Written memorial on behalf of the State of Rosmarus

(Applicant)

in

The case concerning sovereignty over Abundantia Ridge and other matters

(Rosmarus v. Urusus)

Registration Number

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Since the transport by Rosmarus to Beluga did not take place through the territory of Urusus, Urusus cannot be considered a transit State in the sense of the Basel Convention. Therefore, Rosmarus was under no obligation to notify Urusus of its shipping activities.

III. URUSUS IS RESPONSIBLE FOR THE DAMAGE TO MARINE LIFE THAT RESULTED FROM THE DYNAMITE EXPLOSION AND RESULTING LEAK OF 1 SEPTEMBER 2008, IN PARTICULAR, DAMAGE TO COD AND POLLACK STOCKS ON THE HIGH SEAS ABOVE ABUNDANTIA RIDGE AND WITHIN ROSMARUS’S OWN TERRITORIAL WATERS; AND IS LIABLE TO PAY COMPENSATION FOR THE TOTALITY OF THE DAMAGE.

A. ROSMARUS HAS A LEGAL INTEREST IN INVOKING URUSUS’ RESPONSIBILITY FOR THE TOTALITY OF THE DAMAGE.

A State must have a legal interest in the outcome of a case when invoking another State’s responsibility before the ICJ.\(^{36}\) Such a legal interest exists in case of (1) an injury or (2) a breach of an obligation owed to the international community as a whole.\(^{37}\)

1. Rosmarus may be considered an injured State with respect to the damage done in its territorial waters.

The concept of an injured State, which is central to the invocation of responsibility, includes situations where the breach of multilateral treaty obligations, such as under UNCLOS, specifically affects a State party.\(^{38}\) Specifically, a coastal State is affected by a

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\(^{36}\) Northern Cameroons (Cameroon v. UK), 1963 ICJ 15, 33-34 (Judgement, Dec. 2); S.S. “Wimbledon” (Great Britain, France, Italy, Japan v. Germany), 1923 PCIJ (Ser. A) No. 1, 6, 20 (Judgement, June 28); Article 31(2), ILC Articles on State Responsibility.


breach of the obligation to prevent pollution of the marine environment under Article 194
UNCLOS when it is specially damaged by pollution.\textsuperscript{39}

As will be shown, Urusus violated its obligations under UNCLOS and the FSA and thereby caused damage to marine life, in particular cod and pollack, which, during certain times of the year, are within Rosmarus territorial waters. Thus, with regard to the damage within its territorial waters, Rosmarus is specially affected and an injured State.

2. Rosmarus may invoke Urusus’s responsibility for a violation of \textit{erga omnes} obligations on the high seas.

With regard to obligations owed to the international community as whole, the ICJ has held in the \textit{Barcelona Traction Case} that such obligations (obligations \textit{erga omnes}) are by their very nature the concern of all States which therefore all have a legal interest in their protection.\textsuperscript{40} As confirmed by the ILC, the obligation to protect the marine environment is of an \textit{erga omnes} character.\textsuperscript{41}

Therefore, by damaging marine life, in particular cod and pollack stocks on the high seas, Urusus violated an \textit{erga omnes} obligation for which Rosmarus has the right to invoke responsibility like any other State.

B. URUSUS IS RESPONSIBLE FOR VIOLATIONS ATTRIBUTABLE TO IT.

\textsuperscript{39} Military and Paramilitary Activities in and Against Nicaragua (Provisional Measures) (Nicaragua v. U.S.) 1984 ICJ 169, 198 (Order, May 10); East Timor (Portugal v. Australia), 1995 ICJ 90, 102 (Judgment, June 30); Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, 257 (Advisory Opinion, July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 136, 199 (Advisory Opinion, July 9); Armed Activities on the Territory of the Congo (D.R.C. v. Uganda), 2005 ICJ paras. 39-40 (Separate Opinion, Simma, Dec. 19).

\textsuperscript{40} Article 48, ILC Articles on State Responsibility; Fitzmaurice, \textit{Liability for Environmental Damage Caused to the Global Commons}, 5 Review of European Community & International Environmental Law 305, 307 (1996); C. Tams, \textit{Enforcing Obligations Erga Omnes in International Law}, 120 (2005).
A State incurs international responsibility when its acts or omissions constitute a breach of an international obligation and this conduct is attributable to it under international law.\textsuperscript{42}  

1. **Urusus has violated its obligation to protect the marine environment and to prevent pollution with due diligence under UNCLOS.**

According to Article 192 UNCLOS and reaffirmed by ITLOS, States parties have the general obligation to protect the marine environment.\textsuperscript{43} More specifically, Article 194 UNCLOS requires States parties to take all necessary measures to prevent, reduce and control pollution of the marine environment. As was shown above,\textsuperscript{44} the requirement to undertake such measures is particularly emphasized by UNCLOS in fragile environments such as the Arctic.\textsuperscript{45} In determining which measures are necessary to protect and preserve the marine environment in a specific context, UNCLOS has adopted the standard of due diligence.\textsuperscript{46} This standard requires measures to be appropriate and proportional to the degree of risk of transboundary harm in a particular instance, considering inter alia the location, special climate conditions and materials used in an activity. To satisfy this standard, UNCLOS obliges State parties to prepare the aforementioned EIA, in accordance with international rules and


\textsuperscript{44} Part II. C of the Argument.

\textsuperscript{45} Article 194(5), UNCLOS.

standards.\textsuperscript{47} Such international standards may be ascertained from a series of international conventions.\textsuperscript{48} Additionally, States shall cooperate in eliminating the effects of pollution and prevent or minimize damage by developing contingency plans for responding to pollution incidents in the marine environment.\textsuperscript{49}

The arctic Grotius Sea is a habitat of threatened cod and pollack species. Urusus has neither implemented an EIA prior to its exploration, drilling and CCS activities on the Abundantia Ridge nor has it developed a contingency plan to respond to events comparable to those of September 1\textsuperscript{st}. The drilling site was only recently put into operation. Due diligence was highly warranted due to the lack of experience of any State with drilling activities in the recently frozen Grotius Sea. Moreover, environmental and meteorological circumstances, such as regional conditions, the threatened State of fish stocks, as well as winds and currents add further emphasis to the requirement of due diligence. If the necessary care had been undertaken, potentially dangerous drilling activities would have been suspended in times of strong winds and currents and at the critical spawning season periods for cod and pollack. Furthermore, Urusus failed to notify Rosmarus or any international body of its intention to

\begin{footnotesize}
\textsuperscript{48} Convention on the Protection of the Marine Environment of the Baltic Sea Area; Convention for the Protection of the Mediterranean Sea Against Pollution; Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution; Convention for Co-operation in the Protection and Development of the Marine Coastal Environment of the West and Central African Regions; Convention on Regional Co-operation in Combating Pollution of the South-East Pacific by Oil and Other Harmful Substances in Cases of Emergency; Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment; Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil.
\textsuperscript{49} Article 199, UNCLOS.
\end{footnotesize}
undertake exploration and exploitation activities on the seabed. Consequently, Urusus violated UNCLOS obligations to prevent pollution and protect the marine environment.

2. **Urusus violated its obligations under the FSA to minimize pollution and waste.**

   While the FSA mainly provides for measures concerning fishing activities, it also imposes the obligation on States to minimize pollution and waste for the preservation of the marine environment.\(^\text{50}\) The preservation of straddling and highly migratory fish stocks, the object and purpose of the FSA, is inextricably linked with non-fisheries activities such as the preservation of the marine environment.\(^\text{51}\)

   The exploration and drilling by Urusus on the subsoil of the Abundantia Ridge affects straddling and highly migratory fish of the Grotius Sea. This damage caused on the high seas materializes within the territorial sea of Rosmarus. Urusus failed to undertake an EIA and consequently also failed to take the necessary measures to fulfill its obligations under the FSA to minimize pollution and waste.

C. **URUSUS IS LIABLE TO PAY COMPENSATION FOR THE TOTALITY OF THE DAMAGE CAUSED BY IT.**

   Any internationally wrongful act entails the obligation of the wrongdoing State to eliminate the totality of the consequences of the illegal act and to reestablish the situation which would have existed if the act had not been committed.\(^\text{52}\) Where restitution is impossible

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\(^{52}\) *S.S. “Wimbledon”* (U.K., France, Italy, Japan v. Germany), 1923 PCIJ 16 (Ser.A) No. 1, 7, 30 (Judgement, June 28); *Factory at Chorzów* (Merits) (Germany v. Poland), 1928 PCIJ 5 (Ser.A) No. 17, 5, 29 (Judgement, Sept. 13); *Phosphates in Morocco* (Preliminary Objection) (Italy v. France), 1938 PCIJ 5 (Ser.A/B) No. 74, 10, 28 (Judgement, June 14); *Corfu Channel* (Merits) (U.K. v. Albania), 1949 ICJ 4, 23 (Judgement., April 9); *Gabčíkovo-Nagymaros*
or insufficient the wrongdoing State must pay full compensation for all financially assessable damage which in the ordinary course of events would not have occurred without the unlawful act. The ICJ held that there must be a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered. This causal nexus has a factual and legal element. Factual causation may be demonstrated by showing a clear and direct causal link between the respective conduct and the harm incurred. The requirement of legal causation is met when the internationally unlawful act is a foreseeable and proximate cause for the damage, the latter implying vicinity in time. An explosion in an offshore oil rig can be reasonably anticipated,

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53 *Corfu Channel* (Merits) (U. K. v. Albania), 1949 ICJ 4, 17-18 (Judgement, April 9); *Cape Horn Pigeon* (U.S. v. Russia), 9 RIAA 51, 65 (Award, Oct. 29, 1902); *Spanish Zone of Morocco* (Spain v. UK), 2 RIAA 615, 647 (Award, July 31, 1925); J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, 201-206, 218-230 (2002).


as evidenced by the regular occurrence of numerous incidents, including explosions, on offshore oil sites.\textsuperscript{58}

The incident on September 1\textsuperscript{st} consisted in an explosion which “caused large amounts of oil to be released from the rig and the subsurface of the Abundantia Ridge”.\textsuperscript{59} This leak caused severe and lasting damage to the fragile arctic marine environment of the Grotius Sea, in particular to the threatened stocks of cod and pollack on the high seas and within Rosmarus’s territorial waters. Urusus not only disregarded its obligation to undertake an EIA prior to commencing seabed activities but also failed to take into account the particular arctic conditions and threatened habitat of cod and pollack in the area. An EIA could have led to preventive measures in case of an accident on the oil rig. Thus, there is a direct causal link between the conduct of Urusus and the totality of the damage. The requirement of legal causation is also met, since the damage was an immediate result of the explosion and, in the light of the risks involved in offshore drilling, could have been reasonably anticipated. The damage to stocks of cod and pollack eradicated a whole generation of fish whose existence would have been of critical importance to already overexploited stocks. The damage occurred at their respective critical spawning times and therefore resulted in an irreparable reduction of stocks which requires the payment of compensation. Thus, Urusus is responsible for the totality of the damage and under the obligation to pay compensation for the totality of the financially assessable damage.


\textsuperscript{59} Para. 12, \textit{Compromis}. 
IV. URUSUS HAS FAILED TO MEET ITS INTERNATIONAL LAW OBLIGATIONS TO CONTROL THE ACTIVITIES OF ITS FISHING VESSELS IN ROSMARUS’S EEZ.

A. URUSUS VIOLATED ITS OBLIGATIONS UNDER UNCLOS TO CONTROL THE FISHING ACTIVITIES OF ITS VESSELS IN THE EEZ OF ROSMARUS.

1. Urusus fishing activities in Rosmarus EEZ without Rosmarus consent were unlawful.

According to Article 56 (1)(a) of the UNCLOS, the Coastal State has the sovereign right to exploit, conserve and manage all living natural resources in its EEZ, including migratory and straddling species.\textsuperscript{60} Use of these resources shall not reach a level which results in over-exploitation.\textsuperscript{61} Therefore, the coastal State shall have the absolute powers to determine the total allowable catch (TAC),\textsuperscript{62} taking into account the best scientific data available and its harvesting capacity; only if the TAC exceeds its own harvesting capacities shall the coastal State, through agreements, allocate to other States a share of the surplus.\textsuperscript{63} This obligation of a coastal State is to be understood as a \textit{pactum de contrahendo} and merely gives other States the right to enter into negotiations about access to an available surplus and not a right to exploit such a surplus unilaterally.\textsuperscript{64}

Rosmarus expressed its concerns that fish stocks are nearly depleted. Moreover, Rosmarus has not allocated any fishing quotas to Urusus and no negotiations on this matter

\textsuperscript{60} Article 64(2), UNCLOS; J. Yturriaga, \textit{The International Regime of Fisheries}, 128-129 (1997).

\textsuperscript{61} Article 61(2), UNCLOS.

\textsuperscript{62} J. Yturriaga, \textit{The International Regime of Fisheries}, 117 (1997).

\textsuperscript{63} Article 62(2), UNCLOS.

\textsuperscript{64} J. Yturriaga, \textit{The International Regime of Fisheries}, 118 (1997).
have taken place. Therefore, Urusus’s fishing activities in Rosmarus’ EEZ without Rosmarus’s consent were unlawful.

2. **Urusus failed to have due regard to Rosmarus’s sovereign rights and failed to control its fishing vessels in Rosmarus’s EEZ.**

   UNCLOS obliges other States to have due regard to the rights and duties of the coastal State in its EEZ and comply with the laws and regulations adopted by the coastal State. 65 The flag State is obliged to control its fishing vessels to prevent unilateral fishing activities in other States’ EEZ, since a State must enforce UNCLOS duties with regard to their citizens and the vessels flying its flag. 66 This obligation to control fishing vessels in a foreign EEZ is also in conformity with the sovereign equality of States and mutual respect enshrined in the UN Charter. 67 Furthermore, this interpretation of UNCLOS was overwhelmingly endorsed by UN member States. 68

   Urusus has not taken any measures to prevent vessels flying its flag from fishing illegally in Rosmarus’s EEZ and thus undermined the sovereign powers of Rosmarus to ensure the proper and sustainable exploitation of the living maritime resources in its EEZ. Therefore, Urusus has violated its obligations under UNCLOS.

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B. URUSUS HAS VIOLATED ITS OBLIGATIONS UNDER ARTICLE 18 OF THE FISH STOCKS AGREEMENT TO CONTROL ITS FISHING VESSELS.  

Where it is specifically provided for, the FSA applies to areas under national jurisdiction.69 Accordingly, Article 18(b)(iv) requires the flag State to take measures to ensure that vessels flying its flag do not conduct unauthorized fishing in areas under the national jurisdiction of other States. Furthermore, the wording of Article 18 evidences that these duties apply not only to vessels fishing for straddling and migratory species, but to any fishing activities.70

Rosmarus repeatedly alerted Urusus about the illegal fishing activities in Rosmarus’s EEZ. This should have signaled to Urusus that specific measures were called for to prevent vessels flying its flag from fishing in Rosmarus’s EEZ without Rosmarus’s consent. However, Urusus has not taken any such measures. Therefore, Urusus has violated Article 18 (b)(iv) of the FSA.

C. ROSMARUS’S SEIZURE OF THE VESSEL MARIA WAS A NECESSARY RESPONSE TO URUSUS’S FAILURE TO CONTROL ITS FISHING VESSELS.

1. By seizing Maria, Rosmarus complied with its own obligations under the FSA

The principle of the precautionary approach adopted by the FSA, which also applies to areas under national jurisdiction,71 governs the conservation of straddling and migratory fish stock.72 It requires States to advance with caution where information is uncertain.73 As this

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69 Article 3(1), FSA.


71 Article 3(1), FSA.

72 Article 6(1), FSA.

principle concerns cases where information is lacking, no scientific proof of danger is needed for it to apply.74 Where there is the possibility of damage to the marine environment because of overfishing, States involved are under the obligation to adjust their fishing activities by preventing overfishing and taking effective protection measures,75 not only against their own vessels, but against all vessels, wherever encountered.76

Rosmarus expressed concern about the danger of over-exploitation and depletion and, because Urusus failed to report data on a regular basis, was uncertain about the State of migratory fish stocks in the Grotius Sea. Therefore, the application of the precautionary approach was called for, which Urusus has failed to adopt, since it has not taken any appropriate protective measures. After numerous complaints about fishing activities undertaken by vessels flying the Urusus’s flag, Rosmarus has taken steps to prevent overfishing and thus fulfilled its obligations under the Fish Stock Agreement by seizing Maria, a vessel which was detected fishing illegally within Rosmarus’s EEZ.

2. **Furthermore, the seizure of Maria was in accordance with the requirements for exercising the right of hot pursuit under UNCLOS.**

UNCLOS grants the coastal State authorities the right to pursue a vessel from its territorial waters or its EEZ into the high seas when there is a good reason to believe that the vessel has violated national laws and regulations.77 The element of good reason to believe lies

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77 Article 111(1), (2), UNCLOS.
between mere suspicion and actual knowledge and needs to be assessed *ex ante* on a case-by-case basis.\(^78\) The pursuit may be commenced after a visual or auditory signal to stop has been given and the enforcing authorities have satisfied themselves that the vessel is within the limits of the EEZ.\(^79\) The purposes of the signal are to inform the crew of the vessel that it is pursued by coastal State authorities and to give them the opportunity to stop and await inspection.\(^80\) However, when there is an indication that the suspected vessel has no intention to await inspection, giving a signal to stop becomes a mere formality and is not required.\(^81\)

The coast guard exactly determined the vessel Maria’s position within Rosmarus’s EEZ, which was engaged in unauthorized and therefore illegal fishing. Moreover, officers of the coast guard had good reason to believe that Maria was using trawl nets prohibited under Rosmarian domestic law.\(^82\) This belief was based on good reason since Maria was fishing without authorization and escaped towards the High Sea as soon as the coast guard vessel approached it, indicating that the vessel was trying to avoid boarding and inspection.

Therefore, the coast guard was not required to give a signal prior to commencement of pursuit. The vessel was pursued without interruption and seized on the high seas.

The specific right of hot pursuit must be interpreted in the light of general international law which provides that the use of force must not go beyond what is reasonable and

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79 Article 111(4), UNCLOS.


82 Para. 25, *Clarifications to the Compromis*. 
necessary. ITLOS found that the Guinean authorities involved in the arrest of the crew of the M/V Saiga, which was illegally fishing in a foreign EEZ, applied excessive force because when on deck of the ship, they indiscriminately used gunfire to stop the engines, thereby seriously injuring two crew members.

In contrast, the force applied by the Rosmarus coast guard was precisely targeted: Only one crew member of the impounded vessel was injured while attempting to resist his arrest. Neither the remaining crew members nor the vessel itself were in any way harmed. Thus, the force used in seizing Maria did not go beyond what is reasonable and necessary. Consequently, the seizure of Maria was in accordance with the requirements for exercising the right of hot pursuit.

V. URUSUS, BY ACTING CONTRARY TO OR BY FAILING TO ACT IN ACCORDANCE WITH ARTICLES 1 AND 2 OF THE TREATY OF FRIENDSHIP AND COOPERATION IN FISHING MATTERS OF 1962, HAS VIOLATED THE SPIRIT AND PURPOSE OF THAT TREATY, AS WELL AS THE OBLIGATIONS DERIVING THEREFROM.

While Article 4 of the VCLT reaffirms the general rule of non-retroactivity of treaties the ICJ has stated that Articles 31 and 32 of the VCLT can generally be considered as reflecting pre-existing rules of customary international law. In the Kasikili Sedudu Island

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83 Article 293, UNCLOS; M/V Saiga (No. 2), (St. Vincent v. Guinea), 1999 ITLOS, 38 ILM 1323 (1999), para. 155 (Judgment, July 1); A. Cassese, International Law, 88 (2nd ed., 2005).

84 M/V Saiga (No. 2) (St. Vincent v. Guinea), 1999 ITLOS, 38 ILM 1323, paras. 158, 159 (Judgement, July 1).

85 The Mavrommatis Palestine Concessions Case (Greece v. Britain), 1924 PCIJ (Ser. A), No. 2, 35 (Judgement, Aug. 30); A. Aust, Modern Treaty Law and Practice, 8 (2nd ed., 2007).

86 Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 ICJ 38, 6, para. 41 (Judgment, Feb. 3).