

NO. 1990

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

---

**THE STATE OF LEONIA,**

*Applicant*

v.

**THE STATE OF VULPINIA,**

*Respondent*

---

Spring Term

1990

---

ON SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE

---

**MEMORIAL FOR THE APPLICANT**

---

TABLE OF CONTENTS

INDEX OF AUTHORITIES. . . . .iv

STATEMENT OF JURISDICTION. . . . .xi

STATEMENT OF FACTS. . . . .xi

QUESTIONS PRESENTED. . . . .xiv

SUMMARY OF PLEADINGS. . . . .xv

PLEADINGS AND AUTHORITIES

I. VULPINIA HAS BREACHED INTERNATIONAL LAW BY ALLOWING THE DISPOSAL OF HAZARDOUS WASTES IN ANTARCTICA. . . . .1

A. LEONIA IS THE PROPER PARTY TO BRING AN ACTION FOR ENVIRONMENTAL DAMAGE TO ANTARCTICA. . . . . 1

1. The Duty To Protect And Preserve The Antarctic Environment In An Obligation *Erga Omnes*. . . . . 1

2. Leonia, As A Consultative Party To The Antarctic Treaty, Is Best Situated To Bring This Claim. . . . .3

a. The Antarctic Treaty specifically imposes a duty on its signatories to protect and preserve the Antarctic environment. . . . .4

b. The Antarctic Treaty has attained the status of binding third States to the Antarctic regime. . . . .4

3. Leonia, As A Signatory To The Law Of The Sea Convention, Has *Locus Standi* To Bring A Claim For Damage To The High Seas. . . . .6

B.	VULPINIA IS LIABLE FOR THE ILLEGAL ACTIONS OF ITS NATIONALS. . . . .	.7
1.	Detritus' Illegal Traffic In Hazardous Waste Is Imputable To Vulpinia. . . . .	.7
2.	The Hazardous Wastes Were Dumped In Antarctic Waters By Vulpinian Officials. . . . .	.8
C.	VULPINIA BREACHED CUSTOMARY INTERNATIONAL LAW BY DISPOSING OF HAZARDOUS WASTES IN ANTARCTICA. . . . .	.8
1.	Customary International Law Provides For The Protection Of The Environment. . . . .	.9
2.	Treaties Regulating And Protecting The Environment Are Evidence Of Customary International Law. . . . .	.11
D.	VULPINIA'S DISPOSAL OF HAZARDOUS WASTES IN ANTARCTIC WATERS VIOLATES THE OBJECT AND PURPOSE OF THE LAW OF THE SEA CONVENTION. . . . .	.13
1.	Vulpinia, The Flag State, Is Responsible For The Actions Of Its Nationals. . . . .	.13
2.	Under The Convention, All States Have The Duty To Reduce And Control Marine Pollution. . . . .	.13
E.	VULPINIA'S DISPOSAL OF HAZARDOUS WASTE IN ANTARCTICA VIOLATES PRINCIPLES OF INTERNATIONAL LAW. . . . .	.14
F.	VULPINIA IS BOUND BY ITS AGREEMENT EXPRESSED IN THE DIPLOMATIC NOTE. . . . .	.15
II.	VULPINIA IS RESPONSIBLE FOR ALL ENVIRONMENTAL DAMAGE RESULTING FROM THE STELLA MARIS INCIDENT. . . . .	.16
A.	VULPINIA IS LIABLE FOR ITS ULTRA-HAZARDOUS ACTIVITIES. . . . .	.17
1.	Strict Liability For Ultra-hazardous Activities Is A General Principle Of Law Recognized By Civilized Nations. . . . .	.17
2.	International Case Law Evidences Acceptance Of Strict Liability For Ultra-hazardous Activities . . . . .	.19

3.	Public Policy Necessitates The Imposition Of Strict Liability For Ultra-Hazardous Activities. . . . .	.20
4.	Alternatively, Vulpinia Is Responsible Even Under A Fault-Based Standard . . . . .	.21
B.	VULPINIA MUST TAKE THE NECESSARY REMEDIAL MEASURES AND PROVIDE APPROPRIATE REPARATIONS. . . . .	.22
1.	Vulpinia Must Institute Further Remedial Measures To Determine And Abate The Environmental Damage. . . . .	.23
2.	Vulpinia Must Provide Reparations For Its Breach Of Right . . . . .	.24
	CONCLUSION. . . . .	.25

## INDEX OF AUTHORITIES

### TREATIES:

The Antarctic Treaty, <i>opened for signature</i> 1 Dec. 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 . . . . .	1
Preamble . . . . .	5
art. VI . . . . .	7
art. IX . . . . .	2
art. IX, para. 1(f). . . . .	4
art. IX, para. 2 . . . . .	3
art. X . . . . .	4
Brussels Convention on the Liability of Operators of Nuclear Ships, <i>done</i> 25 May 1962, <i>reprinted in</i> 57 Am. J. Int'l L. 268. . . . .	20
Convention on International Liability for Damage Caused by Space Objects, <i>done</i> 29 Mar. 1972, art. 2, 2 U.S.T. 2839, T.I.A.S. No. 7762. . . . .	20
Convention on the Conservation of Antarctic Marine Living Resources, <i>done</i> 7 May 1980, T.I.A.S. No. 10240 . . . . .	11
Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, <i>done</i> 22 Mar. 1989, <i>reprinted in</i> 28 I.L.M. 649	
Preamble. . . . .	12
art. 4, para. 6. . . . .	12
art. 4, para. 8. . . . .	12
art. 25, para. 1. . . . .	12
Annex I . . . . .	8, 11, 19
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter <i>opened for signature</i> 29 Dec. 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165 . . . . .	11

Convention on the Regulation of Antarctic Mineral Resource Activities, Doc. AMR/SCM/88/78, <i>opened for signature</i> 2 June 1988, <i>reprinted in</i> 27 I.L.M. 868 (1988). . . . .	21
--	----

art. 8, para. 2(c). . . . .	21
-----------------------------	----

Statute of the International Court of Justice 16 U.S.T. 1164, 59 Stat. 1031, T.S. No. 933 . . . . .	1
--	---

art. 38, para. 1(b) . . . . .	9
art. 38, para. 1(c). . . . .	14, 17
art. 38, para. 1(d). . . . .	17

U.N. Charter	
art. 73. . . . .	3
art. 102 . . . . .	16

United Nations Convention on the Law of the Sea, <i>done</i> 10 Dec. 1982, U.N. Doc. A/CONF.62/122	
---	--

art. 1, para. 1(1). . . . .	7
art. 3 . . . . .	6
art. 31. . . . .	13
art. 57 . . . . .	6
art. 86. . . . .	7
art. 94, para. 4(c) . . . . .	13
art. 96. . . . .	14
art. 117 . . . . .	13
art. 136 . . . . .	7
art. 145 . . . . .	13, 14
art. 192 . . . . .	13, 14
art. 194, para. 3 . . . . .	13, 14
art. 194, para. 5 . . . . .	14
art. 210. . . . .	13
art. 215 . . . . .	7

Vienna Convention of the Law of Treaties, <i>opened for signature</i> 23 May 1969, U.N. Doc. A/CONF. 39/27	
--	--

art. 18. . . . .	13
art. 28. . . . .	12
art. 34. . . . .	3
art. 53 . . . . .	1

**CASES:**

*Angola* (Port. v. Ger.),  
2 R. Int'l Arb. Awards 1011 (1928) . . . . . 22

*Asylum* (Colom. v. Peru),  
1950 I.C.J. 266 (Judgment of 20 Nov.) . . . . . 4

*Austro-German Customs Regime* 1931 P.C.I.J.  
(ser. A/B) No. 41 (Advisory Opinion of 5 Sept.) . . . . . 5, 6

*Barcelona Traction, Light and Power Co., Ltd.*,  
(Belg. v. Spain), 1970 I.C.J. 4  
(Judgment of 5 Feb., Second Phase) . . . . . 2

*Corfu Channel* (U.K. v. Alb.),  
1949 I.C.J. 4 (Judgment of 9 Apr.) . . . . . 15, 20, 21, 24

*Factory at Chorzów* (Ger. v. Pol.),  
1927 P.C.I.J. (ser. A) No. 9  
(Judgment of 26 July) . . . . . 22

*Factory at Chorzów* (Ger. v. Pol.),  
1928 P.C.I.J. (ser. A) No. 17  
(Judgment of 13 Sept.) . . . . . 24

*Fisheries Jurisdiction* (U.K. v. Ice.),  
1972 I.C.J. 12 (Interim Protection Order of 17 Aug.) . . . . . 9

*Gut Dam Arbitration* (U.S. v. Can.),  
*reprinted in* 8 I.L.M. 118 (1969) . . . . . 10

*International Status of South-West Africa*,  
1950 I.C.J. 128  
(Advisory opinion of 11 July) . . . . . 5

*Lake Lanoux Arbitration* (Spain v. Fr.),  
*reprinted in* 53 Am. J. Int'l L. 156 (1959) . . . . . 10

*Legal Status of Eastern Greenland* (Den. v. Nor.),  
1933 P.C.I.J. (ser. A/B) No. 53  
(Judgment of 5 Apr.) . . . . . 15, 16

*Maninat* (Fr. v. Venez.),  
1905 Ralston's Rep. 44 . . . . . 22

*North Sea Continental Shelf*  
(W. Ger. v. Den., W. Ger. v. Neth.),  
1969 I.C.J. 3 (Judgment of 20 Feb.) . . . . . 11

*Nuclear Tests* (Austl. v. Fr., N.Z. v. Fr.),  
1974 I.C.J. 253 (Judgment of 20 Dec.) . . . . . 3, 16, 23

<i>Nuclear Tests</i> (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order of 22 June) . . . . .	10
<i>Right of Passage Over Indian Territory</i> (Port. v. India), 1960 I.C.J. 6 (Judgment of 12 Apr.) . . . . .	6
<i>Rylands v. Fletcher</i> , L.R. 1 H.L. 330 (1868) . . . . .	18
<i>S.S. Wimbledon</i> (Fr., U.K., Italy, and Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 (Judgment of 17 Aug.) . . . . .	5
<i>South West Africa</i> (Eth. v. S. Afr., Lib. v. S. Afr.), 1966 I.C.J. 6 (Judgment of 18 July, Second Phase) . . . . .	2, 7
<i>Temple of Preah Vihear</i> (Cambodia v. Thailand), 1961 I.C.J. 4 (Judgment of 15 June) . . . . .	16
<i>Trail Smelter Arbitration</i> (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941) . . . . .	9, 19, 24
<i>Western Sahara</i> , 1975 I.C.J. 12 (Advisory Opinion of 16 Oct.) . . . . .	11

**U.N. MATERIALS:**

G.A. Res. 2398, 23 GAOR Supp. 18, U.N. Doc. A/7218 (1968). . . . .	11
<i>International Responsibility of States in Regard to the Environment</i> , G.A. Res. 2996, 30 U.N. GAOR Supp. (No. 38), U.N. Doc. A/8730 (1972) . . . . .	10
<i>Report of the U.N. Conference on the Human Environment</i> , 11 I.L.M. 1416 (1972). . . . .	21
U.N. Doc. E/4466/Add. 1 (1968) . . . . .	11
U.N. ECOSOC Res. 1345, U.N. ECOSOC Supp. 1, U.N. Doc. E/4561 (1968) . . . . .	11
United Nations Conference on the Human Environment, A/CONF. 48/14 (1972). . . . .	9, 10

**TREATISES, DIGESTS & RESTATEMENTS:**

3 <i>Kurs Mezhdunardodnovo Prava</i> 402 (1967) . . . . .	4
11 <i>Code of Mainmonides (Book of Torts)</i> (H. Klein trans. 1954) . . . . .	17
Beauchet, L. 4 <i>Histoire Du Droit Privé De La</i> <i>République Athénienne</i> (1969) . . . . .	17
C. Joyner & S. Chopra <i>The Antarctic Legal Regime</i> (1988) . . . . .	1, 3, 6
Cheng, B., <i>General Principles of Law</i> (1987) . . . . .	12, 14-16
Diamond, A., <i>Primitive Law Past and Present</i> (1971) . . . . .	17
<i>Hammurabi Code</i> , (Edwards trans. 1904) . . . . .	17
Harris, D. <i>Cases and Materials on</i> <i>International Law</i> (3d ed. 1983) . . . . .	5
Henkin, L., Pugh, R., Schachter, O. & Smit, H. <i>International Law</i> (2d ed. 1987) . . . . .	8
McNair, A. <i>The Law of Treaties</i> (1986) . . . . .	4, 5
Oppenheim, L. 1 <i>International Law, Peace</i> (H. Lauterpacht 8th ed. 1955) . . . . .	9, 15
<i>Restatement (Third) of the Foreign Relations</i> <i>Law of the United States</i> (1987) . . . . .	2
Springer, A. <i>The International Law of Pollution</i> (1983) . . . . .	7

**ARTICLES:**

Barcelo, J., <i>The International Legal Regime for Antarctica</i> , 19 <i>Cornell Int'l L.J.</i> 155, 159-60 (1986) . . . . .	1
---	---

Bilder, R., <i>The Present Legal and Political Situation in Antarctica,</i> <i>reprinted in J. Charney, The New Nationalism</i> <i>and the Use of Common Spaces, (1982)</i> . . . . .	4
Boczek, B., <i>The Protection of the Antarctic Ecosystem:</i> <i>A Study in International Environmental Law,</i> 13 <i>Ocean Dev. and Int'l L.</i> 347 (1983) . . . . .	1, 2
Boczek, B., <i>The Soviet Union and the Antarctic Regime,</i> 78 <i>Am. J. Int'l L.</i> 834 (1954) . . . . .	4
Bohlen, M., <i>The Rule in Rylands v. Fletcher,</i> 59 <i>U. Pa. L. Rev.</i> 298 (1911) . . . . .	18
Caldwell, L., <i>Concepts in the Development of</i> <i>International Environmental Policies,</i> 13 <i>Nat. Resources J.</i> 190 (1973) . . . . .	1
Charney, J., <i>International Agreements and the</i> <i>Development of Customary International Law,</i> 61 <i>Wash. L. Rev.</i> 971 (1986) . . . . .	9
Handl, G., <i>International Liability of States</i> <i>for Marine Pollution,</i> 21 <i>Can. Y.B. Int'l L.</i> 85 (1983) . . . . .	8, 17, 21
Jenks, W., <i>Liability for Ultra-Hazardous Activities</i> <i>in International Law,</i> 117 <i>Recueil des Cours</i> 99 (1966) . . . . .	20
Joyner, C., <i>The Exclusive Economic Zone and Antarctica,</i> 21 <i>Va. J. Int'l L.</i> 693 (1981) . . . . .	3, 6
Joyner, C., <i>The Southern Ocean and Marine Pollution:</i> <i>Problems and Prospects,</i> 17 <i>Case W. Res. J. Int'l L.</i> 165 (1985) . . . . .	7
Larschan, B., & Brennan, B., <i>The Common Heritage of Mankind Principle</i> <i>in International Law,</i> 21 <i>Colum. J. Transnat'l L.</i> 305 (1983) . . . . .	7

Palmer, V.,  
*A General Theory of the Inner Structure  
of Strict Liability: Common Law, Civil Law  
and Comparative Law,*  
62 Tul. L. Rev. 1303 (1988) . . . . . 17

Schneider, J.,  
*State Responsibility for Environmental  
Protection and Preservation,*  
*reprinted in International Law:  
A Contemporary Perspective* (R. Falk ed. 1985) . . . . . 19

Weiss, E.,  
*Who Pays for Weather Modification Damage,*  
4 Env'tl. L. & Pol'y 22 (1978) . . . . . 21

**MISCELLANEOUS:**

Baxter, Q.,  
*Draft Articles on International Liability  
for the Injurious Consequences of Acts  
Not Prohibited by International Law,*  
[1984] 2 Y.B. Int'l L. Comm'n 77 (vol. II) . . . . . 23

Code Civile art. 1384 (France) . . . . . 17

GK RSFSR 1964 (Civil Code) . . . . . 17

Lemonick,  
*Antarctica,* Time, 15 Jan. 1990 . . . . . 2

Restatement (Second) of Torts § 519 (1965) . . . . . 17

SCAR Constitution,  
*reprinted in 1 Antarctica and International Law* (1982) . . . . . 23

## STATEMENT OF JURISDICTION

The Governments of the State of Vulpinia and the State of Leonia have submitted the following matter by special agreement to the International Court of Justice pursuant to Article 36(1) of the Statute of the International Court of Justice.

## STATEMENT OF FACTS

On 10 January 1988, Dr. Detritus, Vulpinia's leading hazardous waste disposal expert, placed 100 drums containing hazardous waste on the Stella Maris ice shelf in Antarctica. *Compromis* at 2. Detritus placed the drums in Antarctica for experimental purposes to ascertain the suitability of Antarctica to be utilized as a hazardous waste disposal site. *Compromis* at 2. Detritus' intention was to seek further sites in which to dispose hazardous wastes due to the scarcity of available dumps elsewhere in the world. *Compromis* at 1. Leonian intelligence services monitored the incident and the Leonian government dispatched naval ships to ensure that the containers did not contain radioactive materials. *Compromis* at 3.

As a consultative party to the Antarctic Treaty, Leonia notified the Vulpinian government that it considered the actions of the Vulpinian nationals to be in violation of the text and spirit of the treaty. *Compromis* at 3. The Vulpinian Minister of Foreign Affairs denied any knowledge of Detritus' actions and stated that export of hazardous wastes was not contrary to Vulpinian municipal law. *Compromis* at 3.

After discussions with Vulpinian officials, Detritus agreed to remove the waste. *Compromis* at 3. Minister Fox, of Vulpinia, contacted his Leonian counterpart and informed him that Detritus, under the auspices of the Vulpinian government, would recover the waste and arrange to have it disposed elsewhere. *Compromis* at 3-4. These diplomatic discussions culminated in an exchange of notes on 2 February 1988 in which Vulpinia agreed to recover the drums of waste and to re-establish the situation that previously existed. *Compromis* at 4.

On 7 January 1989, the Vulpinian ship, the *Arianna*, arrived in Antarctica with a Vulpinian crew, Detritus' employees, and Leonian observers aboard. *Compromis* at 5. Ninety-five drums were recovered without incident; however, five of the drums were discovered to be seriously damaged by their highly corrosive and explosive contents. *Compromis* at 5. Experts from Detritus' company recommended that the drums be opened carefully and that the toxins should be vented into the sea where their effect would dissipate rapidly. *Compromis* at 5. Upon consultation with their respective governments, Vulpinian officials were ordered to comply with the recommendations of Detritus' experts and Leonian observers were told not to interfere with what was essentially a Vulpinian operation. *Compromis* at 5. Subsequently, the contents of the drums were poured into the sea directly off the Stella Maris ice shelf. *Clarifications to Compromis*, para. 1. Tests of the wastes showed that all traces of the chemicals had disappeared within ten days. *Compromis* at 5-6.

The original notion to utilize Antarctica as a hazardous waste disposal site occurred to Detritus after reading about an expedition to Antarctica led by Professor Handlin, a Leonian marine biologist. *Compromis* at 1. In 1987, Handlin discovered what he believed to be a new species of asteroid echinoderm (starfish). *Compromis* at 6. In December 1988, subsequent analysis of samples taken back to Leonia confirmed that Handlin had indeed discovered a previously unknown species of starfish. *Clarifications to Compromis*, para. 6. Because the starfish died if there was any change in its indigenous seawater characteristics, Handlin concluded that further studies were required in Antarctica. *Compromis* at 6. Upon his return to Antarctica on 10 February 1989, Handlin discovered that the entire species was destroyed as a result of the Vulpinian disposal of hazardous waste. *Compromis* at 6-7.

Following Handlin's announcement of the extermination of the starfish, the governments of Leonia and Vulpinia were subjected to severe criticism by the world scientific and environmental communities. *Compromis* at 7. A joint communique was

issued by the two governments expressing a deep commitment to protecting and preserving the Antarctic ecosystem. *Compromis* at 7. Subsequent ad hoc negotiations were unsuccessful; the two governments being unable to reach a consensus on a remedy for the environmental harm. *Compromis* at 8. After months of deadlock, the two countries agreed to submit the matter to the International Court of Justice for resolution. *Compromis* at 8.

QUESTIONS PRESENTED

- I. IS THE STATE OF VULPINIA RESPONSIBLE FOR ANY BREACH OF RIGHT PERTAINING TO LEONIA BY VIRTUE OF ANY RULE OF CUSTOMARY OR CONVENTIONAL INTERNATIONAL LAW BINDING UPON VULPINIA?
  
- II. IN THE CASE OF AN AFFIRMATIVE ANSWER TO QUESTION NUMBER I, IS VULPINIA UNDER ANY OBLIGATION TO LEONIA TO TAKE REMEDIAL MEASURES OR TO PROVIDE REPARATIONS FOR THE INJURY TO THE ANTARCTIC ENVIRONMENT CAUSED IN THE STELLA MARIS INCIDENT, AND, IF SO, WHAT TYPE OF REMEDIAL MEASURES OR REPARATIONS WOULD BE APPROPRIATE UNDER THE INSTANT CIRCUMSTANCES?

## SUMMARY OF PLEADINGS

This claim is based on damages to the Antarctic environment by Vulpinian nationals. Leonia is the proper party to instigate this action as Vulpinia has breached an obligation *erga omnes*, or one owed to the international community as a whole. Therefore, as a beneficiary of Vulpinia's obligation, the claim is admissible. Furthermore, as a Consultative Party to the Antarctic Treaty, Leonia is obligated to undertake all appropriate efforts to protect and preserve the Antarctic environment. Clearly, Leonia is best situated to prosecute this claim. Vulpinia is estopped from disputing these assertions as Vulpinia has never objected to the Antarctic regime, and issued a public statement affirming the Vulpinian Government's commitment in preserving the delicate Antarctic environment. Lastly, the claim is admissible under the Law of the Sea Convention because the toxic wastes were poured directly into the high seas off the Stella Maris ice shelf.

Vulpinia breached international law by allowing the disposal of the hazardous waste in Antarctica. This intentional delict is imputable to Vulpinia because the State is responsible for any extra-territorial damage caused by private persons or private entities when the damage results from an ultra-hazardous activity. Furthermore, the wastes were dumped into Antarctic waters by Vulpinian officials under the supervision of their government.

Vulpinia's actions violate customary international law which mandates protection of the environment. This is a settled principle of customary international law utilized in case law and evidenced by numerous treaties regulating pollution. The disposal of the waste also violated the general principle of law requiring Vulpinia not to allow its territory to be used in a manner detrimental to any area beyond Vulpinia's territorial boundaries. Further, Vulpinia's disposal of the waste defeats the object and purpose of the law of the Sea Convention regulating flag States and marine pollution.

Vulpinia is required under international law, to reestablish the situation in

Antarctica that previously existed. Vulpinia's Minister of Foreign Affairs bound his country to this course of action through the Diplomatic Notes exchanged with Leonia and registered with the United Nations. Vulpinia is bound by this international contract.

Vulpinia is strictly liable for all damage, current and future, that may occur from the disposal of toxic waste. Strict liability is a well-recognized principle in international law and has been applied by international arbitral tribunals and this Court. Alternatively, Vulpinia is still responsible under a fault-based standard. The effects of the waste on living resources and on the storage drums were clearly foreseeable to Detritus and the Vulpinian Government. In either scenario, Vulpinia is responsible for all damage to the environment.

International law mandates appropriate reparations for any violations thereof. In this case, Vulpinia should bear the cost of a longitudinal study commissioned by this Court to determine the extent of damage to the environment and any future ramifications stemming from the Stella Maris ice shelf incident.

## PLEADINGS AND AUTHORITIES

### I. VULPINIA HAS BREACHED INTERNATIONAL LAW BY ALLOWING THE DISPOSAL OF HAZARDOUS WASTES IN ANTARCTICA.

The continent of Antarctica is non-sovereign territory and, thus, cannot bring an action on its own behalf.<sup>1</sup> The territory is currently administered through the thirty-three signatories to the Antarctic Treaty.<sup>2</sup> In order to ensure the continued protection of the Antarctic environment and enforcement of States' obligations *erga omnes*, Leonia must be permitted to bring this claim for Vulpinia's breach of international law.

#### A. LEONIA IS THE PROPER PARTY TO BRING AN ACTION FOR ENVIRONMENTAL DAMAGE TO ANTARCTICA.

##### 1. The Duty To Protect And Preserve The Antarctic Environment Is An Obligation *Erga Omnes*.

The duty to protect the environment is a rule of *jus cogens*,<sup>3</sup> a peremptory norm of international law accepted and recognized by the international community "from which no derogation is permitted...."<sup>4</sup> The basis of this rule has been variously described as man's obligation as custodian of the earth<sup>5</sup> and protection of a "global commons" such

---

<sup>1</sup> Statute of the International Court of Justice, art. 34, 16 U.S.T. 1164, 59 Stat. 1031, T.S. No. 933 [hereinafter Statute of the I.C.J.]. See also C. Joyner & S. Chopra, *The Antarctic Legal Regime* 173-74 (1988).

<sup>2</sup> The Antarctic Treaty, *entered into force* 23 June 1961, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 [hereinafter Antarctic Treaty]; see also Barcelo, *The International Legal Regime for Antarctica*, 19 Cornell Int'l L.J. 155, 159-60 (1986).

<sup>3</sup> Boczek, *The Protection of the Antarctic Ecosystem: A Study in International Environmental Law*, 13 Ocean Dev. & Int'l L. 347, 389 (1983).

<sup>4</sup> Vienna Convention of the Law of Treaties, art. 53, *opened for signature* 23 May 1969, U.N. Doc. A/CONF. 39/27 [hereinafter Treaty on Treaties].

<sup>5</sup> Caldwell, *Concepts in the Development of International Environmental Policies*, 13 Nat. Resources J. 190, 200 (1973).

as Antarctica.<sup>6</sup> Obligations *erga omnes* are those owed by a State "towards the international community as a whole" and are the concern of all States.<sup>7</sup> Because of the importance of the rights involved, all States have a legal interest in their protection.<sup>8</sup> The protection of the environment is clearly an aspect of world order that impacts on the well-being of all States and Leonia has *locus standi* to address the issue.

The extra vigilance due in safeguarding Antarctica, an environment particularly susceptible to damage from pollution,<sup>9</sup> was recognized by the parties to the Antarctic Treaty.<sup>10</sup> As stated by Judge Tanaka, such a treaty incorporates "common and humanitarian interests"<sup>11</sup> and its organizational form transforms those interests into a legal interest that requires protection through "specific procedural means."<sup>12</sup> The protection of the Antarctic environment is analogous to Judge Tanaka's view that the League of Nations' Mandate system raised the common interests of the Mandatories, in eliminating debilitating racial policies, to an actionable legal right.<sup>13</sup> The international interest in Antarctica's preservation is a cognizable legal interest that entitles Leonia

---

<sup>6</sup> *Restatement (Third) of the Foreign Relations Law of the United States*, Introductory Note at 99 (1987).

<sup>7</sup> *Barcelona Traction, Light and Power Co., Ltd.*, (Belg. v. Spain), 1970 I.C.J. 4, 32 (Judgment of 5 Feb., Second Phase).

<sup>8</sup> *Id.*

<sup>9</sup> Lemonick, *Antarctica*, *Time*, 15 Jan. 1990, at 56; *see also* Boczek, *supra* note 3.

<sup>10</sup> *Supra* note 2, art. IX (States should preserve and conserve Antarctic resources).

<sup>11</sup> *South West Africa* (Eth. v. S. Afr., Lib. v. S. Afr.), 1966 I.C.J. 6, 252 (Judgment of 18 July, Second Phase) (Tanaka, J., dissenting).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

to enforce this claim as a beneficiary of this obligation *erga omnes* binding on Vulpinia.<sup>14</sup> Indeed, Vulpinia is estopped from denying this assertion as the Vulpinian government made a public declaration that it recognized that the Antarctic ecosystem must be preserved.<sup>15</sup> The unacceptable result of a finding that Leonia lacks *locus standi* is a declaration that a large area of the world is immune from the dictates of international law.

2. Leonia, As A Consultative Party To The Antarctic Treaty, Is Best Situated To Bring This Claim.

Leonia's *locus standi* does not derive from an attempt to enforce specific provisions of the Antarctic Treaty against Vulpinia.<sup>16</sup> As a consultative party, Leonia is a decision-making State of the regime and has demonstrated a substantial interest in Antarctica through scientific research activities.<sup>17</sup> Protection of Antarctica's resources and environment, and maintenance of the *status quo*, is logically vested in the States that have assumed this duty for the past thirty years. As a nation with a strong and visible presence in Antarctica, Leonia is the logical party to institute an action for damages due to the pollution of the Antarctic environment. Indeed, Leonia first discovered the illegal activities of Vulpinia's Dr. Detritus and immediately notified the Vulpinian government. The preservation of the most pristine environment on the planet should also be regarded as a "sacred trust";<sup>18</sup> one voluntarily assumed by the parties to the Antarctic Treaty system, and accepted as a matter of regional customary

---

<sup>14</sup> See *Nuclear Tests* (Austl. v. Fr., N.Z. v. Fr.), 1974 I.C.J. 253, 387 n.1 (Judgment of 20 Dec.) (De Castro, J. dissenting).

<sup>15</sup> See *id.* at 270 (oral declaration by French President binding on France).

<sup>16</sup> See Treaty on Treaties, *supra* note 4, art. 34.

<sup>17</sup> Antarctic Treaty, *supra* note 2, art. IX, para. 2. See also Joyner, *The Exclusive Economic Zone and Antarctica*, 21 Va. J. Int'l L. 693, 704-06 (1981).

<sup>18</sup> See U.N. Charter art. 73.

international law.<sup>19</sup>

- a. The Antarctic Treaty specifically imposes a duty on its signatories to protect and preserve the Antarctic environment.

Leonia pledged to undertake appropriate efforts to ensure "that no one engages in any activity in Antarctica contrary to the principles or purposes of the present treaty."<sup>20</sup> It is undisputed that Vulpinia disposed of hazardous wastes in Antarctic waters which led to the destruction of a previously unknown species of starfish. Such an act is clearly contrary to the principles of the treaty which include the preservation and conservation of its living resources.<sup>21</sup> One such appropriate effort to protect Antarctica encompasses the present suit against Vulpinia. Consequently, the claim is admissible.

- b. The Antarctic Treaty has attained the status of binding third States to the Antarctic regime.

The Antarctic Treaty is valid *erga omnes* due to the semi-legislative authority of the States comprising the Antarctic regime.<sup>22</sup> The treaty is a constitutive treaty, also referred to as a treaty of public law character,<sup>23</sup> which embodies the decisions of a group of States acting in the public interest.<sup>24</sup> The Antarctic Treaty specifically states that "it is in the interest of all mankind" that Antarctica should be used solely for

---

<sup>19</sup> *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 399 (Judgment of 20 Nov.); see also Bilder, *The Present Legal and Political Situation in Antarctica*, reprinted in J. Charney, *The New Nationalism and the Use of Common Spaces*, 197-98 (1982).

<sup>20</sup> Antarctic Treaty, *supra* note 4, art. X (emphasis added).

<sup>21</sup> *Id.* art. IX, para. 1(f).

<sup>22</sup> A. McNair, *The Law of Treaties* 255 (1986); see also Boczek, *The Soviet Union and the Antarctic Regime*, 78 Am. J. Int'l L. 834, 856 (1954)(quoting 3 *Kurs Mezhdunardodnovo Prava* 402 (1967)(stating that the Soviet Union considers the Antarctic Treaty to be valid *erga omnes*).

<sup>23</sup> McNair, *supra* note 22, at 259.

<sup>24</sup> *Id.*

peaceful purposes and should not be the object of international discord.<sup>25</sup>

Initially, the treaty bound only States that were parties to it; however, the lapse of time and the acquiescence of other States to the system converted the *de facto* situation into a *de jure* regime.<sup>26</sup> As stated by Lord McNair, it is possible for States to create an international regime through a multipartite treaty which acquires a degree of acceptance that extends beyond the limits of the contracting parties thus giving the regime an objective existence.<sup>27</sup>

This constitutive principle was also enunciated by the Permanent Court of International Justice in the case of the *S.S. Wimbledon*,<sup>28</sup> where the Court, in examining the legal status of international waterways, held that the Treaty of Versailles of 1919 created objective law and produced an effect *erga omnes* that limited Germany, the riparian state, from preventing States not party to the treaty from using the Kiel Canal. Specifically, the Court held that the treaty converted the canal into an international waterway benefiting all nations of the world.<sup>29</sup> Similarly, in the case of *Austro-German Customs Regime*,<sup>30</sup> Judge Anzilotti stated that the Austrian customs regulations were

---

<sup>25</sup> Antarctic Treaty, *supra* note 2, Preamble.

<sup>26</sup> McNair, *supra* note 22, at 259. See also D. Harris, *Cases and Materials on International Law* 608 n.4 (3d ed. 1983).

<sup>27</sup> *International Status of South-West Africa*, 1950 I.C.J. 128, 151-53 (Advisory opinion of 11 July)(McNair, J., concurring)(arguing that the Mandatories to the League of Nations had *locus standi* to address South Africa's apartheid policy in South West Africa).

<sup>28</sup> (Fr., U.K., Italy, and Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 (Judgment of 17 Aug.).

<sup>29</sup> *Id.* at 22.

<sup>30</sup> 1931 P.C.I.J. (ser. A/B) No. 41 (Advisory Opinion of 5 Sept.).

"not adopted in the interests of Austria, but in the interests of Europe as a whole."<sup>31</sup>

Significantly, Vulpinia has never objected to the Antarctic regime. This Court has indicated that such silence on the part of sovereigns is tantamount to acceptance and acquiescence of an existing practice.<sup>32</sup> In the *Right of Passage* case, this Court held that the undisputed use of Indian territory by Portuguese nationals to reach Portuguese enclaves constituted India's tacit approval of the practice.<sup>33</sup> Because of its silence and inaction, India was obligated to allow the practice to continue.<sup>34</sup> Similarly, Vulpinia's silence and total inaction regarding the Antarctic Treaty amounts to its approval of the treaty regime and its recognition of Leonia's *locus standi* to seek redress for damages to the Antarctic environment.

3. Leonia, As A Signatory To The Law Of The Sea Convention, Has *Locus Standi* To Bring A Claim For Damage To The High Seas.

If Antarctica were a traditional State, the waste, that was disposed within twelve miles from its coast, would have been disposed of in its territorial sea.<sup>35</sup> However, because Antarctica is non-sovereign territory administered by a treaty regime, it has no territorial sea and no 200-mile exclusive economic zone.<sup>36</sup> Consequently, the outer limits of Antarctica are the edge of the ice shelves and the waters that border

---

<sup>31</sup> *Id.* at 57 (Anzilotti, J., concurring).

<sup>32</sup> *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 39 (Judgment of 12 Apr.).

<sup>33</sup> *Id.* at 39.

<sup>34</sup> *Id.*

<sup>35</sup> See United Nations Convention on the Law of the Sea, art. 3, done 10 Dec. 1982, U.N. Doc. A/CONF.62/122 [hereinafter UNCLOS III].

<sup>36</sup> See *id.* art. 57; see also Joyner, *supra* note 17, at 725.

Antarctic ice are part of the high seas<sup>37</sup> and fall under the auspices of the Law of the Sea Convention.<sup>38</sup> This analysis is reinforced through resort to the Antarctic Treaty which governs the area south of 60° South Latitude except with regard to the high seas within that area.<sup>39</sup> Were UNCLOS III in effect, *locus standi* would be conferred upon the Authority or an international legal entity established thereunder.<sup>40</sup> As an interim measure to permit redress of Vulpinia's breaches of international law, Leonia is best situated to bring this action for damage to the high seas, known as the Area,<sup>41</sup> and governed under the principle that the Area's resources are "the common heritage of mankind."<sup>42</sup>

B. VULPINIA IS LIABLE FOR THE ILLEGAL ACTIONS OF ITS NATIONALS.

The hazardous wastes were initially placed on the Stella Maris ice shelf by Dr. Detritus, a Vulpinian national, and were ultimately vented into Antarctic waters by Vulpinian officials under the direct supervision of the Vulpinian government. Well-recognized principles of international law attribute responsibility to Vulpinia for the acts and omissions of its nationals.<sup>43</sup>

1. Detritus' Illegal Traffic In Hazardous Waste Is Imputable To Vulpinia.

Generally, States are not liable for transnational injurious conduct by private

---

<sup>37</sup> Joyner, *The Southern Ocean and Marine Pollution: Problems and Prospects*, 17 Case W. Res. J. Int'l L. 165, 179 (1985).

<sup>38</sup> UNCLOS III, *supra* note 35, art. 86.

<sup>39</sup> Antarctic Treaty, *supra* note 2, art. VI.

<sup>40</sup> UNCLOS III, *supra* note 35, art. 215. *See also South West Africa*, *supra* note 11.

<sup>41</sup> UNCLOS III, *supra* note 35, art. 1, para. 1(1).

<sup>42</sup> *Id.* art. 136; *see also* Larschan & Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 Colum. J. Transnat'l L. 305, 320-26 (1983).

<sup>43</sup> A. Springer, *The International Law of Pollution* 128 (1983).

individuals.<sup>44</sup> This proposition is, however, inapplicable when the transnational damage is the result of recognizably hazardous activities.<sup>45</sup> Traffic in toxic wastes, specifically those disposed of by Detritus' company, is a recognized ultra-hazardous activity.<sup>46</sup> Therefore, Vulpinia violated international law merely by allowing the export of the hazardous wastes which originated inside Vulpinia's territorial jurisdiction.

2. The Hazardous Wastes Were Dumped In Antarctic Waters By Vulpinian Officials.

Vulpinia bears international responsibility for the acts committed by its officials which were delictual under international law.<sup>47</sup> Responsibility is imputed to Vulpinia regardless of whether the officials acted within the limits of their competency or exceeded their authority.<sup>48</sup> It is undisputed that when the hazardous wastes were dumped in Antarctic waters, the ship, the *Arianna*, was operated by Vulpinian officials under the auspices of the Vulpinian government pursuant to the agreement entered into with Leonia.<sup>49</sup> Vulpinia is clearly liable for this international delict.

C. VULPINIA BREACHED CUSTOMARY INTERNATIONAL LAW BY DISPOSING OF HAZARDOUS WASTES IN ANTARCTICA.

Vulpinia's attempt to transform the continent of Antarctica into a hazardous waste disposal site violates customary international law. Custom, the oldest and the original

---

<sup>44</sup> Handl, *International Liability of States for Marine Pollution*, 21 Can. Y.B. Int'l L. 85, 108 (1983).

<sup>45</sup> *Id.* at 109.

<sup>46</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Annex I, done 22 Mar. 1989, reprinted in 28 I.L.M. 649 [hereinafter Basel Convention]; Clarifications to *Compromis*, para 2.

<sup>47</sup> L. Henkin, R. Pugh, O. Schachter, & H. Smit, *International Law* 527 (2d ed. 1987).

<sup>48</sup> *Id.*

<sup>49</sup> *Compromis* at 4.

source of international law,<sup>50</sup> is evidence of a general practice accepted as law.<sup>51</sup> Accordingly, customary international law is binding when there is a common practice among States as well as a consent to be bound to the practice by those States, or *opinio juris*.<sup>52</sup>

1. Customary International Law Provides For The Protection Of The Environment.

Customary international law mandates protection of the environment and imposes strict liability on States that cause damage to the environment. The genesis of this rule in case law can be found in the *Trail Smelter Arbitration* where the Tribunal stated that "no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another [State.]"<sup>53</sup> This rule has been extended to require that no State may conduct activities originating in its own territorial jurisdiction that impact adversely on the environment beyond its jurisdiction.<sup>54</sup> The Arbitral Tribunal found that a lead and zinc smelter operated by a Canadian corporation had caused damage to the lumber industry in the State of Washington through emissions of highly noxious fumes.<sup>55</sup> Significantly, the Tribunal imputed responsibility to the Dominion of Canada for damages incurred by a private entity.<sup>56</sup>

---

<sup>50</sup> L. Oppenheim, 1 *International Law, Peace* 25-26 (H. Lauterpacht 8th ed. 1955).

<sup>51</sup> Statute of the I.C.J., *supra* note 1, art. 38, para. (1)(b).

<sup>52</sup> See *Fisheries Jurisdiction* (U.K. v. Ice.), 1972 I.C.J. 12 (Interim Protection Order of 17 Aug.). See also Charney, *International Agreements and the Development of Customary International Law*, 61 Wash. L. Rev. 971, 983-84 (1986).

<sup>53</sup> *Trail Smelter Arbitration* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905, 1965 (1941).

<sup>54</sup> United Nations Conference on the Human Environment, Principle 21, A/CONF. 48/14 (1972) [hereinafter Stockholm Declaration].

<sup>55</sup> *Trail Smelter*, *supra* note 53, at 1945.

<sup>56</sup> *Id.* at 1965.

Other arbitral decisions have based their reasoning on this rule. In the *Gut Dam Arbitration*, the Tribunal found Canada liable for all flood damage due to the construction and operation of a dam in the St. Lawrence River.<sup>57</sup> The *Lake Lanoux Arbitration* entailed a claim by Spain against France for France's planned diversion of water from a river in which the two countries shared riparian rights and the replacement of the diverted water from a French river.<sup>58</sup> While ultimately holding for France, the Tribunal stated that any detrimental change in any characteristic of the water that could injure Spanish interests would form the basis for relief.<sup>59</sup> In another case, this Court expressed concern over transboundary pollution by entering an Interim Protection Order requiring France to desist in conducting nuclear tests in the South Pacific that caused radioactive fallout in Australia.<sup>60</sup>

Vulpinia's actions violate Principle 21 of the Stockholm Declaration which specifically states that nations have the responsibility to ensure that State activities do not damage the environment "of areas beyond the limits of national jurisdiction."<sup>61</sup> Significantly, the Stockholm Declaration was unanimously commended by the U.N. General Assembly.<sup>62</sup> This Court has expressed the view that certain resolutions of the U.N. should be

---

<sup>57</sup> *Gut Dam Arbitration* (U.S. v. Can.), reprinted in 8 I.L.M. 118, 138 (1969).

<sup>58</sup> *Lake Lanoux Arbitration* (Spain v. Fr.), reprinted in 53 Am. J. Int'l L. 156, 159 (1959).

<sup>59</sup> *Id.* at 160-61.

<sup>60</sup> *Nuclear Tests* (Austl. v. Fr.), 1973 I.C.J. 99, 106 (Interim Protection Order of 22 June).

<sup>61</sup> *Supra* note 54, Principle 21 (emphasis added).

<sup>62</sup> *International Responsibility of States in Regard to the Environment*, G.A. Res. 2996, 30 U.N. GAOR Supp. (No. 38), U.N. Doc. A/8730 (1972).

regarded as declaratory of customary international law.<sup>63</sup> Furthermore, numerous U.N. resolutions have expressed concern for and called for the protection of the environment.<sup>64</sup> This consistent practice and ratification by the world community of a State's obligation to prevent environmental damage outside its territorial limits is evidence that Vulpinia is bound by this rule of customary international law.

2. Treaties Regulating And Protecting The Environment Are Evidence Of Customary International Law.

Numerous treaties have been enacted that provide for the protection of the environment and the majority of these treaties devote particular attention to preservation of the Antarctic environment.<sup>65</sup> This Court has stated unequivocally that the treaty process can generate customary international law.<sup>66</sup> To create customary international law, the treaty provisions in question must be of a fundamental "norm-creating character such as could be regarded as forming the basis of a general rule of law."<sup>67</sup> Treaties calling for protection of the environment in general and, specifically, the Antarctic environment clearly establish substantive norms; the benefits of which inure to all mankind.

The Basel Convention, regulating transboundary movements of hazardous wastes,

---

<sup>63</sup> *Western Sahara*, 1975 I.C.J. 12, 30-31 (Advisory Opinion of 16 Oct.).

<sup>64</sup> See U.N. Doc. E/4466/Add. 1 (1968); U.N. ECOSOC Res. 1345, U.N. ECOSOC Supp. 1, at 8, U.N. Doc. E/4561 (1968); G.A. Res. 2398, 23 GAOR Supp. 18, at 2, U.N. Doc. A/7218 (1968).

<sup>65</sup> See, e.g., Convention on the Conservation of Antarctic Marine Living Resources, art. II, done 7 May 1980, T.I.A.S. No. 10240 (sole objective is conservation of Antarctica's living resources); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art. I, opened for signature 29 Dec. 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165 (outlaws marine dumping detrimental to human health and marine life); Basel Convention, *supra* note 46.

<sup>66</sup> *North Sea Continental Shelf* (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Judgment of 20 Feb.).

<sup>67</sup> *Id.* at 42.

explicitly prohibits the disposal of any waste south of 60° South Latitude.<sup>68</sup> The underlying premise of the Convention is that the generator of hazardous wastes bears ultimate responsibility<sup>69</sup> if hazardous wastes are disposed of in an environmentally unsound manner.<sup>70</sup> Vulpinia's damage to the Antarctic occurred prior to the final draft of the Convention, and as a signatory, Vulpinia would not normally be bound to a treaty on a retroactive basis.<sup>71</sup> However, a State should undertake an evaluation process before obligating itself to a treaty. The fact that Vulpinia signed the treaty less than two months after the wastes were dumped in Antarctic waters<sup>72</sup> is ample evidence that Vulpinia accepted the provisions of the treaty and regarded the provisions as valid statements of international law. Further, the wastes were included in the Annex to the Basel Convention and Vulpinia's assertion that it has not violated international law amounts to a breach of the principle of *pacta sunt servanda*.<sup>73</sup>

Whether this Court regards Vulpinia's actions to be a violation of a substantive norm created by a treaty or a violation of customary international law as evidenced by the numerous treaties regulating the environment is immaterial to the final result: the unauthorized transboundary shipment of hazardous wastes and its subsequent disposal in Antarctica amounted to a breach of customary international law by Vulpinia.

---

<sup>68</sup> Basel Convention, *supra* note 46, art. 4, para. 6.

<sup>69</sup> *Id.* at Preamble.

<sup>70</sup> *Id.* art. 4, para. 8.

<sup>71</sup> Treaty on Treaties, *supra* note 4, art. 28. Basel Convention, *supra* note 46, art. 25, para. 1 (Basel Convention does not provide for retroactive effect.)

<sup>72</sup> Clarifications to *Compromis*, para. 9.

<sup>73</sup> B. Cheng, *General Principles of Law* 106 (1987).

D. VULPINIA'S DISPOSAL OF HAZARDOUS WASTES IN ANTARCTIC WATERS VIOLATES THE OBJECT AND PURPOSE OF THE LAW OF THE SEA CONVENTION.

In addition to codifying international law regarding utilization of international waterways and the high seas, UNCLOS III also imposed duties on all signatories to prevent and to minimize marine pollution.<sup>74</sup> The government of Vulpinia signed the treaty and is obligated to prevent activities contrary to the treaty's object and purpose.<sup>75</sup>

1. Vulpinia, The Flag State, Is Responsible For The Actions Of Its Nationals.

UNCLOS III imposes conservation duties on flag States.<sup>76</sup> Under the Convention, the flag State bears international responsibility for any damage or loss occasioned by any government ship operated for non-commercial purposes that violates the Convention or any rule of international law.<sup>77</sup> The hazardous wastes were dumped in Antarctic waters by Vulpinian officials under the authorization of the Vulpinian government. This clearly brings the actions of the *Arianna's* crew, and the government of Vulpinia, within the proscription of the Convention. Vulpinian approval of the action, whether tacit or express, defeats the object and purpose of UNCLOS III.

2. Under The Convention, All States Have The Duty To Reduce And Control Marine Pollution.

UNCLOS III imposes affirmative duties on States to protect and preserve the marine

---

<sup>74</sup> UNCLOS III, *supra* note 35, arts. 117, 145, 192, 194, & 210.

<sup>75</sup> Treaty on Treaties, *supra* note 4, art. 18.

<sup>76</sup> UNCLOS III, *supra* note 35, art. 94, para 4(c) (to prevent and to control marine pollution); art. 117 (to conserve the living resources of the high seas).

<sup>77</sup> *Id.* art. 31.

environment.<sup>78</sup> Because Vulpinia has not ratified UNCLOS III, it cannot be required to perform any affirmative acts under the treaty. However, Vulpinia cannot turn a blind eye to any actions that defeat the object and purpose of the treaty on the part of Vulpinian officials. The initial placement of the sealed drums of waste was obviously inadequate as evidenced by the volatility of the chemicals following a year's time and the resultant damage to the storage drums. Dr. Detritus, Vulpinia's leading expert on hazardous waste disposal with an international reputation in the field, should have foreseen the effects of the chemicals on the storage drums.

Rather than undertaking efforts to forestall any further pollution from the damaged drums, Vulpinian nationals dumped admittedly toxic wastes into Antarctic waters, and for ten days following the discharge, the Vulpinians engaged in a chess tournament. Such irresponsible actions clearly defeat the purpose of the Convention. The presence of Leonian observers does not change this result as observers have no power to influence decisions aboard foreign ships.<sup>79</sup>

E. VULPINIA'S DISPOSAL OF HAZARDOUS WASTE IN ANTARCTICA VIOLATE PRINCIPLES OF INTERNATIONAL LAW.

General principles of law under this Court's statute<sup>80</sup> are those principles found in the majority of the municipal law systems of the world.<sup>81</sup> This Court unequivocally stated that a State's obligation not to allow its territory to be used in any manner contrary to the rights of other States is a well-recognized principle of international

---

<sup>78</sup> *Id.* art. 192; *see also* art. 145 (to prevent, reduce, and control pollution and other hazards to the marine environment); art. 194, para. 3 (to minimize dumping of toxic substances); art. 194, para. 5 (to protect and preserve fragile ecosystems).

<sup>79</sup> *Id.* art. 96.

<sup>80</sup> Statute of the I.C.J., *supra* note 1, art. 38, para. 1(c).

<sup>81</sup> Cheng, *supra* note 73, at 3.

law.<sup>82</sup> This principle is based on the Roman Law doctrine of *sic utere tuo ut alienum non laedas*.<sup>83</sup>

Vulpinia violated this principle through its constructive knowledge of Dr. Detritus' activities regarding the export and disposal of hazardous wastes.<sup>84</sup> Detritus' illegal export of the wastes, a violation of international law in and of itself, is immediately imputable to Vulpinia.<sup>85</sup> Further, the fact that the export was ostensibly legal under Vulpinian municipal law is juridically irrelevant.<sup>86</sup> Vulpinia remains liable on an international level for its violation of general principles of law.

F. VULPINIA IS BOUND BY ITS AGREEMENT EXPRESSED IN THE DIPLOMATIC NOTE.

On 2 February 1988, the Vulpinian Minister of Foreign Affairs dispatched a diplomatic note to his Leonian counterpart agreeing to recover all 100 drums of hazardous waste and to "re-establish the situation that previously existed."<sup>87</sup> The Permanent Court of International Justice, when addressing a similar declaration made by the Norwegian Foreign Minister to the Danish government, held that replies by government officials in response to requests by foreign powers are binding upon the State that made the declaration.<sup>88</sup> The binding effect of government declarations stems

---

<sup>82</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Judgment of 9 Apr.).

<sup>83</sup> Oppenheim, *supra* note 50, at 291 (use your own property so as not to injure the property of another).

<sup>84</sup> *See supra* notes 43-49 and accompanying text.

<sup>85</sup> Cheng, *supra* note 73, at 170.

<sup>86</sup> *Id.* at 180.

<sup>87</sup> *Compromis* at 4.

<sup>88</sup> *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 71 (Judgment of 5 Apr.).

from the fact that the official made the declaration with "regard to a question falling within his province...."<sup>89</sup> Minister Fox of Vulpinia occupies the same position as Minister Ihlen of Norway and, accordingly, Vulpinia is bound by the declaration to restore Antarctica to its original state.

When interpreting such binding notes, the correspondence must be judged as a whole and individual expressions are not dispositive.<sup>90</sup> Therefore, Vulpinia's statement that the note was without prejudice to their legal position is overridden by the clear intention of the note as a whole in which Vulpinia, in effect, conceded responsibility for the damage. The note has the character of a legal undertaking that requires Vulpinia to follow a course of action consistent with its declaration.<sup>91</sup> Further, the note was registered with the United Nations in accordance with Charter obligations.<sup>92</sup> Consequently, Vulpinia is bound by its unilateral assumption of responsibility to restore the Antarctic environment.

## II. VULPINIA IS RESPONSIBLE FOR ALL ENVIRONMENTAL DAMAGE RESULTING FROM THE STELLA MARIS INCIDENT.

"International responsibility is immediately incurred by a state, which, by an act imputable to it, has violated a rule of international law."<sup>93</sup> Vulpinia's ultimate responsibility for the Stella Maris incident must be based upon the standard of strict liability. Strict liability should be applied in this case because Detritus' activities are

---

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 54.

<sup>91</sup> *Nuclear Tests, supra* note 14, at 267; *see also Temple of Preah Vihear* (Cambodia v. Thailand), 1961 I.C.J. 4, 31 (Judgment of 15 June).

<sup>92</sup> U.N. Charter art. 102; Clarifications to *Compromis*, para. 4.

<sup>93</sup> Cheng, *supra* note 73, at 170.

imputable to Vulpinia,<sup>94</sup> and such acts are properly regarded as ultra-hazardous. Furthermore, general principles of law<sup>95</sup> require utilization of a strict liability standard for extra-territorial damage resulting from such activities.<sup>96</sup>

A. VULPINIA IS LIABLE FOR ITS ULTRA-HAZARDOUS ACTIVITIES.

In addition to conventional and customary law, international law may also be found in the general principles of law recognized by civilized nations.<sup>97</sup> Article 38 of the Statute of the I.C.J. also provides that judicial decisions and teachings of the most highly qualified international publicists are subsidiary means for the determination of international law.<sup>98</sup>

1. Strict Liability For Ultra-hazardous Activities Is A General Principle Of Law Recognized By Civilized Nations.

The principle of strict liability has its roots in ancient law, and was the liability standard applied long before any fault-based standard was theorized.<sup>99</sup> Indeed, it is apparent that strict liability in tort is a universal principle found to some degree in the modern legal systems of civilized states.<sup>100</sup> Therefore, it is in fact a general

---

<sup>94</sup> See *supra* Part I. B.

<sup>95</sup> Statute of the I.C.J., *supra* note 1, art. 38, para. 1(c).

<sup>96</sup> See Handl, *supra* note 44.

<sup>97</sup> Statute of the I.C.J., *supra* note 1, art. 38, para. 1(c).

<sup>98</sup> *Id.* para. 1(d).

<sup>99</sup> See, e.g., L. Beauchet, 4 *Histoire Du Droit Privé De La République Athénienne* 384-405 (1969); 11 *Code of Mainmonides (Book of Torts)* (H. Klein trans. 1954); A. Diamond, *Primitive Law Past and Present*, 95-96, 341, 396 (1971); *Hammurabi Code*, arts. 195-246 (Edwards trans. 1904).

<sup>100</sup> Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law and Comparative Law*, 62 *Tul. L. Rev.* 1303, 1309 (1988); see also GK RSFSR 1964 (Civil Code) § 454 (Soviet Union); C. civ. art. 1384 (France); Restatement (Second) of Torts § 519 (1965) (United States).

principle of law within the meaning of the Statute of the I.C.J.

The imposition of strict liability for ultra-hazardous activities in modern municipal law finds its foundation in the English case of *Rylands v. Fletcher*.<sup>101</sup> In *Rylands*, the defendants had constructed a reservoir on their premises for the purpose of aiding their business enterprise. While it was not unlawful for the defendants to construct the reservoir, and although they had qualified contractors and engineers overseeing the project, the defendants were held responsible for the subsequent flooding of an adjacent landowner's property. The House of Lords based its decision upon the fact that the defendants had put their land to a non-natural use by constructing the reservoir and collecting such a great amount of water and stated "that which the Defendants were doing they were doing at their own peril."<sup>102</sup> If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.<sup>103</sup>

In this case, it is clear that the ongoing business activities of Detritus in Vulpinia are indeed ultra-hazardous. The possibility of immense environmental harm resulting from the disposal of such "highly corrosive and explosive"<sup>104</sup> wastes is self-evident. For the purpose of furthering his enterprise Detritus dumped 100 drums of toxic waste on the Stella Maris ice shelf. A number of the drums contained chemicals at least

---

<sup>101</sup> L.R. 1 H.L. 330 (1868).

<sup>102</sup> *Id.* at 341.

<sup>103</sup> Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. Pa. L. Rev. 298, 310 (1911).

<sup>104</sup> *Compromis* at 5.

presently agreed by the parties as being hazardous waste.<sup>105</sup> Thus, upon the dumping of the hazardous waste in Antarctica and despite any precautions it may have taken, Vulpinia immediately became responsible for any damage.

2. International Case Law Evidences Acceptance Of Strict Liability For Ultra-hazardous Activities.

In *Trail Smelter*,<sup>106</sup> the Arbitral Tribunal held the Dominion of Canada responsible for the environmental damage caused by pollution originating from a private Canadian smelter. Although the direct responsibility of Canada was determined prior to the parties' submission of the case to the Tribunal,<sup>107</sup> Canada's strict liability was made clear when the tribunal stated that "no State has the right to use or permit the use of its territory in such a manner as to cause injury"<sup>108</sup> to persons or property beyond its territory. Therefore, although the Canadian corporation which owned and operated the smelter utilized the most technologically advanced equipment of the time, the Tribunal did not inquire into the reasonableness of the corporation's precautions. Hence, liability arose solely because of the causal connection between the act and the consequences.<sup>109</sup>

Similarly, it has been argued that this Court recognized a strict liability standard<sup>110</sup>

---

<sup>105</sup> See Basel Convention, *supra* note 46, Annex I; Clarifications to *Compromis*, para. 2.

<sup>106</sup> *Supra* note 53.

<sup>107</sup> *Trail Smelter*, *supra* note 53, at 1945.

<sup>108</sup> *Id.* at 1965.

<sup>109</sup> *Id.*

<sup>110</sup> Schneider, *State Responsibility for Environmental Protection and Preservation*, reprinted in *International Law: A Contemporary Perspective* (R. Falk ed. 1985).

in *Corfu Channel*.<sup>111</sup> In that case the Albanian Government's acquiescence to a non-natural use of its territorial waters gave rise to liability for all damage to British warships stemming from that non-natural, inherently dangerous use.<sup>112</sup> There, as in *Trail Smelter*, the Court did not require any showing of negligence on the part of Albania. The Court's decision was based solely upon Albania's knowledge of the existence of the ultra-hazardous activity (i.e., undersea mines) and the causal connection with the injuries suffered.

3. Public Policy Necessitates The Imposition Of Strict Liability For Ultra-Hazardous Activities.

It must be recognized that the rapid technological advances of modern society require the development of law to meet the changing needs posed by these advances. As succinctly stated by Professor Jenks "[i]nternational law should not be a limited body of specific rules, but a body of living principle and developing precedent growing with the needs of the international society."<sup>113</sup> The international community has foreseen the need to recognize strict liability for previously unknown ultra-hazardous activities created by technological development. For example, the State which launches a space object is held strictly liable for any damage caused by such object.<sup>114</sup> Similarly, States operating nuclear ships are strictly liable for nuclear damage caused by an accident involving nuclear fuel or wastes from the ship.<sup>115</sup> Furthermore, the

---

<sup>111</sup> *Supra* note 82.

<sup>112</sup> *Id.* at 23.

<sup>113</sup> Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 *Recueil des Cours* 99, 177 (1966).

<sup>114</sup> Convention on International Liability for Damage Caused by Space Objects, *done* 29 March 1972, art. 2, 2 U.S.T. 2839, T.I.A.S. No. 7762.

<sup>115</sup> Brussels Convention on the Liability of Operators of Nuclear Ships, *done* 25 May 1962, art. 2 *reprinted in* 57 *Am. J. Int'l L.* 268.

most recent draft of the Antarctic Minerals Convention<sup>116</sup> imposes strict liability on the sponsoring State for environmental damage to Antarctica.<sup>117</sup> The mere fact that the probability of immense environmental damage arising from disposal of industrial toxins is a relatively recent predicament of the international community is not a sufficient reason to absolve a State of liability for damage caused by the irresponsible dumping of such material.

Furthermore, because humanity is responsible for the protection and preservation of the environment for present and future generations,<sup>118</sup> the necessity for imposing strict liability when environmental damage results from ultra-hazardous activities is apparent. The imposition of such liability would clearly cause States to institute more stringent domestic laws and international agreements to guard against accidents like the one which is the center of the present controversy, thus achieving the purpose of providing for the protection and preservation of the environment for present and future generations.

4. Alternatively, Vulpinia Is Responsible Even Under A Fault-Based Standard.

In the alternative, if a fault-based standard is employed by this Court, then Vulpinia is still liable because of the lack of due diligence on the part of both Vulpinia and Detritus. If, as some commentators have urged,<sup>119</sup> the Court's decision in *Corfu Channel*<sup>120</sup> was premised upon a fault-based standard of liability, then Vulpinia would

---

<sup>116</sup> Convention on the Regulation of Antarctic Mineral Resource Activities, Doc. AMR/SCM/88/78, *open for signature* 2 June 1988, *reprinted in* 27 I.L.M. 868 (1988).

<sup>117</sup> *Id.* art. 8, para. 2(c).

<sup>118</sup> *Report of the U.N. Conference on the Human Environment*, 11 I.L.M. 1416 (1972).

<sup>119</sup> See, e.g., Handl, *supra* note 44, at 96. See also Weiss, *Who Pays for Weather Modification Damage*, 4 *Envtl. L. & Pol'y* 22, 23 (1978).

<sup>120</sup> *Supra* note 82.

be held liable for their failure to regulate the ultra-hazardous activities of Detritus which originated in Vulpinia.

Detritus was negligent in his choice of containers for storage of the toxic material. The fact that the chemical wastes seriously damaged the drums is sufficient proof of Detritus' negligence in failing to utilize proper storage receptacles. Furthermore, Detritus' agents should have been prepared to recover the damaged receptacles from Antarctica, as the damage to the storage drums was reasonably foreseeable to a hazardous waste expert.

As noted, when applying a fault-based standard of liability the harm which results from the incident must have been foreseeable by the wrongdoer.<sup>121</sup> If the subsequent harm (i.e., environmental damage) is one which is naturally expected from the original act (i.e., placing toxic waste in Antarctica) and there is no independent cause of the subsequent harm, then the author of the original act is responsible for the ultimate harm.<sup>122</sup> Therefore, regardless of whether the Court imposes a strict liability standard or a fault-based standard in this case, Vulpinia has an obligation to take remedial measures and to provide reparations for the injury to the Antarctic environment caused in the Stella Maris incident.

**B. VULPINIA MUST TAKE THE NECESSARY REMEDIAL MEASURES AND PROVIDE APPROPRIATE REPARATIONS.**

It is a principle of international law that every breach of right gives rise to an obligation to make reparations.<sup>123</sup> In addition, States responsible for environmental harm have an obligation to reduce the extent of such harm through remedial

---

<sup>121</sup> *Angola (Port. v. Ger.)*, 2 R. Int'l Arb. Awards 1011, 1031 (1928)

<sup>122</sup> *See Maninat (Fr. v. Venez.)*, 1905 Ralston's Rep. 44, 77.

<sup>123</sup> *Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (Judgment of 26 July).

measures.<sup>124</sup>

1. Vulpinia Must Institute Further Remedial Measures To Determine And Abate The Environmental Damage.

By virtue of the exchange of diplomatic notes, Vulpinia engaged in a necessary first step to remedy the situation created by its national in that it agreed to reestablish the situation that existed prior to Detritus' experiment and to recover the toxic waste. While Vulpinia will argue that its remedial acts were merely *ex gratia*, the obligation to continue its efforts to remedy the situation are nevertheless apparent.<sup>125</sup> Vulpinia must now take further remedial measures consistent with international law.

In order to determine the proper remedial measures and reparations, the actual degree of harm to the Antarctic environment must first be determined. The extent of environmental harm may only be determined by experts in the field of Antarctic marine biology. Therefore, a multi-national committee of experts should be empaneled by the Court to assess the environmental damage and the ultimate degree of harm caused by the extinction of the *asteroid echinoderm*. Leonia proposes that the Court utilize the wealth of knowledge and organizational framework already established; that is, the Court should request the assistance of the Scientific Committee on Antarctic Research (SCAR)<sup>126</sup> in implementing this research project.

The Committee should prepare a report of their findings to be submitted to the Court in order for the Court to finalize its determination of this case. A longitudinal study of this type has been ordered by tribunals in the past and is a recognized

---

<sup>124</sup> Baxter, *Draft Articles on International Liability for the Injurious Consequences of Acts Not Prohibited by International Law*, art. I, [1984] 2 Y.B. Int'l L. Comm'n 77 (vol. II).

<sup>125</sup> *Nuclear Tests*, *supra* note 14, at 267.

<sup>126</sup> See SCAR Constitution, *reprinted in 1 Antarctica and International Law* 5, 6 (1982).

principle of international law.<sup>127</sup>

2. Vulpinia Must Provide Reparations For Its Breach Of Right.

The determination of the reparations to be provided by a State responsible for damage arising out of a breach of international law requires an inquiry into how to best "wipe out all of 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>128</sup> If such restitution is not possible, then the Court should attempt to ascertain an amount of money damages which would correspond to the value which such restitution would bear,<sup>129</sup> or some alternative form of necessary reparations.

Since returning the Antarctic environment to its previously pristine state is highly unlikely, alternative forms of reparation must be identified. Leonia proposes that following completion of the Committee's report on the environmental harm caused by Detritus' experiment, the Court determine an amount of money damages which corresponds to the value of such environmental damage. Leonia further proposes and pledges that in the event such monetary damages are awarded, that any damages awarded be paid to Leonia in a managerial capacity to be placed into a trust for the purpose of Antarctic scientific research and environmental protection and preservation.

Furthermore, in order to demonstrate to the international community that this Court and the international community will not tolerate any environmental damage, Leonia requests that Vulpinia be ordered to fund the Committee's undertaking, and provide an apology and acknowledgement of wrongdoing.

---

<sup>127</sup> *Trail Smelter*, *supra* note 53, at 1966; *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 22 (Judgment of 13 Sept.); *Corfu Channel*, *supra* note 82, at 36.

<sup>128</sup> *Factory at Chorzów*, *supra* note 127, at 47.

<sup>129</sup> *Id.*

## CONCLUSION

For the reasons stated above, Leonia respectfully requests this Honorable Court to:

- I. Declare that Leonia's claim is admissible.
- II. Declare that Vulpinia is responsible for a breach of right pertaining to Leonia through Vulpinia's violation of international law.
- III. Declare that Vulpinia is under an obligation to take remedial measures and to make reparations for injury to the Antarctic environment.
- IV. Authorize a longitudinal study to determine the extent of damage to the Antarctic ecosystem.

Respectfully submitted,

TEAM 85A