2001 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE REPUBLIC OF EREBUS V. THE KINGDOM OF MERAPI
THE CASE CONCERNING THE SEABED MINING FACILITY

BENCH MEMORANDUM

CONFIDENTIAL

FOR JUDGES EYES ONLY

2001 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM
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BENCH MEMORANDUM

PART I: GENERAL INFORMATION

I. INTRODUCTION

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with a basic outline of the factual and legal issues relevant to the 2001 Compromis. This Bench Memorandum should be read in conjunction with the Compromis, the map annexed to the Compromis, and the Corrections/Clarifications to the Compromis. The Compromis was intended to present a balanced problem, such that each side has strengths and weaknesses in its case.

This memorandum is not meant to be an exhaustive treatise on the issues raised by the facts, but rather an outline of the most relevant arguments and authorities parties may draw upon. As the memorandum is intended to give only a basic outline of the issues, it should not be surprising that a judge, in evaluating either a memorial or an oral argument, will encounter arguments and authorities that are not discussed in this memorandum. The omission of any such arguments and authorities from this memorandum does not suggest that they are not relevant or credible.

While there are a number of sub-issues which might be raised on these facts, the following questions must be addressed by the teams:

(1) What is the legal result of the shift in the principal arm of the Krakatoa River?

(2) Whether Merapi's seizure of the Erebus fishing vessels operating in the Alma Shoals was unlawful under the circumstances?

(3) Whether Erebus's military presence in the Alma Shoals was unlawful under the circumstances?

(4) Whether Erebus's deep seabed mining operation was in violation of international law?

(5) Did Merapi incur state responsibility for the Aqua Protectors' attack on the Erebus deep seabed mining facility?

(6) Can the attack on the Erebus deep seabed mining facility be justified or excused under international law?

(7) Whether Merapi has a duty to extradite the responsible members of the Aqua Protectors to Erebus for prosecution?

The problem includes tangential issues, some of which are discussed in this Memorandum. The teams should not be penalized for missing them or credited unduly for noticing them.

Citations: Some teams inevitably are at a disadvantage, as are some countries, with respect to access to well-equipped law libraries. The issues in this Compromis are addressable with generally available materials and careful reading of the facts. The teams should be candid about the existence of apparently adverse, significant authority.

II. JUDGING THE JESSUP

There are differing opinions as to the judge's role in a moot court competition. On the one hand, there are those who believe that a judge should do whatever is necessary to ensure that the competitors complete their entire presentation. At the other extreme are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions. There is no "correct" position on this issue. However, when judges ask questions sufficient to prevent the competitors from merely giving a rehearsed speech, many of those involved with the competition in the past agree that such an approach works well. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy passive benches – each judge must balance these two extremes.

Judges in the Jessup Competition play a different role than those in the real world. They do not indicate the determinations they have made in the form of opinions, but rather are there to assess the validity of the participant's arguments, the persuasiveness of their presentation and the thoroughness of their preparation. Judges are encouraged, however, to review the Statute of the International Court of Justice prior to the competition to re-familiarize themselves with the basic jurisdictional and theoretical nature of that body.

The substantive rules of judging the Jessup Competition are set forth in the rules promulgated by the International Law Students Association, and, as they are available to judges through the ILSA office, shall not be repeated here. Judges must be familiar with these rules to avoid controversy during the competition. Judges are also asked to review these rules and the instructions provided with the Memorial Scoresheets or Oral Argument Scoresheets, as these contain an abbreviated list of general judging criteria upon which judges should formulate their opinions.

Judges are expected primarily to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition. Once the participants submit their memorials, the memorials may not be revised. As they advance through the competition, however, participants are sure to revise their argumentative style and legal presentation. It is important that judges in

the oral rounds keep this fact in mind, as their questions and responses to the participants should be formulated so as to encourage that learning process.

There are certain tactics judges in the oral rounds can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. In these ways, a judge can make a meaningful contribution to a performance without being unduly intrusive.

A judge should refrain as much as possible from insisting upon an answer to a question when it appears as if a competitor has already made a good faith effort to respond. In the final analysis, however, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors. Just as there is no truly "correct" judging style in a courtroom there is no correct judging style in a moot court competition.

As concerns the legal arguments to be made by the competitors, it is important to keep in mind that the competitors choose neither the problem nor the side of the issue that they argue. In spite of every attempt to make the Compromis factually and legally equal between the parties, inevitably international law favors one side or the other. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, mis-cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

It appears that, in the past, judges who do not have a strong background in international law have hesitated to ask questions during the oral rounds for fear that such questions are too fundamental. It is important, however, to have those questions asked to ensure the competitors have an understanding of the fundamental issues and are not merely regurgitating memorized details. Further, in a real courtroom, it is often the case that a judge is not expert in the substantive law at issue. Pertinent fundamental questions are as appropriate as the more complex questions.

The following are some specific suggestions for questioning:

- Frequently utilize questions that call for a "yes" or "no" answer. The questions test a competitor's ability to answer directly, and the questions themselves tend to be shorter and more concise.

- Avoid asking rhetorical questions or making statements.

- Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.

- Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.

- Avoid detailed questioning about a co-counsel's argument. Each competitor should, at the beginning of their presentation, outline the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

- Avoid extensive questioning after time has expired, which requires in part being cognitive of the time elapsed for a particular presentation (which will be constantly updated by the courtroom bailiff).

- If there is a competitor in the round who is not a native English speaker, it is important to word questions carefully. It is especially important in these instances to avoid asking questions with overly complex sentence structures.

III. SYNOPSIS

This case encompasses two contemporaneous maritime disputes between the large, industrialized nation of Erebus (to the north) and the smaller, developing nation of Merapi (to the south), which both border the Etna Ocean (to the east). You should familiarize yourself with the Map appended to the Compromis to get a sense of the locations of the geographic features that play a role in this case.

The first dispute is about whether the maritime boundary between the two countries shifted when the principal arm of the Krakatoa River, which had been their border pursuant to their "bilateral Treaty of Amity and Peace," shifted southward after a series of hurricanes. After the river shifted southward and Erebus discovered petroleum reserves in the Alma Shoals, which used to be on the Merapi side of the maritime boundary, Erebus announced that the Alma Shoals were now in Erebian waters. In light of its dependence on fishing the Alma Shoals for ten percent of its Gross Domestic Product, Merapi rejected that claim and announced that any Erebus flagged vessels found in the Alma Shoals would be seized. When Merapi subsequently seized six such vessels, Erebus responded by sending a fleet of military patrol boats to accompany Erebian vessels operating in the Alma Shoals. This caused the outgunned Merapin naval force and fishing fleet to retreat from the area.

The second dispute concerns Erebus's decision to begin mining the deep ocean floor for manganese nodules 500 nautical miles off the coast of Merapi using a novel process which has been criticized by scientists worldwide as dangerous to the marine life in the nearby Grand Basin. Erebus announced that it would commence its operation in September of 2000 notwithstanding a Presidential Statement issued by the U.N. Security Council on August 15, 2000, which invoked Chapter VII of the U.N. Charter and demanded that Erebus not begin its operation until the Council was convinced that it would not threaten the marine life of the Grand Basin. Because fishing in the Grand Basin accounts for forty percent of Merapi's Gross Domestic Product, Merapi provided U.S. $100,000 to finance an operation by an environmental

group known as the "Aqua Protectors" to disable the Erebus seabed mining facility with an explosive charge. The explosion did U.S. $1 billion in damage to the facility, and killed six Erebian scientists and engineers who were working on board a temporary platform at the facility. Erebus has requested compensation from Merapi and the extradition of the responsible members of the Aqua Protectors, some of whom were Merapi nationals and others were nationals of a third state located to the south of Merapi.

The U.N. Secretary-General persuaded the two countries to bring their dispute to the International Court of Justice for resolution. There is no dispute as to the propriety of the Court's jurisdiction in this case.

Erebus and Merapi are both parties to the U.N. Charter, the Statute of the International Court of Justice, the Vienna Convention on the Law of Treaties, and the four 1958 Geneva Conventions on the Law of the Sea. They have a bilateral Treaty of Amity and Peace that sets out their mutual border, but they do not have a bilateral extradition treaty. Only Merapi is a signatory and Party to the 1982 Law of the Sea Convention and the Agreement in Implementation of Part XI of the Law of the Sea Convention. Neither State is party to any other treaty relevant to this case.

IV. SOURCES OF INTERNATIONAL LAW

A. General

Under Article 38 of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

(1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(2) international custom, as evidence of a general practice accepted as law;

(3) the general principles of law recognized by civilized nations;

(4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is some dispute among commentators as to whether these four sources of international law are listed in order of importance. Although Article 59 of the ICJ Statute provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case," the ICJ often cites its previous case law, and that of its predecessor, the PCIJ, as persuasive authority.

B. Treaties

According to Article 34 of the Vienna Convention on the Law of Treaties, generally, treaties are not binding on non-parties. However, Article 38 of the Vienna Convention recognizes that a treaty may become binding on non-parties as customary international law. In addition, some parts of a treaty may become customary international law while other parts do not. One of the critical questions in the instant case is whether all or parts of the 1982 Law of the Sea Convention have become customary international law.

C. Customary International Law

Customary international law is comprised of two elements: widespread state practice and opinion juris (sense of legal obligation). Evidence of customary international law may be in the form of treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations.

State practice simply means that a sufficient number of states behave in a regular and repeated manner that establishes a customary norm. State practice also may be evidenced by a sufficient number of States signing, ratifying, and acceding to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law."

The second element of customary international law, opinio juris, requires that the subject state action be taken out of a sense of legal obligation, as opposed to domestic expediency. Put another way, opinion juris, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

In *The North Sea Continental Shelf Cases* (1969), the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving its existence.

PART II: LEGAL ANALYSIS

I. WHAT IS THE LEGAL RESULT OF THE SHIFT IN THE PRINCIPAL ARM OF THE KRAKATOA RIVER?

A. Interpretation of the 1947 Treaty of Amity and Peace

Both Merapi and Erebus will argue that the plain language of the Treaty should govern, citing to article 31(1) of the Vienna Convention on the Law of Treaties. Teams should be aware of the fact that the Vienna Convention was concluded in 1969 and the Treaty of Amity and Peace was signed in 1947. Since article 4 of the Vienna Convention states that it has prospective effect only, to the extent that students are relying upon the Convention, they will need to be relying on the principles therein as customary international law or general rules, rather than on the text of the treaty per se.

Merapi will argue that the boundary between the two countries has not shifted. It will suggest that the Treaty language referring to the location of the river (between Pigeon Rock to the South, and the Cape of Realto to the North), is the key provision. Merapi may also argue that Erebus is suggesting the boundary change in bad faith, contrary to article 31(1) of the Vienna Convention, as a means of territorial acquisition that Erebus desires to effectuate in order to exploit the petroleum reserves discovered in 1999. Finally, Merapi may refer to supplementary means of interpretation, including the preparatory work of the treaty and the drafters' intent (article 32 of the Vienna Convention) where, as here, the circumstances underlying the negotiation have fundamentally changed. Since measurements exist that can objectively determine the boundary between the two countries, maintaining the boundary at its initial location would appear to satisfy the requirement that the boundary be objectively definable, as well as maintain the initial division of the delta's fertile area between the two countries that the 1947 Treaty initially effectuated.

Erebus, on the other hand, will argue that the shift in the River has created a shift in the boundary between the two countries, and that the important language in the Treaty of Amity and Peace is the reference to "the mouth of the Krakatoa River, taking as the mouth of the river its principal arm." Similarly, Erebus will try to insist that reference to the drafters' intent or the preparatory work should be forbidden since the language is clear. Although Erebus may attempt to refer to article 62 of the Vienna Convention providing that a fundamental change of circumstance may not be invoked in the case of treaties establishing a boundary, that provision is inapposite given that neither party is attempting to terminate or withdraw from the treaty.

B. The International Law of Maritime Delimitation

Because the Treaty's interpretation may not be dispositive of the issues, the parties should brief for the Court the international law of maritime delimitation. As a preliminary matter, it should be noted that both countries appear to suggest that their view of the Treaty's meaning determines the entire maritime boundary between them, from the baseline to the end of their respective exclusive economic zones. That is, a single boundary is apparently proposed for all zones. In bolstering their readings of the treaties, both sides may refer to article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone (or its equivalent in the 1982 Treaty, article 15), but that Treaty will not be of much assistance to either side. Indeed, as one prominent expert has noted, "the international maritime boundary law codified in the 1982 Convention on the Law of the Sea is indeterminate." Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 Am. J. Int'l L. 227 (1994). Both sides should refer to the substantial body of caselaw, both arbitral, and from the ICJ, on the subject of maritime delimitation, which forms a sort of "common law" in the field. *Id.; see also* Sang-Myon Rhee, *Sea Boundary Delimitation Between States before World War II*, 76 Am. J. Int'l L. 555 (1982). In a somewhat confusing use of terminology, many decisions state that the court (or tribunal) is applying equitable principles as a matter of law. This is different than a decision ex aequo et bono, which would not be permitted in the instant dispute, because the parties have not agreed to it pursuant article 38(2) of the ICJ's Statute. This is an important subtlety for the students to observe. Thus, both parties will need to argue that the equities (and history) favor their interpretation.

The reference to equity (as a legal principle) was taken in the *Grisbadarna Case*, involving a boundary dispute between Sweden and Norway, which was decided by the Permanent Court of Arbitration at The Hague in 1909. In that case, the court held that maritime boundaries between adjacent states should be fixed by tracing a line perpendicularly to the general direction of the coast (but the tribunal ultimately tilted the line slightly to accommodate historic fishing patterns of the two countries). This holding was adopted by the Harvard Research Project of 1929, which confirmed that historical, vested and other rights and conditions may be considered. Merapi will obviously point to its virtually undisturbed fishing of the shoals to maintain its claim as to the equities; Erebus could attempt, in a rather clever way, to argue that since equitable principles generally favor taking the main channel of a river as the boundary in order to guarantee access to and navigation in the waterway to each riparian state, its view is "fairer" to Merapi than Merapi's own position; Merapi, of course, will simply refute that claim.

Other recent cases that the teams may cite include *Delimitation of the Maritime Areas between Canada and France (St. Pierre and Miquelon); Land, Island and Maritime Frontier Dispute (El Salvador/Honduras:*

Nicaragua intervening); and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway).* These cases establish that essential to a maritime boundary delimitation are questions of historic title, treaty obligations, common behavior and stability derived from the doctrine of uti possidetis (a doctrine that provides that a state retains pre-colonial boundaries after it gains independence, which is of limited relevance here). The Court has typically discounted arguments related to non-geographic considerations, such as geology, economics, population and other social science data, although in some cases it has looked at particular fishing stocks in an attempt to share a valuable resource equally between disputants. Finally, teams may refer to the maritime delimitation cases between Qatar & Bahrain and between Nicaragua and Honduras that are currently before the ICJ, but have not yet been decided on the merits.

C. The Principles of Accretion and Avulsion

Merapi will assert the general doctrine that where a river suddenly abandons its bed entirely, a process known as avulsion, the boundary line continues to run along the middle of the old *thalweg* in the abandoned bed. Erebus may counter that the shift in the river boundary was gradual, and that the boundary line between the two countries therefore continues to be the mid-channel of the shifting course of the river, pursuant to the doctrine of accretion. 1 OPPENHEIM'S INTERNATIONAL LAW 665, 697 (9th ed., 1992); *Louisiana v. Mississippi*, 282 U.S. 458 (U.S. 1930). Paragraph 5 of the Compromis and Clarification # 2 suggest that the shift was due to hurricanes over the last few years, but that the principal arm of the river had been relatively stable prior to that time, providing potential factual arguments to both sides.

II. THE LEGALITY OF MERAPI'S SEIZURE OF THE EREBUS FISHING VESSELS

Merapi asserts that the Alma Shoals lie within its exclusive economic zone based on the boundary determination made in Part I, above. Erebus claims that the shoals now lie within its EEZ, and therefore its nationals may fish there pursuant to Erebian law. In resolving the issues, the parties may look to the 1958 Law of the Sea Conventions, to which both are parties, and to the 1982 Law of the Sea Convention, to which only Merapi is a party.

Under the 1958 Convention on the Territorial Sea and Contiguous Zone, the Alma Shoals lie outside the territorial seas and contiguous zones (12 miles) of both parties. No exclusive economic zone provisions are contained in any of the four 1958 Conventions, as the exclusive economic zone doctrine developed after the Conventions' conclusion. Thus, were the parties limited to the 1958 Conventions, the regime governing the waters of the Alma Shoals would be the 1958 Law of the Sea Convention on the High Seas; as regards the petroleum reserves, presumably the parties would refer to the 1958 Convention on the Continental Shelf which defines the "continental shelf" as the "seabed and subsoil of the submarine areas

adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." Because freedom of fishing is a high seas right under the 1958 Convention on the high seas, neither State would have any right to exclude the other and establish exclusive fishing rights under the 1958 regime. In the *Fisheries Jurisdiction Case (U.K. v. Iceland)*, decided by the Court under the 1958 Convention regime, the ICJ recognized that coastal states dependent on fishing may have preferential fishing rights outside their territorial waters, but that the coastal state may not categorically exclude other states from fishing in non-territorial waters by declaring exclusive fishing zones (50 miles in that case) not recognized by international law. The case actually did not settle the dispute between the U.K. and Iceland, and naval confrontations continued to occur until the situation was ultimately resolved by agreement of the parties.

Both Merapi and Erebus claim an exclusive economic zone, however, implicitly asserting that the 1958 Convention regime does not apply and that they have sovereign rights over the natural resources of the Shoals, as well as jurisdiction over activities affecting those resources. Presumably they both rely on the 1982 Convention for that proposition, or on customary international law. Although one commentator has suggested that the 1982 Convention's creation of 200 nautical mile EEZs "sanctioned the largest territorial grab in history," David J. Bederman, INTERNATIONAL LAW FRAMEWORKS 125 (2000), others have suggested that the extensive state practice of declaring 200 mile EEZs, as well as its acceptance in the 1982 Law of the Sea Convention, make it beyond doubt that "the exclusive economic zone has become a part of general international law." OPPENHEIM, *supra* at 789. The International Court of Justice took this position in the *Tunisia v. Libya* case, in 1982, and in the *Libya v. Malta* case in 1985. Indeed, as we shall see below, Erebus itself will probably need to assert this in order to justify its attempt to exclude the Merapin fishing vessels from the area. The question for both sides will be whether only the principle of 200 mile EEZs has become customary international law, or whether the specific regulatory regime of the 1982 Convention is also part of customary international law.

Under the 1982 Convention, Merapi will argue that, as the coastal state, it may regulate all fishing in the Shoals, including categorically excluding vessels from fishing in its territory, pursuant to articles 56, 61, and 62 of the Convention. In addition, it may point to article 73 of the Convention which permits the coastal state, pursuant to subparagraph 1, to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

Merapi will argue that these provisions permitted its seizure of the six Erebian vessels, and do not require their return as Erebus never posted a bond. Erebus may respond, first, that even assuming the Shoals lie within Merapi's EEZ, Merapi did not adopt any regulations governing fishing stocks, but simply arbitrarily

categorically excluded Erebian fishermen from the Shoals, in violation of the Convention; second, even if Merapi had the right to exclude Erebian vessels from the Shoals, and the seizure was proper, subparagraph (2) of article 73 provides "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security." Thus, Merapi should have released the vessels, rather than bring forfeiture proceedings. Merapi may counter by arguing that although the concept of the 200 mile exclusive economic zone is now accepted as general international law, the specific rules of Part V of the 1982 Convention bind only the parties to the Convention itself. Thus, Erebus, which is not a party to the 1982 Convention, may not avail itself of procedural rules that benefit parties to the Convention without also accepting the obligations imposed by the text. Finally, Merapi may argue that Erebus' claim should fail as it has not exhausted local remedies that may be available in Merapi for the ultimate release of the vessel.

Both Erebus and Merapi may cite to several recent decisions from the Law of the Sea Tribunal. Although those decisions would not be binding on the ICJ, and several relate to article 292 of the 1982 Convention, which requires prompt release of vessels and crews upon posting a bond or other financial security, they may be instructive. These cases include *M/V Saiga* (ITLOS, Dec. 4, 1997) and *The Camouco Case* (Panama v. France) (ITLOS, Feb. 7, 2000).

III. THE LEGALITY OF EREBUS'S MILITARY OCCUPATION OF THE ALMA SHOALS

Although Erebus may attempt to cast its actions as necessary to protect its ships from unlawful seizure, both parties to the dispute seem to have asserted exclusivity over the Shoals, and have resorted to force in order to enforce their claims. In this manner, both States have arguably misunderstood that an exclusive economic zone is not equivalent to state territory, and is not an area from which States and their nationals may categorically be excluded for all purposes. Instead, the exclusive economic zone permits coastal states to regulate certain economic activities in the zone. Thus, pursuant to article 56(2) of the 1982 Convention, the rights of other states are safeguarded in the zone, and the coastal state must respect those rights in asserting its own rights under the Convention, including the right of navigation. Thus, neither Erebus nor Merapi would appear to have acted completely in accordance with the Convention regime in attempting to categorically exclude nationals from the other state wishing to fish in the EEZ, unless, of course, each state had determined the allowable catch and determined it had the capacity to harvest all of it.

Erebus will argue here that it is permitted to assert an EEZ because the EEZ is part of customary international law, and that it may therefore exclude non-Erebian fishing vessels from its EEZ. It should be noted that this will put Erebus in a difficult position, as it is rejecting application of the provisions of the 1982 Convention relating to the deep seabed mining regime, and many have argued that it is not permissible for states to "pick and choose" what they like in the Convention

and ignore the portions they dislike. See, e.g., Bernard H. Oxman, *Current Developments: United States Interests in the Law of the Sea Convention*, 88 Am. J. Int'l. L. 167, 171 (1994). The question in this case is whether that assertion entitles Erebus to have military vessels accompany its fishing vessels, particularly to the extent that the military presence appears to be more than casual, and may be an attempt to assert sovereignty over the area by force. (Compromis, para. 7)

Article 59 of the 1982 Convention provides that in cases not specifically covered by the convention, where "a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole." This standard, combined with the general thrust of the 1982 Convention, which exhorts states to cooperate in their relations with each other, suggests that the use of force is not sanctioned by the Convention. For example, article 88 states that "the high seas shall be reserved for peaceful purposes"; article 63(2) requires states to cooperate with regard to the management of straddling stocks, such as halibut, which are present in this case (Clarification, para. 3); and, finally article 279 requires States Parties to the Convention to settle their disputes "by peaceful means," recalling them of their duty to do so pursuant to article 2, paragraph 3 of the United Nations Charter, to which both Merapi and Erebus are parties.

IV. THE LEGALITY OF THE EREBUS SEABED MINING OPERATION

A. Can Erebus lawfully conduct seabed mining outside the Regime of the 1982 Law of the Sea Convention?

According to the Compromis (para. 8), Erebus is not a party to the 1982 Law of the Sea Convention, nor the Agreement in Implementation of Part XI of the Convention, which establish a regime for states to mine the deep ocean floor consistent with the "Common Heritage of Mankind Doctrine." After the Law of the Sea Convention was signed in 1982, the United States, Japan, Germany, and a handful of other states who opposed the treaty announced their intention to enter into mini-treaties between themselves outside of the 1982 Law of the Sea Convention regime to govern their seabed mining activities. Merapi may point out, however, that most of the other states of the world, which had signed the 1982 Law of the Sea Convention, took the position that seabed mining outside of the Convention regime was unlawful. This is a case of first impression. Had its operation not been disabled, Erebus would have been the first country in the world to actually undertake commercial seabed mining operations outside of the 1982 Law of the Sea Convention regime.

Erebus may argue that since it is not a party to the 1982 Law of the Sea Convention, it cannot be held bound to the terms of the Convention. This

argument is supported by articles 34 and 51 of the Vienna Convention on the Law of Treaties (to which both Erebus and Merapi are party) which provide that a treaty cannot bind a non-party without its written consent. Erebus may further argue that the provisions of the 1982 Law of the Sea Convention governing seabed mining do not constitute customary international law binding on Erebus. In the absence of binding treaty or customary international law, under the principle of the freedom of the high seas, Erebus has a right to exploit the mineral resources of the deep seabed located outside the jurisdiction of other states. This will put Erebus in the delicate position of attempting to choose between provisions of the 1982 Law of the Sea Convention it wants to accept (the EEZ) and provisions that it rejects (the seabed mining regime).

B. Did the proposed Erebus sea bed mining operation violate customary international law governing protection of the marine environment?

Merapi may argue that the "common heritage of mankind" principle and the "equitable utilization" principle codified in the 1970 U.N. General Assembly "Declaration of Principles Governing the Seabed" have ripened into customary international law binding on Erebus. Under these principles, a state may exploit the waters of the high seas and the minerals on the deep ocean floor only to the extent that such exploitation does not damage the environment or interfere with the use by other sovereign states. There are numerous widely ratified treaties concerning marine pollution that reflect this principle, including the 1960 International Convention for the Safety of Life at Sea (117 parties); the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (70 parties); the 1973 Convention for the Prevention of Pollution from Ships (51 parties); and the 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships (71 parties).

Merapi may argue that the "novel hybrid process" to be employed by the Erebus seabed mining operation would violate this customary international law rule since many prominent scientists around the world had determined that the Erebus process would cause underwater pollution that would severely endanger the marine life in a 300 nautical mile radius of the mining site. This radius would include virtually all of resource-rich waters of the Grand Basin on which Merapi relies for forty percent of its gross domestic product. (Compromis, para. 10; Clarification #4).

Erebus may argue that the 1970 "Declaration of Principles Governing the Seabed" was not meant to codify, and has not ripened into, customary international law. In the alternative, Erebus may argue that its operation does not contravene the "common heritage of mankind" nor the "equitable utilization" principles since Erebus has not attempted to exclude other states from mining the seabed in the area of Erebus's operation, and since the Chair of the Department of Environmental Science of the University of Erebus had determined, using

computer simulations and comparative data from other seabed mining sites, that the Erebus operations were "entirely safe." (Compromis at para. 10; Clarification #4).

C. Was the Erebus sea bed mining operation in violation of a binding decision of the U.N. Security Council?

According to paragraph 12 of the Compromis, on August 15, 2000, the U.N. Security Council issued a "Presidential Statement" demanding that Erebus not commence operation of its seabed mining facility until satisfying the Council that the process would not threaten the marine life of the Grand Basin. The issue is whether this Presidential Statement created a binding obligation on Erebus. The question of whether Security Council Presidential Statements have equivalent force to formal resolutions is one of first impression. Scholars are divided on the issue. The U.N. Charter speaks in terms of "decisions" of the Security Council, without distinction between "Presidential Statements" issued with the consensus approval of the members of the Council and "Resolutions" issued after a formal vote.

Erebus may argue that since Presidential Statements are the product of informal consultations as opposed to formal meetings (at which affected States have a right to participate), they should not be treated as formal decisions of the Council.

Merapi may point out that in contrast to previous Presidential Statements that were not considered binding, the August 15, 2000 Presidential Statement expressly invoked the Security Council's powers under Chapter VII of the U.N. Charter. Further, it used the term "demands," rather than "encourages" or "invites, which had been used in previous Presidential Statements that were not considered to be binding.

This issue also raises the question of the authority of the ICJ to rule on the validity of Security Council action. In several past cases, the ICJ has taken the position that it could not do so, but several judges in the *Lockerbie Case* signaled a possible change of position on this question. The teams should be able to distinguish between the ICJ's authority to interpret Security Council actions and its questionable authority to exercise the power of judicial review.

V. THE LEGALITY OF THE AQUA PROTECTORS' ATTACK ON THE SEABED MINING FACILITY

A. Is Merapi responsible for the Actions of the Aqua Protectors?

The ICJ's opinion in the 1986 *Military and Paramilitary Activities Case (Nicaragua v. the United States)* establishes the standard for when state responsibility may be imputed for the acts of non-state actors. To impute the acts of a private group to the state, there must be evidence of sufficient control by, and dependency on the state. In *Nicaragua*, the ICJ held that the mere provision of funds to the Contras did not impute state responsibility for their acts to the United States since it was not proven that the acts would not have occurred but for the U.S. provision of funds.

Drawing on the *Nicaragua Case*, Merapi may argue that it cannot be held responsible for the acts of the Aqua Protectors since they are not an agency or instrumentality of Merapi, Merapi did not organize the group or participate in the planning of their attack on the Erebus facility, and there is no proof that the Aqua Protectors would not have conducted the attack without the relatively small amount of money (U.S. $100,000) provided by Merapi.

Erebus may point out that this aspect of the Nicaragua opinion has been subject to criticism by scholars as inconsistent with a series of U.N. General Assembly resolutions and a recent U.N. Convention prohibiting the provision of financial assistance to support acts of terrorism or incursion of armed bands into the territory of another state.

Drawing upon the ICJ's opinion in the 1949 *Corfu Channel Case (U.K. v. Albania)*, Erebus may in the alternative argue that international law requires states to prevent their territory from being used for the purpose of attacks on other states. In the *Corfu Channel Case*, the Court held Albania responsible for mines that damaged a U.K. ship in Albanian territorial waters despite the fact that the U.K. had no proof that Albania placed the mines there. Relying on circumstantial evidence and inference, the ICJ found that Albania knew of the danger and breached international law by failing to warn the U.K. of it. In the instant case, Merapi similarly had knowledge of the Aqua Protectors's planned attack against the Erebus facility, but took no action to warn Erebus or prevent the attack.

Merapi may try to distinguish the *Corfu Channel Case* by pointing out that the acts of the Aqua Protectors occurred on the high seas rather than on Merapi territory, there was no evidence that the attack was launched from Merapi as opposed to the State located to Merapi's south whose citizens took part in the attack (Clarification # 5), and Merapi did not know the timing or specific modalities of the attack.

Finally, both parties are likely to draw upon the International Law Commission Draft Articles on State Responsibility. Judges may wish to inquire of the teams about the legally binding status of the Draft Articles, which purport to be a codification of existing international law.

B. Did Merapi/the Aqua Protectors have implied authority to act under the Security Council's Presidential Statement?

The August 15, 2000, Presidential Statement is worded almost identically to Security Council Resolution 1199 (1999) involving Kosovo. Both cite Chapter VII of the U.N. Charter, both express the Council's determination that the situation constitutes a threat to international peace and security, and both demand a halt to the threatening actions. Although Resolution 1199 did not expressly authorize the use of force, France, the United Kingdom and the United States have cited the wording of the Resolution as providing implied authorization for the NATO bombing campaign in Serbia. Russia and China and several other states have taken the position that the NATO intervention was in violation of the U.N. Charter. This Jessup Problem was designed to elicit a debate on the question of implied Security Council authorization to use force.

Merapi may argue that since there was no widespread condemnation of the 1999 NATO intervention into Serbia, and the Security Council ultimately ratified the results of the intervention when it adopted Resolution 1244 (1999), Resolution 1199 therefore sets a precedent for implied Security Council authorization to use force that is applicable to this case. In addition to the similar wording of Resolution 1199 and the August 15, 2000, Presidential Statement, both situations involved the potential for widespread harm if no action were taken, and in both situations the Security Council was unable to muster the votes to take other action.

Erebus may argue that since the August 15, 2000, Presidential Statement does not use the words "all necessary means," which the Council has used in every past case in which it authorized the use of force, the Presidential Statement should not be read as an implied authorization for Merapi to use force to prevent the commencement of the Erebus Seabed Mining operation. From a policy perspective, Erebus may point out that acceptance of the concept of implied authorization would erode the authority of the Security Council and undermine the importance of negotiations among the members of the Council over the precise language employed in Council Resolutions. Finally, Erebus may seek to distinguish the Kosovo situation from the situation in the instant case.

C. Was Merapi's support for the Aqua Protectors a legitimate act of self-defense?

As an exception to the non-use of force principle codified in Article 2(4) of the U.N. Charter, Article 51 of the U.N. Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Scholars are divided on the issue of whether Article 51

includes the right to anticipatory self-defense to head off a threat before an armed attack is actually launched. The ICJ in the *Nicaragua case* expressly declined to rule on the legitimacy of anticipatory self-defense. This Jessup Problem was designed to elicit a debate on this controversial issue.

Erebus may argue that the plain meaning of Article 51 prohibits resort to force before an armed attack has occurred. Further, Erebus may point to several incidents (e.g., the Israeli bombing of the Iraqi nuclear reactor in 1981, the United States bombing of Tripoli in 1986, and the United States bombing of the Sudan chemical weapons plant in 1998) where large numbers of states have condemned uses of force that were justified on the basis of anticipatory self-defense.

Merapi may point out that some commentators argue that the equally authentic French version of Article 51 of the U.N. Charter uses the phrase "*agression armee*" -- meaning armed aggression -- instead of the more restrictive term "armed attack" contained in the English version. The right to respond to armed aggression would include the right to respond to threats, since aggression can exist separate from and prior to an actual attack. Further Merapi may point out that the United Nations recognize the legitimacy of anticipatory self-defense when Israel launched a preemptory airstrike against Egypt, precipitating the 1967 Six Day War. Many countries supported Israel's right to conduct defensive strikes prior to armed attack and draft resolutions condemning the Israeli action were soundly defeated in the Security Council and the General Assembly. Further, Merapi may argue that in the cases in which anticipatory self-defense justifications were rejected, the condemnation focussed on the lack of evidence of necessity rather than rejection of the principle of anticipatory self-defense itself.

Even if anticipatory self-defense is permissible, it must be in anticipation of an armed attack. The problem here is that the Erebus facility may pose an environmental threat to Merapi's high seas fishing grounds, and consequently to Merapi's economy, but it is not an armed attack on Merapi's territory. Erebus may argue that state practice has not recognized economic harm as justifying the use of force in self-defense. For example, the General Assembly voted overwhelmingly to reject the French, British, and Israeli argument that their use of force during the 1965 Suez Canal crisis was justified because of the economic necessity of maintaining the uninterrupted flow of shipping through the Suez Canal. Merapi may counter that this case is not simply about maintaining Merapi's economic interests, but involves a threat of massive environmental harm (similar in scale to the use of a weapon of mass destruction) which could lead to widespread death and starvation in Merapi.

Finally, to be legitimate, self-defense must meet the requirements of necessity and proportionality, as first set forth in the diplomatic correspondence between the United States and the United Kingdom in the aftermath of the *Caroline*

incident. As to necessity, Erebus may argue that use of force in self-defense under Article 51 is not permissible after the Security Council has become involved in a situation, as it has in this case by issuing the August 15, 2000 Presidential Statement, and subsequently deciding to "remain seized of the matter." (Compromis at paras 12 and 15). Merapi may counter that the phrase "until the Security Council has taken the measures necessary to maintain international peace and security" means that use of force in self-defense continues to be permissible until the Security Council has taken effective measures to avert the threat. Where, as here, the Council is unable to take effective measures because of the threat of a veto or failure to muster the required votes, self-defense remains an available course of action.

Proportionality requires that the force used not be excessive. In this case, the force used (the detonation of explosive charges) resulted in the deaths of six Erebus scientists and engineers who were working on board a temporary platform at the facility when the bomb went off. (Compromis at para. 16). There is disagreement among scholars as to whether proportionality is to be measured (1) against the magnitude of the initial threat, or (2) against the reasonable force necessary to avert the threat. Merapi may argue that the deaths of the six Erebus scientists was minor compared to the magnitude of the starvation and death that would have resulted from the Erebus seabed mining facility's hazardous pollution. Erebus, on the other hand, may argue that the manner the Aqua Protectors carried out their attack was in excess of that necessary to disable the seabed mining facility because they failed to take reasonable steps (such as issuing a bomb threat) to ensure that the innocent civilian scientists would not be not killed in the bombing.

VI. THE QUESTION OF EXTRADITION OF THE AQUA PROTECTORS

A. Does Merapi have a duty to extradite in the absence of a treaty?

Clarification #6 provides that Merapi and Erebus do not have a bilateral extradition treaty, but that Merapi has on occasion surrendered wanted fugitives to Erebus on the basis of comity. Generally, customary international law does not require extradition in the absence of a controlling extradition treaty. Erebus may argue, however, that in light of Merapi's past practice of extraditing to Erebus, Merapi is required to surrender the Aqua Protectors who attacked the seabed mining facility as a matter of regional custom or the equitable principle of estoppel.

In the alternative, Erebus may argue that customary international law recognizes a duty to extradite or prosecute (*aut dedere aut judicare*) with respect to persons responsible for terrorist crimes. Scholars claiming the existence of such a duty as an outgrowth of principles of state responsibility include Grotius, Vattell, and

more recently Bassiouni. Other scholars believe that this duty exists only where there is an applicable treaty with an extradite or prosecute provision.

In any event, the extradite or prosecute principle would permit Merapi to subject the case to its authorities to consider prosecution in lieu of extradition. Erebus may argue that Merapi has forfeited this option because it has not taken any steps to prosecute the responsible Aqua Protectors and because it cannot be expected to reliably prosecute the case in light of its financial support for the attack. This is similar to the argument the United States and United Kingdom have made in the *Aerial Incident at Lockerbie Case (Libya v. U.S./U.K.),* which is currently pending before the ICJ.

B. Is Merapi entitled to rely on the political offense exception to extradition to justify its refusal to surrender the Aqua Protectors?

Merapi has based its refusal to extradite in part on the political offense exception. (Compromis at para.19). International law permits a state to refuse to extradite when it has determined that the crime constitutes a "political offense." The political offense exception is premised on three justifications: (1) it is grounded in a belief that individuals have a right to resort to political activism to foster political change; (2) it reflects a concern that individuals -- particularly unsuccessful rebels -- should not be returned to countries where they may be subjected to unfair trials; and (3) it comports with the notion that governments should not intervene in the internal political struggles of other nations. There are two types of political offenses: pure political offenses such as treason, sedition, and espionage aimed directly at the government; and relative political offenses, which are otherwise common crimes such as homicide committed for political motives or in a political context.

There exist three tests used in the international community to determine what constitutes a non-extraditable relative political offense. Erebus may argue Merapi has violated the international law obligation to exercise "good faith" in asserting the political offense exception in a case that does not meet any of these three tests.

The first test is the French test, which protects only offenses directly against the government. In this case, destruction of the government-owned seabed mining facility might qualify, but the killing of the six scientists would be a stretch since they are not members of the military, though they are government employees.

The second test is the incidence test used by the United States, United Kingdom, and several other common law countries. Under this test, a crime is considered a political offense only where it is in incidental to and in furtherance of an ongoing uprising or major disturbance. In this case, there is nothing in the compromis to suggest that Erebus has been the subject of an uprising or civil war.

The third test is the proportionality test developed by Switzerland and used by many civil law countries. Under this test, a crime is considered a political offense if there is either a proportionality between the means and the political ends, or a predominance of the political elements over the common crime elements. In light of Merapi's possible self-defense argument discussed above, this would seem to be the test most favorable to Merapi's position.