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STATEMENT OF JURISDICTION

The Governments of Erebus and Merapi have agreed to submit the present controversy for final resolution by the International Court of Justice by Special Agreement pursuant to Article 36, paragraph 1, in relation to Article 40, paragraph 1, of the Statute of this Court. In accordance with Article 36, the jurisdiction of the Court comprises all cases that the parties refer to it.

STATEMENT OF THE FACTS

The Treaty of Amity and Peace between Merapi and Erebus, concluded in 1947, represents the will of the parties as to the location of the maritime boundary between the two states. After months of difficult negotiations, both States were finally able to agree on an objectively identifiable boundary that would satisfy the claims of both parties. Erebus first maintained that the maritime border should extend straight outward from Pigeon Rock because this territory had always been Erebian. However, in the spirit of compromise, Erebus eventually agreed on the border established in the treaty, and did so in good faith reliance that the border would be respected in the future. The treaty establishes that the maritime boundary is the mouth of the Krakotoa River, formed by the natural extension of the principal arm of the river, which, at the time of the Treaty's conclusion, lay between Pigeon Rock to the South and the Cape of Realto to the North. The *travaux préparatoires* to the Treaty indicates that this maritime delimitation was established in order to have a border that could be objectively identified by reference to the River.

Following a series of hurricanes, which resulted in erosion of the wetlands area, the principal arm of the Krakotoa River has naturally shifted southward. The Erebian Ministry of Foreign Affairs therefore determined in August of 1999 that, based on this shift, the Alma Shoals were now part of the territory of Erebus. The Merapin Prime Minister refused to recognize Erebus' claim and threatened to use force against any Erebian fishing vessel found in the Alma Shoals. Erebian vessels continued to fish the waters of the Alma Shoals. In March of 2000, the Merapin Navy forcibly seized six Erebian fishing vessels peacefully fishing in the Shoals. Although the crews have been allowed to return to Erebus, Merapi continues to hold the vessels for trespass pending forfeiture proceedings. In response to this seizure, Erebus has taken

measures to protect its remaining fishing vessels by escorting them into the Shoals and maintaining a protective watch over them while they fish these waters.

As a result of defense concerns arising from the aggression of its northern neighbor, Fogo, Erebus initiated a program of seabed mining at a depth of 5,000 meters, 500 nautical miles off the coast of the southernmost portion of Merapi. The vast amounts of manganese, cobalt, nickel, and copper that could be obtained by this facility are essential to Erebus' efforts to build fighter aircraft and short-range missiles to defend itself against Fogoian aggression. According to a detailed report of the Chair of the Department of Environmental Science of the University of Erebus, based on computer simulations and comparative data from other seabed mining facilities, the innovative hybrid mining process used by the seabed mining facility is entirely safe.

At the behest of some States, the Security Council considered the issue of whether or not the proposed seabed mining facility was in violation of international law. The Council also addressed the issue of the maritime border dispute between Erebus and Merapi. On August 15, 2000, the President of the Security Council issued a statement expressing the Council's grave concern over the seabed mining facility and the border dispute. The Erebian Foreign Ministry acknowledged this Statement as a recommendation in its diplomatic note of August 20, 2000, explaining the necessity of the mining operation and stating that Merapi had known of the proposal and had not itself complained to the Security Council. Furthermore, Erebus noted that its maritime border with Merapi had been established by the Treaty of Amity and Peace, and that the Security Council had no authority to alter its terms.

On the morning of September 1, 2000, a team of divers belonging to a non-governmental organization called the "Aqua Protectors," which is headquartered in Merapi, violently attacked and badly damaged the Erebian seabed mining facility. Six scientists were killed in this attack,

and around \$1 billion damage was inflicted on the facility. Furthermore, this attack has seriously hindered the ability of Erebus to defend itself against the military aggression of Fogo for at least a year. In its note to the Security Council on September 1, 2000, Merapi denied its participation in the actions of the Aqua Protectors, but it did, in fact, give the action an *ex post facto* seal of approval. It was later revealed, however, that Merapi had given the Aqua Protectors \$100,000 in financial support for the Operation, and this report was eventually confirmed by its own legislative body.

In the aftermath of the bombing, Merapi has refused to either prosecute or extradite the individuals who have acknowledged their responsibility for the attack on the Erebian facility. It has stated that its policy is not to extradite in the absence of an extradition treaty, despite the fact that it has extradited individuals to Erebus in the absence of such a treaty in the past.

In light of this dispute, on October 1, 2000 Erebus and Merapi chose to bring this dispute to the International Court of Justice for resolution through a Special Agreement under Article 40(1) of the Statute of the Court. The International Seabed Authority has ceded jurisdiction to the International Court of Justice regarding this matter. The Security Council, while remaining seized of the matter, has also declined to take further action and has decided to refrain from acting until the settlement of the pending case.

QUESTIONS PRESENTED

1. Does the change in course of the principal arm of the Krakatoa River place the Alma Shoals in waters belonging to Erebus?
2. Did Merapi's seizure and detention of the Erebian fishing vessels found in the Alma Shoals violate international law?
3. If so, is Merapi obligated to release those vessels?
4. Is the proposed deep seabed mining operation in the Grand Basin consistent with international law?
5. Has Merapi violated international law through its involvement in the attack against the Erebian seabed mining facility?
6. What compensation is owed Erebus for the damage to the seabed mining facility and loss of life caused as a result of the attack?
7. Is Merapi obligated to surrender to Erebus for prosecution those members of The Aqua Protectors responsible for the attack on the mining facility?

SUMMARY OF PLEADINGS

Under both the language of the Treaty of Amity and Peace and customary international law, the maritime boundary between Erebus and Merapi has shifted with the Krakatoa River, and now lies to the south of the Alma Shoals. Therefore, only Erebus has the right to regulate fishing in the Shoals. Merapi's attempted exclusion of Erebian fishing vessels and nationals from the Shoals violates international law. Additionally, Merapi's forcible seizure of the six Erebian-flagged vessels is an illegal use of force against the territory of Erebus, and therefore Erebus' accompaniment of its fishing vessels into the Alma Shoals is a legitimate act of self-defense. Merapi's use of force was neither a legitimate exercise of the right of self-defense nor authorized by the Security Council. Thus, Merapi may not claim an exception to the general prohibition on the use of force.

Assuming *arguendo* that this Court finds that the Alma Shoals lie within the Exclusive Economic Zone of Merapi, the arbitrary arrest of the Erebian vessels is still in violation of international law. Merapi has violated its international obligations under the UN Convention on the Law of the Sea by arresting the Erebian vessels in the absence of a regulation permitting it to do so and by continuing to detain the vessels without the possibility of release upon the posting of a bond.

Merapi lacks standing to bring a claim before this Court challenging the legality of the proposed Erebian seabed mining facility. Assuming *arguendo*, that Merapi has standing, there is no customary international law which prohibits Erebus from mining the seabed, and Erebus is not a party to any agreement that would curtail its ability to do so. Further, the Presidential Statement of the Security Council, requesting that Erebus delay the commencement of the operation of the facility, is only a recommendation. Therefore, Erebus has no international

obligation to accede to this request. Further, no environmental limitations on seabed mining exist in international law. The precautionary principle is not customary international law, and even assuming *arguendo* that it is, the seabed mining facility meets the test laid out in this principle as it has been proven environmentally safe.

The attack by Merapi on the seabed mining facility is in violation of international law. The acts of the Aqua Protectors are imputable to Merapi. Since Merapi knew of the impending illegal act of international terrorism and did nothing to prevent it or warn Erebus, it bears responsibility for the act under customary international law. This act cannot be justified as a legitimate use of force because it was not authorized by the Security Council and it was not undertaken in response to an armed attack by Erebus. Should this Court find that Merapi is not responsible for the attack on the Erebian seabed mining facility, however, Merapi's provision of financial support for the attack still constitutes an unlawful intervention into the internal affairs of Erebus. Further, this financing violates international law prohibiting State assistance of terrorist activities.

Under customary international law, expressed in the principle of *aut dedere aut judicare*, Merapi must either extradite or prosecute those individuals responsible for the attack on the Erebian seabed mining facility. Merapi has failed to prosecute these individuals domestically, and must, therefore, extradite.

International law makes clear that Merapi is obligated to pay damages to Erebus in order to compensate it for the losses it has sustained as a result of the attack on the seabed mining facility. Additionally, Merapi must release the six Erebian fishing vessels seized from the Alma Shoals.

PLEADINGS

I. MERAPI'S ARREST OF THE SIX EREBIAN-FLAGGED FISHING VESSELS IN THE ALMA SHOALS IS IN VIOLATION OF INTERNATIONAL LAW.

A. EREBUS HAS EXCLUSIVE JURISDICTION OVER THE RESOURCES OF THE ALMA SHOALS.

1. The Treaty of Amity and Peace specifies the maritime boundary between Erebus and Merapi.

The delimitation of the maritime border between Erebus and Merapi is governed by the terms of the Treaty of Amity and Peace.¹ The treaty specifies that the maritime boundary extends outward from the mouth of the principal arm of the Krakatoa River, and has been implicitly recognized by both Erebus and Merapi to delimit not only their respective territorial seas, but also their Exclusive Economic Zones.² Following such a line of delimitation places the Alma Shoals in waters explicitly delimited to Erebus.³

Under international law, the principal method of treaty interpretation, especially in cases where there are doubts as to the construction to be given to the provisions of a treaty, is strict grammatical and logical interpretation.⁴ According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of that treaty.⁵ The Treaty of Amity and Peace provides that the maritime boundary between Erebus and Merapi “follow[s] the mouth of the Krakatoa River,

¹ *Compromis*, para. 4.

² *Compromis*, para. 4; Clarifications, para. 1.

³ *Compromis*, Annex A.

⁴ Jankovic, B., PUBLIC INTERNATIONAL LAW 302 (1984); Haraszti, G., *Extensive and Restrictive Treaty Interpretation*, in QUESTIONS OF INTERNATIONAL LAW 37 (1971).

⁵ Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, 8 I.L.M. 679, 115 U.N.T.S. 331 at Art. 31 (entered into force Jan. 27, 1980).

taking as the mouth of the river its principal arm, said arm lying between Pigeon Rock to the South, and the Cape of Realto to the North.”⁶ A strict grammatical and logical interpretation, based on the ordinary meaning of the terms of the Treaty of Amity and Peace, requires that the maritime boundary “follow” the mouth of the Krakatoa River, defined by its principal arm, wherever that arm may shift. The clause of the Treaty stating that, “... said arm lying between Pigeon Rock to the South, and the Cape of Realto to the North,” is merely a subordinate clause intended to identify the location of the principle arm of the River in 1947, and therefore does not require that the maritime delimitation always lie between these two geographic points. The southward shift of the principal arm of the Krakatoa River has now placed the Alma Shoals in waters delimited to Erebus.

Assuming *arguendo* that this Court finds the express language of the Treaty to be unclear, it is authorized under Article 32 of the Vienna Convention to look to the preparatory work of the Treaty and the circumstances of its conclusion to determine the intent of the parties and confirm the meaning of the treaty.⁷ The travaux préparatoires of the Treaty indicates that the maritime delimitation was set to follow the principal arm of the Krakatoa River so as to provide an objectively identifiable boundary that would satisfy both parties.⁸ Since the river shifted course in 1901, both parties were aware in fixing this boundary of the possibility that the river could change its course. The supplementary materials to the Treaty therefore confirm the interpretation of the Treaty based on its expressed terms.

2. *Assuming arguendo that the language of the Treaty of Amity and Peace establishes a*

⁶ *Compromis*, para. 4.

⁷ Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, 8 I.L.M. 679, 115 U.N.T.S. 331 at Art. 31 (entered into force Jan. 27, 1980).

⁸ *Compromis*, para. 4.

fixed maritime boundary between Erebus and Merapi, international law affirms Erebus' border claim.

It is a universally recognized principle of international law that when a border between two nations is set by a river, and the course of that river shifts by the dual processes of erosion and accretion, the border will follow the river.⁹ Erosion is the process by which land is lost owing to the encroachment of waters.¹⁰ Accretion, alternatively, is the process by which land is gradually added to pre-existing territory by a movement of a river, lake or sea.¹¹ These principles of international law arose from the laws of Rome,¹² were then incorporated into the common law¹³ as well as the law of Spain and its colonies,¹⁴ and have since been accepted in judicial decisions throughout the world.¹⁵

⁹ Nebraska v. Iowa, 143 U.S. 359, 360-64 (1892); *See generally*, 1 Hackworth, G., DIGEST OF INTERNATIONAL LAW §§ 58-66 (1940).

¹⁰ BLACK'S LAW DICTIONARY, def. "accretion", 20 (6th ed., 1990)

¹¹ BLACK'S LAW DICTIONARY, def. "erosion", 542 (6th ed., 1990)

¹² Justinus, THE INSTITUTE OF JUSTINIUS 2.1.20; Gaius, THE INSTITUTES OF GAIUS 2.70; *See also* Voet, J., COMMENTARIUS AD PANDECTAS, TOM I, p. 606, 607.

¹³ Blackstone, W., 2 COMMENTARIES ON THE LAWS AND CONSTITUTION OF ENGLAND 261-62 (1823). *See also* Bracton, H., 1 DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE 69-70 (1878); Woolrych, H., A TREATISE OF THE LAW OF WATERS 34 (1853); Angell, J., A TREATISE ON THE LAW OF WATERCOURSES, ch. 2 (1850); Lynch v. Allen, 4 De. & Bat. N.C.R. 62; Murry v. Sermon, 1 Hawks, N.C.R. 56; The King v. Lord Scarborough, 3 B.&C. 91.

¹⁴ Alvarez, J., INSTITUCIONES DE DERECHO REAL DE CASTILLA Y DE INDIAS, lib. II, tit. I, s. 6 (1854); Asso, I., INSTITUCIONES DEL DERECHO CIVIL DE CASTILLO 101 (1771); Gomez de la Serna, P., ELEMENTOS DEL DERECHO CIVIL Y PENAL DE ESPAÑA, lib. II, tit. 4, sec 3, no.2 (1886); ESCRICHE MEXICANO: DICCIONARIO RAZONADO DE LEGISLACION Y JURISPRUDENCIA MEXICANAS (1905); Sala, J., SALA MEXICANO, O SEA: LA ILUSTRACION AL DERECHO REAL DE ESPAÑA 62 (1845).

¹⁵ *See e.g.*, Southern Centre of Theosophy Inc. v. South Australia, 1982 A.C. 706, 715 (P.C. Australia); Eliason v. Registrar, 115 D.L.R.3d 360, 362 (Alta.Q.B. 1980 Canada); Penang v.

It is clear from the explicit wording of the *Compromis*, which was drafted and agreed to by both parties, that the movement of the Krakatoa River came about through the process of erosion.¹⁶ Although the processes of erosion and accretion in the Krakatoa River may have been accelerated in the aftermath of several major hurricanes, there is no indication in the *Compromis* that the river ever avulsed, that is, jumped its bank to form a new channel. International law therefore demands recognition that the maritime boundary between Erebus and Merapi has shifted to its present position, south of the Alma Shoals. As such, these Shoals lie within the EEZ of Erebus.

3. *Merapi's use of force within the EEZ of Erebus is in violation of international law.*

Customary international law recognizes the sovereign right of coastal states to extend jurisdiction over fisheries in a 200-mile zone beyond its coastline, known as the Exclusive Economic Zone (EEZ).¹⁷ Indeed, the customary nature of the principle of the EEZ has been repeatedly reaffirmed in the decisions of this Court.¹⁸ Within its EEZ, a State is guaranteed the

Beng Hong Oon, 1972 A.C. 425 (P.C. Malaysia); Attorney General of S. Nigeria v. John Holt & Co., 1915 A.C. 599, 611-12 (P.C. Southern Nigeria).

¹⁶ *Compromis*, para. 5.

¹⁷ Burke, W., THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 40 (1994); Caminos, H. & Molitor, M., *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 A.J.I.L. 871, 876, 888 (1985); Macrae, *Customary International Law and the United Nations Law of the Sea Treaty*, 13 CAL. W. INT'L L.J. 181, 221-22 (1983); Gamble & Frankowska, *The 1982 Convention and the Customary Law of the Sea: Observations: a Framework and a Warning*, 21 SAN DIEGO L.R. 491 (1984).

¹⁸ Continental Shelf, (Libya v. Malta) 1985 I.C.J. 13 at para. 34 (1985); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the Continental Shelf, (Tunisia v. Libyan Arab Jamahiriya) 1982 I.C.J. 18, 74 (1982); Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.A.) 1984 I.C.J. 246, 294 (1984).

sovereign and exclusive right to exploit, conserve and manage all natural resources.¹⁹ In March of 2000, Merapi unlawfully attempted to exercise control over the Shoals by arresting and detaining six fishing vessels flying the Erebian flag.²⁰ These vessels were fishing legally in Erebian waters, and as Merapi has no jurisdiction over this area, its use of force cannot be seen as a legitimate exercise of its police powers.

The legality of Merapi's arrest of the six Erebian-flagged fishing vessels must, therefore, be judged on the basis of the general principles of international law governing the use of force in international relations. Merapi is bound by the prohibition on the use or threat of use of force against the territorial integrity of another State under customary international law, as codified in Article 2(4) of the U.N. Charter,²¹ to which Merapi is a party.²² Under the decision of this Court in the S.S. Lotus case, vessels flying the flag of a State are constructively the territory of that State.²³ The fishing vessels upon which Merapi used force in the Alma Shoals were flying the

¹⁹ *Id.*; United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982), arts. 58.3, 61.1, 62.4; 1958 Geneva Convention on Fishing and Conservation of Living Resources of the High Seas, 13 UST 2312, TIAS No. 5200, 450 UNTS 82 (Apr. 29, 1958) at art. 7; Derrick Kedziora, *Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks*, 17 J. INT'L L. BUS. 1132, 1139 (1996).

²⁰ *Compromis*, para. 7.

²¹ Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, para. 190 (June 27, 1986); Henkin, L., *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 572 (1997); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 A.J.I.L. 841, 843 (1999).

²² *Compromis*, para. 8.

²³ S.S. Lotus Case, (Fr. v. Turkey), 1927 P.C.I.J. (ser. A), no. 10 (Sept. 7).

Erebian flag,²⁴ and thus Merapi's attack on these vessels constitutes an unlawful attack on the territorial integrity of Erebus.²⁵

The only exceptions to this general prohibition on the use of force are in cases of Security Council authorization or self-defense.²⁶ The Security Council was not involved in this fishing dispute and gave no authorization to Merapi to use force. The law of self-defense, governed by Article 51 of the Charter of the United Nations, was strictly construed by this Court in the Case Concerning Military and Paramilitary Activities in Nicaragua, as requiring there to be an armed attack before a use of force in response is justified.²⁷ The peaceful fishing vessels seized by the Merapin navy were clearly not engaged in any armed attack, and thus, the use of force by Merapi on these vessels cannot be justified on the grounds of self-defense. Therefore, in using force against the fishing vessels in the Alma Shoals, Merapi violated international law.

B. ASSUMING ARGUENDO THAT MERAPI DOES HAVE JURISDICTION OVER THE ALMA SHOALS, ITS DISCRIMINATORY ARREST AND CONTINUED DETENTION OF THE EREBIAN VESSELS CONSTITUTE A VIOLATION OF INTERNATIONAL LAW.

In the Barcelona Traction Case, this Court found that the prohibition on discrimination on the basis of race rises to the level of a *jus cogens*²⁸ norm from which no State may derogate.²⁹ Racial discrimination is defined by international law as "any distinction, exclusion, restriction or

²⁴ *Compromis*, para. 7.

²⁵ Charter of the United Nations, art 2(4).

²⁶ Charter of the United Nations, arts. 2(4), 42, 51.

²⁷ Charter of the United Nations Charter, art. 51; Case Concerning Military and Paramilitary Activities in Nicaragua, (Nic. v. U.S.) 1986 I.C.J. 13, para. 195 (June 27, 1986).

²⁸ Barcelona Traction, Light and Power Co. Ltd. (Belg. V. Spain), 1970 I.C.J. 3 (Feb. 5).at 32.

²⁹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 4, 12 (May 28, 1951). See also Vienna Convention on the Law of Treaties, art. 53.

preference based on race, colour, descent, or *national* or ethnic origin.³⁰ Discrimination on the basis of nationality is therefore a clear violation of the doctrine of alien non-discrimination, which constitutes a fundamental provision of international customary human rights law,³¹ and is supported by judicial and arbitral decisions³² as well as state practice.³³ Additionally, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, to which both Merapi and Erebus are parties, explicitly prohibits a coastal state from enacting any regulation that discriminates in form or in fact against foreign fishermen.³⁴

The Merapin regulation singles out and excludes Erebian vessels and nationals from the Alma Shoals solely on the basis of national origin.³⁵ As further evidence of the intent to discriminate, Merapi has requested this Court to exclude persons of Erebian nationality from

³⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Art. 2.

³¹ Universal Declaration of Human Rights, art. 2; IESCR, art. 2(2); Art. 2(1); Convention Relating to the Status of Refugees, art. 3; African Charter on Human and People's Rights, art. 2, American Convention on Human Rights, art. 1(1); European Social Charter, preamble; M. McDougal et al, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AJIL 432,464 note 116 (1976).

³² Oscar Chinn Case (U.K. v. Belg.) 1934 P.C.I.J. (ser. A/B) No. 63 at 87 (Dec 12); Amoco International Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 231 (1987); Westberg & Marchais, *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists*, WORLD BANK SURVEY 135, 139.

³³ B. Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon Contemporary International Law Debate*, 75 AJIL 437, 446; U.S. Department of State, *Statement on Foreign Investment and Nationalization of 30 November 1975*, 15 I.L.M. 186 (1976).

³⁴ Convention on Fishing and Conservation of the Living Resources of the High Seas, art. 7(2).

³⁵ See *Compromis* para. 8.

fishing in the Alma Shoals.³⁶ Thus, even if Merapi has jurisdiction over the Alma Shoals, its discrimination against Erebian vessels and nationals violates international law.

C. EREBUS' ACCOMPANIMENT OF ITS FISHING VESSELS INTO THE ALMA SHOALS IS LEGAL UNDER INTERNATIONAL LAW.

Merapi's seizure of the Erebian fishing vessels, regardless of the status of the Alma Shoals as belonging to either Erebus or Merapi, justifies Erebus' accompanying its fishing vessels into the Alma Shoals. Merapi's armed attack on Erebian fishing vessels in the Alma Shoals is illegal either as a violation of Erebus' right to regulate its EEZ³⁷ or of the principle of non-discrimination.³⁸ Erebus is therefore justified, under the law of self-defense, to protect against any further attacks on its territorial integrity, *vis-à-vis* its ships.³⁹

II. EREBUS'S PROPOSED SEABED MINING OPERATION IS CONSISTENT WITH INTERNATIONAL LAW.

A. MERAPI LACKS *JUS STANDII* TO BRING A CLAIM WITH REGARD TO THE SEABED MINING FACILITY.

A state possesses *jus standii* to introduce legal proceedings against another state only when it has a particular right or specific interest in the subject matter of the claim.⁴⁰ In the North Sea Continental Shelf Cases, this Court held that a depression of more than 200 meters

³⁶ See *Compromis*, para. 22.

³⁷ See *supra*, section I(A)(3).

³⁸ See *supra*, note XX.

³⁹ Charter of the United Nations, art. 51.

⁴⁰ See South West Africa (Ethiopia v. S. Africa; Liberia v. S. Africa), 1966 I.C.J. 6, 39 (July 18); Christine M. Chinkin, *East Timor Moves into the World Court*, 4 EUR. J. INT'L. L. 206, 210 (1993); Jean Pierre La Fonteyne, *The Portuguese Timor Gap Litigation before the International Court of Justice*, 42(2) AUSTL. J. INT'L. AFFAIRS 170, 174 (1991).

was of such significance as to determine the extent of the natural prolongation of the continental shelf.⁴¹ While state practice has ignored troughs up to 4600 meters in depth,⁴² St. Helena's Trench, at a depth of 10,000 meters and a width of 20 nautical miles, is clearly a depression of such significance as to delimit the extent of Merapi's continental shelf.⁴³ Furthermore, at a distance of 220 nautical miles from the coast of Merapi,⁴⁴ the Grand Basin does not lie within Merapi's EEZ but, rather, entirely within the high seas outside of Merapi's jurisdiction. It is inappropriate for a State to take action individually with regard to a matter which is, by definition, the concern of all states.⁴⁵

This Court has held on several occasions that the fact that an obligation is owed *erga omnes* does not grant standing before this Court unless a State can demonstrate that one of its rights has been violated.⁴⁶ Since the Grand Basin lies entirely within the high seas, Merapi has no special right to fish in this area.⁴⁷ Erebus' obligation not to harm the ecosystem of the Grand

⁴¹ North Sea Continental Shelf Case (FRG v. Den.) (FRG v. Neth.), 1969 I.C.J. 3, para. 45 (1969); Feulner, 17 Va. J. Int'l L. 77, 95 (1976).

⁴² M. Evans, *Relevant Circumstances and Maritime Delimitation* 106 (1989).

⁴³ See *Compromis*, para. 2.

⁴⁴ See *Compromis*, para. 2.

⁴⁵ See Riphagen, *Third Report on the Content, Forms and Degree of State Responsibility*, U.N. Doc. A/CN.4/354/Add 2 (May 5, 1982), at 6-7; K. Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status*, 28 NETH. INT'L L. REV. 273, 284 (1988).

⁴⁶ See South West Africa (Eth. V. S. Afr., Lib. V. S. Afr.), 1966 I.C.J. Rep. 4 (Second Phase, July 18); Nuclear Tests (Austl. V. Fr., N.Z. v. Fr.), 1974 I.C.J. Rep. 253, 424; Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1972 I.C.J. Rep. 4, 32 (Feb. 5).

⁴⁷ UNCLOS, Art. 1; Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 1(1); Convention on the High Seas, Art. 2.

Basin is owed not to Merapi but is, rather, owed *erga omnes*. Thus, Merapi does not possess *jus standii* to introduce legal claims concerning the Grand Basin.

B. EREBUS IS NOT A PARTY TO ANY AGREEMENT CURTAILING ITS ABILITY TO UNDERTAKE THE PROPOSED SEABED MINING OPERATION.

Erebus is not subject to any treaty obligation preventing it from engaging in the proposed seabed mining operation.⁴⁸ The principle that treaty rights and obligations are legally confined to the contracting parties is firmly embedded in international law.⁴⁹ The Vienna Convention on the Law of Treaties, to which both Erebus and Merapi are parties,⁵⁰ reflects the ancient principle *pacta tertiis nec nocent nec prosunt*, stating: "A treaty does not create either obligations or rights for a third State without its consent."⁵¹ This Court reaffirmed this principle in the North Sea Continental Shelf Cases, recognizing that the rights and benefits of a treaty fall naturally to the signatories, as do obligations and liabilities.⁵² Hence, there is no basis for imposing legal obligations and liability on a third party for not complying with the terms of a treaty it did not sign.⁵³

⁴⁸ See *Compromis*, para. 8

⁴⁹ Free Zones of Upper Savoy and the District of Gex, 1932 PCIJ (ser A/B) No. 46, at 141; Upper Silesia Case, 1926 PCIJ (ser. A) No. 7, at 29; Oppenheim, L., *INTERNATIONAL LAW* 925-26 (8th ed., 1955).

⁵⁰ *Compromis*, para. 8.

⁵¹ Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, 8 I.L.M. 679, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980). See also *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* § 328(1) (Tent. Draft No. 1, 1980).

⁵² North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 ICJ REP. 3, 25-26 (Judgment of Feb. 20).

⁵³ Wolfke, K., *Custom in Present International Law*, in 14 *DEVELOPMENTS IN INTERNATIONAL LAW* (1993).

The 1958 Geneva Convention on the High Seas⁵⁴ is the only treaty relevant to seabed mining on the high seas to which both States are parties.⁵⁵ Article 2 and the Commentaries to Article 2 of the Convention recognize the right of States to mine the seabed of the high seas.⁵⁶ Although it is not specifically listed in Article 2 as a freedom of the seas, the list of freedoms is explicitly stated to be nonexclusive,⁵⁷ and the Commentary to Article 2 states that the article includes the freedom to explore and exploit the subsoil of the high seas.⁵⁸

C. CUSTOMARY INTERNATIONAL LAW PLACES NO LIMITATION ON EREBUS' RIGHT TO MINE THE HIGH SEAS SEABED.

1. *No limitation on a state's freedom to engage in high seas seabed mining per se exists under customary international law.*

To be classified as customary international law, a principle must represent the constant and uniform usage of states, accepted by those states as legally obligatory even in the absence of a treaty.⁵⁹ Neither of these prerequisites has been met with regard to prohibitions on seabed mining on the high seas. Although the 1982 Convention on the Law of the Sea contains several

⁵⁴ 1958 Geneva Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

⁵⁵ *Compromis*, para. 8.

⁵⁶ Van Dyke & Yuen, "*Common Heritage*" v. "*Freedom Of The High Seas*": *Which Governs The Seabed?*, 19 SAN DIEGO L. REV. 493, 501 (1982). *See also* 1958 Geneva Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962), at art. 2.

⁵⁷ Van Dyke & Yuen, "*Common Heritage*" v. "*Freedom Of The High Seas*": *Which Governs The Seabed?*, 19 SAN DIEGO L. REV. 493, 502 (1982)

⁵⁸ Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at 24, U.N. Doc. A/3159 (1956); reprinted in [1956] 2 Y.B. INT'L L. COMM'N 253, U.N. Doc. No. A/CN.4/SER.A/1956/Add. 1.

⁵⁹ D'Amato, A., *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 17(1971); North Sea Continental Shelf Cases (F.R.G. v. Denmark; F.R.G. v. Neth.) 1969 I.C.J. 3, para. 71.

provisions which purport to establish a regulatory regime governing high seas mining, these provisions are universally considered as not having achieved the status of customary international law,⁶⁰ as even State Parties to the 1982 Convention readily admit. They argue that the Convention is strictly contractual in nature and thus the obligations and rights arising from the treaty do not extend to third-parties.⁶¹

Furthermore, given that high seas seabed mining operations have not yet achieved economic viability, it is difficult, if not impossible, to determine what state practice will be once most states are actually capable of engaging in seabed mining.⁶² An analysis of the actions of those states with high seas mining capability argues against mining regulation rising to

⁶⁰ See Charney, J., *Entry Into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT'L L. 381 (1995); Charney, J., Revision, at 283-89; Djalal, *Law of the Sea Conference: Other Alternatives For Seabed Mining?*, 3 N.Y.L.S. J. INT'L & COMP. L. 39, 47-48 (1981); Kindt, J., *The Environmental Aspects of Deep Seabed Mining*, 8 UCLA J. ENVTL. L. & POL'Y 125 (1989); Kindt, J., *Deep Seabed Exploitation*, 4 UCLA J. ENVTL. L. & POL'Y 1, 16 (1984); Remarks by John Norton Moore, *The United States Without the Law of the Sea Treaty: Opportunities and Costs, Proceedings from the Seventh Annual Conference of the Center for Ocean Management Studies*, UNIVERSITY OF RHODE ISLAND 111 (June 12-15, 1983).

⁶¹ Kalo, COASTAL AND OCEAN LAW 267, 274 (2nd ed. 1994); Hearing on the Law of the Sea Treaty and the Deep Seabed Hard Minerals Resources Act Before the Subcomm. on Oceanography, Gulf of Mexico and the Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries, 103d Cong., 2d Sess. (1994) (statement of Capt. Richard B. Schiff, JAGC, U.S. Navy).

⁶² Charney, J., *The Marine Environment and the 1982 United Nations Convention on the Law of the Sea*, 28 INT'L LAW 879, 881 n.7 (1994). See also Bartlett, P.M. & W.C.J. Van Rensburg, *Technical, Economic and Institutional Constraints on the Production of Minerals from the Deep Seabed*, 1986 ACTA JURIDICA 69, 76-78 (1986); Broadus, J., *Seabed Materials*, 235 SCIENCE 853, 856 (1987); Hoagland, P., *Manganese Nodule Price Trends: Dim Prospects for Commercialization of Deep Seabed Mining*, 19 RES. POL'Y 287 (1993); Report of the Group of Technical Experts to the General Committee of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, 12th Sess., U.N. Doc. LOS/PCN/BUR/R.32 (1994), reprinted in 16 THE LAW OF THE SEA: DOCUMENTS 1983-1994, at 113, 118-24 (Renate Platzoder ed., 1994); National Oceanic & Atmospheric Administration, U.S. Dep't of Commerce, DEEP SEABED MINING, REPORT TO CONGRESS 3 (1991); Emery, K. & James M. Broadus, *Overview: Marine Mineral Reserves and Resources - 1988*, 8 MARINE MINING 109, 110-11 (1989).

customary international law, as claims to areas in which mining operations have been planned have been expressed by the United States.⁶³ In addition, unilateral claims to mining sites have been adopted by Germany, France, the United Kingdom, Belgium, Italy, Japan, the former USSR, and the Netherlands.⁶⁴

2. *No environmental law exists which prevents the mining of the high seas' seabed.*

Under customary international law,⁶⁵ and the 1958 Convention on the Law of the High Seas,⁶⁶ to which Erebus is a party,⁶⁷ Erebus is obligated to refrain from polluting the marine environment as a result of its exploration of the high seas' seabed. International law does not however prohibit Erebus from planning and beginning construction on a facility which may or may not pollute the seabed. Such a precautionary principle, requiring decision-makers to avoid projects when there is an expectation that a relevant activity may create adverse environmental interference, even in the absence of conclusive evidence displaying a relationship between cause and alleged effects,⁶⁸ is not a principle of customary international law.⁶⁹ It is simply too vague to

⁶³ National Oceanic and Atmospheric Administration, U.S. Dept. of Commerce, DEEP SEABED MINING 4 (1994).

⁶⁴ Larson, D., *Deep Seabed Mining: A Definition of the Problem*, 17 OCEAN DEV. & INT'L L. 271, 281 (1986); *Recent Developments in the Law of the Sea 1986*, 24 SAN DIEGO L.R. 701, 703-04 (1987); Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed, 21 I.L.M. 950 (entered into force Sept. 2, 1982).

⁶⁵ Nuclear Tests Cases, (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

⁶⁶ 1958 Geneva Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962)

⁶⁷ *Compromis*, para. 8.

⁶⁸ Ebbesson, J., COMPATIBILITY OF INTERNATIONAL AND NATIONAL ENVIRONMENTAL LAW 119-20 (1996).

⁶⁹ Freestone, D. & Ellen Hey, *Origins and Development of the Precautionary Principle*, in

serve as a regulatory standard, because different formulations of it give different answers to the question of when precautionary actions are warranted and at what price.⁷⁰

Assuming *arguendo* that there is a definable obligation under the precautionary principle recognized by customary international law, Erebus has credibly demonstrated that its actions will not result in unacceptable damage to the marine ecosystem of the Grand Basin.⁷¹ Erebian scientists have studied the safety of the facility using computer simulations and comparative data from other seabed mining sites.⁷² In a lengthy report by the Chair of the Department of Environmental Science of the University of Erebus, it was concluded that the novel hybrid process used by the seabed mining facility poses no threat to the marine life in the area surrounding the proposed mining site.⁷³

III. THE OFFICIAL STATEMENT OF THE PRESIDENT OF THE SECURITY COUNCIL IS NOT BINDING UNDER INTERNATIONAL LAW.

Freestone, D. & Ellen Hey eds., *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 53 & n.1 (1996). See also Handl, G., *Environmental Security and Global Change: The Challenge to International Law*, in Winfried Lang et al, *ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW* 59-87, 78-79 (1994); Birnie, P. et al., *INTERNATIONAL LAW AND THE ENVIRONMENT* 98 (1992).

⁷⁰ MacDonald, J., *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management*, 26 *OCEAN DEV. & INT'L L.* 255, 257 (1995); Gundling, L., *The Status in International Law of the Principle of Precautionary Action*, 5 *INT'L J. ESTUARINE & COASTAL L.* 23, 25 (1990). See also Kindall, M.P.A., *UNCED and the Evolution of Principles of International Environmental Law*, 25 *J. MARSHALL L.R.* 19, 24 (1991); *Nicholls v. Director of National Parks & Wildlife*, 84 *L.G.E.R.A.* 419; Editor, *New Developments in International Environmental Law*, 85 *A.S.I.L. PROC.* 401, 414 (1991); Hickey, Jr., J. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 *VA. ENV. L.J.* 423 (1995); Stone, C., *Deciphering "Sustainable Development"*, 69 *CHICAGO KENT L.R.* 977, 982 (1994).

⁷¹ *Compromis*, para. 10; Clarifications, para. 4.

⁷² Clarifications, para. 4.

⁷³ *Compromis*, para. 10; Clarifications, para. 4.

While Presidential Statements are used to convey a general agreement on an issue by the Security Council, they have no binding force, and are used when the issue in question is not entirely ripe to be settled by a binding decision.⁷⁴ Only Security Council decisions, that is, those taken pursuant to a vote by the Council members, are binding.⁷⁵ Under Rule 19 of the Rules of Procedure of the UN Security Council, while the President of the Council may speak on behalf of the Council, her official statements are not a substitute for a full vote of the Council on a binding resolution.⁷⁶ Indeed, substantial state practice underlies this interpretation, as even the UN itself explicitly recognizes that Presidential Statements are often ignored.⁷⁷

IV. MERAPI'S INVOLVEMENT IN THE TERRORIST ATTACK AGAINST THE EREBIAN SEABED MINING FACILITY VIOLATES INTERNATIONAL LAW.

A. MERAPI IS RESPONSIBLE FOR THE ACTS OF THE AQUA PROTECTORS.

International law governing State responsibility holds a State accountable for illegal acts of which it had prior knowledge but failed to prevent,⁷⁸ or illegal acts which it publicly endorses and condones *ex post*.⁷⁹ This formulation of State responsibility for *de facto* agents is premised

⁷⁴ Prandler, A., *QUESTIONS OF INTERNATIONAL LAW* 162 (1971).

⁷⁵ UN Charter arts. 25 & 27.

⁷⁶ Provisional Rules of Procedure of the Security Council, S/96/Rev. 4. *See also*, Prandler, A., *Questions of International Law* 161 (1971); Charter of the United Nations, art. 24; Jankovic, B., *PUBLIC INTERNATIONAL LAW* 194 (1984).

⁷⁷ UN Press Release, *Conflict Prevention Must Be 'Cornerstone of Collective Security in 21 Century', Secretary-General Tells Members, as Council Discusses Armed Conflict*, SC/6892 (July 20, 2000).

⁷⁸ *Corfu Channel Case*, (U.K. v. Albania) 1949 I.C.J. 4, 18-23 (April 9, 1949); *United States Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran) 1980 I.C.J. 3, 30-33 (1980).

⁷⁹ *United States Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran) 1980 I.C.J. 3, 35 (1980); *Prosecutor v. Dusko Tadic, International Criminal Tribunal for the Former Yugoslavia: In the Appeals Chamber*, para. 133 (visited Dec. 3, 2000)

on the desire to avoid allowing States to escape responsibility by contracting out activities which would be illegal for its *de jure* officials to undertake.⁸⁰ In both Corfu Channel and United States Diplomatic and Consular Staff in Tehran, this Court held that, when a State has knowledge of an activity of others that will violate international law, it incurs responsibility for that act unless it takes appropriate actions to warn other potentially affected States.⁸¹ The Nicaragua case appears to be the only one in which this Court held a State not responsible for acts of which it knew and failed to prevent or warn.⁸² However, the Nicaragua case can be distinguished from the Court's earlier decisions because it involved an action -- the civil war by the *contras* -- that did not constitute a violation of international law *per se*.⁸³

Merapi clearly knew of the illegal terrorist attack by the Aqua Protectors on the Erebian seabed mining facility. It financed the operation in part,⁸⁴ and it even publicly approved the act afterwards.⁸⁵ Where the intent of an act is to instill fear in order to realize a political mission,⁸⁶

<<http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.htm>>.

⁸⁰ UN Doc. A/35/10 (1980); First Report on State Responsibility by the Special Rapporteur J. Crawford, U.N. Doc. A/CN.4/490/Add.5, 16-24; Prosecutor v. Dusko Tadic, *International Criminal Tribunal for the Former Yugoslavia: In the Appeals Chamber*, para. 117 (visited Dec. 3, 2000) <<http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.htm>>.

⁸¹ Corfu Channel Case, 1949 I.C.J. 4, 18-23 (April 9, 1949); United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran) 1980 I.C.J. 3, 29-37, 41 (1980). See also Charney, J., *Is International Law Threatened by the Multiplication of International Tribunals*, 271 RECUEIL DES COURS 101, 264 (1998).

⁸² Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, para. 115 (June 27, 1986); Charney, J., *Is International Law Threatened by the Multiplication of International Tribunals*, 271 RECUEIL DES COURS 101, 263 (1998).

⁸³ *Id.*

⁸⁴ *Compromis*, para. 18.

⁸⁵ *Compromis*, para. 17.

the delivering, placing, or detonation of an explosive device in a foreign government facility with the intent to cause extensive damage resulting in economic loss is an act of terrorism.⁸⁷ The Aqua Protectors' bombing of the Erebian government's facility was intended to cause extensive damage and terrorize the Erebian people into foregoing their attempts to build this seabed mining facility. Thus, it was a violation of customary international law, and Merapi, given that it had knowledge of this impending violation, breached international law by failing to warn Erebus.

B. THE ATTACK ON THE EREBIAN SEABED MINING FACILITY IS A USE OF FORCE IN VIOLATION OF INTERNATIONAL LAW.

International law regulating the use of force by States is governed by Article 2(4) of the Charter of the United Nations,⁸⁸ which provides that any use or threat of use of force against the territorial integrity and political independence of another State is a violation of international law unless justified by Security Council authorization or the inherent right of self-defense.⁸⁹ No derogation from the provisions of this article is permitted.⁹⁰ Unilateral uses of force outside the Charter regime to protect the environment are therefore proscribed by international law. Thus, even if this Court held that the operation of Erebus' seabed mining facility violated international

⁸⁶See International Law Association, Report of the Sixty-First Conference held at Paris, Resolution No. 7, Article 2 (1984); A. Schmid and J. Jongman, Political Terrorism, 28 (1988); B. Jenkins, *International Terrorism: Trends and Potentialities*, 32 J. Int'l Aff. 115 (1978); M. Crenshaw, *Theories of Terrorism*, 10 J. Strategic Studies 13 (1987).

⁸⁷See International Convention for the Suppression of Terrorist Bombings, reported in 37 I.L.M. 249 (1998).

⁸⁸ Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, para. 190 (June 27, 1986); Henkin, L., *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 572 (1997); Charney, J., *Anticipatory Humanitarian Intervention in Kosovo*, 93 A.J.I.L. 841, 843 (1999).

⁸⁹ Charter of the United Nations, arts. 2(4), 42, 51.

⁹⁰ Schachter, O., INTERNATIONAL LAW IN THEORY AND PRACTICE 128 (1998).

law, Merapi would have no right to unilaterally use force to prevent the breach.⁹¹ Such uses of force may be just, but the just war doctrine is not the law.⁹²

1. *The use of force by Merapi was not pursuant to a Security Council authorization.*

The Charter explicitly requires that all non-self-defense uses of force be *explicitly* authorized by the Security Council.⁹³ While there have been some attempts to justify the use of force on the basis of an implied authorization by the Security Council, these do not amount to the systemic state practice required for a norm to crystalize into customary international law.⁹⁴ There was no explicit authorization by the Security Council for the use of force in this case.⁹⁵ Merapi's attack on the seabed mining facility cannot therefore be justified as having been authorized by the Security Council.

2. *Merapi's attack on the Erebian seabed mining facility is not a legitimate exercise of the right of self-defense.*

Article 51 of the Charter of the United Nations explicitly allows for self-defense in only those cases where there has been an armed attack.⁹⁶ The term 'armed attack' is left undefined in

⁹¹ Teece, D., *Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-Seas Environment?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 89, 89 (1997); Zumwalt, A., *Straddling Stock Spawn Fish War on the High Seas*, 3 U.C. DAVIS J. INT'L L. & POL'Y 35, 48-49 (1997).

⁹² Murphy, M., *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT'L L. 1181, 1212 (1999).

⁹³ Charter of the United Nations, arts. 33 & 42; Lobel, J., & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 A.J.I.L. 124, 153 (1999).

⁹⁴ Lobel, J., & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 A.J.I.L. 124, 133, 153 (1999),

⁹⁵ *See Compromis.*

⁹⁶ Charter of the United Nations, art. 51.

the Charter, but has been narrowly interpreted by this Court in both the Corfu Channel case and the Nicaragua case,⁹⁷ and all governments have resisted any efforts to broaden its scope.⁹⁸ In this case, there was no armed attack on Merapi by Erebus. Even if this Court were to find that significant environmental damage would result from Erebus' operation of a seabed mining facility, that damage cannot be considered an armed attack.⁹⁹ Therefore, Merapi cannot claim that its use of force is justified by its inherent right of self-defense.

C. ASSUMING ARGUENDO THAT MERAPI IS NOT RESPONSIBLE FOR THE ACTS OF THE AQUA PROTECTORS, ITS FINANCING OF THE OPERATIONS CONSTITUTES A PER SE VIOLATION OF INTERNATIONAL LAW.

Customary international law, embodied in the Declaration of the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, imposes a duty on all States to refrain from intervening, either directly or indirectly, in the internal or external affairs of another State.¹⁰⁰ Specifically, it requires that every State conduct its affairs so as not to interfere in any other's State's determination of its own political, economic, cultural system, and foreign policy. This Court held

⁹⁷ Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, para. 195 (June 27, 1986); Murphy, M., *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT'L L. 1181, 1199 (1999).

⁹⁸ Henkin, L., *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 573 (1997); Kelsen, H., RECENT TRENDS IN THE LAW OF THE NATIONS, 165 (1968); Alexandrov, S., SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 28-29 (1996); Jessup, P., A MODERN LAW OF NATIONS, 165 (1968).

⁹⁹ Murphy, M., *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT'L L. 1181, 1191-1200 (1999).

¹⁰⁰ RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 8, 3(1) (REVISED)(Tent. Draft No. 1, 1980); S.S. Lotus Case, (Fr. v. Turkey) 1927 P.C.I.J. (ser. A), no. 10, at 18 (1927); G.A. Resolution 2625 (XXV).

in Nicaragua that while mere financing does not rise to the level of a use of force,¹⁰¹ it does violate the principle of non-intervention.¹⁰² The seabed mining facility was to play a fundamental role in Erebus' national defense strategy.¹⁰³ By financing the Aqua Protectors in their attack on this facility, Merapi thus interfered with Erebus' sovereign right to effectively formulate and implement its foreign policy.¹⁰⁴

Additionally, the Declaration on Principles of International Law recognizes that States have "a duty to refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."¹⁰⁵ This duty was recognized as customary international law by this Court in the Nicaragua case,¹⁰⁶ and has been reiterated in many international conventions, treaties,¹⁰⁷ and resolutions of the General Assembly.¹⁰⁸ Additionally, this duty was recently expressed by the UN Security Council as the basis of its resolution imposing sanctions on Afghanistan for the financing of and acquiescence in the terrorist activities of Usama bin

¹⁰¹ Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, at para. 83 (June 27, 1986)..

¹⁰² *Id.*, para. 241.

¹⁰³ *Compromis*, para. 9.

¹⁰⁴ Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, para. 188 (June 27, 1986).

¹⁰⁵ GA Resolution 2625(XXV).

¹⁰⁶ Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 I.C.J. 13, para. 188 (June 27, 1986).

¹⁰⁷ *See, e.g.*, Convention on the Rights and Duties of States in the Event of Civil Strife, 46 Stat. 2749, 134 LNTS 45 (Feb. 20, 1928), at art.1.1; International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109 (Dec. 9, 1999).

¹⁰⁸ Security Council Resolution 1267 (1999); Security Council Resolution 1333 (2000); G.A.

Laden.¹⁰⁹

V. MERAPI IS OBLIGATED TO EXTRADITE THOSE ACCUSED OF DESTROYING THE EREBIAN SEABED MINING FACILITY.

The duty to extradite or prosecute, *aut dedere aut judicare*, is a customary norm of international law that applies to acts of international terrorism,¹¹⁰ irrespective of whether they are politically motivated.¹¹¹ In the Nicaragua case, this Court recognized that “*opinio juris* may . . . be deduced from, *inter alia*, the attitude of States towards certain General Assembly resolutions . . .,” and that consent to these resolutions “may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”¹¹² Thus, the *opinio juris* of States regarding the duty to extradite or prosecute international terrorist offenders is evident from a long series of General Assembly Resolutions, which call upon states to “fulfill their obligations under international law to refrain from . . . acquiescing in activities within their territory directed towards the commission of [international terrorist] acts.”¹¹³ Later resolutions

Resolution 42/159; G.A. Resolution 34/145.

¹⁰⁹ Security Council Resolution 1333 (2000).

¹¹⁰ Bassiouni, M. & E. Wise, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 21 (1995); Bassiouni, M., *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 499-508 (1992); Grotius, H., *2 DE JURE BELLI AC PACIS*, c. 21, paras. 3, 4 (1624); International Law Association, *REPORT OF THE SIXTY-FIRST CONFERENCE* 6-7, 316 (1985); Murphy, J., *Legal Aspects of International Terrorism: Summary Report of an International Conference* 19 *A.S.I.L. STUD. IN TRANSNAT. LEGAL POL’Y* 26 (1980).

¹¹¹ International Law Association, *REPORT OF THE SIXTY-FIRST CONFERENCE* 6-7, 316 (1985); *see e.g.* International Convention for the Suppression of Terrorist Bombings, reported in 37 *I.L.M.* 249 (1998).

¹¹² Case Concerning Military and Paramilitary Activities in Nicaragua (Nic. v. U.S.) 1986 *I.C.J.* 13, para. 188 (June 27, 1986), at para. 188.

¹¹³ G.A. Resolution 2625 (Friendly Relations Resolution); G.A. Res. 34/415 (1980); G.A. Resolution 34/145 (1979); G.A. Resolution 38/130 (1983); G.A. Resolution 40/61 (1985).

go even further, urging States to fulfill their obligations and “to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts.”¹¹⁴

The customary nature of the duty to extradite or prosecute is also supported by state practice as evidenced by the principle’s incorporation in numerous multilateral conventions.¹¹⁵ A state’s assent to a particular treaty provision provides a firm declaration of the state’s position, and serves as a more reliable indication of state practice than its overt actions in any particular

¹¹⁴ G.A. Resolution 42/159 (Dec. 7, 1987); G.A. Resolution 44/29 (Dec. 4, 1989); G.A. Resolution 46/51 (Dec. 9, 1991); G.A. Resolution 49/60 (Dec. 9, 1994)(and the Annex “Declaration on Measures to Eliminate International Terrorism)

¹¹⁵ The Geneva Conventions of August 12, 1949 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287; Single Convention on Narcotic Drugs, Art. 36, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204; Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 7, Dec. 16 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and related Extortion that are of International Significance, Art. 5, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, 10 I.L.M. 255 (1971); Convention on Psychotropic Substances, Art. 22, Feb. 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 175; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Art. 7, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Art. 7, Dec. 14, 1973, 28 U.S.T. 1975, 13 I.L.M. 41 (1974); European Convention on the Suppression of Terrorism, Art. 7, Jan. 27, 1977, E.T.S. No. 90, 15 I.L.M. 1272 (1976); International Convention Against the Taking of Hostages, Art. 8, Dec. 18, 1979, 18 I.L.M. 1456 (1979); Convention on the Physical Protection of Nuclear Material, Art. 10, March 3, 1980, 18 I.L.M. 1422 (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 7, Dec. 10, 1984, G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984); Inter-American Convention to Prevent and Punish Torture, Art. 14, Dec. 9, 1985, O.A.S. T.S. No. 67, O.A.S. Doc. OEA/Ser. P, AG/Doc. 2023/85 rev. 1, Mar. 12, 1986; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Art. 10, Mar. 10, 1988, 27 I.L.M. 668 (1988); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Art. 12, Dec. 4, 1989, 29 I.L.M. 91 (1990).

situation.¹¹⁶ In his dissenting judgment in the Lockerbie Case, Judge Weeramantry explicitly recognized the customary status of the norm requiring the prosecution or extradition of international terrorists.¹¹⁷ He explained that, “[t]he widespread use of the formula ‘prosecute or extradite’ either specifically stated, explicitly stated in a duty to extradite, or implicit in the duty to prosecute or criminalize, and the number of signatories to these numerous conventions, attests to the existing general *jus cogens* principle.”¹¹⁸ This principle has also been recognized by the Security Council in its recent resolutions where it first condemned Afghanistan for harboring Usama bin Laden¹¹⁹ and demanded that he be extradited and then imposed sanctions on Afghanistan when it failed to comply with the first resolution.¹²⁰

As it has shown its unwillingness to prosecute those responsible for the destruction of the Erebian Seabed Mining Facility, as evidenced by its failure to even arrest those actors, Merapi must be required to extradite in accordance with customary international law.

VI. MERAPI MUST RELEASE THE EREBIAN FISHING VESSELS AND PAY COMPENSATION FOR THE DAMAGE TO THE MINING FACILITY.

It is a fundamental principle of international law that any action which violates international

116 Bassiouni, M. & E. Wise, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 21, 46-47 (1995); Baxter, R., *Multilateral Treaties as Evidence of Customary international Law*, 41 *Brit. Y.B. Int'l L.* 275, 277-78, 300 (1965-66). *See also* D'Amato, A., *INTERNATIONAL LAW: PROCESS AND PROSPECT* 126-39 (2nd ed., 1995).

¹¹⁷ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (*Libyan Arab Jamajiriya v. U.K.*) 1992 I.C.J. 9, at para.165 (1992)(Preliminary Objections)(Weeramantry, J., dissenting),

¹¹⁸ *Id.*

¹¹⁹ Security Council Resolution 1267 (1999).

¹²⁰ Security Council Resolution 1333 (2000).

law gives rise to an obligation to make reparations.¹²¹ Merapi is responsible for the illegal attack on the Erebian seabed mining facility, causing significant loss of innocent human life, \$1 billion in direct damage to the facility, and resulting in the loss of vital seabed mining revenues. Merapi must therefore pay compensation sufficient to “. . . wipe out all the consequences of the illegal act and re-establish the situation which could in all probability have existed if that act had not been committed.”¹²² Erebus therefore requests that this Court order Merapi to release the Erebian fishing vessels seized from the Alma Shoals and award Erebus appropriate monetary damages according to an accurate estimate as to the damage to the seabed facility, the loss of human life, and the loss of future seabed mining revenue.¹²³

¹²¹ Chorzow Factory Case (Ger. v. Pol.) 1928 P.C.I.J. Rep. 4 (ser. A) no. 17 (Sept. 13). *See also* International Law Commission, DRAFT ARTICLES ON STATE RESPONSIBILITY (1979) Part. II, Art. 2.

¹²² Chorzow Factory Case (Ger. v. Pol) PCIJ Rep. 46(ser. A) No. 17, at 47.

¹²³ *See* S.S. Wimbledon Case (France, Italy, Japan and U.K. v. Ger.) 1923 P.C.I.J. 25 (ser. A), no. 1; Mavromattis Palestine Concessions, (Greece v. UK) 1924 P.C.I.J. 16 (ser. A) no. 2 (Aug. 30); Chorzow Factory Case (Ger. v. Pol.) P.C.I.J. Rep. (ser. A) no. 17 (1928); Corfu Channel Case, (U.K. v. Albania) I.C.J. Rep. 4 (1949).

CONCLUSION AND PRAYER FOR RELIEF

For all the aforementioned reasons argued in this memorial the government of Erebus respectfully requests that this honorable Court:

- 1) **DECLARE** that, by virtue of the change in course of the principal arm of the Krakatoa River, the Alma Shoals lie in waters belonging to Erebus, and its citizens and vessels therefore have a right to fish there;
- 2) **DECLARE** that its proposed seabed mining operations in the Grand Basin are consistent with international law;
- 3) **DECLARE** that Merapi violated international law through its involvement in the terrorist attack against the Erebus seabed mining facility, and by its seizure and detention of the six Erebian vessels;
- 4) **ORDER** Merapi to pay U.S. \$1.2 billion in compensation for the damage to the facility, the loss of human life, and the loss of future seabed mining revenue;
- 5) **ORDER** Merapi to surrender those members of The Aqua Protectors responsible for the attack on the mining facility to Erebus for prosecution, and release the six Erebian fishing vessels.

Respectfully submitted,

Team # 311A

