

2003 Stetson International Environmental Moot Court Competition

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

Case Concerning Fishing Practices in the North Ocean

NEW MADIERA: PETITIONER

v.

REPUBLIC OF ORLANDO: RESPONDENT

FALL 2003 TERM

On Submission to the International Court of Justice

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....iv

STATEMENT OF JURISIDCTION.....vi

QUESTIONS PRESENTED.....vii

STATEMENT OF THE FACTS.....1

SUMMARY OF ARGUMENT.....4

PLEADINGS.....6

I. NEW MADERIA’S PRACTICE OF DRIFTNET FISHING IN THE NORTH OCEAN WITH NETS GREATER THAN 2.5 KM IS ILLEGAL UNDER INTERNATIONAL CUSTOMARY LAW THAT CALLS FOR THE CONSERVATION AND SUSTAINABLE USE OF MARINE RESOURCES.....6

A. The successor independent state of New Madiera is obligated to adhere to international policies and practices that create binding international customary law.....6

B. The treaties, conventions and organizations of Orlando, Commonwealth of Socialist States, and New Madiera created international customary law that deemed New Madiera’s driftnet fishing practices illegal.....10

C. New Madiera driftnet fishing practices in the North Ocean is illegal under the jus cogens rule of international customary against driftnet fishing.....12

II. NEW MADERIA’S ILLEGAL PRACTICE OF USING DRIFTNETS IN THE NORTH OCEAN IS IN VIOLATION OF THE UNITED STATES CONVENTION ON THE LAW OF THE SEAS.....13

A. New Madiera is bound to the United Nations Convention on the Law of the Sea banning driftnet fishing due to the treaty being dispositive.....14

B. New Madiera’s use of driftnets on the North Ocean is illegal as a result of the codification of the United Nations Convention on the Law of the Sea.

III.	NEW MADIERA SHOULD BE PROHIBITED FROM FISHING IN THE NORTH OCEAN BECAUSE IT BREACHED TWO DUTIES OWED TO THE INTERNATIONAL COMMUNITY – THE DUTY OF CARE AND THE DUTY TO COOPERATE.....	15
	A. New Madiera breached its duty of care to the international community by causing destruction to resources living in the high seas.....	16
	B. New Madiera breached its duty to cooperate with the international community by being unwilling to work towards the goal of conservation.....	17
IV.	ORLANDO SHOULD BE ALLOWED TO RESTRICT NEW MADIERA’S ACCESS TO FISHING IN THE NORTH OCEAN BECAUSE ORLANDO CAN ACT OUTSIDE OF ITS EXCLUSIVE ECONOMIC ZONE IN ORDER TO CONSERVE THE HIGH SEAS LIVING RESOURCES AND TO STOP INTERNATIONAL CRIMES.....	19
	A. In order to protect the resources living in the high seas, customary international law supports the extension of a coastal state’s jurisdiction.....	19
	B. Orlando can enforce New Madiera’s restriction because a state has universal jurisdiction to prevent piracy from being committed on the high seas.....	21
	CONCLUSION.....	23

INDEX OF AUTHORITIES

BOOKS

Gary Knight & Hungdah Chiu, *The International Law Of The Sea: Cases, Documents, and Readings* 323 (1991). 17,19,20

DIGEST

Freedom of the Seas, 4 Whiteman Digest § 7, at 542. 15

INTERNATIONAL CONVENTIONS

United Nations Conference on the Succession of States in Respect of Treaties at 34, U.N. Doc A/Conf. 80 (1978). 6

Vienna Convention on the Laws of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332. 7,12

CASES

CUSCLIN v. Reagan, 859 F.2d 929 (Cir. 1988). 12

Fisheries Jurisdiction (U.K v. Ice), 1974 I.C.J. 3, at 31. 17

Fisheries Jurisdiction (U.K. v. Nor.), 1951 I.C.J. 116. 9

LEGAL ARTICLES, ESSAYS & JOURNALS

A. Anna Zumwalt, *Straddling Stock Spawn Fish War On the High Seas*, 3 U.C. Davis J. Int'l L. & Pol'y 35, 45. 19,20,21

Arthur Mizzi, Comment, *Caspian Sea Oil, Turmoil, and Caviar: Can They Provide a Basis for an Economic Union of the Caspian States?*, 7 Colo. J. Int'l Envtl. L. & Pol'y 483 (1996). 15

Constance Sathre, *Symposium Salmon Law: Restoration and Harvest Allocation: Salmon Interception on the High Seas: A Continuing Controversy Between the United States and Japan*, 16 Envtl. L. 731 (1986). 10

Derrick M. Kedziora, Comment, *Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks*, 17 N.W. J. Intl'L. & Bus. 1132, 1151. 20

Diba B. Majzub, *Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec*, 24 Queen's L.J. 411, 443 (1999). 13,14

Douglas M. Zang, Note, *Frozen In Time: The Antarctic Mineral Resource Convention*, 76 Cornell L. Rev. 722 (1991). 10,11

Grant James Hewison, *High Seas Driftnet Fishing In The South Pacific and The Law Of The Sea*, 5 Geo. Int'l Envtl. L. Rev 313, 335. 16,17, 18

Heidi K. Guth, Comment, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples – Examining the Maori Fisheries Settlement*, 24 Haw. L. Rev. 179 (2001). 6,7

Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529 (1993). 7,8,9,10

Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga is Essential to Preserve the Legitimacy and Potential of the Alien Tort Act*, 35 Colum. J.L. & Soc. Probs. 83 (2002). 12

Lawrence Marin, Note, *Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment*, 13 Fla. J. Int'l L. 361 (2001). 15

Lindsay Glauner, Comment, *The Need for Accountability and Reparation: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime OF Genocide Against Native Americans*, 51 DePaul L. Rev. 911 (2002). 8

Marco A. Martins, Note, *An Alternative Approach to the International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia*, 44 Syracuse L. Rev. 1019 (1993). 14

M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81, 108. 22

Mark Allen Gray, *The International Crime of Ecocide*, 26 Cal.W. Int'l L.J. 215, 237. 16

ELECTRONIC MEDIA

Jon M. Van Dyke, *The Legitimacy of Unilateral Actions to Protest the Ocean Shipment of Ultrahazardous Radioactive Materials*, at <http://www.nci.org/i/ib121396.htm>. 21

Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons*, at <http://www.earthtrust.org/dnpaper/contents.html>. 16, 21

STATEMENT OF JURISDICTION

The States of New Madiera and Orlando voluntarily submit to the jurisdiction of the International Court of Justice under Article 36 of the Statute of the International Court of Justice.

QUESTIONS PRESENTED

- I. Is New Madiera's practice of driftnet fishing in the North Ocean with nets greater than 2.5 km illegal under international customary law that calls for the conservation and sustainable use of marine resources?
- II. Is New Madiera's use of driftnets in the North Ocean in violation of the United States Convention on the Law of the Seas?
- III. Can New Madiera be restricted from fishing in the North Ocean because it refuses to refrain from using driftnets when this use causes destruction to the international community's resources and undermines the community's general goal of conservation?
- IV. Does Orlando have the authority to restrict New Madiera's use of the North Ocean when New Madiera's high seas fishing activities depletes resources which aid Orlando in sustaining its economy?

STATEMENT OF THE FACTS

Orlando's eastern coastline borders the North Ocean.¹ Orlando has a population of 52 million people and although it has a diversified economy, it is one of the sixteen states that fish in the North Ocean.²

The North Ocean's fishing operations, specifically the high seas, is regulated by one regional organization – the North Ocean Fisheries Organization (NOFO).³ Orlando is a member of this organization.⁴ In fact, every State who fishes in the North Ocean is a member of this organization with the exception of one – the island nation of New Madiera.⁵

New Madiera has a population of 1.5 million people.⁶ It fishes on the high seas of the North Ocean but is *not* a member of the United Nations Convention on the Law of the Sea (UNCLOS), 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 (the Straddling Stock Agreement) the Food and Agriculture Organization of the United Nations (FAO), or the Vienna Convention of the Law of Treaties.⁷ Orlando is a party to all of those agreements and is a party to the Vienna Convention of the Law of Treaties.⁸

From 1921 until January 1, 2003, New Madiera was a territory of the Commonwealth of Socialist States (CSS).⁹ On January 1, 2003, the developing nation of New Madiera regained its

¹ Compromis at 6.

² Compromis at 6; Compromis at 7.

³ Compromis at 7.

⁴ *Id.*

⁵ Compromis at 6; Compromis at 7.

⁶ Compromis at 6.

⁷ Compromis at 6 and 7.

⁸ *Id.*

⁹ Compromis at 6.

independence from CSS and became a member of the United Nations.¹⁰ But CSS, who is also a member of the United Nations, is a party to UNCLOS, a member nation of FAO and a party to the Vienna Convention on the Law of Treaties.¹¹ New Madiera is not a party to the Vienna Convention on the Law of Treaties.¹²

CSS did not allow its fishing fleets to use driftnets in the North Ocean.¹³ “Driftnets, which cause severe damage to the environment, are gillnets or other net or combination of nets which is more than 2.5 kilometers in length, the purpose of which is to enmesh, entrap or entangle fish by drifting on the surface or in the water.”¹⁴ CSS made this decision after NOFO voted on a regulation that prohibited their use on the high seas of the North Ocean.¹⁵ CSS formally objected to this regulation; however, this instruction mirrored the United Nations General Assembly’s call for a moratorium on “all large-scale pelagic driftnet fishing” by 1992.¹⁶ Although this prohibition reaffirmed existing international law, New Madiera’s fishing vessel, the *Dickerson*, used a driftnet 3.0 kilometers in length on the high seas.¹⁷ Orlando notified New Madiera that the *Dickerson*’s use of driftnets was inconsistent with New Madiera’s international legal responsibilities and invited New Madiera to a discussion concerning its use.¹⁸ New Madiera, however only wanted to engage in a dialogue with Orlando about its dependence on the North Ocean’s resources.¹⁹ Accordingly, New Madiera advised Orlando that the *Dickerson* had its permission to use driftnets exceeding 2.5 kilometers, and that it would continue to do so.²⁰

¹⁰ Compromis at 6.

¹¹ *Id.*

¹² *Id.*

¹³ Compromis at 7.

¹⁴ Compromis at 7, Compromis at 10.

¹⁵ *Id.*

¹⁶ Compromis at 9.

¹⁷ Compromis at 8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Orlando also notified New Madiera that its use of driftnets violated its legal obligation imposed by the Convention on Biological Diversity.²¹ But New Madiera insisted that its fishing vessels did not derogate the interests of other states, and claimed that Orlando could not assert any rights regarding the Convention on Biological Diversity.²² Although Orlando made it clear to New Madiera that the prohibition on driftnets has become a *jus cogens* – a peremptory norm from which no derogation is permitted, New Madiera considers itself to be a “persistent objector” of customary law and refuses to be bound.²³

²¹ Compromis at 10.

²² Compromis at 10, Compromis at 11.

²³ Compromis at 11.

SUMMARY OF THE ARGUMENT

I. New Madiera's use of 2.5 km driftnets to fish in the North Ocean was illegal under international customary law. State practices in an effort to preserve marine and food resources and manage the stock of high seas fisheries led to the creation of treaties, conventions, and regional state organizations rules that banned the practice of driftnet fishing. New Madiera is bound to follow international customary law because customs of state's that are accepted and practiced in the international community are binding all states regardless of membership. Driftnet fishing also violates the jus cogens rules on international customary because its detriment to the marine environment and its effect on the basics of human life.

II. New Madiera violated the United Nations Convention on the Law of the Sea ban on the practice of driftnet fishing. Although the Commonwealth of Socialist States was the original party to UNCLOS, New Madiera is still obligated to follow its provisions. UNCLOS is a dispositive treaty with a territorial character that was intended to run with the land, therefore automatically continuing with the successor state of New Madiera. New Madiera is additionally obligated to abide by the provisions of UNCLOS because it codified the accepted state practices of the international community in regards to high seas fishing practices. New Madiera should be restricted from fishing in the North Ocean because it breached both its duty of care and its duty to cooperate to the international community.

III. New Madiera knows that fishing with large driftnets in the high seas causes irreparable damage to the ocean's resources; however, it insists on using them. This behavior violates customary international law. States are required to have due consideration (care) for the

interests of other States and causing severe damage to resources that aid the economy of Orlando and other States does not satisfy this requirement. New Madiera should also be restricted from fishing in the North Ocean because it breached its duty to cooperate with the international community. It has an obligation to work towards the general goal of conservation. The duty to cooperate restricts a States traditional freedom of the seas, and New Madiera's behavior towards customary law, the United Nations moratorium, and the regulations established by NOFO demonstrates that it is unwilling to do so.

IV. Orlando should be allowed to enforce New Madiera's access to fishing in the North Ocean. Although Orlando is a coastal state, emerging customary law supports an extension of its jurisdiction onto the high seas in order to preserve depleting resources. In addition, using driftnets is considered to be piracy; therefore, any State including Orlando has universal jurisdiction to prevent this crime.

PLEADINGS

I. NEW MADERIA'S PRACTICE OF DRIFTNET FISHING IN THE NORTH OCEAN WITH NETS GREATER THAN 2.5 KM IS ILLEGAL UNDER INTERNATIONAL CUSTOMARY LAW THAT CALLS FOR THE CONSERVATION AND SUSTAINABLE USE OF MARINE RESOURCES.

A. The successor independent state of New Madiera is obligated to adhere to international policies and practices that create binding international customary law.

Even though New Madiera became a newly independent state on January 1, 2003 by claiming its independence from the Commonwealth of Socialist States (CSS) through a referendum passed by 88% of the 90% of the participating eligible voters, is duty-bound to abide by international customary laws. The international community has commonly accepted meanings of newly independent states and customary international law. The Vienna Convention on Succession of States in Respect of Treaties defines a newly independent state as a “successor state, the territory of which immediately before the date of the succession of states was a dependent territory for the international relations of which the predecessor state was responsible.”²⁴ The Statute of the International Court of Justice (ICJ) simply establishes international custom as “a general practice accepted as law.”²⁵

In the application of international law, it is the general consensus that it consists of the practice and acceptance of the law. The practice and acceptance of the law must arise as a legal obligation and not from a sense of moral or ethical duty.²⁶ “A norm of international law is established if states act in conformity with it and the international community accepts that norm

²⁴ *United Nations Conference on the Succession of States in Respect of Treaties* at 34, U.N. Doc A/Conf. 80 (1978).

²⁵ Heidi K. Guth, Comment, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples – Examining the Maori Fisheries Settlement*, 24 *Haw. L. Rev.* 179 (2001).

²⁶ *Id.*

as obligatory under the law.”²⁷ The purpose of international customary law is to promote uniform state behavior and establish foundational international rules in order to protect, maintain, and sustain interconnected international relationships while addressing global issues effectively and efficiently. “It is also impracticable to have treaties on all subjects of international law...In contrast, general international law may be established on the basis of less formal indications of consent or acquiescence. This makes worldwide law possible; it cannot be done through treaties alone.”²⁸ Because of widespread practice of acceptance, all states regardless of their successor status must follow international customary law. “Clearly acceptance is required only by the international community and not by all individual states.”²⁹ While the Vienna Convention on the Law of Treaties and the Restatement Third of Foreign Relations dictates that newly independent states start with a “clean slate” and are not obligated to fulfill predecessor states treaty obligations when the successor state was dependent upon it for international relations; the Law of Treaties provides for an exception in the case of international customary law. Article 38 of the Vienna Convention on the Law of Treaties states: “Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such.”³⁰ International customary law not only recognizes the practices and policies of the state attempting to enforce the law, but also recognizes the accepted practices of other states worldwide. New Zealand courts have consistently based many of their cases dealing with fisheries on the practices and decisions on cases from Canada, Australia, and the United States.³¹ Reliance on international customary law has also been evidenced in the United States

²⁷ Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int’l L. 529 (1993).

²⁸ *Id.* at 551.

²⁹ *Id.* at 535.

³⁰ Vienna Convention on the Laws of Treaties, 23 May 1969, 1155 U.N.T.S. 331

³¹ Heidi K. Guth, Comment, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples – Examining the Maori Fisheries Settlement*, 24 Haw. L. Rev. 179 (2001).

judicial system. The Supreme Court in *Paquete Habana* held that the court should “rely on the customs and usages of civilized nations” when dealing with issues affecting the international community.³² The *Filaritga* court later expanded the Supreme Court’s reliance on international customary law by reasoning that “the United States judiciary has come to accept international law as part of its law; therefore, it is bound to interpret, create, and apply customary and conventional international law when applicable.”³³

Alternatively, newly independent states have asserted that the persistent objector rule allows for an exception to states in following law created by international custom. The persistent objection rule provides that “if a state persistently objects to the establishment of a norm while it is becoming law and persistently objects up to the present, it is exempt from that norm.”³⁴ However, international custom does not support the theory of exemption from a state that simply is persistent in its objections to custom. It should be noted that international customary law is not created from the activities of individual states but the custom that is created by the accepted activities of states acting internationally. Additionally, a newly independent state that objects to custom will still face pressure to conform to the norm, which is the rationale of international customary law. “This pressure may be characterized as merely political, but the alleged right of the persistent objector does not equip that state with any real defenses in practice.”³⁵ Finally, newly independent states that object to international customary law after its formation generally do so to no avail and without a special exemption. Persistent objectors are treated as violators of the law. The United States and South Africa have been persistent objectors in the past but were

³² Lindsay Glauner, Comment, *The Need for Accountability and Reparation: 1830-1976 the United States Government’s Role in the Promotion, Implementation, and Execution of the Crime OF Genocide Against Native Americans*, 51 DePaul L. Rev. 911 (2002).

³³ *Id.* at 923.

³⁴ Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int’l L. 529 (1993).

³⁵ *Id.* at 539

both held to the rules of international law. The United States persistently objected to the expansion of fisheries and territorial sea zones, but ultimately changed its behavior based on the claims of coastal states and conformed to international customs. South Africa was a persistent objector to international custom against apartheid and was still forced to coincide with the international customary law, as well. International customary practice and the ICJ have referred to persistent objections as dicta and do not support the existence of the persistent objector rule.³⁶ In *Anglo-Norwegian Fisheries*, in a case pertaining to a coastline demarcation rule, it was the reasoning of the International Court of Justice that “the theory behind the persistent objector rule is very similar to the general objections to the binding effects of customary international law”.³⁷ In the present case, it is evident that New Madiera is a newly independent state based on its reliance on the predecessor state of the CSS for its international relations. However, New Madiera is bound by customary international laws. It is evident that the international community has been concerned about damage that driftnet fishing causes through the formation of many treaties and conventions addressing the subject. New Madiera cannot assert the persistent objector rule simply because it cannot object to the international customs pertaining to the preservation of marine and food resources and management of high seas fisheries, which were already in acceptance by practice for many decades in the international community at the time of its succession. Finally, New Madiera cannot assert the persistent objector rule primarily because it has not been recognized by the International Court of Justice. New Madiera is obligated to follow international customary that has been established through conventions, treaties, and various regional state organization’s policies. New Madiera’s decision not to follow international custom is in violation of the law

³⁶ *Id.* at 540.

³⁷ *Fisheries Jurisdiction* (U.K. v. Nor.), 1951 I.C.J. 116.

B. The treaties, conventions and organizations of Orlando, Commonwealth of Socialist States, and New Madiera created international customary law that deemed New Madiera's driftnet fishing practices illegal.

State practices in an effort to preserve marine and food resources and manage high sea fisheries led to the creation of the treaties, conventions and organizations, which included the membership of New Orlando, CSS, and New Madiera, that established binding international customary law banning the practice of driftnet fishing. Treaties, conventions and policies of regional state organizations created binding international customary law through widespread practice and acceptance among international states. “Standards of conduct which were binding initially only by virtue of their explicit stipulation in an international agreement became enforceable rules of customary law through widespread acceptance among the international community. Products of such an evolution include the principle of freedom of the seas and the minimum standards of protection owed to foreigners.”³⁸ Treaties, conventions, and organizational rules and policies each invite a universal participation that further the interests of the international community, thereby creating international law for members and non-members, as well.³⁹ The International North Pacific Convention for the High Seas Fisheries of the North Pacific was “enacted to ensure the maximum sustained productivity of the fisheries of the fishery resources of the North Pacific Ocean.”⁴⁰ Additionally, the International Convention for the Conservation of Atlantic Tunas was “formed among states that had a common interest in maintaining the populations of tuna and tuna-like species existing in the Atlantic Ocean at a level that would produce a maximum sustainable yield.”

³⁸ Douglas M. Zang, Note, *Frozen In Time: The Antarctic Mineral Resource Convention*, 76 Cornell L. Rev. 722 (1991).

³⁹ Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 539 (1993).

⁴⁰ Constance Sathre, *Symposium Salmon Law: Restoration and Harvest Allocation: Salmon Interception on the High Seas: A Continuing Controversy Between the United States and Japan*, 16 Env'tl. L. 731 (1986).

Alternatively, it is argued that treaties, conventions and organizational rules are ineffective as international customary law because it is ultimately the belief of the states that they are subject to the control of other international agreements. However, to determine if treaties are effective in becoming international law, the activities of all states are examined for conformance to various agreements. The Antarctic Treaty created in part to address the conservation of mineral resources exhibits the international community duplicating its provisions. “Therefore one must examine the actions and statements of both members and nonmember states during the thirty years since the creation of the Treaty to determine whether there has been general acquiescence in, and recognition of, the Treaty parties’ right to exercise jurisdiction” over Antarctica’s mineral resources.⁴¹ In this case, it is clear that United Nations viewed driftnet fishing detrimental to the world’s oceans and seas by calling on states to ban this activity. The UN recommendation was preceded and followed by agreements such as the Straddling Stock Agreement, the Food and Agriculture Organization Code of Conduct for Responsible Fisheries, and Convention on Biological Diversity which all called for the management of fisheries and their stock and conservation in the world’s oceans, in turn banning and discouraging the use of driftnets. The North Ocean Fishing Organization, with 16 members states, acquiesced with the rules established by other states and issued regulation banning driftnet fishing. It is evident through the numerous states rules issued through conventions, treaties, regional state organizations, and state practice and acceptance that harmful activities, such as driftnet fishing is banned under international customary laws. The overwhelming acceptance and practice of refraining from driftnet fishing prompted binding international customary law, thereby making it

⁴¹ Douglas M. Zang, Note, *Frozen In Time: The Antarctic Mineral Resource Convention*, 76 Cornell L. Rev. 722 (1991).

moot whether CSS, New Orlando or Madeira were parties of any of the agreements. New Madiera violated international customary law.

C. New Madiera driftnet fishing practices in the North Ocean is illegal under the jus cogens rule of international customary against driftnet fishing.

Bans on driftnet fishing are a jus cogens norm that makes their use by New Madiera for fishing illegal. Driftnet fishing has risen to the level of jus cogens and is binding on all states due to its egregious damage to the marine environment and subsequent effect on the basics of human life. The Vienna Convention on the Treaties and the Restatement similarly define jus cogens as a "peremptory norm of international law, is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."⁴² The court in *CUCSLIN* held that "a jus cogens norm exists if the international community recognizes the norm as so fundamental that it is nonderogable."⁴³ Similarly, the *Paquete Habana* court also incorporated the evolutionary nature of the law of nations into its analysis that the rights of fishing vessels and marine resources had finally risen to the level of law of nation status."⁴⁴ The evolution of treaties, conventions, and organizational policies, and UN recommendations such as UNCLOS, the Code of Conduct for Fisheries, North Ocean Fishing Organization, the Straddling Stock agreement are clear examples that ending driftnet fishing has risen to the level of jus cogens. The purpose of each of these agreements is to protect marine resources, thereby supporting the ban or limited use of driftnets. New Madiera is in violation of jus cogens international customary law.

⁴² Vienna Convention on the Laws of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332.

⁴³ *CUSCLIN v. Reagan*, 859 F.2d 929 (Cir. 1988).

⁴⁴ Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga is Essential to Preserve the Legitimacy and Potential of the Alien Tort Act*, 35 Colum. J.L. & Soc. Probs. 83 (2002).

II. NEW MADERIA'S ILLEGAL PRACTICE OF USING DRIFTNETS IN THE NORTH OCEAN IS IN VIOLATION OF THE UNITED STATES CONVENTION ON THE LAW OF THE SEAS.

A. New Madiera is bound to the United Nations Convention on the Law of the Sea banning driftnet fishing due to the treaty being dispositive.

Due to the nature of dispositive treaties, it has often been determined that they automatically continue with the successor states. The International Law Association describes a dispositive treaty as those that: “(a) are in the nature of objective territorial regimes created in the interest of one nation or community of nations; (b) applied locally in virtue of territorial application clauses; (c) touch or concern a particular area of land.”⁴⁵ A dispositive treaty is frequently viewed as a “covenant that runs with the land and its continuation is dependent upon the existence of the territory and not the existence of the particular parties that agreed to the treaty.”⁴⁶ Dispositive treaties regularly concern boundaries, waterways, and rights over territories.⁴⁷ Due to the nature of dispositive treaties, it has often been determined that they automatically continue with the successor states. The ICJ confirmed in a 1977 ruling that it is customary international law for dispositive treaties to automatically continue for successor states when the treaties are of a territorial character.⁴⁸ The decision was based on a 1997 treaty that was signed by Hungary and Czechoslovakia for the purpose of constructing a “large series of structures along the Danube and to create a navigational regime for an important sector of the international waterway.”⁴⁹ Following the succession of Slovakia from Czechoslovakia, the court concluded that since the treaty was of a territorial character that the 1977 treaty continued in force for Slovakia, which was in concurrence with Article 12 of the *Treaty Succession*

⁴⁵ Diba B. Majzub, *Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec*, 24 Queen's L.J. 411, 443 (1999).

⁴⁶ *Id.* at 444.

⁴⁷ *Id.* at 444.

⁴⁸ *Id.* at 443.

⁴⁹ *Id.* at 446.

Convention.⁵⁰ Predecessor state obligations also apply to its party membership and compliance with conventions as well. “Successors are bound because the convention was merely an instrument for the creation of objective law, which binds the successor state, irrespective of its will and interest.”⁵¹

The creation of New Madiera was a result of 88% of the 90% of the registered voters making the decision to no longer remain as a territory of the CSS and to become a newly independent state. It is not of importance that New Madiera succeeded from its predecessor state. CSS party membership with UNCLOS was intended to be permanent and is of a territorial character further supporting the idea that the treaty was dispositive, thereby automatically continuing with the successive states. New Madiera therefore was automatically obligated to acquiescence with the conventions ban on driftnet fishing, regardless of New Madiera becoming a party to the convention.

B. New Madiera’s use of driftnets on the North Ocean is illegal as a result of the codification of the United Nations Convention on the Law of the Sea.

The United Nations Convention on the Law of the Sea (UNCLOS) codified international customary law pertaining to the uses of the ocean. The codification was the result of the need for state practices to be binding for members and non-members of treaties concerning the law of the sea. UNCLOS took widely accepted international customary law such as the Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of Living Resources of the High Seas to create binding and codified law. “The codification of these laws represented a gradual shift from a *mare liberum* notion of the seas, highlighting the sea as a natural resource

⁵⁰ *Id.* at 447.

⁵¹ Marco A. Martins, Note, *An Alternative Approach to the International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia*, 44 *Syracuse L. Rev.* 1019 (1993).

enjoyed by all, to derogations from commonage principles focusing on the exclusive rights of coastal states in exercising certain types of jurisdiction over waters adjacent to their shores.”⁵²

There have been conflicting views regarding codification of UNCLOS because key states, such as the United States, lack of ratification. Although the United States failed to ratify UNCLOS due to limitations rights to deep seabed mining, President Reagan “acknowledged the legal applicability of virtually all the treaty provisions, except those relating to deep seabed mining, of UNCLOS as a codification of customary international law.”⁵³ The codification of UNCLOS was encouraged by the international community’s concern for the depletion of fisheries stock and marine dilapidation, therefore UNCLOS called for a ban on driftnet fishing. “Thus, while these concepts have been legally accepted because of their long existence and nations’ widespread adherence to them, their actual codification in the UNCLOS treaty ensures their applicability.”⁵⁴ New Madiera committed illegal acts in violation of UNCLOS by fishing in the North Ocean using driftnets.

III. NEW MADIERA SHOULD BE PROHIBITED FROM FISHING IN THE NORTH OCEAN BECAUSE IT BREACHED TWO DUTIES OWED TO THE INTERNATIONAL COMMUNITY – THE DUTY OF CARE AND THE DUTY TO COOPERATE.

Orlando recognizes that traditionally, the freedom of the high seas includes the freedom of fishing. States have customarily been able to fish in the “high seas” (waters outside of the Exclusive Economic Zone of any State) because these waters could not be claimed by any single international community.⁵⁵ But the doctrine of the “freedom of the seas” has never been absolute

⁵² Arthur Mizzi, Comment, *Caspian Sea Oil, Turmoil, and Caviar: Can They Provide a Basis for an Economic Union of the Caspian States?*, 7 Colo. J. Int’l Envtl. L. & Pol’y 483 (1996).

⁵³ *Id.* at 788.

⁵⁴ Lawrence Marin, Note, *Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas’ Right of Innocent Passage and Duty to the Marine Environment*, 13 Fla. J. Int’l L. 361 (2001).

⁵⁵ Freedom of the Seas, 4 Whiteman Digest § 7, at 542.

because “there is no legal right, however, well established, which could not in some circumstance, be refused on the ground that it has been abused.”⁵⁶

New Madiera has abused its freedom to fish on the high seas. The over-exploitation of high seas living resources “undermines the basis” for the freedom of the high seas doctrine because it prevents the *whole* international community from enjoying it.⁵⁷ By insisting on using driftnets, knowing that a global moratorium prohibiting their use was declared, New Madiera has already contributed to the maiming, depletion, and destruction of the North’s Oceans living resources. Because of New Madiera’s resolve to be a “persistent objector” of customary, international law, this destruction will continue unless New Madiera is stopped from fishing in the North Ocean. Therefore, Orlando Contends that New Madiera should be prohibited from fishing in the North Ocean because of the following two reasons: It breached both its duty of consideration “care” and its duty to cooperate with the international community:

A. New Madiera breached its duty of care to the international community by causing destruction to resources living in the high seas.

The duty to care for the interests of other States is customary, international law binding on all States.⁵⁸ States who recklessly or negligently cause environmental harm breach this duty of care owed to the entire international community.⁵⁹ This duty to care inevitably limits a State’s traditional freedom of the seas as indicated by the following UNCLOS provision: Article 87(2) of UNCLOS reads, in pertinent part, “These freedoms [of the seas] shall be exercised by all States, *with due consideration for the interests of other States* in their exercise of the freedom of

⁵⁶ Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons*, at <http://www.earthtrust.org/dnpaper/contents.html>.

⁵⁷ Grant James Hewison, *High Seas Driftnet Fishing In The South Pacific and The Law Of The Sea*, 5 Geo. Int’ L Env’tl. L. Rev 313, 335.

⁵⁸ Mark Allen Gray, *The International Crime of Ecocide*, 26 Cal.W. Int’l L.J. 215, 237.

⁵⁹ *Id.* at 236.

the high seas”⁶⁰ New Madiera, in exercising its freedom to fish with driftnets, ignored Orlando’s *interest* in obtaining adequate living resources from the North Ocean. Driftnet fishing often leaves marks on certain types of fish and consequently reduces its economic value.⁶¹ This impedes on Orlando’s freedom of fishing because Orlando cannot obtain the adequate resources it needs in order to sustain the 51 million people who depend on them. This threat to Orlando’s economy and the harm caused to the resources by New Madiera’s driftnet practices is a breach to the duty of care owed to Orlando.⁶² Consequently, New Madiera should be prohibited from fishing in the North Ocean because its practices violate UNCLOS 87.

B. New Madiera breached its duty to cooperate with the international community by being unwilling to work towards the goal of conservation.

The Court declared in *U.K. v. Ice*, 1974 I.C.J. 3, 31 (July 25) that a high seas fishing state has an obligation to conserve the living resources “for the benefit of all.”⁶³ This requirement is codified in Article 118 of UNCLOS, which, in pertinent part, reads as follows:

States shall co-operate with each other in the *conservation* and management of the living resources in the areas of the high seas. States who nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures *necessary for the conservation* of the living resources concerned ...⁶⁴

The duty States have to co-operate with one another (in order to conserve the living resources of the high seas) further restricts the traditional principle of freedom of fishing in the high seas.⁶⁵

At a minimum, a duty to cooperate obliges parties to demonstrate “a practical willingness to

⁶⁰ Gary Knight & Hungdah Chiu, *The International Law Of The Sea: Cases, Documents, and Readings* 323 (1991).

⁶¹ Hewison, *supra* note 26, at 344.

⁶² *Id.* at 450.

⁶³ Fisheries Jurisdiction (*U.K v. Ice*), 1974 I.C.J. 3, at 31 (July 25).

⁶⁴ Gary Knight & Hungdah Chiu, *The International Law Of The Sea: Cases, Documents, and Readings* 644 (1991).

⁶⁵ Hewison, *supra* note 26, at 344.

work towards the general goal of conservation.”⁶⁶ “But a State breaches this duty if it clearly demonstrates an *unwillingness* to co-operate with other States.”⁶⁷

New Madiera demonstrated its unwillingness to cooperate with Orlando by engaging in the following behavior: First, New Madiera is the only State (out of sixteen States who fish in the North Ocean) who refuses to become a member of NOFO. Although New Madiera knows that NOFO members can *choose* what regulations they will be bound to, it still is not a member of the only North Ocean regional organization established for the purpose of promoting conservation. Second, New Madiera refused to even consider discussing its use of driftnets with Orlando - it responded with an invitation to discuss the situation with, “New Madiera has used ... *and will continue to use* a driftnet of 3.0 kilometers” Third, New Madiera rejected an attempt to discuss its legal obligation (under the Convention on Biological Diversity) to refrain from activities, which cause damage to the environment on the irrelevant grounds that Orlando is not a member to that convention. Although Orlando is not a member of the Convention on Biological Diversity, it is a member of the international community who suffers from the damage New Madiera is causing to the environment; therefore, New Madiera had an obligation to discuss its use of driftnets on the high seas. And Fourth, New Madiera blatantly indicated that even if customary international law does prohibit New Madiera from using driftnets that were longer than 2.5 kilometers, it would disobey it.

New Madiera did “welcome the opportunity to engage in dialogue concerning food resources upon which the people of New Madiera depend.” However, as indicated above, New Madiera made it clear that this dialogue would not have included its use of driftnets that exceeded 2.5 kilometers. A dialogue that omits a use of large driftnets is not a dialogue that

⁶⁶ *Id.* at 351.

⁶⁷ *Id.* (emphasis added).

works towards the general goal of conservation. In fact, it violates UNCLOS Article 118 because States that use living resources in the same area are obligated to negotiate "with a view to taking measures "necessary" for the conservation of the living resources concerned." ⁶⁸

All of New Madiera's actions indicate that it did not meet the minimum threshold for "cooperating" with Orlando. As shown above, its behavior demonstrated a clear unwillingness to avoid cooperating with Orlando. As a result, New Madiera has breached its duty to the international community and should be denied access to the North Ocean fisheries.

IV. ORLANDO SHOULD BE ALLOWED TO RESTRICT NEW MADERIA'S ACCESS TO FISHING IN THE NORTH OCEAN BECAUSE ORLANDO CAN ACT OUTSIDE OF ITS EXCLUSIVE ECONOMIC ZONE IN ORDER TO CONSERVE THE HIGH SEAS LIVING RESOURCES AND TO STOP INTERNATIONAL CRIMES.

As discussed above, New Madiera should be denied access from fishing in the North Ocean because it insists on violating international law by causing destruction to the fish in the North Ocean. Orlando contends that *it* should be able to enforce New Madiera's restriction from the North Ocean. The following discussion illustrates two reasons why Orlando is able to enforce New Madiera's restriction: First, emerging customary law supports an extension of a coastal state jurisdiction onto the high seas in order to preserve depleting resources.⁶⁹ Second, using driftnets is considered to be piracy; therefore, any State may stop the international crime – even on the high seas.

A. In order to protect the resources living in the high seas, customary international law supports the extension of a coastal state's jurisdiction.

Orlando is a State Party to 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

⁶⁸ Gary Knight & Hungdah Chiu, *The International Law Of The Sea: Cases, Documents, and Readings* 644 (1991).

⁶⁹ A. Anna Zumwalt, *Straddling Stock Spawn Fish War On the High Seas*, 3 U.C. Davis J. Int'l L. & Pol' y 35, 45.

Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. This agreement gave Orlando the authority to enforce conservation measures within its 200-mile exclusive economic zone (EEZ).⁷⁰ But since the implementation of that agreement, recent history indicates – through the implementation of emerging principles and international agreements - that the conservation crisis in the world’s oceans demands action from coastal states beyond their 200-mile limitation.

The 1995 United Nations Agreement Relating To the Conservation And Management Of Straddling And Highly Migratory Fish Stocks is an example of such an agreement. It gives coastal states the authority to include international waters within its jurisdiction when action is required in order to protect stock that “straddle” between its exclusive economic zone and the high seas.⁷¹ It gives States who are members of regional fisheries organizations the authority to board and inspect vessels – and to take “*whatever* enforcement actions (consistent with international law) deemed necessary” - in order to conserve fishing stocks.⁷² A coastal state can enforce this agreement (if the flag state does not) against both parties and nonparties.⁷³

This agreement may appear to be inconsistent with UNCLOS which provides, in Article 89 that “no state may validly purport to subject any part of the high seas to its sovereignty.”⁷⁴ And as previously mentioned, it also extends the 200 mile limitation placed on the Coastal State’s EEZ. But it is important to note that Law Of The Sea is "not a static body of absolute rules, but rather a living, growing, customary law, grounded in the claims, practices, and

⁷⁰ Gary Knight & Hungdah Chiu, *The International Law Of The Sea: Cases, Documents, and Readings* 39 (1991).

⁷¹ Zumwalt, *supra* note 38, at 47.

⁷² Derrick M. Kedziora, Comment, *Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks*, 17 N.W. J. Intl’ L. & Bus. 1132, 1151.

⁷³ *Id.* at 1156.

⁷⁴ Gary Knight & Hungdah Chiu, *The International Law Of The Sea: Cases, Documents, and Readings* 323(1991).

sanctioning expectations of States.”⁷⁵ And States now expect to be able to assert jurisdiction over other States whose conduct - outside a State’s territory – threatens its national interests.⁷⁶ “This practice is called the protective principle, which is considered to be customary international law.”⁷⁷

Canada, a coastal state like Orlando, used the protective principle against Spain. Asserting that Spain violated both domestic law and international conservation measures, it unilaterally exercised jurisdiction over the high seas to prevent Spain from fishing for turbot – an already depleted stock.⁷⁸ Because the world’s oceans are facing an international crisis, emerging customary law supports Canada’s exercise of jurisdiction over the high seas. Accordingly, Orlando contends that it can extend its jurisdiction to the high seas in order to restrict New Madiera from fishing in the North Ocean. If this occurs, Orlando’s use of the protective principle will not violate international law.

B. Orlando can enforce New Madiera’s restriction because a state has universal jurisdiction to prevent piracy from being committed on the high seas.

Piracy is defined as “any act of depredation, committed for private ends.”⁷⁹ Driftnet fishing is piracy because it destroys the resources of the oceans in order “to maximize short term profits at the cost of long term sustainability.”⁸⁰ International Law has clearly established universal jurisdiction for piracy, which is considered to be the beginning of universal criminal

⁷⁵ Jon M. Van Dyke, *The Legitimacy of Unilateral Actions to Protest the Ocean Shipment of Ultrahazardous Radioactive Materials*, at <http://www.nci.org/ib121396.htm>.

⁷⁶ Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons*, at www.earthtrust.org/dnpaper/contents.html.

⁷⁷ *Id.*

⁷⁸ Zumwalt, *supra* note 38, at 47.

⁷⁹ Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons*, at www.earthtrust.org/dnpaper/contents.html.

⁸⁰ *Id.*

jurisdiction for *jus cogens* international crimes.⁸¹

It is Orlando's position that the destruction that New Madiera causes to the North Ocean fisheries is piracy. New Madiera chooses to destroy the resources of the North Ocean for the sole reason of asserting its newly gained independence and sovereignty. Universal jurisdiction empowers Orlando and any other State to seize any ship committing piracy on the high seas.⁸² The perpetrators may be arrested and any property on board may be seized.⁸³ Consequently, if New Madiera keeps its promise to continue to use driftnets by being a "persistent objector" to international law Orlando has the right to seize New Madiera's ship in order to stop the international crime.

⁸¹ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81, 108.

⁸² *Id.*

⁸³ *Id.*

CONCLUSION

We ask the court to rule that New Madiera's use of driftnets in the North Ocean is illegal under international customary law and the provisions of UNCLOS. Accordingly, we are asking the court to deny New Madiera fishing rights in the North Ocean and declare that Orlando has authority to enforce this restriction.