

TEAM 100

**2000 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION**

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

Case Concerning the Seabed Mining Facility

REPUBLIC OF EREBUS

Applicant

v.

KINGDOM OF MERAPI

Respondent

SPRING TERM 2001

MEMORIAL FOR THE RESPONDENT

University of Vienna, Austria

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THE SEABED MINING FACILITY**

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I. STATEMENT OF JURISDICTION

Merapi and Erebus have agreed to submit the Case Concerning The Seabed Mining Facility to the ICJ pursuant to Art.36(1) of the Statute of the ICJ. The jurisdiction of the Court has not been qualified or contested. There is no dispute as to the jurisdiction of the Court.

II. QUESTIONS PRESENTED TO THE COURT

Merapi asks the Court:

1. Whether the Alma Shoals still lie in Merapin waters, despite the change in the course of the Krakatoa river;
2. Whether Merapins still have the right to fish the Alma Shoals even if the boundary has moved;
3. Whether Merapi is required to release the six Erebian fishing vessels;
4. Whether Erebus has to pay compensation for the losses Merapi has sustained as a result of Erebus' occupation of the Alma Shoals;
5. Whether the proposed Erebian seabed mining operation is in violation of international law;
6. Whether Erebus should be enjoined from starting up the seabed mining operation;
7. Whether Erebus is required to upgrade or relocate the seabed mining facility;
8. Whether Merapi acted in violation of international law regarding the destruction of the seabed mining facility
9. Whether Merapi is required to surrender the members of the Aqua Protectors to Erebus.

III. STATEMENT OF THE FACTS

Merapi is a small developing State whose fishing industry provides its main source of subsistence. By contrast Erebus is a large economically developed State with a minor fishing sector. Both are parties to the Vienna Convention on the Law of Treaties and the four 1958 Geneva Conventions on the Law of the Sea. Only Merapi is party to the 1982 United Nations Convention on the Law of the Sea. The land and maritime boundaries between Merapi and Erebus are delimited by the 1947 Treaty of Amity and Peace which specifies that the maritime boundary should follow the mouth of the principal arm of the Krakatoa River, "said arm lying between Pigeon Rock to the South, and the Cape of Realto to the North." According to the preparatory works the river was chosen to provide a boundary that would satisfy both parties. This solution was agreed to after difficult negotiations, over opposed territorial claims and Merapi's burial sites. From 1996 to 1999 the river's principal arm has made a substantial

southward shift, resulting from three violent hurricanes, so that the Alma Shoals presently lie to its north. Erebus now holds that this has placed the rich fishing grounds of the Alma Shoals, lying immediately off the Merapin coast, in its waters. Merapi has fished the Alma Shoals for decades and without interruption, contributing 10% to its GDP. After Merapi had warned Erebus against fishing in the Alma Shoals, six Erebian vessels subsequently found fishing there were seized. Proceedings are still pending before Merapin courts. Erebus responded with an armed occupation driving Merapin vessels from the area, causing losses in fishing of U.S.\$ 1 billion.

In the midst of the escalating fishing dispute, Erebus announced that seabed mining would start near the Grand Basin in September 2000 for its own purposes, although the hard metals sought are also available on the world market. Merapin fishermen have had exclusive use of the resource-rich Grand Basin, lying 220nm off the coast of Merapi, for at least half a century, amounting to 40% of Merapi's GDP. Erebus' announcement, although accompanied by a report which however was limited to computer simulations of seabed mining data, was met with harsh criticism by prominent scientists around the world who indicated that the operation would severely endanger the marine environment in a 300nm radius, including most fish stocks in the Grand Basin. The President of the International Sea-Bed Authority also opposed the operation. Several States brought the issue to the attention of the U.N. Security Council which determined, by Presidential Statement, that the boundary dispute and the potential environmental catastrophe constitute a threat to international peace and security within the meaning of Chapter VII of the Charter and demanded the delay of the operation until proof was given that it would not threaten marine life. Erebus refused to comply with this demand. Merapi stated that the pollution would be equivalent to an armed attack, resulting in human death and starvation on a massive scale. The Security Council has been unable to reach any further decision. The Aqua Protectors, environmentalists partially funded by Merapi, carried out an operation to disable the seabed mining facility a few days before the proposed commencement of mining, unfortunately resulting in six casualties and property damage. The operation was brought to Merapi's attention.

Merapi refused to extradite the members of the Aqua Protectors due to the absence of an extradition treaty between the two countries and the policy of Merapi not to extradite its own nationals or political offenders.

IV. SUMMARY OF THE PLEADINGS

- A.** The Alma Shoals still lie in Merapi's EEZ despite the shift in the Krakatoa river, since the boundary has remained in place pursuant to interpretation of the Treaty of Amity and Peace. Further, according to customary international law a boundary delimited by a river does not change when the river makes a sudden and violent shift. Even if the boundary has moved Merapi still has the right to exclude Erebus from fishing because of Merapi's historic rights and due to its dependence on fishing.
- B.** The proposed Erebian seabed mining operation is in breach of the 1958 Convention on the High Seas since it excludes other legitimate uses. Erebus furthermore contravenes customary international environmental law by polluting areas beyond national jurisdiction, and not consulting other States. It violates the principle of the common heritage of mankind by not sharing the seabed resources with other States. The continuance of the operation contravenes the Security Council's Presidential Statement, a binding decision under Chapter VII.
- C.** Merapi did not violate international law regarding the destruction of the seabed mining facility because the private action of the Aqua Protectors cannot be attributed to Merapi. Even if it is attributable, the action is justified as carrying out the Presidential Statement. Even if no authorization by the Security Council existed, it was justified by a state of necessity.
- D.** Merapi is not required to surrender the environmentalists since no extradition treaty exists between the two States. No duty to extradite exists under customary international law for offences not constituting international crimes. Furthermore, Merapi does not have to extradite persons for predominantly political offences, or its nationals. In place of extraditing, Merapi may still prosecute the Aqua Protectors.
- E.** Merapi is not required to release the six fishing vessels since the Erebian ship owners have not exhausted local remedies. Furthermore, under customary international law Merapi was allowed to seize and detain vessels fishing in its EEZ, and Erebus may not claim their release, not being party to the UNCLOS and not having posted any bond.
- F.** Merapi requests the Court to indicate provisional measures to avoid irreparable harm from the pollution of the Grand Basin, which would render any decision of the Court ineffective.

- G. Under customary international law Erebus is obliged to upgrade or relocate the mining facility in order to prevent, or at least reduce, pollution of the Grand Basin and to respect Merapi's historic fishing rights. Further, it has to respect Merapi's human right to development.
- H. Erebus must compensate Merapi for U.S.\$1 billion in fishing losses resulting from the unlawful occupation of the Alma Shoals. Exhaustion of local remedies is not required because the losses to Merapi's nationals are incidental to the direct injury caused to Merapi in its quality as a State. Furthermore, the grave infringement in itself on Merapi's sovereign rights renders Erebus responsible.
- I. Even if Erebus is not responsible, it has to reimburse the revenue from fishing, as it is unjustly enriched.

V. PLEADINGS

A. Merapi Requests The Court To Declare That, Notwithstanding The Change In Course Of The Principal Arm Of The Krakatoa River, It Has The Right Under International Law To Exclude Vessels And Persons Of Erebian Nationality From Fishing The Alma Shoals

1. The boundary between Merapi and Erebus has not moved and the Alma Shoals remain in Merapi's exclusive economic zone.

Under customary international law a coastal state enjoys sovereign rights to exploit all natural resources of the sea and exclude other States in a 200nm zone from its coast.¹ This regime of an Exclusive Economic Zone [hereinafter EEZ] is codified in Part V of the 1982 United Nations Convention on the Law of the Sea [hereinafter UNCLOS].² In order to ascertain Merapi's EEZ towards Erebus, the 1947 Treaty of Amity and

1. Continental Shelf (*Libya v. Malta*), 1985 I.C.J. 13, 33 (Jun. 3); Continental Shelf (*Tunis v. Libya*), 1982 I.C.J. 18, 73, 74 (Feb. 24); Gulf of Me. (*Can. v. U.S.*), 1984 I.C.J. 247, 265 (Oct. 12); Fitzmaurice/Lachs, *The Legal Regime of the Baltic Sea Fisheries*, 29 NILR 232 (1982); JIMENEZ DE ARÉCHAGA, *Customary International Law and the Conference on the Law of the Sea*, in IN HONOUR OF JUDGE MANFRED LACHS 585 (1984); VIGNES, *La coutume surgie de 1973 à 1982 n'aurait-elle pas écartée la codification comme source principale du droit de la mer?*, in LIBER AMICORUM HONOURING IGNAZ SEIDL-HOHENVELDERN 639 (1988); BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 28 (1989); D.N. Hutchinson, *The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law*, 1985 BRIT. Y.B. INT'L L. 170.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 56, 1(a), 21 I.L.M. 1261 [hereinafter UNCLOS].

Peace [hereinafter TAP] determining the land and maritime boundaries, has to be interpreted.

2. The boundary between Merapi and Erebus has not moved according to the TAP.

Although both States are parties to the Vienna Convention on the Law of Treaties [hereinafter VCLT] its non-retroactivity³ renders the VCLT inapplicable to the 1947 TAP. However, since Arts. 31 and 32 VCLT are customary international law, the terms of a treaty have to be interpreted in good faith according to their ordinary or especially intended meaning, in the light of the treaty's object and purpose,⁴ at the time of conclusion.⁵ In case of ambiguity, recourse may be had to supplementary means including the preparatory work and circumstances of the treaty's conclusion.⁶

The ordinary meaning of a term may be displaced by a special, unusual meaning.⁷ The parties gave a special meaning to the term "principal arm" by defining it as "lying between Pigeon Rock to the South and the Cape of Realto to the North." With regard to this geographical meaning intended by the parties, the terms of the TAP do not allow the line of delimitation to lie south of Pigeon Rock.

In order to determine the object and purpose of a treaty the intentions of the parties have to be taken into account.⁸ Object and purpose of a

3. Vienna Convention on the Law of Treaties, May 22, 1969, art. 4, 1155 UNTS 331 [hereinafter VCLT].

4. Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. available at <http://www.icj-cij.org/icjwww/idocket/ibona/ibonaframe.htm> (last visited Oct. 6, 2001); Territorial Dispute (Libya v. Chad), 1994 I.C.J. 21, 22; I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 153 (2d ed. 1984); A. AUST, MODERN TREATY LAW AND PRACTICE 10s (2000).

5. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21, 1971); Right of Passage (Port. v. India), 1960 I.C.J. 6, 37, 38 (Apr. 12); Grisbadarna (Nor. v. Swed.), 1909 Rep. Int'l Arb. Awards 147-60 (Mar. 14); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 (Part Three)*, 1991 BRIT. Y.B. INT'L L. 27, 57; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles, and Sources of Law*, 1953 BRIT. Y.B. INT'L L. 5.

6. VCLT, *supra* note 3, at art. 32; Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 812 (Dec. 12); Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1995 I.C.J. 6, 17 (Feb. 15).

7. VCLT, *supra* note 3, at arts. 31, 34; Thirlway, *supra* note 5, at 27; Western Sahara, 1975 I.C.J. 12, 52 (Oct. 16).

8. Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 197 (Aug. 27); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretations and Other Treaty Points*, 1957 BRIT. Y.B. INT'L L. 203, 204; Employment of Women During the Night, 1932 P.C.I.J. (ser. A/B) No. 50, at 383 (Anilotti, J., dissenting), available in World Court Reports.

boundary treaty is stability and finality of borders,⁹ otherwise instability could continue indefinitely, and “finality would never be reached.”¹⁰ A boundary established by a treaty may not even be unilaterally altered by invoking a fundamental change of circumstances.¹¹ The parties to the TAP wanted a stable and final border, protecting the achieved balance of interests between the two opposing territorial claims. Therefore, the boundary remains at the old river course.

Even if the Court decides that the meaning of the terms is ambiguous, the *travaux préparatoires* and the circumstances of the TAP as supplementary means of interpretation still confirm that the boundary did not change. Heritage sites as a special local circumstance are of relevance for determining State boundaries.¹² Ancient Merapi burial sites are lying between the Cape of Realto and Pigeon Rock. In 1947 Merapi already agreed to losing the northern half of its burial sites. The *travaux préparatoires* show that the drafters of the TAP agreed on a satisfactory solution forming the basis of the Treaty. Having the boundary at the present river course would deprive Merapi of all the remaining burial sites and would not have satisfied it in 1947, nor today. Therefore the preparatory work and the circumstances at the time of the conclusion of the TAP confirm that the boundary has not changed.

Moreover, according to the principle of restrictive interpretation, restrictions on the sovereignty of States are not to be presumed.¹³ Interpreting the TAP so as to move the boundary would lead to a loss of territory for Merapi. The ensuing loss of territorial sovereignty cannot therefore be presumed.

For all these reasons, correct interpretation of the TAP leads to the result that the boundary has not changed.

9. Temple of Preach Vihear (Cambodia v. Thai.), 1962 I.C.J. 6, 33 (Jun. 15); A. WATTS & R. JENNINGS, *OPPENHEIM'S INTERNATIONAL LAW* 667 (1992).

10. Temple, 1962 I.C.J. at 34.

11. VCLT, *supra* note 3, at art. 62, 2(a); Schwelb, *Fundamental Change of Circumstances*, 29 ZaöRV 55 (1969); Aust, *supra* note 4, at 242.

12. G.M. Kelly, *The Temple Case in Historical Perspective*, 1963 BRIT. Y.B. INT'L L. 470; The Jaworzina Boundary, 1932 P.C.I.J. (ser. B) No. 8, at 274, available in World Court Reports.

13. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 4, 4-108 (Sept. 7); H. Lauterpacht, *Restrictive Interpretation and the Principles of Effectiveness in the Interpretation of Treaties*, 1949 BRIT. Y.B. INT'L L. 58; *River Oder Case* (Gr. Brit. et. al. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 26 (Judgment); *Kronprins Gustaf Adolf and Pacific* (Swed. v. U.S.), 2 R.I.A.A. 1239 (1932); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 636 (1998).

3. The boundary has not moved according to customary international law.

Under customary international law, slow and gradual accretion in a boundary river alters the boundary, whereas avulsion—a sudden and substantial shift—leaves the respective boundary in place.¹⁴ The total extent of the shift, its duration and the violent nature of the causal event determine such an avulsion.¹⁵ The principal arm shifted at least 50nm southwards, the entire length of the Alma Shoals, resulting from three consecutive hurricanes within only four years—a substantial shift for a delta which saw its last hurricane in 1901. Hurricanes are of a violent nature. Thus, the shift was a prime example for avulsion and therefore the boundary has not moved.

4. It is contrary to the principle of good faith to assume that the boundary has moved.

The principle of good faith is a general principle of international law¹⁶ protecting reliance of States on the effectiveness of statements made under certain attending circumstances by one State to another.¹⁷ In 1947 Erebus only claimed the land up to Pigeon Rock. This statement about an issue as important as territory made during bilateral negotiations, disqualifies—as not acting in good faith—the present claim seeking to establish the border as far south as the present course of the river, south of Pigeon Rock.

For all these reasons, the boundary has not changed and the Alma Shoals still lie in Merapi's EEZ. Accordingly Merapi has the right to exclude Erebian from fishing there.

14. *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892); *Kansas v. Missouri*, 322 U.S. 213, 215 (1944); *New Jersey v. New York*, 523 U.S. 767 (1998); Dipla, *Les règles de droit international en matière de délimitation fluviale: Remise en question?*, 89 R.G.D.I.P. 611s (1985); WATTS & JENNINGS, *supra* note 9, at 665; BROWNLEE, *supra* note 13, at 150.

15. *Arkansa v. Tennessee*, 246 U.S. 162, 173-177 (1918); L.J. Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 THE INT'L & COMP. L. Q. 810 (1963).

16. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (Dec. 20); G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 21, at U.N. Doc. A/8019 (1970-71); Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, 62 BRIT. Y.B. INT'L L. 17(1992).

17. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 474 (Dec. 20); *Eastern Greenland Case*, 1933 P.C.I.J. (ser. A/B) No.53, 71(Judgment).

B. Merapins Have The Right To Fish The Alma Shoals Under Customary International Law Even If The Boundary Has Moved

1. Merapi has historic rights to fish the Alma Shoals.

Historic rights of States over certain land or maritime areas are recognized under international law.¹⁸ They emanate from acquiescence, over a reasonable period of time¹⁹ of States directly affected.²⁰ Merapin citizens have been fishing the Alma Shoals continuously and uninterruptedly, long before Merapi claimed an EEZ. Erebus tolerated Merapi's fishing, whereas Merapi acted in reliance on this situation. Therefore, even if the Court holds that the Alma Shoals are within the EEZ of Erebus, Erebus is precluded from claiming fishing rights neglecting Merapi's historic title.

2. Merapi's economic dependence on fishing establishes the right to fish.

Economic dependence of a State on vital commodities creates certain rights under international law, particularly fishing for coastal States.²¹ A developing State even has the right to fish another State's EEZ in order to satisfy its basic needs.²² Merapi is a small developing coastal State. Over half of its GDP comes from the fishing industry. Merapi's economy is thus highly dependent on fishing the Alma Shoals, contributing 10% to its GDP. By contrast, the Erebian economy is highly developed, with only a minor fishing sector, and therefore not dependent on fishing. Hence,

18. *Continental Shelf*, 1985 I.C.J. at 74; Fitzmaurice, *supra* note 5, at 31; BROWNLIE, *supra* note 13, at 163; Y. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 38 (1965); *cf.* *Grisbadarna*, *supra* note 5, at 161.

19. *Temple*, 1962 I.C.J. at 23; *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 152 (Dec. 18); *Venezuelan Preferential Case*, 9 REP. INT'L ARB. AWARDS 103 (1904); Fitzmaurice, *supra* note 5, at 30.

20. *Temple*, 1962 I.C.J. at 23; *Right of Passage*, *supra* note 5, at 39; *Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*, 1959 I.C.J. 209, 250 (June 20) (Armand-Ugon, J. dissenting); *Island of Palmas (Neth. v. U.S.)*, 2 Rep. Int'l Arb. Awards 830, 869 (1928); *The Legal Status of the Gulf of Fonseca*, 11 AM. J. INT'L L. at 700 (1917); *Chamizal Tract*, *supra* note 14, at 329; I. C. Macgibbon, *Customary International Law and Acquiescence*, 1957 BRIT. Y.B. INT'L L. 115; Fitzmaurice, *supra* note 5, at 31.

21. UNCLOS, *supra* note 2, at art. 70, ¶ 2; *Fisheries Jurisdiction (Gr. Brit. & N. Ir. v. Ice.)*, 1974 I.C.J. 3, 26, (July 25); *id.* at 120 (Waldock, J., sep. op.); *Grisbadarna*, *supra* note 5, at 161; DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES: A FRAMEWORK FOR POLICY-ORIENTED INQUIRIES* 283 (1965); LEO J. BOUCHEZ, *THE FREEDOM OF THE HIGH SEAS: A REAPPRAISAL* 45 (L. J. Bouchez & L. Kaijen ed. 1973); *Continental Shelf*, 1985 I.C.J. at 78.

22. UNCLOS, *supra* note 2, at art. 62, ¶ 3.

Merapi has a prevailing right to fish the Alma Shoals to the extent of satisfying its basic needs.

C. Merapi Requests The Court To Declare That The Proposed Seabed Mining Operation Is In Violation Of International Law

1. The seabed mining operation is in violation of Erebus' obligations under the 1958 convention on the High seas.

Merapi and Erebus are parties to the 1958 Geneva Convention on the High Seas [hereinafter CHS], and therefore bound by its provisions. According to Art.2 CHS the freedoms of the high seas shall be exercised "with reasonable regard to the interests of other States."²³ Reasonableness must incorporate equitable principles.²⁴ Any use which by its very nature completely excludes a parallel use by another State is not reasonable.²⁵ Furthermore, subsistence fishing enjoys preferential treatment in international law.²⁶

Erebus' announcement of the proposed seabed mining operation was met with harsh criticism by prominent scientists indicating that the underwater pollution caused by the operation would severely endanger most fish stocks in the Grand Basin. Fishing from this area contributes 40% to Merapi's GDP, constituting Merapi's main source of subsistence. Erebus, by contrast, is not dependent on the seabed mining, since manganese, cobalt, nickel and copper are also available on the world market. Erebian mining would harmfully affect fish stocks, as ascertained by aforementioned scientists, and is therefore not a reasonable use because it would exclude Merapi from its legitimate use of the Grand Basin. This would also not be equitable given Merapi's dependence on fishing. Therefore, the seabed mining operation is in violation of international law.

23. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11; Bos, *La liberté de la Haute Mer: Quelques Problèmes d'actualité*, 12 N.I.L.R. 346s (1965); cf. Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175, 198 (July 25).

24. Fisheries Jurisdiction (U.K. v. Gr.Brit.), 1974 I.C.J. 3, 29 (July 25); GEORGE SCHWARZENBERGER, *THE DYNAMICS OF INTERNATIONAL LAW* 57 (1976); M. D. Blecher, *Equitable Delimitation of Continental Shelf*, 73 AM. J. INT'L L. 60, 83 (1979).

25. Tiewul, *International Law and Nuclear Test Explosions on the High Seas*, 8 C.I.L.J. 47 (1974); Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. at 636 (1955); Bouchez, *supra* note 21, at 29; WOLFGANG GRAF VITZTHUM, *DER RECHTSSTATUS DES MEERESBODENS* 282 (1972).

26. JOHNSTON, *supra* note 21, at 283; cf. *Paquete Habana*, 175 U.S. 677, 708 (1900); C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 474 (3d ed. 1954); CHARLES ROUSSEAU, *LE DROIT DES CONFLITS ARMÉS [THE LAW OF ARMED CONFLICT]* 290 (A.. Pedone Ed. 1983) (1957).

2. The seabed mining operation is in violation of customary international environmental law.

Every State is under a fundamental obligation not to endanger or damage the environment beyond its national jurisdiction.²⁷ Additionally, every State has a good faith obligation to consult with and notify other States who might be affected by possible damage impending on them.²⁸ These principles, constituting customary international law, are codified in Part XII of the UNCLOS.²⁹ Construction had already begun on the seabed mining facility, prior to announcement in April 2000. One part of the recently developed mining process Erebus will use, the hydraulic system, is known to have the effect of destroying marine ecosystems and food chains, e.g. killing fish larvae.³⁰ Thus Erebus' extraction process would severely damage the marine environment beyond Erebian jurisdiction. Furthermore, by not informing Merapi of its plans as soon as they materialized, Erebus disregarded Merapi's right to consultation, since Merapi's fishing is highly affected by the killing of fish larvae in the Grand Basin. For these reasons, the proposed seabed mining operation is in violation of international law.

3. The seabed mining operation contravenes the principle of the common heritage of mankind.

The seabed and subsoil thereof are the common heritage of mankind.³¹ This general principle is embodied in several conventions on areas beyond

27. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. art. 29 (July 8); Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 41 (Sept. 25); Stockholm Declaration on the Human Environment, Principle 21, Jan. 1972, 11 I.L.M. 1420 (adopted June 16, 1972); Rio Declaration on Environment and Development, Principle 2, July 1992, 31 I.L.M. 874, 876 (adopted June 14, 1992);); P. SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 190s (1995); Vessey, *The Principle of Prevention in International Law*, 3 A.R.I.E.L. 189 (1998); Alan E. Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 A.J.I.L. 347, 366 (1985).

28. Rio Declaration, *supra* note 27, at principle 19; SANDS, *supra* note 27, at 607, Boyle, *supra* note 27, at 367; International Law Ass'n, *ILA Draft Rules of Int'l Law on Transfrontier Pollution*, arts.7, 9 in ILA REPORT OF THE 59TH CONFERENCE 547s (1980); *cf.* Fisheries Jurisdiction, *supra* note 24, at 33; Lac Lanoux (Fr. v. Spain), 24 I.L.R. 101 (Arb. Trib. 1957).

29. UNCLOS, *supra* note 2, at arts. 194, ¶ 2, 198; Vignes, *supra* note 1, at 639; Moore, *The Rule of Law in the Oceans*, in SECURITY FLASHPOINTS 471 (M. Nordquist & J. Moore eds., 1998).

30. E. BROWN, 2 SEABED ENERGY AND MINERAL RESOURCES AND THE LAW OF THE SEA: THE AREA BEYOND THE LIMITS OF NATIONAL JURISDICTION II.9 6s (1986); Richard A. Frank, *Environmental Aspects of Deepsea Mining*, 15 VA. J. INT'L L. 815, 818 (1974-75).

31. GA-Res.2749 (XXV), Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, 25 UN-GAOR, Supp. No. 28, 24 art. 1, U.N. Doc. A/8028 (1971) [hereinafter Seabed Principles Declaration];

the limit of national jurisdiction.³² Accordingly appropriation of the seabed is prohibited, its use must be peaceful, and in accordance with an institutional regime.³³ Furthermore, activities shall be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing states.³⁴ This shall be achieved by active transfer of technology³⁵ and equitable sharing of the benefits.³⁶ States shall pay reasonable regard to the environment.³⁷ All States currently preparing for seabed exploitation, even non-signatories of UNCLOS, have incorporated this principle into their domestic legislation.³⁸ Since Erebian seabed mining serves a military end, the operation solely pursues Erebus' national interest. Erebus has not registered with the International Sea-Bed Authority, nor contributed any revenue or technology to developing States.

UNCLOS, *supra* note 2; at art.136; GA-Res.3281(XXIX), Charter of Economic Rights and Duties of States, 29 UN-GAOR, Supp. No. 31, 50 art.29, U.N. Doc. A/9631 (1975) [hereinafter CERDS].

32. UNCLOS, *supra* note 2, part XI; Treaty on Principles Governing the Activities of States in the Exploration and Use of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. 1, 610 U.N.T.S. 205 (Jan. 27, 1967); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, art. 11, 1363 U.N.T.S. 22, 25 (Dec. 5, 1979); Preamble to The Antarctic Treaty, 402 U.N.T.S. 72 (Dec. 1, 1959).

33. Seabed Principles Declaration, *supra* note 31, at arts. 2, 4, 5, 9; UNCLOS, *supra* note 2, at arts. 137, 141; CERDS, *supra* note 31, at art. 29; G.A. Res. 2574, U.N. GAOR, 24th Sess., 9 I.L.M. 417, 418, (reproduced from U.N. Gen. Assy. Doc. A/RES/2602 (XXIV) of Jan. 21, 1970).

34. Seabed Principles Declaration, *supra* note 31, art. 7; UNCLOS, *supra* note 2, art. 140 ¶ 1; CERDS, *supra* note 31, at art. 29.

35. Wolfrum, *The Principle of the Common Heritage of Mankind*, 43 ZaöRV 323 (1983); UNCLOS, *supra* note 2, at art.144; Brown, *supra* note 30, at 49; R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 249 (3d ed. 1999).

36. UNCLOS, *supra* note 2, at art. 140; CHURCHILL & LOWE, *supra* note 35, at 229; Paolillo, *The Institutional Aspects for the International Sea-Bed and their Impact on the Evolution of International Organizations*, 188 Rd.C 209s (1984-V); A HANDBOOK ON THE NEW LAW OF THE SEA 582 (Ren-Jean Dupuy & Daniel Vignes eds., 1991).

37. Seabed Principles Declaration, *supra* note 31, at art. 11; UNCLOS, *supra* note 2, at art. 145; cf. CERDS, *supra* note 31, at art. 30.

38. United States Dep't of Commerce Nat'l Oceanic and Atmospheric Admin. Regulations on Deep Seabed Mining, §§ 970.204, 970.519, 20 I.L.M. 1228, 1238, 1244 (Sept. 15, 1981); France: The Exploration and Exploitation of Mineral Resources of the Deep Seabed, arts. 4, 9, 14, 21 I.L.M. 808 (Dec. 23, 1981); Italy: Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, arts. 3, 7, 15, 24 I.L.M. 983, 984, 986, 991 (Feb. 20, 1985); Union of Soviet Soc. Republics: Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, arts. 8, 14, 18, 21 I.L.M. 551, 552, 553 (Apr. 17, 1982); United Kingdom: Deep Sea Mining (Temporal Provisions) Act 1981, arts. 5, ¶ 1, 10, ¶ 6, 20 I.L.M. 1217, 1221-23 (1981); Federal Republic of Germany: Act of Interim Regulation of Deep Seabed Mining, secs. 1, 13, 20 I.L.M. 393, 393, 395, 396 (Aug. 22, 1980).

Furthermore, the operation poses a serious threat to the environment. For these reasons, the Erebian seabed mining operation does not respect the principle of the common heritage of mankind and is therefore in violation of international law.

4. The Erebian seabed mining operation contravenes the Security Council's presidential statement.

In order to prevent an aggravation of a situation which the Security Council [hereinafter SC] has determined to be a threat to international peace and security, the SC may, under Chapter VII, demand the parties concerned to take provisional measures,³⁹ which are binding.⁴⁰ Such a threat to international peace and security may consist in a humanitarian crisis⁴¹ or by a possible extension of a conflict to other states,⁴² e.g., caused by a massive flow of refugees.⁴³ The Charter does not prescribe any specific form for such decisions by the SC, which enjoys procedural autonomy.⁴⁴ Beside the traditional form of Resolutions, the SC has also increasingly made use of Presidential Statements for at least twenty years.⁴⁵ State

39. UNITED NATIONS CHARTER art.40.

40. UNITED NATIONS CHARTER art. 25; SYDNEY BAILEY & S. DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 19 (1998); Weller, *Enforced Negotiations: The Threat and Use of Force to Obtain an International Settlement for Kosovo*, 5 INT. PEACEKEEPING 4 (1999); Frowein, *Article 39 in THE CHARTER OF THE UNITED NATIONS* 620s (B. Simma, ed. 1995); K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality, in MANUAL OF PUB. INT'L L.* 739 (Max Sorenson ed., 1968); Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AMER. J. INT'L L. 515, 520 (1963); F. SEYERSTED, *UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR* 140, (1966); L. GOODRICH & E. HAMBRO, *THE CHARTER OF THE UNITED NATIONS* 306 (1969).

41. SC Res. 794 (1992), 47 U.N. SCOR 63, U.N. Doc. S/INF/48 (1993); SC Res. 733 (1992), 47 U.N. SCOR 55, U.N. Doc. S/INF/48 (1993); Jean-Marc Sorel, *L'élargissement de la notion de menace contre la paix*, in *LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIES* 41 (Société Française pour le Droit International ed., 1995); Gaja, *Réflexions sur le Rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial*, 97 R.G.D.I.P. 304s (1993).

42. Frowein, *supra* note 40, at 611; Sorel, *supra* note 41, at 42; Gaja, *supra* note 41, at 304.

43. SC Res. 688 (1991), 46 U.N. SCOR 32, U.N. Doc. S/INF/47 (1993); U.N. Doc. S/RES/918 (1994); 49 UN-SCOR 6, UN-Doc.S/INF/50(1996).

44. UNITED NATIONS CHARTER art. 30; Benedetto Conforti, *The Legal Effect of Non-Compliance with Rules of Procedure in the U.N. General Assembly and Security Council*, 63 AMER. J. INT'L L. 479, 482 (1969); BAILEY & DAWS, *supra* note 40, at 390, 410.

45. See, e.g., Statement by the President of the Security Council on Afghanistan, S/PRST/1997/55, available at www.un.org/docs/sc/statements/1997/prst9755.htm (last visited Sept. 17, 2001); Statement by the President of the Security Council on Namibia, 40 U.N. SCOR 10, U.N. Doc. S/INF/41 (1986); Statement by the President of the Security Council on the Hijacking of Commercial Aircraft, 27 U.N. SCOR 18, U.N. Doc. S/INF/28 (1973); BAILEY & DAWS, *supra* note 40, at 63s.

practice shows that a decision using the term “demands” is held to be binding by States.⁴⁶ The proposed seabed mining operation would have the effect of death and starvation on a massive scale by destroying the basis of subsistence for many Merapins. This humanitarian crisis threatens to prompt an exodus of refugees thus destabilizing the whole region. The SC, acting under Chapter VII, has therefore rightfully determined, by the Presidential Statement of Aug.15,2000, the potential environmental catastrophe due to the seabed mining operation to be a threat to international peace and security and demanded Erebus to delay the commencement of the operation. Consequently this SC decision is valid, and binding on Erebus. Erebus has to abort the seabed mining operation and any act of proceeding with it is in violation of international law.

5. Merapi did not violate international law regarding the destruction of the Seabed Mining Facility.

a. The private action of the Aqua Protectors is not attributable to Merapi.

A government is not responsible for any acts of private individuals it does not directly control, because such acts are not considered as occurring on its behalf.⁴⁷ As the ICJ held in the *Nicaragua Case*, direct control is lacking even where a government is “preponderant or decisive in the financing, organizing, training, supplying and equipping [the perpetrators], the selection of [their] military or paramilitary targets and the planning of the whole of [their] operation.”⁴⁸ Merapi’s mere financial contribution and knowledge of the operation does not amount to direct control of the Aqua Protectors. Therefore, Merapi is not responsible for the destruction of the seabed mining facility.

b. Even if the Court decides that Merapi is responsible, the action is justified under the SC Presidential Statement.

Under international law a doctrine has emerged allowing forcible measures by States under circumstances where the SC is incapable of responding adequately to a security crisis, especially where a threat to, or breach of international peace and security has been determined and specific

46. SC Res. 598 (1987), U.N. SCOR, 5th Sess., U.N. Doc. S/INF.43 (1988); Protto Res. 598, U.N. Doc. S/PV.2750 16, 21, 27, 61 (1987); Frowein, *supra* note 40, at 621.

47. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); United State Diplomatic and Consular Staff in Tehron (U.S. v. Iran), 1980 I.C.J. 3; *cf.* INTERNATIONAL L. COMM’N, *Draft Articles on State Responsibility, Second Reading*, art.6[8] available at <http://www.law.cam.ac.uk/rcil/ILCSR/index.htm> (last visited Sept. 28, 2001) [hereinafter *Draft Articles on State Responsibility*].

48. Nicara Military and Paramilitary Activities (Nicar.v.U.S.), 1986 I.C.J. 14 (June 27).

measures demanded by the SC were not complied with.⁴⁹ Erebus, in a diplomatic note, has expressly denied to comply with the SC's demand to delay the operation. The SC has been unable to agree on any further measure. Since a peaceful solution was precluded by Erebian behavior, Merapi, as the immediately affected State, carried out the Presidential Statement, to prevent the devastating consequences on the Merapin population. Hence, the operation was justified under international law.

c. Even if the Court decides that no authorization by the SC existed, the action was justified by a state of necessity.

Necessity—a fundamental principle of customary international law—precludes the wrongfulness of an otherwise illegal act.⁵⁰ A State is under a state of necessity where an act not in conformity with an international obligation is the only means of safeguarding an essential interest against a grave and imminent peril.⁵¹ Furthermore, necessity may not be invoked if the act impairs an essential interest of another State.⁵² Seabed mining was to commence in a few days, imminently threatening Merapi. Saving its population from the danger of starvation is an essential interest to Merapi in order to safeguard its own existence, whereas seabed mining is not essential to Erebus. Furthermore, the Aqua Protectors' operation was carried out early in the morning, as a precaution to avoid injury to persons. Therefore, a state of necessity justified the action under international law.

D. Merapi Requests The Court To Declare That It Is Not Required By International Law To Surrender The Members Of The Aqua

49. See generally Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999); Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Wedgwood, *Unilateral Action in the UN System*, 11 EUR. J. INT'L L. 349 (2000); F. Abiew, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 100s* (1999); Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1726 (2000); cf. Lewis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. L. INT'L. L. 828 (1999).

50. *Draft Articles on State Responsibility*, *supra* note 47, at art. 26[33]; M/V "Saiga" No. 2 (St. Vincent and the Grenadines v. Guinea), 1999 I.T.L.O.S. No. 2 (July 1), available at <http://www.un.org/Depts/los/ITLOS/ITLOSproc.htm> [hereinafter M/V "Saiga"]; 1997 I.C.J. at 37; Yankov, *State Responsibility*, II Y.B.I.L.C., Part Two 39 (1980).

51. *Draft Articles on State Responsibility*, *supra* note 47, at art. 26[33]/1(a), *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 40 (Sept. 25); M/V "Saiga," *supra* note 50; S.P. Jagota, *State Responsibility: Circumstance Precluding Wrongfulness*, 16 NETHERLANDS Y.B. INT'L L. 16, 269 (1985); Brown, *The Lessons of the Torrey Canyon*, 21 C.L.P. 129s (1968).

52. *Draft Articles on State Responsibility*, *supra* note 47, at art. 26[33]/1(b).

Protectors To Erebus For Prosecution, Or To Release The Six Fishing Vessels

1. Merapi is not required to surrender the members of The Aqua Protectors for prosecution.

In the absence of a treaty obligation there exists no duty to extradite alleged criminals under international law.⁵³ In such cases, extradition usually is effected by non-binding considerations of reciprocity and comity.⁵⁴ Since there is no treaty obligation between Merapi and Erebus to extradite wanted fugitives, Merapi's surrendering of fugitives in the past was based on comity and thus has created no obligation for the present case. Therefore, Merapi is under no duty to extradite.

The only crimes that might cause the obligation to extradite under customary international law are international crimes,⁵⁵ such as genocide, crimes against humanity, war crimes and the crime of aggression.⁵⁶ These crimes, if wide-spread and systematic, are of concern to the international community as a whole.⁵⁷ The Aqua Protectors disabled the Seabed Mining Facility to prevent grave pollution of the marine environment. This single, limited act unfortunately resulted in six casualties and property damage, but was not wide-spread or systematic, and was not directed against humanity as a whole. It cannot therefore be considered an international crime. Consequently, Merapi is under no obligation to extradite the Aqua Protectors.

53. Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Lib. v. U.K.), 1992 I.C.J. 3, 24 (April 14); WATTS & JENNINGS, *supra* note 9, at 950; Wise, *The Obligation to Extradite or Prosecute*, 27 ISR. L. REV. 282 (1993); Best Swart, *Refusal of Extradition*, NETHERLANDS YEARBOOK INT'L L. 23, 214 (1992); Stein, *Rendition of Terrorists: Extradition versus Deportation*, ISR'L YEARBOOK INT'L L. 79, 282 (1989); BROWNLIE, *supra* note 13, at 318; cf. M. BASSIOUNI, *A Policy-Oriented Inquiry into the Different Forms and Manifestations of 'International Terrorism,'* in LEGAL RESPONSES TO INTERNATIONAL TERRORISM xlvi (1988).

54. Bassiouni, *Reflections on International Extradition*, in FESTSCHRIFT FÜR OTTO TRIFFTERER 727 (K.Schmoller, ed.1996). Cf. William Hannay, *International Terrorism and the Political Offence Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 383 (1979).

55. BROWNLIE, *supra* note 13, at 318; Bassiouni, *supra* note 54, at 729.

56. Rome Statute of the International Criminal Court, 37 I.L.M. 999, arts. 5, 6, 7, 8 (1998) [hereinafter ICC]; Secretary-General's Report on Aspects of Establishing An International Tribunal for the Prosecutions of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 I.L.M. 1159, arts. 4, 5 (1993); Security Counsel Resolution Establishing the International Tribunal for Rwanda, 33 I.L.M. 1598, arts. 2, 3 (1994); CHARTER OF THE NUREMBERG TRIBUNAL, art. 6, *available at* <http://www.yale.edu/lawweb/avalon/avalon.htm> (last visited Sept. 29, 2001).

57. Rome Statute of the International Criminal Court, *supra* note 56, at prmbi.

Moreover, Merapi submits that it does not have to extradite political offenders or its nationals. Under customary international law, political offences are exempted from the obligation to extradite owing to their overall political motivation.⁵⁸ Extradition treaties and conventions show that it is up to the requested State whether to consider an offence as political or not.⁵⁹ An offence is political if the political motivation is predominant over the criminal one⁶⁰ and if it is directed against a State.⁶¹ The state-owned mining facility was disabled to prevent famine in Merapi, not for private gain. Since Merapi reasonably considers this act as predominantly politically motivated, it does not have to extradite.

Furthermore, under customary international law, States do not have to extradite their own nationals.⁶² This is evidenced by the fact that many States have provided not to extradite their own citizens in their constitutions and national legislations⁶³ and by inclusion of a clause allowing to deny extradition of nationals in international legal instruments.⁶⁴ Therefore, Merapi is under no obligation to extradite the alleged offenders of Merapin nationality.

58. GEOFFREY FREESTONE, *COOPERATION AGAINST TERRORISM in TERRORISM AND INTERNATIONAL LAW* 46 (R.Higgins et. al. eds., 1997); Geoffrey Gilbert, *Terrorism and the Political Offence Exception Reappraised*, 34 INT'L & COMP. L.Q. 696, 700 (1985); Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS at 906 (Spring 1986); Manuel R. Garcia-Mora, *The Nature of Political Offences*, 48 VA. L. REV. 1226 (1962); Hannay, *supra* note 54, at 411; BROWNLIE, *supra* note 13, at 319; WATTS & JENNINGS, *supra* note 9, at 959; *In re Castioni*, 1 Q.B. 148 (1891) reprinted in 5 BRIT. INT. L. CASES 558 (1967); *In re Kavic*, 19 I.L.R. 373 (1952).

59. European Convention on Extradition, Council of Europe, 359 U.N.T.S. 278, art. 3/1 (Dec. 13, 1957) [hereinafter ECE]; Inter-American Convention on Extradition, 20 I.L.M. 724 (Feb. 25, 1981); Extradition Treaty Between United States of America and United States Mexico, 17 I.L.M. 1061, art.5/1(a) (May 4, 1978); Extradition Treaty (Can.-India), 27 I.J.I.L. 279 (Feb. 6, 1987); Extradition Treaty (U.K.-U.S.), 5 A.I.L.C. 408, art.V/1(c)(i) (2nd Ser. 2, 1992) (Jun. 8, 1972); *Model Treaty on Extradition*, G.A. Res. 45/116, U.N. GAOR, 45th Sess., U.N. Dec., A/RES/45/116 (Dec. 14, 1990), available at <http://www.un.org>.

60. *In re Nappi*, 19 I.L.R. 375 (1952); *In re Ockert*, 7 ANN. DIG. PUB. INT'L L. CASES 370 (1933-4); *In re Kavic*, 19 I.L.R. 373 (1952), *In re Kaphengst*, 5 ANN. DIG. PUB. INT'L L. CASES 293 (1929-30).

61. *In re Giovanni Gatti*, 14 ANN. DIG. PUB. INT'L L. CASES 145 (1947); *In re Meunier*, 2 QB 415 (1894); cf. *In re Abu Eain*, 529 F. Supp. 695 (1980); *Wassilief Case*, quoted in: Manuel R. Garcia-Mora, *The Present Status of Political Offences in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 378 (1953)(quoting from *Wassilief Case*).

62. Geoffrey Freestone, *Cooperation Against Terrorism*, in *TERRORISM AND INTERNATIONAL LAW* 46 (R. Higgins et. al. eds., 1997); Vieira, *L'Evolution Récente de l'Extradition dans le Continent Américain*, 185 Rd.C. 236ss (1984-II).

63. IVAN ANTHONY SHEARER, *EXTRADITION IN INTERNATIONAL LAW*, 102, (1971); Vieira, *L'Evolution Récente de l'Extradition dans le Continent Américain*, 185 Rd.C. 236, 238 (1984-II); WATTS & JENNINGS, *supra* note 9, at 955 (1992).

64. ECE, *supra* note 59, at art.6/1(a); Treaty Concerning Extradition (Belg.-Lux.-Neth.),

Finally, according to the principle *aut dedere aut judicare*, a State not extraditing an accused person, has to “submit the case to its competent authorities for the purpose of prosecution.”⁶⁵ Since nothing in the *Compromis* points to Merapi’s unwillingness to investigate or to prosecute, Merapi has the option to prosecute and is under no obligation to extradite.

2. Merapi requests the Court to declare that it is not required by international law to release the six fishing vessels.

a. *The Erebian ship owners have not exhausted local remedies.*

Under customary international law a State may not afford diplomatic protection to its nationals unless said nationals have exhausted local remedies.⁶⁶ Since proceedings on Erebian vessels are still pending before Merapi courts, local remedies are not exhausted. Consequently, Erebus cannot claim diplomatic protection and Merapi need not release the six fishing vessels.

b. *Merapi need not release the vessels according to customary international law.*

Under customary international law coastal States are allowed to take measures—including seizure, detention and judicial proceedings—to ensure compliance with their sovereign rights within their EEZ.⁶⁷ The Alma Shoals lie in Merapi’s EEZ. Despite the announcement by the Merapi Prime Minister that any Erebian fishing vessel found fishing the

available at <http://www.consilium.eu.int/ejn/> (Jun. 27, 1962); Treaty on Extradition (U.S.-Mex.), available at <http://www.yale.edu/lawweb/avalon/avalon.htm> (Dec. 11, 1861); *Model Treaty on Extradition*, art.4(a), G.A.Res. 45/116, U.N. GAOR, 45th Sess., U.N. Dec., A/RES/45/116 (1990), available at <http://www.un.org> (Dec. 14, 1990); Inter-American Convention on Extradition, 20 I.L.M. 724, art. 7 (Feb. 25, 1981); Stein, *supra* note 53, at 330.

65. G.A. Res. 39/46, 39; U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1985); *cf.* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; *Bassouni*, *supra* note 54, at 726; Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L. Q. 593 (1989).

66. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1939 P.C.I.J. (ser.A.) No. 2, at 12 (date); *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6, at 26 (March 21); E. Borchard, *Diplomatic Protection of Citizens Abroad* 332(1922); *cf.* *Draft Articles on State Responsibility*, *supra* note 47, at art.45[22].

67. UNCLOS, *supra* note 2, art. 73/1; United Nations Convention on the Law of the Sea 1982, 794 (S. Nandan & S. Rosenne eds. 1993); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 514 cmt. (1987); Nor.:¶8, Act. No. 91 of Dec.17, 1976 Relating to the Economic Zone of Norway, United Nations, *National Legislation and Treaties Relating to the Law of the Sea*, UN/ST/LEG/Ser.B/19 242 (1980); Bah.:art. 13, Fisheries Resources (Jurisdiction and Conservation) Act, 1977, *id.* 185s; N.Z.:art. 24, Tokelau (Territorial Sea and Fishing Zone) Act, 1976, *id.* 75s; Myan./Burma:Art.22, Territorial Sea and Maritime Zones Law, 1977, *id.* 11.

Alma Shoals would be seized, six Erebian vessels fished there in violation of Merapi's sovereign rights. Therefore seizure and detention pending proceedings are lawful and Merapi need not release the vessels.

The UNCLOS provides for prompt release of detained vessels upon the posting of a reasonable bond or other security.⁶⁸ However, no treaty creates a right for a third State unless the States Parties so intend, and such an intention cannot be lightly presumed.⁶⁹ Since Erebus is not a party to the UNCLOS, it may not rely on the UNCLOS to claim prompt release of the vessels from Merapi.

Even if the Court decides that Erebus may claim prompt release of the vessels upon the posting of a reasonable bond or other security, no such security has been posted by the Erebian ship owners. Therefore, Merapi need not release the vessels.

E. Merapi Requests The Court To Enjoin Erebus From Starting Up Its Seabed Mining Operation Until It Is Either Upgraded Or Relocated To Ensure The Safety Of The Marine Life Off The Coast Of Merapi

1. Merapi requests the court to indicate provisional measures of protection.

The Court has the power to indicate provisional measures to ensure that no action is taken which might prejudice the disputed rights of either party, notwithstanding whatever decision on the merits the court may render.⁷⁰ They may be awarded if there is urgency that such prejudicial action might infringe upon these disputed rights before the final decision is given⁷¹ and if irreparable damage would otherwise be caused.⁷² Such provisional measures have been indicated by the Court, e.g. to protect a State's fishing right, considering the possible effects on its fishing

68. UNCLOS, *supra* note 2, at 292, art. 73/2.

69. VCLT, *supra* note 3, at arts. 34, 36/1; Free Zones of Savoy and the District of Gex, 1932 P.C.I.J. (ser. A/B) No. 46, at 147; Luke Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. (1983).

70. A Passage Through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, at 17; Fisheries Jurisdiction (U.K., Fr. v. Ice.), 1972 I.C.J. 12, at 15, 17, 35; Nuclear Tests (Aus., N.Z. v. Fr.), 1973 I.C.J. 99, at 133.

71. 1991 I.C.J. at 17; 1973 I.C.J. at 140s; Pakistani Prisoners of War (India v. Pak.), 1973 I.C.J. 330 (Order).

72. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 257 (Apr. 9); Convention for Prevention and Punishment on Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 19 (April 8); Fisheries Jurisdiction (U.K., Fr. v. Ice.), 1972 I.C.J. 12 at 16, 34; 1973 I.C.J. at 103, 139.

industry,⁷³ as well as to protect the environment against pollution.⁷⁴ Irreversible injury threatens the marine environment beyond the limits of national jurisdiction, affecting all States. Regarding Merapi, the need for provisional measures derives from the fact that the lives of Merapin citizens and the health and progress of Merapi's economy are highly endangered, thus posing a threat of irreparable harm. It would be unacceptable to wait and then let Erebus compensate for loss of human lives and massive sea pollution. There is urgency inasmuch as the date of commencement of the operation is not clear and possibly very close and a final decision on the pertinent case is uncertain. Once the operation has started, marine pollution cannot be undone and would render any decision on the merits ineffective. Therefore, the Court should indicate provisional measures to enjoin Erebus from starting up its seabed mining operation.

Even if the Court decides that protection of specific rights is not required, provisional measures may be indicated to prevent any aggravation or extension of the dispute.⁷⁵ Considering the devastating consequences to Merapi's economy and the threat to many lives, it cannot be denied that starting the mining operation would severely aggravate the present dispute. Therefore, Merapi requests the Court to indicate provisional measures.

2. Erebus has to either upgrade or relocate the mining facility under international law.

a. *Erebus must upgrade or relocate the mining facility, according to customary international environmental law.*

States must protect and preserve the marine environment by taking all appropriate measures to prevent, reduce and control pollution resulting from installations for the exploitation of the seabed. This is well recognized under customary international law as evidenced by numerous conventions,⁷⁶ resolutions,⁷⁷ and national legislations.⁷⁸ Furthermore,

73. 1972 I.C.J. at 34; Jimenez de Arechaga, *International Law in the Past Third of a century*, 159 Rd.C. 159 (1978-I); Thirlway, *Indication of Provisional Measures by the International Court of Justice*, in INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 11 (R. Bernhardt ed. 1994); J.Elkind, INTERIM PROTECTION, A FUNCTIONAL APPROACH 115 (1981).

74. 1973 I.C.J. at 141; de Aréchaga, *supra* note 73, at 159.

75. Convention for Prevention and Punishment on Crime of Genocide (Bosn. & Herz. v Yugo.), 1993 I.C.J. 19 at 23 (April 8); Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 1996 I.C.J. 13 at 22 (March 13); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 9; 1972 I.C.J. at 16, 35; Oda, *The International Court of Justice Viewed from the Bench (1976-1993)*, 244 Rd.C. 72 (1993-VII).

76. UNCLOS, *supra* note 2, at arts. 192, 194/1,3(c); Convention on the Protection of the

according to the precautionary principle lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious damage.⁷⁹ Erebus will use a recently developed hybrid process for its seabed mining, already criticized by prominent scientists, which contains the hydraulic system. Since said system is harmful to the environment, danger from the hybrid process as a whole cannot be ruled out. Due to its recency, computer simulation cannot give sufficient information about its potential environmental impact and data from other seabed mining sites can only give information about already tested technology. Hence, there is a lack of full scientific certainty about the impacts of the hybrid process. Therefore, Erebus has not taken all appropriate measures to prevent pollution and is obliged to upgrade the mining facility by using environmentally safe technology. Furthermore, since this untested technology can lead to an environmental catastrophe threatening the plentiful fish stock in the resource-rich Grand Basin, Erebus at least has to relocate the mining facility in order to prevent pollution of this area of special ecological value.

Marine Environment of the Baltic Sea Area, art. 10, Mar. 22, 1974, *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES, 974:23 (1995); Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, art. 3, Oct. 14, 1994, *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES 976:13/E (1995); Convention for the Protection of the Marine and Coastal Environment of the West and Central African Region, art. 8, Mar. 3, 1981, *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES 981:23 (1995); Convention for the Protection of the Marine Environment of the Wider Caribbean Region, art. 8, Mar. 24, 1983, *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES 983:237 (1995); Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 5, Sept. 22, 1992, *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES 992:71 (1995).

77. Seabed Principles Declaration, *supra* note 31; G.A. Res. 2467, U.N. GAOR Dec. 21, 1968, 8 I.L.M. 203 (1969).

78. 20 I.L.M. at 1228 *et seq.* (§§ 970.204, 506, 701); 20 I.L.M. at 1221-23 (art. 5, ¶1 and art. 10, ¶ 6); 21 I.L.M. 808 *et seq.* (arts. 8, 14); 21 I.L.M. 551 *et seq.* (art. 8); 20 I.L.M. 393 *et seq.* (§§ 1, 8)

79. 31 I.L.M. at 876; SANDS, *supra* note 27, at 212s; Şolyan, *The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles*, 3 ARIEL 211 (1998); Communication on the Precautionary Principle, EC-Commission, COM (2000)1-final; Convention for the Protection of the Marine and Coastal Environment of the West and Central African Region, *supra* note 75, at art. 3/3; Convention on Biological Diversity, *prmbli.*, *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW-MULTILATERAL TREATIES, 992:42 (1995)

b. Erebus has to upgrade or relocate the mining facility, according to Merapi's historic rights to exploit the resources of the Grand Basin.

Historic rights are recognized under international law. On the high seas, they emanate from acquiescence of the international community.⁸⁰ The citizens of Merapi have been fishing the Grand Basin for hundreds of years uninterruptedly, and exclusively for at least half a century. Erebus, being technologically advanced, had the possibility to exploit the area off the coast of Merapi. But it remained inactive and Merapi thus validly trusted this given state of affairs. Deprivation of these rights would result in unequal hardship for Merapi due to the consequence of starvation and death on a massive scale. Therefore, Merapi has established a historic right to fish the Grand Basin and Erebus is under the obligation to respect this right and consequently to upgrade or relocate its mining facility.

c. Erebus has to upgrade or relocate the mining facility, according to the International Law of Development.

According to the right to development, developing States are to be treated in a favorable, preferential manner by creating such conditions as to enable them to compete with more developed States.⁸¹ As it is a human right, this is a common and shared responsibility of the entire international community.⁸² It has to be fulfilled in accordance with the concept of sustainable development, thus not harming the environmental needs of present and future generations.⁸³ Erebus' mining operation endangers Merapi's main source of subsistence—fishing the Grand Basin. In destroying the basic pillar of Merapi's economy, Erebus is violating the human right to development. Furthermore, the seabed mining greatly endangers the marine environment in breach of the principle of sustainable

80. Fitzmaurice, *supra* note 5, at 30; MacGibbon, *supra* note 20, at 122; 1951 I.C.J. at 139; cf. BLUM, *supra* note 18, at 315s.

81. Verwey, *The Recognition of the Developing Countries as Special Subjects of International Law Beyond the Sphere of United Nations Resolutions*, RdC 372s (1979); Ansbach, *Peoples and Individuals as Subjects of the Right to Development*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 155 (S.Chowdhury et al., eds. 1992).

82. G.A. Res. 41/128, U.N. GAOR 41st Sess., U.N. Doc. A/Res.41/128 (1986) available at <http://www.un.org>; Roland Y. Rich, *The Right to Development as a Principle of Human as an Emerging Human Right*, 23 VA. J. INT'L L. 314 (1983); Ansbach, *supra* note 81, at 145; U. Umzurike, *THE AFRICAAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 60 (1997).

83. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 78 (Sept. 25); Beyerlin, *The Concept of Sustainable Development*, in *ENFORCING ENVIRONMENTAL STANDARDS* 103 (R. Wolfrum ed., 1996); Canelas de Castro, *The Judgment in the Case Concerning Gabcikovo-Nagymaros Project*, 8 Y.I.E.L. 28 (1997); 31 I.L.M. 874 (prin. 3); Resource Renewal Institute, *Brundtland Report* (1987), art. 2, available at <http://www.rri.org/envatlas/supdocs/brundt.html>.

development. Therefore, Erebus is under the obligation to upgrade or relocate the mining facility.

F. Merapi Requests U.S.\$ 1 Billion In Damages In Compensation For The Losses It Has Sustained As A Result Of Erebus' Occupation Of The Waters Surrounding The Alma Shoals

1. Erebus must compensate Merapi for the losses suffered by its nationals.

An internationally wrongful act, i.e. an action or omission in breach of an international obligation attributable to a State, entails the responsibility of that State.⁸⁴ The wrongdoing State incurs the obligation to wipe out all consequences of the illegal act and reestablish the situation which would have existed if the act had not been committed.⁸⁵ Where restitution is impossible or insufficient, the wrongdoing State must pay compensation.⁸⁶ Compensation is due for any financially assessable loss which in the ordinary course of events would not have occurred if the unlawful act had not been committed.⁸⁷ Where the damage suffered by nationals is incidental to the direct injury to a State in its very quality, which thus has a legal interest of its own, distinct from that of its nationals, exhaustion of local remedies is not required.⁸⁸ The Erebian military has occupied the waters surrounding the Alma Shoals, forcing Merapin fishing vessels to retreat from the area. Since Merapi, and not Erebus, is entitled

84. Cf. *Draft Articles on State Responsibility*, *supra* note 47, at arts.1 ,2 [3]; Corfu Channel (Alb. v. U.K.), 1949 I.C.J. 4, 22, 23 (Judgment); 1980 I.C.J. at 41; Dupuy, *Le Fait Générateur de la Responsabilité Internationale des Etats*, 188 RdC 26s (1984-V).

85. *Factory at Chorzów (Germany v. Pol.)*, 1928 P.C.I.J. (ser.A) No.17, 47 (Judgment); *Draft Articles on State Responsibility*, *supra* note 47, at art. 36[43].

86. Cf. *Draft Articles on State Responsibility*, *supra* note 47, at art. 37[44]; 1928 P.C.I.J. at 47; G. SCHWARZENBERGER, 1 *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURT AND TRIBUNALS* 660 (3d ed.,1957); F.A. Mann, *The Consequences of an International Wrong and National Law*, 48 BRIT. Y.B. INT'L L. 2 (1976-77); Jiménez de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 565s (M. Sørensen ed.,1968).

87. *Draft Articles on State Responsibility*, *supra* note 47, at art.37/2[44]; Central Rhodope Forests (Greece v. Bulg.), 28 AM. J. INT'L L. 804 (1934)(1933); Cape Horn Pigeon (U.S. v. Russia), 9 REP. INT'L ARB AWARDS 51, 65 (1902); AMCO Asia Corp.v.Indonesia, 24 I.L.M. 1032, 1036 (Nov. 21, 1984); Spanish Zone of Morocco (Spain v. UK), 2 REP. INT'L ARB AWARDS 658 (1925); C. WILLFRED, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 544 (1964); García-Amador, *State Responsibility*, II Y.B. INT'L L. COMM'N (1961); Arangio-Ruiz, *State Responsibility*, II Y.B. INT'L L. COMM'N, 19 (1989) (Part One).

88. Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT Y.B. INT'L L. 86; C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* 129 (1990); *Aerial Incident of 27 Jul. 1955 (Isr., U.S., U.K. v. Bulg.)*, 1959 I.C.J. PLEAD. 531, 589; M/V "Saiga," *supra* note 50, at ¶98.

to exercise sovereign fishing rights in the Alma Shoals, the occupation by Erebus was an internationally wrongful act. This violation of Merapi's sovereign rights constitutes a direct injury to Merapi in its quality as a State. Subsequently, it also caused loss of fishing yields to its nationals. As this loss is incidental to the direct injury to Merapi, exhaustion of local remedies is not required. Erebus has to reestablish the previous situation by withdrawing its navy from the Alma Shoals. Merapi's fishing yields during the time of occupation would in the ordinary course of events have accrued to U.S.\$ 1 billion. These yields cannot be restituted in kind, thus appropriate compensation is due to Merapi and Erebus has to pay compensation for the loss of fishing yields.

2. Even if the Court does not hold Erebus responsible for damages to Merapi's nationals, the infringement on Merapi's sovereign rights renders Erebus responsible.

Under international law compensation is due for the infringement of a State's rights, independently of material damage, reflecting the gravity of the breach.⁸⁹ The infringement of a State's sovereign rights is a grave violation of international law.⁹⁰ Erebus' occupation of the Alma Shoals using armed force completely excludes Merapi from fishing its own EEZ and infringes on its sovereign rights. Therefore Erebus has to pay compensation.

3. Even if the court does not hold Erebus responsible for the occupation Erebus is unjustly enriched.

The concept of unjust enrichment which is a recognized general principle of international law⁹¹ is based on the idea that no State should enrich itself at the expense of another State without legal cause.⁹² Erebus is

89. The Rainbow Warrior Affair, 19 REP. INT'L ARB. AWARDS 202 (1986); The I'm Alone (Can. v. U.S.), 3 REP. INT'L ARB. AWARDS 1618 (1949) (1933); Fitzmaurice, *The Case of the I'm Alone*, 17 BRIT Y.B. INT'L L. 94, 109 (1936); M. Whiteman, DAMAGES IN INTERNATIONAL LAW 628 (1937); *Draft Articles of State Responsibility*, art. 45/2(c), in Y.B. INT'L L., PART TWO 61 (1996); G.A. Res, U.N. GAOR, 48th Sess., U.N. Doc. A/48/10 205 (1993).

90. Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 10 (Order).

91. H. Lauterpacht, *Lena Goldfields Arbitration*, 5 ANN. DIG. PUB. INT'L L. CAS. 3 (1930); W. Friedmann, *Some impacts of Social Organization on International Law*, 50 AM. J. INT'L L. 505 (1956); Rodríguez-Iglesias, *El Enriquecimiento sin Causa como Fundamento de Responsabilidad Internacional*, 34 R.E.D.I. 387ss (1982); *Shannon & Wilson, Inc. v. AEOI*, 9 Iran-U.S. Claims Tribunal REP 402 (1985-II); *Schlegel Corp. v. NICIC*, 14 Iran-U.S. Claims Tribunal 180 (1987-I); McNair, *The Seizure of Property and Enterprises*, 6 N.I.L.R. 240 (1959).

92. Fombad, *The Principle of Unjust Enrichment in International Law*, 30 C.I.L.S.A. 129 (1997); Friedmann, *General Course in Public International Law*, 127 Rd.C. 155 (1969-II).

profiting from fishing the occupied Alma Shoals. Since the Alma Shoals are part of Merapi's EEZ, this fishing is without legal title. Erebus is therefore unjustly enriched and consequently must reimburse the profit gained.

VI. PRAYER FOR RELIEF

May it therefore please the Court to:

1. Declare that, notwithstanding the change in course of the principal arm of the Krakatoa River, Merapi has the right under international law to exclude vessels and persons of Erebian nationality from fishing the Alma Shoals;
2. Declare that the proposed Erebian seabed mining operation is in violation of international law;
3. Declare that Merapi is not required by international law either to surrender the members of The Aqua Protectors to Erebus for prosecution, or to release the six fishing vessels;
4. Enjoin Erebus from starting up its seabed mining operation until it is either upgraded or relocated to ensure the safety of the marine life off the coast of Merapi;
5. Award to Merapi U.S. \$1 billion in damages to compensate it for the losses it has sustained as a result of Erebus' occupation of the Alma Shoals.

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