IN THE

INTERNATIONAL COURT OF JUSTICE

March, 1969

CASE NO. 1

PACIFICA,

Applicant,

v.

OCEANIA,

Respondent.

MEMORIAL FOR RESPONDENT

Brian J. Hoyle,

Myron H. Nordquist,

Agents for Oceania.

On the Memorial:

Richard A. Speare

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JURISDICTION

Jurisdiction of the International Court of Justice "comprises all cases which the parties refer to it." Stat. Int'l Ct. Just. art. 36, para. 1. Both Pacifica and Oceania accept the jurisdiction of the Court.

STATEMENT OF FACTS

Late in 1968, following the discovery of a sea shallow in the high seas (approximately 25 metres under the surface, and one mile in circumference, at a distance of 45 miles from the coast of Oceania), Pacifica proceeded to construct an artificial island on top of the sea shallow. After completion, the flag of Pacifica was hoisted and a small garrison left on the island, over which Pacifica proclaimed sovereignty. The seabed surrounding the shallow gradually descended to a maximum depth of 180 metres between the sea shallow and Oceania.

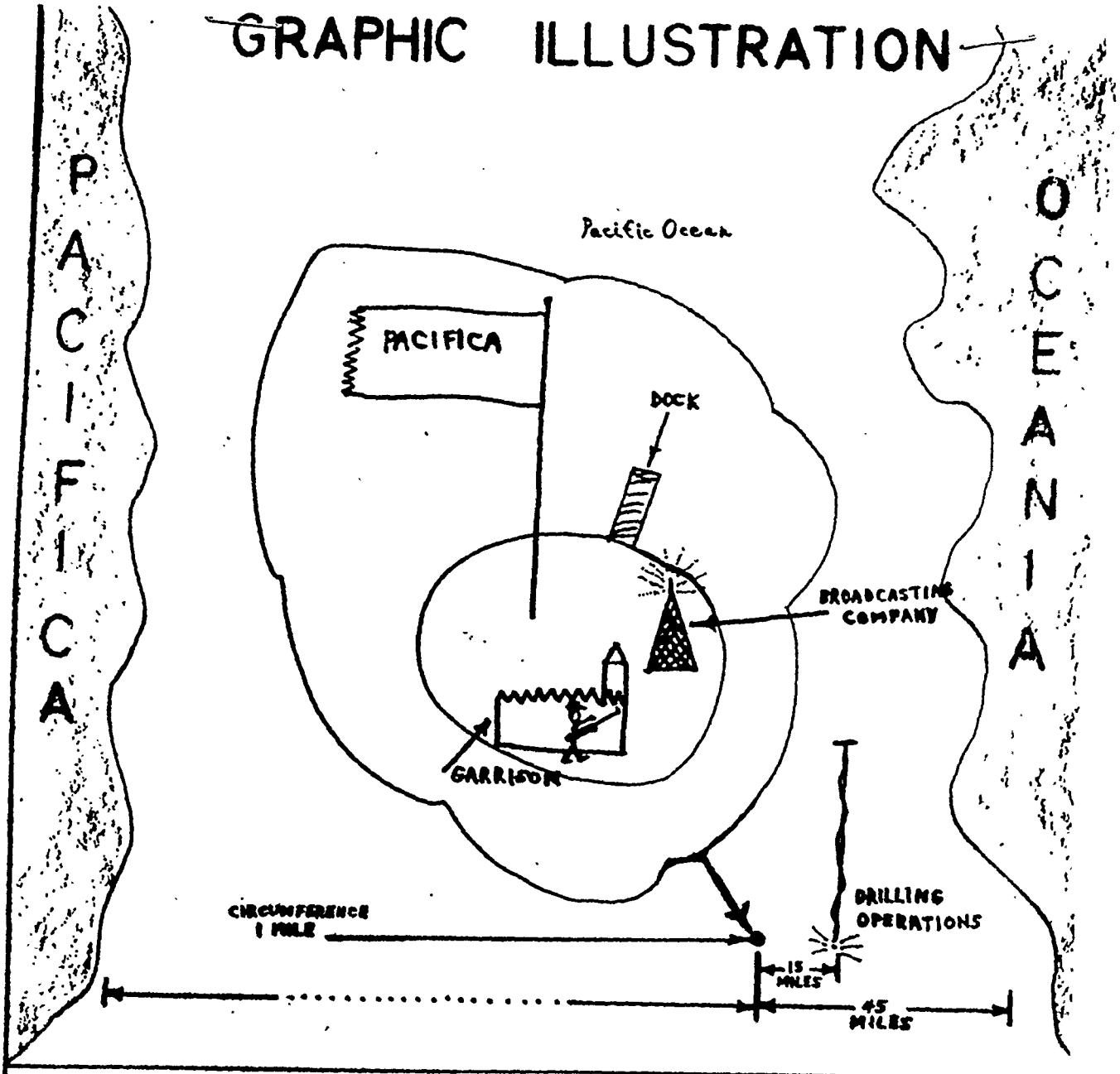
Following the proclamation of sovereignty over the island, the government of Pacifica constructed a dock adjacent to the island, and licensed a broadcasting company, registered in the Bahamas, in which the government of Pacifica held 51% of the shares.

It also issued a license for the exploration and exploitation of oil and other minerals to a British company which commenced drilling operations at a distance of 15 miles from the island and at a depth of 150 metres. The broadcasting company, in its daily political broadcasts, frequently attacked the government of Oceania.

In the spring of 1969, Oceania sent a naval task force which occupied the island, seized the garrison, which it sent back to Pacifica, and destroyed the dock, the drilling equipment, and the broadcasting installations.

After unsuccessful attempts to settle the matter by negotiation, the parties agreed to submit the dispute to the International Court of Justice. Both nations are signatories to the Geneva Conventions on the Law of the Sea and members of the United Nations.

GRAPHIC ILLUSTRATION



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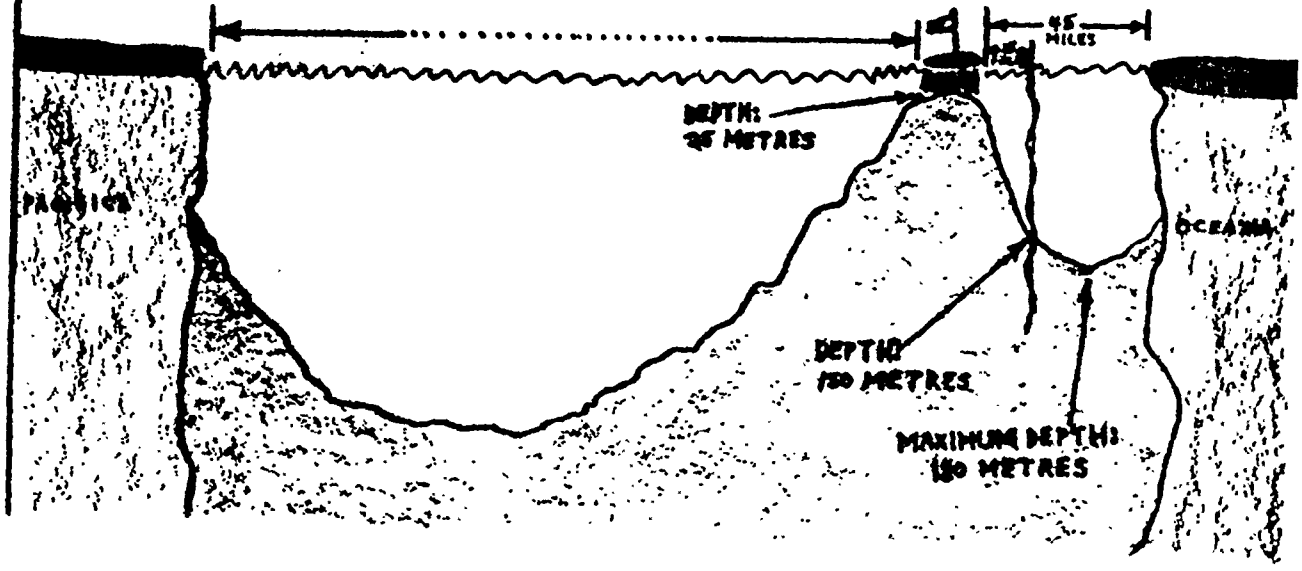

QUESTIONS PRESENTED

1. Whether sovereignty may be established by one State over an artificial island constructed in the high seas on the continental shelf adjacent to another State.

2. Whether one State, in vindication of what it regards as a violation of international law, may use force against another State.

SUMMARY OF ARGUMENT

Pacifica violated customary international law by her activities on Oceania's continental shelf in the high seas. Traditional international law principles preclude national appropriation of the high seas by claim of sovereignty. These rules have been established to prevent unreasonable interference with freedom of the high seas. Specifically, Pacifica's installations were an unreasonable interference with freedom of navigation and fishing.

Oceania has a proprietary interest in her continental shelf. Pacifica is prohibited from proclaiming sovereignty over an area where Oceania has inherent rights. The cumulative effect of the Continental Shelf Convention and subsequent State practice have established a well-recognized proprietary interest in the coastal State. Pacifica's piratical broadcasting and illegal oil drilling violated customary international law and represented an intolerable intrusion on Oceania's proprietary interest in her continental shelf.

Pacifica's infringement on the right to freedom of the high seas constituted an immediate danger to Oceania's political and territorial independence. This threat justified Oceania in exercising the

traditional right of self-defence. The measures taken were in behalf of the family of nations and complied with international law.

ARGUMENT

I. PACIFICA VIOLATED CUSTOMARY INTERNATIONAL LAW BY HER ACTIVITIES ON OCEANIA'S CONTINENTAL SHELF

A. PACIFICA'S CONSTRUCTION OF INSTALLATIONS ON OCEANIA'S CONTINENTAL SHELF VIOLATED FREEDOM OF THE HIGH SEAS

1. THE HIGH SEAS ARE NOT SUBJECT TO INDIVIDUAL CLAIMS OF SOVEREIGNTY

The preamble to the 1958 Geneva Convention on the High Seas states that its provisions are generally declaratory of established rules of international law. One universally recognized principle is that the high seas are not susceptible to national appropriation. This means no State can perfect a claim, by occupation or otherwise, which would entitle it to subject a portion of the high seas to its sovereignty. McDougal and Burke, The Public Order of the Oceans 699 (1965).

Reflecting the consensus of the world community, Article 2 of the High Seas Convention expressly provides that the high seas are open to all nations and that "... no State may validly purport to subject any part of them to its sovereignty." 450 UNTS 82.

World community interests are advanced by precluding individual State sovereignty over the high seas. By recognizing a legal status of open access

to the high seas, a multitude of divergent uses can be simultaneously conducted. Thus, through cooperation and accomodation, mankind as a whole obtains greater productive benefits from the oceans than could result from the division of the sea into private sectors subject to individual State sovereignty.

Pacifica constructed an artificial structure in the high seas and proclaimed sovereignty over it. By purporting to subject a portion of the high sea to her sovereignty, she violated a fundamental principle of international law and breached a solemn treaty obligation.

2. THE INSTALLATIONS UNREASONABLY INTERFERRED WITH FREEDOM OF NAVIGATION

It is undisputed that Pacifica seized portions of the high seas. Places once freely accessible to all were suddenly restricted to only a few. Other users of the high seas could no longer freely traverse the areas where the artificial structures were located. Illegal obstacles had been created. Obstacles which may cause danger or have harmful effects upon other users of the high seas are intolerable. Mouton, "Radio and Television Transmissions from Artificial Islands," 35 Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Academie de Droit International de la Haye 156 (1965).

Article 2 of the High Seas Convention indicates that the freedom of the high seas comprises, inter alia, the freedoms of navigation and fishing. The last sentence of the article reads:

> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas. [Emphasis added].

From this it is seen that "freedom of the high seas" is not an absolute doctrine. It is founded on reasonable use with due regard for the freedoms enjoyed by other users. Cf. Art. 5(1),Continental Shelf Convention.

The International Law Commission recognized this problem by stating:

> The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing, or fish production. McDougal, supra 707, quoting the Official Report.

The water depths in which the installations were built did not constitute pre-existing hazards to navigation. Moreover, the rapidity with which Pacifica authorized construction of these obstacles precluded adequate warning to mariners. In normal circumstances, new safety hazards would be marked on navigation charts. See Article 5, Continental Shelf Convention. Further, there are no indications that Pacifica attempted to formulate agreements with

the nearest coastal State, Oceania, to ensure coordination of compatible lighting and fog signalling procedures. See Burke, Ocean Sciences, Technology, and the Future International Law of the Sea 51 (1966). Pacifica's unilateral action thereby endangered innocent seamen and unduly interferred with other nations' freedom of navigation.

3. THE INSTALLATIONS UNREASONABLY INTERFERRED WITH OCEANIA'S FREEDOM OF FISHING

Hastily erected installations may harmfully affect the marine environment. Article 6 of the Convention on Fishing and Conservation of the Living Resources of the High Seas discusses the special interest a coastal State has in maintaining "...living resources in any area of the high seas adjacent to its territorial sea." Cf., id., Art. 1(1) (b).

Oceania has a legitimate concern for the welfare of her continental shelf marine resources. This is especially true of areas such as the shallow waters around Pacifica's artificial island which would be likely fish feeding grounds, as their construction activities could easily upset a delicate balance in marine life. See Browning, "Who Has What Rights on the Continental Shelves," Ocean Industry 54 (February, 1968).

Oil drilling operations can result in a variety of unseen consequences. The Torrey Canyon and Santa Barbara Channel incidents dramatically demonstrated the importance to a coastal State of adequate oil transportation and exploitation regulations. It would be Oceania's long coastline and continental shelf fisheries, not Pacifica's, which would be contaminated and polluted by careless oil company actions. Reasonable regard for Oceania's freedom of fishing and fish production would dictate that Pacifica closely coordinate with the nearest coastal State, prior to establishing installations. See UN Doc. A/RES./2467 14 January 1969.

In this regard, there is no suggestion that Pacifica attempted to comply with treaty obligations assumed under Article 6 (2) of the Convention on Fishing and Conservation of the Living Resources of the Sea. By that provision Oceania had "...equal footing...in regulation for purposes of conservation of the living resources of the high seas in that area...."

An overall requirement for reasonable exercise of freedom on the high seas is that the activity must be undertaken for a lawful purpose. That is, the freedom must be recognized under general principles

of international law. Woodliffe, "Some Legal Aspects of Pirate Broadcasting in the North Sea," 13 Netherlands Int'l. L. Rev. 365 (1965). An unlawful purpose would be to use an artificial island to justify licensing of pirate broadcasting and illegal oil drilling activities.

B. PACIFICA'S LICENSING OF THE BROADCASTING AND DRILLING ACTIVITIES VIOLATED CUSTOMARY INTERNATIONAL LAW

1. OCEANIA HAS INHERENT RIGHTS IN HER CONTINENTAL SHELF AS A NATURAL PROLONGATION OF HER TERRITORY

The official press release of the judgment delivered by the International Court of Justice on 20 February 1969, in the North Sea Continental Shelf cases described the basic concept of continental shelf entitlement as follows:

> ...the most fundamental of all the rules of law relating to the continental shelf, namely, that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea existed ipso facto and ab initio, by virtue of its sovereignty over the land. That right was inherent. In order to exercise it, no special acts had to be performed. p. 4.

The plain and ordinary meaning of the above language is that the coastal State would have a claim of "prior appropriation" to any installation attached to or embedded in its continental shelf.

In the Eastern Greenland case (1933), P.C.I.J., ser. A/B, No. 53, the Court observed that the requirements for establishing sovereignty are more stringent when there are competing claims. Thus, Pacifica is precluded from perfecting her claim to the artificial island by any form of effective occupation. Oceania has an ipso jure title to her continental shelf submarine areas, as they "might be deemed to be actually part of its [Oceania's] territory in the sense that they [submarine areas] were a prolongation of its land territory under the sea." North Sea Continental Shelf, supra at 6.

2. THE CONTINENTAL SHELF CONVENTION CONFERS A PROPRIETARY INTEREST IN COASTAL STATES WITH RESPECT TO THEIR CONTINENTAL SHELVES

Analysis of the North Sea Continental Shelf Case reveals two requisites for establishing customary international law. First, the emergent norm must be at its inception, declaratory of a mandatory rule of customary international law. Also, subsequent State practice must uniformly effectuate the rule of law involved. Id. at 8. Oceania contenda that the Convention on the Continental Shelf declared norm-creating rules of customary international law insofar as the rights of a coastal State to her continental

shelf are concerned. Further, State practice following the Geneva Convention precludes Pacifica's establishing a claim of sovereignty over or licensing of broadcasting and drilling operations on Oceania's continental shelf.

Article 2 of the Continental Shelf Convention gives the coastal State "sovereign rights" for the purpose of exploration and exploitation of the natural resources of its continental shelf. Such rights are exclusive in the sense that no one may make a claim to the continental shelf without "express consent" from the coastal State. Moreover, the coastal State's rights are not dependent upon any type of occupation or express proclamation.

The rights of a coastal State are limited in that the waters above the continental shelf remain high seas. Id. Art. 3. Also, where the activity is reasonably conducted, the coastal State may not impede the laying of submarine cables or pipelines. Id. Art. 4. Nor may the coastal State unjustifiably interfere with navigation, fishing, living resource conservation, or scientific research openly published. Id. Art. 5(1).

Coastal States are entitled to construct and operate continental shelf installations. Id. Art. 5(2). No other State is authorized by the treaty to erect

devices for exploring and exploiting natural resources.

Jurisdiction over such installations and devices and their safety zones is conferred upon the coastal State. At the same time, such structures "...do not possess the status of islands...." Id. Art. 5(4). This meaning is consistent with Article 10 of the Territorial Sea and Contiguous Zone Convention which defines an island as a "naturally formed area of land."

It follows that Oceania may enforce laws on and around installations attached to or embedded in her continental shelf. Jurisdiction over these areas is based on "sovereign rights" but not "sovereignty." The Convention grants the coastal State "exclusive" rights and interests which nevertheless fall short of the full legal status accorded sovereign territory. This proprietary interest has been deliberated at length. As a consequence, it was integrated with other Articles formulated at the 1958 Geneva Conference. On that basis, Oceania contends that the origins of the emergent norm were declaratory of a mandatory rule of customary international law. This conclusion is reinforced by the practice of States subsequent to 1958.

3. STATE PRACTICE SUBSEQUENT TO 1958 HAS UNIFORMLY RECOGNIZED THE PROPRIETARY INTEREST WHICH COASTAL STATES POSSESS WITH RESPECT TO THEIR CONTINENTAL SHELVES

There is no case where an artificial island has been reduced to State possession under traditional rules regarding acquisition of sovereignty over a terra nullius. Hunnings, "Pirate Broadcasting in European Waters," 14 I.C.L.Q. 410, 428 (1965). A relatively recent phenomenon has concerned "pirate" radio stations located on fixed structures attached to the bed of the high sea. They are a source of annoyance in that they avoid copyrights and performers' royalties, as well as the tax provisions of the coastal State at which they beam their broadcasts. A serious objection to these stations is that they may cause static in communications, due to the limited radio frequency spectrum. Radio interference can be disastrous to ships and aircraft. Green, "Pirate Radio Stations," 35 Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Academie de Droit International de La Haye 133 (1965).

Three fixed structures situated in international waters have directed unauthorized broadcasts toward listeners in proximate coastal States. Of these, Radio City and Radio Invicta were located on Martello

Towers in the Thames Estuary off the South Eastern coast of England. Hunnings, supra 412.

The third installation transmitted from an artificial structure erected on the sea-bed, within the part of the North Sea continental shelf under Dutch jurisdiction. The station was owned by Reclame Exploitatie Maatschappij N.V. (R.E.M.). R.E.M. was controlled by foreign interests, though operated by Dutch nationals. Green, supra. In that case, the transmissions were made over an unused wave-length, and, apparently, no harmful interference with other stations resulted.

In December, 1964, the Netherland's Parliament passed "A Law on Installations in the North Sea." The Netherlands Penal Code was made applicable to and enforceable against persons committing an offense while on any fixed installation erected in that part of the North Sea assigned to Holland by the Continental Shelf Convention. Subsequent Acts made punishable the establishment or operation of a broadcasting station without authorization from the Netherlands government. Id. 144. Pursuant to this municipal statutory enactment, Dutch police were landed by helicopter on the R.E.M. installation. They forcibly removed the operators.

No State protested against Holland's unilateral action. In fact, insurance claims were paid without contest. van Panhuys, "Legal Aspects of Pirate Broadcasting," 60 A.J.I.L. 303, 336 (1966). Regarding the legality of the Netherlands' action, scholars expressed accord with the belief that "...from the point of view of international law, no national legislation was necessary for any action to be taken by the Government in the exercise of authority over fixed installations." Id. at 335, citing authorities. The important focus for analysis must be the proprietary interest protected by the Dutch. The legal status of the broadcasters is largely immaterial for this purpose, as the Dutch interest would be the same whether private individuals or governments were involved. For this purpose the term "piratical" may be broadly construed to include broadcasting operations illegally licensed by Pacifica. By ownership or license, Pacifica is accountable under international law for the activities she authorized. Green, supra 145.

With varying terms and conditions, Norway, Denmark, Sweden, Finland and Belgium, as well as the Netherlands, have enacted legislation against offshore broadcasting. Norway and Belgium's statutes are explicitly confined to mobile stations. van Panhuys, supra 323. The

practice by these nations is particularly significant as they are "...States whose interests were specially affected." North Sea Continental Shelf cases, supra 7.

The practice of a major maritime power, the United States, is also pertinent to a determination of the uniformity accorded a coastal States' proprietary interests in its continental shelf. The Outer Continental Shelf Lands Act, 67 STAT. 462, 43 U.S.C. secs. 1331-1343, asserts the jurisdiction of the United States over the outer continental shelf. It extends the Constitution, laws, and civil and political jurisdiction of the United States to the outer continental shelf, and to artificial islands and structures erected thereon to exploit or remove resources.

The United States has already leased tracts of land situated under water several hundred fathoms deep, and well beyond its territorial waters. This proprietory interest is asserted on the basis that the leasing authority "...extends as far seaward as its technological ability can cope with water depth." Mimeographed materials, Address by Undersecretary C. F. Luce, Dept. of the Interior, Am. Bar. Assoc. National Institute on Marine Resources, Long Beach, Calif., June 8, 1967.

United States v. Ray, Civ. No. 65-271 (S. D. Fla., 1969), was brought by the United States to enjoin a private project to create artificial islands and an independent country five miles off the coast of Florida. The government won its case on the basis of proprietary rights in the outer continental shelf. The memorandum opinion states, "Whatever proprietary interest exists...belongs to the United States under both national (shelf Act) and international (shelf Convention) law." p. 17.

The cumulative effect of the Continental Shelf Convention and subsequent State practice has established a customary norm of international law recognizing a coastal State's proprietary interest in her continental shelf. By intruding on Oceania's proprietary interests in her continental shelf, Pacifica violated this emergent norm of international law. Her aggressive acts also constituted an immediate threat to the security of Oceania.

It should be remembered that the raison d'etre for the Convention on the Continental Shelf was to settle various Parties' rights to use of the adjacent sea and its vast resources. If these treaty obligations can be circumvented by minute legal distinctions, there may soon be disrespect and disuse of consensual devices for peaceful settlement of disputes.

Judicial sanction of Pacifica's action would destroy the effective value of the Convention on the Law of the Sea. It could lead to denunciation of the Treaties by signatories, in the interests of their national security.

The unilateral declaration of sovereignty by Pacifica on Oceania's continental shelf is basically unacceptable because other States may attempt like action. This could open a new race for the riches of the Oceans. It could lead rival nations to potentially disastrous confrontations. The high seas could be reduced to private territorial areas, which would drastically reduce multilateral use by all humanity.

Coastal States cannot tolerate threats to their survival. The continental shelf is too closely tied to a nation's future welfare to be abdicated to potentially hostile States. Thus, the possibility for armed conflict and loss of life was greatly enhanced by Pacifica's attempted appropriation of the areas near Oceania's shores. Pacifica's aggressive authorization of piratical broadcasting and oil drilling operations necessitated prompt response by Oceania.

II. OCEANIA'S SEIZURE OF THE INSTALLATIONS WAS AN ACT OF SELF-DEFENCE

A. PACIFICA'S ACTIVITIES THREATENED OCEANIA'S POLITICAL AND TERRITORIAL INTEGRITY

Pacifica's interference with the freedom of the high seas created a grave danger to the political independence and proprietory interests of Oceania. The right of freedom from intervention in the political and territorial independence is a right strictu sensu, which each nation enjoys under international law. 2 Hackworth, Dig. 282 (1941). By attempting to establish sovereign rights adjacent to Oceania on the high seas, Pacifica threatened the very existance of the coastal State. If unchecked, such acts would lead to the economic strangulation of Oceania. If the economy of Oceania were to collapse, the political and territorial sovereignty of that nation would become a mere fiction.

Likewise, the broadcasting from the artificial island created a grave danger to the independence of Oceania. A State must not organize hostile expeditions within its own territory directed against another State, nor may it encourage the formation of such expeditions by non-state agencies or private persons. Lauterpacht, I Oppenheim 292, 293 (8th ed. 1955)

Additionally, a State must not use or allow its territory to be used as a base for instigating an infringement on the political and territorial sovereignty of a neighboring State through propaganda or subversion. The Draft prohibits the undertaking or encouragement by the authorities of a State of these activities. Thus, Pacifica was obligated to suppress the inflammatory broadcasts by the radio station. These broadcasts were designed to bring about a condition of unrest in Oceania, endangering that nation's political and territorial independence in direct violation of Pacifica's duties as a member of the family of nations.

B. OCEANIA WAS ENTITLED TO EXERCISE THE TRADITIONAL RIGHT OF SELF-DEFENCE

The right of self-defence is a privilege which legalizes action taken in the protection of certain essential rights upon which the security of the State depends. Bowett, Self-Defence in International Law 269 (1958). This right is preserved to Members of the United Nations by Article 51 of the United Nations Charter which provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...

The right of self-defence has under traditional international law always been "anticipatory." The Caroline, 3 Moore, Dig. 919 (1906). Its exercise remains valid against imminent danger as well as actual attacks. While some recent publicists such as Kelsen have attempted to define Article 51 as restricting self-defence to retaliatory action, this interpretation is too narrow. The French text of Article 51, "dans un cas ou un Member des Nations Unies est l'object d'une agression armée," is not expressed in the form of a condition and suggests that the English "if" was used to express an hypothesis rather than a condition. Brierly, The Law of Nations 419 (6th ed. 1963). For this reason, the Kelsen view that an armed attack is a condition precedent to the exercise of the right of self-defence is without foundation. The traditional right of self-defence has been maintained intact, subject only to the well-recognized limitations, an immediate threat must exist, and the action taken must be in proportion to the threat.

A State may exercise its authority on the high seas in exceptional circumstances where this is necessary to forestall a real threat to its territorial integrity and general security. Lauterpacht, I Oppenheim, 497 (8th ed. 1955). It can scarcely be contemplated

that a State must remain passive while a serious menace to its security mounts on the high seas. A coastal State cannot tolerate a danger to its security within its own jurisdiction. It must take measures to prevent that danger from spreading to its shores.

Pacifica's illegal claims to sovereignty created an imminent danger that Oceania's legitimate claims to sovereign rights over the exploration and exploitation of the resources of the continental shelf, as provided for in the Convention on the Continental Shelf, would be eroded until they no longer existed. The stationing of a military garrison on the artificial island and the inflammatory broadcasts created an immediate threat to the political and territorial sovereignty of Oceania. The military danger created on the high seas by Pacifica justified Oceania in employing its naval power to protect itself from the threatened danger.

The primary restrictions on the employment of force in self-defence are that the threatened danger must be imminent, and the force used in defence must be limited to the needs of defence. Brierly, supra 421. In order for the use of force in self-defence to be justifiable, the danger to the defending State must be immediate. Otherwise the State must seek pacific

solution to the situation. Pacifica committed the acts complained of in the short period between the winter of 1968 and the spring of 1969 when Oceania initiated its defensive action. During this period Pacifica committed one aggressive act after another. First, it built the artificial island. It then licensed a broadcasting station, in which it owned a majority interest, to transmit inflammatory material to Oceania. In addition, Pacifica authorized a drilling company to exploit oil on the continental shelf, in direct violation of the sovereign rights to the natural resources of the continental shelf, guaranteed to Oceania by the Convention on the Continental Shelf. Because these acts were an immediate threat, Oceania was justified in taking defensive action to protect its rights under international law.

The degree of force employed by Oceania was merely that necessary to abate the threat created by Pacifica. The degree of force which may legally be used in self-defence is governed by the principle of proportionality. Bowett, supra 269. This means that the measure taken must be reasonable, limited to the necessity of protection, and proportionate to the danger. Oceania seized the island to prevent further interference with the freedom of the high seas, to halt production

of adverse propaganda, to eliminate a possible base for the launching of armed attack, and to curtail the continued invasion of sovereign rights in the continental shelf. The force used by Oceania resulted in no loss of life as Oceania sent the garrison home without injury. The only destruction was that of the broadcasting and drilling equipment. The destruction of this equipment was necessary to prevent it from being used at some future date for similar infringements on the rights of Oceania. At no time did Oceania attempt to do more than protect its political and territorial integrity.

CONCLUSION

Oceania respectfully requests a declaration by the Court that Pacifica's occupation of the island and subsequent actions represent an illegal violation of the freedom of the seas and an intrusion on Oceania's proprietary interests in her continental shelf. Therefore, Oceania was authorized under customary international law to exercise self-defence measures in protection of political and territorial integrity.

CERTIFICATE

We have counted the number of words in our memorial, and we certify that our memorial contains fewer than the maximum allowable number of words as defined in Section V-F-3 of the 1969 Rules of the Philip C. Jessup International Law Moot Court Competition.

Brian J. Hoyle

Myron H. Nordquist

On the Memorial:

Richard A. Spaare

TABLE OF AUTHORITIES

Geneva Conventions on the Law of the Sea

United Nations Charter Provisions and Documents

Miscellaneous