compensation and the Assessment of Damages, 1997, 78-9; Barron, After Chernobyl: Liability for Nuclear Accidents Under International Law, 25 Colum. J. Transnat'l L., 1987, 660.

[122] Brownlie, *supra* note 16, 225; Shelton, Remedies in International Human Rights Law, 1999, 10; Verzijl, International Law in Historical Perspective, Martinus Nijhoff, 1973, 735.

[123] *Administrative Decision No. II*, U.S.-German Mixed Cl.Comm., 7 RIAA, 1923, 30; *Dix Case*, U.S.-Venez. Mixed Cl. Comm., 1902, In: Ven. Arb. 1903, Ralston and Doyle eds., 9; Brownlie, *supra* note 16, 223-27.

**a. There is no clear and unbroken connection between Appollonia's acts and the damage to the Norton Shallows.**

Intervening causes in the chain of events that lead to a damage relieves a defendant from responsibility.[126] Regarding hazardous activities, this principle is included in international instruments as a circumstance exempting liability when the damage is caused by an intentional act of a third party.[127] In this case, the damage to the Norton Shallows would have not occurred without the intervention of extraneous causes independent of any acts attributable to Appollonia, namely (i) the acts of Good who dismantled *The Mairi Maru* and; (ii) the existence of a severe storm which altered the course of the ship, causing it to wreck in the Norton Shallows. Thus, a clear and unbroken connection between Appollonia's MOX shipment and the damage caused is lacking.

**b. The damage to the Norton Shallows was neither a normal or foreseeable consequence of Appollonia's MOX shipment.**

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[124] *Lighthouses Arbitration*, PCA, 12 RIAA, 1956, 217-18; *Naulilaa Case*, Portugo-German Arbitration, 2 RIAA, 1930, 1032; *Life Insurance Claims*, German-US Mixed Cl.Comm., In: Opinions and Decisions, January 1, 1933-October 30, 1939, 1930, 133-4; *Beha Case*, German-U.S. Mixed Cl.Comm., 1928, In: Opinions and Decisions, January 1, 1933-October 30, 1939, 1940, 901; *Heirs of Jean Maninat Case*, Fr.-Venez. Mixed Cl.Comm, 10 RIAA, 1905, 55; *Samoan Claims*, (Joint Report No. II of August 12, 1904) MS., U.S. Department of State, National Archives, 210 Despatches, Great Britain, Ambassador Choate to Secretary Hay, August 18, 1904, No. 1429, enclosure, 1904.

[125] *Trail Smelter Case*, *supra* note 28, 105; Hauriou, Les Dommages Indirects dans les Arbitraux Internationaux, RGDIP, 1924, 219.

[126] *Lusitania Case*, U.S.-Germany Mixed Cl.Comm., 7 RIAA, 1923, 35-6; *Yuille, Shortrigde and Co. Case*, Lapradelle and Politis, Recueil des Arbitrages Internationaux, Vol. 2, 109.

[127] International Convention On Civil Liability For Oil Pollution Damage, in force Jun. 1975, Art. III(2)(b); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, not in force, Art. 7(2)(b); International Convention on Civil Liability for Bunker Oil Pollution Damage, not in force, Art. 3(3)(b); Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, not in force, Art. 5(4).

Raglan may argue that there was a high risk of a pirate attack to *The Mairi Maru* at the time of its shipment, and that a spill of MOX resulting from such attack could have been foreseen. However, the attack on *The Mari Maru* and the way it occurred could have not been foreseen by Raglan. This is so if considered that no ship piloted by Raglanian officers or private contractors had ever been attacked by "pirates" and that all attacks that occurred in the past were carried out by private persons with no link to Raglanian authorities. Good's attack was indeed the first to be carried out by a pilot of Raglan's anti-piracy program. Consequently, Appollonia had no basis to foresee neither the occurrence of this attack under these circumstances nor any of its consequences.

Additionally, considering that Appollonia had successfully been shipping MOX for over seven years –even during the highest level of warning- with no similar incident, a MOX spill resulting from a "pirate" attack cannot be regarded as a normal consequence.

Hence, a MOX spill was neither a foreseeable nor normal consequence of Appollonia's shipment of MOX, and thus, it should not be deemed its proximate cause.

### D. Alternatively, Appollonia Is Not Bound To Pay Full Compensation.

#### 1. Raglan's Alleged Economic Losses are not Subject to Compensation.

Under international law it is still unclear whether loss of profits is recognized as an established head of damages.[128] Notwithstanding, compensation can not be recognized for economic losses suffered by individuals who enjoy a public or common facility not involving a loss or injury to a proprietary interest.[129] Specifically, regarding harm caused by nuclear

[128] Bowett, Claims Between States and Private Entities: The Twilight Zone of International Law, 35 Cath. U.L. Rev., 1986, 940-42.

[129] Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, not in force, Art. 2(7)(c); First Report of the Special Rapporteur PS Rao on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities, ILC, 2003, UN Doc. A/CN.4/531, 2003, ¶130; *Robins Dry Dock & Repair Co. v. Flint*, 275 US 303, 1927; *Union Oil Company v. Oppen*, 501 F.2d 558, 1974,

activities, the existing treaties governing liability limit compensation to personal injury and damage to or loss of property.[130] In this case, a proprietary interest over the Norton Shallows is lacking as it is *terra nullius*. Hence, any claim for damages occurring in said area should be disregarded.

### 2. Since Raglan's Negligence Contributed to the Damage, Full Recovery is Precluded.

If the Court deems that compensation is owed by Appollonia, Raglan's negligence in preventing an attack to *The Mairi Maru* must be considered, as it raises a question of comparative fault.[131] Indeed, in determining the extent of reparation, account shall be taken of an injured State's contribution to the injury by its willful or negligent conduct.[132] Indeed, international tribunals have reduced a claimant's award in proportion to her culpability.[133] Thus, should Appollonia be held responsible, it would not be bound to pay full compensation, among other causes, due to Raglan's failure to prevent a "pirate" attack to *The Mairi Maru,* as proven *supra*.

## V. PRAYER FOR RELIEF

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563; *In re Oriental Republic of Uruguay*, 821 F.Supp 950, 1993; *In re the Exxon Valdez*, US Dist., LEXIS 6009, 1994; *Murphy v. Brenthood District Council*, 1991, 1 AC 398.

[130] Paris Convention on Third Party Liability in the Field of Nuclear Energy, in force Apr. 1968, Art. 3; Agreement Supplementary to the Paris Convention of 1960 on Third Party Liability in the Field of Nuclear Energy, in force Dec. 1974, Art. I(1)(k); Vienna Convention on Civil Liability for Nuclear Damage, in force Nov. 1977, Art. I(1)(k).

[131] Garcia-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens, Brill Academic Pub., 1974, 35; Bederman, Contributory Fault and State Responsibility, Va. J. Int'l L., 1990, 359.

[132] *LaGrand Case*, ICJ Rep., 1999, ¶57; Graefrath, Responsibility and Damage Caused: Relations Between Responsibility and Damages, Recueil des Cours, Vol. 185, 1984-II, 95.

[133] *Garcia & Garza Case*, US-Mex Gral. Cl.Comm., 4 RIAA, 1926; *Kling Case*, US-Mex Gral. Cl.Comm., 4 RIAA, 1930, 585; *Delagoa Bay Railway Case*, , 1900.

Appollonia respectfully requests that the Court **Declare** (i) that Raglan is responsible for the attack upon and wreck of *The Mairi Maru* and all consequences that arose from the wreck; (ii) that Raglan is responsible for the loss of *The Mairi Maru* and the MOX onboard as the scuttling of the vessel was illegal and is obliged to pay compensation for these losses; (iii) that Raglan lacks standing to seek compensation for losses resulting from acts that occurred outside its territory; and (iv) that Appollonia did not violate any obligations under international law in the transportation of MOX through Raglanian waters.