

THE 2005 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

CASE CONCERNING THE VESSEL *THE MAIRI MARU*

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**IN THE INTERNATIONAL COURT OF JUSTICE**

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Republic of Appollonia,

*Applicant*

*versus.*

Kingdom of Raglan,

*Respondent*

---

**MEMORIAL FOR THE RESPONDENT**

---

January 2005

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## **STATEMENT OF JURISDICTION**

The Kingdom of Raglan and the Republic of Appollonia have submitted by Special Agreement their differences to the jurisdiction of this Court pursuant to Article 36(1) of the *Statute of the International Court of Justice*. The parties have jointly prepared a Special Agreement and transmitted it to the Court pursuant to the procedure established in Article 40(1). The jurisdiction or competence of the Court has not been qualified or contested. There is no dispute as to the Court's jurisdiction to hear this matter.

## **QUESTIONS PRESENTED**

1. Was the attack on *The Mairi Maru* an act of piracy as defined in Article 101 of the *United Nations Convention on the Law of the Sea*?
2. If the attack on *The Mairi Maru* was piracy within the meaning of *UNCLOS*, did Raglan satisfy its obligation to co-operate in prevention of piracy?
3. Did Raglan meet all its obligations to Appollonia while *The Mairi Maru* was within its archipelagic waters?
4. Can illegal, unauthorized acts of Thomas Good be imputed to Raglan?
5. Was Raglan justified at international law in scuttling *The Mairi Maru*?
6. Did Appollonia violate international law when it transported MOX through Raglan's archipelagic waters without notifying or obtaining consent of Raglan?
7. Is Raglan entitled to compensation from Appollonia for Raglan's economic losses that resulted from the MOX spill?
8. Is Raglan entitled to compensation from Appollonia for the costs of decontaminating the area affected by the MOX spill?

## STATEMENT OF FACTS

The parties to this dispute are the Kingdom of Raglan (“Raglan”) and Republic of Appollonia (“Appollonia”). Raglan is an underdeveloped archipelagic state; whereas Appollonia is a technologically advanced coastal state [*Compromis*, ¶ 1]. Raglan is situated approximately halfway between Appollonia and the Democratic Republic of Maguffin (“Maguffin”), which are approximately 1440 kilometers apart [¶ 1]. Maguffin is not a party to this case [¶ 1].

The Norton Shallows are a small group of uninhabited sandbars [¶ 2]. The Norton Shallows are situated at least 250 nautical miles from Raglan’s relevant archipelagic baseline [Correction 4]. While the Norton Shallows are unclaimed by any nation [¶ 2], the only Raglanin incorporated firms engage in commercial activities in the area [Clarification 6]. These commercial activities are confined to eco-tourism and sport fishing [Clarification 6]. They began in the mid 1990s [Clarification 6] and provide the Raglanian government with over 80 million Euro in annual tax revenues [¶ 2].

The Appollonian government owns and operates a nuclear reactor [¶ 3]. This power plant produces, as a byproduct, a significant amount of plutonium [¶ 4]. Appollonia mixes this plutonium with depleted uranium to produce fresh mixed oxide fuel (MOX) [¶ 4]. MOX is highly radioactive [¶ 19]. Appollonia produces more MOX than it can use [¶ 5]. As such, it entered into an arrangement to sell its surplus MOX to a company in Maguffin [¶ 5].

In 1995, pirates attack began along the islands of the Raglanian Archipelago [¶ 6]. In 1997 alone, 40 separate instances of pirate attacks in the Raglanian Archipelago were reported [¶ 6]. On 30 September 1998, the Insurers of Lading and Shipping Association (ILSA) issued a ‘five-point’ warning, the highest level of caution, warning its members concerning shipping routes through the Raglanian Archipelago [¶ 7]. According to the ILSA, these shipping routes

presented an unreasonable risk of loss [¶ 7]. Following this warning, shipping traffic of vessels traveling through the Raglan Archipelgo plummeted [¶ 8]. However, Appollonia continued to transport MOX *via* private carriers through the Raglanian Archipelago [¶ 8].

In its final report issued 31 July 1999, the International Atomic Energy Agency (IAEA) noted concerns with Appollonia's exproation of MOX concluding that "Appollonia gives no notice to affected States such as Raglan that MOX will be transported through their territorial waters or exclusive economic zones. MOX is shipped without adequate safeguards on vessels through waters known to be frequented by pirates" [¶ 9].

In response to the IAEA's concerns, the Appollonia Energy Minister, Ms Antonieta Ybarra stated on 20 August 1999 "We notify the IAEA of shipments as required. But in order to maintain the highest level of security, we do not otherwise publicize the shipments or identify the cargo"[¶ 10]. Ms Ybarra made reference that in the previous two years Appollonia shipped MOX through the Raglanian Archipelago on more than 20 occasions without notifying Raglan [¶ 10].

On 15 October 1999, the Prime Minister of Raglan, Robert Price, announced Raglan would be establishing a "comprehensive new anti-piracy program" [¶ 11]. Under this comprehensive program, upon request by any vessel entering or leaving Raglan's archipelagic waters, the Raglanian Royal Navy would provide a naval officer to serve as pilot [¶ 11]. The officer would pilot the ship throughout its entire voyage in Ragalanian waters [¶ 11]. Furthermore, the Royal Navy would electronically monitor the progress of the ship and be in constant contact with armed navy vessels [¶ 11]. Raglan incurred the all the associated costs of the program [¶ 11].

The comprehensive program was immediately popular and immensely successful [¶ 12]. In the program's first two years, no vessel piloted by a Royal Navy officer was attacked by

pirates [¶ 12]. The ILSA reduced its alert warning to a “four point warning” and was considering a further reduction [¶ 12].

On 30 November 2001 Prime Minister Price announced that Raglan was no longer able to provide enough officers to meet every escort request [¶ 13]. He declared that the Navy would select and train private contractors to serve as pilots [¶ 13]. These contractors were used interchangeable with naval officers [¶ 13]. All pilots would continue to be assigned by the Royal Navy and would be able to request armed intervention by the Navy if and when needed [¶ 13].

On 26 July 2002, *The Mairi Maru*, a privately owned Appollonian flagged vessel, was on course directly through the center of the Raglanian Archipelgo [¶ 14] on a designated sea lane [Clarification 10]. The ship’s Captain reported that he planned his route to minimize the risk of a pirate attack [¶ 14]. In particular, he adhered to a schedule that would not require *The Mairi Maru* to travel through the Raglanian Archipelago at night [¶ 14]. The Captain did not request for a Raglanian naval pilot as he approached Raglan’s waters [¶ 14].

On board *The Mairi Maru* were several canisters of MOX [¶ 15]. The only persons or entities aware of the MOX were the Appollonian Ministry of Energy, the headquarters of the IAEA and the Captain and First Officer of the vessel [¶ 15].

Due to a severe storm, *The Mairi Maru* was delayed and neared Raglanian archipelagic waters three hours before dusk of 27 July 2004 [¶ 16]. The Captain radioed the Raglanian Royal Navy and requested a pilot because he realized that he would be forced to traverse the Raglanian Archipelago at night [¶ 16]. Two hours later, the assigned pilot named Mr. Thomas Good arrived with two other men and boarded the ship [¶ 16]. Mr. Good, like all other assigned pilots, flew a specially-designed flag beneath the Appollonian flag on *The Mairi Maru* [Clarification 9].

According to the survivors, at 2300 on 27 July 2004, Mr. Good revealed that he had brought on board a small explosive device. He threatened to use the device unless he was given control of the ship. Mr. Good then locked the ship's crew in the ship's galley [¶ Clarification 9]. Based on evidence and reports, Mr. Good then navigated the ship to a pre-determined location where he met up with some confederates [¶ 18]. Mr. Good and his colleagues removed all the technical navigation and communication equipment from *The Mairi Maru* [¶ 18]. They also disabled the ship's propeller shaft disabling the ship's steering capabilities [¶ 18]. They did not, however, disturb the MOX [¶ 18].

Mr. Good steered *The Mari Maru* off the sea lane [Clarification 10]. Shortly after, he and his colleagues disembarked [¶ 17]. On July 28, *The Mairi Maru*, as a result of an intense storm, ran aground into one of the Norton Shallow sandbars [¶ 19]. The MOX canisters leaked over fifty kilograms of highly radioactive MOX pellets directly into the sandbar and into the surrounding waters [¶ 19].

Following the crash, a patrol boat of the Raglanian Royal Navy that was conducting training near the sandbar offered assistance to *The Mairi Maru* [¶ 20]. Upon learning that the ship was leaking MOX, a commander of the Raglanian Royal Navy immediately radioed Raglanian Royal Navy headquarters [¶ 20]. The Navy reported that several members of the crew of *The Mairi Maru* were dead and others were showing acute signs of radiation syndrome [¶ 20]. The Raglanian Royal Navy eventually confirmed the presence of radioactive materials and hundreds of dead fish and sea birds in the area surrounding the sandbar up to 15 kilometers from the site of the wreck of the *The Mairi Maru* [¶ 21].

On 31 July 2002, Prime Minister Price announced to the President Stark (Appollonia's President) that shifting winds and ocean currents might spread the contamination to inhabited

Raglanian islands within several weeks [¶ 21]. He also informed President Stark that a region vital to Raglan's thriving tourism industry was heavily damaged [¶ 21]. He concluded that Appollonia caused the damage by shipping MOX through Raglan's archipelagic waters without notice to Raglanian authorities [¶ 21]. According to Prime Minister Price, had Raglan known of the shipment in advance, Raglan would have either denied *The Mairi Maru* access to Raglanian waters or provided the ship with an armed navel escort to ensure safe passage through the Raglanian Archipelago [¶ 21]. He asserted that Appollonia must compensate Raglan for its economic losses and the cost of the clean up [¶ 21]. In response, President Stark blamed Raglan [¶ 22].

On 4 August 2002, Prime Minister Price informed President Stack that *The Mairi Maru* with every passing day was leaking noxious material in open waters and that clean up was impossible in a short time-span [¶ 22]. As such, he concluded that Raglan's only choice was to scuttle the vessel [¶ 22]. Later that week, the Raglanian Royal Navy scuttled *The Mairi Maru* less than a kilometer of the crash site [¶ 24]. The ship sank to a depth of over 9000. [¶ 24].

As of 1 June 2004, the contamination was concentrated in a radius of approximately 30 kilometers from the sandbar where *The Mairi Maru* had run aground, but there were traces of radiation detected 25 kilometers from Raglan's exclusive economic zone [Clarification 12]. The Raglan began decontamination efforts immediately prior to the removal and scuttling of *The Mairi Maru*, and efforts continue to this day [Clarification 12].

Appollonia does not dispute that it will cost Raglan 160 million to decontaminate the area affect by the MOX spill [¶ 34]. Moreover, Appollonia does not dispute that it will take five years to decontaminate the area and that the Raglanian tourism industry will lose approximately 100 million Euro.

## SUMMARY OF PLEADING

1. The attack on *The Mairi Maru* was not piracy within the definition of *UNCLOS*. The attack occurred within archipelagic waters and hence the requirements in *UNCLOS* are not met.
2. If the attack on *The Mairi Maru* is piracy, Raglan met its duty to co-operate in prevention of piracy. Evidence of that is Raglan's diligent anti-piracy program.
3. In customary law, Raglan's only duty was to warn of dangers in navigation. Raglan satisfied this duty. Raglan did not owe any obligations to Appolonia under *Convention on the Suppression of Unlawful Acts Against Maritime Navigation*, as the convention does not reflect customary law. The statement made by the Raglanian Prime Minister, on October 15<sup>th</sup>, 1999 is not an oral binding declaration as the necessary intent on behalf of Raglan to be bound is absent.
4. The acts of Thomas Good were acts of a private person. To accomplish the attack on *The Mairi Maru* Good used means obtained in his private capacity. In acting under the apparent authority of a Raglanian official, he did not use the means put at his disposal to complete the attack and hence, his actions cannot be imputed to Raglan.
5. Appollonia was justified in scuttling *The Mairi Maru* pursuant to Articles 23 and 25 of the *Draft Articles on State Responsibility*. MOX spillage was cause by *force majeure* situation and or by the state of necessity. Raglan was protecting interests of its environment and lives of its citizens and therefore was justified in scuttling *The Mairi Maru*. In so doing, Raglan abided by the *London Dumping Convention* and hence did not impair the interests of the international community.

6. Appollonia breached its international law obligations to notify and obtain the consent of Raglan prior to transporting MOX through Raglanian waters. By not notifying Raglan Appollonia breached: Principle 19 of the Rio Declaration; the precautionary principle; its duty to co-operate with Raglan; the custom based rule of due diligence; and, its treaty obligations. Security concerns do not exempt Appollonia from its obligations. Similarly, the archipelagic sea lane regime cannot be used to justify Appollonia's illegal shipment.
7. Raglan has standing to claim damages against Appollonia. Appollonia's illegal shipment economically injured Raglan. It is irrelevant that Raglan seeks damages for losses to industry that operated beyond Raglan's exclusive economic zone because, *inter alia*, Raglan has an economic interest peculiar to the region affected by the MOX.
8. Raglan is entitled to full reparation from Appollonia because liability for damages caused by the shipment of ultra-hazardous materials is absolute. Raglan must be compensated for the economic losses it sustained to its industry and the costs of decontaminating the area affected by the MOX. These heads of damages are legitimate and recognized under international law.

## PLEADINGS

### **I. RAGLAN IS NOT RESPONSIBLE TO APPOLLONIA FOR THE ATTACK ON AND THE WRECK OF *THE MAIRI MARU*.**

#### **A. Raglan is not responsible for the attack on *The Mairi Maru*.**

- (i) The attack on *The Mairi Maru* was not piracy under Article 101 of the *United Nations Convention on the Law of the Sea*.<sup>1</sup>**

In Article 101 of the *United Nations Convention on Law of the Sea*, piracy is defined as an act of violence, detention or depredation committed by the crew or passengers of a private ship against another ship *on the high seas* or outside jurisdiction of any State. Illegal acts of detention and depredation occurred within Raglan’s territorial waters. An illegal act of detention occurred when Thomas Good revealed an explosive device on board of *The Mairi Maru*; an illegal act of depredation was committed when Thomas Good and his confederates removed navigational equipment from the ship. The boarding of the ship was lawful in both international and Raglan’s national law and therefore it can not be categorized as an act *illegal* detention or depredation. While a mere attempt may amount to an act of piracy, it is only when the attempt is made that piracy occurs not when it is being planned.<sup>2</sup>

To satisfy the requirements of piracy in Article 101 the illegal act of detention and depredation must be committed by crew or passengers of one ship against another ship. The commentary of the International Law Commission (ILC) on the *Convention on the High Seas*<sup>3</sup>

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<sup>1</sup> *United Nations Convention on the Law of the Sea* (1982), 21 ILM 1261 [hereinafter “UNCLOS”]

<sup>2</sup> Jennings, R. & A. Watts, eds., *Oppenheims International Law*, Vol. 1 Parts 2 & 4, (Harlow: Longman Group UK Limited, 1992) at 753.

<sup>3</sup> *Convention on the High Seas* (1958), 13 U.S.T. 2312 (1962), 450 U.N.T.S. 82 [hereinafter “Geneva Convention”].

corresponding article states that “acts committed on board a ship by the crew of passengers and directed against the ship itself, or against persons or property on the ship, can’t be regarded as acts of piracy”, the ILC went on to say that, “even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy”<sup>4</sup>. Churchill and Lowe state that the requirement of two ships –pirate and victim- being involved distinguishes piracy from maritime hijacking<sup>5</sup>. Several incidents where passengers attempted to gain control of ships were not, this characterized as “piracy”<sup>6</sup>. The illegal acts detention and depredation occurred when Thomas Good was on board of *The Mairi Maru* and hence the two ship requirement is not met.

**(ii) Raglan did not breach its general duty to co-operate in repression of piracy.**

Raglan submits that the failure of the general duty to co-operate in repression of piracy can only evidenced once an act of piracy occurred and the obliged state failed to participate in its repression by not co-operating with other states. It follows, absent of such evidence, a breach of the general duty to co-operate cannot be established unless the concerned state blatantly failed to recognize and respond to all circumstances demanding the need for a piracy repression program. Since an act of piracy did not occur and Raglan did possess an anti-piracy program it is not in breach of its general to co-operate in repression of piracy.

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<sup>4</sup> “Report of the International Law Commission to the General Assembly” in *Yearbook of the International Law Commission 1956*, Vol. II, at 282, note (1)(vi) [hereinafter “Report of ILC”].

<sup>5</sup> Churchill, R.R. & A.V. Lowe, *The Law of the Sea*, 3d ed., (1999), (Manchester: Manchester University Press, 1999) at 210.

<sup>6</sup> Menefee, S.P., “THE NEW “JAMAICA DISCIPLINE”: PROBLEMS WITH PIRACY AND THE 1982 CONVENTION ON THE LAW OF THE SEA”, 6 *Conn. J. Int’l L.* 127 (1990-1991) at 144.

**(iii) If the attack on *The Mairi Maru* was piracy, Raglan met its duty to co-operate in the repression of piracy.**

Pursuant to Article 100 of the *United Nations Convention Law on the Law of the Sea*, Raglan is under an obligation to co-operate in the repression of piracy.<sup>7</sup> Piracy is a crime against all states. It is a crime that occurs outside the jurisdiction of any state and hence customary international law dictates that all state co-operate with each other to suppress it; however, no one state can be assigned the task of eliminating piracy.<sup>8</sup> The ILC, in commenting on the duty to co-operate in the repression of piracy, stated “the state must be allowed a certain latitude as to the measures it should take to this end in any individual case.”<sup>9</sup> Raglan implemented an anti-piracy program which included providing states traversing its archipelagic waters with a pilot and providing naval support in case of an attack. During the first two years of the program, no vessel assisted by a pilot was attacked by pirates and consequently, the danger level was reduced from a 5 point to a 4 point warning, and further reduction was to be considered.<sup>10</sup> Therefore, Raglan did not breach its obligation to co-operate in the repression of piracy and is not responsible for the attack on *The Mairi Maru*.

**B. Raglan met all its existing duties to prevent and mitigate the effect of maritime offences inside or outside its territorial waters.**

At customary international law, the duties of coastal states to prevent maritime offences are limited to warning other states of dangers to navigation of which it has knowledge, and not to

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<sup>7</sup> *UNCLOS, supra* at Art. 100.

<sup>8</sup> Brown, E.D., *The International Law of the Sea Introductory Manual*, Vol.1 (Brookfield: Dartmouth Publishing Company, 1994) at 299.

<sup>9</sup> Report of the ILC, *supra* note 3 at note (3).

<sup>10</sup> *Compromis* at para. 12.

interfere with innocent passage of ships in transit.<sup>11</sup> Raglan satisfied this duty. The danger of pirates was an established fact since 1995.<sup>12</sup> Appollonia had full knowledge of this danger prior to entering into a 5 year agreement to sell MOX to Maguffin and its likely shipment through Raglanian archipelagic waters.<sup>13</sup>

To hold Raglan responsible for breaching any further international obligation, Appollonia must prove existence of some other customary rule that binds Raglan. In the *Case of the SS Lotus* the court also made clear that unless there is a specific rule prohibiting a specific action or imposing a specific obligation, a state is neither precluded from exercising the action nor is it bound to perform that obligation.<sup>14</sup>

**(i) Raglan is not bound by the *Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*.**<sup>15</sup>

The *SUA Convention* is not part of customary international law. To attain status of custom in international law there must be “constant and uniform usage”<sup>16</sup> of that law or principle. In *Lotus Case*, the court declared that there must be “existence of state practice and of its acceptance as an expression of law”<sup>17</sup>. This principle can also be found in the *North Sea Continental Shelf Case*.<sup>18</sup>

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<sup>11</sup> *Geneva Convention*, *supra* note 2 at Art. 15(2); *UNCLOS*, *supra* note 7 at Art. 24(2); Churchill, R.R., *supra*, note 5 at 100; Brown, E.D., *supra*, note 8 at p. 60.

<sup>12</sup> *Compromis*, at para. 6

<sup>13</sup> *Ibid*, at para.5.

<sup>14</sup> *Case of the SS Lotus*, (1927), P.C.I.J. (Ser. A) No. 10 at 26-29 [hereinafter “*Lotus Case*”].

<sup>15</sup> *Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, (1988), 27 ILM 672 [hereinafter “*SUA Convention*”].

<sup>16</sup> *Columbian – Peruvian Asylum Case* [1995] I.C.J. Rep. at 276-77.

<sup>17</sup> *Lotus Case*, *supra* note 14 at 19.

The principles in *SUA Convention* are not accepted by states and hence are not part of customary international law. This is evidenced by the failure of the international community to amend the definition of piracy to include a broader range of offences. Part of the reason for the opposition to such amendment was the reluctance of states to undertake the obligations to take action in prevention of maritime offences.<sup>19</sup>

**(ii) If the *SUA Convention* represents customary international law, Raglan met the obligations asserted therein**

Raglan co-operated in prevention of offences<sup>20</sup> as defined in Article 3 of *SUA Convention*. Raglan's duty to co-operate in prevention of hostile acts, does not oblige Raglan to absolutely prevent such acts, rather Raglan should exercise due diligence.<sup>21</sup> Raglan met that duty. Raglan possessed an anti-piracy program which was immensely successful during its use. On the day of the accident, Appollonia's request for assistance was made just prior to *The Mairi Maru* entering Raglan's archipelagic waters and was met by Raglan within two hours. Raglan relied on the assigned pilot to assist the *The Mairi Maru* and contact the Raglanian Royal Navy in case of emergency. The ensuing accident was a result of an isolated and entirely private act of Thomas Good not anticipated by and not known to Raglan. It was not a result of Raglan's failure to co-operate in prevention of offences as required by the *SUA Convention*.

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<sup>18</sup> *North Sea Continental Shelf Case*, (1969) I.C.J. Rep.

<sup>19</sup> Brown, E.D. *supra*, note 8 at 305.

<sup>20</sup> *SUA Convention*, *supra* note 15 at Art. 13.

<sup>21</sup> Pisillo-Mazzeschi, R., "The Due Diligence Rule and the Nature of the International Responsibility of States" (1992), *German Yearbook of International Law*, 35, pp. 9-51 at FN3.

**C. Raglan did not breach an international obligation by not complying with the statement made on October 15th, 1999.**

**(i) Raglan did not intend that the statement made be binding upon them.**

In order for a unilateral declaration to be binding upon the party making it, the party must have intended for the declaration to be binding.<sup>22</sup> Unilateral declarations attracting international responsibility should be distinguished from “unilateral declarations[s] of policy...declarations of this kind are not normally intended to give rise to obligations which can be relied upon by other States.”<sup>23</sup> Raglan did not intend for the declaration to be binding. The ambiguous language of the declaration demonstrates lack of intention on the part of the Raglanian government for the declaration to be binding.

**D. Acts of Thomas good cannot be imputed to Raglan.**

**(i) Thomas Good was neither a state organ nor an entity exercising elements of governmental authority.**

Pursuant to Article 4 of the *Draft Articles on the Responsibility for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, a person or entity is an organ of the state if the state’s internal law so stipulates.<sup>24</sup> So long as the internal law provides that the entity is an organ, the function, level in the hierarchy or purpose, whether legislative executive or provincial is irrelevant. However, absent such stipulation by the internal law, a person or entity is not an

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<sup>22</sup> Rubin, A., “The International Legal Effects of Unilateral Declarations” (1977), 71 Am. J. Int. L. 1.

<sup>23</sup> “Canadian Treaty Practice” (1980), 18 Can. Y.B. Int. L, at 313.

<sup>24</sup> *Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, U.N. GAOR Int'l L. Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) Art. 4 [hereinafter *ILC Draft Articles*].

organ within the meaning of Article 4 of the *ILC Draft Articles*. Raglanian internal law did not classify Thomas Good as an organ; rather Thomas Good was referred to as a private contractor.<sup>25</sup> An act of a private person is considered an act of the State under international law when bodies which are not state organs under Article 4 exercise governmental authority.<sup>26</sup> In the commentaries on the *ILC Draft Articles*, Crawford stated that Article 5 may include, “private companies, provided that in each case the entity is empowered...to exercise functions of a public character, normally exercised by state organs, and the conduct of the entity relates to the exercise of governmental authority concerned”<sup>27</sup> Thomas Good was a private contractor acting as a pilot assisting vessels traversing archipelagic waters. This is not an activity of public character normally exercised by State organs.

**(ii) If Thomas Good was an entity, he was acting so outside his authority that his acts were acts of a private person not imputable to Raglan.**

To engage state responsibility for unauthorized acts of state officials, two criteria must be satisfied: firstly, the official must have been acting with apparent authority; and, secondly, the official must have used the means available to him by virtue of that authority.<sup>28</sup> This principle of customary international law was formulated in *Caire* where the commission said that for an *ultra vires* act to be imputable to the state the government entities must have acted both under the

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<sup>25</sup> *Compromis*, para. 13 and 16.

<sup>26</sup> *ILC Draft Articles*, *supra* note 24 at Art. 5.

<sup>27</sup> Crawford, James, *The International Law Commission's Articles on State Responsibility*, (Cambridge: Cambridge University Press, 2002) at 100.

<sup>28</sup> Stritsower, P., “Institute Lausanne Conference of 1927” (1928) 22 A. J. I. L. 330.

cover of their authority and used the means placed at their disposal on account of that authority.<sup>29</sup> This rule for imputing unauthorized acts of governmental organs and entities is supported by learned legal publicists<sup>30</sup> and decisions of international tribunals.<sup>31</sup>

While Thomas Good acted under color of his authority, he did not depend on the means placed at his disposal, as a result of his function, to accomplish the attack on *The Mairi Maru*. The success of the attack depended on Thomas Good's possession of a detonating device. The device was an integral part of the attack itself. Thomas Good obtained the device in his private capacity. It was not provided to him by virtue of his official function as a private contractor working for Raglan and hence Raglan's responsibility is not engaged in this case.

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<sup>29</sup> *Caire (Fr. v. Mex.)* (1929), V R.I.A.A. 516 [hereinafter "*Caire Case*"].

<sup>30</sup> Dunn, *The Protection of Nationals, a Study in the Application of International Law* (Baltimore: The Johns Hopkins Press, 1932) at 133-136; Meron T., "International Responsibility of States for unauthorized acts of their officials" (1957) 33 Brit. Y.B. Int. L. 85 at 107.

<sup>31</sup> *Youmans (U.S. v. Mex.)* (1926), IV R.I.A.A. 110 [hereinafter *Youmans Case*]; *Mallen (Mex. v. U.S.)* (1927), IV R.I.A.A. 173 [hereinafter *Mallen Case*]; *Way (U.S. v. Mex.)* (1928), IV R.I.A.A. 391.

## II. RAGLAN DID NOT VIOLATE ANY OBLIGATION OWED TO APPOLLONIA UNDER INTERNATIONAL LAW BY SCUTTLING *THE MAIRI MARU*.

A. A situation of *force majeure* outlined in Article 23, justifies the scuttling of *The Mairi Maru*.

(i) It was materially impossible to protect Raglan's environment without scuttling *The Mairi Maru*.

A state's conduct is precluded from being wrongful where, "the occurrence of an *irresistible force of an unforeseen event*, beyond the control of the State, made it *materially impossible* in the circumstances to perform the international obligation".<sup>32</sup> The unforeseen event may be due to a combination of physical event and human intervention. The unforeseen event which caused the MOX spillage was Appollonia's transportation of MOX through Raglannian waters without prior notification and the storm which altered the course of *The Mairi Maru* and caused it to run aground in the Norton Shallows<sup>33</sup>. Material impossibility exists where the concerned state concerned had no real possibility of escaping the effects of the irresistible situation.<sup>34</sup> Raglan's concern was to achieve the protection of its environment and save lives of its people on the inhabited islands towards which the contamination was moving<sup>35</sup>. The scuttling of *The Mairi Maru* was the only means available to Raglan to safeguard these essential. The rainy season was approaching which would spread the radioactive material more rapidly. Raglan maintains that, efforts to decontaminate the area would have been futile. Decontamination efforts continue to

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<sup>32</sup> Crawford, J., *supra* note 27, *Draft Articles on State Responsibility*, *supra* 24 at Art. 23.

<sup>33</sup> *Compromis*, para. 19

<sup>34</sup> *Ibid.*, at p. 171.

<sup>35</sup> *Compromis*, para. 21.

this day, yet the spread of the radioactive substance has reached a 30 kilometer radius even after *The Mairi Maru* has been safely scuttled.<sup>36</sup>

**(ii) The situation of *force majeure* was not *due* to Raglan's conduct.**

Raglan can still rely on Article 23 even if it is held responsible for the attack on *The Mairi Maru* is still not wrongful. Article 23 can be invoked in situations when “a State may have unwittingly contributed to the occurrence of material impossibility by something which in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen”<sup>37</sup> Raglan's actions were in good faith and the ensuing MOX spillage could not have been foreseen by Raglan. Raglan was not aware of the dangerous radioactive material on board of *The Mairi Maru* and hence could not foresee the danger posed by the spillage which made it necessary to scuttle *The Mairi Maru*.

**B. The scuttling of *The Mairi Maru* was justified under the defence of necessity.**

**(i) The scuttling of *The Mairu Maru* was the only way to protect Raglan's essential interest against grave and imminent threat.**

To invoke the defence of necessity Raglan has to demonstrate that scuttling was the *only way* for Raglan to safeguard its *essential interest* against *a grave and imminent threat* while not impairing an *essential interest* of Appollonia and the international community as a whole.<sup>38</sup>

The essential nature of the interest is judged according to particular interests of the state and its people, as well as the international community as a whole.<sup>39</sup> Raglan had two essential

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<sup>36</sup> *Clarifications*, para. 12

<sup>37</sup> Crawford, J., *supra* note 27 at 173.

<sup>38</sup> *ILC Draft Articles*, *supra* note 24, Art. 25.

interests to safeguard: protection of the environment and safety of the lives of its citizens. In international law, protection of the environment is imperative to the well being of the international community.<sup>40</sup> The threat to Raglan's environment, as well as the environment of the high seas, was grave and imminent. Raglan maintains that cleanup was not possible in such a short time span.<sup>41</sup> Lives of Raglanian citizens were also in grave and imminent danger. The shifting winds and currents would spread the contamination to inhabited islands. The scuttling of *The Mairi Maru* was the only means available to Raglan to protect its environment and the lives of its people. In order to invoke the defence of necessity, there need not be absolute certainty about the imminence of danger and unavailability of alternative means. Some uncertainty is acceptable.<sup>42</sup> Raglanian authorities were acting on the information that was "reasonably available at the time."<sup>43</sup> The failure of Appollonia to suggest any other solution or offer help to Raglan during ongoing correspondence is suggestive of the fact that scuttling was in fact the only reasonable way to deal with the situation.

**(ii) Raglan's interest to protect the environment and the lives of its nationals outweighed Appollonia's right to freedom on the high seas.**

The essential interest of the state relying on the defence of necessity must outweigh the essential interest of another concerned state. ILC commentator Robert Ago stated that the interest of the

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<sup>39</sup> Crawford, J., *supra* note 27 at 183.

<sup>40</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 at 241-42 para. 29; Rosenne, S. (ed.), *The International Law Commission's Draft Articles on State Responsibility Articles 1-35*, (London: Martinus Nijhoff Publishers & Kulwer Academic Publishers, 1991) 356.

<sup>41</sup> *Comrpomis*, para. 24

<sup>42</sup> Crawford, J., *supra* note 27 at 184.

<sup>43</sup> *Ibid.*

state towards whom the obligation was breached "must obviously be inferior to" the threatened essential interest of the state claiming necessity and "cannot be one which is comparable and equally essential to the foreign State concerned."<sup>44</sup>

Customary law recognized that intervention with foreign-flagged vessels on the high seas may be necessary in certain circumstances to ensure protection of more essential interests which. Treaties and writings of legal publicists support this proposition.<sup>45</sup> Evidence of this rule is *The "Torrey Canyon"* disaster on the high seas, where Great Britain bombed a Liberian tanker to protect the environment. No legal action was brought and Britain did not advance any justification for its actions. The ILC, in commenting on the incident said that "the action taken by the British Government would have had to be recognized as internationally lawful because of state of necessity."<sup>46</sup> The *Intervention Convention*,<sup>47</sup> which allows for intervention with maritime casualties in prevention of marine pollution, is further evidence of international law principle that environmental protection is a right of greater importance than a right against intervention. This Customary principle is also found in Article 221 of *UNCLOS* and is further evidence that it is part of customary law.<sup>48</sup> Raglan's environment was in imminent danger and it outweighed

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<sup>44</sup> Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago, [1980] 2 Y.B. Int'l L. Comm'n 51 at 53, U.N. Doc. A/CN.4/318/ADD.5-7 [hereinafter Addendum to Eighth Report]; Laursen, A., "The Use of Force and the state of Necessity" 37 Vand. J. Transnat'l L. 485 at 506.

<sup>45</sup> *The Stockholm Declaration on the Human Environment* 11 ILM (1972) *The Helsinki Conventions on the Protection of the Marine Environment of the Baltic Sea Area*, 13 ILM (1974) 546; Jennings, R., & A. Watts, *supra*, note 1 at p. 439-440.

<sup>46</sup> Rosenne, S., *supra*, note 40 at p. 356.

<sup>47</sup> *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution*, 9 ILM 20 (1970) and the 1973 protocol [hereinafter "*Intervention Convention*"]

<sup>48</sup> *UNCLOS*, *supra*, note 7, at Art. 221.

Appollonia's right to freedom on the high seas. Hence, scuttling of *The Mairi Maru* is justified in international law.

- (iii) In scuttling *The Mairi Maru*, Raglan did not breach the *London Convention* and did not breach any obligation owed to the international community.**

Article V(I) of the *London Convention* allows for dumping at sea where it is necessary to secure the safety of human life in cases of *force majeure* caused by stress of weather, *or* in any case which constitutes a danger to human life. Dumping must appear to be the only way of averting the threat and the consequence of it must be less than would have been had the dumping not been conducted. The Intervention Maritime Organization must be immediately notified and the means of dumping should not harm human or marine life.<sup>49</sup> Raglan met all the requirements of justifiable dumping contained in Article V of the *LDC*. The contamination was spreading and moving towards Raglan's inhabited islands; the life of Raglanian citizens was in danger. Scuttling of *The Mairi Maru*, was necessary to avert such threat. Furthermore, prior to sinking of *The Mairi Maru* the Raglanian Royal Navy secured and encased the MOX canisters in conformity with international standard, to prevent any further leakage. As required by Article V, Raglan notified the IMO immediately after the scuttling. Raglan did not breach the *LDC* and is able to rely on defence of necessity to preclude responsibility to Appollonia for scuttling of *The Mairi Maru*.

- (iv) Raglan can rely on the defence of necessity even if Raglan is responsible on any of the grounds argued above.**

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<sup>49</sup> *London Convention on the Prevention of Marine Pollution By Dumping Of Wastes and Other Matter*, 11 ILM 1294 (1972) [hereinafter *LDC*"]

For a plea of necessity to be precluded under part 25(2)(b) of *ILC Draft Articles* the state's contribution to the situation of necessity must be "sufficiently substantial and not merely incidental".<sup>50</sup> If Raglan is found responsible for failure to prevent and mitigate the effect of maritime offences, its contribution is merely incidental. Appollonia's transportation of MOX, illegal unauthorized acts of Thomas Good, and weather conditions were the major contributing causes.

Furthermore, the case of *Gabcikovo – Nagymaros Project* seems to imply that in order to be precluded from using the defence of necessity the state must have had prior knowledge of the potential state of necessity occurring. In this case, Hungary failed to perform its treaty obligation and relied on defence of necessity to justify its failure. The ICJ, referring to the perceived perils in issue, stated that "...a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty".<sup>51</sup> The court precluded Hungary from relying on the defence of necessity on the basis that it contributed to the situation by constantly and intentionally changing the pace with which the project was completed while having ecological concerns.<sup>52</sup> Raglan had no knowledge of the fact that Appollonia was transporting MOX through its waters. Raglan's anti-piracy program has been immensely successful and Raglan never had any problems with its pilots. Thus, if Raglan is found responsible for the attack on *The Mairi Maru*, it should not be precluded from relying on the defence of necessity.

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<sup>50</sup> Crawford, *supra*, note 27, at p. 185

<sup>51</sup> *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), [1997] I.C.J. 1, 21 (Sept. 25) at para. 57

<sup>52</sup> *Ibid.*

### III. APPOLLONIA'S TRANSPORT OF MOX WITHOUT PRIOR NOTIFICATION TO OR THE CONSENT OF RAGLAN VIOLATES INTERNATIONAL LAW.

#### A. Appollonia breached its international customary law obligations to notify and obtain the consent of Raglan prior to transporting MOX through Raglanian waters.

##### (i) Appollonia breached Principle 19 of the Rio Declaration.

By transporting fresh mixed oxide fuel (MOX) through Raglan's archipelagic waters without notifying or obtaining the consent of Raglan, Appollonia breached its duty under Principle 19 of the Rio Declaration to provide "*prior and timely notification* of relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall *consult* with those States at an early stage and in good faith."<sup>53</sup> This principle, which was adopted by more than 178 Governments at UNCED, "reflects what many states have recognized as required practice in terms that reflect an obligation of customary international law."<sup>54</sup> This prior notification principle is referenced in numerous international instruments<sup>55</sup>, including the *Convention on the Physical Protection of Nuclear Materials*, a convention ratified by Appollonia.<sup>56</sup> MOX is a dangerous radioactive substance that poses a significant adverse environmental effect. As such, Raglan had the right to expect it would be informed that MOX would be transported through its archipelagic waters.

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<sup>53</sup> *Rio Declaration on Environment and Development*, 31 ILM 874 (1992) Principle 19 [hereinafter "Rio Declaration"].

<sup>54</sup> Sands, P., *Principles of International Environmental Law*, vol. 1 (Manchester: Manchester University Press, 1995) at 606.

<sup>55</sup> *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* excerpt from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), chp. V.E.1. Articles 8 and 9; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 11 I.L.M. 1294 (1972) Art. 4, 6 and 9 [hereinafter "Basel Convention"].

<sup>56</sup> *Convention on the Physical Protection of Nuclear Material*, T.I.A.S. 11080 Art. 4(5).

**(ii) Appollonia breached the precautionary principle.**

The precautionary principle is “the most developed form of the general Rule imposing an obligation to prevent harm to the environment”.<sup>57</sup> The precautionary principle is referenced in numerous international agreements<sup>58</sup> and international decisions.<sup>59</sup> As such, it has been characterized as a basic tenet in international environmental law.<sup>60</sup>

The precautionary principle is based on the principle of *sic utere tuo, ut alienum non laedas*: a nation may do as it wishes with its own resources, but if it may adversely affect another in doing so, that nation should notify the other.<sup>61</sup> The principle applies when (1) a situation exists that may threaten the environment or human health in a grave or irreversible way, and (2) there is a serious risk that the threat will materialize.<sup>62</sup>

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<sup>57</sup> Seamone, E. R., “THE DUTY TO “EXPECT THE UNEXPECTED”: MITIGATING EXTREME NATURAL THREATS TO THE GLOBAL COMMONS SUCH AS ASTEROID AND COMET IMPACTS WITH THE EARTH” (2003) 41 Colum. J. Transnat’l L. 735 at FN143.

<sup>58</sup> *World Charter for Nature* 22 I.L.M. 455 at II(11)(b); *Framework Convention on Climate Change*, (1992), 31 I.L.M. 848 [hereinafter “*Framework Convention on Climate Change*”]; Rio Declaration, *supra* note 53 at Principle 15.

<sup>59</sup> Dobos, D., “THE NECESSITY OF PRECAUTION: THE FUTURE OF ECOLOGICAL NECESSITY AND THE PRECAUTIONARY PRINCIPLE” 13 Fordham Envtl. L.J. 375 citing *Gabcikovo-Nagymaros Project* (Hung. v. Slovk.), [1997] I.C.J. 1, 21 (Sept. 25) (separate opinion of Judge Weeramantry) [hereinafter *Gabcikovo-Nagymaros Project*] at 388 and *Southern Bluefin Tuna* (N.Z. v. Japan) (Austl. v Japan), 381 I.L.M. 1624 at 393

<sup>60</sup> Cameron, J., & J. Abouchar, “The Status of the Precautionary Principle in International Law”, in *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 29 David Freestone & Ellen Hey, eds., 1996).

<sup>61</sup> Marín, L., “Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas’ Right to Innocent Passage and Duty to the Marine Environment” (2001) 13 Fla. Int’l L. 361 at 374.

<sup>62</sup> Boutillon, S., “The Precautionary Principle Development of an International Standard” (2002) 23 Mich. J. Int’l L. 429 at 431.

The recent tragedy off of Norway's waters involving the Russian nuclear submarine, *Kursk*, demonstrated that accidents concerning radioactive materials do occur.<sup>63</sup> As such, in the context of the transport of radioactive materials, the precautionary principle mandates that the transporting ship notify coastal states through whose exclusive economic zones (EEZ) the ship plans to pass.<sup>64</sup> If Appollonia adhered to the precautionary principle by notifying Raglan of the incoming MOX shipment then Raglan could have prepared for and possibly prevented the MOX spill.

**(iii) Appollonia breached its duty to cooperate with Raglan.**

Appollonia had a customary duty to co-operate with Raglan to control transboundary pollution and environmental risks.<sup>65</sup> In the context of the transboundary transportation of hazardous substances, the duty to cooperate translates into specific commitments including the exchange of information, consultation, and notification.<sup>66</sup> In the *MOX Plant*, the United Kingdom was held in breach of its duty to cooperate with Ireland.<sup>67</sup> The United Kingdom should have notified Ireland and other en-route states of its planned maritime transports of radioactive materials and should have disclosed to those states basic information including the route and itinerary of the planned

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<sup>63</sup> Marín, L., *supra* note 61 at 369.

<sup>64</sup> van Dyke, J., "Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials", (1996) 24 *Ocean Dev. & Int'l L.* 399 at 376.

<sup>65</sup> Kummer, K., *International management of hazardous wastes: the Basel Convention and related legal rules* (Oxford: Clarendon Press, 1995) at 23.

<sup>66</sup> Sands, P., *supra* note 54 at 197 (emphasis added).

<sup>67</sup> *MOX Plant* (Ir. v. U.K.), 41 *I.L.M.* 405 (Int'l Trib. for the Law of the Sea 2001).

shipments.<sup>68</sup> Similarly, Appollonia should have notified Raglan of its planned maritime transport of MOX on 26 July 2002 through Raglan's archipelagic waters and consulted with Raglan to maximize the opportunity for safe passage.

**(iv) Appollonia breached its customary standard of care.**

Appollonia's failure to notify Raglan of the incoming MOX shipment was a breach of its standard of care. Reasonable care should be measured by the minimum standard of conduct accepted by States in the operation of a certain activity under normal circumstances.<sup>69</sup> Due to the ultra hazardous nature of transporting MOX at sea, the applicable standard of care for Appollonia is absolute liability [see Part IV.B, below, for more on this topic].

However, Appollonia's failure to notify also breaches a more lenient standard of care based on due diligence. Some scholars believe that due diligence is the only standard of care for states supported by customary law.<sup>70</sup> In the context of transboundary harmful activities, the OECD's Environmental Committee has observed that the "custom based rule of due diligence" includes adherence to the principles of consultation and notification.<sup>71</sup>

**(v) Appollonia's duty to notify and obtain consent is endorsed by the IAEA.**

The International Atomic Energy Agency (IAEA) has expressed concerns about Appollonia's practice of not notifying Raglan that MOX is being transported through Raglanian waters. The

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<sup>68</sup> Tanaka, M., "Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea" (2004) 25 Mich. J. Int'l L. 337 at 412.

<sup>69</sup> Hanquin, X., *Transboundary damage in international law* (New York: Cambridge University Press, 2003) at 165 citing *Lake Lanoux Arbitration* (Fr. v. Sp.) 24 ILR (1957) 101.

<sup>70</sup> Kummer, K., *supra* note 65 at 215.

<sup>71</sup> Organisation for Economic Co-operation and Development, "Responsibility and Liability of States in Relation to Transfrontier Pollution" (1984) 13 *Env'tl. Pol'y & L.* 122 (1984) at 4.

*IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste*<sup>72</sup> arose in part out of public reaction to unauthorized transboundary movement of radioactive waste to developing countries.<sup>73</sup> The *IAEA Code of Practice* provides as a basic principle that *every state*, including Appollonia, is to ensure that the transboundary movement of radioactive waste takes place only with the prior notification and consent of transit states, such as Raglan.<sup>74</sup> Moreover, it affirms the sovereign right of every state to prohibit the movement of radioactive waste through its territory.<sup>75</sup> As such, Appollonia has breached its obligations under the IAEA regime.

The *IAEA Code of Practice* applies to radioactive materials for which no use is foreseen.<sup>76</sup> Appollonia only exported its surplus supply of MOX.<sup>77</sup> This surplus supply of MOX falls within the scope of the *IAEA Code of Practice* because it was a substance for which no use was foreseen by Appollonia. Although this surplus supply had economic value, it was nevertheless Appollonia's waste. This Court has acknowledged that radioactive waste does not exclude substances/objects, which are capable of economic reutilization.<sup>78</sup>

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<sup>72</sup> *IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste*, IAEA doc. GC(XXXXIV)/920, 21 September 1990 Principle 3(5) [hereinafter "*IAEA Code of Practice*"].

<sup>73</sup> Sands, P., and P. Galizzi, *Documents in International Environmental Law, Second Edition*, (Cambridge: Cambridge University Press 2004) at 968.

<sup>74</sup> *IAEA Code of Practice*, *supra* note 72 Principle 3(5).

<sup>75</sup> *IAEA Code of Practice*, *supra* note 72 at Principle 3(1).

<sup>76</sup> *IAEA Code of Practice*, *supra* note 72 at II.

<sup>77</sup> *Compromis*, at para. 5.

<sup>78</sup> *Tombesi and Others* C304/94, C330/94, C342/94, C224/95. CJCE, Judgement, 25 June 1997.

Although Raglan is not a party to the *Statute of the IAEA*,<sup>79</sup> the *IAEA Code of Practice* was endorsed in *Agenda 21*, a plan of action adopted by over 178 countries.<sup>80</sup>

**B. Appollonia breached its treaty obligations.**

The *Convention on the Physical Protection of Nuclear Material*<sup>81</sup> has been ratified by Appollonia.<sup>82</sup> According to an informational document circulated by the IAEA, parties to this Convention, when shipping nuclear materials “should identify the other States involved in such transit with a view to informing them and securing in advance their co-operation and assistance for adequate physical protection measures ...”<sup>83</sup>. This informational document has been favorably received by Member States and has since become a standard reference document.

**C. Security concerns do not exempt Appollonia from its legal duties to notify and obtain prior consent from Raglan.**

In response to IAEA concerns regarding Appollonia’s exportation of MOX<sup>84</sup>, the Appollonian Energy Minister said that Appollonia does not publicize or identify the ships carried its MOX to “maintain the highest level of security.”<sup>85</sup> This rationale is problematic and frustrates the principles of good neighbourliness and cooperation among states. This Court has acknowledged

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<sup>79</sup> *Compromis*, Clarification 5.

<sup>80</sup> *Agenda 21, U.N. Conference on Environment and Development*, 35th Sess., U.N. Doc. A/CONF.151.26 (1992) Ch. 22 (‘Safe and Environmentally Sound Management of Radioactive Wastes’) Art. 25.5(a).

<sup>81</sup> *Compromis*, at para. 35.

<sup>82</sup> *Convention on the Physical Protection of Nuclear Material*, T.I.A.S. 11080.

<sup>83</sup> IAEA informational document, “The Physical Protection of Nuclear Materials & Nuclear Facilities, INFCIRC/225/Rev.4 at 4.2.6.3.

<sup>84</sup> *Compromis*, at para. 9.

<sup>85</sup> *Compromis*, at para.10.

that “whether a measure is necessary to protect the essential security interests of a party is not ... purely a question for the subjective judgment of the party.”<sup>86</sup> Raglan and Maguffin share the same security concerns as Appollonia: the avoidance of the theft or spillage of the MOX. Furthermore, both countries are at peace with Appollonia. Multi-lateral cooperation would have been the only way to ensure the highest level of security. The IAEA acknowledges that the protection of nuclear materials is a matter of “international concern and co-operation”.<sup>87</sup> Thus, consultation regarding route selections and emergency planning is in everyone's best interest and can only serve to make the shipments safer for all concerned.<sup>88</sup>

**D. The archipelagic sea lane passage regime does not apply to the *The Mairi Maru*.**

Appollonia has not ratified *UNCLOS*.<sup>89</sup> As such, it can only rely on *UNCLOS* to the extent that it reflects customary international law. For a *UNCLOS* provision to be custom, state practice must be virtually uniform.<sup>90</sup> This is not the case for the *UNCLOS* transit passage regime for archipelagic sea lanes. There is indication that four states withhold recognition of the *UNCLOS* transit passage regime (Iran, Morocco, Oman and Yeman) while others dispute the application of the transit passage regime (Germany, Spain, Greece, Yugoslavia, Slovenia).<sup>91</sup>

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<sup>86</sup> *Military and Paramilitary Activities In and Against Nicaragua* (U.S. v. Nic.), 1986 I.C.J. Rep. 14, 141 (June 27).

<sup>87</sup> IAEA informational document, *supra*, note 83

<sup>88</sup> van Dyke, J., “The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials” (2002) 33 *Ocean Development & International Law* 77.

<sup>89</sup> *UNCLOS*, *supra*, note 7.

<sup>90</sup> van Dyke, J., “Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials”, *supra* note 64 at 383.

<sup>91</sup> Molenaar, E., J, *Coastal state jurisdiction over vessel-source pollution*, (The Hague: Kluwer Law International, 1998) at 299-308

Even if the *UNCLOS* provisions on archipelagic sea lane passage have attained customary international law status, the traditional navigational freedoms do not apply to ships carrying ultra hazardous substances.<sup>92</sup> Under customary international law, Raglan has the sovereign right to adopt measures for the protection of its marine environment and to exercise jurisdiction in environmental matters within its territorial sea.<sup>93</sup> It follows that Raglan had the right to prohibit or control Appollonia's shipment of MOX within its marine environment. A recipient state's right of notification is an essential basis for the exercise of its right to prohibit or control the activities in question.<sup>94</sup> Some of the countries that have protested the shipment of ultra-hazardous cargos within their waters include: New Zealand, South Africa, Mauritius, Argentina, Brazil, Chile, Haiti, Saudi Arabia, Portugal, Nauru, Kiribati, as well as the Heads of Government of the Caribbean Community.<sup>95</sup>

**E. Raglan did not validly consent to Appollonia's practice of transporting MOX through Raglanian waters.**

The Foreign Ministry of Appollonia takes the view that it owes no obligation to Raglan under the IAEA regime and treaties because Raglan was aware that MOX was being transported through its territory without objection. This view is not consistent with international law. Article 20 of the *ILC Draft Articles* provides that *valid* consent can preclude the wrongfulness of an act.<sup>96</sup>

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<sup>93</sup> Kummer, *supra* note 65 at 21.

<sup>94</sup> Kummer, *supra* note 65 at 24.

<sup>95</sup> van Dyke, J., "Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials", *supra* note 64 at 386; and van Dyke, J., "The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials" *supra*, note 88.

<sup>96</sup> *Commentaries to the Draft Articles*, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2, at 300 at 174.

However, valid consent cannot be presumed, it must be expressly given and clearly established.<sup>97</sup> As such, implied consent is not valid consent. Nevertheless, Raglan did not expressly or impliedly consent to Appollonia's practice of shipping MOX through Raglanian waters without notifying or obtaining the consent of Raglan. The Appollonian Foreign Ministry belief that Raglan consented is based on an unsubstantiated inference.

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<sup>97</sup> *Commentaries to the Draft Articles, ibid* at 175.

#### **IV. RAGLAN IS ENTITLED TO FULL COMPENSATION FROM APPOLLONIA.**

##### **A. Raglan has standing to claim damages against Appollonia.**

###### **(i) Raglan is an injured State.**

Raglan acknowledges that a mere interest is not sufficient to give an applicant state the standing to claim damages against another State. The *Barcelona Traction, Light and Power Co. Ltd.*<sup>98</sup> case affirmed that states must possess a legal right to make a claim. Article 42 of the *ILC Draft Articles* articulates when a state can invoke the responsibility of another: “a State is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed to that state individually.”<sup>99</sup> Appollonia owed a legal duty to Raglan individually, to notify and/or obtain consent prior to shipping MOX through Raglanian waters. Appollonia breached this duty thereby injuring Raglan. As such, Raglan has standing to claim damages from Appollonia.

###### **(ii) Appollonia caused Raglan’s injuries.**

A successful claim for full reparation for an international wrong requires a causal link between the wrong and the injury.<sup>100</sup> The injury must have been foreseeable and not too remote.<sup>101</sup> Appollonia committed an internationally wrongful act by shipping MOX through Raglanian waters without notifying and/or obtaining Raglan’s consent. In effect, Raglan was unable to deny the *The Mairi Maru* access to Raglanian waters or provide an armed naval escort.<sup>102</sup>

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<sup>98</sup> *Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 ICJ 3 (Feb. 5).

<sup>99</sup> *ILC Draft Article, supra*, note 24.

<sup>100</sup> *Ibid.*, at Art. 31(2).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Compromis*, at para. 22.

Appollonia knew Raglanian waters were not safe since the Insurers of Lading and Shipping Association had a four point warning in effect for transit within the Raglanian Archipelago.<sup>103</sup> If properly notified, Raglan could have prevented or at least mitigated the risk of a nuclear accident. It was completely foreseeable that by not notifying Raglan of an incoming MOX shipment, Raglan could be the victim of a radioactive accident.

**(iii) Raglan can claim damages for activities that occurred outside its EEZ.**

The argument that Raglan does not have standing to seek compensation for losses resulting from activities that occurred outside of its territorial waters and EEZ is flawed. Raglan has sustained losses to its economic interests. There is no risk of liability in an indeterminate amount to an indeterminate class since Raglan and Appollonia agree on the quantum of Raglan's losses<sup>104</sup> and only Raglanian firms engage in commercial activity in the region affected by the MOX spill.<sup>105</sup>

Secondly, this Court has acknowledged that a nation's economic interests peculiar to a region extend beyond purely geographical factors and are based on long usage.<sup>106</sup> The Norton Shallows are unclaimed by any nation and its region has long been the basis for eco-tourism exclusively conducted by companies incorporated in Raglan<sup>107</sup>, which in turn generates 80 million Euro in annual tax revenue for the Raglanian government.<sup>108</sup> Furthermore, the Raglanian

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<sup>103</sup> *Compromis*, at para. 12.

<sup>104</sup> *Compromis*, at para. 34.

<sup>105</sup> *Compromis, Clarifications* 6.

<sup>106</sup> *Anglo Norwegian Fisheries (United Kingdom v. Norway)* (1949-1950) ICJ Reps 1951 116.

<sup>107</sup> *Compromis, Clarifications* 6.

<sup>108</sup> *Compromis*, at para.2.

Navy patrol boats conduct training in the region.<sup>109</sup> Clearly, Raglan has interests peculiar to Norton Shallows region.

Thirdly, reparation must "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."<sup>110</sup> This principle has not been interpreted as limiting the scope of claimable damages to damages sustained within a country's territorial boundaries.

#### **B. Appollonia's illegal shipment triggers absolute liability for the MOX spill.**

It is a principle of general international law that absolute liability applies to fields of activities that have a high degree of risk.<sup>111</sup> Many international instruments focused on civil liability for nuclear damage specify that upon proof of causation liability shall be absolute.<sup>112</sup> In fact, the preamble of the *1971 Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material* states that "the operator of a nuclear installation will be exclusively liable for damage caused by a nuclear incident occurring in the course of maritime carriage of nuclear material."<sup>113</sup> As such, Appollonia is exclusively liable for damage caused by MOX spill.

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<sup>109</sup> *Compromis*, at para.20.

<sup>110</sup> *Factory at Chorzów*, (Germany v Poland) 1928 PCIJ, ser. A, No. 17, at 47.

<sup>111</sup> O'Keefe, C., "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" (2002) 18 *Denv. J. Int'l L & Pol'y* 145 at 177.

<sup>112</sup> *Convention on the Liability of Operators of Nuclear Ships*, 1962, 57 *AJIL* (1963) 268 at Art. II; *Vienna Convention on Civil Liability for Nuclear Damage*, (1963) UNTS, Vol. 1063, No. I-16197, 263 Art. IV.

<sup>113</sup> O'Keefe, C., *supra* note 111 at 173.

If this Court finds that absolute liability is not the correct approach, Appollonia's failure to notify Raglan of the incoming MOX shipment also amounts to a breach of a standard of care based on due diligence [see Part III.A (iv), above, for more on this topic].

**C. Raglan is entitled to be compensated for its injuries resulting from the MOX spill.**

“It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>114</sup> This principle is consistent with a principle recognized in many municipal law systems: no victim should remain uncompensated.<sup>115</sup> The costs of minimizing damage to the marine environment and compensating the victims should be borne by the person who controls the hazardous activity and benefits from it economically.<sup>116</sup> Raglanian citizens are the victims. They are suffering economic losses as a result of Appollonia's illegal shipment from which Appollonia stood to gain economically. As such, Appollonia must make full reparation to Raglan.

**(i) Raglan must be compensated for the losses to its fishery and tourist industries.**

Appollonia does not dispute that the area where the MOX spilled will be unusable for tourism or sports fishing, costing Raglan's tourism industry approximately 100 million Euro.<sup>117</sup> Appollonia must, under international customary law, compensate Raglan for these agreed upon economic losses. Compensation for environmental damage to marine areas typically includes

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<sup>114</sup> *Factory at Chorzów*, *supra* note 110.

<sup>115</sup> O'Keefe, C., *supra* note 111 at 162.

<sup>116</sup> Kummer, K., *supra* note 65 at 213.

<sup>117</sup> *Compromis*, at para 34.

loss of tourism or damage to the fishing industry.<sup>118</sup> In fact, the Pacific Island leaders, in response to MOX shipments through the region, called specifically for a compensation regime to be established that would indemnify the island communities for any economic losses that their tourism and fishing industries might suffer as a result of an accident "even if there is no actual environmental damage caused."<sup>119</sup>

Additionally, numerous international instruments concerning the marine environment provide that an injured state is entitled to lost profits from the party at fault.<sup>120</sup> Yugoslavia's dispute with Austria regarding the *River Maru*, and Liberia's dispute with Japan regarding the *Juliana* are instances where a victim state has received compensation from a responsible state for economic losses it caused to the victim state's marine industry.<sup>121</sup>

**(ii) Appollonia must compensate Raglan for the cost of decontamination.**

Appollonia does not dispute the fact that the decontamination process of the area affected by the MOX spill will cost Raglan approximately 160 million Euro.<sup>122</sup> Appollonia must accept its

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<sup>118</sup> Hanquin, X., *supra* note 69 at 252

<sup>119</sup> van Dyke, "REGIONALISM, FISHERIES, AND ENVIRONMENTAL CHALLENGES IN THE PACIFIC", (2004) 6 San Diego Int'l L.J. 143 at 161. Forum Communique, Thirtieth South Pacific Forum, para. 31 (Oct. 3-5, 1999), available at <http://www.forumsec.org.fj/> (last visited Jan. 12, 2005).

<sup>120</sup> *ILC Draft Articles*, *supra* note 24 at Art. 36; *Liability for Nuclear Damage, IAEA Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage and to adopt a Convention on Supplementary Funding* GOV/INF/822-GC(41)/INF/13 Art. 2; *Basel Protocol on Liability and Compensation* was adopted at the Fifth Conference of Parties (COP-5) on 10 December 1999 (Doc. UNEP/CHW.5/29) at Art. 2(b)(iii); *Final Act of the International Conference on Hazardous and Noxious Substances and Limitation of Liability*, May 2, 1996, 35 I.L.M. 1406 at Art. 1.6.

<sup>121</sup> Handl, G., "State Responsibility for Accidental Transnational Environmental Damages by Private Persons," (1980) 74 Am. J. Int'l L. 525 at 545 & 547.

<sup>122</sup> *Compromis*, at para.34.

responsibility and pay this amount. The duty of reparation specifically includes the clean-up of contaminated sites or polluted water ways.<sup>123</sup> One of the main forms of reparation is the obligation to restore the area to the condition it would have been in if such damage had not occurred.<sup>124</sup> This obligation is bolstered by the principle of common but differentiated responsibilities<sup>125</sup> and the fact that Raglan is an under-developed nation, while Appollonia is technologically advanced. This principle recognizes the limits on the principle of equality of States in coping with environmental deterioration.<sup>126</sup> Raglan is “environmentally vulnerable” and should be given “special priority” due to its “special situation and needs” by an advanced nation such as Appollonia.<sup>127</sup>

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<sup>123</sup> Kummer, *supra* note 24 at 219.

<sup>124</sup> Hanquin, X., *supra* note 69 at 252.

<sup>125</sup> *Framework Convention on Climate Change*, *supra* note 58 at Art. 3(1).

<sup>126</sup> Hanquin, X., *supra* note 69 at 324.

<sup>127</sup> *Rio Declaration*, *supra* note 53 Principle 6.

### **PRAYER FOR RELIEF**

For the foregoing reasons, the Kingdom of Raglan respectfully requests that this Court DECLARE that:

(1) Raglan is not responsible for the attack on *The Mairi Maru* and that it owes no compensation to Appollonia for any of the consequences arising therefrom.

(2) Raglan did not violate any obligation owed to Appollonia under international law in the scuttling of *The Mairi Maru*.

(3) Appollonia violated international law by transporting MOX through Raglanian waters without notifying and obtaining the consent of Raglan.

(4) Appollonia must compensate Raglan for the cost of decontaminating the area affected by the MOX spill and for the economic losses to Raglan's tourism and fisheries industries.