

**2023**

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**QUESTIONS RELATING TO  
DEEP-SEA MINING AND STATE RESPONSIBILITY**

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**THE FEDERAL STATES OF AZARLUS**

**(APPLICANT)**

**V.**

**THE REPUBLIC OF RATHEARRE**

**(RESPONDENT)**

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**AT THE PEACE PALACE**

**THE HAGUE, NETHERLANDS**

**-WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT-**

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## TABLE OF ABBREVIATIONS

1	Art : Article
2	AFZ : Azarlus Fracture Zone
3	CBD : Convention on Biological Diversity
4	CIL : Customary International Law
5	Comm'n : Commission
6	Doc : Document
7	DSHMAR : Deep Seabed Mineral Resources Act
8	EEZ : Exclusive Economic Zone
9	EIA : Environmental Impact Assessment
10	GAOR : General Assembly Official Records
11	G.A. Res : General Assembly Resolution
12	ICJ : International Court of Justice
13	ILC : International Law Commission
14	Int'l : International
15	ISA : International Seabed Authority
16	ITLOS : International Tribunal for the Law of the Sea
17	NDC : Nationally Determined Contribution
18	NGO : Non-governmental organization
19	ORCA : Ocean Researchers and Cetacean Avengers
20	Pmbl : Preamble
21	R : Stetson Record
22	Rep : Report
23	UNCLOS : United Nations Convention on the Law of the Sea



24	U.S.C. : United States Code
25	U.N. : United Nations
26	VCLT : Vienna Convention on Succession of States in Respect to Treaties
27	Vol : Volume
28	Y.B. : Yearbook
29	¶ : Paragraph
30	1994 Agreement : Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982

## QUESTIONS PRESENTED

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I.

**WHETHER RATHEARRE'S MINING ACTIVITIES IN THE AFZ  
VIOLATE INTERNATIONAL LAW,**

II.

**WHETHER THE ACTIONS OF THE *BALEEN WARRIOR*'S  
CAPTAIN AND CREW CONSTITUTE PIRACY,  
AND WHETHER AZARLUS'S ACTS REGARDING  
THE *BALEEN WARRIOR* VIOLATED INTERNATIONAL LAW.**

## STATEMENT OF JURISDICTION

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In accordance with *Article 40 of the Statute of the ICJ*, the Federal States of Azarlus (Azarlus) and the Republic of Rathearre (Rathearre) have submitted to the ICJ by Special Agreement, questions concerning their differences relating to protected areas and armed conflict as contained in Annex A, including the Clarifications. The parties transmitted a copy of the Special Agreement to the Register of the ICJ on June 16, 2022.

The Registrar of the Court, in accordance with Article 26 of the Rules of the Court, addressed a notification of receipt of the Special Agreement to the parties on August 1, 2022.

The parties have accepted the jurisdiction of the ICJ. Consequently, they request the Court to adjudge the merits of this matter based on the rules and principles of general international law, as well as any applicable treaties. The parties further request this Court to determine the legal consequences, including the rights and obligations of the Parties arising from any judgement on the questions presented in this matter.

The parties have agreed to respect the decision of this Court.

## STATEMENT OF FACTS

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### Background

The Federal States of Azarlus is located in the Southern and Eastern Hemispheres (R¶1). The Republic of Rathearre is a sovereign state located in the Northern and Western Hemispheres (R¶2). Each State claims that the other has violated international law as follows (R¶42).

### Rathearre's Verte Mining activities in the AFZ

Rathearre asserts jurisdiction over a 200-mile EEZ based on CIL (R¶9). To satisfy its obligations under the Paris Agreement, Rathearre submitted the First and Second NDC which pledges to reduce carbon emissions by promoting use of electric vehicles (R¶17, 18).

In December 2018, Rathearre created Verte Mining. In January 2019, Verte Mining announced that it would explore the AFZ, five nautical miles beyond Azarlus's EEZ (R¶18, 19). On March 1, 2019, Azarlus sent a diplomatic note to Rathearre claiming that Verte Mining may not conduct seabed exploration because 1) it violates the benefit of humankind, 2) Rathearre has asserted UNCLOS-created rights, such as EEZ, 3) it would be contradictory for Azarlus asserting these rights while claiming this mining is not bound by the obligations of UNCLOS (R¶20).

On 22 March 2019, Rathearre responded that UNCLOS permits marine scientific research. Verte Mining is acting for the benefit of humankind, because its activities will reduce greenhouse gas emissions and climate change. Rathearre volunteered to follow ISA exploration regulations (R¶21). Verte Mining conducted EIA and announced that its mining activities will not likely significantly impact the marine environment (R¶22).

On 8 June 2021, Azarlus claimed Rathearre should postpone Verte Mining's

exploitation activities until the ISA issues regulations (R¶24). On June 25, 2021, Rathearre replied that it has not ratified UNCLOS and therefore has no duty because of the expected burdens that ISA regulation might affect Rathearre's mining activities. However, Rathearre assured Verte Mining would attempt to avoid marine pollution. Also, Rathearre clarified it will never ratify UNCLOS (R¶25).

### **ORCA's vessel *Baleen Warrior***

ORCA is an environmental group in Azarlus dedicated to protecting the marine environment. For many years, ORCA's vessels have intentionally interfered with whaling vessels on the high seas to disrupt whaling operations. In 2019, all ORCA vessels were registered in Azarlus as the flag state (R¶27).

On September 2021, a fishing vessel six nautical miles from Verte Mining's operation captured a dead royal frilled shark. Necropsy determined that the royal frilled shark had died before its capture (R¶28).

On October, 2021, a fishing vessel caught two more dead royal frilled sharks (R¶30). Other fishing vessels netted five more dead royal frilled sharks (R¶31). On November, 2021, additionally three dead frilled sharks were found in the same area (R¶32). No direct connection was found between the actions of Verte Mining and the sharks' deaths (R¶33).

On 9 November 2021, the *Baleen Warrior* intentionally blocked Verte Mining's vessel, *The Crusher*. The *Baleen Warrior* crew then fired paintballs at *The Crusher*. Five crew members of *The Crusher* were struck by paintballs but none was injured. Firing the paintballs kept the crew below decks, which disrupted mining operations (R¶34).

The next day, Rathearre declared that ORCA had engaged in piracy, mentioning Azarlus's flag-state responsibility under UNCLOS and ReCAAP (R¶35). However, Azarlus refused to prosecute the *Baleen Warrior*. Later, Rathearre demanded that Azarlus take

immediate action to stop the *Baleen Warrior*, but Azarlus again declined (R¶36). The *Baleen Warrior* departed the area prior to the arrival of the Rathearre's naval vessel (R¶37). At the same time, ORCA requested donations to support its action (R¶38).

On 10 December 2021, Rathearre demanded that Azarlus, as flag state, hold the *Baleen Warrior* responsible for its acts, arresting the captain and crew and prosecuting them for piracy (R¶39).

On 7 January 2022, Azarlus wrote to Rathearre, demanding that Verte Mining stop its mining activities in the AFZ. Azarlus refused to prosecute the *Baleen Warrior*'s captain and crew, because the criminal law of Azarlus does not apply extraterritorially (R¶40). Rathearre then stated that ORCA's fundraising activities were established for "private ends" and Azarlus had failed to prosecute piracy under international obligations (R¶41).

Failing to resolve their disputes diplomatically, the parties submitted matters to the ICJ. (R¶42).

## SUMMARY OF ARGUMENTS

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### I

Rathearre's mining activities do not violate international law. Rathearre is not party to UNCLOS, and therefore is not bound by its obligations. Furthermore, international custom does not restrict Rathearre's mining activities, regardless of what the custom now is. And because ISA does not bind non-party States, Rathearre need not follow ISA's regulations.

Even if UNCLOS binds Rathearre, Rathearre's mining activities benefit humankind. They collect minerals to produce electric motor vehicles, which will reduce greenhouse gas emissions, which will reduce climate change. Also, compared to land-based mining, deep-sea mining causes fewer human-rights and environmental problems. Given these two considerations, Rathearre's deep-sea mining activities benefit humankind.

Rathearre may assert an EEZ under international custom. The ICJ has already judged that EEZ is general practice, and most states already recognize EEZ as a legal obligation.

Rathearre conducted EIA in accordance with CBD and CIL. Therefore, Verte Mining's activities do not violate CBD or CIL.

### II

The actions of the *Baleen Warrior* constitute piracy: one illegal act of violence and two illegal acts of detention. UNCLOS and ReCAAP define piracy as "any illegal act of violence or detention ... committed for private ends by the crew or the passengers of a private ship, ... and directed ... on the high seas, against another ship, or against persons or property on board such ship." "Private ends" are ends pursued for non-governmental purposes, and since ORCA did not act under government orders, its ends were private.

Azarlus's refusal to prosecute the *Baleen Warrior* violates UNCLOS and ReCAAP. Azarlus has a legal duty to restrict piracy under its internal laws as the flag state of the ship. Even if it cannot prosecute under its internal laws, Azarlus still must try to repress piracy on the high seas. However, Azarlus did not suppress the *Baleen Warrior's* actions, arrest the captain and crew of the ship, or seize the ship. Therefore, Azarlus's acts violate international law.



## ARGUMENTS ADVANCED

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### **1. Rathearre's mining activities in the AFZ do not violate international law.**

**a. International law allows Rathearre and the Verte Mining Corporation to conduct prospecting, exploration, or exploitation of mineral resources on the seabed or ocean floor beyond the limits of national jurisdiction.**

**i. Rathearre is not bound by the UNCLOS, because Rathearre has not ratified the UNCLOS and has clarified its intention never to do so.**

VCLT Article 14 provides, “The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification.”<sup>1</sup> UNCLOS Article 306 requires ratification by deposit with the Secretary-General of the United Nations.<sup>2</sup> Rathearre has not ratified UNCLOS, however,<sup>3</sup> and therefore is not bound by UNCLOS or its restrictions on mining operations.

**ii. Rathearre's mining activities do not violate CIL.**

The Court has not clarified what international custom now is regarding exploration for and extraction of resources of the deep seabed. Two chief alternatives exist. One, custom

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<sup>1</sup> VCLT, Art 14(a), 1155 U.N.T.S. 331.

<sup>2</sup> UNCLOS, Art 306, 1833 U.N.T.S. 397.

<sup>3</sup> Record ¶25.

remains as it was through the mid-twentieth century: extracting resources of the deep seabed is freedom of the high seas subject to reasonable use. Two, modern efforts such as the UNCLOS have restricted custom: the resources of the deep seabed are the common heritage of mankind. We consider Rathearre's actions given both alternatives and find, in neither case, has Rathearre violated custom.

First, if custom about resources of the deep seabed remains a freedom of the high seas subject to reasonable use, Rathearre's conduct satisfies this custom. The freedom of the high seas means the high seas are open to all States, and no State may validly purport to subject any part of them to its sovereignty.<sup>4</sup> This definition, from the Convention on the High Seas, became accepted as custom.<sup>5</sup> The ILC's commentary on Article 2 of the Convention on the High Seas acknowledged that "freedom to explore or exploit the subsoil of the high sea" was already freedom of the high seas when they drafted this treaty.<sup>6</sup>

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<sup>4</sup> Convention on the High Seas, Art 2, 450 U.N.T.S 11.

<sup>5</sup> Convention on the High Seas, pmbl, 450 U.N.T.S. 11, *Report of the International Law Commission to the General Assembly*, 10 U.N. GAOR Supp. No. 9 at 3, U.N. Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Common 21, U.N. Doc.

A/CN.4/SER.A/1955/Add.1, *see also* Main page of Codification and Progressive Development of International Law, *See also* Richard B. Bilder et al., "Disentangling Treaty and Customary International Law.", 81 *Proceedings of the Annual Meeting (American Society of International Law)*. 157, 164, *see also* R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-1966).

<sup>6</sup> *Report of the International Law Commission to the General Assembly*, draft of Art. 2, 10 U.N. GAOR Supp. No. 9 at 3, U.N. Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Common 21, U.N. Doc. A/CN.4/SER.A/1955/Add.1.

Reasonable use has two elements, exemplified in the United States' DSHMRA. One, "reasonable use" permits commercial recovery of resources unless the environment would be harmed.<sup>7</sup> Two, "reasonable use" prohibits "unreasonable interference with the interests of other states in their exercise of the freedoms of the high seas."<sup>8</sup>

Here, Rathearre's mining activities neither harm the environment nor interfere with other States' exercise of the freedoms of the high seas. First, to avoid harming biodiversity, Rathearre conducted EIA prior to beginning mining<sup>9</sup> and followed the ISA's 2013 Regulations on Prospecting and Exploration for Polymetallic Nodules.<sup>10</sup> This theme is fully developed in part 1-d part of this memorial. Second, the Record does not even suggest that Rathearre interfered with any State's exercise of its freedoms of the high seas. Thus, Rathearre's activities constitute a reasonable use of its freedom of the high seas.

The second alternative is, if UNCLOS and other attempts to restrict use of resources of the deep seabed have changed custom to the common heritage of mankind, Rathearre's conduct still does not violate custom, because the custom is not a peremptory norm, and Rathearre is a persistent objector, having made clear in law its derogation from custom.

UNCLOS Article 136 declares the resources of the deep seabed to be "the Common heritage of mankind,"<sup>11</sup> and Article 137 defines the legal consequences of this regime. Article 137(1) prohibits States to "exercise ... sovereign rights over ... [such] resources" or to

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<sup>7</sup> *Ibid*, § 1413(a)(D)(ii).

<sup>8</sup> *Ibid*, § 1415(c)(1)(A).

<sup>9</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 I.C.J. Rep. 14, ¶204 (April 20).

<sup>10</sup> Record ¶21.

<sup>11</sup> *Supra* note 2, Art 136, U.N.T.S. 397.

“appropriate any part thereof,” refusing to recognize any such claim. Article 137(2) provides, “These resources are not subject to alienation.”<sup>12</sup> But as a persistent objector, Rathearre is not subject to these restrictions.

If UNCLOS has changed custom, the custom is not a peremptory norm, so Rathearre may derogate from it. A peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>13</sup>

First UNCLOS does not provide that “common heritage” is a peremptory norm. UNCLOS’s “no amendments” article results specifically from a rejection of making this a peremptory norm. Chile and other Third World States proposed making “common heritage” a peremptory norm,<sup>14</sup> but the United States and other States rejected the proposition.<sup>15</sup> The result was simply the “no amendments” article. Thus, drafters of UNCLOS specifically rejected making “common heritage” a peremptory norm.

Second, other states have also derogated from UNCLOS practice. States party to UNCLOS’s “common heritage of mankind” nevertheless recognize in other treaties the mining

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<sup>12</sup> *Ibid*, Art 137(1)(2), U.N.T.S. 397.

<sup>13</sup> Int’l law Comm’n, Report of the International Law Commission to the General Assembly, U.N Doc, A/74/10, at 141-147 (2019).

<sup>14</sup> Bernard H. Oxman, The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979), 74 *American Journal of International Law* 1–47 (1980).

<sup>15</sup> Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/WS/37 and Add.1-2, 243 (1982).

rights of States *not* party to UNCLOS, as a freedom of the high seas.<sup>16</sup> For example, in Memorandum of Understanding on the Avoidance of Overlaps and Conflicts Relating to Deep Sea-Bed Areas, a multilateral treaty, parties to UNCLOS<sup>17</sup> recognize the rights of the United States regarding exploration and exploitation,<sup>18</sup> which contract UNCLOS. Since States may derogate from the “common heritage of mankind”, it is no peremptory norm.

Finally, Rathearre derogates from the common-heritage practice as a persistent objector. To be a persistent objector, (1) a State objects to an international custom “while that rule was in the process of formation,” (2) “[t]he objection must be clearly expressed, made known to other States, and maintained persistently,” and (3) no State may object to a peremptory norm.<sup>19</sup>

Rathearre’s actions satisfy all three elements. Rathearre objected when the rule was in formation, refusing to ratify UNCLOS even before it came into effect, because Rathearre thought it would establish unnecessarily burdensome regulations.<sup>20</sup> Rathearre persistently maintained its objection by statutorily creating Verte Mining Corporation for the purpose of deep seabed exploration and mining.<sup>21</sup> Throughout the Record, Rathearre’s refusal to ratify UNCLOS and its mining activities have made known its objection to Azarlus and other

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<sup>16</sup> U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January (2020)*.

<sup>17</sup> *Supra* note 15.

<sup>18</sup> Memorandum of Understanding on the Avoidance of Overlaps and Conflicts Relating to Deep Sea-bed Areas, Art 1, 4, 5, Aug. 20, 1991, T.I.A.S. No. 11825.

<sup>19</sup> G.A. Res 73/203, at 5 (Dec.20.2018).

<sup>20</sup> Record ¶8

<sup>21</sup> Record ¶18

States. And we have already seen that the “common heritage” is no peremptory norm. Thus, Rathearre derogates from the “common heritage” practice as a persistent objector.

So, whatever custom now is, Rathearre is not violating custom. Rathearre is either reasonably using a freedom of the high seas or derogating from UNCLOS’s “common heritage” regime as a persistent objector.

**iii. Regulations of the ISA do not bind Rathearre, because Rathearre is not a State party to ISA.**

Azarlus wants Rathearre to refrain mining activities until the ISA issues regulations for exploitation.<sup>22</sup> However, ISA’s regulations do not restrict Rathearre. First, Rathearre is not a State party to ISA and, second, ISA does not regulate non-party States.

First, Rathearre is not a State party to ISA, so ISA cannot regulate Rathearre. Under UNCLOS Article 156(2), only parties to UNCLOS are parties to ISA.<sup>23</sup> Also, VCLT Article 34 provides, “A treaty does not create either obligations or rights for a third State without its consent.”<sup>24</sup> Here, Rathearre is neither a party to UNCLOS nor has Rathearre consented to be bound by hypothetical ISA regulations on exploitation.<sup>25</sup> Therefore, neither ISA nor its regulations can bind Rathearre.

Second, ISA does not bind non-party States. For example, though ISA regulations limit

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<sup>22</sup> Record ¶24.

<sup>23</sup> UNCLOS, Art 156(2), 1833, U.N.T.S. 397.

<sup>24</sup> VCLT, Art 34, 1155 U.N.T.S. 331.

<sup>25</sup> Record, ¶25.

exploration areas to 150,000 square kilometers,<sup>26</sup> the United States statutorily permits exploration areas up to 168,841 square kilometers<sup>27</sup>. As mentioned above in part 1-a-ii, parties to UNCLOS and ISA recognize the laws of the United States in separate conventions, which conflict with UNCLOS provisions.<sup>28</sup>

Then, neither the ISA nor its regulations can restrict Rathearre.

- iv. The requirement that activities concerning these resources be carried out “for the benefit of humankind” comes from the UNCLOS, which does not bind Rathearre. But even if it does, Rathearre’s activities are “for the benefit of humankind”.**

UNCLOS requires that deep-sea mining activities be carried out for the benefit of mankind.<sup>29</sup> Rathearre’s mining activities will “benefit humankind” and will avoid the harms of land-based mining.

This Court’s jurisprudence broadly defines “the benefit of humankind” to include any benefits to a larger community. In *Jurisdictional Immunities of the State (Germany v. Italy:*

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<sup>26</sup> Int’l Seabed Authority, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, U.N. Doc, ISBA/19/C/17.

<sup>27</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, TN. 291.5. D4. 1989, Deep Seabed Mining Report To Congress (1989).

<sup>28</sup> *Supra* note 19.

<sup>29</sup> UNCLOS Article 140(1).

*Greece intervening*),<sup>30</sup> Judge Cançado Trindade found the Martens clause<sup>31</sup> relevant, because “the dictates of the public conscience” concern “the benefit of humankind as a whole.” In *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*,<sup>32</sup> Judge Cançado Trindade found that an exercise of territorial sovereignty to preserve a temple for the world cultural heritage<sup>33</sup> was to the benefit of humankind. In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*<sup>34</sup>, Judge Cançado Trindade found that establishing nuclear-weapon-free zones<sup>35</sup> to prohibit nuclear weapons was to the benefit of humankind. In

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<sup>30</sup> Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.

<sup>31</sup> The Martens clause was introduced into the preamble to the 1899 [Hague Convention II](#) – Laws and Customs of War on Land.

<sup>32</sup> Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Judgment, I.C.J. Reports 2013, p. 281.

<sup>33</sup> This case concerned the preservation of the Temple of Preah Vihear which is situated on the edge of a plateau that dominates the plain of Cambodia, and is dedicated to Shiva.

<sup>34</sup> Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833.

<sup>35</sup> Nuclear-weapon-free zones is a regional approach to strengthen global nuclear non-proliferation and disarmament norms and consolidate international efforts towards peace and security.



*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*<sup>36</sup>, Judge Cançado Trindade found that the benefit of humankind included fostering respect for life, evolution of recognizing and asserting norms of *jus cogens*, and obligations *erga omnes*. Also, establishing nuclear-weapon-free zones benefits humankind by fulfilling the needs and aspirations of peoples living under the fear of nuclear victimization.

Thus, whether the matter at issue is “the dictates of the public conscience”, preserving a temple, establishing nuclear-weapon-free zones, respecting life, or protecting norms of *jus cogens*, the Court has accepted arguments that they benefit humankind, because the beneficiary is not a small party but rather a larger community.

The Paris Agreement reinforces this broad interpretation, acknowledging that climate change is a common concern of humankind and obligating Parties to mitigate the threats of climate change.<sup>37</sup> Here, Rathearre’s mining activities collect polymetallic nodules to produce batteries for electric motor vehicles,<sup>38</sup> the use of which will reduce greenhouse gas emissions and climate change. A reduction in climate change benefits all humankind. Since Rathearre’s mining activities will benefit a large community, they benefit humankind. Furthermore, Verte Mining returns “unwanted sediment ... to the deep ocean”, to protect the environment of the deep sea as much as possible.<sup>39</sup> This also prevents harm to humankind.

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<sup>36</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255.

<sup>37</sup> Paris Agreement Art 3.

<sup>38</sup> Record ¶18.

<sup>39</sup> Record ¶23.

In contrast, if Rathearre may not extract the necessary minerals from the deep seabed, then it must do so by land-based mining, which would introduce human-rights and environmental harms. ActionAid, a global federation working to abolish poverty and injustice, describes the human rights impact of mining on land.<sup>40</sup> First, mining companies often secure no mining rights. Though mining companies in South Africa must make a settlement with local communities regarding their mining rights, almost 94% had not done so. Such mining activities, as in the Kalahari Manganese Field, greatly harm residents. Second, land-based mining causes air pollution that can lead to asbestos poisoning. Third, land-based mining causes water scarcity and water pollution. Residents in Maipeng, Magojaneng, and Vergenoeg areas, which are affected by Kalahari Manganese Field, get their drinking and farming water from boreholes, but the mining lowers the water table and worsens the water quality. In contrast, deep seabed mining avoids such harms and more benefits humankind.

In conclusion, Rathearre's deep-sea mining activities benefit humankind. Therefore, even if this Court finds UNCLOS binding on Rathearre, the mining activities do not violate UNCLOS.

**b. Rathearre's assertion of an EEZ is consistent with its rejection of the UNCLOS, because the UNCLOS only codified a right that already existed in custom, and that international custom is the basis of Rathearre's claim.**

Rathearre's assertion of an EEZ is consistent with its rejection of UNCLOS, because UNCLOS codified a right that already existed in international custom, and Rathearre bases its claim of an EEZ on that international custom, not on UNCLOS.

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<sup>40</sup> *Manganese Matters*, ActionAid Netherlands.

The concept of an EEZ is international custom. International custom is “a general practice accepted as law,”<sup>41</sup> that is: (1) a general practice, and (2) accepted as law. General practice is “a way of doing things that is widespread ... among the majority of a community.”<sup>42</sup> This Court has recognized that, in 1958, “[t]he concept of an exclusive economic zone in international law was still some long years away,”<sup>43</sup> but that by 1982, the concept of an EEZ had gained “general acceptance in practice.”<sup>44</sup> Thus, at least since 1982, EEZ has been general practice.

A general practice is “accepted as law” when “undertaken with a sense of legal right or obligation.”<sup>45</sup> Evidence includes “public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with [international] resolutions.”<sup>46</sup> Its very definition shows that States claim EEZs “with a sense of legal right”: it is “an area of coastal water and seabed within a certain distance of a country’s coastline, to which that country claims exclusive rights for fishing, drilling, and other economic activities.”<sup>47</sup> Because States claim

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<sup>41</sup> Statute of The International Court of Justice, Art 38(1)(b).

<sup>42</sup> *Oxford English Dictionary*, definition of “General practice” (Oxford 3d ed. 1989).

<sup>43</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61

<sup>44</sup> *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 3

<sup>45</sup> Int’l law Com’n, Draft conclusions on identification of customary international law, U.N. Doc, A/73/10/, at 122-156.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Oxford English Dictionary*, definition of “Exclusive Economic Zone” (Oxford 3d ed. 1989).

EEZs on the basis of legal rights, they are *inherently* a legal practice—that is, accepted as law. Every State that has claimed an EEZ has done so in law. For example, the first claim of an EEZ was made by the President of Chile on 23 June 1947,<sup>48</sup> in a “public statement[ ] made on behalf of” Chile and later recognized by numerous Latin American States in the Lima Declaration, an international resolution.<sup>49</sup> Furthermore, this Court has recognized the EEZ as a “concept of international law”.<sup>50</sup>

Therefore, at least since 1982, the concept of an EEZ has been a general practice accepted as law—in short, international custom.

Rathearre bases its claim of an EEZ on international custom, not on UNCLOS. Therefore, Rathearre is consistent when it both rejects UNCLOS and claims an EEZ.

**c. Rathearre may proceed with the proposed prospecting and exploration activities, without ISA authorization, because the VCLT Article 18 does not restrict Rathearre’s activities with regard to UNCLOS.**

VCLT Article 18(a) prohibits a State “from acts which would defeat the object and purpose of a treaty when ... [i]t has signed the treaty . . . subject to ratification, . . . until it shall have made its intention clear not to become a party to the treaty.” That is, between the

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<sup>48</sup> S. N. Nandan, *The Exclusive Economic Zone: A Historical Perspective*, in *The Law of the Sea – Le Droit et la Mer-EL Derecho y el Mar*, (Food and Agriculture Organization of the United Nations, 1987).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra* note 34, Judgment, 2009 I.C.J. Rep. 40, ¶70 (Fed 03).

time a State signs a treaty and ratifies the treaty, the State may not act against the treaty. But once a State makes clear it will not ratify the treaty, Article 18 no longer applies.<sup>51</sup>

Here, though Rathearre signed UNCLOS, it has made clear it will not ratify it. In a diplomatic note sent by Rathearre to Azarlus on June 25, 2021, Rathearre clarified its intent never to ratify UNCLOS and explained why.<sup>52</sup> As a result, VCLT Article 18 does not restrict Rathearre’s mining activities with regard to UNCLOS.

**d. Rathearre satisfied its responsibility, under both the CBD and CIL, to ensure that activities in its control do not damage the environment of areas beyond its national jurisdiction, by conducting an EIA prior to commencing mining.**

An EIA evaluates “environmental risk factors, such as permission and implementation of a project plan, plans, programs, policies, or legislation, and the results of the assessment are reflected in such decisions.”<sup>53</sup> Article 14 of the CBD requires Parties to institute “environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity.”<sup>54</sup> The ICJ has also repeatedly held that the requirement for an EIA is international custom. In *NICARAGUA v. COSTA RICA*, the Court

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<sup>51</sup> VCLT Art 18.

<sup>52</sup> Record ¶25.

<sup>53</sup> Lee Jaegon, *International Environmental Law*, 2015, p.108.

<sup>54</sup> CBD, Art.14.

emphasized the obligation of States to conduct EIA.<sup>55</sup> In *Pulp Mills on the River Uruguay (ARGENTINA v. URUGUAY)*, the Court held that custom requires EIA.<sup>56</sup> EIA must precede the activities in question. Again, an ITLOS advisory opinion held, “the obligation to conduct EIA is ... a general obligation under CIL.”<sup>57</sup>

As a related obligation, CBD Article 6 requires Parties to take steps to conserve and sustainably use biological diversity.<sup>58</sup> A report of the ILC on the work of its fifty-third session provides, “‘State likely to be affected’ means the State or States in the territory of which there is the risk of significant transboundary harm.”<sup>59</sup> “Significance” is determined by factual and objective standards. In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences to States likely to be affected by activities within the scope of these articles.<sup>60</sup>

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<sup>55</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 665.

<sup>56</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14.

<sup>57</sup> Responsibilities and obligations of states with respect to 11 activities in the area (advisory opinion of 1 february 2011), para. 145.

<sup>58</sup> CBD, Art 6.

<sup>59</sup> Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries p.152.

<sup>60</sup> *Ibid*, p.153.

Here, Rathearre conducted EIA in accordance with CBD Article 14<sup>61</sup>. Before Verte Mining’s mining activities commenced, it confirmed the mining activities would not significantly impact the marine environment. Therefore, Rathearre satisfied the procedural obligations of CIL and its duty of care, to determine appropriate measures to prevent or mitigate risks. Since it found no risk of significant impact on the environment on factual and objective standards, Rathearre took steps to conserve sustainable biodiversity. In addition, since the royal frilled sharks were thought to be long extinct,<sup>62</sup> a risk of harming them would be unforeseeable, so Rathearre had no obligation to consider it in EIA.

Thus, Rathearre satisfied its obligations under CBD Article 14 and CIL, to conduct EIA and ensure its mining activities would not harm the environment.

**2. The actions of the captain and crew of *Baleen Warrior* constitute three counts of piracy—an illegal act of violence and two illegal acts of detention—and the actions and inactions of Azarlus regarding *Baleen Warrior* violate international law.**

**a. The actions of the captain and crew of *Baleen Warrior* constitute two counts of piracy—an illegal act of violence and an illegal act of detention.**

UNCLOS and ReCAAP define piracy as “any illegal act of violence or detention ... committed for private ends by the crew or the passengers of a private ship ... and directed[] on the high seas, against another ship, or against persons or property on board such ship.”<sup>63</sup> We

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<sup>61</sup> Record ¶22.

<sup>62</sup> Record ¶1.

<sup>63</sup> UNCLOS Art 101, ReCAAP Art 1.

consider each element individually below.

**i. illegal act of violence.**

It was an act of violence when the crew of the *Baleen Warrior* fired paintballs at *The Crusher* and its crew. Violence is “the use of physical force.”<sup>64</sup> Firing the paintballs was an act of violence, because paintball guns fire paintballs with great physical force. Paint capsules fired from paintball guns exceed 300 kilometers per hour, which can cause serious or even fatal injuries if the victim is not wearing protective equipment.<sup>65</sup> Furthermore, the act of violence was illegal, because the crew of *The Crusher* did not agree to be fired upon.

Therefore, when the crew of the *Baleen Warrior* fired paintballs at *The Crusher* and its crew, it was an illegal act of violence.

**ii. Two illegal acts of detention**

It was an act of detention when the captain of the *Baleen Warrior* positioned his vessel “to block *The Crusher* so that *The Crusher* could not maneuver, thereby disrupting mining operations.”<sup>66</sup> A detention is “[a] keeping from going on or proceeding; hindrance to progress; compulsory delay.”<sup>67</sup> In our case, the *Baleen Warrior* caused a “compulsory delay” in the mining operations of *The Crusher* by positioning itself in front of *The Crusher*. This kept *The*

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<sup>64</sup> *Black’s Law Dictionary*, “violence” (West 11th ed. 2019).

<sup>65</sup> *Medical dictionary*, Definition of “Paintball”.

<sup>66</sup> Record ¶34.

<sup>67</sup> *Oxford English Dictionary*, definition of “detention” (Oxford 2d ed. 1989).



*Crusher* “from going on or proceeding”. Thus, the captain of the *Baleen Warrior* detained *The Crusher*.

It was also an act of detention when the crew of the *Baleen Warrior* fired paintballs at the crew of *The Crusher*, driving them belowdecks, because this also caused a delay in the mining operations.<sup>68</sup> Moreover, both acts of detention were illegal because neither the captain nor crew of *The Crusher* agreed to compulsory delay.

As a result, the captain and crew of the *Baleen Warrior* committed illegal acts of detention.

### **iii. Committed for private ends.**

ORCA’s actions were committed for private ends. “Private” is “of relating to, or involving an individual, as opposed to the public or the government.”<sup>69</sup> The opposite is a public end, where public is “connected with the government and the services it provides.”<sup>70</sup> This interpretation of “private” and “public” has been widely advocated and adopted. For example, the United States Court of Appeals, in the *Sea-Shepherd* case, defined “private ends” broadly as non-governmental ends.<sup>71</sup> “‘private ends’ include those pursued on personal, moral or philosophical grounds, such as *Sea Shepherd*’s professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends

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<sup>68</sup> Record at para. 34.

<sup>69</sup> *Oxford English Dictionary*, definition of “private”.

<sup>70</sup> *Oxford English Dictionary*, definition of “public”.

<sup>71</sup> *The Institute of Cetacean Research v. Sea Shepherd Conservation Society*, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013.

public.”<sup>72</sup> Just as in *Sea Shepherd*, ORCA’s belief that it acted to serve the ‘public good’ does *not* make its ends public; ORCA’s ends are private ends. Legal scholar Honniball also advocates this definition of “private”: “private ends are those activities which are lacking in state sanctioning, which defines acts taken for private ends as those not taken on behalf of a state.”<sup>73</sup>

In this case, ORCA is an NGO, and no government directs its actions. That is, ORCA is a private organization. As a result, its goals are “private ends”, not public or government ends. Moreover, since Azarlus never intervened in ORCA’s actions, ORCA’s acts were entirely “for private ends”.

**iv. By the crew or the passengers of a private ship.**

The *Baleen Warrior* is a private ship. Of a ship, “private” means “privately owned.”<sup>74</sup> Here, the *Baleen Warrior* is privately owned because it belongs to ORCA. It does not belong to Azarlus or any other government. Therefore, the *Baleen Warrior* is a private ship.

**v. Directed on the high seas, against another ship, or against persons or property on board such ship.**

The actions of the captain and crew of the *Baleen Warrior* were carried out on the high

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<sup>72</sup> *Ibid* at 1100.

<sup>73</sup> Arron N. Honniball, The ‘Private ends’ of international piracy: The necessity of legal clarity in relation to violent political activists (International Crimes Database, 2015).

<sup>74</sup> *Oxford English Dictionary*, definition of “private”.

seas. The high seas is all parts of the sea not included in the EEZ, or in other territorial seas.<sup>75</sup> *The Crusher* was conducting its mining activities in the AFZ,<sup>76</sup> “five nautical miles beyond Azarlus’s EEZ.”<sup>77</sup> Thus, *The Crusher* was operating on the high seas.

The actions of the captain and crew of the *Baleen Warrior* were directed against the *The Crusher* and its crew. First, the *Baleen Warrior* “intentionally interfered with Verte Mining’s vessel *The Crusher*,” blocking its progress and causing a compulsory delay in mining operations.<sup>78</sup> Second, the crew of the *Baleen Warrior* fired paintballs at *The Crusher* and its crew.<sup>79</sup>

Therefore, the actions of the captain and crew of the *Baleen Warrior* were directed on the high seas against *The Crusher* and its crew.

**b. UNCLOS and ReCAAP require Azarlus to act against the captain, crew, and ship of the *Baleen Warrior*; Azarlus’s refusal violates UNCLOS and ReCAAP.**

**i. Failure to act against the *Baleen Warrior* violates UNCLOS Article 94, which requires Azarlus to exercise its internal law over the ships flying its flag on the high seas under its domestic law.**

UNCLOS Article 94 requires every States to “effectively exercise its jurisdiction and

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<sup>75</sup> UNCLOS Art 86.

<sup>76</sup> Record ¶26.

<sup>77</sup> Record ¶19.

<sup>78</sup> Record ¶34.

<sup>79</sup> Ibid.

control in ... social matters over ships flying its flag. In particular, every State shall ... assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of ... social matters concerning the ship.”<sup>80</sup> A social matter relates “to human society, the interaction of the individual and the group, or the welfare of human beings as members of society.”<sup>81</sup> Piracy is a social matter because an illegal act “of violence or detention ... against another ship ... or against persons ... on board such ship” relates to “the welfare of human beings as members of society.” Here, the *Baleen Warrior* flies Azarlus’s flag, which makes Azarlus the flag state of the *Baleen Warrior*.<sup>82</sup> Therefore, Azarlus’s internal laws apply to the *Baleen Warrior* even when it is on the high seas. As a result, Azarlus must prosecute the piracy committed by the captain and crew of the *Baleen Warrior*.

**ii. When Azarlus argues that its criminal laws do not apply extraterritorially, Azarlus is violating international obligations, not providing a legal excuse.**

Even if this court rejects the flag state doctrine, Azarlus still should have revised its internal laws to apply extraterritorially. UNCLOS Article 100 and VCLT Article 26 preclude Azarlus from arguing that its domestic criminal laws do not apply extraterritorially.<sup>83</sup> Article 100 expressly requires States to “cooperate to the fullest possible extent in the repression of piracy on the high seas.” Furthermore, VCLT Article 26 provides, “Every treaty in force is

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<sup>80</sup> UNCLOS Art 94(1), (2)(b).

<sup>81</sup> *Merriam-Webster’s collegiate Dictionary*, social (Merriam-Webster 3d ed. 2011).

<sup>82</sup> Record ¶27.

<sup>83</sup> Record ¶40.

binding upon the parties to it” and requires parties to perform those obligations in good faith. As shown above, the captain and crew of the *Baleen Warrior* committed acts of piracy on the high seas, and in particular, the acts were “committed for private ends.”<sup>84</sup> Provided this Court agrees, then Azarlus must reverse its prior conclusion<sup>85</sup> and recognize that the acts were piratical. Then, Azarlus must repress the piracy. However, Azarlus has failed to make its laws against piracy apply extraterritorially, and Azarlus relies on this failure as an excuse against repressing piracy. Failure to conform domestic law to international obligations simply violates international obligations; it is *not* a legal excuse.

**iii. Failure to act against the *Baleen Warrior* violates ReCAAP Article 3, which requires Azarlus to repress piracy, to arrest pirates, and to seize ships used in for committing piracy.**

Given that the *Baleen Warrior*’s acts were piratical, and Azarlus must prosecute such acts, ReCAAP Article 3 requires Azarlus to take particular measures, and Azarlus’s refusal violates its obligations. ReCAAP Article 3 requires parties, “in accordance with ... applicable rules of international law ... “(a) to ... suppress piracy ... against ships; (b) to arrest pirates ... [and] (c) to seize ships ... used for committing piracy.” Here, Azarlus refused all three measures. First, Azarlus declined Rathearre’s demand to stop the *Baleen Warrior*’s illegal conduct.<sup>86</sup> Second, Azarlus declined Rathearre’s demand to arrest the captain and crew of the *Baleen*

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<sup>84</sup> Memorial part 2a.

<sup>85</sup> Record ¶40.

<sup>86</sup> Record ¶36.

*Warrior*.<sup>87</sup> Finally, Azarlus refused to seize the *Baleen Warrior*.<sup>88</sup> Declining these reasonable demands, and even to prosecute the *Baleen Warrior*, violates ReCAAP Article 3.

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<sup>87</sup> Record ¶40.

<sup>88</sup> *Ibid.*

## CONCLUSION AND PRAYER FOR RELIEF

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Respondent, The Republic of Rathearre, respectfully requests the Court to adjudge and declare that:

- (1) Rathearre's mining activities in the AFZ do not violate international law.
  
- (2) The actions of the *Baleen Warrior* captain and crew constituted piracy and Azarlus's actions and inactions regarding the *Baleen Warrior* violated international law.

RESPECTFULLY SUBMITTED

AGENTS OF RESPONDENT