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THE 2003 STETSON INTERNATIONAL ENVIRONMENTAL
MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

Case Concerning Driftnet Fishing in the North Ocean

NEW MADIERA

APPLICANT

V

THE REPUBLIC OF ORLANDO

RESPONDENT

SEPTEMBER 2003

On Submission to the International Court of Justice

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Governments of New Madiera and the Republic of Orlando have agreed to submit by Special Agreement the present dispute for final resolution by the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court. The parties have further agreed to accept the Judgment of the Court as final and binding upon them and to execute it in its entirety and in good faith. Neither party has entered any reservations.

TABLE OF QUESTIONS PRESENTED

1. Whether the vessels of New Madiera may legally conduct driftnet fishing operations in the North Ocean with nets greater than 2.5 kilometres in length.
2. Whether the Republic of Orlando may lawfully restrict new Madiera's access to the North Ocean fishery.

STATEMENT OF FACTS

New Madiera is an island nation situated in the North Ocean. The Republic of Orlando's eastern coastline borders the North Ocean.

New Madiera is a small, developing nation. It is a newly independent state, having regained its sovereignty from the Commonwealth of Socialist States (CSS) on 1 January 2003. It is a member of the United Nations, and a party to the Convention on Biological Diversity.

The Republic of Orlando is a large, developed nation. It is a member of the United Nations. It is a party to the Law of the Sea Convention, the UN Fish Stocks Agreement, and the Vienna Convention on the Law of Treaties, and is a member of the Food and Agriculture Organisation. It is a signatory to the Convention on Biological Diversity.

Fisheries operations in the North Ocean are regulated by the North Ocean Fisheries Organisation (NOFO). There are primarily sixteen states that conduct high seas fisheries in the North Ocean. New Madiera is the only one of those states that is not a member of NOFO.

In January 2001 NOFO passed a regulation prohibiting the use of driftnets longer than 2.5 kilometres in the high seas of the North Ocean. Thirteen members of NOFO (including the Republic of Orlando) voted in favour of this measure; the CSS and the Kingdom of DeLand abstained. Both the CSS and the Kingdom of DeLand subsequently submitted formal objections to NOFO's driftnet measure, exempting them from the restriction under the constitution of NOFO.

From February 2001 to December 2002, CSS vessels, operated out of New Madiera, used driftnets in the high seas of the North Ocean up to 2.0 kilometres in length. On 15 January 2003 Bluepeace, an international non-governmental organisation, reported that a fishing vessel from New Madiera (the *Dickerson*) was using a driftnet 3.0 kilometres in length.

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On 22 January the Government of Orlando forwarded a diplomatic note in protest. It requested that the Government of New Madiera enter into consultations with the Republic of Orlando and the other members of NOFO with respect to the use of large-scale pelagic driftnets. It observed that New Madiera's reported driftnet fishing practices were inconsistent with its international obligations.

An exchange of diplomatic correspondence followed between the Governments of New Madiera and the Republic of Orlando. New Madiera denied that it was in breach of any international obligation, and asserted that its vessels have used and will continue to use driftnets in excess of 3.0 kilometers on the high seas of the North Ocean with the express permission of the Government. The Republic of Orlando asserted that it had a responsibility to deny access by such vessels to the North Ocean fishery, and that it would use all necessary means, including the use of its navy, to do so.

After continued discussions, on 2 May 2003 the Government of New Madiera and the Government of Orlando agreed to submit this matter to the International Court of Justice.

During the pendency of this matter before the Court, New Madiera agreed that its fishing vessels will only use driftnets up to 2.0 kilometres in length. The Republic of Orlando agreed that it would not restrict the access of New Madiera's vessels to the North Ocean Fishery.

SUMMARY OF PLEADINGS

A. The Driftnet fishing practices of New Madiera are illegal under international law.

The freedom of fishing on the high seas is subject to a state's obligations under customary international law. States have a duty to take all necessary measures for the conservation of the living resources of the high seas, and to cooperate and negotiate with other states exploiting the same resources towards this end.

There is a customary international law prohibition on driftnets exceeding 2.5 kilometres in length. This is encapsulated in the text of nine UN General Assembly Resolutions over the past decade prohibiting large-scale driftnets. It is confirmed by substantial state practice prohibiting driftnets longer than 2.5 kilometres. New Madiera's fishing practices are not in conformity with this legal norm.

Furthermore, in the North Ocean a regional customary norm has developed whereby high seas fishing states are obliged to cooperate with the North Ocean Fisheries Organisation (NOFO). This duty entails a choice for states: either join and participate in NOFO, or simply apply its agreed regulatory measures. This regional elaboration of the general duty to cooperate is reflected in the practice of other states throughout the international community. New Madiera is in breach of this customary obligation to cooperate with other states in the conservation and management of the limited resources of the high seas.

Moreover, New Madiera is in breach of its duty to take such measures for its nationals as may be necessary for the conservation of the living resources of the high seas. States have the responsibility to ensure that activities within their control do not cause damage to the environment of other areas beyond the limits of national jurisdiction. Environmental protection requires states take a precautionary approach to ecosystem management. New Madiera's North Ocean fisheries policy pays no regard to its obligation to conserve this shared resource.

B. The Republic of Orlando may lawfully restrict New Madiera's access to the North Ocean fishery.

Enforcement powers are required to uphold international law in the North Ocean. In the absence of enforcement, illegal driftnetting will continue unabated, decimating this vital shared resource. Modern international law gives force to environmental norms (such as the prohibition on North Ocean driftnetting) by allowing enforcement measures by interested states. This is evidenced by the practice of member states of RFMOs around the world.

The Republic of Orlando is willing and able to shoulder the responsibility of protecting the shared resources of the North Ocean from illegal fishing practices. It may legitimately take necessary steps, including the use of its navy, to restrict the access of illegal fishing vessels to this vulnerable fishery.

Alternatively, the Respondent's proposed actions are justified by ecological necessity. Ecological necessity is accepted as a valid justification in international law.

A situation of necessity exists where an essential interest of the invoking state is in grave and imminent peril. Protection of the marine environment constitutes an essential interest of all nations. The biodiversity of the North Ocean is crucial to the ecological balance of the Respondent's territorial waters.

The North Ocean fishery is in grave and imminent peril. Illegal fishing practices with no regard to regionally agreed limitations will inevitably drive fish stocks into collapse.

Necessity justifies taking the only effective and proportional means available. Restricting illegal fishing activities is the measure of last resort available to the Republic of Orlando in the face of New Madiera's blunt refusal to comply with its international obligations. Restricting the access of illegal fishing vessels is exactly proportional to New Madiera's breach of its international obligations. The importance of the imperilled interest justifies such measures

PLEADINGS

***I THE DRIFTNET FISHING PRACTICES OF NEW MADIERA ARE
ILLEGAL UNDER INTERNATIONAL LAW***

A There are contemporary limitations on high seas fishing

Freedom of fishing on the high seas is not absolute. The traditional international law doctrine of *mare liberum*, based on the belief that the sea could provide an inexhaustible source of nutrition, has evolved to recognise the necessity to impose limitations on the use of common resources.¹ Modern customary international law recognises that high seas fishing is limited by obligations and duties on fishing states. Primarily these comprise the duties to take all necessary measures for the conservation of the living resource of the high seas,² and to cooperate and negotiate with other states exploiting the same resource.³

These limitations on states freedom of high seas fishing have also been encapsulated in the United Nations Convention on the Law of the Sea.⁴ The Law of the Sea Convention is “becoming the constitution of the world ocean”,⁵ and its fisheries provisions are generally accepted by most states to reflect customary international law.⁶ Under the Convention, freedom to fish on the high seas is subject to the rights,

¹ Jeremy Faith, ‘Enforcement of Fishing Regulations in International Waters: Piracy or Protection, is Gunboat Diplomacy the Only Means Left?’ (1996) 19 *Loyola of Los Angeles International and Comparative Law Journal* 199, 200.

² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, art 116 (entered into force 16 November 1994). [Hereafter the Law of the Sea Convention].

³ Law of the Sea Convention, art 117.

⁴ Law of the Sea Convention, art 116.

⁵ Erik Franckx, ‘Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea’ (2000) 8 *Tulane Journal of International and Comparative Law* 49.

⁶ David Balton, ‘Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks’ (1996) *Ocean Development and International Law* 125, 30.

duties and interests of coastal states, and to the duties of conservation, cooperation and negotiation enunciated above.⁷

B New Madiera is in breach of the customary international law prohibition on the use of large-scale pelagic driftnets.

Customary international law prohibits the use of driftnets longer than 2.5 kilometres on the high seas. This binding custom is encapsulated in nine United Nations General Assembly (UNGA) Resolutions over the past decade prohibiting large-scale driftnets. The Resolutions are the “written embodiment of a measure that is independently legally binding.”⁸

Furthermore, there is a wealth of state practice evidencing the normative status of the driftnet prohibition initiated and supported by the UN. The practice of states establishes that driftnets used in high seas shall not exceed 2.5 kilometres. This widespread convention is today legally binding.

1. The UNGA Driftnet Resolutions are declaratory of the prohibition on driftnets exceeding 2.5 kilometres.

This Court has referred to UNGA Resolutions in its advisory opinion on the *Western Sahara*.⁹ A consistent series of resolutions can lead to new binding rules of customary international law.¹⁰ Resolutions can “provide evidence important for establishing the existence of a rule or the emergence of an *opino juris*”¹¹ Resolutions are able to increase the momentum of customary law, fast tracking the legalisation of

⁷ Law of the Sea Convention, arts 87 (2), 116, 117 and 118.

⁸ Grant Hewison, ‘The Legally Binding Nature of the Moratorium on Large-Scale Pelagic Driftnet Fishing’ (1994) 25 *Journal of Maritime Law and Commerce* 557, 572.

⁹ [1975] ICJ Rep 12, 31 – 37.

¹⁰ Statute of the International Court of Justice, art 38 (1) (b); Malcolm Shaw, *International Law* (4th ed, 1998) 92.

¹¹ *Legality of the threat or use of Nuclear Weapons (Advisory Opinion)* [1986] ICJ Rep 14, 102.

the state practice and allowing a “speedier adaptation of customary law to the conditions of modern life.”¹²

Repetitive voting by nations in favour of a principle provides evidence of consistent state practice over a number of years. This Court, in *Nicaragua v United States*,¹³ has held that state parties’ acts of consenting to resolutions “may be understood as acceptance of the validity of the rule or rules declared by the resolution by themselves.”¹⁴

They can also indicate the emergence of an *opinio juris* towards the norm. As this Court has opined series of resolutions “may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”¹⁵

Nine UNGA resolutions on driftnet fishing have been adopted from 1992 to 2003.¹⁶ This consistent adoption reconfirms the importance of driftnet fishing to the global community. In 1989, the UNGA called for a moratorium on “all large scale pelagic driftnet fishing” by 1992. Following this, the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific¹⁷ was concluded, and entered into force in 1991. The resolutions have remained constant and have been adopted by consensus.¹⁸ This can be distinguished from the advisory opinion *Legality of the threat or use of Nuclear Weapons* where this court held resolutions not to be binding

¹² Malcolm Shaw, *International Law* (4th ed, 1998)91.

¹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 4 p14.

¹⁴ *Nicaragua v US* [1986] ICJ Rep 4, p100.

¹⁵ *Legality of the threat or use of Nuclear Weapons (Advisory Opinion)* [1986] ICJ Rep 14, 102.

¹⁶ GA res: A/RES/46/215, A/RES/49/116, A/RES/49/118, A/RES/50/25, A/RES/ 51/36, A/RES/52/29, A/RES/53/33, A/RES/55/8.

¹⁷ Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 29 ILM 1454 (1990).

¹⁸ Grant Hewison, ‘The Legally Binding Nature of the Moratorium on Large-Scale Pelagic Driftnet Fishing’ (1994) 25 *Journal of Maritime Law and Commerce* 557.

as they lacked focus, consensus and were not as numerous.¹⁹ The ban on driftnet fishing was reaffirmed in 2002.²⁰

The Arbitral Tribunal in *Texaco v Libya* held that “[r]efusal to recognise any legal validity of United Nations Resolutions must, however, be qualified, according to the various texts enacted by the United Nations. These are very different and have varying legal value.”²¹

The UN Driftnet Resolutions have a significant normative value. Their constancy, repetition and general acceptance accord them a substantial status, evidencing the longevity and consistency of state practice and opinion. They are important indicators of the rapidly crystallizing customary prohibition on the use of large-scale driftnets on the high seas.

2. Widespread state practice reinforces the customary international law prohibition on driftnets longer than 2.5km.

The practice of states establishes that driftnets used on the high seas shall not exceed 2.5 kilometers. The Commission for the Conservation of Antarctic Marine Living Resources adopted resolution 7/IX on large-scale pelagic driftnet fishing, which prohibits driftnets longer than 2.5km in length. The Latin American Organisation for Fisheries Development adopted resolution no. 076-CM on the prohibition of the use of driftnets. The General Fisheries Commission for the Mediterranean adopted binding resolution 97/1 concerning the use of large-scale pelagic driftnet gear. This was defined as “driftnets whose individual total length is more than 2.5 km.”

Large fishing regions such as the European Union have adopted a ban on driftnet fishing with nets longer than 2.5km in length. The European Commission has taken

¹⁹ *Legality of the threat or use of Nuclear Weapons (Advisory Opinion)* ICJ Reports [1986] 14, 102.

²⁰ *Large scale pelagic driftnet fishing, unauthorized fishing in zones of national jurisdiction and on the high seas/illegal, unreported, and unregulated fishing, fisheries by-catch and discards and other developments*, GA res 142, UN GAOR, 57th sess, UN Doc A/RES/57/142 (2003).

²¹ *Texaco Overseas Petroleum v Libyan Arab Republic* [1977] 53 ILR 389 para 83.

measures to restrict and restructure the Italian Fishing fleet which has, until recently, insisted upon using driftnets greater than 2.5 km in length. A ban on the use of driftnets for the fishing was adopted by the Council in June 1998, and entered into force on 1 January 2002. Council directive 97/29/EC states that the use of driftnets over 2.5 km in length is illegal under European Community law.

3. New Madiera's driftnet practices breach this international legal norm.

The use of driftnets in excess of 2.5 kilometers is a breach of customary international law. The Driftnet resolutions correspond with the practice and opinion of states. New Madiera has expressed, through diplomatic correspondence, its intention to continue using driftnets in excess of 2.5 kilometers in length, in the North Ocean:

The Government of New Madiera can also confirm that a fishing vessel from New Madiera has used and will continue to use a driftnet of 3.0 kilometers in length on the high seas of the North Ocean. This vessel does so with the express permission of the Government of New Madiera.²²

Such driftnet fishing practices are not in conformity with international law.

C New Madiera is in breach of a regional customary obligation to cooperate with NOFO

1. There are general international law obligations to cooperate and negotiate with other interested states regarding shared natural resources.²³

This duty is an inherent limitation on states' freedom of fishing on the high seas.²⁴ It is a customary international law obligation that is codified in Article 118 of the Law

²² Government of New Madiera, *Diplomatic Note to the Government of Orlando* (14 February 2003).

²³ Alexandre Kiss and Dinah Shelton, *International Environmental Law* (2nd ed, 2000), 259; William T Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994), 103-104; *Lac Lanoux Arbitration (France v Spain)* [1957] 24 ILR 101, 119; *North Sea Continental Shelf* [1969] ICJ Rep 3 46-7.

of the Sea Convention. The duty to cooperate and negotiate is “particularly applicable to the resolution of conflicts of rights and interests with respect to the conservation and management of the living resources of the high seas.”²⁵

It is true that the obligation to negotiate does not imply an obligation to reach an agreement.²⁶ However states *are* obliged to conduct negotiations in good faith, paying reasonable regard to the rights and interests of other states.²⁷

2. In the North Ocean the duties of cooperation and negotiation have developed into a regional customary norm that fishing states will cooperate with NOFO.

This Court has accepted the notion that regional customs may have binding force in international law.²⁸ The content of this custom is a binding obligation upon all states conducting fisheries on the North Ocean High Seas: either join and participate in NOFO, or simply apply its agreed regulatory measures.

The uniform state practice in the North Ocean is that states join NOFO. The Applicant is the only North Ocean fishing state that is not a member of NOFO. Prior to this year, every North Ocean fishing state was a member of NOFO, and it may reasonably be inferred that this uniform practice was informed by a sense of regional obligation.

The shared fisheries resources of the North Ocean need effective cooperation between all interested states. NOFO is the vehicle that achieves this. Thus in the North Ocean fishing states are obliged to cooperate in the NOFO forum.

²⁴ *Fisheries Jurisdiction Case (Merits)* [1974] ICJ Rep 31, paras 75 & 78.

²⁵ Dolliver Nelson ‘The Development of the Legal Regime of the High Seas Fisheries’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 114, 121.

²⁶ *Railway Traffic between Lithuania and Poland*, PCIJ, series A/B, No 42, 116.

²⁷ *North Sea Continental Shelf* [1969] ICJ Rep 3, 85; *Lac Lanoux Arbitration (France v Spain)* [1957] 24 ILR 101,128.

²⁸ *Asylum Case (Columbia / Peru)* [1950] ICJ Rep 266; 17 ILR 280; See also Ian Brownlie, *Principles of Public International Law* (5th ed, 1998), 72.

This duty upon North Ocean fishing nations does not impinge state sovereignty. No member of NOFO is bound to rules against its will as any party may exercise the ‘opt out’ prerogative. However for states to exercise this they must join the forum and participate in the rule-making process. If new members of NOFO are bound by their existing regulations, they bear no more onerous a burden than newly independent states that are born into the existing customary international legal framework.²⁹

There is a solid policy basis behind this regional customary norm. Members of NOFO endure significant sacrifice by complying with its regulations. This is for the benefit of all North Ocean fishing nations. Allowing free-riders to fish freely outside the conservation regime will undermine states’ initiative to agree to such restrictions.³⁰

3. New Madiera cannot invoke the ‘persistent objector’ doctrine because this regional customary norm crystallised before its independence.

To invoke the persistent objector exception, and thus not be bound by a customary norm, the state must have objected from the very moments the practice began to crystallise into law.³¹ This Court has recognized that new principles of customary international law may crystallize in a short time.³² In the North Ocean region, the customary norm of cooperation with NOFO had crystallised prior to this year when New Madiera gained independence.

4. This regional duty to cooperate with NOFO reflects international practice.

Modern international fisheries law has coalesced the duty to cooperate and negotiate around the focal point of Regional Fisheries Management Organisations (RFMOs).

²⁹ Ian Brownlie, *Principles of Public International Law* (5th ed, 1998), 72.

³⁰ Jean-Pierre Ple ‘Responding to Non-member Fishing in the Atlantic: The ICCAT and NAFO Experiences’ in Harry N Scheiber, *The Law of the Sea* (2000) 207, 208.

³¹ *Anglo-Norwegian Fisheries* [1951] ICJ Rep 116; 18 ILR 86.

³² *North Sea Continental Shelf* [1969] ICJ Rep 3; 41 ILR 29.

The Law of the Sea Convention refers to regional fisheries organisations as an appropriate vehicle for states to focus their obligations of cooperation and negotiation.³³

The UN Fish Stocks Agreement encapsulates the development of this policy. Article 8(4) provides that where regional fisheries organisations manage an area of the high seas, only states that are members of the organisation may access the particular resource. The Fish Stocks Agreement has widespread support throughout the international community. It was negotiated and adopted by consensus, including all the major distant water and coastal fishing states,³⁴ and now has enough ratifications to enter into force.³⁵ The UN General Assembly has repeatedly called for states to ratify or provisionally accept the agreement.³⁶

The FAO Compliance Agreement reiterates the importance of RFMOs.³⁷ Article III(1)(a) provides that all states must ensure that their flag vessels on the high seas do not undermine the effectiveness of regional fisheries measures.

These agreements encapsulate the development of the general customary duties codified in the Law of the Sea Convention. They elaborate and give content to the previously non-specific obligations of high seas fishing states.

5. There is widespread practice of such regional organisations applying their regulations to all states fishing in the region.

Members of the International Commission for the Conservation of Atlantic Tuna impose trade embargoes on non-members whose vessels engage in fishing practices

³³ art 118; Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), 126.

³⁴ Patricia Birnie and Alan Boyle, *International Law and the Environment* (2nd ed, 2001), 673.

³⁵ Lawrence Juda, 'Rio Plus-Ten: The Evolution of International Marine Fisheries Governance' (2002) *Ocean Development and International Law* 109, 122.

³⁶ GA res: 50/24; 51/35; 52/28; 54/31; 55/8.

³⁷ *Food and Agriculture Organisation Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, (not yet in force).

that diminish the effectiveness of ICCAT measures.³⁸ The North East Atlantic Fisheries Commission,³⁹ Northwest Atlantic Fisheries Organisation⁴⁰ and the Commission for the Conservation of Antarctic Marine Living Resources⁴¹ impose port-state controls, refusing non-members' vessels from landing catches caught in contravention of the organisation's rules in member ports. The WCPT Convention⁴² and the South East Asian Fisheries Organisation Convention⁴³ place an obligation on members to take measures to deter the activities of non-party vessels that undermine the effectiveness of conservation and management measures.

This practice is evidence of a mounting body of international opinion that free-riders who undermine the effectiveness of regional conservation measures should no longer be tolerated. Such actions are in accordance with the Law of the Sea Convention and the evolving customary norms limiting high seas freedoms.⁴⁴

6. New Madiera is in breach of its regional customary obligation to cooperate with NOFO.

In accordance with the developing international custom, North Ocean fishing states are obliged to join NOFO or comply with its regulations. New Madiera is not a

³⁸ International Commission for the Conservation of Atlantic Tuna (ICCAT) Bluefin Tuna Action Plan 1994; Similar sanctions in ICCAT Swordfish Action Plan 1995. In Jean-Pierre Ple 'Responding to Non-member Fishing in the Atlantic: The ICCAT and NAFO Experiences' in Harry N Scheiber, *The Law of the Sea* (2000) 207, 200 – 201.

³⁹ North East Atlantic Fisheries Commission *Non-Contracting Party Scheme* <<http://www.neafc.org/>> at 19 September 2003.

⁴⁰ Northwest Atlantic Fisheries Organisation *Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO* <<http://www.nafo.ca/activities/FRAMES/AcFrFish.html>> at 19 September 2003.

⁴¹ Commission for the Conservation of Antarctic Marine Living Resources *Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures* <<http://www.ccamlr.org/pu/E/pubs/cm/02-03/10-07.pdf>> at 19 September 2003.

⁴² The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art 32 (1).

⁴³ The South East Asian Fisheries Organisation Convention, art 22 (3).

⁴⁴ Jean-Pierre Ple 'Responding to Non-member Fishing in the Atlantic: The ICCAT and NAFO Experiences' in Harry N Scheiber, *The Law of the Sea* (2000) 207.

member of NOFO. Its fishing practices contravene its regulations. This conduct is a breach of the applicant's duty to cooperate with NOFO.

D New Madiera is in breach of its general duty to conserve marine resources.

1. There is a fundamental international obligation to conserve marine resources.

A general duty to conserve the marine environment restricts high seas freedoms. Where previously open access prevailed, and conservation had a secondary role, the issue of conservation is now prominent.⁴⁵

Fishing states have a duty to take such measures for their nationals as may be necessary for the conservation of the living resources of the high seas.⁴⁶ All states have the responsibility to ensure that activities within their control do not cause damage to the environment of areas beyond the limits of national jurisdiction.⁴⁷ This duty of environmental protection requires states take a precautionary approach to ecosystem management.⁴⁸

Conservation of the living resources of the high seas is an essential interest of the international community.⁴⁹ There is an increased reliance on fish stocks, and as populations increase, so does the demand for accessible food supplies. The notion that conservation of fisheries is paramount was highlighted by this Court in the *Fisheries Jurisdiction Case*⁵⁰ noting, “The former laissez-faire treatment of the living resources

⁴⁵ Olav Schram Stokke (ed) *Governing High Seas Fisheries, the interplay of global and regional regimes* (2001) 26.

⁴⁶ Law of the Sea Convention art 117.

⁴⁷ Stockholm Declaration Principle 21; Rio Declaration on Environment and Development, Aug. 12, 1992, 31 I.L.M. 874, Principle 2.

⁴⁸ Rio Declaration on Environment and Development, Aug. 12, 1992, 31 I.L.M. 874 Principle 15.

⁴⁹ D Nelson ‘The development of the legal regime of the high seas fisheries,’ in A. Boyle and D. Freestone (eds). *International Law and sustainable development, past achievements and future challenges*. (1999), 128.

⁵⁰ *Fisheries Jurisdiction Case (UK v Iceland)* [1974] ICJ Rep 31 para 72.

of the high seas has been replaced by... the need of conservation for the benefit of all.”

2. New Madiera’s driftnet fishing practices breach this international duty.

The ecological implications of driftnets are significant. Driftnets are unselective, and capture of a wide range of non-target species. This is wasteful as many of the species are disregarded and a large drop out occurs while it is being hauled.⁵¹ Juxtaposed to this, sustainable fisheries are sustainable because they are very focused fisheries, catching the target species and little else. They are generally active, not passive fisheries where waste and by-catch is minimal.⁵² Large-scale pelagic driftnet fishing is not a sustainable practice. Therefore limits are required to minimize the ecological impact. Such limitations are inherent in states’ duty of conservation.

New Madiera’s fisheries practices breach its general duty of conservation. There is no evidence that New Madiera places any limits on the driftnet activities of its nationals. By adopting a ‘laissez-faire’ approach to fisheries management, new Madiera exposes the environment of the North Ocean to irreparable damage. Far from the precautionary approach required by modern international law New Madiera chooses to allow its national to driftnet effectively unrestricted, irregardless of the possible irreparable long-term damage to the North Ocean ecology.

⁵¹ FAO Report, *‘Driftnet fisheries and their impact on non target species: a worldwide review.’* (1991) <www.fao.org/DOCREP/003/T0502E/> (last accessed 19 September 2003).

⁵² FAO Report, *‘Driftnet fisheries and their impact on non target species: a worldwide review.’* (1991) <www.fao.org/DOCREP/003/T0502E/> (last accessed 19 September 2003).

III THE REPUBLIC OF ORLANDO MAY LAWFULLY RESTRICT NEW MADIERA'S ACCESS TO THE NORTH OCEAN FISHERY

A Enforcement is Required to Uphold International Law in the North Ocean

1. Modern international law gives force to the prohibition on North Ocean driftnetting by allowing enforcement measures by interested states.

Without enforcement the driftnet prohibition would be condemned to rhetoric. This cannot be acquiesced to. High seas fisheries restrictions are not mere environmental aspirations, but are essential for the preservation of the oceans. Ecological protection is one of the most pressing concerns of the international community.

It follows that the specific norms of international environmental law, like the North Ocean driftnet restrictions, are bolstered by recognizing a right of enforcement by interested states. The natural corollary to the driftnet restrictions is allowing North Ocean fishing states to refuse access to the resource for vessels fishing illegally.

There is widespread practice of non-flag states enforcing fisheries regulations in international waters.⁵³ In 2002, high seas driftnet enforcement measures were undertaken by the United States, Japan, Canada and Russia.⁵⁴ Regional Fisheries Management Organisations around the world have recognised the need for

⁵³ Jeremy Faith, 'Enforcement of Fishing Regulations in International Waters: Piracy or Protection, is Gunboat Diplomacy the Only Means Left?' (1996) 19 *Loyola of Los Angeles International and Comparative Law Journal* 199. 204 - 5; Julie Mack 'International Fisheries Management: How the UN Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas' (1996) 26 *California Western International Law Journal* 313, 323.

⁵⁴ 'Report of the Secretary of Commerce to the Congress of the United States concerning U.S. actions taken on foreign large scale high seas driftnet fishing pursuant to Section 206 (e) of the Magnuson-Stevens Fishery Conservation and Management Act' (2002) <<http://www.nmfs.noaa.gov/sfa/international/Congress%20Reports>> (19 September 2003).

enforcement of their regulations, allowing powers to non-flag states including seizure and detention of fishing vessels.⁵⁵

An enforcement regime is similarly legitimised here. For the North Ocean Fishery to be effectively protected from illegal driftnetting, states must be free to take steps to enforce the law. A mere declaration of the illegality of using driftnets in excess of 2.5 kilometres in the North Ocean would not effectively cease such activities; illegal fishermen can only be dissuaded by practical enforcement.

The international rule of law relies on the actions of willing states. It is a fantasy to claim that international law prohibits the use of driftnets exceeding 2.5 kilometres on the North Ocean if in fact such practices continued unabated. This is why the practice of willing state enforcement has developed, to give strength to the norms of international law.

2. The Republic of Orlando may lawfully restrict the access to the North Ocean fishery of vessels engaging in illegal fishing practices.

The Respondent is willing, and able, to shoulder such a role within the North Ocean region. The Republic of Orlando is mindful of its position in the international community as a developed nation, and accepts a significant responsibility to protect the ecological resources of its region. This responsibility includes preserving the shared fisheries resource of the North Ocean from illegal fishing activities.

The Respondent submits that the content of the anticipated enforcement action may include the use of its navy to refuse access to the North Ocean fishery for vessels demonstrating an intention to engage in illegal driftnetting. The Republic of Orlando is hesitant to resort to such measures against vessels flying flags of its North Ocean neighbours. However such action is the only effective means of upholding international law. Accordingly the Republic of Orlando may legally take responsibility for the enforcement of international law in the North Ocean, and restrict the access of illegal vessels to the shared fisheries resource.

⁵⁵ David J Bederman 'CCALMR in Crisis' in Harry N Scheiber *The Law of the Sea* (2000), 185.

B Alternatively, the Republic of Orlando's Proposed Actions Are Justified by Ecological Necessity

1. Ecological necessity is accepted as a valid justification in international law.

Necessity included as a circumstance precluding wrongfulness in the ILC Draft Articles on State Responsibility,⁵⁶ which represent a codification of existing customary international law. Ecological necessity has recently been expressly recognized as a valid justification by this Court in the *Gabcikovo-Nagymaros Project* case.⁵⁷

*(I) A situation of necessity exists where an essential interest of the invoking state is in grave and imminent peril.*⁵⁸

1. The North Ocean fishery is an essential interest of the Respondent.

Protection of the marine environment constitutes an essential interest of all nations. This Court has reiterated the statement of the International Law Commission that “safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States.”⁵⁹

The biodiversity of the North Ocean is crucial to the ecological balance of the Respondent’s territorial waters. The collapse of North Ocean fish stocks would have a dramatic impact upon the Republic of Orlando’s marine environment. The high

⁵⁶ Commentaries to the draft articles on ‘Responsibility of States of internationally wrongful acts’ adopted by the International Law Commission (2001) art 25. http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm at 19 September 2003.

⁵⁷ *Gabcikovo-Nagymaros (Hungary/ Slovakia)* [1997] ICJ Rep 7. [Hereafter *Gabcikovo-Nagymaros Project*].

⁵⁸ Commentaries to the draft articles on ‘Responsibility of States of internationally wrongful acts’ adopted by the International Law Commission (2001) art 25 (1) (a).

⁵⁹ *Gabcikovo-Nagymaros Project*, para 53, citing ILC Commentary, 39.

value that Orlando places on the conservation of high seas biodiversity is evidenced by its commitment to international fisheries regulation: it is a party to the Law of the Sea Convention,⁶⁰ the UN Fish Stocks Convention⁶¹ and NOFO.

2. The North Ocean fishery is in grave peril.

Experience from around the world demonstrates that declining fish stocks can collapse rapidly once they reach a critical point. This can have catastrophic consequential effects on the entire ecosystem.

Illegal fishing practices with no regard to regionally agreed limitations is the very conduct that will drive such stocks into collapse. If it is clear that certain states accessing a shared resource are not prepared to comply with their obligations, then the incentives for other states to limit their conduct will be lost.

3. The peril is imminent.

Scientific uncertainty regarding exactly how soon an irreparably collapse of the North Ocean fisheries resource is likely to eventuate does not mean it is not legally imminent.⁶² This Court has accepted that:

a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.⁶³

This precisely reflects the situation in issue. It may be unclear exactly when unchecked exploitation of the North Ocean fishery will substantially impair the

⁶⁰ The Law of the Sea Convention.

⁶¹ *The Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, (entered into force 11 December 2001).

⁶² Commentaries to the draft articles on ‘Responsibility of States of internationally wrongful acts’ adopted by the International Law Commission (2001) art 25 (1) (a) para 17.

⁶³ *Gabcikovo-Nagymaros Project*, para 54.

ecology of the region. However it is inevitable now that if illegal practices continue then the environment will be so damaged.

The precautionary principle is today sufficiently developed to be incorporated into the analysis of necessity.⁶⁴ The principle has today infiltrated “virtually every international environmental and natural resource treaty regime.”⁶⁵ It is submitted that where there are manifest threats of serious or irreversible ecological damage, lack of full scientific certainty does not preclude a plea of necessity.

(II) Necessity justifies taking the only effective and proportional means available.⁶⁶

A situation of necessity justifies those measures effectively protecting the imperilled interest that constitute the least possible impingement on the rights of the other state. Such measures must be proportional to the violation by the other state and the imperilled interest.

1. Restricting illegal fishing activities is the only effective means available.

Action to preventing New Madiera from continuing its illegal fishing practices constitutes the only means available to the Respondent to protect the ecology of the North Ocean. Orlando has attempted to resolve the matter diplomatically. However the exchange of diplomatic notes displayed a blunt refusal by New Madiera to accept its international obligations, and an insistence that its illegal fishing practices would continue unabated.

⁶⁴ See: *Rio Declaration on Environment and Development*, Aug. 12, 1992, 31 I.L.M. 874 Principle 15; *U.N. Conference on Environment and Development: Framework Convention on Climate Change*, 31 I.L.M. 849, 854 (1992); *Convention on Biological Diversity*, opened for signature 5 June 1992, art 5, 6, 10 (entered into force 29 December 1993). *Convention for the Protection of the Marine Environment of the Northeast Atlantic*, Sept. 22, 1992, 32 I.L.M. 1069, 1076.

⁶⁵ David Freestone, *International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle*, in Alan Boyle *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 135.

⁶⁶ Commentaries to the draft articles on ‘Responsibility of States of internationally wrongful acts’ adopted by the International Law Commission (2001) art 25 (1) (a), Restatement of the Law, Third, Foreign Relations Law of the United States, § 905.

Possible alternative measures, such as trade sanctions or continued diplomatic pressure, are highly unlikely to be effective given the stance of New Madiera on this issue. The Republic of Orlando does not wish to hamper the development of New Madiera, or to impede its emergence into the community of nations. The only effective and efficient means of protecting the imperiled North Ocean fisheries resource is to prevent illegal fishing.

2. This restriction is proportional to New Madiera's breach of its international obligations, and to the imperilled interest.

The Republic of Orlando would restrict New Madiera's vessels only from engaging in illegal fishing practices. Such action would be exactly proportional to New Madiera's breach of international law, as it would only extend to ceasing such breaches. This would "restore equivalence between the Parties and encourage them to continue negotiations with the mutual desire to reach an acceptable solution."⁶⁷

It is manifest that preventing a state from illegally pillaging a vulnerable natural resource is proportional to the importance of protecting the interest at stake. This is why modern international law recognises a justification of ecological necessity.

⁶⁷ *Case Concerning Air Service Agreements (US – France)* [1978] R Int'l Arb Awards 471, 443–45.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the respondent, the Republic of Orlando, respectfully requests this Honourable Court find, adjudge and declare as follows:

1. That the driftnet fishing practices of New Madiera are illegal under international law.
2. That the Republic of Orlando may lawfully restrict New Madiera's access to the North Ocean fishery.

Respectfully submitted

Agents for the Respondent