

**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 – RESPONDENT

**First Place
Richard R. Baxter Award**

**University of Vienna
Austria (Team #100)**

CASE CONCERNING THE SEABED MINING FACILITY

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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.

STATEMENT OF 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.

QUESTIONS PRESENTED

Merapi asks the Court:

(1) whether the Alma Shoals still lie in Merapi waters, despite the change in the course of the Krakatoa river;

(2) whether Merapi still has 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.

SUMMARY OF PLEADINGS

(1)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.

(2)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.

(3)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.

(4)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.

(5)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.

(6)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.

(7)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.

(8)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.

Even if Erebus is not responsible, it has to reimburse the revenue from fishing, as it is unjustly enriched.

I. 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.

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

1. 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

¹ *Continental Shelf*(Libya v.Malta),1985 ICJ 33(Judgm.); *Continental Shelf*(Tunis.v.Libya),1982 ICJ 74(Judgm.); *Gulf of Maine*(Can.v.U.S.),1984 ICJ 265(Judgm.); Fitzmaurice/Lachs, *The Legal Regime of the Baltic Sea Fisheries*,29 NILR 232(1982); Jiménez 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); B.Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* 28(1989); Hutchinson, *The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law*,56 BYIL 170(1985).

² Art.56/1(a),United Nations Convention on the Law of the Sea, Dec.10,1982,21 ILM 1261ss(1982)[hereinafter UNCLOS].

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

meaning, in the light of the treaty's object and purpose⁴, at the time of conclusion⁵. 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 boundary treaty is stability and finality of borders⁹, otherwise instability could continue indefinitely, and "finality would

⁴ *Kasikili/Sedudu Island*(Bots.v.Namib.),1999 ICJ para.18(Judgm.)<<http://www.icj-cij.org>>; *Territorial Dispute*(Libya v.Chad),1994 ICJ 21s(Judgm.); I.Sinclair, *The Vienna Convention on the Law of Treaties* 153(2nded.,1984); A.Aust, *Modern Treaty Law and Practice* 10s(2000).

⁵ *Namibia*,1971 ICJ 31(Adv.Op.); *Right of Passage*(India v.Port.),1960 ICJ 37(Judgm.); *Grisbadarna*(Nor.v.Swed.),11 RIAA 160(1909); Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*,62 BYIL 57s(1992); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54, General Principles and Sources of Law*,30 BYIL 5ss(1953).

⁶ Art.32,VCLT,supra fn.3; *Oil Platforms*(Iran v.U.S.),1996 ICJ 812(Judgm.); *Maritime Delimitation and Territorial Questions*(Quatar v.Bahr.),1995 ICJ 18(Judgm.).

⁷ Art.31/4,VCLT,supra fn.3; Thirlway,supra fn.5,27; *Western Sahara*,1975 ICJ 52s(Adv.Op.).

⁸ *U.S. Nationals in Morocco*(Fr.v.U.S.),1952 ICJ 198(Judgm.); Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*,33 BYIL 204(1957); A.McNair, *The Law of Treaties* 366(1961); *Employment of Women During the Night*,1932 PCIJ (Ser.A/B)No.50,383(Adv.Op.) (Anzilotti,diss.op.).

⁹ *Temple of Preah Vihear*(Cambodia v.Thail.),1962 ICJ 34(Judgm.); *Continental Shelf*(Tunis.v.Libya),supra fn.1,66; *Rann of Kutch*(India v.Pak.),50 ILR 409s,520(1968); Watts A./Jennings R., *Oppenheim's International Law* 667s(1992).

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 Merapin 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

¹⁰ *Temple*, supra fn.9,34.

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

¹² Kelly, *The Temple Case in Historical Perspective*, 39 BYIL 470(1963); *Delimitation of Polish-Czechoslovakian Frontier*, 1923 PCIJ (Ser.B)No.8,40(Adv.Op.); cf. *Temple*, supra fn.9,53(Fitzmaurice, diss.op.).

¹³ *S.S. Lotus* (Fr.v.Turk.), 1927 PCIJ (Ser.A)No.10,18(Judgm.); *River Oder Case* (Gr.Brit.et al.v.Pol.), 1929 PCIJ (Ser.A)No.23,26(Judgm.); *Kronprins Gustaf Adolf and Pacific* (Swed.v.U.S.), 2 RIAA 1239(1932); Lauterpacht, *Restrictive Interpretation and the Rule of Effectiveness in the Interpretation of Treaties*, 26 BYIL 58s(1949); I.Brownlie, *Principles of Public International Law* 636(5thed.,1998).

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.

2. 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.

3. 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

¹⁴ *Nebraska v. Iowa*, 143 U.S. 361 (1892); *Chamizal Tract (U.S. v. Mex.)*, 11 RIAA 322 (1911); *Kansas v. Missouri*, 322 U.S. 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 RGDIP 611s (1985); Oppenheim's, supra fn. 9, 665s (1992); Brownlie, supra fn. 13, 150.

¹⁵ *Arkansas v. Tennessee*, 246 U.S. 162, 173, 177 (1918); Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 ICLQ 810 (1963).

¹⁶ *Nuclear Tests (Austl. v. Fr.)*, 1974 ICJ 268 (Judgm.); GA-Res. 2625 (XXV), Friendly Relations Declaration, 25 UN-GAOR Supp. No. 28, 124, UN-Doc. A/8028 (1971); Thirlway, *The Law and Procedure of the International Court of Justice*, 62 BYIL 17 (1992).

¹⁷ *Nuclear Tests (N.Z. v. Fr.)*, 1974 ICJ 474s (Judgm.); *Eastern Greenland Case*, 1933 PCIJ

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 Erebus from fishing there.

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 affected²⁰. Merapi 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

(Ser.A/B)No.53,71(Judgm.).

¹⁸ *Continental Shelf* (Tunis.v.Libya),supra fn.1,74; Fitzmaurice, supra fn.5,31s; Brownlie, supra fn.13,163s; Y.Blum, *Historic Titles in International Law* 38(1965); cf. Grisbadarna, supra fn.5,161.

¹⁹ *Temple*, supra fn.9,23; *Fisheries*(Nor.v.U.K.),1951 ICJ 152(Judgm.); *Venezuelan Preferential Case*,9 RIAA 103(1904); Fitzmaurice, supra fn.5,30s.

²⁰ *Temple*, supra fn.9,23; *Right of Passage*, supra fn.5,39; *Sovereignty over Certain Frontier Land*(Belg.v.Neth.), 1959 ICJ 250(Judgm.)(Armand-Ugon, diss.op.); *Guiana Boundary Dispute*(Braz.v.U.K.),11 RIAA 22(1904); *Island of Palmas*(U.S.v.Neth.),2 RIAA 869(1928); *Gulf of Fonseca*(El Sal.v.Nicar.),11 AJIL 700s(1917); *Chamizal Tract*, supra fn.14,329; MacGibbon, *Customary International Law and Acquiescence*,33 BYIL 115s(1957); Fitzmaurice, supra fn.5,31s.

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

II. MERAPI REQUESTS THE COURT TO DECLARE THAT THE PROPOSED SEABED MINING OPERATION IS IN VIOLATION OF INTERNATIONAL LAW.

A. 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

²¹ Art.70/2,UNCLOS,supra fn.2; *Fisheries Jurisdiction*(U.K.,F.R.G.v.Ice.),1974 ICJ 26, 30; 205s(Judgm.); *ibid.* 121(Waldock,sep.op.); *Grisbadarna*,supra fn.5,161; D.Johnston, *International Law of Fisheries* 283ss(1965); Bouchez, *The Freedom of the High Seas*, in:*The Future of the Law of the Sea* 45(L.Bouchez,ed.,1973); *Continental Shelf*(Tunis.v.Libya),supra fn.1,78.

²² Art.62/3 UNCLOS,supra fn.2.

²³ Art.2,Convention on the High Seas, Apr.29,1958,450 UNTS 11; Bos, *La liberté de la Haute Mer: Quelques Problèmes d'actualité*,12 NILR 346s(1965); cf.*Fisheries Jurisdiction*(F.R.G.v.Ice.),1974 ICJ 198(Judgm.).

²⁴ *Fisheries Jurisdiction*(U.K.v.Ice.),1974 ICJ 29s(Judgm.); G.Schwarzenberger, *The Dynamics of International Law* 57(1976); Blecher, *Equitable Delimitation of the Continental Shelf*,73 AJIL 83(1979).

²⁵ Tiewul, *International Law and Nuclear Test Explosions on the High Seas*,8 CILJ 47(1974); Margolis, *The Hydrogen Bomb Experiments and International Law*,64 Yale Law J'l 636(1955); Bouchez,supra fn.21,29; W.Vitzthum, *Der Rechtsstatus des*

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.

B. 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,

Meeresbodens 282(1972).

²⁶ Johnston, supra fn.21, 283ss; cf. *Paquete Habana*, 173 U.S.708(1900); C.Colombos, *The International Law of the Sea* 474(3rded.,1954); C.Rousseau, *Le Droit des Conflits Armés* 290(1983).

²⁷ *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 241s(Adv.Op.); *Gabcikovo-Nagymaros Project*(Hung.v.Slovk.), 1997 ICJ 41(Judgm.); Principle 21, *Stockholm Declaration on the Human Environment*, Jun.16,1972, 11 ILM 1420(1972); Principle 2, *Rio Declaration on Environment*, Jun.14,1992, 31 ILM 876(1992); P.Sands, *Principles of International Environmental Law* 190s(1995); Vessey, *The Principle of Prevention in International Law*, 3 ARIEL 189(1998); Boyle, *Marine Pollution under the Law of the Sea Convention*, 79 AJIL 366(1985).

²⁸ Principle 19, *Rio Declaration*, supra fn.27; Sands, supra fn.27, 607; Boyle, supra fn.27, 367; Arts.7,9, *ILA Draft Rules of International Law on Transfrontier Pollution*,

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.

C. 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 the limit of national jurisdiction.³² Accordingly appropriation of the seabed is prohibited, its use must be

Aug.20,1980, ILA Report of the 59th Conference 547s(1980); cf. *Fisheries Jurisdiction*, supra fn.24,33; *Lac Lanoux*(Fr.v.Spain),24 ILR 128(1957).

²⁹ Arts.194/2,198, UNCLOS,supra fn.2; Vignes,supra fn.1,639; Moore, *The Rule of Law in the Oceans*, in:*Security Flashpoints* 471s(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); Frank, *Environmental Aspects of Deepsea Mining*,15 VJIL 815,818(1974-75).

³¹ Art.1,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, UN-Doc.A/8028(1971)[hereinafter Seabed Principles Declaration]; Art.136,UNCLOS,supra fn.2; Art.29,GA-Res.3281(XXIX), Charter of Economic Rights and Duties of States,29 UN-GAOR, Supp.No.31,50, UN-Doc.A/9631(1975)[hereinafter CERDS].

³² Part XI,UNCLOS,supra fn.2; Art.I,Outer Space Treaty, Jan.27,1967,610 UNTS 205; Art.11,Agreement on the Moon and Other Celestial Bodies, Dec.5,1979,1363 UNTS 3; Preamble, Antarctic Treaty, Dec.1,1959,402 UNTS 71.

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 benefits³⁶. 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. 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

³³ Arts.2,4,5,9, Seabed Principles Declaration,supra fn.31; Art.137,141,UNCLOS,supra fn.2; Art.29,CERDS,supra fn.31; Preamble, GA-Res.2574(XXIV), Dec.15,1969, Moratorium on Seabed Activities,9 ILM 419(1970).

³⁴ Art.7, Seabed Principles Declaration,supra fn.31; Art.140/1,UNCLOS,supra fn.2; Art.29,CERDS,supra fn.31.

³⁵ Wolfrum, *The Principle of the Common Heritage of Mankind*,43 ZaöRV 323(1983); Art.144,UNCLOS,supra fn.2; Brown, supra fn.30,II.3 49; R.Churchill/A.Lowe, *The Law of the Sea* 249(3rded.,1999).

³⁶ Art.140,UNCLOS,supra fn.2; Churchill/Lowe,supra fn.35,229; Paolillo, *The Institutional Aspects for the International Sea-Bed and their Impact on the Evolution of International Organizations*,188 RdC 209s(1984-V); R.Dupuy/D.Vignes, *A Handbook on the New Law of the Sea* 582s(1991).

³⁷ Art.11,Seabed Principles Declaration,supra fn.31; Art.145,UNCLOS,supra fn.2; cf.Art.30,CERDS,supra fn.31.

³⁸ U.S.:§970.204,519,602ss,Deep Seabed Mining Regulations(Sept.15,1981),20 ILM 1228s(1981); Fr.:Arts.4,9,14 Law on Mineral Resources of the Deep Sea Bed(Dec.23,1981),21 ILM 808ss(1982); Italy:Arts.3,7,15, Regulations on the Mineral Resources of the Deep Seabed(Feb.20,1985),24 ILM 983ss(1985); Russ.:Arts.8,14,18, Edict on Mineral Resources beyond the Limits of the Continental Shelf(Apr.17,1982),21 ILM 551ss(1982); U.K.:Arts.5,/1,10/6, Deep Sea Mining Act 1981,20 ILM 1217ss(1981); F.R.G.:Secs.1,13, Act of Interim Regulation of Deep Seabed Mining(Aug.22,1980),20 ILM 393ss(1981).

therefore in violation of international law.

D. 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 measures³⁹, 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 states⁴², e.g. caused by a massive flow of refugees⁴³. The Charter does not prescribe any specific form for such decisions by the SC, which enjoys procedural autonomy⁴⁴. Beside the traditional form of Resolutions, the SC has also increasingly made use of Presidential Statements for at least

³⁹ Art.40, UN-Charter.

⁴⁰ Art.25, UN-Charter; S.Bailey/S.Daws, *The Procedure of the UN Security Council* 19s(3rded.,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); Skubiszewski, *Use of Force by International Institutions in: Manual of Public International Law* 786(M.Sørensen,ed.,1968); Meeker, *Defensive Quarantine and the Law*, 57 *AJIL* 520ss(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 UN-SCOR, 63, UN-Doc.S/INF/48(1993); SC Res.733(1992), 47 UN-SCOR, 55, UN-Doc.S/INF/48(1993); Sorel, *L'élargissement de la notion de menace contre la paix*, in: *Le Chapitre VII de la Charte des Nations Unies* 41s(SFDI,ed.,1995); Gaja, *Réflexions sur le Rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial*, 97 *RGDIP* 304s(1993).

⁴² Frowein, *supra* fn.40, 611; Sorel, *supra* fn.41, 42; Gaja, *supra* fn.41, 304s.

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

⁴⁴ Art.30, UN-Charter; Conforti, *The Legal Effect of Non-Compliance with Rules of Procedure in the U.N. General Assembly and Security Council Charter*, 63 *AJIL* 482(1969); Bailey/Daws, *supra* fn.40, 390, 410.

twenty years.⁴⁵ State 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.

E. MERAPI DID NOT VIOLATE INTERNATIONAL LAW REGARDING THE DESTRUCTION OF THE SEABED MINING FACILITY.

1. 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

⁴⁵ e.g. Presidential Statement on Afghanistan, S/PRST/1997/55<<http://www.un.org>>; Presidential Statement on Namibia,40 UN-SCOR 10, UN-Doc.S/INF/41(1986); Presidential Statement on the Hijacking of Commercial Aircraft,27 UN-SCOR 18, UN-Doc.S/INF/28(1973); Bailey/Daws,supra fn.40,63s.

⁴⁶ SC Res.598(1987),42 UN-SCOR, 5s, UN-Doc.S/INF/43(1988); Prot.to Res.598, UN Doc. S/PV.2750 16,21,27,61(1987); Frowein, *Article 40* in:Simma,supra fn.40,621.

⁴⁷ *Nicaragua*(Nicar.v.U.S.),1986 ICJ 62s(Judgm.); *Tehran U.S. Consular Staff*(U.S.v.Iran),1980 ICJ 29(Judgm.); cf.Art.6[8],ILC, *Draft Articles on State Responsibility, Second Reading*,<<http://www.law.cam.ac.uk/rcil/ILCSR/index.htm>>.

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.

2. 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 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 Merapi population. Hence, the operation was justified under international law.

3. 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

⁴⁸ *Nicaragua*, supra fn.47,64.

⁴⁹ Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EJIL 23(1999); Simma, *Nato, the UN and the Use of Force*, *ibid.* 12; Wedgwood, *Unilateral Action in the UN System*, 11 EJIL 349(2000); F.Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* 100s(1999); Brown, *Humanitarian Intervention at a Crossroads*, 41 WMLR 1726(2000); cf. Henkin, *Kosovo and the Law of “Humanitarian Intervention”*, 93 AJIL 828(1999).

⁵⁰ Art.26[33], ILC, supra fn.47; *M/V “Saiga” No.2* (St. Vincent v. Guinea), 1999 ITLOS No.2, para.134(Judgm.), <<http://www.un.org/Depts/los/ITLOS/ITLOSproc.htm>>; *Gabcikovo-Nagymaros*, supra fn.27,37; Yankov, *State Responsibility*, II YBILC, Part Two 39(1980).

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 (supra II.A.). 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.

III.MERAPI REQUESTS THE COURT TO DECLARE THAT IT IS NOT REQUIRED BY INTERNATIONAL LAW TO SURRENDER THE MEMBERS OF THE AQUA PROTECTORS TO EREBUS FOR PROSECUTION, OR TO RELEASE THE SIX FISHING VESSELS.

A. 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

⁵¹ Art.26[33]/1(a),ILC,supra fn.47; *Gabcikovo-Nagymaros*,supra fn.27,40; *M/V“Saiga”No.2*,supra fn.50, para.133; Jagota, *State Responsibility: Circumstance Precluding Wrongfulness*,16 NYIL 269(1985); Brown, *The Lessons of the Torrey Canyon*,21 CLP 129s(1968).

⁵² Art.26[33]/1(b),ILC,supra fn.47.

⁵³ *Lockerbie Case*(Lib.v.UK),1992 ICJ 24(Order)(Joint Declaration of Evensen,et al.); Oppenheim's,supra fn.9,950; Wise, *The Obligation to Extradite or Prosecute*,27 Isr.L.Rev. 282(1993); Swart, *Refusal of Extradition*,23 NYIL 214s(1992); Stein, *Rendition of Terrorists: Extradition versus Deportation*,79 IsrYIL 282(1989); Brownlie,supra fn.13,318; cf. M.Bassiouni[1], *A Policy-Oriented Inquiry into the Different Forms and Manifestations of 'International Terrorism'*, in:*Legal Responses to international terrorism* xlvi(M.Bassiouni,ed.,1988).

⁵⁴ Bassiouni[2], *Reflections on International Extradition*, in:*Festschrift für Otto Triffterer* 727(K.Schmoller,ed.,1996); cf.Hannay, *International Terrorism and the Political*

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 crimes⁵⁵, such as genocide, crimes against humanity, war crimes and the crime of aggression⁵⁶. 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.

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

Offence Exception to Extradition, 18 CJTL 383(1979).

⁵⁵ Brownlie, *supra* fn.13,318; Bassiouni[2], *supra* fn.54,729.

⁵⁶ Arts.5,6,7,8, Rome Statute of the International Criminal Court [hereinafter ICC], 37 ILM 999(1998); Arts.4,5, Statute of the International Tribunal for the Former Yugoslavia, 32 ILM 1172(1993); Art.2,3, Statute of the International Criminal Tribunal for Rwanda, 33 ILM 1602s(1994); Art.6, Charter of the Nuremberg Tribunal <<http://www.yale.edu/lawweb/avalon/avalon.htm>>.

⁵⁷ Preamble, ICC, *supra* fn.56.

⁵⁸ Freestone, *Cooperation against Terrorism in: Terrorism and International Law* 46 (R.Higgins/M.Flory, eds., 1997); Gilbert, *Terrorism and the Political Offence Exception Reappraised*, 34 ICLQ 696,700(1985); Sofaer, *Terrorism and the Law*, 64 Foreign Affairs, 906(1985/86); Garcia-Mora[2], *The Nature of Political Offences*, 48 Va.L.Rev. 1226(1962); Hannay, *supra* fn.54,411; Brownlie, *supra* fn.13,319; Oppenheim's, *supra* fn.9,959; *In re Castioni*, 1 QB 148 (1891), 5 Brit.Int.L. Cases 558(1967); *In re Kavic*, 19 ILR 373(1952).

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 State⁶¹. 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 instruments⁶⁴. Therefore, Merapi is under no obligation to extradite the alleged offenders of Merapi nationality.

⁵⁹ Art.3/1, European Convention on Extradition, Council of Europe, Dec.13,1957, 359 UNTS 278[hereinafter ECE]; Art.4/4, Inter-American Convention on Extradition, Feb.25,1981,20 ILM 724 (1981); Art.5/1, Extradition Treaty(U.S.-Mexico), May 4,1978,17 ILM 1061(1978); Art.5/1(a), Extradition Treaty(Can.-India), Feb.6,1987,27 IJIL 279(1987); Art.V/1(c)(i), Extradition Treaty(U.K.-U.S.), Jun.8,1972,5 AILC 408(2nd Ser.2,1992); Art.3(a), GA-Res.45/116, *Model Treaty on Extradition*, A/RES/45/116, Sept.22,1999, <<http://www.un.org>>.

⁶⁰ *In re Nappi*,19 ILR 375(1952); *In re Ockert*,7 AD 370(1933-4); *In re Kavic*,supra fn.58,373; *In re Kaphengst*,5 AD 293(1929-30).

⁶¹ *In re Giovanni Gatti*,14 AD 145s(1947); *In re Meunier*,2 QB 415(1894); cf. *In re Abu Eain*,529 F.Supp. 695(1980); *Wassilief Case*, quoted in:Garcia-Mora[1], *The Present Status of Political Offences in the Law of Extradition and Asylum*,14 U.Pitt.L.Rev. 378(1953).

⁶² Freestone,supra fn.58,46; Vieira, *L'Evolution Récente de l'Extradition dans le Continent Américain*,185 RdC 236ss(1984-II).

⁶³ I.Shearer, *Extradition in International Law* 102ss,115(1971); Vieira,supra fn.62,238s; Oppenheim's,supra fn.9,955.

⁶⁴ Art.6/1(a),ECE,supra fn.59; Art.5,Treaty concerning Extradition(Belg.-Lux.-Neth.), Jun.27,1962,<<http://www.consilium.eu.int/ejn/>>; Art.VI,Treaty on Extradition(U.S.-Mexico), Dec.11,1861,<<http://www.yale.edu/lawweb/avalon/avalon.htm>>; Art.4(a),*UN Model Treaty*,supra fn.59; Art.7,Inter-American Convention,supra fn.59; Stein,supra fn.53,330.

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.

B. MERAPI REQUESTS THE COURT TO DECLARE THAT IT IS NOT REQUIRED BY INTERNATIONAL LAW TO RELEASE THE SIX FISHING VESSELS.

1. 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.

2. 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 (supra I.).

⁶⁵ Art.7/1, Torture Convention, Dec.10,1984, annexed to GA-Res.39/46,39 GAOR Supp.No.51 197 UN-Doc.A/39/51(1985); cf. Art.146, Convention Relative to the Protection of Civilian Persons in Time of War, Aug.12,1949,75 UNTS 287; Bassiouni[2], supra fn.54,726; Cassese, *The International Community’s “Legal” Response to Terrorism*,38 ICLQ 593(1989).

⁶⁶ *Mavrommatis Palestine Concessions*(Greece v.Gr.Brit.),1939 PCIJ (Ser.A)No.2,12(Judgm.1924); *Interhandel Case*(Prel.Obj.)(Sw.v.USA),1959 ICJ 27(Judgm.); E.Borchard, *Diplomatic Protection of Citizens Abroad* 332(1922); cf.Art.45[22](b), ILC Draft,supra fn.47.

⁶⁷ Art.73/1 UNCLOS,supra fn.2; S.Nandan/S.Rosenne(eds.), *2 United Nations Convention on the Law of the Sea 1982* 794s(1993); U.S.:ALI, *2 Restatement Third of the Foreign Relations Law of the U.S.*(1987), Commentary to §514 60s; Nor.:Para.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*,

Despite the announcement by the Merapi Prime Minister that any Erebian fishing vessel found fishing the 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.

IV. 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.

A. 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

UN/ST/LEG/Ser.B/19 242(1980); Bah.:Art.13, Fisheries Resources (Jurisdiction and Conservation) Act, 1977, *ibid.*185s; N.Z.:Art.24, Tokelau (Territorial Sea and Fishing Zone) Act, 1976, *ibid.*75s; Myan./Burma:Art.22, Territorial Sea and Maritime Zones Law, 1977, *ibid.*11.

⁶⁸ Arts.73/2,292,UNCLOS,supra fn.2.

⁶⁹ Arts.34,36/1,VCLT,supra fn.3; *Free Zones of Upper Savoy and the District of Gex*,1932 PCIJ (Ser.A/B)No.46,147s(Judgm.); Lee, *The Law of the Sea Convention and Third States*,77 AJIL 545(1983).

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 caused⁷². 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 industry⁷³, 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 (supra II.B.). 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

⁷⁰ Art.41/I, ICJ Statute; *Passage through the Great Belt* (Fin.v.Den.), 1991 ICJ 18 (Order); *Fisheries Jurisdiction* (U.K., F.R.G.v.Ice.), 1972 ICJ 17, 35 (Orders); *Nuclear Tests* (Austl., N.Z.v.Fr.), 1973 ICJ 103, 139 (Orders).

⁷¹ *Great Belt*, supra fn.70, 17; *Nuclear Tests*, supra fn.70, 104s, 140s; *Pakistani Prisoners of War* (India v.Pak.), 1973 ICJ 330 (Order).

⁷² *The Vienna Convention on Consular Relations* (Para.v.U.S.), 1998 ICJ 257 (Order); *Application of the Genocide Convention* (Bosn.Herz.v.Yugo.), 1993 ICJ 19 (Order); *Fisheries Jurisdiction*, supra fn.70, 16, 34; *Nuclear Tests*, supra fn.70, 103, 139.

⁷³ *Fisheries Jurisdiction*, supra fn.70, 16s, 34s; Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RdC 159 (1978-I); Thirlway, *Indication of Provisional Measures by the International Court of Justice*, in: *Interim Measures Indicated by International Courts* 11s (R.Bernhardt, ed., 1994); J.Elkind, *Interim Protection, A Functional Approach*, 115 (1981).

⁷⁴ *Nuclear Tests* (N.Z.v.Fr.), supra fn.70, 141; Jiménez de Aréchaga, supra fn.73, 159.

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 dispute⁷⁵. 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.

B. EREBUS HAS TO EITHER UPGRADE OR RELOCATE THE MINING FACILITY UNDER INTERNATIONAL LAW.

1. 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 conventions⁷⁶, resolutions,⁷⁷ and national legislations⁷⁸.

⁷⁵ *Application of the Genocide Convention*, supra fn.72,23; *Boundary between Cameroon and Nigeria*(Cameroon v.Nigeria),1996 ICJ 22s(Order); *Frontier Dispute*(Burk.Faso v.Mali),1986 ICJ 9(Order); *Fisheries Jurisdiction*, supra fn.70,17,35; Oda, *The International Court of Justice Viewed from the Bench (1976-1993)*,244 RdC 72(1993-VII).

⁷⁶ Arts.192,194/1,3(c), UNCLOS, supra fn.2; Art.10, Convention on the Protection of the Marine Environment of the Baltic Sea Area, Mar.22,1974, International Environmental Law-Multilateral Treaties, 974:23(W.Burhenne,ed.,1995)[hereinafter IELMT]; Art.3, 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, Oct.14,1994, IELMT 976:13/E; Art.8,Convention for the Protection of the Marine and Coastal Environment of the West and Central African Region, Mar.3,1981, IELMT 981:23; Art.8,Convention for the Protection of the Marine Environment of the Wider Caribbean Region, Mar.24,1983, IELMT 983:237; Art.5, Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept.22,1992, IELMT 992:71.

⁷⁷ Art.11,Seabed Principles Declaration, supra fn.31; GA-Res.2467(XXIII), Dec.21,1968,8 ILM 203s(1969).

⁷⁸ U.S.:§970.204,506,701s, supra fn.38; U.K.:Sec.5, supra fn.38; Fr.:Arts.8,14, supra fn.38; USSR: Art.8, supra fn.38; F.R.G.:Secs.1,8, supra fn.38.

Furthermore, 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 (supra II.B), 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.

2. 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 (supra I.B.1.). 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

⁷⁹ Principle 15, *Rio Declaration*, supra fn.27; Sands, supra fn.27,212s; Šolyan, *The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles*, 3 ARIEL 211s(1998); Communication on the Precautionary Principle, EC-Commission, COM(2000)1-final; Art.3/3, UN Framework Convention on Climate Change, IELMT, supra fn.76,992:35; Preamble, Convention on Biological Diversity, IELMT, supra fn.76,992:42.

⁸⁰ Fitzmaurice, supra fn.5,30; MacGibbon, supra fn.20,122; *Fisheries*, supra fn.19,139; cf. Blum, supra fn.18,315s.

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.

3. 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

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,E.Denters,P.de Waart,eds.,1992).

⁸² Art.1,GA-Res.41/128(1986), Declaration on the Right to Development, UN-Doc.A/RES/41/128,<<http://www.un.org>>; Rich, *The Right to Development as an Emerging Human Right*,23 VJIL 314s(1983); Nayak, *Evolving Right to Development as a Principle of Human Rights Law* in:Chowdhury et al.,supra fn.81,145; U.Umozurike, *The African Charter on Human and Peoples' Rights* 60(1997).

⁸³ *Gabcikovo-Nagymaros*,supra fn.27,78; Beyerlin, *The Concept of Sustainable Development*, in:*Enforcing Environmental Standards* 103s(R.Wolfrum,ed.,1996); Canelas de Castro, *The Judgment in the Case Concerning Gabcikovo-Nagymaros Project*,8 YIEL 28(1997); Principle 3, *Rio Declaration*, supra fn.27; Art.2,*Brundtland Report*(1987),<<http://www.rrl.org/envatlas/supdocs/brundt.html>>.

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

V. 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.

A. 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 committed⁸⁵. 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

⁸⁴ Art. 1,2[3],ILC,supra fn.47; *Corfu Channel*(Alb.v.U.K.),1949 ICJ 23(Judgm.); *Tehran U.S. Consular Staff*,supra fn.47,41s; Dupuy, *Le Fait Générateur de la Responsabilité Internationale des Etats*,188 RdC 26s(1984-V).

⁸⁵ *Factory at Chorzów*(Germany v.Pol.),1928 PCIJ (Ser.A)No.17,47(Judgm.); Art.36[43],ILC,supra fn.47.

⁸⁶ cf. Art.37[44],ILC,supra fn.47; *Chorzów*,supra fn.85,47; G.Schwarzenberger, 1 *International Law as applied by International Court and Tribunals* 660(3rded.,1957); Mann, *The Consequences of an International Wrong and National Law*,48 BYIL 2(1976-77); Jiménez de Aréchaga, *International Responsibility in:Manual of Public International Law*, 565s(M.Sørensen,ed.,1968).

⁸⁷ Art.37/2[44],ILC,supra fn.47; *Central Rhodope Forests*(Greece v.Bulg.),28 AJIL 804ss(1934)(1933); *Cape Horn Pigeon*(U.S.v.Russia),9 RIAA 51,65(1902); *AMCO Asia Corp.v.Indonesia*,24 ILM 1036ss(1985)(1984); *Spanish Zone of Morocco*(Spain v.UK),2 RIAA 658(1925); C.Jenks, *The Prospects of International Adjudication* 544(1964); García-Amador, *State Responsibility*,II YBILC 41(1961); Arangio-Ruiz, *State Responsibility*,II YBILC, Part One 19(1989).

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 to exercise sovereign fishing rights in the Alma Shoals (supra I.), 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. Merapin 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.

B. EVEN IF THE COURT DOES NOT HOLD EREBUS RESPONSIBLE FOR DAMAGES TO MERAPIN 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

⁸⁸ Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BYIL 86ss(1959); C.Amerasinghe, *Local Remedies in International Law* 129(1990); *Aerial Incident of 27 Jul.1955*(Isr.,U.S.,U.K.v.Bulg.),1959 ICJ Plead.531,589; *M/V "Saiga" No.2*, supra fn.50, para.98.

⁸⁹ *The Rainbow Warrior Affair*, 19 RIAA 202(Ruling,1986); *The I'm Alone*(Can.v.U.S.),3 RIAA 1618(1949)(1933); Fitzmaurice, *The Case of the I'm Alone*, 17 BYIL 94,109s(1936); M.Whiteman, *Damages in International Law* 628(1937); Art.45/2(c), ILC Draft, II YBILC, Part Two 61(1996); Report of the ILC, 48 GAOR, UN-Doc.A/48/10 205(1993).

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.

C. 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 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.

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

⁹⁰ *Aegean Sea Continental Shelf*(Greece v.Turk.),1976 ICJ 10s(Order).

⁹¹ *Lena Goldfields Arbitration*,5 AD 3s(1930); Friedmann, *Some impacts of Social Organization on International Law*,50 AJIL 505(1956); Rodríguez-Iglesias, *El enriquecimiento sin causa como fundamento de responsabilidad internacional*,34 REDI 387ss(1982); *Shannon & Wilson, Inc.v.AEOI*,9 Iran-U.S.C.T.R. 402(1985-II); *Schlegel Corp.v.NICIC*,14 Iran-U.S.C.T.R. 180(1987-I); McNair, *The Seizure of Property and Enterprises*,6 NILR 240(1959).

⁹² Fombad, *The Principle of Unjust Enrichment in International Law*,30 CILSA 129(1997); Friedmann, *General Course in Public International Law*,127 RdC 155(1969-II).

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.

