Team No. 2344

27TH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION 2022-2023

BEFORE

THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

QUESTIONS RELATING TO DEEP-SEA MINING AND STATE RESPONSIBILITY

THE FEDERAL STATES OF AZARLUS

APPLICANT

v.

THE REPUBLIC OF RATHEARRE

RESPONDENT

MEMORIAL FOR THE APPLICANT

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QUESTIONS PRESENTED

I. WHETHER RATHEARRE'S MINING ACTIVITIES IN THE AZARLUS FRACTURE ZONE VIOLATE INTERNATIONAL LAW.

II. WHETHER THE ACTIONS OF THE *BALEEN WARRIOR* CAPTAIN AND CREW CONSTITUTED PIRACY AND AZARLUS' ACTIONS AND INACTIONS REGARDING THE *BALEEN WARRIOR* VIOLATED INTERNATIONAL LAW.

STATEMENT OF JURISDICTION

The Federal States of Azarlus ("Azarlus") and the Republic of Rathearre ("Rathearre") have submitted the present dispute to the International Court of Justice (hereinafter "the Court" or "ICJ") by Special Agreement dated 16 June 2022 and transmitted a copy thereof to the Registrar of this Court pursuant to Article 40(1) of the Statute of the International Court of Justice. Both parties have accepted the jurisdiction of this Court under Article 36(1) of this Court's Statute, and shall accept its judgment as final and binding and execute it in its entirety and in good faith.

STATEMENT OF FACTS

Azarlus is a sovereign, lower-middle income island State whose economy depends on fishing. Rathearre is a sovereign, high-income State.

In 2018, Rathearre established Verte Mining Corporation ("VMC") by Act of Parliament to conduct deep-seabed mining. VMC is wholly government-owned.

In January 2019, VMC announced its intention to conduct prospecting and exploration in the Azarlus Fracture Zone ("AFZ"), located just five nautical miles beyond Azarlus' EEZ. Azarlus requested that Rathearre refrain from any unauthorized mining activities in the AFZ. Nevertheless, VMC proceeded with prospecting and exploration in the AFZ. In July 2021, despite objections by Azarlus and protests by environmental groups, VMC commenced exploitation operations in the AFZ.

Between September 2021 and November 2021, a total of 11 dead royal frilled sharks were netted by fishing vessels in Azarlus' EEZ, approximately six nautical miles from VMC's operations. The royal frilled shark was previously thought extinct. Necropsies determined that the sharks had died before being netted. Despite the sharks' deaths, VMC continued mining operations.

The *Baleen Warrior* is a vessel owned by the Ocean Researchers and Cetacean Avengers ("ORCA"), a non-governmental environmentalist organisation. The *Baleen Warrior* is registered with Azarlus as its flag State. On 9 November 2021, the *Baleen Warrior* positioned itself to block VMC's mining ship, *The Crusher*. The *Baleen Warrior* crew fired paintballs at *The Crusher*, causing *The Crusher*'s crew to remain below deck and temporarily cease mining operations. *The Crusher*'s crew were not injured by the paintballs.

Rathearre asserted that the *Baleen Warrior* had committed piracy, calling on Azarlus to intervene. Azarlus responded that it would refrain from any immediate law enforcement or military action against the *Baleen Warrior*. After engaging with *The Crusher* for four days, the *Baleen Warrior* departed the Area.

On 10 December 2021, Rathearre demanded that Azarlus arrest and prosecute the *Baleen Warrior* captain and crew for piracy. Azarlus declined, having concluded following an investigation that their actions did not constitute piracy. Azarlus repeated its request that VMC cease mining in the AFZ. This request was not met.

SUMMARY OF ARGUMENT

I. Rathearre's mining activities violated international law.

The deep seabed is the common heritage of mankind. The key provisions of Part XI of UNCLOS have become customary international law, and Rathearre had no right to conduct deep-seabed mining in the AFZ. Rathearre breached its obligations under the CBD, UNCLOS and customary international law. Rathearre caused environmental harm which it had a duty to prevent, and failed to notify and cooperate with Azarlus. Rathearre's actions cannot be justified by UNFCCC or the Paris Agreement.

II. The actions of the *Baleen Warrior* captain and crew did not constitute piracy and Azarlus' actions and inactions regarding the *Baleen Warrior* did not violate international law.

The acts of the *Baleen Warrior* captain and crew did not constitute illegal acts of violence. Further, their acts were not committed for private ends. Therefore, the acts could not constitute piracy under international law.

Azarlus complied with its international law obligations under ReCAAP and UNCLOS. Azarlus effectively exercised its jurisdiction and control over the *Baleen Warrior*, and cooperated in the suppression of piracy, by conducting an investigation at Rathearre's request. Since no piracy was found to be committed, Azarlus had no obligation to take further legal or military actions.

ARGUMENTS

I. Rathearre's mining activities violated international law.

A. VMCs actions should be attributed to Rathearre.

Conduct may be attributed to a State if the persons carrying out the conduct are acting under the control of that State in carrying out that conduct.[1] VMC is a wholly-owned government corporation established by an Act of the Rathearrean Parliament.[2] The Rathearrean Government effectively controls VMC's activities. Therefore, VMC's mining activities are attributable to Rathearre, and Rathearre is responsible for the violations of international law which flow therefrom.

B. Rathearre's mining activities breached customary international law created by Part XI of UNCLOS.

1. Rathearre is bound by Part XI of UNCLOS because UNCLOS has achieved the status of customary international law.

Certain key provisions of UNCLOS,[3] namely Articles 136, 137, 138 and 140, have generated rules of customary international law.

A treaty provision may generate a rule which subsequently becomes a new rule of customary international law.[4] Firstly, such provisions must "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".[5] Articles 136, 137, 138 and 140

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[1] ILC, Rep. on the Work of Its Fifty-Third Session, ¶ 77, art. 8, U.N. Doc. A/56/10 (2001); Military and Paramilitary Activities in and against Nicaragua (Nicar v. U.S.), Merits, Judgement, 1986 I.C.J. Rep. 14, ¶ 115 (June 27).

[2] Record, ¶ 18.

[3] United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[4] ILC, Rep. on the Work of Its Seventieth Session, ¶ 65, Conclusion 11(1)(c), U.N. Doc. A/73/10 (2018); *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), Judgement, 1969 I.C.J. Rep. 327, ¶ 71 (Feb. 20).

[5] *North Sea Continental Shelf*, ¶ 72.

meet this criteria. Article 136 lays down the underlying principle that the Area and its resources constitute the common heritage of mankind. Article 137 lays down the general rule that no State may carry out deep-seabed mining activities in the Area outside of the UNCLOS legal regime. Article 138 provides that States' conduct in the Area must be in accordance with the provisions of Part XI. Article 140 provides a general rule that all activities in the Area must be carried out for the benefit of mankind as a whole.

Articles 136, 137, 138 and 140 are also supported by settled State practice and *opinio juris*,[6] which may be satisfied if there is a very widespread and representative participation in the convention.[7] UNCLOS has achieved widespread and representative participation, with 167 State Parties, which is a sufficiently large proportion of all States.[8]

There also exists State practice and *opinio juris* among non-State Parties to UNCLOS in support of Articles 136, 137, 138 and 140 as customary international law. Non-Party States have enacted deep-seabed mining legislation compatible with UNCLOS provisions. For example, the United States of America's (US) Deep Seabed Hard Mineral Resources Act (DSHMRA)[9] establishes a "Deep Seabed Revenue Sharing Trust Fund"[10] for "the sharing among nations of the revenues from deep seabed mining",[11] which aligns with Article 140 of UNCLOS and indicates that the US recognizes a legal obligation to share benefits in observance of the "common heritage of mankind" principle.[12] This is evidence of *opinio juris* supportive of the UNCLOS deep-seabed regime.

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[6] *See, e.g.*, Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 64 (July 8).

[7] *North Sea Continental Shelf* ¶ 73.

[8] Sarei v Rio Tinto, PLC, 456 F.3d 1069, 1078 (9th Cir. 1976).

[9] Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (2002).

[10] *Id.* § 1472.

[11] *Id.* § 1472(d).

[12] *See* Christopher Garrison, *Beneath the Surface: The Common Heritage of Mankind*, 1 KEStudies, at 65 (July, 2007), www.kestudies.org/wp-content/uploads/2019/06/chrisg_21-144-3-PB.pdf.

Non-Party States have also demonstrated widespread acceptance of the UNCLOS deep-seabed regime through indirect participation. Almost all the non-Party States are Observer States at the ISA[13], evincing their recognition of the significant role played by the ISA. Additionally, of the non-Party States, 14 are signatories to UNCLOS and one has signed the 1994 Agreement.

Therefore, Articles 136, 137 and 140 of UNCLOS ought to be considered customary international law and are binding upon Rathearre as customary rules notwithstanding that Rathearre is not Party to UNCLOS.[14]

2. Rathearre breached customary international law as reflected in Articles 137, 138 and 140 of UNCLOS.

a. Rathearre breached Articles 137 and 138 of UNCLOS by unilaterally carrying out deep-seabed mining outside of the UNCLOS regime.

Article 138 provides that States' conduct in the Area must be in accordance with the provisions of Part XI. Under Part XI, exploration and exploitation activities in the Area may only be carried out by State Parties, with authorization from the ISA.[15] Therefore, contrary to Rathearre's assertions,[16] it did not have a right under customary international law to carry out deep-seabed mining outside of the UNCLOS legal regime. Rathearre is not a Party to UNCLOS[17] and did not have authorization from the ISA to carry out its activities in the AFZ. Thus, Rathearre had breached Article 138.

Article 137 of UNCLOS prohibits every State from alienating resources in the Area, except in accordance with the provisions of UNCLOS and ISA rules and regulations. Rathearre did not have ISA

[13] *Observers*, International Seabed Authority, https://www.isa.org.jm/observers (last visited Nov. 10, 2022).

[14] See Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[15] UNCLOS art. 153.

[16] Record, ¶ 21.

[17] Record, ¶ 8.

authorization to carry out exploitation activities in the AFZ. Moreover, Rathearre's exploitation activities were not conducted in accordance with ISA regulations, since the ISA has yet to issue exploitation regulations. Thus, Rathearre's exploitation activities breached Article 137.

b. Rathearre breached Article 140 of UNCLOS as VMC's mining activities were not carried out for the benefit of mankind as a whole.

Article 140 requires that activities in the Area be carried out for the benefit of mankind as a whole. Particularly, Article 140(2) requires that there be equitable sharing of financial and other economic benefits derived from activities in the Area.

VMC's mining activities did not benefit mankind as a whole. The minerals recovered from Rathearre's mining operations would only enhance Rathearre's capacity to produce electric vehicles and any financial benefits would accrue solely to Rathearre. Despite being a high-income State,[18] Rathearre did not take steps to redistribute the financial benefits from its mining activities to lower-income States. Therefore, Rathearre has breached Article 140 of the UNCLOS.

C. Rathearre breached its obligation, under the CBD and customary international law, to ensure that its mining activities did not cause damage to the environment.

As a Party to the CBD, Rathearre was obliged to ensure that activities within its jurisdiction or control did not cause damage to the environment of other States or areas beyond national jurisdiction.[19] This same obligation exists under customary international law.[20]

1. Rathearre's activities caused significant harm to the marine environment in Azarlus' EEZ, the Area and the high seas.

[18] Record, ¶ 1.

[19] Convention on Biological Diversity art.3, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

[20] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 29 (July 8).

Firstly, deep-seabed mining causes physical disturbance to the seafloor, disrupting the habitats of marine organisms.[21] Studies of experimental-mining sites have found that seafloor habitats do not fully recover from the damage caused by mining even decades after the cessation of mining.[22]

Secondly, Rathearre's mining activities produced sediment plumes.[23] Such sediment plumes harm marine organisms by impeding their respiration and feeding, and may contain high concentrations of heavy metals and acidic wastes.[24] The release of sediment plumes is likely to affect commercial fish species.[25]

Thirdly, Rathearre's submerged nodule collector vehicles generated noise and light.[26] Deep-sea species generally only experience low levels of noise,[27] and an increase in noise adversely impacts marine organisms.[28] Light levels at the deep-seabed are naturally low, and bright lights on nodule collector vehicles can cause permanent retinal damage to deep-sea organisms.[29]

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[21] Hartmut Bluhm, *Re-establishment of an abyssal megabenthic community after experimental physical disturbance of the seafloor*, 48 Deep Sea Rsch. Part II: Topical Stud. Oceanogr. 3841 (2001).

[22] *See, e.g.*, Daniel O.B. Jones et al., *Biological responses to disturbance from simulated deep-sea polymetallic nodule mining*, 12 PLoS ONE (2017).

[23] Record, ¶ 23, referring to MIT Mechanical Engineering, *Visualizing Deep-sea Mining*, YouTube (Dec. 10, 2019), https://www.youtube.com/watch?v=Lwq1j3nOODA.

[24] Cindy L. Van Dover, *Mining seafloor massive sulphides and biodiversity: what is at risk?*, 68 ICES J. Marine Sci. 341 (2010).

[25] Namibian Marine Phosphates, *Environmental Impact Assessment Report - Dredging of Marine Phosphates from ML 170* (2012), https://www.namphos.com/images/downloads/Environmental_Impact_Assessment_2012_Final_Report.pdf.

[26] See MIT, *Visualizing Deep-sea Mining*, *supra* note 23.

[27] Musa Bashir et al., *Concept for seabed Rare Earth Mining in the Eastern South Pacific*, 1 The LRET Collegium 2012 Series (2012), at 58, https://www.southampton.ac.uk/assets/imported/transforms/content-block/UsefulDownloads_Download/7C8750BCBBB64FBAAF2A13C4B8A7D1FD/LRET%20Collegium%202012%20Volume%201.pdf.

[28] Catalina Gomez et al., *A systematic review on the behavioural responses of wild marine mammals to noise: the disparity between science and policy*, 94 Can. J. Zool. (2016) 801.

[29] *See, e.g.*, Peter J. Herring et al., *Are vent shrimps blinded by science?*, 398 Nature 116 (1999).

The above effects would have harmed marine life at the AFZ and the surrounding waters. Studies have shown that deep-seabed mining indeed results in the mortality of organisms,[30] and there is a low level of recolonization by marine organisms at mining sites even after decades.[31] Rathearre's mining activities would have caused a long-term loss of biodiversity in the high seas and the Area.

Moreover, the effects of Rathearre's mining activities extended to Azarlus' EEZ. Sediment plumes may disperse over 10 km away,[32] and Azarlus' EEZ was located just five nautical miles from Rathearre's mining activities.[33] Noise from deep-seabed mining may propagate up to 600 km away.[34] Deaths of marine organisms in one area may also adversely affect marine organisms in a much larger area through ecological relationships. Hence, Rathearre's mining activities would also have harmed marine life in Azarlus' EEZ.

Although a clear causal connection has not been established,[35] Rathearre's mining activities were likely to have contributed to the death of the royal frilled sharks in Azarlus' EEZ. Firstly, the dead royal frilled sharks were found just six nautical miles from VMC's operations. Secondly, no royal frilled sharks have been sighted since the mid-1850s;[36] but after the commencement of Rathearre's mining operations, 11 dead royal frilled sharks surfaced. Thirdly, the closely-related frilled sharks (*Chlamydoselachus anguineus*) are a deep sea-dwelling species.[37] The royal frilled sharks are also likely to inhabit the deep sea. They were liable to come into close proximity to VMC's mining activities, and

[30] Cindy L. Van Dover et. al, *Biodiversity loss from deep-sea mining*, 10 Nature Geosci. 464 (2017).

[31] *See* Jones et al., *supra* note 22; Bluhm, *supra* note 21.

[32] *See e.g.*, Nautilus Minerals, *Environmental Impact Statement* (2008).

[33] Record, ¶ 19.

[34] Bashir et al., *supra* note 27.

[35] Record, ¶ 33.

[36] Record, ¶ 1.

[37] *See* David A. Ebert, Sharks, Rays, and Chimaeras of California 50-52 (2003).

the mining activities were likely to disrupt their natural habitat.[38] Hence, it is highly plausible that Rathearre's mining activities contributed to the death of the royal frilled sharks.

Considering that the royal frilled sharks were thought to be extinct since the mid-1850s,[39] they represent a potentially endangered species that deserves greater protection. The closely-related *Chlamydoselachus anguineus* has been classified as an at-risk species.[40] Moreover, considering that the closely-related *Chlamydoselachus anguineus* are considered to be living fossils,[41] the royal frilled sharks are likely also a species of biological significance. Therefore, the death of 11 royal frilled sharks constituted "significant" harm.

2. Rathearre breached its due diligence obligations.

The obligation for States to ensure that their activities do not cause harm to the environment is a due diligence obligation.[42] A State is required "to exert its best possible efforts to minimize the risk" of transboundary harm.[43] Rathearre failed to exercise its best possible efforts.

A State is required to conduct an environmental impact assessment ("EIA") when it has reasonable grounds for believing that their activities may cause significant harm to the marine environment.[44] Although Rathearre announced that an EIA had been conducted, no indication exists that such EIA satisfied the requirements under international law. Mere assertions by a State that it has

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[38] *See supra* Section I.C.1.

[39] Record, ¶ 1.

[40] Clinton Duffy et al., *Conservation status of New Zealand Chondrichthyans (Chimaeras, Sharks and Rays)*, New Zealand Department of Conservation (2018), at 9, https://www.doc.govt.nz/globalassets/documents/science-and-technical/nztcs23entire.pdf.

[41] *The Frilled Shark—The Oldest Living Type of Vertebrates,* 56 Sci. Am, 130 (Feb. 26, 1887)

[42] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgement, 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20, 2010).

[43] ILC, Rep. on the Work of Its Fifty-Third Session, ¶ 98, art. 3 commentary (7), U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles on Transboundary Harm*].

[44] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.) and *Construction of a Road* (Nicar. v. Costa Rica), Judgement, 2015 I.C.J. Rep. 665, ¶ 104 (Dec. 16); *Pulp Mills*, ¶ 204.

conducted an assessment do not equate to evidence that it has actually carried out an assessment.[45] Moreover, an EIA must be conducted before the implementation of a project.[46] It appears that Rathearre only conducted an EIA *after* it had commenced prospecting and exploration in the AFZ.[47]

Therefore, Rathearre has breached its due diligence obligation to ensure that its activities did not harm the environment.

D. Rathearre breached its obligation, under customary international law, to apply a precautionary approach in carrying out its mining activities.

In order to protect the environment, States are under an obligation to apply the precautionary approach in their activities, as a matter of customary international law.[48] The customary status of the precautionary approach is supported by its inclusion in a large number of international treaties.[49]

[45] see *Construction of a Road*, ¶ 154; *South China Sea Arbitration* (Phil. v. China), Perm. Ct. Arb. Case No. 2013-19, Award, ¶ 989 (2016).

[46] *Pulp Mills* at ¶ 205.

[47] Record, ¶ 22.

[48] *See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 10, ¶ 135; *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgement, 2010 I.C.J. Rep. 14, 135, ¶¶ 67-68 (Apr. 20, 2010) (separate opinion of Judge Cançado Trindade).

[49] *See, e.g.* Cartagena Protocol on Biosafety to the Convention on Biological Diversity, arts. 1, 10(6), Jan. 29, 2000, 2226 U.N.T.S. 208; United Nations Framework Convention on Climate Change, art. 3(3), May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Vienna Convention for the Protection of the Ozone Layer, preamble ¶ 5, Mar. 22, 1985, 1513 U.N.T.S. 293; Convention for the Protection of the Marine Environment of the North-East Atlantic. art. 2(2)(a), Sept. 22, 1992, 2354 U.N.T.S. 67.

Moreover, the precautionary approach has been applied by various international and regional courts[50]. The precautionary approach requires that, where there is a risk of serious or irreversible damage to the environment, States must take measures to prevent environmental harm, notwithstanding that there is a lack of full scientific certainty.[51]

Rathearre's mining activities in the AFZ carried a risk of serious and irreversible damage to the environment. The ecosystems surrounding polymetallic nodules are a unique habitat for marine megafauna.[52] Examinations of experimental deep-seabed mining sites indicate that deep-seabed mining can cause permanent damage to these habitats and lead to significant biodiversity loss.[53] In light of the existing body of scientific knowledge of these risks of deep-seabed mining, Rathearre's decision to commence mining activities in the AFZ was a breach of its obligation to adopt a precautionary approach.

Moreover, Rathearre failed to cease its mining activities despite the deaths of 11 royal frilled sharks in the Azarlus' EEZ just six nautical miles from VMC's operations.[54] There was a real possibility that VMC's mining activities had contributed to the sharks' deaths.[55] This posed a risk of serious and irreversible damage to the environment, especially in light of the rarity of the species.[56] Accordingly, once Rathearre became aware that royal frilled sharks had perished in close proximity to VMC's

[50] *See, e.g.*, Case T-74/00, Artegodan GmbH v. Comm'n, 2002 ECR II-4945, ¶¶ 184-185; Tatar v. Rom., App. No. 67021/01, ¶ 120 (Jan. 27, 2009), https://hudoc.echr.coe.int/eng?i=001-90909; Case C-77/09, Gowan Comercio Internacional e Servicos Lda v. Ministero della Salute, ECLI:EU:C:2010:803, ¶ 75 (Dec. 22, 2010).

[51] U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 15, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter Rio Declaration].

[52] *See* Virginie Tilot, *Biodiversity and Distribution of the Megafauna*, 69 Intergov. Oceanograph. Comm'n Tech. Series (2006), http://unesdoc.unesco.org/images/0014/001495/149556e.pdf.

[53] Vanreusel et al., *Threatened by mining, polymetallic nodules are required to preserve abyssal epifauna*, 6 Sci. Rep. (2016).

[54] Record, ¶¶ 28-32.

[55] See *supra* Section I.C.1.

[56] See *supra* Section I.C.1.

operations, Rathearre should have exercised precaution and ceased its mining activities in the AFZ immediately.

E. Rathearre breached its obligations, under the CBD and customary international law, to cooperate with, notify and consult Azarlus.

1. Rathearre breached its obligation to cooperate with Azarlus.

As a Contracting Party to the CBD, Rathearre has an obligation to cooperate with other Contracting Parties for the conservation of biological diversity,[57] particularly in the mining sector.[58] The obligation of States to cooperate with one another also exists under customary international law.[59]

Given that Rathearre conducted its mining activities just five nautical miles beyond Azarlus' EEZ,[60] Azarlus' marine environment was highly likely to be affected. Rathearre, however, failed to cooperate or coordinate with Azarlus in planning or executing the mining activities, and did not consult Azarlus in conducting the EIA. On numerous occasions, Azarlus warned Rathearre of the risks of mining activities and requested that Rathearre refrain from their continuation.[61] Rathearre disregarded these requests. In so doing, Rathearre breached its obligation to cooperate.

2. Rathearre breached its obligation to notify and consult Azarlus.

States have an obligation under customary international law to notify, and consult with, the potentially affected State in respect of activities which carry a risk of significant transboundary harm.[62]

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[57] CBD art. 5.

[58] *Decision Adopted by Conference of the Parties to the Convention on Biological Diversity*, CBD/COP/DEC/14/3 (Nov. 2018, 30).

[59] *See, e.g.*, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 4, ¶ 140; Rio Declaration, Principles 7, 27.

[60] Record, ¶ 19.

[61] Record, ¶¶ 20, 24, 40.

[62] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road (Nicar. v. Costa Rica), Judgement, 2015 I.C.J. Rep. 665, ¶ 106 (Dec. 16); *see also* Rio Declaration, Principle 19; *Draft Articles on Transboundary Harm*, arts 8-9.

As a Contracting Party to the CBD, Rathearre was also under an obligation to notify and consult with other States on activities under its control which were likely to have significant adverse effects on biological diversity.[63] The notification must be given prior to carrying out the activities and in a timely manner.[64]

Rathearre's mining activities, conducted in close proximity to Azarlus' EEZ, carried a risk of causing significant transboundary harm to Azarlus. Therefore, Rathearre was obliged to notify Azarlus of its mining activities. Rathearre's public announcements[65] and diplomatic notes[66] were unilateral declarations of its intent to proceed with mining, and did not suffice to discharge Rathearre's obligation to notify.

Rathearre's announcements and diplomatic notes were also not timely. Less than six months after Rathearre's announcement of its intention to conduct prospecting and exploration,[67] it proceeded with prospecting and exploration.[68] Just one month after announcing its plan to proceed with exploitation activities,[69] Rathearre commenced exploitation activities[70].

F. Rathearre cannot rely on the Paris Agreement to justify its actions.

Rathearre has invoked its commitments under the Paris Agreement to justify its mining activities.[71] However, the Paris Agreement does not stipulate the specific mitigation measures that

[63] CBD, art. 14(1)(c).

[64] Rio Declaration, Principle 19; *see also Draft Articles on Transboundary Harm*, art. 8(1).

[65] Record, ¶¶ 19, 22.

[66] Record, ¶¶ 21, 25.

[67] Record, ¶ 19.

[68] Record, ¶ 22.

[69] *Id*.

[70] Record, ¶ 26.

[71] Record, ¶ 21.

States must take to achieve the NDCs, and should not be construed as legal authority for Rathearre's mining in the AFZ.

Rathearre was under no specific obligation to phase out its gasoline-powered vehicles and promote the use of electric vehicles[72] to achieve its pledged emission reductions under its NDCs. There were numerous other ways by which Rathearre could have met its NDCs, such as reducing greenhouse gas emissions in other sectors.

If Rathearre wished to phase out gasoline-powered vehicles, it did not have to carry out deep-seabed mining. Rathearre could instead have improved its underdeveloped public transportation system[73] to reduce reliance on private vehicles. Adopting alternative measures to achieve its NDCs would be consistent with the flexible approach advocated under the UNFCCC.[74]

In any event, Rathearre's Paris Agreement obligations must be understood in a manner consistent with the context of the Paris Agreement and UNFCCC[75]. This includes the importance of protecting ecosystems and biodiversity[76] and ensuring that States' activities do not cause transboundary harm.[77] Rathearre's mining activities have damaged the marine environment in Azarlus' EEZ and the AFZ, resulting in a loss of biodiversity. This contradicts the intent of the Paris Agreement and the UNFCCC. Therefore, Rathearre cannot rely on the Paris Agreement to justify its mining activities.

[72] Record, ¶ 17.

[73] Record, ¶ .

[74] UNFCCC, preamble ¶ 18.

[75] VCLT, arts. 31(1)-(2).

[76] Paris Agreement, preamble ¶ 13, U.N. Doc. FCCC/CP/2015/L.9/REV.1 (12 Dec. 2015) [hereinafter Paris Agreement]

.[77] UNFCCC, preamble ¶ 8.

II. The actions of the *Baleen Warrior*'s captain and crew did not constitute piracy. In any case, Azarlus' actions and inactions regarding the *Baleen Warrior* did not violate International Law.

A. The actions of the Baleen *Warrior*'s captain and crew did not constitute piracy.

Under international law, piracy is defined as follows:[78]

> *"piracy" consists of any of the following acts:*
>
> > *(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
> >
> > > *(i) on the high seas, against another ship, or against persons or property on board such ship;*
> >
> > > *(ii) against a ship, persons or property in a place outside the jurisdiction of any State;*
>
> ...

The acts of the *Baleen Warrior*'s captain and crew did not constitute piracy, since they (1) were not illegal; (2) did not constitute violence, detention, or depredation; and (3) were not committed for private ends.

1. The Baleen Warrior's acts were not illegal.

An illegal act is one dissociated from lawful authority.[79] In interfering with *The Crusher's* mining activities, the *Baleen Warrior*'s crew acted with the purpose of safeguarding and conserving nature in the Area pursuant to Principle 21(c) of the World Charter for Nature, which provides that "individuals" and "groups" shall "[i]mplement the applicable international legal provisions for the conservation of nature and the protection of the environment". Principle 21(e) of the World Charter for Nature further provides that "individuals" and "groups" shall "[s]afeguard and conserve nature in areas beyond

[78] Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia art. 1; Nov. 11, 2004, https://www.recaap.org/resources/ck/files/ReCAAP%20Agreement/ReCAAP%20Agreement.pdf [hereinafter ReCAAP]; *see also* UNCLOS, art. 101.

[79] Clyde H. Crockett, *Toward a Revision of the International Law of Piracy*, 26 Depaul L. Rev. 78 (1976).

national jurisdiction". Since the *Baleen Warrior*'s crew was acting pursuant to lawful authority under the above principles, their acts were not illegal.

2. The Baleen Warrior's acts did not constitute violence, detention or depredation.

The acts of the *Baleen Warrior*'s crew clearly did not constitute "detention" or "depredation". They also did not constitute "violence". "Violence" requires deliberate exercise of physical force against a person or property, characterized by the doing of deliberate harm or damage.[80] Paintballs used by the *Baleen Warrior*[81] are commonly used in sports and entertainment. They are unlikely to cause damage. No threat to *The Crusher*'s safe navigation and personal safety of its crew. In fact, no personnel or property onboard the Crusher were harmed.[82] This distinguishes the present case from case such as the *Sea Shepherd*,[83] where the acts which endangered the safety of the target ship's crew included "fouling propellers", "hurling fiery and acid-filled projectiles", and ship-ramming.

Furthermore, Article 31(3) of the VCLT provides that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account for interpretation. In practice, the ReCAAP Information Sharing Centre recognizes "intensity of violence" as a factor for classifying piracy and armed robbery cases, including the type of weapons used and treatment of crew. This supports that "violence" for the purpose of defining piracy requires some capacity to cause damage. The present case lacks the level of "violence" required to constitute piracy.

An interpretation of "violence" wide enough to include the *Baleen Warrior*'s conduct, which lacked a damaging character, is also incongruent with ReCAAP's objective to "suppress piracy" and protect "safety of ships, including their crew". The crime of piracy attracts universal jurisdiction[84] and

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[80] See, e.g., *violence, violent*, Oxford English Dictionary (2nd ed. 1989).

[81] Record, ¶ 34.

[82] *Id*.

[83] Institute of Cetacean Research v. Sea Shepherd Conservation Society, 153 F.3d 940 (9th Cir. 2013).

[84] UNCLOS art. 105.

is an exception to the general rule of exclusive jurisdiction of flag States over ships on the high seas.[85] This is due to its serious threat to maritime navigation, a common interest of all States. A restrictive approach requiring considerable severity of the acts should be adopted, because universal criminal jurisdiction should "be exercised only over those crimes regarded as the most heinous by the international community".[86] The international community has not granted universal jurisdiction over lesser violations to the general interest on the high seas, *e.g.*, illegal fishing.[87]

Moreover, suppression of piracy enjoys a special status as one of the traditional areas of peremptory norms of general international law (*jus cogens*).[88] Other crimes accorded such a status include genocide, war crimes, and crimes against humanity. Relatively trivial acts of interference should not be categorized with such egregious offences. The severity of the *Baleen Warrior*'s act of obstruction and usage of paintballs are not comparable with the said offences. "Piracy" should not be expanded to include such acts without a threat to the freedom of navigation and the safety of ships on the high seas.

3. The Baleen Warrior's environmental objective is not a "private end".

a. <u>The definition of "private ends" was not intended to encompass environmental objectives.</u>

The "private ends" requirement, under UNCLOS and ReCAAP, traces it provenance to the Harvard Draft Convention on Piracy ("Harvard Draft Convention")[89] and the *Matsuda Draft Provisions for the Suppression of Piracy.*[90] The drafters of the *Matsuda Draft* intended the "private ends"

[85] UNCLOS art. 92.

[86] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v Belg.), Judgement, 2002 I.C.J. Rep. 3, ¶¶ 60-61 (Feb. 14) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

[87] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea,* 25 (2009).

[88] Int'l L. Comm'n, Rep. on the Work of Its Seventy-Third Session, ¶ 44, conclusion 23 commentary (15), U.N. Doc. A/77/10 (2022).

[89] *The Draft Convention on Piracy, Supplement: Research in International Law, Part IV – Piracy*, 26 Am. J. Int'l L. 739 (1932) [hereinafter Harvard Draft Convention].

[90] *Matsuda's Draft Provisions for the Suppression of Piracy, 1926* (1926) 20 Am. J. Int'l L. Supp. 222, 228 [hereinafter *Matsuda Draft*]

requirement to mean that acts committed for "a purely political object" would not constitute piracy.[91] The drafters of the Harvard Draft Convention intended to exclude from the definition of piracy "all cases of wrongful attacks on persons or property for political ends".[92] Considering that the term "private ends" was adopted in subsequent treaties and in UNCLOS and ReCAAP without further debate, it should continue to bear the meaning intended by the drafters of the Harvard Draft Convention and the *Matsuda Draft*.

The *Baleen Warrior*'s crew targeted Rathearre's mining activities to prevent harm to the marine environment. Such environmental goals are political, not private, ends. Environmental issues are widely considered to be political and public issues, and the conservation of the environment is a public interest.

The drafters of the Harvard Draft Convention included the "private ends" requirement with a view towards excluding from universal jurisdiction politically-motivated acts undertaken "on behalf of states, or of recognized belligerent organisations, or of unrecognised revolutionary bands".[93] The intent evidenced here is that acts on the high seas which do not threaten the common interest of all States should not be subject to universal jurisdiction.

Environmental activists only specifically target ships which conduct activities that are especially harmful to the environment. It is inappropriate to place environmental activists on the high seas in the same legal category as pirates and subject them to universal jurisdiction.

b. <u>There exists state practice in support of the position not to treat environmental objectives as "private ends".</u>

[91] *See id.*.

[92] Harvard Draft Convention, at 786.

[93] *Id.*

The Japanese Government has in principle taken the stance that obstructive acts against Japanese research whaling ships by environmentalists are not piracy.[94] It has declared such acts would not constitute piracy under the Japanese Law on Punishment of and Measures against Acts of Piracy. This was based on the belief that "inclusion of such obstructive acts in acts of piracy is difficult to be generally understood in international society".[95]

The two domestic decisions which held that environmental goals constitute "private ends"[96] do not constitute a settled practice.[97] They are insufficient to expand the customary law definition of "piracy" to include environmentally-motivated protests. Moreover, in these decisions, the courts failed to consider the aforementioned *travaux préparatoires* necessary in interpreting treaty law. In *Castle John*, the Belgian Court of Cassation reasoned that the environmentalists were motivated by private ends, being "purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective".[98] This reasoning contradicts the drafters' intention that "private ends" exclude political motivations. In *Sea Shepherd*, the US Court of Appeals for the Ninth Circuit placed considerable weight on the decision in *Castle John*,[99] but likewise failed to consider the *travaux préparatoires* and drafting intention.

More weight ought to be placed on the position that "private ends" exclude political objectives, which is consistent with the intention of the provision. The environmental goals of the *Baleen Warrior*'s captain and crew were therefore not "private ends".

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[94] *Minutes of the Special Committee on Combating Piracy and Terrorism*, House of Representatives, 171th Sess, No. 6, at 21 (Apr. 22, 2009), *quoted in* Atsuko Kanehara, *Japanese Legal Regime Combating Piracy – The Law on Punishment of and Measures against Acts of Piracy*, 53 Japan Y.B. Int'l L. 457, 469-489 (2010).

[95] *Id*.

[96] Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin, 77 Int'l L. Rep. 537 (1986) (Cass.) (Belg.); *Sea Shepherd*.

[97] For the requirement of a settled practice, *see* cases cited *supra* note 6.

[98] *Castle John*, ¶ 540.

[99] *Sea Shepherd*, 944.

B. Azarlus' actions and inactions did not constitute a breach of its international law duty.

Azarlus' actions and inactions regarding the *Baleen Warrior* were consistent with international law. As the *Baleen Warrior*'s flag State, Azarlus is obligated to comply with UNCLOS's requirements in the ship nationality registration, and to effectively exercise jurisdiction and control over the ship. Additionally, Azarlus is a party to both UNCLOS and ReCAAP, and is obliged to cooperate to the fullest possible extent in the suppression of piracy. Azarlus has complied with these obligations.

1. Azarlus' allowing the ORCA ships to register under its flag was consistent with its international law obligations.

Article 91(1) of UNCLOS requires States to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory", and there must be a "genuine link" between the State and the Ship. This is supplemented by the Article 94 obligation to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".

There is no indication that the *Baleen Warrior* failed to fulfil such conditions. Reading Article 91 and Article 94(1) in conjunction, for the purposes of effective control by the flag State, it is not necessary for the link to be between the state and the actual owner of the ships (here, ORCA). It is sufficient that the management of the ship be "carried out from a place of business in [the flag State] by a person authorised to represent the shipowner".[100]

2. Azarlus has effectively exercised its flag State jurisdiction and control in relation to the Baleen Warrior, and has complied with its cooperative obligation under international law.

[100] Case C-299/02, Comm'n v. Neth., ¶¶ 25-26, (Oct. 14, 2004), https://curia.europa.eu/juris/document/document.jsf?text=&docid=49218&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=143045.

By conducting an investigation into the matter,[101] Azarlus has effectively exercised its flag State jurisdiction and control.

Article 94(5) UNCLOS requires the flag State to "conform to generally accepted international regulations, procedures and practices" in exercising its jurisdiction and control. Conducting an investigation over suspected incidents of piracy is a generally accepted international practice.[102] In such investigations, States are encouraged to "cooperate to the fullest possible extent in the investigation of acts or attempted acts of piracy".[103] Azarlus has cooperated with Rathearre in conducting an investigation.

Furthermore, conducting an investigation into the matter at the request of another State which suspects jurisdiction and control were not effectively exercised fulfils the requirement of UNCLOS Article 94(6). Azarlus also cooperatively suggested that a civil suit may be brought against ORCA in Azarlus, demonstrating compliance with Article 94(6) obligation to "take any action necessary to remedy the situation".

Azarlus' act of conducting an investigation also fulfils its obligation to cooperate under ReCAAP Article 10(2) (to "take appropriate measures") and Article 11(1). While Article 10(2) suggests such "appropriate measures" includes arrests or seizures, the language here is only illustrative and not exhaustive. Azarlus had reasonable grounds to believe that arrests or seizures were inappropriate in a non-violent situation.

Azarlus has therefore effectively discharged its obligations of flag State jurisdiction and control and of cooperation.

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[101] Record, ¶ 40.

[102] *See, e.g.*, S.C. Res. 1851, ¶¶ 3, 5.

[103] IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships (Res. A.1025(26), Dec. 2, 2009).

3. Azarlus was not in breach of international law obligations by refraining from taking legal or military action.

After conducting an investigation, Azarlus concluded that no piracy was committed. Without a finding of actual piracy, Azarlus' decision not to prosecute the captain and crew did not breach any obligations.

Neither was Azarlus' refusal to take immediate military action against the *Baleen Warrior* a breach of international law. First, there was no legal ground to make arrests because no piracy was committed. Second, since a seizure on account of piracy may only be performed "by warships or military aircraft, or other ships or aircraft … on government service",[104] and use of force is permitted by such vessels against suspected pirates,[105] Azarlus needed to carefully balance the likelihood of the existence of piracy requiring military apprehension against the undesirable consequence of military intervention unduly escalating the situation. Recognising that "international law requires that the use of force in the arrests of ships must be avoided as far as possible… considerations of humanity must apply in the law of the sea, as they do in other areas of international law"[106], Azarlus had reasonable grounds for refraining from taking military action against a vessel which had not demonstrated violent behaviour.

[104] UNCLOS art. 107.

[105] *See, e.g.*, Tullio Treves, *Piracy and the international law of the sea*, in *Modern Piracy: Legal Challenges and Responses*, § 6.11, (Douglas Guilfoyle ed., 2013).

[106] M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of Jul. 1, 1999, ¶ 155, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.

CONCLUSION

For the foregoing reasons, Azarlus respectfully requests this Court to declare that:

1. Rathearre's mining activities violated international law.
2. The *Baleen Warrior*'s acts did not constitute piracy, and Azarlus' actions and inactions regarding the *Baleen Warrior* did not violate its international law obligations.

RESPECTFULLY SUBMITTED,

AGENTS OF THE APPLICANT