The 2001 Philip C. Jessup International Law Moot Court Competition

Republic of Erebus

v.

Kingdom of Merapi

The Case Concerning the Seabed Mining Facility

BEST OVERALL MEMORIAL – APPLICANT

First Place
Richard R. Baxter Award

New England School of Law
United States (Team #342)

THE CASE CONCERNING
THE SEABED MINING FACILITY

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STATEMENT OF JURISDICTION

Pursuant to Article 40(1) of the Statute of the Court, the Republic of Erebus and the Kingdom of Merapi, by a special agreement dated 1 November 2000, have agreed to submit their present dispute concerning maritime boundary delimitation and the seabed mining facility to the jurisdiction of the International Court of Justice under Article 36(1) of the Statute of the Court.

QUESTIONS PRESENTED

Erebus asks the Court:

1. Whether the Treaty of Amity and Peace established the Erebian-Merapin boundary as being the middle of the Krakatoa River's principal arm, irrespective of any subsequent movement in the location of said arm;
2. Whether the shift that has occurred in the location of the Krakatoa River's principle arm is governed by the doctrine of accretion;
3. Whether the shift in the Krakatoa's main arm has resulted in placing the Alma Shoals and the adjacent petroleum reserves within the Erebian exclusive economic zone;
4. Whether Merapi acted in violation of international law when it seized and subjected to forfeiture proceedings six Erebian-flagged vessels fishing in the Alma Shoals;
5. Whether Erebus acted consistent with international law when, in response to the Merapin seizures, it provided naval escorts to Erebian fishing vessels in the Alma Shoals;
6. Whether Merapi is required to return or compensate for the Erebian fishing vessels it seized in the Alma Shoals;
7. Whether the establishment of the Erebian deep seabed mining facility under the high seas was inconsistent with international law;
8. Whether Merapi is prevented by the doctrine of equitable estoppel from asserting that the Erebian seabed mining facility is not in compliance with international law;
9. Whether the Aqua Protectors' attack on the Erebian seabed mining facility is imputable to the government of Merapi;
10. Whether Merapi's involvement in the Aqua Protectors' attack was justifiable as self-defense under Article 51 of the United Nations Charter;

11. Whether Merapi had authorization from the United Nations Security Council to attack the Erebian seabed mining facility;
12. Whether Merapi is required to compensate Erebus for the cost of repairing the seabed mining facility and lost profits while such repair is underway;
13. Whether Merapi is required to compensate Erebus for the loss of life inflicted by the Aqua Protectors' attack; and
14. Whether Merapi must extradite the responsible members of the Aqua Protectors for prosecution in Erebus.

STATEMENT OF FACTS

This case arises out of the Kingdom of Merapi's seizure of Erebian-flagged fishing vessels and its support for a deadly attack on the Erebian government's seabed mining facility. (Compromis ¶¶7, 18; Clarifications ¶4).

THE ALMA SHOALS

The Kingdom of Merapi borders the Republic of Erebus to its south. (Comp. ¶2). In 1947, Erebus and Merapi entered into the Treaty of Amity and Peace, which established their common land border as the midpoint of the principal arm of the Krakatoa River. (Comp. ¶¶3, 4). The Krakatoa River follows an easterly path and forms a large uninhabited delta before reaching the Etna Sea. (Comp. ¶2; Clar. ¶2). The Treaty also marked the nations' maritime boundary as extending out to sea from the midpoint of the principle arm of the Krakatoa River. (Comp. ¶4).

At the time the Treaty was prepared, the principle arm lay between Pigeon Rock to the south and the Cape of Realto to the north. (Comp. ¶4). As a result, the Alma Shoals and its fish-stocks were placed within the contiguous waters of Merapi. (Comp. ¶2). Notwithstanding, vessels from Erebus and other nations fished the area without provoking a response from Merapi. (Clar. ¶3).

Over time, hurricane-induced erosion has shifted the principal arm of the Krakatoa southward, so as today Pigeon Rock lies to the north of the principal arm. (Comp. ¶5). The river's previous main arm has ceased to exist as a distinct topographical feature. (Comp. ¶5; Clar. ¶1). Drawing the maritime boundary from the midpoint of the river's new principal arm establishes the Alma Shoals as now being within the exclusive economic zone of Erebus. (Comp. ¶5).

In early 1999, an Erebian oil company discovered petroleum reserves approximately 50 nautical miles from shore and adjacent to the Alma Shoals. (Comp. ¶5; Clar. ¶3). In August 1999, Erebus clarified its position that the Treaty of Amity and Peace places the Alma Shoals and the

petroleum reserves within Erebian waters. (Comp. ¶6). Shortly thereafter, the Prime Minister of Merapi issued a communiqué, which stated that any interpretation of the Treaty as giving Erebus claim to this territory would constitute an act of hostility. (Comp. ¶6). Additionally, the Prime Minister threatened the seizure of Erebian fishing vessels operating in the Shoals. (Comp. ¶6). Erebus did not alter its position in response, and vessels bearing its flag continued to fish the Shoals. (Comp. ¶7).

Several months after the communiqué, the Merapin navy seized six Erebian fishing vessels found in the Shoals. (Comp. ¶7). The crews of these ships were released unharmed; however, the ships themselves were confiscated for their alleged trespass. (Comp. ¶7). In response, Erebus offered to provide naval escorts to any Erebian vessel wishing to exercise its right to fish in the Alma Shoals. (Comp. ¶7). No further confrontations between Erebian and Merapin vessels have occurred in the Shoals region. (Comp. ¶7). However, Erebus continues to demand the release of the six captured vessels bearing its flag. (Comp. ¶21).

SEABED MINING

Erebus's northern neighbor is the powerful state of Fogo, whose territorial ambitions have created hostile relations, resulting in sporadic military confrontation. (Comp. ¶1). In response to Fogo's aggression, Erebus has been forced to embark upon a buildup of its defensive forces. (Comp. ¶9). Some of the weapon systems that Erebus is developing require the procurement of minerals such as manganese, cobalt, nickel, and copper. (Comp. ¶9). While Erebus has a modern, developed economy, it is almost totally dependent on imports for its mineral needs. (Comp. ¶1.) In response to this critical strategic weakness, Erebus spent a number of years studying deep seabed nodules as a potentially dependable and economically viable source of minerals. (Comp. ¶9.)

In April 2000, Erebus announced to the world its intention to begin mining manganese nodules in international waters approximately 300 nautical miles beyond Merapi's exclusive economic zone. (Comp. ¶9). Government owned and operated facility was being constructed 5,000 feet below the surface of the water with mining scheduled to begin by the end of September 2000. (Comp. ¶9; Clar. ¶4). This announcement was accompanied by the release of an exhaustive report conducted by the Chair of the Department of Environmental Science of the University of Erebus. (Comp. ¶10). This report, which was the result of computer modeling and site comparison research, vouched for the environmental safety of the project. (Comp. ¶10; Clar. ¶4).

On August 15, 2000, the President of the United Nations' Security Council released a statement regarding concerns over the Erebian seabed mining facility. (Comp. ¶12). The statement asked Erebus to postpone mining until it could prove to the Council that the operation would not harm the fish-stocks of the nearby Grand Basin. (Comp. ¶12; Corrections ¶2). In a prompt reply to the Security Council, Erebus noted that while it had announced its seabed mining plans some six months prior, Merapi had never protested these plans. (Comp. ¶13). While Erebus could appreciate the Council's concerns, Erebus declined to postpone the mining operation at such a late date. (Comp. ¶13). Erebus believed the operation to be fully tested and proven safe. (Comp. ¶13). Additionally, due to continued tense relations with Fogo, Erebus had an immediate need for minerals for self-defense purposes. (Comp. ¶13).

Merapi's first diplomatic correspondence regarding the seabed mining operation was an August 25, 2000 note to the Security Council, in which Merapi requested that the Council take actions to prevent Erebus from beginning its mining operation. (Comp. ¶14). While the Council stated its intention "to remain seized of the matter," it took no official action in response to Merapi's request. (Comp. ¶15).

On the morning of September 1, 2000, saboteurs bombed the Erebian seabed mining facility. (Comp. ¶16). The bombing of the facility resulted in the death of six Erebian civilians who at the time of the blast were working on a temporary platform. (Comp. ¶16). Additionally, the explosion resulted in over U.S. $1 billion in damages to the physical plant that will take over a year to repair. (Comp. ¶16).

Later that same day, a Merapi-based organization calling itself the "Aqua Protectors" claimed responsibility for the attack, which it referred to as "Operation Sea Storm." (Comp. ¶¶11, 16). Within hours, Merapi delivered a diplomatic note to the Security Council in which it denied either planning or participating in the attack. (Comp. ¶17). However, the same day the *Merapi Times* reported that the government of Merapi had prior knowledge of the operation and had financially backed the attack with US $100,000. (Comp. ¶18; Corrections ¶3). This report was later confirmed during routine oversight hearings in the Merapin Legislature. (Comp. ¶18).

Erebus immediately demanded that Merapi pay for the damage and loss of life caused by this attack. (Comp. ¶19). Additionally, Erebus demanded that Merapi extradite the responsible members of the Aqua Protectors for prosecution in Erebus on charges of homicide and destruction of government property. (Comp. ¶19; Clar. ¶6). Some of the individuals responsible are Merapin citizens, while others are nationals of a third state to Merapi's south. (Clar. ¶5.) To date, Merapi has neither extradited nor prosecuted any of these individuals. (Comp. ¶19; Clar. ¶6). They remain free from police custody, amidst the general population of Merapi. (Clar. ¶6).

On October 1, 2000, after a series of diplomatic talks, the parties agreed to submit their dispute to the International Court of Justice. (Comp. ¶22).

SUMMARY OF PLEADINGS

I. The Erebian-Merapin border is the present location of the Krakatoa River's principal arm. Erebus and Merapi are bound by the terms of the Treaty of Amity and Peace, the plain meaning of which establishes their boundary as the middle of the principal arm of the Krakatoa, irrespective of changes in the river's location. Over time, hurricane-induced erosion has shifted the river's principle arm southward. Since this movement was of a gradual nature, the doctrine of accretion dictates that the Erebian-Merapin boundary moved with the shift in the river. Consequently, the Alma Shoals, as well as the adjacent petroleum reserves, now lie within the Erebian exclusive economic zone, entitling Erebus to exploit and regulate the sea and seabed resources of that area.

II. Independent of the issue of the location of the Erebian-Merapin maritime boundary, Merapi's seizure and submission to forfeiture procedures of Erebian vessels fishing in the Alma Shoals was a violation of international law. Erebus was, thus, justified in sending its naval vessels into the Alma Shoals to protect other Erebian fishing vessels. International law requires that Merapi must either return the six unlawfully seized vessels bearing the Erebian flag, or pay Erebus reparations equal to their value.

III. The Erebian deep seabed mining operation was not in violation of international law. Erebus is a party to neither the 1982 Law of the Sea Convention nor the 1994 Agreement on Implementing Part XI of the 1982 Convention. The seabed mining provisions of the 1982 Convention and the 1994 Agreement do not constitute customary international law binding on non-parties. Thus, Erebus is not restricted by the seabed mining provisions in these agreements, and may mine the seabed consistent with the customary international law freedom of the high seas doctrine. Finally, the U.N. Security Council Presidential Statement did not create a binding

obligation upon Erebus to forbear from commencing its seabed mining operation. In any event, the doctrine of estoppel bars any claim that Merapi may have had concerning the legality of the Erebian seabed mining facility, since it made no protest during the construction of the billion-dollar facility.

IV. Merapi is liable for the destruction of the Erebian seabed mining facility and the killing of Erebian nationals. Under the principles of state responsibility, Merapi's financial support to the Aqua Protectors, with prior knowledge of their planned attack against the Erebian facility, amounts to a use of force against the property and citizens of Erebus. Since Merapi had knowledge of the Aqua Protectors' plan, Merapi was obligated to warn Erebus and to take other reasonable measures to prevent the Aqua Protectors' attack. Merapi's support of the Aqua Protectors was not justified as self-defense consistent with Article 51 of the U.N. Charter, because Article 51 does not authorize anticipatory self-defense, and even if it did, the potential for economic or environmental harm would not constitute an "armed attack" triggering such a right. In any event, Merapi's actions were inconsistent with the requirements of "necessity" and "proportionality." Merapi's actions were unnecessary, both because the U.N. Security Council was actively engaged in the dispute and because Merapi failed to exhaust all available peaceful measures. Merapi's actions were also disproportional, since the attack needlessly resulted in the death of civilians.

V. International law requires Merapi to compensate Erebus for the destruction of the mining facility and the killing of Erebian nationals, as well as to extradite the responsible parties to Erebus for prosecution. Merapi's refusal to extradite cannot be justified by resort to the political offense exception as the Aqua Protectors do not qualify as "political offenders" under any of the internationally excepted tests for determining the exception's applicability.

PLEADINGS

I. THE LEGITIMATE BOUNDARY BETWEEN EREBUS AND MERAPI IS THE PRESENT LOCATION OF THE KRAKATOA RIVER'S PRINCIPAL ARM.

A. Merapi and Erebus are bound by the terms of the Treaty of Amity and Peace, which explicitly establishes their land and maritime boundaries.

A treaty is a written agreement between states, governed by international law.[1] All treaties are binding upon their contracting parties.[2] In 1947, Erebus and Merapi entered into the Treaty of Amity and Peace [hereinafter "Treaty"], which established their common land and maritime boundaries.[3] As parties to this treaty, Erebus and Merapi are bound by its terms.

1. The plain meaning of the Treaty establishes the border as the midpoint of the principal arm of the Krakatoa River, irrespective of the river's location.

A treaty is to be understood according to the plain meaning of its terms, subject to the context in which they appear, with an eye towards the purpose of the instrument.[4] Unless it leads to a reading that is ambiguous or patently unreasonable, the plain meaning is definitive.[5]

The Treaty establishes the Erebian-Merapin land border as being "the midpoint of the Krakatoa River."[6] The Treaty is thus clear that the border is the river itself, and not an

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[1] *See* Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, U.N. Doc. A./CONF. 39/27 (1971), *reprinted in* 63 AM. J. INT'L L. 875, 876 (1969) [hereinafter Vienna Convention]; *see also* LORD MCNAIR, THE LAW OF TREATIES 4 (1961).

[2] *See* Vienna Convention, *supra* note 1, art. 26; *see also* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L. L. 495, 516 (1970).

[3] Compromis ¶¶3, 4.

[4] *See* Vienna Convention, *supra* note 1, art. 31; *see also* Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. (Dec. 13), *reprinted in* 39 I.L.M. 310, 320 (2000); *see also* Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 812 (Prelim. Obj., Dec. 12).

[5] *See* Vienna Convention, *supra* note 1, art. 32.

[6] Comp. ¶4.

indelible line fixed by a surveyor's level and compass. The Treaty states that the maritime boundary extends from "the mouth of the Krakatoa River, taking as the mouth of the river its principal arm...."[7] The Treaty, thus, again utilizes an impermanent, rather than a geographically fixed, marker. The Treaty goes on to identify the river's principal arm as "lying between Pigeon Rock to the South, and the Cape of Realto to the North."[8] The context in which this phrase is employed compels the interpretation that it was meant as a contemporary identification of the principle arm, and not a condition precedent to using the principal arm to mark the boundary.

The Treaty's plain meaning clearly establishes that the Erebian-Merapin land and maritime boundaries are indeterminate in nature, subject to change with the course of the Krakatoa. There is nothing unreasonable about this interpretation, as despite their fundamental impermanence, states routinely use the course of rivers to mark their boundaries.[9] Moreover, Merapi was aware that the Krakatoa had shifted course in the past,[10] yet it did not insist on a clause, such as exists in the Israeli-Jordanian Peace Agreement,[11] stating that the boundary would not move with the river, perhaps because the previous shift had been favorable to Merapi.

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[7] *Id.*

[8] *Id.*

[9] *See* STEPHEN B. JONES, BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY AND BOUNDARY COMMISSIONERS 108 (1971).

[10] Clarifications ¶2.

[11] *See* Israel-Jordan: Treaty of Peace, Oct. 26, 1994, Isr.-Jordan, Annex I(a), *reprinted in* 34 I.L.M. 43 (1995).

2. Evidence of the circumstances surrounding the Treaty's conclusion confirm that the reference to Pigeon Rock and the Cape of Realto was meant for contemporary identification purposes only.

Recourse to extrinsic evidence, such as preparatory work and evidence of the circumstances surrounding a treaty's conclusion, is allowed for the purpose of confirming a treaty's interpretation.[12] The circumstances surrounding agreement on the Erebian-Merapin maritime boundary indicate that the parties were primarily interested in setting forth "an objectively identifiable boundary."[13] This extrinsic evidence, thus, confirms that the purpose of the phrase "said arm lying between Pigeon Rock to the South, and the Cape of Realto to the North," was to identify the principal arm's location at the time. This phrase is now obsolete, since the new principal arm is in itself an objectively identifiable boundary, as its location is uncontested, while the previous riverbed has ceased to exist as a distinct topographical feature.[14]

B. Under the doctrine of accretion, the Erebian-Merapin border followed the gradual southerly shift of the Krakatoa's principal arm.

The shifting of riparian boundaries is governed by either the doctrine of accretion or avulsion, depending on the speed at which the change occurs.[15] When the course of the river changes over time, accretion dictates that the boundary follows the altered course.[16] When the river's path is suddenly altered, avulsion leaves the boundary in the middle of the now abandoned riverbed.[17]

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[12] *See* Vienna Convention, *supra* note 1, art. 32; *see also* Kearney, *supra* note 2, at 519.

[13] Comp. ¶4.

[14] Comp. ¶¶4, 5; Clar. ¶1.

[15] *See* 72 AM. JUR. 2d, *States* §27 (1974); *see, e.g.,* Nebraska v. Iowa, 143 U.S. 359, 369 (1892).

[16] *See* 45 AM. JUR. 2d, *International Law* §29 (1999).

[17] *See id.*

A typical avulsion was displayed in the case of *Arkansas v. Tennessee*, wherein the Mississippi River changed its course over a period of 30 hours so as to abandon 20 miles of the riverbed.[18] Alternatively, accretion was illustrated by the case of *Nebraska v. Iowa*, wherein the Missouri River markedly changed course over a period of several years.[19] In that case, Nebraska argued that, due to local soil conditions, large sections of riverbank often collapsed into the river, thus, the change was "not gradual and imperceptible, but sudden and visible," and consequently, inconsistent with accretion.[20] The United States Supreme Court, however, found the doctrine of accretion to apply, because the change, though relatively rapid, was the product of an ongoing erosive process and not a swift and singular event.[21]

Gradually, over a period of several years, hurricane-induced erosion shifted the Krakatoa's principal arm southward.[22] Thus, according to the principle of accretion, the boundary moved with the shift in the river.[23]

C. The shifting of the Krakatoa River has placed the Alma Shoals and the adjacent petroleum reserves within the exclusive economic zone of Erebus.

All states are entitled to an exclusive economic zone [hereinafter "EEZ"] extending 200 nautical miles beyond their coastal baseline.[24] First codified in the 1982 Law of the Sea Convention [hereinafter "UNCLOS"], the concept of the EEZ has ripened into customary international

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[18] *See* Arkansas v. Tennessee, 246 U.S. 158, 162 (1917).

[19] 143 U.S. at 369-70 (1892).

[20] *Id.* at 367-68.

[21] *See id.* at 368-70.

[22] Comp. ¶5.

[23] *Cf.* A. S. WISDOM, THE LAW OF RIVERS AND WATERCOURSES 25 (4th ed., 1979).

[24] *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 57, U.N. Doc. A./CONF. 62/122 (1982), *reprinted in* 21 I.L.M. 1245, 1280 (1982) [hereinafter UNCLOS].

law.[25] Within their EEZ, states have an exclusive right to non-living resources and a preferential right to living resources.[26] It should be noted, the relative socio-economic conditions of the parties are irrelevant in the resolution of a maritime boundary dispute.[27] Thus, any contention that Merapi's economic conditions should influence the Court's judgment must be rejected as "[s]uch considerations are totally unrelated to the underlying intention of the applicable rules of international law."[28]

Drawing the maritime boundary from the midpoint of the Krakatoa River's new principal arm establishes that the newly discovered petroleum reserves and the Alma Shoals lie within the EEZ of Erebus.[29] Erebus, thus, has the exclusive right to any petroleum found in the zone and a priority right to the zone's living resources.[30]

II. MERAPI IS LIABLE FOR ITS UNJUSTIFIED SEIZURE OF EREBIAN FISHING VESSELS IN THE ALMA SHOALS.

A. Irrespective of the legal status of the Alma Shoals, Merapi's seizure and subjection to forfeiture proceedings of the Erebian fishing vessels is unlawful.

While under customary international law a coastal state has certain economic rights in its EEZ, in all other respects, the zone retains the attributes of the high seas.[31] Under customary

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[25] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §514 cmt. a (1986) [hereinafter RESTATEMENT]; *see also* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 294 (Oct. 12).

[26] *See* UNCLOS, *supra* note 24, art. 56; *see also* James E. Bailey III, *The Exclusive Economic Zone: Its Development and Future in International and Domestic Law*, 45 LA. L. REV. 1269, 1270 (1985).

[27] *See* Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 74 (June 14).

[28] Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 41 (June 3).

[29] Comp. ¶¶4, 5.

[30] *See* RESTATEMENT, *supra* note 25, at §514, Reporters' Note 4; *see also* UNCLOS, *supra* note 24, arts. 56, 61-62.

[31] *See* RESTATEMENT, *supra* note 25, §514 cmt. b.

international law, a ship operating beyond territorial waters is functionally a floating island of the country whose flag it flies, and as such, no other state may exercise jurisdiction upon it without the flag state's consent.[32] Under the UNCLOS, a party-state may enforce fishing regulations in its EEZ by boarding, inspecting, and arresting the vessel of another party-state believed to be out of compliance with such regulations.[33] However, as a non-party to the UNCLOS,[34] Erebus never consented to such a regime.

Moreover, there is no indication that the Erebian-flagged vessels were in violation of any regulatory regime. Prior to recent events, Merapi had not objected to Erebian vessels fishing in the Shoals,[35] and the actual count with which the seized vessels were charged was simply "trespass."[36]

Additionally, the UNCLOS provides that when a ship is lawfully seized, not only must the crew be promptly released, but also the vessel itself must be released upon the posting of a reasonable bond.[37] Thus, even if the UNCLOS's search and seizure provisions are found to be applicable to the Erebian vessels, Merapi violated international law by subjecting the vessels to forfeiture proceedings without affording Erebus the option of posting a bond to secure their return.

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[32] *See* The S.S. Lotus (Turk. v. Fr.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7); *see also* Koru North American v. U.S., 701 F. Supp. 229, 231 (1988).

[33] *See* UNCLOS, *supra* note 24, art. 73.

[34] Comp. ¶8.

[35] Clar. ¶3.

[36] Comp. ¶7.

[37] *See* UNCLOS, *supra* note 24, arts. 73, 292; *see generally* The "Camouco" Case (Pan. v. Fr.), 2000 ITLOS (Judgm. of Feb. 8), *reprinted in* 39 I.L.M. 666 (2000).

B. Merapi's unlawful seizure and forfeiture of Erebian-flagged ships provided Erebus the right to send naval vessels to protect Erebian ships fishing in the Shoals.

When a state's rights have been denied or infringed under international law that state has the right to respond with appropriate defensive measures.[38] Merapi's seizure of the Erebian ships was an unlawful act; thus, Erebus clearly acted within its rights when it responded by providing naval escorts to Erebian vessels wishing to operate in the Alma Shoals. Moreover, the mere presence of naval vessels in the EEZ of another state is a violation of neither customary international law, nor the UNCLOS.[39]

C. International law requires Merapi to return the six unlawfully seized fishing vessels or make reparations to Erebus on behalf of their owners.

Reparations must, to the extent possible, eliminate the consequences of the breach of duty and restore the injured state to the position it would have occupied if the breach had never occurred.[40] The unlawful seizure of a ship at sea is a violation of the rights of the flag-state, not simply a violation of the rights of the ship's owner and crew.[41] Since the requirement to exhaust effective local remedies before bringing an action in an international tribunal applies only to cases in which the plaintiff-state is making a claim on behalf of a private citizen, it does not apply to the case at hand.[42] Therefore, Merapi is obligated to redress the Erebian

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[38] *Cf.* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 30 (Apr. 9).

[39] *See* D.G. Stephens, *The Impact of the Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L. J. 283, 290 (1999).

[40] *See* Factory at Chorzow (Merits) (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47-48 (Sept. 13).

[41] *See* The M/V "Saiga" (No. 2) Case (St. Vincent v. Guinea), 1999 ITLOS, paras. 97-98 (Judgm. of July 1), *available at* <http://www.un.org/Depts/los/ITLOS/Judg_E.htm>.

[42] *See id.*; *see also Draft Articles of State Responsibility,* [1980] II-2 Y.B. INT'L L. L. COMM'N 32, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2); *see also* Phosphates in Morocco (Judgm.) (Italy v. Fr.), 1936 P.C.I.J. (ser. A/B) No. 74, at 25 (June).

injury by either returning the unjustly seized vessels to their owners, or paying reparations equal to their value.[43]

III. THE EREBIAN DEEP SEABED MINING OPERATION IS NOT IN VIOLATION OF INTERNATIONAL LAW.

A. International law imposes no obligation upon Erebus to refrain from mining the deep seabed under international waters.

1. As a non-party, neither Part XI of the UNCLOS nor the 1994 Agreement on Implementing Part XI bind Erebus.

According to the Vienna Convention on the Law of Treaties, to which both Erebus and Merapi are parties,[44] a treaty may obligate a non-party only if it "expressly accepts that obligation in writing."[45] As a non-party, Erebus cannot be bound by the terms of either Part XI of the UNCLOS or the 1994 Agreement on Implementing Part XI [hereinafter "Agreement"], without its consent.

2. The seabed mining provisions found in Part XI of the UNCLOS and the 1994 Agreement have not ripened into customary international law.

The *opinio juris* and consistent practice of a substantial number of states evidence customary international law.[46] International agreements may lead to the creation of customary law only when they are intended for general adherence and become widely accepted.[47] The party claiming a customary international norm bears the burden of proving its existence.[48]

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[43] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 115 (1994).

[44] Comp. ¶8.

[45] *See* Vienna Convention, *supra* note 1, art. 35; *see also* MCNAIR, *supra* note 1, at 309.

[46] *See* The Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 191 (Dec. 18); *see also* SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 17-18 (1986).

[47] *See* RESTATEMENT, *supra* note 25, at §102.

[48] *See Lotus,* 1927 P.C.I.J. at 28.

Though the UNCLOS was signed by a majority of states, several important industrialized nations, including the United States, refused to sign it due to the "hopelessly flawed"[49] seabed mining provisions contained in Part XI.[50] The Agreement made substantial changes to those provisions in an effort to appease the industrialized world.[51] However, it apparently failed to appease the United States Senate, which has continued to block ratification.[52] What the Agreement accomplished, though, was to fracture any international conformity that may have existed regarding acceptance of a seabed mining regime. Today, the UNCLOS has 158 signatories, while the Agreement, with its substantially altered provisions, has only 79.[53]

Finally, the Secretary-General of the International Seabed Authority, in his most recent annual report, admitted that it was too soon to tell if the seabed mining regime would be successful as currently constructed.[54] Accordingly, it cannot be said that either the UNCLOS deep seabed mining provisions or the Agreement have crystallized into customary international law binding on Erebus.[55]

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[49] White House Office of Policy Information, *The Law of the Sea Convention,* Issue Update No. 10, at 8 (Apr. 15, 1983).

[50] *See* E.D. Brown, *Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, 20 SAN DIEGO L. REV. 521 (1983).

[51] *See* Bernard H. Oxman, *The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea: The 1994 Agreement and the Convention*, 88 AM. J. INT'L L. 687 (1994).

[52] *See* John Alton Duff, *UNCLOS and the New Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT'L L. REV. 1, 15, 32-33 (1995).

[53] *See* II MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1999, ST/LEG/SER.E/18, 209, 242 (2000).

[54] *See Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea*, ISBA/6/A/9 (June 6, 2000).

[55] *See* RESTATEMENT, *supra* note 25, Part V: Introductory Note, at 7.

3. General Assembly Resolutions proclaiming the seabed to be the "common heritage of mankind" do not constitute customary international law.

A General Assembly Resolution, in and of itself, is not legally binding upon member states.[56] While General Assembly Resolutions may function as a part of the larger customary law creating process, by themselves, they are merely recommendations.[57]

In 1970, the United Nations General Assembly adopted the "Declaration of Principles Governing the Seabed," which proclaimed the deep seabed and its resources to be the "common heritage of mankind," and provided that the exploitation of these resources had to be carried out to the benefit of all mankind.[58] While the vote was unanimous, a number of states made comments at the time of its adoption that the Declaration was intended to be aspirational rather than binding.[59] Since a General Assembly Resolution is not binding in the absence of other evidence of conforming state practice, the Declaration of Principles Governing the Seabed does not constitute customary international law.[60]

4. The U.N. Security Council Presidential Statement does not legally obligate Erebus to delay commencement of its seabed mining operation.

Security Council Presidential Statements are informal documents, which should not be

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[56] *See* Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67, 115 (Sep. Op. of J. Lauterpact, June 7).

[57] *Cf.* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254-55 (Advisory Op., July 8) [hereinafter *Nuclear Weapons*].

[58] *See* Declaration of Principles Governing the Seabed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 GAOR Supp. (No. 28), at 28, U.N. Doc. A/8028 (1970).

[59] *See* Brown, *supra* note 50, at 542-46.

[60] *See id.* at 540-41.

interpreted as creating legal obligations.[61] Whereas Chapter VII Resolutions are formal statements of the will of the Council, and as such have the force of law, Presidential Statements are the product of informal consultations between the Council President and members, and not a decision by the body as a whole.[62] These informal consultations are not Security Council "meetings;" in fact, they have no legal status as the Council's procedural rules make no reference to them.[63] Additionally, informal consultations, unlike formal Security Council meetings, do not afford "a party to a dispute under consideration,"[64] such as Erebus, its right under Article 32 of the U.N. Charter to participate in Council debates.[65] In light of these facts, the Presidential Statement dated August 15, 2000, should not be interpreted as having legally obligated Erebus to delay its seabed mining operation.

It should be noted that this Court has previously determined that it lacks the power of "judicial review," and is thus, incapable of passing judgment upon the validity of a Security Council action.[66] However, it is within this Court's ability to interpret the purpose and meaning of a Security Council instrument.[67]

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[61] *Cf.* SYDNEY D. BAILEY & SAM DAVIS, THE PROCEDURE OF THE U.N. SECURITY COUNCIL 65 (3d ed., 1998).

[62] *Cf. id.* at 65, 547.

[63] *See id.*; *see also* Michael C. Wood, *Security Council Working Methods and Procedures: Recent Developments,* 45 INT'L & COMP. L. Q. 150, 155 (1996).

[64] U.N. CHARTER art. 32.

[65] *See* Loie Feuerle, *Informal Consultation: A Mechanism In Security Council Decision-Making,* 18 N.Y.U.J. INT'L L. & POL. 267, 298 (1985).

[66] *See* Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Advisory Op., July 20).

[67] *See, e.g.,* East Timor (Port. v. Austl.), 1995 I.C.J. 90, 103-04 (June 30).

B. The Erebian facility conforms to the customary international law doctrine of freedom of the high seas and the duty of states to protect the natural environment.

The freedom to use the high seas, the air space above them, and the seabed may only be limited or modified by a general consensus amongst states.[68] Thus, in the absence of a universally recognized seabed mining regime, the doctrine of freedom of the high seas remains controlling.[69] According to this doctrine, deep seabed mining is permitted as long as the state conducting such activity gives reasonable regard for the rights of others engaged in similar activities,[70] and adequately complies with its customary law duty to protect the environment.[71]

In April 2000, Erebus announced its intention to begin mining manganese nodules in international waters.[72] No state or individual has suggested to Erebus that this project will interfere with their similar operation. Erebus complied with its duty to safeguard the environment by conducting an exhaustive environmental impact assessment, which has vouched for the project's safety.[73] While others less familiar with the project have disputed its environmental soundness,[74] it should be noted that when faced with similarly conflicting environmental studies in the past, this Court as declined to weigh their relative merit.[75] Since Erebus has satisfied all requirements of

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[68] *See* North Sea Continental Shelf (Ger. v. Den; Ger. v. Neth.), 1969 I.C.J. 3, 103 (Sep. Op. of J. Ammoun, Feb. 20).

[69] *See* Brown, *supra* note 50, 559-60.

[70] *See id.*

[71] *Cf.* The Gabcikovo-Nagymaros Project (Hun. v. Slovk.), 1997 I.C.J. 7, 41 (Sept. 25); *see Nuclear Weapons*, 1996 I.C.J. at 241-42.

[72] Comp. ¶9.

[73] Comp. ¶10; Clar. ¶4.

[74] Comp. ¶10.

[75] *See Gabcikovo,* 1997 I.C.J. at 41.

freedom of the high seas doctrine, the seabed mining project is permitted by customary international law.

C. Merapi is estopped from asserting that the Erebian seabed mining facility is in violation of international law.

The principle of estoppel bars a state's claim when a state has maintained an inconsistent position in regard to a matter of fact or law.[76] An estoppel by acquiescence results when a plaintiff-state is provided ample opportunity to protest what it believes is an infringement of its rights, but remains silent, thus, leading the defendant-state to believe that its conduct is acceptable.[77]

Erebus announced to the world its intention to begin deep seabed mining 500 nautical miles off Merapi's coast.[78] Merapi did not protest Erebus's plan for several critical months during which Erebus, relying upon Merapi's silent acceptance, poured vast economic resources into the project.[79] Merapi is, thus, estopped from objecting to the Erebian seabed mining facility.

IV. MERAPI IS LIABLE FOR THE DESTRUCTION OF THE EREBIAN SEABED MINING FACILITY AND THE KILLING OF EREBIAN NATIONALS.

A. Under the Principles of State Responsibility, Merapi is responsible for the Aqua Protectors' attack, either by its acts or by its omissions.

1. Merapi's act of providing financial support to the Aqua Protectors with prior knowledge of their planned attack against the Erebian facility amounts to a use of force against the property and citizens of Erebus.

Article 2(4) of the United Nations Charter prohibits the use of force in international

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[76] *See* Temple of Preah Vihear (Camb. v. Thail.), 1962 I.C.J. 6, 42 (Sep. Op. of J. Alfaro, June 15); *see* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 17, 25 (Feb. 5); *see* Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1990 I.C.J. 92, 118 (Sept. 13); *see Fisheries Case*, 1951 I.C.J. at 138-39.

[77] *See* Christopher Brown, *Comment: A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 397 (1995).

[78] Comp. ¶9.

[79] Comp. ¶17.

relations.[80] The term "use of force" is not limited to conventional military force, but also prohibits states from "organizing or encouraging the organization of irregular forces or armed bands... for incursion into the territory of another state."[81]

Merapi's financial support of the Aqua Protectors with knowledge of their objective was an act of "encouraging" their plan to attack the Erebian facility. Erebus's seabed mining facility is jurisdictionally a part of Erebian territory, just as Erebian ship on the high seas would be.[82] Thus, Merapi's support for the operation conducted by the Aqua Protectors is a violation of the prohibition against the use of force.

2. Since Merapi had knowledge that an attack on Erebus was being planned on Merapin territory, Merapi was obligated to warn Erebus and to take other reasonable measures to prevent the Aqua Protectors' attack.

Customary international law requires that states use "due diligence" to prevent their territory from being used for the purposes of attacks on other states with whom they are not at war.[83] Since states exercise exclusive control over their territory, victim states are at a disadvantage when attempting to establish facts necessary to prove such a breach of duty.[84] Under these circumstances, victim states are entitled to a relaxed burden of proof, and a more generous allowance for circumstantial evidence and inference.[85]

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[80] *See* U.N. CHARTER art. 2, para. 4.

[81] The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No.28), at 121, U.N. Doc. A/8028 (1970); *see also* Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27).

[82] *Cf. Lotus,* 1927 P.C.I.J. at 18.

[83] *See* United States v. Arjona, 120 U.S. 479, 484 (1887); *see also* FITZMAURICE, *supra* note 46, at 21.

[84] *See* FITZMAURICE, *supra* note 46, at 128.

[85] *See id.*

In the *Corfu Channel Case*, two British ships struck mines in Albanian waters, sustaining serious damage and loss of life.[86] This Court found, by way of circumstantial evidence, that Albania knew of the mines, and thus, breached international law by not warning others of the danger.[87] This Court also found the duty to warn to be part of the obligation of all states not to allow knowingly their territory to be used for attacks on other states.[88]

Merapi knew the Aqua Protectors where planning an attack on Erebus's seabed mining facility from their headquarters in Merapin territory,[89] yet it neither acted to prevent the attack nor to warn Erebus of it. Thus, Merapi has incurred responsibility for the attack.

B. Merapi's support of the Aqua Protectors was not justified as an act of self-defense consistent with Article 51 of the U.N. Charter.

1. Article 51 of the U.N. Charter does not authorize anticipatory self-defensive attacks.

The plain meaning of Article 51 of the U.N. Charter prohibits a state from resorting to the use of force before it has been the subject of a military attack. Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs*... ."[90] Merapi was never subjected to an armed attack.

While some publicists have argued that Article 51's use of the phrase "inherent right of self-defense" preserved the right as it existed prior to the Charter, and thus, includes a right of anticipatory

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[86] *See Corfu,* 1949 I.C.J. at 10.

[87] *See id.* at 18-23.

[88] *See id.* at 22.

[89] Comp. ¶18.

[90] U.N. CHARTER art. 51 (emphasis added).

self-defense,[91] others have pointed out that such a reading renders the words "if an armed attack occurs" inoperable.[92] Publicist Philip Jessup believed that Article 51 did not codify a right to anticipatory self-defense: "Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force...."[93]

Additionally, the case for anticipatory self-defense is weakened by the fact that consistently large numbers of states have condemned, censured, or disapproved of uses of force justified on the basis of anticipatory self-defense.[94] The best historic analogy is the 1981 Israeli bombing of a partially constructed Iraqi nuclear reactor. Israel justified its attack as anticipatory self-defense, since it feared that Iraq would use the reactor to produce fissionable material for weapons to be used against it.[95] However, the Security Council unanimously rejected this defense in a resolution, which stated that the attack was a "clear violation of the charter of the United Nations and the norms of international conduct."[96]

2. Even if anticipatory self-defense were legitimate under Article 51, the potential for economic harm does not constitute an "armed attack" triggering the right of self-defense.

Even if the U.N. Charter allowed anticipatory self-defense, Merapi's contention that

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[91] *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257 (1963); *see also* TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 150, 151 (1996).

[92] *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984); *see also* DINSTEIN, *supra* note 43, at 182-84 (1994).

[93] PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1968).

[94] *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 165 (1996).

[95] *See id.* at 191.

[96] S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg. at 10, U.N. Doc. S/RES/487 (1981).

economic harm can be the equivalent of an armed attack[97] is without merit. During the 1945 negotiations of the U.N. Charter in San Francisco, the drafters confirmed that economic embargoes did not constitute an unlawful use of force, let alone armed attack.[98] State practice has never recognized economic harm as justifying the use of force.

Merapi claims its economic dependence on the fish-stock within the Grand Basin means that a threat to that resource is the same as an armed attack on Merapi itself.[99] Merapi's argument is similar to the economic justifications for the use of force used by France, Great Britain, and Israel during the 1956 Suez Canal crisis.[100] All three nations justified their actions at least partly on the economic necessity of maintaining the flow of traffic through the canal.[101] However, an overwhelming majority of nations rejected their rationalizations, as the General Assembly voted 64 to five to denounce their actions.[102]

3. International law does not allow a state to intervene in anticipation of environmental damage outside of its EEZ.

The practice and *opinio juris* of states indicate that a right to environmental intervention on the high seas has not been internationally recognized. This was recently confirmed in the Canadian-Spanish dispute, which began when Canada amended its laws to authorize its officials to use force to board foreign vessels in international waters to prevent over-fishing of stocks

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[97] Comp. ¶14.

[98] *See* ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., NON-INTERVENTION: THE LAW AND IMPORT IN THE AMERICAS 410-11 (1956).

[99] Comp. ¶14.

[100] *See* Quincy Wright, *Intervention, 1956*, 51 AM. J. INT'L L. 257, 271-73 (1957).

[101] *See id.* at 272.

[102] *See* ALEXANDROV, *supra* note 94, at 152.

important to Canada's economy.[103] In 1995, Canadian naval forces chased, fired upon and captured a Spanish fishing vessel suspected of violating Canadian law and regulations.[104] Spain strenuously objected to Canada's unilateral extension of jurisdiction into international waters.[105] As part of the settlement that ensued, Canada was required to repeal the statutes allowing for the seizure of foreign ships in international waters.[106] Thus, Merapi's concern for the marine environment of the Grand Basin cannot justify a use of force against the Erebian facility.

4. In any event, Merapi's actions are inconsistent with the customary international law requirements of "necessity" and "proportionality."

Customary international law holds that the use of self-defense must be necessary and proportional.[107] These requirements stem from the *Caroline* incident, as to which U.S. Secretary of State Daniel Webster wrote that self-defense must be limited to situations in which the "necessity of the self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[108] Additionally, Webster wrote that a necessary action must also be proportionate in that it "must be limited by that necessity, and kept clearly within it."[109]

a. Merapi's actions cannot meet the requirement of necessity because Merapi did not first exhaust all possible peaceful measures available to it.

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[103] *See* Coastal Fisheries Protection Act, R.S.C., ch. C-33, §7 (1994) (Can.), *reprinted in* 33 I.L.M. 1383, 1386 (1994).

[104] *See* Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. at para. 19 (Dec. 4), *available at* <http://www.icj-cij.org/icjwww/idocket/ibona/ibonajudgments/ibona_ijudgment_19991213.htm>.

[105] *See id.* para. 20.

[106] *See id.*

[107] *See Military and Paramilitary Activities*, 1986 I.C.J. at 103.

[108] IAN BROWNLIE, *supra* note 91, at 42-43.

[109] *Id.* at 261.

Before self-defense can be "necessary," a state must exhaust all of potential peaceful means of settling the dispute.[110] Article 2(3) of the U.N. Charter requires states to "settle their international disputes by peaceful means...."[111] Article 33(1) requires that attempts be made to resolve disputes by means, such as "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement..." prior to the use of force.[112] Merapi failed to exhaust this list of potential peaceful settlement means prior to launching its attack. Therefore, Merapi's actions were in violation of the requirement of "necessity."

b. Merapi's actions cannot meet the requirement of necessity since the Security Council was actively engaged in the matter.

Self-defense under Article 51 is limited to the time prior to the Security Council's engagement in a dispute.[113] Once the Security Council is involved in a dispute, it has sole authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression...."[114] Mere days before the Aqua Protectors attacked the seabed mining facility, the Security Council stated its intent "to remain seized of the matter."[115] Thus, Merapi's actions were not "necessary" as the Security Council was actively engaged in the dispute.[116]

c. Merapi's actions cannot meet the requirement of proportionality since the attack needlessly resulted in the death of civilians.

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[110] *See* U.N. CHARTER art. 2, para. 3; art. 33, para. 1.

[111] *Id.* art. 2, para. 3.

[112] *Id.* art. 33, para. 1.

[113] *See id.* art. 51.

[114] *Id.* art. 39.

[115] Comp. ¶15.

[116] Comp. ¶12.

A proportionate self-defensive use of force is one that is equal to its necessity, not one that is equal to the initial threat.[117] Thus, no matter how great a threat Merapi may have believed the Erebian seabed mining facility posed to its security, proportionality required Merapi to use self-defensive measures that were only equal to what was required to eliminate that threat.[118] Merapi and its agents, the Aqua Protectors, could have given warning (even just a few minutes) to ensure that the Erebian civilians could be evacuated from the temporary platforms before the detonation of the explosives.[119] The loss of life that accompanied the Aqua Protectors' attack[120] was unjustified; thus, the attack was disproportionate.

C. Merapi had no implied authorization from the Security Council to attack the Erebian seabed mining facility.

In every past case in which the Security Council authorized the use of force (Iraq,[121] Bosnia,[122] Somalia,[123] Rwanda,[124] Haiti[125]), it employed the phrase "all necessary means," which does not appear in this Presidential Statement.[126] In the absence of this talismanic phrase, authorization to use force should not be read into the actions of the Security Council.

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[117] *See* ALEXANDROV, *supra* note 94, at 165.

[118] *See id.*

[119] Comp. ¶16.

[120] *See id.*

[121] S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990).

[122] S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg. at 1, U.N. Doc. S/RES/770 (1992).

[123] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 1, U.N. Doc. S/RES/794 (1992).

[124] S.C. Res. 929, U.N. SCOR, 49th Sess., 3392nd mtg. at 2, U.N. Doc. S/RES/929 (1994).

[125] S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 4, U.N. Doc. S/RES/940 (1994).

[126] Comp. ¶12.

Resolutions and statements from the Security Council are often the subject of intense negotiations. Allowing tenuous assertions of authorization for the use of force to be read into these instruments effectively undoes their negotiations.[127] For this reason, the Court should reject any assertion by Merapi that the Presidential Statement implicitly authorized their use of force.

V. INTERNATIONAL LAW REQUIRES MERAPI TO COMPENSATE EREBUS FOR THE DESTRUCTION OF THE MINING FACILITY AND KILLING OF EREBIAN NATIONALS, AS WELL AS SURRENDER THE PERPETRATORS OF THE ATTACK TO EREBUS FOR PROSECUTION.

A. International law requires Merapi to compensate for the unlawful destruction of Erebian property.

Reparations must be set at a level equal to the cost of repairing or replacing the destroyed property plus any lost profits, which the property may reasonably have been expected to produce.[128] Merapi is thus required to compensate Erebus for the cost of repairing the seabed mining facility and the cost of purchasing manganese, cobalt, nickel, and copper on the open market for the period of time that will be required to repair the facility.

B. International law requires Merapi to compensate for the unlawful killing of Erebian citizens.

International law gives states the right to bring claims for the injuries suffered by their nationals.[129] Though the state is asserting its own rights and not acting in a representative capacity, the damages are, nonetheless, measured by the injury suffered by the citizens or their estates.[130] Six Erebian citizens were killed by Merapi's attack on the seabed

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[127] *See* Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841, 842 (1999).

[128] *See Chorzow*, 1928 P.C.I.J. at 47-48.

[129] *See* FITZMAURICE, *supra* note 46, at 26.

[130] *See id.*

mining facility.[131] Thus, Merapi is liable to Erebus for these citizens' injuries, measured by the loss to their estates.

C. International law requires Merapi to surrender the members of the Aqua Protectors responsible for the attack on the seabed mining facility.

1. The customary international law principle of *aut dedere aut judicare* requires Merapi to extradite or prosecute the Aqua Protectors.

States have a duty under the customary international law principle of *aut dedere aut judicare* to either extradite persons accused of terrorism and other international crimes, or prosecute them under their own laws.[132] This duty is rooted in the principles of state responsibility and starts from the assumption that when an international crime is committed, the injured state has a right to punish the perpetrators.[133] As a fundamental duty to respect the sovereign rights of fellow states, the duty applies equally with regards to aliens and nationals.[134]

While the international crime of terrorism has no precise definition, terrorist activities have certain characteristics, which include the victimization of innocent third parties, and the targeting of non-military facilities.[135] Given these characteristics, the Aqua Protectors are clearly terrorists, as their targeting of a non-military installation killed innocent civilians.

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[131] Comp. ¶16.

[132] *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 22-24 (1995); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 315 (4th ed., 1990).

[133] *See* BASSIOUNI, *supra* note 132, at 38-39.

[134] *See* II HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, 529 (Francis W. Kelsey trans., 1995); *see also* II E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 136-37 (Charles G. Fenwick trans., 1995).

[135] *See Draft Single Convention on the Legal Control of International Terrorism*, International Law Association (1980), *reprinted in* RICHARD B. LILLICH, TRANSNATIONAL TERRORISM CONVENTIONS AND COMMENTARY 199 (1982).

Since the duty of *aut dedere aut judicare* is a part of so many multi-national treaties dealing with international crimes such as terrorism,[136] it may be deemed to have ripened into customary international law.[137] Thus, Merapi has a duty to prosecute or extradite the Aqua Protectors even in the absence of a specific treaty obligation. In light of Merapi's involvement in the actions of the Aqua Protectors and its failure to arrest or bring criminal charges against them,[138] extradition is required because Merapi cannot realistically be expected to prosecute this case diligently.[139]

2. Merapi has displayed a lack of good faith in its invocation of the political offense exception to the duty to extradite.

Under the political offense exception, states may refuse the extradition of fugitives accused of crimes of a political nature.[140] While the exception is applied according to the standards of the state from which extradition is requested,[141] like all decisions affecting relations between States, its application is subject to a duty of good

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[136] *See, e.g.,* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, art. VII; International Convention Against the Taking of Hostages, Dec. 18, 1979, U.N. G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No.46), at 245, U.N. Doc. A/34/146, arts. 7-8; Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted by the International Maritime Organization, at Rome, Mar. 10, 1988, I.M.O. Doc. SUA/CON/15, arts. 10-11; International Convention for the Suppression of Terrorist Bombing, Jan. 9, 1998, U.N. Doc. A/52/653, art. 8.

[137] *See* BASSIOUNI, *supra* note 132, at 47.

[138] Comp. ¶19; Clar. ¶6.

[139] *See* Oral Pleadings of the United States, Question and Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Prelim. Obj., at 3.59, 3.61 (Oct. 15, 1997), *available at* <http://www.icj-cij.org/icjwww/idocket/ilus/iluscr/ilus_icr9719.htm>.

[140] *See* Michael R. Littenberg, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1196 (1990).

[141] *See* Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1227 (1962).

faith.[142] Since a principal justification for the exception is to maintain neutrality in other states' political conflicts, good faith requires a nonpolitical branch, i.e. the judiciary, to determine the exception's applicability.[143] Merapi's invocation of the exception exhibits a lack of good faith. Firstly, Merapi has refused to submit the issue to its court system for a nonpolitical determination. Secondly, the Aqua Protectors do not qualify as political offenders under any of the tests applied by the international community.

Under the political-incidence test employed by most common law countries, a crime is considered a political offense when the perpetrator is a member of an organization engaged in a political uprising and the crime is committed in furtherance of that uprising.[144] Erebus has not witnessed a political uprising; thus, the actions of the Aqua Protectors cannot be deemed to further a political uprising.

Under the proportionality test employed by most civil law countries, the political element must predominate over the act's common crime aspects in order for it to be considered a political offense.[145] However, like the political-incidence test, the crime must be committed in the confines of the political uprising.[146] Again, since Erebus has not been the subject of political unrest, the Aqua Protectors' attack cannot constitute a political offense.

The French political objective test focuses on the nature of the injury, rather than on the intent

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[142] *Cf.* GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 137 (7th ed., 1996).

[143] *Cf.* Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir.).

[144] *See id.* at 806-07; *see generally In re* Castioni, [1891] 1 Q.B. 149 (1890).

[145] *See* CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 127 (1980); *see, e.g., In re* Peruzzo, [1952] Int'l L. Rep. 369 (1951) (Swit.).

[146] *See* Garcia-Mora, *supra* note 141, at 1249-53.

of the perpetrator.[147] Under this test it would be irrelevant whether the Aqua Protectors intended a political result, as the question would be whether the injury resulting was solely to the state.[148] Under the political objective test, treason, espionage, and even the destruction of government property would qualify as political offenses, however, the killing of civilians, as occurred in the present case,[149] would not.

VI. PRAYER FOR RELIEF

For the reasons stated above, the Republic of Erebus respectfully requests that this Honorable Court:

(1) DECLARE that by virtue of the change in course of the principal arm of the Krakatoa River, the Alma Shoals lie within the EEZ of Erebus, and its citizens and vessels, therefore, have a right to fish there;

(2) DECLARE that its proposed deep seabed mining operations are consistent with international law;

(3) DECLARE that Merapi violated international law through its involvement in the terrorist attack against the Erebian seabed mining facility, and by its seizure and detention of the six Erebian vessels;

(4) ORDER Merapi to pay Erebus U.S. $1.2 billion in compensation for the damage to the facility, the loss of human life, and the loss of future seabed mining revenue; and

(5) ORDER Merapi to surrender the members of the Aqua Protectors responsible for the attack on the seabed mining facility to Erebus for prosecution, as well as to release the Erebian fishing vessels.

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[147] *See id.* at 1249-50.

[148] *See id.*

[149] Comp. ¶16.