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THE 2007 MANFRED LACHS SPACE LAW MOOT COURT COMPETITION

CASE CONCERNING INTERNATIONAL LIABILITY

Emeralda v Mazonia

PART A: INTRODUCTION

The 16th Manfred Lachs Space Law Moot Court Competition was held during the Hyderabad IISL Colloquium. The *Case concerning International Liability (Emeralda v Mazonia)* was written by Jean-François Mayence and David Sagar. Preliminaries were held at regional level in Europe, North America and in the Asia Pacific region. The Finals were judged by three Judges of the International Court of Justice.

The final was hosted by NALSAR University of Law.

The local organising committee and the local sponsors, NALSAR University of Law in Hyderabad, and the Indian Space Research Organisation (ISRO) in Bangalore, had made excellent arrangements for the finals. In addition, NASA, ESA/ ECSL and JAXA sponsored the winners of the regional rounds to come to India.

Results of the world finals:

Winner: George Washington University, USA (David J. Western, Magin T. Puig-Monsen, Carlos F. Laboy; Coach: Prof. Henry R. Hertzfeld)

Runner-up: University of Queensland, Australia (Rola Lin, Breanna Hamilton, Alexander Meaney; Coach: Mr. Matthew Jones)

2nd runner-up: University of Leiden, the Netherlands (Jason Bonin, Lauren Payne, Scott Phillips, Coach: Dr. Frans von der Dunk)

Eilene M. Galloway Award for Best Written Brief: University of Queensland, Australia

Sterns and Tennen Award for Best Oralist: Ms Rola Lin, University of Queensland, Australia

Participants in the regional rounds

In North America:
1. George Washington University School of Law
2. University of Mississippi School of Law
3. University of Missouri—Columbia
4. St. Thomas University School of Law
5. Georgetown University Law Center
6. New York University
7. Cornell Law School
8. Institute of Air & Space Law, McGill University
9. University of North Carolina—Chapel Hill

In Europe:
1. George Washington University School of Law
2. Warsaw University Department, Institute of International Relations, Poland
3. Catholic University of Leuven, Belgium
4. University of Lueneburg, Germany
5. Leiden University, The Netherlands
6. John Paul II Catholic Univ. of Lublin, Poland

In the Asia Pacific:
1. University of Queensland, Brisbane
2. Amity Law School, India
3. Bangalore University Law College, India
4. Barkatullah University, India
5. Beijing Institute of Technology, China
6. Bharti Vidyapeeth University, India
7. China University of Political Science and Law, China
8. City University of Hong Kong, Hong Kong
9. Flinders University of South Australia, Australia
10. Government Law College, Mumbai, India
11. Gujarat National Law University, India
12. H P University School of Legal Studies, India
13. Hidayatullah National Law University, India
14. I L S Law College, India
15. Keio University, Japan
16. M S Ramaiah College of Law, Bangalore, India
17. Murdoch University, Australia
18. National Academy of Legal Studies Research, India
19. National Law Institute University, Bhopal, India
20. National Law School of India University, India
21. National Law University, Jodhpur, India
22. National University of Advanced Legal Studies, India
23. National University of Juridical Sciences, India

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24. National University of Singapore, Singapore
25. Padjadjaran University, Indonesia
26. Panjab University Institute of Legal Studies, India
27. Parahyangan Catholic University, Indonesia
28. Seoul National University, Korea
29. Tamil Nadu Dr Ambedkar Law University, India
30. Universitas Pelita Harapan, Indonesia
31. University of Auckland, New Zealand
32. University of Kyoto, Japan
33. University of Lucknow, India
34. University of New South Wales, Australia
35. University of Queensland, Australia
36. University of Technology, Sydney, Australia
37. University of Tokyo, Japan
38. Vivekananda Institute of Professional Studies, India
39. Waseda University, Japan

Judges for written briefs:

- Mr. Ian Awford, Australia
- Dr. Peter van Fenema, The Netherlands
- Dr. Martha Mejia-Kaiser, Mexico
- Ms. Marcia Smith, USA
- Dr. Leslie Tennen, USA
- Dr. Yun Zhao, Hong Kong

Judges for semi finals:

- Prof. VS Mani, India
- Prof. Elisabeth Back Impallomeni, Italy
- Prof. Jonathan Galloway, USA

Judges for finals:

- H.E. Judge Abdul Koroma, ICJ
- H.E. Judge Hisashi Owada, ICJ
- H.E. Judge Peter Tomka, ICJ

Contact details regional rounds:

- *North America:* Milton (Skip) Smith SSMITH@sah.com
- *Europe:* Melanie Vincent (new contact!) Melanie.Vincent@esa.int
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PART B: THE PROBLEM

STATEMENT OF FACTS

1. A new multinational consortium called SkyQuest, established in the Kingdom of the Lowlands and incorporated under its national law, had developed a space vehicle: the Skyhunter NSV (New Space Vehicle), designed to be launched from a specially customized ship. The ship used for the launch was owned by a private maritime consortium and was registered in Philamina, a small equatorial republic. The Skyhunter NSV comprised the Skyhunter space plane and a launcher rocket. A company, Minergia, established in Rhumenistan, was responsible for the design and the manufacturing of the Skyhunter space plane. The rocket was manufactured by the multinational industrial group Space Systems ("SSC"), which was also responsible for the integration of the launcher rocket with the Skyhunter space plane.

2. The majority (65%) of SkyQuest's capital was held by companies established in the State of Mazonia, one of the most important space faring nations in the world. The remaining 35% was held by various shareholders, some in the small Principality of Malao (15%), some in Europe (12%) and one in Africa (8%). The SSC company headquarters was located in Mazonia.

3. In April 2005, the Skyhunter NSV was certified, according to Mazonian national regulations, for human flight. In September 2005, SkyQuest proudly announced that the Mazonian authorities had licensed the first commercial flight of the Skyhunter NSV involving a "Space Flight Participant" and a professional astronaut of Mazonian citizenship. The flight plan (code NSV-01) consisted of the launch from a location situated on the high seas in the South Pacific Ocean, 32 nautical miles off shore of the Republic of Emeralda, followed by the separation of the space plane from its launch vehicle, after which the space plane was supposed to make a number of orbits of the Earth at an altitude of 360 km. The landing was planned to occur on the territory of the Commonwealth of Downunder, in the desert, 36 hours later. Once the space plane would have

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separated from the launcher, it would be powered by its own propulsion system.

4. The space plane and the launcher were registered in Isla Roca, a small island State, on the territory of which SkyQuest had established its technical subsidiary called TechnoQuest. This latter company was responsible for the preparation and design of SkyQuest's future projects, including a space hotel as well as some of the launching facilities located on the maritime platform.

5. SkyQuest was keen to make this a major event in the history of the Company. It engaged in a worldwide advertising campaign in which Skyhunter was presented as "the space Volkswagen": The Company spoke of a "robust, reliable technology, able to provide an uncommon experience to the common people".

6. The highlight of the flight was to be a concert broadcast from the Skyhunter by Ian Brady, a Mazonian citizen and a 23 year-old celebrity pop singer, who will be on board. His participation in NSV-01 was sponsored by Tonik, a big brand of soda from Sylvana (a state neighbouring Mazonia) and MBC, a Mazonian TV-channel dedicated to music programmes. This sponsorship covered 80% of the total flight costs

7. The launch was scheduled for 5 November 2005, at 14:30 GMT. On the day before the launch, the Emeraldian Maritime Authority, following a request from SkyQuest, circulated an announcement to all ships in its territorial waters informing them of the launch and recommending that all ships remained at least 15 nautical miles (nm) from the launch site. However, the announcement did not specify any particular risk or reason for the 15 nm exclusion.

8. A hundred people were invited by SkyQuest to attend the event onboard the Condor, a ship chartered by the commercial sponsors and flying the Emeraldian flag. The passengers on the Condor were observing the launch from about 8 nm from the launch platform.

9. The night before the launch, another ship, the Barracuda, left the little harbour of Armagosa on the Emeraldian coast for a fishing party. The area chosen by the captain of the Barracuda was approximately 10 nm from the location of the launch.

10. The Commander of NSV-01 was a former member of the Mazonian astronaut corps, Colonel Guy van den Bergh, who had been hired by SkyQuest. For the purposes of the command, as well as for flight protocols and procedures, SkyQuest has established a Crew Code of Conduct. This flight regulation is contractually accepted by all crew members and flight participants.

11. The launch proceeded perfectly until 8 seconds after lift-off when a large piece of insulating material detached from the upper part of the spaceplane, splitting into several fragments. Pieces from the rocket also detached. While these events seemed to have no direct consequences on the launch itself (the rocket remained on its nominal trajectory), the debris caused damage to the two ships cruising in the area of the launch. The Condor was hit by one of the falling pieces, causing a fire in the cabin. The fire was quickly brought under control. Nobody was hurt but the communication equipment was destroyed and the deck must be repaired.

12. Unfortunately on the Barracuda, an Emeraldian sailor was killed by the falling debris. Severe damage was caused to the communications equipment located in the superstructure of the ship. Although the ship was able to return to its port, the loss of the sailor as well as the delays in repairing the equipment caused the owners, Emeraldian Batoblue Ltd, to cancel a lucrative charter for a fishing expedition.

13. At 16:04 GMT, Van den Bergh contacted the Flight Director in the mission control room on the launch ship. According to calculations by the control computers, the loss of the material did not jeopardize the mission and so the flight could proceed according to the nominal conditions. The Flight Director decided to continue with the flight. This decision was questioned by Van den Bergh; his experience of space flights told him to abort the mission and to land as soon as possible, considering the possible loss of heat- protection elements. Consequently, Van den Bergh chose to ignore

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the Flight Director's instructions, took full command of the spaceplane and initiated a descent through the atmosphere. Before losing contact with ground control, he was able to communicate the latest position of the spacecraft and its expected area of landing.

14. On 6 November 2005, ten hours after that last contact, the Emeraldian Government issued an official communiqué stating that the Emeraldian Coast Guard had rescued the crew of an unidentified aircraft which had come down in their territorial sea. The two crew members had been transported to Emerald City – the capital city of Emeralda – by helicopter after a short stay in a military base for medical treatment and care. They were safe and in good condition. It was quickly confirmed by a subsequent press release that "those two men were the crew of the Mazonian space plane involved in the death of a compatriot half a day earlier". The wreck of the spaceplane was brought to the military base and placed in a secured warehouse by the Emeraldian Government.

15. After release of these statements, the Mazonian Government immediately requested information from the Emeraldian Government. Soon after the identities of the two men were confirmed by Emeraldian authorities, the Mazonian Government proceeded with an official request to the Emeraldian Government to:

15.1. ensure the immediate safe delivery of Col. Van den Bergh and Mr. Brady to the Mazonian Embassy in Emerald City and their return thereafter to Mazonia; and

15.2. return to the Mazonian authorities any part, debris or component of the Skyhunter spaceplane found within Emeraldian jurisdiction.

16. The reply from the Emeraldian Government was that the Mazonian request will be duly considered after a careful review of the following issues, namely:

16.1. indemnification by the Mazonian Government for the damage caused to the family and/or the company of the sailor killed during the launch; and

16.2. assessment of a possible violation of Emeraldian sovereignty by the Mazonian Government and compensation thereof.

17. Meanwhile, on 8 November, Soaring High Inc., the Emeraldian company which owns the Condor, requested the Emeraldian Minister of Foreign Affairs to present a claim for compensation under international law to the Mazonian Government, with the initial estimate of the damages by independent experts to amount to US$150,000.00.

18. Emeraldian Batoblue Ltd. also requested the Emeraldian Minister of Foreign Affairs to present a claim for compensation to the Mazonian Government for the cost of the repairs to the onboard communication equipment, for the financial loss resulting from the death of one of its sailors, as well as for the loss of revenue resulting from the cancelled charter.

19. On 14 November, an Emeraldian prosecutor notified Col. Van den Bergh and Mr. Brady of her decision to prosecute them for manslaughter arising from the death of the sailor, as well as for violation of the Emeraldian Maritime Code, regulating access to Emeralda's territorial sea. This Code requires foreign ships and aircraft to obtain prior authorization before entering Emeraldian territorial waters or airspace. Considerations of possible actions before Emeraldian and Mazonian courts against the sponsoring companies by the sailor's family were announced in the press. On 20 November, the Mazonian Ambassador in Emerald City forwarded to the Emeraldian authorities a new formal request for the immediate return of the two men.

20. On 5 December, the Emeraldian Government replied to the second formal request from Mazonia that, after a careful legal review by their experts, there was no obligation for Emeralda under any international law to return the two Mazonian citizens who are currently subject to criminal proceedings concerning the death of the sailor.

21. Nevertheless, the Emeraldian Government agreed in principle to return the two men on the following conditions:

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21.1. a written guarantee from the Mazonian Government that the two men would be prosecuted for the death of the sailor, and that actions would be initiated against the two sponsoring companies in due course;

21.2. compensation to be paid to the family and the company of the sailor killed on the Barracuda in the total amount of US$5 million and for financial losses arising from the death of the sailor and material damage to the ship of US$200,000.00;

21.3. compensation to be paid to Soaring High Inc. in the amount of US$200,000.00 for material damage to the Condor; and

21.4. a public apology for the damage caused and for the violation by Mazonian nationals of Emeralda's sovereignty.

22. The reply from the Mazonian Government was the following:

22.1. Emeralda was violating its obligation under several provisions of international law and this could lead to "appropriate legal actions", in the words of the spokesperson of the Mazonian Foreign Affairs Department;

22.2. the legal basis for the indemnifications in the two claims made under the applicable provisions of international law had not been identified by the Emeraldian authorities;

22.3. none of the ships or facilities used for the launch of NSV-01 was registered by Mazonia;

22.4. according to general principles of international law and to the absence of delimitation of outer space not disputed by Emeralda, the operation of a spacecraft, including its landing, must be considered as a space activity and is not subject to the application of any territorial jurisdiction; and

22.5. despite having deep sympathy for the victim's family, there was no reason why the Mazonian Government should apologise.

23. On 7 June 2006, the Parties, failing to reach an agreed settlement as requested above, have mutually agreed to present their respective claims before a three-judge Chamber of the International Court of Justice for a binding resolution of their dispute, which took place on 14 November 2006.

24. Mazonia seeks declarations that :

24.1. the claim for return of the two crew members and of any part or element of the spaceplane is legally based on the international treaties and international rules to which Mazonia and Emeralda are bound;

24.2. there is no legal basis for the claim for the prosecution of the two astronauts before Mazonian courts;

24.3. Mazonia is not liable for the damage caused to the two vessels; and

24.4. no violation of Emeralda's sovereignty have occurred.

25. Emeralda seeks declaration that :

25.1. there is no obligation of Emeralda under international law to return the crew members to the Mazonian authorities;

25.2. Mazonia is liable for the loss and suffering caused by the death of the Emeraldian sailor, and the material damage to the Barracuda and for financial loss suffered by Emeraldian Batoblue Ltd,

25.3. Mazonia is liable for the material damage to the Condor and for the financial loss

suffered by Soaring High, Inc.; and

25.4. Mazonian national activities involving the Mazonian Government have caused a violation of Emeralda's sovereignty.

26. Mazonia is party to the 1967 Outer Space Treaty, the 1968 Rescue Agreement, the 1972 Liability Convention and the 1976 Registration Convention.

27. Emeralda, Lowlands, Malao, Sylvana and Downunder are party to the 1967 Outer Space Treaty, the 1968 Rescue Agreement, the 1972 Liability Convention, the 1976 Registration Convention and the 1979 Moon Agreement.

28. Isla Roca has not signed the 1967 Outer Space Treaty and has signed but not yet ratified the 1968 Rescue Agreement, the 1972 Liability Convention and the 1975 Registration Convention. No licence from Isla Roca's

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Government is required to operate space objects registered under Isla Roca national law.

29. Philamina is party to the 1967 Outer Space Treaty.

30. All the above States are party to the 1944 Chicago Convention on Civil Aviation, to the 1969 Vienna Convention on the Law of Treaties and to the Charter of the United Nations.

CODE OF CONDUCT FOR THE SKYHUNTER NSV CREW

I. INTRODUCTION

A. Authority

1. This Code of Conduct, hereinafter referred to as "Code", is applicable to all Skyhunter NSV Crew Member, as defined here under.

B. Scope and Content

2. The purposes of this Code are to:

(a) establish a clear chain of command in orbit;

(b) establish a clear relationship between ground and orbital management; and establish a management hierarchy;

(c) set forth standards for work and activities in space, and, as appropriate, on the ground;

(d) establish responsibilities with respect to elements and equipment; set forth disciplinary regulations;

(e) establish physical and information security guidelines; and

(f) define the Skyhunter NSV Commander's authority and responsibility,

on behalf of all the partners, to enforce safety procedures, physical and information security procedures and crew rescue procedures for the Skyhunter NSV.

3. This Code sets forth the standards of conduct applicable to all Skyhunter NSV Crew Members during pre-flight, in orbit and post-flight activities (including launch and return phases).

C. Definitions

4. For the purposes of the Code:

(a) "Crew Surgeon" means a flight surgeon assigned by SkyQuest to any given expedition. He or she is the lead medical officer and carries primary responsibility for the health and well-being of the entire crew, including the Space Flight Participant(s).

(b) "Disciplinary Policy" means the policy developed by SkyQuest to address violations of the Code and impose disciplinary measures.

(c) "Flight Rules" means the set of rules used by SkyQuest to govern flight operations of the Skyhunter NSV.

(d) "Skyhunter NSV Crew Member" means any SkyQuest personel assigned to a dedicated flight onboard the Skyhunter NSV, including the Commander and any flight assistant and any person assigned to a specific mission during the flight and onboard the spacecraft. This definition excludes a Space Flight Participant.

(e) "Space Flight Participant" means any passenger taking part in the flight pursuant to a contract concluded with SkyQuest, excluding any participation in the flight operations or in a mission.

II. GENERAL STANDARDS

A. Responsibilities of Skyhunter NSV Crew Members

5. Skyhunter NSV Crew Members shall comply with the Code. Accordingly, during pre-flight, in orbit and post-flight activities, they shall comply with the Skyhunter NSV Commander's orders, all flight and rules, operational directives and management policies, as applicable. These include those related to safety, health, well-being, security and other operational or management matters governing all aspects of spacecraft equipment and payloads and any other equipments or facilities, to which they have access.

6. All applicable rules, regulations, directives and policies shall be made accessible to Skyhunter NSV Crew Members through appropriate means, coordinated by SkyQuest.

B. General Rules of Conduct

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7. No activities performed by SkyQuest, its personel or its contractors shall violate the principles of international law, in particular the provisions of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, open for signature on 27 January 1967.

8. Skyhunter NSV Crew Members' conduct shall be such as to maintain a harmonious and cohesive relationship among the crew and an appropriate level of mutual confidence and respect through an interactive, participative and relationship-oriented approach which duly takes into account the international and multicultural nature of the crew and flight.

9. No Skyhunter NSV Crew Member shall, by his or her conduct, act in a manner which results in or creates the appearance of:

(a) giving undue preferential treatment to any person or entity in the performance any SkyQuest activity; and/or

(b) adversely affecting the confidence of the public in the integrity of, or reflecting unfavorably in a public forum on, SkyQuest inc. and its commercial partners or contractors;

10. Skyhunter NSV Crew Members shall protect and conserve all property to which they have access for SkyQuest activities. No such property shall be altered or removed for any purpose other than those necessary for the performance of flight duties. Before altering or removing any such property, Skyhunter NSV Crew Members shall first obtain authorization from the Flight Director, except as necessary to ensure the immediate safety of Skyhunter NSV Crew Members or Skyhunter NSV elements, equipment or payloads.

C. Use of Position - Exclusivity

11. The use of a Skyhunter Crew Member's position by the Skyhunter Crew Members is exclusively restricted to the purposes and the benefit of SkyQuest activities.

12. Furthermore, no Skyhunter NSV Crew Member shall use the position of Skyhunter NSV Crew Member in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to himself or herself or other persons or entities, without the prior written authorization from SkyQuest.

D. Mementos and Personal Effects

13. Each Skyhunter NSV Crew Member may carry and store mementos, including flags, patches, insignia and similar small items of minor value, onboard the Skyhunter NSV for his or her private use, subject to the following conditions:

(a) mementos are permitted as a courtesy, not an entitlement, and as such they shall be considered as ballast as opposed to a payload or mission requirement and are subject to manifest limitations, in-orbit stowage allocations and safety considerations;

(b) mementos may not be sold, transferred for sale, used or transferred for personal gain, or used or transferred for any commercial or fundraising purpose other than SkyQuest's, without the prior written consent of

SkyQuest. Mementos which, by their nature, lend themselves to exploitation by the recipients, or which, in the opinion of SkyQuest providing the Skyhunter NSV Crew Member, engender questions as to good taste, will not be permitted.

14. An Skyhunter NSV Crew Member's personal effects, such as a wristwatch, will not be considered mementos. Personal effects of any nature may be permitted, subject to constraints of mass/volume allowances for crew personal effects, approval SkyQuest, and considerations of safety and good taste.

III. AUTHORITY AND RESPONSIBILITIES OF THE SKYHUNTER NSV COMMANDER, CHAIN OF COMMAND AND SUCCESSION IN ORBIT - RELATIONSHIP BETWEEN GROUND AND IN ORBIT MANAGEMENT

A. Authority and Responsibilities of the Skyhunter NSV Commander

15. The Skyhunter NSV Commander, as a Skyhunter NSV Crew Member, is subject to the standards detailed elsewhere in this Code, in addition to the command-specific provisions set forth below.

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16. The Skyhunter NSV Commander will seek to maintain a harmonious and cohesive relationship among the Skyhunter NSV Crew Members and an appropriate level of mutual confidence and respect through an interactive, participative and relationship-oriented approach, which duly takes into account the international and multicultural nature of the crew and flight.

17. The Skyhunter NSV Commander is the leader of the crew and is responsible for forming the individual Skyhunter NSV Crew Members into a single integrated team. During pre-flight activities, the Skyhunter NSV Commander, to the extent of his or her authority, leads the Skyhunter NSV Crew Members through the training curriculum and mission preparation activities and seeks to ensure that the Skyhunter NSV Crew Members are adequately prepared for the mission, acting as the crew's representative to the SkyQuest's flight training and preparation operations.

18. During post-flight activities, the Skyhunter NSV Commander coordinates with the SkyQuest supervisor to ensure that the Skyhunter NSV Crew Members complete the required postflight activities.

19. The Skyhunter NSV Commander is responsible for and will, to the extent of his or her authority and the Skyhunter NSV in orbit capabilities, accomplish the mission program implementation and assure the safety of the Skyhunter NSV Crew Members and the protection of the Skyhunter NSV elements, equipment or payloads.

20. The Skyhunter NSV Commander's main responsibilities are to:

(a) conduct operations in or on the Skyhunter NSV as directed by the Flight Director and in accordance with the Flight Rules, plans and procedures;

(b) direct the activities of the Skyhunter NSV Crew Members as a single integrated team to ensure the successful completion of the mission;

(c) fully and accurately inform the Flight Director, in a timely manner, of the Skyhunter NSV vehicle configuration, status, commanding and other operational activities on-board (including off-nominal or emergency situations);

(d) enforce procedures for the physical and information security of operations and utilization data;

(e) maintain order;

(f) ensure crew safety, health and well-being including crew rescue and return; and

(g) take all reasonable action necessary for the protection of Skyhunter NSV elements, equipment or payloads.

21. During all phases of in orbit activities, the Skyhunter NSV Commander, consistent with the authority of the Flight Director, shall have the authority to use any reasonable and necessary means to fulfil his or her responsibilities. This authority, which shall be exercised consistent with the provisions of Sections II and IV, extends to:

(a) the Skyhunter NSV elements, equipment and payloads;

(b) the Skyhunter NSV Crew Members as well as any Space Flight Participant or any other passenger onboard the Skyhunter NSV;

(c) activities of any kind occurring in or on the Skyhunter NSV; and

(d) data and personal effects in or on the Skyhunter NSV where necessary to protect the safety and well-being of the Skyhunter NSV Crew Members and the Skyhunter NSV.

22. Any matter outside the Skyhunter NSV Commander's authority shall be within the purview of the Flight Director. Issues regarding the Commander's use of such authority shall be referred to the Flight Director as soon as practicable, who will refer the matter to appropriate authorities for further handling. Although other Skyhunter NSV Crew Members may have authority over and responsibility for certain Skyhunter NSV elements, equipment, payloads or tasks, the Skyhunter NSV Commander remains ultimately responsible, and solely accountable, to the Flight Director for the successful completion of the activity and the mission.

B. Chain of Command and Succession in Orbit

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23. The Skyhunter NSV Commander is the highest authority among the Skyhunter NSV Crew Members in orbit. SkyQuest will determine the order of succession among the Skyhunter NSV Crew Members in advance of flight and the Flight Rules set forth the implementation of a change of command.

24. The Flight Rules define the authority of the Rescue Vehicle Commander and any other commanders, and set forth the relationship between their respective authorities and the authority of the ISS Commander.

C. Relationship between the Skyhunter NSV Commander and the Flight Director

25. The Flight Director is responsible for directing the mission. A Flight Director will be in charge of directing real-time Skyhunter NSV operations at all times. The Skyhunter NSV Commander, working under the direction of the Flight Director and in accordance with the Flight Rules, is responsible for conducting in orbit operations in the manner best suited to the effective implementation of the mission. The Skyhunter NSV Commander, acting on his or her own authority, is entitled to change the daily routine of the Skyhunter NSV Crew Members where necessary to address contingencies, perform urgent work associated with crew safety and protection of Skyhunter NSV elements, equipment or payloads, or conduct critical flight operations. Otherwise, the Skyhunter NSV Commander should implement the mission as directed by the Flight Director.

26. Specific roles and responsibilities of the Skyhunter NSV Commander and the Flight Director are described in the Flight Rules. The Flight Rules outline decisions planned in advance of the mission and are designed to minimize the amount of real-time discussion required during mission operations.

IV. DISCIPLINARY REGULATIONS

27. Skyhunter NSV Crew Members will be subject to the disciplinary policy developed and revised as necessary by SkyQuest and approved by Isla Roca's National Administation for Transportation ("NAT").

28. SkyQuest has developed an initial disciplinary policy, which has been approved by the NAT. The disciplinary policy is designed to maintain order among the Skyhunter NSV Crew Members during preflight, in orbit and post-flight activities. The disciplinary policy is administrative in nature and is intended to address violations of the Code.

29. Such violations may, inter alia, affect flight assignments as an Skyhunter NSV Crew Member and give rise to criminal prosecution under applicable law.

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PART C: FINALISTS BRIEFS

MEMORIAL FOR THE APPLICANT

THE REPUBLIC OF EMERALDA

University of Queensland, Australia (Rola Lin, Breanna Hamilton, Alexander Meaney)

ARGUMENT

A. THE APPROPRIATE LEGAL REGIME TO APPLY IN THIS CASE IS INTERNATIONAL SPACE LAW

The supremacy of treaty obligations under international law, the specific relevance of the Space Treaties[1] to the facts before the Court and the status of the *Skyhunter NSV* (hereinafter *Skyhunter*) as a 'space object' dictate that the Space Treaties be applied in the present case.[2] This is in preference to air law, the law of the sea or general international law. However, analogies may still be drawn from these areas to aid in interpretation of the Space Treaties where appropriate.[3]

A1. Emeralda and Mazonia are bound by the Space Treaties

Treaty obligations are the foremost source of international law.[4] Under the principle of *pacta sunt servanda*,[5] treaty provisions are legally binding upon the parties to the treaty and must be performed in good faith.[6]

The Space Treaties were enacted to deal with the legal issues arising from the operation of space objects.[7] The specific issue of space objects causing damage to ships at sea was raised during the development of the Space Treaties.[8] During the negotiations, the Japanese delegate, whilst acknowledging the need for rules to deal with space objects, referred to a particular incident that affected his state.[9] A Japanese boat was damaged on June 5, 1969 by fragments from a device launched into outer space, injuring five

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[1] Space Treaties refer to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*], Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Space, Apr. 22, 1968, 672 U.N.T.S. 119 [hereinafter *Rescue Agreement*], Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187 [hereinafter *Liability Convention*], and Convention on Registration of Objects Launched into Outer Space, Dec. 18, 1979, 1363 U.N.T.S. 3 [hereinafter *Registration Convention*].

[2] North Sea Continental Shelf Cases (F.R.G v. Den.; F.R.G v Neth.), 1969 I.C.J. 3 (Feb. 20).

[3] Outer Space Treaty, *supra* note 1, art III; V.S. Mani, *The Agreement on the Rescue of Astronauts, the Return of the Astronauts and the Return of Objects Launched in Outer Space 1968*, in PROCEEDINGS OF THE UNITED OF THE NATIONS/REPUBLIC OF KOREA WORKSHOP ON SPACE LAW – UNITED NATIONS TREATIES ON OUTER SPACE: ACTIONS AT THE NATIONAL LEVEL 224, 224 (2003).

[4] Statute of the International Court of Justice, art. 38(1), May 26, 1945, 59 Stat. 1031; Case Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 38 (Feb. 24).

[5] Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

[6] Nuclear Test Cases (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20); Vladimir Kopal, *United Nations and the Progressive Development of International Space Law* 7 FIN. Y.B. INT'L L 1, 3 (1996).

[7] Outer Space Treaty, *supra* note 1, Preambles ('Desiring to contribute to…the legal aspects of the exploration and use of outer space'); Liability Convention, *supra* note 1, Preambles ('Recognising the need to elaborate effective international rules and procedures concerning liability…).

[8] Bin Cheng, *Liability for Spacecraft*, 3 CURRENT LEGAL PROBLEMS 216, 217 (1970).

[9] *Id.*

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sailors. Both the Soviet Union and Canada acknowledged that international space law was the appropriate body of law to apply in order to determine liability for the *COSMOS-954* incident.[10]

Both Emeralda and Mazonia have signed and ratified the *Outer Space Treaty*, the *Liability Convention* and the *Rescue Agreement*. Therefore, the Court should apply these treaties in this case.

A2. The Space Treaties apply because the *Skyhunter* is a 'space object'

The Space Treaties only apply if the damage was caused by a 'space object'. A 'space object' is 'an object launched into outer space'[11] and may be classified by reference to either the spatialist or functionalist approaches.[12] Under the spatialist approach, objects that reach a set altitude above the Earth are 'space object[s]'.[13] Following the functionalist approach, objects that are intended to operate in outer space are 'space object[s]', irrespective of their actual location.[14]

Under both the spatialist and functionalist approaches, the *Skyhunter* can be classified as a 'space object'. It was intended to operate in outer space,[15] and did in fact reach low Earth orbit.[16] The *Skyhunter* may also be classified as a surface-to-orbit (STO) spaceplane. STO spaceplanes are designed and intended to reach orbit.[17] Both the United Nations and the International Civil Aviation Organisation have acknowledged that STO spaceplanes are 'space objects' and consequently, the Space Treaties will apply to their operation.[18]

B. MAZONIA IS LIABLE FOR THE LOSS AND SUFFERING CAUSED BY THE DEATH OF THE EMERALDIAN SAILOR AND THE MATERIAL DAMAGE TO THE *BARRACUDA* AND FOR FINANCIAL LOSS SUFFERED BY EMERALDIAN BATOBLUE LTD

[10] Canadian Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet COSMOS-954, 18 I.L.M. (1979) 899 [hereinafter *Cosmos Case*].

[11] Outer Space Treaty, *supra* note 1, art. VII and VIII; *Travaux préparatoires* to the Liability Convention, *Argentina, Belgium, France Working Paper: Definition of 'Space object'*, U.N. Doc. PUOS/C.2/70/WG.1/CRP16, *compiled in* III MANUAL ON SPACE LAW, 388 (Nandasiri Jasentuliyana & Roy S.K. Lee eds., 1981) [hereinafter MANUAL ON SPACE LAW].

[12] *See Travaux préparatoires* to the Liability Convention, U.N. GAOR, COPUOS, 49th mtg. at 4, U.N. Doc. A/AC.105/C.2/SR.49 (1965), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 464 (statement by U.S.S.R. Amb. Rybokov).

[13] Frans G. von der Dunk, *The Delimitation of Outer Space Revisited: The Role of National Space Laws in the Delimitation Issue*, in PROCEEDINGS TO THE 41ST COLLOQUIUM ON THE LAW OF OUTER SPACE 254 (1998).

[14] *Travaux préparatoires* to the Liability Convention, *Hungary Revised Draft Convention Concerning Liability for Damage Caused by the Launching of Objects into Outer Space*, U.N. Doc. A/AC.105/C.2/L.10/Rev.1 (Sept. 24 1965) *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 269; *Travaux préparatoires* to the Liability Convention, *Argentina, Belgium, France Working Paper: Definition of 'Space object'*, U.N. Doc. POUS/C.2/70/WG.1/CRP16, *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 388.

[15] Compromis, ¶ 3.

[16] Compromis (Additional), ¶ 11.

[17] Int'l Civil Aviation Org. [ICAO], *Working Paper Presented by the Secretary General on Operations Concept of Sub-Orbital Flights*, ICAO Council, 175th Session, ICAO Doc. C-WP/12436 (May 30, 2005) [hereinafter *ICAO Workpaper*]

[18] *Id.*, § 5; *Draft Report on the Status and Application of the Five United Nations Space Treaties*, U.N. COPUOS Sub-Committee, 46th Sess., U.N. Doc. A/AC.105/C.2/L.268/Add.1 (Apr. 5, 2007).

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Mazonia is liable for the death of the Emeraldian sailor, the material damage to the *Barracuda* and for the financial loss suffered by Emeraldian Batoblue Ltd under the *Liability Convention.*

Firstly, in order for the *Liability Convention* to apply, the damages claimed by Emeralda on behalf of Emeraldian Batoblue Ltd[19] must fall within the types of damage recognised by the Convention. Secondly, the elements of Article II must be satisfied, namely that (i) Mazonia is a 'launching State' and (ii) that the operation of the space object 'caused' the damage. Finally, it must be shown that the exoneration provisions of Article VI and Article VII of the *Liability Convention* do not apply.

B1. All of the types of damage suffered by Emeralda are compensable under the *Liability Convention*

Claimant states may claim compensation under the *Liability Convention* only if they sustain 'damage' within the meaning of Article I(a). The loss and suffering caused by the death of the sailor, the material damage to the vessel and the financial loss suffered by Emeraldian Batoblue Ltd all constitute 'damage' within the meaning of Article I(a).

(a) The loss and suffering caused by the death of the sailor and the material damage to the *Barracuda* constitute damage

The debris from the *Skyhunter* launch caused the death of the Emeraldian sailor[20] and also severely damaged the communication equipment on board the *Barracuda.*[21]

The term 'damage' in Article I(a) of the *Liability Convention* includes 'loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical'. The death of the Emeraldian sailor is therefore included, as is the loss and suffering of his family.[22] The material damage to the *Barracuda* also falls within damage to property of juridical persons, and is therefore recoverable.

(b) The financial loss suffered by Emeraldian Batoblue Ltd constitutes damage

Emeraldian Batoblue Ltd suffered financial loss, as it was forced to cancel a lucrative fishing charter while the *Barracuda* awaited repair.[23]

Although financial loss is not a form of 'damage' expressly listed in Article I(a), it is submitted that financial loss may be recovered under the *Liability Convention.* During the drafting process, no agreement was reached as to whether the definition of 'damage' should include indirect damages, such as financial loss.[24] The majority of delegates regarded the

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[19] Liability Convention, *supra* note 1, art VIII(1) (a state may make a claim on behalf of its legal persons, therefore Emeralda may claim on behalf of Emeraldian Batoblue Ltd and Soaring High Inc); *see also* Case Concerning Barcelona Traction, Light and Power Company, Ltd (Belg. v. Spain), 1970 I.C.J. 3, 46 (Feb. 5) [hereinafter *Barcelona Traction*]('[a] general rule of international law authorises the national state of the company to make a claim.').

[20] Compromis, ¶ 12.

[21] Compromis, ¶ 11.

[22] CARL Q CHRISTOL, SPACE LAW PAST PRESENT AND FUTURE 225 (1991) ('mental anguish experienced by a survivor of a person killed by such [a space] object...[is] compensable under the convention'); *see also* Ronald E. Alexander, *Measuring Damages Under the Convention on International Liability for Damage Caused by Space Objects*, 6 J. SPACE L. 151, 155 (1978) (stating that the victim-orientated nature of the conventions support this 'moral right'); *see also* NICOLAS MATEESCO MATTE, AEROSPACE LAW, 157 (1997) ('lost profits, interest, sentimental value, pain and suffering' can be allowed by a claims commission).

[23] Compromis, ¶ 12.

[24] *Travaux préparatoires* to the Liability Convention, Legal Sub Comm. on the Peaceful Uses of Outer Space, 6th Sess., U.N. Doc. A/6804 Annex III (Sept. 27, 1967), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 308;

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matter as one of proximate or adequate causality that need not be expressed in the Convention.[25] This view is commensurate with the position at general international law[26] and is supported by a number of eminent publicists.[27]

Therefore, as long as causation exists between the *Skyhunter* launch and the financial loss suffered by Emeraldian Batoblue Ltd,[28] the damage is recoverable under the *Liability Convention.*

B2. Mazonia is a 'launching State'

The *Liability Convention* attributes liability for damage caused by space objects to the 'launching State'. Article I of the *Liability Convention* defines a 'launching State' as a state that 'launches or procures the launching of a space object or a state from whose territory or facility a space object is launched'.

Where non-governmental entities are involved in space activities, a state is a 'launching State' if: (i) the space activity is a 'national activity' of that state, thereby rendering it responsible for the actions of its non-governmental entities under Article VI of the *Outer Space Treaty*; and (ii) those non-governmental entities either launch, procure or provide the facilities for the launching of a space object.[29]

Responsibility under Article VI of the *Outer Space Treaty* can result in liability under Article II of the *Liability Convention.* This is because in the context of the *Outer Space Treaty*, an important aspect of responsibility is liability.[30] That is, the obligation to make reparation for any damage caused.[31]

The *Skyhunter* mission was a Mazonian 'national activity'. Mazonia therefore bears responsibility for the space activities of Mazonian non-governmental entities. This in turn means that the involvement of SkyQuest, MBC and Space Systems (SSC) in the *Skyhunter* mission makes Mazonia liable for the damage as a 'launching State'.

Additionally, Mazonia is a 'launching State', as it procured the launch of the *Skyhunter* by licensing and certifying it for human flight.

(a) The *Skyhunter* flight was a Mazonian 'national activity'

'National activity' under Article VI of the *Outer Space Treaty* is determined by reference to the nationality of the enterprise conducting the space activity.[32] The nationality of an enterprise depends on whether there is a genuine link between the enterprise and the state in question.[33] A genuine link can be established on the basis of the state of incorporation, the location of the main centre of business activities

BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 323 (1997).

[25] *E.g. Travaux préparatoires* to the Liability Convention, *Japan Working Paper* U.N. Doc. AC.105/C.2/L.61 (Jun. 23, 1969) *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 354; *see also* CHENG, *supra* note 24, at 323.

[26] Administrative Decision No. II (U.S. v. Ger.), 7 R.I.A.A. 23, 29-30 (1923) ('It does not matter whether the loss be directly or indirectly sustained so long as there is a clear unbroken connection between the act of the state and the loss of the injured party').

[27] CHENG, *supra* note 24, at 323; CHRISTOL, *supra* note 22, at 220; William F Foster, *The Convention on International Liability for Damage Caused by Space Objects*, 10 CAN. Y.B. INT'L L. 137, 157 (1972).

[28] See *infra* Submission B3.

[29] CHENG, *supra* note 24, at 627; Frans G. von der Dunk, *Sovereignty Versus Space – Public Law and Private Launch in the Asian Context*, 5 SING. J. INT'L & COMP. L 22, 35-37 (2001); Ricky J. Lee, *Space Law and Commercial Realities*, 4 SING. J. INT'L & COMP. L 194, 230 (2000).

[30] *Id.*, 615-616; *See also infra* Submission D1(c).

[31] CHENG, *supra* note 24, at 615-616.

[32] CHENG, *supra* note 24, at 608; Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 92 (Oct. 22).

[33] Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6); Barcelona Traction, 1970 I.C.J. 3, 42 (Feb. 5).

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or the place of effective ownership and control.[34] Additionally, it should be noted that 'national activities' include space activities conducted within the Earth's atmosphere.[35]

The *Skyhunter* mission was a Mazonian 'national activity'. SkyQuest, the company responsible for the mission, shares a genuine link with the State of Mazonia. 65% of the share capital of SkyQuest is held by companies that are established in Mazonia.[36] This majority shareholding gives Mazonian companies, which are subject to Mazonian laws and regulations, effective ownership and control of SkyQuest.[37] The basis of effective ownership and control provides a more genuine link than the state of incorporation.[38]

(b) Mazonia procured the launch through the activities of its nationals, for which it bears responsibility under Article VI of the *Outer Space Treaty*

The Mazonian non-governmental entities, MBC, SSC and SkyQuest, procured the launch of, or launched the *Skyhunter*.

The term 'procure' is not defined in the Space Treaties. However, the *travaux préparatoires* to the *Liability Convention* provide that 'procure' means to 'actively and substantially participate' in a launch.[39] 'Procuring' a launch also includes organising, urging or assisting in the launch of a space object.[40]

MBC, a Mazonian television channel, procured the launch by covering 40% of the total flight costs of the mission.[41] This is a significant contribution and indicates MBC's substantial involvement with the *Skyhunter* launch.

SSC, a company with its headquarters in Mazonia,[42] built the rocket that propelled the *Skyhunter* into orbit.[43] It was also responsible for the integration of the rocket and spaceplane.[44] Manufacturing has been acknowledged as falling within the term 'procuring'.[45]

Finally, SkyQuest, a company effectively owned and controlled by Mazonian interests,[46] launched the *Skyhunter*. It managed all aspects of the launch, including the development of the

[34] Barcelona, 1970 I.C.J. 3; HENRI WASSENBERGH, PRINCIPLES OF OUTER SPACE LAW IN HINDSIGHT 25 (1991); IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 408 (6th ed. 2003).

[35] CHENG, *supra* note 24, at 609.

[36] Compromis, ¶ 2.

[37] Compromis (Additional), ¶ 6.

[38] Compromis, ¶ 1 (Kingdom of Lowlands was not actively involved).

[39] *Travaux préparatoires* to the Liability Convention, *Japan Working Paper* U.N. Doc. AC.105/C.2/L.61 (Jun. 23, 1969) *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 354 (stating that 'procure' means 'actively and substantially participate'); *see also* William B. Wirin, *Practical Implications of Launching State – Appropriate State Definitions*, in PROCEEDINGS TO THE 37TH COLLOQUIUM ON THE LAW OF OUTER SPACE 109, 111 (1994) ('the usual meaning of procure is to acquire, secure or to bring about').

[40] Liability Convention, *supra* note 1, art XXVIII (Provides that all original translations of the treaty are equally authentic In Russian 'procure' (organizyet) translates to 'organises' the launch, the Chinese (促使) to 'urges' and the Spanish (promeuva) to 'promotes'); Kai-Uwe Schrogl & Charles Davies, *A New Look at the 'launching State': The Results of the UNCOPUOS Legal Subcommittee Working Group Review of the Concept of the 'launching State' 2000–2002* in PROCEEDINGS TO THE 34TH COLLOQUIUM ON THE LAW OF OUTER SPACE 293 (1991).

[41] Compromis, ¶ 6; Compromis (Additional), ¶ 9.

[42] Compromis, ¶ 2.

[43] *Id.*, ¶ 1.

[44] *Id.*

[45] *Travaux préparatoires* to the Liability Convention, U.N. GAOR, COPUOS , 48th mtg. at 3, U.N. Doc. A/AC.105/C.2/SR.48 (1965), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 459 (statement by U.S. Amb. Sohier) (stating that Italy's participation in the United States-Italian joint San Marco project, by manufacturing the various components of the spacecrafts would amount to procurement).

[46] *See supra* Submission B2(a).

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Skyhunter,[47] the announcement and advertising[48] of the flight and the fulfilment of regulatory requirements.[49]

Mazonia is a 'launching State' because the *Skyhunter* mission was a Mazonian 'national activity' and its nationals, for which it bears responsibility under Article VI of the *Outer Space Treaty*, launched or procured the launch of the *Skyhunter*.

(c) Additionally, Mazonia procured the launch of the *Skyhunter* by licensing and certifying the flight

Mazonian authorities actively and substantially participated in the *Skyhunter* launch. They licensed and certified the *Skyhunter* according to Mazonian regulations.[50] This demonstrated a level of involvement and assistance sufficient to constitute 'procurement'[51] and render Mazonia a 'launching State'.

B3. The damage was caused by the *Skyhunter*

Article II of the *Liability Convention* refers to 'damage caused by a space object'. This establishes a test of causation, meaning the harm must flow directly or immediately from, or as the probable or natural result of, the operation of the space object.[52] The 'word "caused" should be interpreted as merely directing attention to the need for some causal connection between the accident and the damage, while leaving a broad discretion so that each claim can be determined on its merits….'[53]

Causation is established with respect to the *Barracuda*, as falling debris is a probable and natural consequence of a launch of a space object. The detachment of materials resulting in falling debris is not an uncommon occurrence during a spacecraft launch.[54]

There was a direct link between the operation of the object and the resulting damage. Insulating material that detached from the *Skyhunter* struck the *Barracuda* on the surface of the Earth, causing the material damage.[55] This in turn caused the financial loss suffered by Emeraldian Batoblue Ltd through the loss of a lucrative charter and the cost of repairs.[56]

The required repairs and the consequent loss of the charter were natural and probable results of the material damage sustained by the *Barracuda*. The delays caused by the shortage of available parts and skilled labour from the sailing regatta,[57] did not destroy this causal relationship.

B4. Article VI(1) of the *Liability Convention* does not exonerate Mazonia from liability for damage to the *Barracuda*

Mazonia may seek to rely on Article VI(1) of the *Liability Convention* for exoneration from liability.

Article VI(1) grants exoneration from absolute liability if the damage has resulted either wholly or partially from the 'gross negligence' of the claimant state. According to Article VI(2), a state may only rely on this provision only if its own acts were in conformity with international law.

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[47] Compromis, ¶ 1.
[48] *Id.*, ¶ 5.
[49] *Id.*, ¶ 3.
[50] Compromis, ¶ 3.
[51] *See supra* Submission B2(b) (on the definition of 'procure').
[52] Cosmos Case, 18 I.L.M. (1979) 899, 906; *Travaux préparatoires* to the Liability Convention, *Belgian Proposal for a Convention on the Unification of Certain Rules Governing Liability for Damage Caused by Space Devices*, art. 4, U.N. Doc. A/AC.105/C.2/L.7 *reprinted in* MANUAL ON SPACE LAW, *supra* note 11, at 249-253; Carl Q Christol, *International Liability for Damage Caused by Space Objects* 74 AM. J. INT'L L. 346, 359 (1980).
[53] Foster, *supra* note 27, at 158.
[54] Interview with NASA flight operations manager John Shannon, in the Johnson Space Centre Houston, Tex. (Jul. 27.2005) (discussing the inevitability of falling debris) *available at* www.cnn.com/2005/TECH/space/07/26/space.shuttle/index.html.
[55] Compromis, ¶ 11.
[56] *Id.*, ¶ 18.
[57] Compromis (Additional), ¶ 7.

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Emeralda has not been grossly negligent and therefore Mazonia cannot be exonerated from liability. However, even if Emeralda has been grossly negligent, Mazonia is precluded from relying on Article VI, as aspects of the *Skyhunter* launch were not in conformity with international law.

(a) Emeralda has not been 'grossly negligent'

Article VI(1) grants exoneration from absolute liability if 'the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage ....' The act of gross negligence may be committed by the claimant state or the natural or juridical person on whose behalf the state is claiming.

Gross negligence is not defined in any of the Space Treaties. In the *travaux préparatoires* to the *Liability Convention*, the United States delegate stated that gross negligence was tantamount to a 'wilful or reckless act or omission' and that the phrase was intended to mean more than mere negligence.[58] The Indian delegate later confirmed that 'gross negligence' was intended to have such a meaning.[59] Conceptions of gross negligence in domestic jurisdictions accord with this definition.[60]

This test is the most appropriate for the Court to apply, given that it was propounded in the context of discussions relating directly to the *Liability Convention* and is the predominant test among domestic jurisdictions. This high threshold test also accords with the context and purpose of the *Liability Convention*.[61]

(i) The Emeraldian Government was not 'grossly negligent'

The Emeraldian Government, as the 'claimant State' of Emeraldian Batoblue Ltd,[62] was not grossly negligent. It did not wilfully or recklessly disregard SkyQuest's request to issue a warning. It issued the warning when it received instructions from SkyQuest on the day before launch. There is nothing in the *Compromis* to suggest that those instructions were not followed.

The Emeraldian Government was not reckless in failing to specify a reason for the fifteen nautical mile exclusion zone. It was entitled to rely on the information it was given by SkyQuest. It would have been unreasonable to require the Emeraldian Government to request further information, given that it had no specific knowledge of the launch.[63] Therefore, any inadequacy in the recommendation made is properly attributed to the source of the warning, namely SkyQuest, and, by the operation of the Space Treaties, Mazonia.[64] In any case, a failure by the Emeraldian Government to enunciate the specific reasons for the exclusion zone does not meet the high threshold required for 'gross' negligence, as it is not a sufficiently large departure from the standard of care required.

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[58] *Travaux préparatoires* to the Liability Convention, U.N. GAOR, COPUOS, 50th mtg. at 3, U.N. Doc. A/AC.105/C.2/SR.50 (1965), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 471 (statement by U.S. Amb. Sohier).

[59] *Travaux préparatoires* to the Liability Convention, U.N. GAOR, COPUOS , 77th mtg. at 9, U.N. Doc. A/AC.105/C.2/SR.77 (1966) *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 487 (statement by Indian Amb. Haraszi).

[60] Jean Limpens et al, *Liability for One's Own Act*, *in* VOL XI (TORTS) INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 2-2, 2-65 & 2-70 (Andre Tunc et al eds., 1983) (Domestic jurisdictions differ slightly in their approach to the definition of gross negligence. France, Italy, Egypt, Lebanon, Sweden, Turkey, Austria, Greece, Taiwan and South Africa impose an extremely high threshold, equating gross negligence with an intention to harm. While, Canada, Argentina, the United Kingdom, Germany, the United States, Belgium and Australia define gross negligence as a greater degree of negligence. No clear delineation can be drawn between civil and common law jurisdictions. However, common to both of these approaches is the severity of the conduct required to meet the standard of 'gross' negligence).

[61] Liability Convention, *supra note* 1, Preamble.

[62] Compromis, ¶ 17 and ¶ 1.

[63] *Id.*, ¶ 5.

[64] See *supra* Submission B2(a) and B2(b).

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Furthermore, the Emeraldian Government was not grossly negligent in failing to enforce the fifteen nautical mile exclusion zone during the *Skyhunter* launch. It was under no international obligation to take such measures.[65] By issuing the warning, Emeralda satisfied all of its obligations.

(ii) Additionally, the Captain of the *Barracuda* was not 'grossly negligent'

The Captain of the *Barracuda* was not grossly negligent in entering the exclusion zone, as there were numerous deficiencies in the warning provided by SkyQuest.

Firstly, the reasons for the exclusion zone were unspecified.[66] As a spacecraft launch is not a routine activity, the lack of detail made it impossible for a reasonable person to be cognisant of the specific dangers of a launch. Secondly, the fact that the exclusion zone was merely recommended meant that the gravity of the risk was not impressed upon persons in the position of the Captain.[67] Thirdly, the recommendation was only announced once to ships in Emeraldian territorial waters on the day prior to the launch.[68] Therefore, unless an individual was actually aboard a ship in the territorial waters of Emeralda at that time, it was unreasonable to expect them to have received the recommendation. Fourthly, despite the inadequacies in the warning given, the Captain only intruded a relatively short distance into the exclusion zone.[69]

These factors show that the Captain's actions were not so grave as to meet the high threshold required for gross negligence.

[65] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter *UNCLOS*] (provides that a costal state can declare a safety zone in their territorial waters, but creates no obligation to do so).

[66] Compromis, ¶ 7.

[67] *Id.*

[68] *Id.*

[69] *Id.*, ¶ 9 (The Captain intruded five nautical miles into the exclusion zone and was therefore ten nautical miles from the launch site).

(b) Even if Emeralda was grossly negligent, Mazonia cannot rely on Article VI(1), as the damage resulted from activities conducted by Mazonia that were not in conformity with international law

Material aspects of the *Skyhunter* launch were not in conformity with international law. Therefore, Article VI(2) applies to deny Mazonia exoneration under Article VI(1).

Firstly, the launch was conducted only thirty-two nautical miles off the coast of Emeralda.[70] The launch therefore had the potential to adversely affect Emeraldian maritime and aviation activities.[71] Secondly, SkyQuest failed to exercise due diligence.[72] It did not provide Emeralda with specific details of the launch and the risks involved.

These two points demonstrate that Mazonia did not give due regard to Emeraldian interests while supervising SkyQuest's activities and the *Skyhunter* launch. This is in breach of Article IX of the *Outer Space Treaty*, which stipulates that states shall conduct all of their activities in outer space with due regard for the interests of other states.

Therefore, the launch was not in conformity with international law and Mazonia is unable to rely on Emeralda's gross negligence to exonerate itself from liability.

C. MAZONIA IS LIABLE FOR THE MATERIAL DAMAGE TO THE *CONDOR* AND FOR FINANCIAL LOSS SUFFERED BY SOARING HIGH INC

C1. Mazonia is liable under Article II of the *Liability Convention*

Article II of the *Liability Convention*, as applied in the previous submission, also applies to the damage sustained by the *Condor* and Soaring

[70] Compromis, ¶ 3.

[71] *See e.g.* Fisheries Jurisdiction Cases (U.K. v. Ice.; F.R.G. v. Ice.), 1974 I.C.J. 3 (Jul. 25).

[72] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Oct. 22).

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High Inc. The types of damage suffered by the *Condor*, namely material damage and financial loss, are recognised as 'damage' in Article I(a). Mazonia is a 'launching State', as the *Skyhunter* flight was a Mazonian 'national activity', and because Mazonia 'procured' the launch of the *Skyhunter*. Causation is also established, as there is a direct link between the launch of the *Skyhunter* and the damage that resulted.

Article VII(b) does not prevent recovery under the *Liability Convention*. Alternatively, if this provision does apply, it merely precludes the application of the *Liability Convention*. Mazonia can still be held responsible for the damage under general international law, and must make full reparation to Emeralda.

(a) Article VII(b) does not prevent Emeralda from claiming damages for the *Condor* under the *Liability Convention*

Article VII(b) of the *Liability Convention* states that the provisions of the Convention shall not apply to damage caused by a space object of a 'launching State' where foreign nationals are in the immediate vicinity of a planned launching or recovery area as a result of an invitation by that 'launching State'. Therefore, a foreign national who suffers damage must be in the immediate vicinity of a launch site. Furthermore, the foreign national must have been invited there by the 'launching State'.

Mazonia cannot rely on the invitation provision in order to avoid liability under the *Liability Convention*. The *Condor* was not there because of an invitation from SkyQuest or Mazonia. The *Condor* was chartered by the commercial sponsors of the launch. The presence of the *Condor* was due to this commercial arrangement.[73] The fact that the *Condor* was used to transport genuine invitees does not mean that its owner, Soaring High Inc, was invited.

As no invitation was extended to Soaring High Inc, Mazonia is unable to rely on Article VII(b) to avoid liability for the *Condor* under the *Liability Convention*.

[73] Compromis, ¶ 8.

C2. If Article VII(b) bars reliance on the *Liability Convention*, Mazonia remains liable for the damage under general international law

Even if the *Liability Convention* does not apply because of Article VII(b), Mazonia remains liable to compensate Emeralda under general international law. Mazonia failed in its duty to ensure that the *Skyhunter* launch did not cause damage to the property of other states.

At general international law, the *Trail Smelter Arbitration* established that every state has a duty not to cause damage to the property of other states.[74] The violation of this duty is a wrongful act.[75] If a wrongful act is attributable to the state from which the claim is sought,[76] that state[77] is under an obligation to make full reparation.[78] Conduct is attributable to a state where the person who committed the wrongful act was acting under the 'direction or control' of the state concerned.[79]

The damage caused by the *Skyhunter* is attributable to Mazonia. SkyQuest, the company responsible for the *Skyhunter* was acting under the direction and control of Mazonia. This was because Mazonia had assumed responsibility over the launch by licensing and certifying the *Skyhunter*.[80] Additionally, both crew members were Mazonian nationals. Accordingly, the Mazonian Government was in the best position to influence the conduct of the launch and had a duty to ensure that the *Skyhunter* did not damage the property of other states. It breached this duty when damage was done to Emeraldian interests.

[74] Trail Smelter Arbitration (U.S. v. Can.), 1941 R.I.A.A. No.3, at 1905.

[75] BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW 436 (1953); BROWNLIE, *supra* note 34, at 436.

[76] CHENG, *supra* note 75, at 180.

[77] Int'l Law Commission [ILC], *Articles on State Responsibility*, U.N. GAOR, 56th Sess, Supp No 10, art 1, UN Doc A/56/10 (2001) [hereinafter *Articles on State Responsibility*].

[78] *Id.*, art 31.

[79] *Id.*, art 8.

[80] Compromis ¶ 3; *see also supra* note Submission B2.

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Mazonia has committed an internationally wrongful act by failing to ensure that damage was not done to Emeraldian interests. It is under an obligation to make full reparation to Emeralda.[81]

D. EMERALDA IS NOT OBLIGATED TO RETURN THE CREW MEMBERS TO MAZONIAN AUTHORITIES

Emeralda is not obligated to return the crew members to Mazonia under the *Rescue Agreement* or the *Outer Space Treaty* for two reasons. Firstly, the *Skyhunter* landing was not due to 'accident, distress or emergency' and was not 'unintended'. Secondly, Mazonia is not the 'launching authority'. Alternatively, even if Emeralda is obligated to return the crew members, its retention of them is a legitimate countermeasure under general international law.

D1. Emeralda is not obligated to return the crew members under the *Rescue Agreement* or the *Outer Space Treaty*

The *Outer Space Treaty* and the *Rescue Agreement* both deal with the return of spacecraft personnel. However, pursuant to Article 30(3) of the *Vienna Convention on the Law of Treaties*, the later more specific provisions of the *Rescue Agreement* should take precedence over the earlier more general provisions of the *Outer Space Treaty*.[82]

Article 4 of the *Rescue Agreement* provides that if the 'personnel of a spacecraft' land in the territory of another Contracting Party under conditions of 'accident, distress, emergency or unintended landing' they shall be returned to 'representatives of the launching authority'. Emeralda acknowledges that both Ian Brady and Colonel Van den Bergh are 'personnel of a spacecraft'. However, Emeralda submits that it is not obligated to return these crew members to Mazonia, as the *Skyhunter* landing was not due to 'accident, distress or emergency' and was not otherwise 'unintended'. Furthermore, Mazonia is not the 'launching authority'.

(a) The *Skyhunter* landing was not due to 'accident', 'distress' or 'emergency'

The *Rescue Agreement* does not define 'accident ', 'distress', or 'emergency'. However, the *Convention on International Civil Aviation*[83] states that: (i) 'accident[s]' refer to incidents that adversely affect the performance or flight characteristics of a craft; [84] (ii) 'distress' is a situation of 'grave and imminent danger' requiring immediate assistance;[85] and (iii) 'emergency' arises where there is a reasonable apprehension of uncertainty as to the safety of the craft.[86] As the *Rescue Agreement* was drafted on the basis of the *Chicago Convention*, recourse may be had to the definitions provided therein.[87]

The *Skyhunter* landing was not due to 'accident'. The loss of the insulating material did not affect the performance of the *Skyhunter*. In fact, the *Skyhunter* continued on its nominal trajectory despite the loss of the material.[88]

Additionally, the *Skyhunter* was not in 'distress'. It was designed to remain in flight for another thirty-five hours at the time of Colonel Van den

[81] Case Concerning the Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29, 47 (Sept. 13).

[82] Vienna Convention, *supra* note 5, art 30(3); MANFRED LACHS, THE LAW OF OUTER SPACE – AN EXPERIENCE IN CONTEMPORARY LAW MAKING 86 (1972).

[83] Convention on International Civil Aviation, Mar. 29, 1972, 15 U.N.T.S. 119 [hereinafter *Chicago Convention*].

[84] *Id.* Annex 11 ¶5.2.1.

[85] *Id.*

[86] *Id*; Ruwantissa Indranath Ramya Abeyratne, *Negligence of the Aircraft Commander and Bad airmanship – New Frontiers* 12(1) AIR LAW 3 (1987).

[87] Vienna Convention, *supra* note 5, art. 32; *Travaux préparatoires* to the Rescue Agreement, U.N. GAOR, COPUOS, 32nd mtg. at 15 & 32, U.N. Doc. A/AC.105/C.2/SR.29-37 (Mar. 12, 1964), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 159 &165 (statements by U.S. Amb Meeker & Austl. Amb. Bailey); Mani, *supra* note 3.

[88] Compromis, ¶ 11.

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Bergh's decision.[89] Objective data also indicated that the flight could continue under nominal conditions.[90] Colonel Van den Bergh therefore had time to consider his options and decide if further action was necessary. There was no imminent harm requiring immediate action.

Although Colonel Van den Bergh's belief in the need to land the *Skyhunter* could constitute 'an apprehension of danger' within the meaning of 'emergency', his belief was not reasonable. Colonel Van den Bergh's experience would have informed him that insulating material detaches in a majority of spacecraft launches.[91] Given this fact, it was unreasonable for him to ignore the Flight Director's assessment that the flight could continue.[92] This is especially the case as the ultra-hazardous nature of space activities means that the smallest deviation from planned procedures can have dire consequences.[93]

Accordingly, Emeralda submits that it is not obligated to return the crew on the basis of 'accident', 'distress', or 'emergency' pursuant to Article 4 of the *Rescue Agreement.*

(b) Additionally, the landing of the *Skyhunter* was not 'unintended'

'Unintended landing' is not defined in the Space Treaties or in any other international treaty. However, it has been stated that 'unintended landings' refer to situations in which the astronaut mistakes the landing area for another site[94] or where the spacecraft is forced down by uncontrollable external events other than 'accident', 'distress', or 'emergency'.[95] Examples of such events include hijackings or attacks.[96]

There is nothing in the *Compromis* to suggest that the Emeraldian territorial waters were mistaken for another intended landing site. Nor does the *Compromis* state that the *Skyhunter* was forced down by an event such as a hijacking. The *Compromis* simply states that Colonel Van den Bergh chose to initiate a descent through the atmosphere[97] and had communicated his intended area of landing.[98]

Therefore, Emeralda is not obligated to return the crew members as the *Skyhunter* did not make an 'unintended landing.'

(c) Additionally, Mazonia is not the 'launching authority'

Article 4 of the *Rescue Agreement* requires states to return rescued crew members to the relevant 'launching authority'.

Article 6 of the *Rescue Agreement* defines the 'launching authority' as 'the State responsible for launching'. Although the term 'responsibility' is used in both the *Outer Space Treaty* and the *Rescue Agreement*, it is not defined in either. Therefore, 'responsibility' must be given its plain and ordinary meaning within the context of those treaties.[99]

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[89] Compromis, ¶ 7 & ¶ 13 (show that ninety-four minutes had elapsed).
[90] Compromis, ¶13
[91] Interview with Walter Cunningham, Apollo 1 Accident Investigation Committee in the Kennedy Space Centre, Houston, TEX. (May 16, 2003) http://www.HoustonChronicle.com
[92] Compromis, ¶ 13.
[93] Brian O'Hagan & Alan Crocker, NASA Johnson Space Centre Mission Operations Directorate, Presentation on Mission Operations – Fault Management Techniques in Human Spaceflight Operations at the Integrated System Health Engineering and Management [ISHEM] Forum 2005 (Nov. 7-10, 2005) http://ase.arc.nasa.gov/projects/ishem/papers_pres.php.

[94] *Travaux préparatoires* to the Rescue Agreement, *Secretariat Note of the Summary of Points Raised in Discussions of Working Group I & II*, U.N. Doc. A/AC.105/21 Annex IV (Oct. 26, 1964), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 148 (whether 'mistake' was to be included in Article 4 was specifically deferred for later discussion, but the words 'unintended landing' were added).
[95] STEPHEN GOROVE, STUDIES IN SPACE LAW: ITS CHALLENGES AND PROSPECTS 99 (1977).
[96] *Id.*
[97] Compromis, ¶ 13
[98] *Id.*
[99] Vienna Convention, *supra* note 5, art. 31.

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As stated previously, responsibility under the *Outer Space Treaty* entails liability. However, under the *Rescue Agreement*, responsibility is attributed to the state with exclusive jurisdiction and control over the spacecraft and its occupants. This is due to the fact that the term 'launching authority' was formulated to ensure there would be certainty as to which state or entity the crew members of a spacecraft launched by multiple entities would be returned to.[100] Accordingly, the state with jurisdiction and control will be the 'state responsible for the launching', and is thus the 'launching authority'.

The *Skyhunter* is registered in Isla Roca.[101] Isla Roca is therefore 'the State responsible for the launch'. The act of registration confers it with exclusive jurisdiction and control over the *Skyhunter* and its crew members.[102] On this basis, if Emeralda is obligated to return the crew members, the appropriate 'launching authority' to which they must be returned is Isla Roca, and not Mazonia.

D2. Given that, Article 4 of the *Rescue Agreement* is not established, Emeralda has the right to detain the crew members by virtue of its territorial jurisdiction

Territorial jurisdiction refers to the ability of a state to make and enforce laws within its territory.[103] This jurisdiction includes the ability to detain and prosecute foreign nationals suspected of committing offences wholly or partially within the territory of a state.[104] The territory of a state includes its sovereign airspace,[105] territorial sea[106] and any vessel in international waters bearing its nationality.[107]

Falling debris from the *Skyhunter* launch killed an Emeraldian sailor onboard the *Barracuda*.[108] The *Barracuda* was flying the Emeraldian flag and therefore constituted Emeraldian territory. The *Skyhunter* also landed in the territorial waters of Emeralda in breach of the Emeraldian Maritime Code.[109]

As each of these offences occurred within Emeraldian territory, the Emeraldian Government is entitled to detain the crew members for the purposes of exercising its territorial jurisdiction and enforcing its laws, similar to the outcome in the *S.S. Lotus Case*.[110]

D3. In the further alternative, if Article 4 of the *Rescue Agreement* is established, Emeralda's retention of the crew members is a legitimate countermeasure under general international law

The doctrine of countermeasures is well-recognised in international law.[111] Countermeasures involve derogations from subsisting treaty obligations that can be justified as a necessary and proportionate response to a

[100] Gabriella Catalano Sgrosso, *Legal Status of the Crew in the International Space Station* in PROCEEDINGS TO THE 34TH COLLOQUIUM ON THE LAW OF OUTER SPACE 41 (1991); Valden S. Vereshchetin, *Legal Status of International Space Crew*, 3 ANNALS SPACE L 545 (1978).
[101] Compromis, ¶ 4.
[102] Outer Space Treaty, *supra* note 1, art. VIII; Registration Convention, *supra* note 1, art. II; Von der Dunk, *supra* note 1, at 32-34.
[103] S.S. Lotus (Fr. v. Turkey), 1927, P.C.I.J. (ser. A) No. 10 at 10 (Sept. 7).
[104] S.S. Lotus (Fr. v. Turkey), 1927, P.C.I.J. (ser. A) No. 10 at 10, 18 (Sept. 7); Oliver J Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law* 47 AM, J. INT'L L. 559, 588 (1953) (intruding aircraft can be penalized); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9(3) 999 U.N.T.S. 171; Harvard Research on International Law, *Harvard Draft Convention on Jurisdiction with Respect to Crime*, 29 AM, J. INT'L L. 439 (1935).
[105] Chicago Convention, *supra* note 83, art. 2.
[106] UNCLOS *supra* note 65, art. 2.
[107] S.S. Lotus (Fr. v. Turkey), 1927, P.C.I.J. (ser. A) No. 10 at 10 (Sept. 7).
[108] Compromis, ¶ 12.
[109] Compromis, ¶ 19.
[110] S.S. Lotus (Fr. v. Turkey), 1927, P.C.I.J. (ser. A) No. 10 at 10 (Sept. 7).
[111] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

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perceived wrongful act.[112] Countermeasures are legitimate if they are (i) taken in response to a prior wrongful act; (ii) directed towards the state responsible for the wrongful act; (iii) preceded by a call for the state committing the wrongful act to discontinue the act or make reparation; (iv) the non-performance of an international obligation; and (v) proportionate to the perceived wrong.[113] In general, countermeasures which reciprocate the perceived wrong will be proportionate.[114]

Emeralda's retention of the crew members complies with the requirements of a legitimate countermeasure. Firstly, Mazonia's failure to compensate for the loss of the sailor and damage to Emeraldian ships is an internationally wrongful act.[115] Secondly, Emeralda's retention of the crew members is a countermeasure directed at the state responsible for the wrong. Emeralda's loss was caused by a space activity that was licensed and certified by Mazonian authorities.[116] Thirdly, Emeralda had informed Mazonia of its intention to detain the crew members unless reparation was made.[117] Fourthly, the detention of the crew members is the non-performance of Emeralda's obligation to return under Article 4 of the *Rescue Agreement*. Finally, the retention of the crew members is proportionate to the loss suffered by Emeralda. This stems from the fact that the obligation to return the crew members under the *Rescue Agreement* and the obligation to make reparation under the *Liability Convention* were formulated as reciprocal obligations during the drafting of the Space Treaties.[118]

E. MAZONIAN NATIONAL ACTIVITIES INVOLVING THE MAZONIAN GOVERNMENT HAVE CAUSED A VIOLATION OF EMERALDA'S SOVEREIGNTY

State sovereignty over airspace[119] and territorial waters[120] is a fundamental principle of international law. In certain situations, states agree to relax their claim to sovereignty,[121] however none of these exceptions apply in the present case. Therefore, the *Skyhunter* landing was made in violation of Emeraldian sovereignty.

Alternatively, even if a right analogous to that of innocent passage did apply to the *Skyhunter*, Mazonia's failure to forewarn Emeralda of the *Skyhunter's* landing constituted a breach of international law.

These violations were Mazonian 'national activities' for which Mazonia should be held responsible under international space law.

E1. The landing of the *Skyhunter* was not made pursuant to any express right of innocent passage

[112] *Id.*; Commentary to Draft Articles on State Responsibility, *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 48th Sess., Supp. No. 10, art 49, at 326, U.N. Doc. A/48/10 (1993).

[113] Articles on State Responsibility, *supra* note 77, art. 49; Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

[114] Air Services Agreement of 27 March 1946, (U.S. v. Fr.), 18 R.I.A.A. 416 (1979); 'Naulilaa' (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa), 2 R.I.A.A. 1013, 1018 (1928).

[115] Compromis, ¶ 22.2 & ¶ 22.5.

[116] Compromis ¶ 3; *see supra* Submission B2(c).

[117] *Id.*, ¶ 21.

[118] Roy S. K. Lee, *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, *compiled in* I MANUAL ON SPACE LAW, at 53 (Nandasiri Jasentuliyana & Roy S.K. Lee eds., 1979); *Travaux préparatoires* to the Rescue Agreement, U.N. GAOR, COPUOS, 89th mtg. at 5, U.N. Doc. A/AC.105/C.2/SR.89 (1967), *compiled in* MANUAL ON SPACE LAW, *supra* note 11, at 464 (statement by Jap. Amb. Otsuka).

[119] Chicago Convention, *supra* note 83, arts. 1 and 2.

[120] UNCLOS, *supra* note 65, art. 2.

[121] *See id.*, art. 19; *see also* Chicago Convention, *supra* note 83, art 5.

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The Skyhunter did not have an express right of innocent passage under the *Chicago Convention*, the *Convention on the Law of the Sea* or the Space Treaties.

(a) There is no right under the *Chicago Convention*

Article 5 of the *Chicago Convention* provides that aircraft engaged in 'non-scheduled' flights may traverse the airspace of, or land in the territory of, another state for 'non-traffic' purposes.[122] This Article applies only to aircraft.[123] An 'aircraft' is 'any machine that can derive support from the atmosphere, other than the reactions of the air against the earth's surface.'[124] It does not include surface-to-orbit spaceplanes or machines propelled into outer space by a rocket.[125]

The *Skyhunter* is a surface-to-orbit spaceplane[126] and was propelled into low Earth orbit by a rocket.[127] Therefore, the *Skyhunter* is not an aircraft. It was at all times a 'space object' as defined and regulated by the Space Treaties and those instruments should be applied to the entire flight of the *Skyhunter*, including its launching and landing through airspace. As such, Article 5 of the *Chicago Convention* does not apply and by landing in Emeraldian territorial waters, the *Skyhunter* violated Emeraldian sovereignty.

(b) There is no right under the Law of the Sea

Article 18 of the *UNCLOS* provides that a ship may anchor in the territorial waters of another state if it is in distress, or traverse the territorial waters of another state for navigational purposes. This right of passage is limited to ships or water craft.[128] It does not extend to aircraft or spacecraft.[129]

The *Skyhunter* is not a ship. It therefore does not have the benefit of Article 19 of the *Law of the Sea Convention* and has violated Emeraldian sovereignty by landing in the territorial sea of Emeralda.

(c) There is no similar right under the Space Treaties

The Space Treaties do not expressly permit space objects to pass through the territory of other states. The fact that the *Outer Space Treaty* is premised on equality of access to outer space[130] is insufficient to prove that territorial sovereignty has been relaxed to cater for the overflight of space objects. Additionally, Article 4 of the *Rescue Agreement* only imposes an obligation to rescue and return downed astronauts. It does not preclude a state from obtaining reparation for a violation of sovereignty.[131]

As the Space Treaties do not provide a right of innocent passage, the *Skyhunter* landing constituted a violation of Emeraldian sovereignty.

E2. The *Skyhunter* landing was not made pursuant to a right of passage under customary international law

As there is no express right of passage for spacecraft in international law, Mazonia must establish this right through custom.[132] Custom exists if there is consistent state practice (*consuetude*) and recognition of this practice as a legal obligation (*opinio juris sive necessitatis*).[133] Further, where a customary

[122] *Cf. UNCLOS*, *supra* note 65, art. 18.
[123] Chicago Convention, *supra* note 83, art. 3(c).
[124] *Id.*, Annex 7 Ch1.
[125] ICAO Workpaper, *supra* note 11, § 6.1.
[126] *See supra* Submission A2.
[127] Compromis, ¶ 1.
[128] *UNCLOS*, *supra* note 65, art. 17.
[129] *Id.*, art. 19.

[130] Outer Space Treaty, *supra* note 1, art. 1 and Preamble.
[131] Cosmos Case, 18 I.L.M. (1979) 899, 907.
[132] Asylum Case (Colum. v. Peru), 1950 I.C.J. 266, 276 ('the party which relies on a custom of this kind must prove that this custom is established').
[133] North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v Neth.), 1969 I.C.J. 3(Feb. 20); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 , 76 (Jun. 27).

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principle takes away a right, express agreement is needed for the custom to be established.[134]

Currently, there is no customary right of innocent passage for spacecraft over the airspace and territorial waters of foreign states. It has been suggested that the failure of states to protest against the flight of spacecraft through their territory has established a right of innocent passage.[135] Although states have failed to protest against such overflight in the past,[136] such intrusions were generally at a height deemed to be outer space[137] and thus subject to the sovereignty of no one state. There is therefore no *opinio juris sive necessitatis* to show that the lack of protest has established a customary right of passage.

In fact, *opinio juris sive necessitatis* actually suggests that there is no such right. In the *COSMOS-954* incident, Canada stated that the crash landing of the satellite in its territory was a violation of sovereignty.[138] Similarly, states involved in space activities often enter into bilateral agreements to waive any liabilities that may arise from the launching and landing of space objects.[139]

As there is no customary right of innocent passage for spacecraft, consent is required before foreign spacecraft can enter the airspace or territorial waters of another state.[140] In the present case, Mazonia did not seek consent for the landing of the *Skyhunter* and therefore violated Emeraldian sovereignty.[141]

E3. Alternatively, Mazonia should have forewarned Emeralda of the *Skyhunter's* imminent entry into its airspace and territorial waters

Alternatively, if the *Skyhunter* was in distress, and if a right of innocent passage did exist at the relevant time, state practice requires prior authorisation before entering foreign airspace.[142] States are also under a general duty to warn other states about dangers within their jurisdiction or control.[143]

Some ten hours elapsed between Colonel Van den Bergh's notification of his intended landing place to mission control and Emeralda's communiqué announcing the rescue of the crew.

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[134] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Nicar. v. U.S.), 1986 I.C.J. 14 , 99-100 (Jun. 27).

[135] Carl Q Christol, *'Innocent Passage' in the International Law of Outer Space*, 22 JAG J. (1965).

[136] *E.g.* Cosmos Case, 18 I.L.M. (1979) 899; Committee on the Peaceful Uses of Outer Space [COPUOS], *Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States*, U.N. Doc. A/AC.105/635 (Jan. 15, 1996) (Reply from Germany & Pakistan) (the flight of *Buran* over Turkish airspace, re-entry of *Skylab* over Australia and re-entry of *Apollo 13/SNAP 27* near the Tonga Trench did not create custom); COPUOS, *Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States*, U.N. Doc. A/AC.105/635/Add.11 (Jan. 26, 2005) (Reply from Finland).

[137] LACHS, *supra* note 82, at 59-61; CHENG, *supra* note 24, at 38.

[138] Cosmos Case, 18 I.L.M. (1979) 899.

[139] *E.g.* Launching of NASA Satellites from San Macro Range Agreement, U.S.-Italy, Jun. 12, 1969, 20 U.S.T. 4119; *see also* CHENG, *supra* note 24, at 611

[140] Compromis, ¶ 19 (the Emeraldian Maritime Code is evidence of Emeralda's position on foreign craft entering its territory, which lends support to the authorisation requirement).

[141] There is no evidence of such consent being sought in the Compromis.

[142] W Allan Edmiston, *Showdown in the South China Sea: An International Incidents Analysis of the So-Called Spy Plane Crisis*, 16 EMORY INT'L L. REV. 639 (2002) (A distressed United States aircraft landed in China in April 2000. China and the United States acknowledged the state practice requires express notification for all landings); Chicago Convention, *supra* note 83, Annex 9 ¶ 7.2.

[143] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 92 (Oct. 22).

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[144] During that period of time, Mazonia did not seek authorisation from or forewarn Emeralda of this landing.[145] There is no evidence of difficulties in formal communications between the two states to justify such an omission.[146] The dangerous nature of spacecraft landings entitled Emeralda to be forewarned of the possibility of damage to its territory. This unauthorised entry therefore constituted a violation of Emeraldian sovereignty.

E4. Mazonia is responsible for these violations under the *Outer Space Treaty*

Mazonia is responsible for the violation of Emeraldian sovereignty, as the *Skyhunter* mission was a Mazonian 'national activity' under Article VI of the *Outer Space Treaty*.

Article VI of the *Outer Space Treaty* provides that states bear international responsibility for their 'national activities' in outer space, even where they are conducted by non-governmental entities.[147] Therefore Mazonia will be liable for the violation of sovereignty under the *Outer Space Treaty* if the *Skyhunter* mission was a Mazonian 'national activity'. As previously submitted, 'national activity' is defined by the nationality of the enterprise conducting the space activity.

The *Skyhunter* mission was a Mazonian 'national activity'. SkyQuest, the company responsible for the *Skyhunter* mission is a Mazonian national, as Mazonia is its basis of effective ownership and control.[148] 65% of its shareholding is held by Mazonian companies.

Given that the *Skyhunter* mission was a Mazonian 'national activity', Mazonia is responsible for the violation of Emeraldian sovereignty.

SUBMISSIONS TO THE COURT

For the foregoing reasons, the Republic of Emeralda, Applicant, respectfully requests the Court to adjudge and declare that:

1. Mazonia is liable for the loss and suffering caused by the death of the Emeraldian sailor, and the material damage to the *Barracuda* and for financial loss suffered by Emeraldian Batoblue Ltd, in the amounts mentioned in the *Compromis*;
2. Mazonia is liable for the material damage to the *Condor* and for the financial loss suffered by Soaring High, Inc.;
3. Emeralda is not presently obligated to return Ian Brady or Colonel Van den Bergh to Mazonia under the Space Treaties or general international law; and
4. Mazonia is liable for the breach of Emeraldian sovereignty caused by the landing of the *Skyhunter,* and consequently Mazonia is bound to refrain from repeating such violations in the future and must formally apologise to Emeralda for that breach.

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[144] Compromis, ¶ 14.
[145] *Id.* (there is no evidence that SkyQuest or Mazonia attempted to notify Emeralda).
[146] *Id.*, ¶ 7 (to the contrary, there is evidence of cooperation when *SkyQuest* had the Emeraldian Maritime Authority issue a warning notice on its behalf).
[147] Outer Space Treaty, *supra* note 1, art. VI.
[148] *See supra* Submission B2(a).

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MEMORIAL FOR THE RESPONDENT

THE STATE OF MAZONIA

George Washington University, USA (David J. Western, Magin T. Puig-Monsen, Carlos F. Laboy)

ARGUMENT

I. Emeralda must return the space plane and the two crew members.

Within the realm of *corpus juris spatialis* there are two treaties that require the prompt return of astronauts.[149] First, the Outer Space Treaty (OST) indicates that in the event of an "accident, distress, or emergency landing on the territory of another State Party," the astronauts "shall be safely and promptly returned to the state of registry of their space vehicle."[150] Second, the Rescue and Return Agreement "makes the duty even more expansive, applying even to cases of unintended landing."[151] According to Article 4, this duty to return can be considered "unconditional."[152] It states:

> If, owing to accident, distress, emergency, or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party or have been found on the high seas or in any other place not under the jurisdiction of any State, they shall be safely and promptly returned to representatives of the launching authority.[153]

Unlike the OST, the Rescue and Return Agreement includes the term, "unintended landing." Add this language to that of the provisions for distress, accident or emergency, and it is clear that *unless* Mr. Ian Brady and Col. Van den Bergh *intended* on crashing into Emeraldian territorial waters, they must be returned to Mazonia promptly.

A. There is a difference between "launching authority" and "launching state."

According to the Rescue and Return Agreement, Mr. Brady and Col. Van den Bergh as spacecraft personnel, "shall be safely and promptly returned to representatives of the launching authority."[154] Since Mazonia is the launching authority, Emeralda must return the two members to Mazonia—promptly.

The fact that Mazonia is a "launching authority" does not mean that it has to be also considered the "launching state." There is a subtle, yet important distinction between the two. According to the Rescue and Return Agreement, a launching authority quite simply refers to "the State responsible for launching."[155] Since Col. Van den Bergh and Mr. Brady are citizens of the State of Mazonia, and Mazonian citizens own the majority of SkyQuest,[156] Mazonia is responsible for the two crew members and the activities within which they participate. Thus, if these two crew members were to find themselves in times of despair based on their launching activities, Mazonia would be responsible for them.

This level of responsibility accords well with the international jurisdictional principle of

[149] See Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space,* 48 A.F. L. Rev. 1, 150 (2000).
[150] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. V, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST].
[151] See Ramey, *supra* note 46, at 150; *See also* Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space art. V, *opened for signature* Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Rescue & Return Agreement].
[152] Rescue & Return Agreement, *supra* note 48, at art. V.
[153] *Id.*
[154] *Id.*
[155] *Id.* at art. VI.
[156] *Compromis* ¶¶ 2, 6, 10.

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"nationality."[157] It is a "mark of allegiance and an aspect of sovereignty" that defines the primary reason why a state is responsible for its citizens.[158] The Rescue and Return Agreement was born out of a desire "to promote international cooperation,"[159] and prompted "by sentiments of humanity,"[160] therefore it makes no sense for Emeralda to do anything but return these Mazonian citizens to the country of responsibility—Mazonia. Otherwise Emeralda is violating both the letter and the spirit behind the Agreement.

Although Mazonia is the launching authority, they are not the "launching state."[161] The reason for this is because Mazonia did not actually launch or procure the launching of the *Skyhunter*.[162] Nor was the *Skyhunter* launched from Mazonian territory.[163]

Additionally, Article V of the OST requires Emeralda to return the space plane and crewmembers to the state of registry.[164] Although citizenship of spacecraft personnel is irrelevant with regard to this article,[165] the fact that Mazonia licensed the *Skyhunter* as suitable for human flight indicates a form of registration.[166] While this form of registration might not comport with the requirements of Article II of the Convention on Registration of Objects Launched into Outer Space (Registration Convention),[167] Mazonia is still the first and only country to have requested the return of the space plane and its crewmembers. No other putative state of registry has yet to act. Thus, Mazonia is the real party in interest, notwithstanding any other form of registry from other countries.

B. Crew members are astronauts and should be afforded diplomatic status.

According to the Outer Space Treaty, astronauts bear the international title of "envoys of mankind."[168] The international community has long regarded astronauts[169] as members of a unique and special class. As one learned scholar commented, "[a]n envoy ranks just below an ambassador and always is an agent, a messenger."[170]

1. Mr. Ian Brady's status as a space flight participant affords protection.

There is little doubt that as the Commander of a spacecraft, Col. Guy Van den Bergh should be considered an astronaut and thus an "envoy of mankind." But what about the rock star Mr. Ian Brady? The United States Federal Aviation Administration (FAA) recently declared that "space flight participant"[171] includes any individual who participates in a space flight and may include people that "*come from all walks of life*, with varying degrees of technical expertise and understanding."[172]

Unlike Col. Van den Bergh, who has a noteworthy background in space, Mr. Brady is a young rock star with no background as an

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[157] *See* Ian Brownlie, *Principles of Public International Law* 301 (6th ed. 2003).
[158] *Id.*
[159] Rescue & Return Agreement, *supra* note 48, at Preamble.
[160] *Id.*
[161] *See* Convention on International Liability for Damage Caused by Space Objects art. I, *opened for signature* Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention].
[162] *Id.*
[163] *Id.*
[164] OST, *supra* note 47, art. V.
[165] Bin Cheng, *Studies in International Space Law* 279 (1997).
[166] *Compromis* ¶ 3.
[167] Convention on the Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration convention].
[168] OST, *supra* note 47, art. V.
[169] "Envoys of mankind" also refers to 'cosmonauts' as the terms are synonymous.
[170] Aldo A. Cocca, *Prospective Space Law*, 1 J. Space L. 51 (1998).
[171] *Compromis* ¶ 3.
[172] *See* Human Space Flight Requirements for Crew and Space Flight Participants, 71 Fed. Reg. 75616, 75624 (Dec. 15, 2006) (to be codified at 14 C.F.R. pt. 460) (U.S.) (emphasis added).

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astronaut.[173] An argument could be made that no treaty provision applies to him. Professor Bin Cheng foresaw this lacuna in the treaties, and indicated that when space exploration reached the point of carrying "persons other than members of the crew," there would be a strong need to amend or construe the treaties to include them.[174]

Mr. Brady, however, is not without an argument for protection under the Rescue and Return Agreement. It states that the rescue of individuals pertains to those who are "personnel of a spacecraft."[175] While there is no precise definition of "personnel of a spacecraft," it is arguable that since the Agreement was "'prompted by sentiments of humanity,' it should be interpreted as applying to all persons involved in a space tourism flight."[176]

If the drafters of the agreement had wanted to narrow the scope of "personnel of a spacecraft" they could have easily done so because the term astronaut is used in the title and preamble of the Agreement.[177] Making such a distinction, however, would be incorrect since extending protection only to some and not others would defeat the nature of a rescue. If any distinction is to be made it will likely arise in a situation dealing with "military astronauts," where the issue of combatant versus non-combatant might appear.[178] However, such an issue is not germane here. Mr. Brady is a "space tourist" and in this case, part of the "personnel of" the *Skyhunter* (a spacecraft)—clearly he is afforded protection.

2. *How far the Skyhunter flew into space is superfluous.*

When a fire ignited shortly after 6:31 P.M. on January 27th 1967, Apollo 1 and the lives of three brave men tragically came to an end.[179] Although their spacecraft never left the ground, few would question the fact that these men were astronauts.[180] In a similar vein, no matter what level of space the *Skyhunter* ultimately reached the men aboard were "personnel of a spacecraft." The Rescue and Return Agreement affords protection for "personnel of a spacecraft" without making any distinction for what level of atmospheric height they had obtained prior to an accident.[181]

3. *Diplomatic Status and international law.*

The concepts of diplomatic protection and immunity are very much accepted in customary international law. In fact, rules surrounding the treatment of diplomatic relations constitute "one of the earliest expressions of international law."[182] As such, "special customs" have firmly evolved regarding how certain individuals of a diplomatic nature should be treated.[183] According to the Vienna Convention on Diplomatic Relations, "the person of a diplomatic agent shall be inviolable."[184] Although the Convention does not specifically address astronauts, it does refer to an "envoy" as a covered category.[185] If the Outer Space Treaty is to be given any credence, the statement "envoy of mankind" must be given proper weight.

It is true that subsequent to the Outer Space Treaty, there has been commentary that suggests that the term "envoy of mankind" was "no more than a figure of speech without really any legal

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[173] *Compromis*, ¶ 6.
[174] Cheng, *supra* note 62, at 232.
[175] Rescue & Return Agreement, *supra* note 48, at art. 2.
[176] Symposium, *Issues in Space Law: Up, Up and Back: The Emergence of Space Tourism and Its Impact on the International Law of Outer Space*, 6 Chi.J. Int'l L. 1 (2005) (quoting Rescue & Return Agreement, *supra* note 48, preamble).
[177] *Id.*
[178] *See* Ramey, *supra* note 46, at 50.
[179] Andrew Chaikin, *Man on the Moon* 22 (1995).
[180] *Id.*
[181] Rescue & Return Agreement, *supra* note 48, at art. 4.
[182] Malcom N. Shaw, *International Law* 668 (2003).
[183] *Id.*
[184] Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.
[185] *Id.* at art. 14(1)(b).

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significance."[186] However, the *travaux preparatoire* suggests that for at least some it might have had considerable significance. In 1962 the Lebanese delegate suggested that a space envoy only maintained his special status when engaged in peaceful pursuits.[187] While this may seem superfluous, the Hungarian delegate in the Legal Sub-Committee stated that the term "envoy of mankind" suggested immunity from local jurisdiction.[188]

Article 31 of the Vienna Convention on the Law of Treaties declares that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[189] Further this Court has made it clear that, "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."[190]

Perhaps one reason why commentators have not given much credence to the term "envoy of mankind" is that no case has yet arisen that would call into question the importance of such words. No case, that is, until today. If ever there were a time to appropriately place these words into context it would be now. Here is a situation where two astronauts crashed into the sea. They were in need of rescue, and now are in need of return. Even if Emeralda does not recognize their own obligations under the Rescue and Return Agreement, the status of these two astronauts alone declares the need for them to be treated as envoys.

4. *Emeralda is violating the UN Charter by holding the astronauts hostage.*

In 1979 when demonstrators took over the US Embassy in Tehran, Iran, and held several diplomats and consular staff hostage, this Court expressed great disdain concerning Iran's inaction. In this Court's own words:

> [Iran's] plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.[191]

Emeralda's actions previous to today have been very much like those of Iran's back in 1979. Here instead of many individuals held hostage, Emeralda is holding just two. Different from Iran, however, is the fact that Emeralda's claim is more likened to extortion in that Emeralda refuses to release the two Mazonian citizens without payment of over US $5 million and guarantees that the two individuals will be prosecuted.[192] Just like this Court rebuffed Iran for its inaction, so too should the Court require Emeralda to unconditionally return the two astronauts held hostage.

Indeed, if Emeralda truly had a justiciable claim regarding compensation and a demand for prosecution, there are more appropriate methods for them to pursue under the Charter of the United Nations than to simply resort to hostage taking. Article 33 states that:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or

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[186] Cheng, *supra* note 62, at 507.
[187] *Id.* at 259.
[188] *Id.*
[189] Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
[190] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion*, 1950 I.C.J. 4, 8 (Mar. 3).

[191] *US Diplomatic and Consular Staff in Tehran (Judgment)*, 1980 I.C.J. 3, 69 (May 24).
[192] *Compromis* ¶ 21.2.

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arrangements, or other peaceful means of their own choice.[193]

Rather than first seeking negotiation or other arbitration, Emeralda has in essence resorted to the "blackmail" of compensation and a demand for prosecution. Clearly this violates Article 33 of the Charter. Second, Article 37 indicates that if Emeralda was not satisfied with the results of its negotiations with Mazonia, they could have sought assistance from the Security Council.[194] No such efforts were made, as such, Emeralda stands in violation of the U.N. Charter until such time as the two astronauts are returned to Mazonia.

C. The Space plane should also be returned.

When *Cosmos-954* crashed into Canada, the Soviets were not interested in seeking the return of the components held in Canadian custody.[195] Canada had properly informed the Soviets of the presence of debris on their territory, but on Feb. 29, 1978 the U.S.S.R. notified Canada that it could dispose of the components "at [Canada's] own discretion."[196] Had the Soviets requested the return of the components to *Cosmos-954*, it is likely Canada would have properly followed the provisions in Article 5 (3) of the Return and Rescue Agreement that required Canada to return or hold for disposal those component parts of *Cosmos-954* that were found in Canada's territory.[197] All the Soviets were required to do was to request the return of the components and to "furnish identifying data prior to their return."[198]

The Soviets, however, did not want the components back and they refused on a number of occasions to provide any identifying details.[199] Unlike *Cosmos-954*, Mazonia does want the return of the *Skyhunter* and any component parts which are within Emeralda's custody. Like Canada, Emeralda should attempt to follow the provisions of the Return and Rescue Agreement and promptly return the vessel to Mazonian control.

II. There is no legal basis to prosecute the two astronauts before Mazonian courts.

In 1985 French agents intentionally set out to destroy a sea vessel by the name of the *Rainbow Warrior*.[200] These actions led to lengthy arbitration proceedings between New Zealand and France and ultimately criminal proceedings against two of the French agents.[201] Unlike the *Rainbow Warrior* affair, where explosives were intentionally set off to destroy a ship,[202] the unfortunate death of an Emeraldian sailor aboard the *Barracuda* was caused by sheer accident. At no time did either Col. Van den Bergh or Mr. Brady intentionally (or for that matter negligently) do anything to cause the sailor's death. For this reason, it is clear that every day these two men are held in captivity, Emeralda is violating established treaty obligations under the Rescue and Return Agreement and the Charter of the United Nations as well as other legal obligations pursuant to the law of the sea.

A. International law does not support Emeralda's demand for prosecution.

One of the most famous international legal cases involving the question of criminal responsibility and territoriality is the *S.S. Lotus*.[203] In this case, Turkey prosecuted Lieutenant Demons, the commanding officer of the Lotus, for manslaughter.[204] The charges stemmed from the Lotus' collision with the Turkish flagged vessel

[193] U.N. Charter, art. 33.
[194] U.N. Charter, art. 37.
[195] *See* Carl Q. Christol, *The Modern International Law of Outer Space* 179 (1982).
[196] *Id.*
[197] Rescue & Return Agreement, *supra* note 48, art. 5(3).
[198] *Id.*
[199] Christol, *supra* note 93, at 178.
[200] *Rainbow Warrior* (N.Z. v. Fr.), 20 R. Int'l Arb.Awards 217 (N.Z.-Fr. Arb. Trib. 1990) [hereinafter *Rainbow Warrior*].
[201] *Id.*
[202] *Id.*
[203] *S.S. "Lotus"* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) [hereinafter *Lotus*].
[204] *Id.*

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known as the *Boz-Kourt*.[205] As a consequence of this collision, eight Turkish lives were lost.[206]

France disputed Turkey's claim of jurisdiction over the French flagged vessel and Lieutenant Demons, arguing that Turkey had no basis for jurisdiction under international law.[207] The French asserted that the law of the pilot's flag should control.[208] Ultimately, the Court sided with Turkey because the accident affected the Turkish vessel, which was considered Turkish territory.[209]

Since that case two multilateral treaties have subsequently adopted the French counter position.[210] Taken together these two treaties indicate a strong indication of customary international law in this area. According to the High Seas Convention, if a similar event occurred today, "no penal or disciplinary proceedings. . . [could be instituted] except before the judicial or administrative authorities either of the flag state or of the state of which [the accused] is a national."[211] The Convention goes on to indicate that "[n]o arrest or detention of the ship, even as a measure of investigation shall be ordered by any authorities other than those of the flag state."[212]

In order for Emeralda to show that the prosecution of the two crew members is justified, they would have to show that the situation is closely related or identical to the *S.S. Lotus* case. The High Seas Convention would certainly not support Emeralda's view. First of all, Emeralda could not commence proceedings against the members of the *Skyhunter* because it was not flown under an Emeraldian registration (flag), and second, the fact that Emeralda is detaining the remnants of the *Skyhunter* and its crew in contravention to the High Seas Convention would be directly contradictory to the treaty provisions. Thus, the *S.S. Lotus* is potentially Emeralda's only "saving grace" for justification regarding the criminal prosecution of the Mazonian astronauts.

Unfortunately for Emeralda, the current case can easily be distinguished from the *Lotus* case. In the *Lotus* case, the ship's pilot had control over the ship prior to its collision with the *Boz-Kourt*,[213] whereas in the current situation, the damage was caused by materials falling off of the *Skyhunter* over which the pilot had no control.[214]

1. *General principles of law indicate the pilot did not commit manslaughter.*

In order to establish an international legal standard for criminal liability, and more specifically "manslaughter," this Court should take into account Article 38 (1) (c) of the Statute of the International Court wherein "general principles of law recognized by civilized nations" is considered an important source of law.[215] Just as the P.C.I.J. recognized the concept of "reparations" for a breach of an engagement based on general principles of law,[216] so too could this Court look to the practice of civilized nations to determine a proper definition of manslaughter from an international perspective.

According to the United States Model Penal Code, manslaughter is defined as homicide that "is committed recklessly."[217] The French Civil Code defines manslaughter (homicide involontaire) as " the fact of causing death by such awkwardness, imprudence, inattention,

[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *See* International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation §1285, *opened for signature* May 10, 1952, 439 U.N.T.S. 233; Convention on the High Seas, Apr. 29, 1958 450 U.N.T.S. 82 [hereinafter High Seas Convention].
[211] High Seas Convention, *supra* note 108, at art. 11.
[212] *Id.*
[213] *Lotus*, *supra* note 101, at 29.
[214] *Compromis* ¶ 11.
[215] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031.
[216] *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, 29 (Sept. 13).
[217] Model Penal Code § 210.3 (1962) (U.S.).

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negligence, or omission of a legal obligation imposed by law or other regulation."[218] Taken together, both codes indicate that at the very least in order for an individual to be held responsible for manslaughter, that individual must have been negligent. Based on the facts submitted before this Court, there is absolutely no indication that the pilot did anything that could be remotely considered negligent by the design of the aircraft. If anything, the real party in interest is neither the pilot nor Mr. Brady, but SkyQuest for the potentially faulty design that led to the insulation material coming off during take-off. Based on the facts in the *Compromis* alone, neither the pilot nor Mr. Brady did anything negligent to cause the death of the sailor on the *Barracuda*. Thus, using general principles of law to establish an international definition of manslaughter, no basis exists to prosecute Col. Van den Bergh nor Mr. Brady for manslaughter since they simply were not reckless or even remotely negligent.

2. *Entrance into Emeralda's territorial waters does not warrant prosecution.*

Unlike the blatant attack on a vessel chartered under the New Zealand flag in *Rainbow Warrior*,[219] no such action took place against any Emeraldian ship via actions from the *Skyhunter* or its crew. It can therefore easily be distinguished from the present case. Arguably, prosecution of the French saboteurs was justified as a breach of sovereignty, but since no intentional actions were carried out by the *Skyhunter's* crew members, no valid justification exists here.

In a similar vein, the actions of the *Skyhunter's* crew are distinguishable from those of the British sailors who worked to destroy Albanian mines in the Corfu Channel.[220] In that case this Court declared specifically, "that the action [minesweeping] of the British Navy constituted a violation of Albanian sovereignty."[221] However, once again like in *Rainbow Warrior*, the actions of the sailors were intentional and therefore distinguishable from that of the *Skyhunter*.

The most closely aligned case to the *Skyhunter* accident is that of *Cosmos-954*.[222]

On Jan. 24, 1978, *Cosmos 954*, a Soviet nuclear-powered surveillance satellite, crashed in the Northwest Territories of Canada.[223] The satellite was launched in 1977, but Canada was never given notice by the Soviets of the possible re-entry of the satellite into the earth's atmosphere over Canadian territory.[224] The crash ultimately dispersed radioactive debris over a 124,000-square-kilometer area in northern Canada.[225] Canada considered the trespass of *Cosmos 954* into Canada's air space, and the presence of the nuclear debris into its territory to be violations of its sovereignty.[226]

Notwithstanding the large amount of damage experienced by Canada, no claim of a right to prosecution was ever demanded.[227] While it is true that no crew members were rescued in conjunction with the satellite's demise, Canada could still have sought individual responsibility over those Soviets ultimately responsible for the incident. This individual criminal liability, however, was never sought. Therefore, Emeralda would be the first country to seek prosecution of this nature.

Unlike the *Cosmos 954* situation where Canada was never warned of the possible dangers of re-entry,[228] Emeralda was warned of the launch on multiple occasions, and had full knowledge of

[218] Code Penal, art 221-6 (Fr.). "le fait de causer [la mort] par maladresse, imprudence, inattention, négligence ou manquement à une obligation de sécurité ou de prudence imposée par la loi ou le règlement."

[219] *Rainbow Warrior*, *supra* note 98, at 225.

[220] *Corfu Channel (Merits)* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9).

[221] *Id.*

[222] *Claim against the USSR for Damage Caused by Soviet Cosmos 954* (Can. v. U.S.S.R.), Jan. 23, 1979, 18 I.L.M. 899, 905 [hereinafter *Cosmos 954*].

[223] *Id.*

[224] Christol, *supra* note 93, at 178.

[225] *Id.*

[226] *Cosmos 954*, *supra* note 120, at 905.

[227] *Id.*

[228] Christol, *supra* note 93, at 178.

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the possible dangers.[229] Any allegation of a violation of sovereignty in these circumstances is specious at best. Indeed by not objecting when notified of the scheduled launch, Emeralda at least tacitly accepted the entrance of the *Skyhunter* into its territory. Further by encouraging the *Condor* to set sail, Emeralda arguably encouraged the *Skyhunter*'s flight.

B. International law recognizes the defense of duress for the Mazonian crew.

In the past, international tribunals have struggled with the defense of "duress."[230] In the *Erdemovic* case, the question presented was whether duress could be considered an absolute defense to murder.[231] In that case, Erdemovic claimed that he would have been killed himself had he not committed certain terrible crimes.[232] Even though the Court did not allow this defense to absolve Erdemovic of all liability, mitigation of the sentence was instead permitted. [233]

Here, unlike *Erdemovic*, there was likely no crime committed at all. If however, a violation is determined by this Court, this is one situation where the absolute defense of duress should apply. Had Col. Van den Bergh not been terrified of the possible dangers of continuing his flight into outer space, it is possible no violation of any airspace would have taken place. Thus, duress operated to Col. Van den Bergh's detriment. As such, under the circumstances it should alleviate him and the crew of any potential criminal liability.

C. SkyQuest Code of Conduct is not binding law.

SkyQuest's Code of Conduct was written by a private agency. Even if it had been written by Mazonia, it as a code of conduct would not be compulsory since codes of conduct "are only guidelines to take into consideration. They have even less legal strength against domestic third party (private actor)[s]."[234]

The best way in which to apply a code of conduct is to consider it as an example of what a "reasonable" person would do in a certain situation.[235] In this case the key question would be whether Col. Van den Bergh acted reasonably under the situations that he was presented with. According to the SkyQuest Code of Conduct, Col. Van den Bergh was required to follow the directions of the Flight Director.[236] Unfortunately, when the spacecraft lost a piece of insulation, Col. Van den Bergh decided to change course notwithstanding the fact that the Flight Director ordered him to do otherwise.[237]

Col. Van den Bergh's reasoning for changing course was based on his evaluation as spacecraft commander that safety concerns required the *Skyhunter* to abort its mission.[238] Considering the discretion given to an aircraft commander, especially with regard to safety, even assuming that the code of conduct had legal significance, Col. Van den Bergh's actions were reasonable. Safety is always a commander's first priority.[239]

III. Mazonia is not liable for the damage caused to the *Condor* and the *Barracuda*.

Mazonia is not liable for the damage caused to the two vessels in question. Not only is Mazonia not the launching state, but both the *Condor* and the *Barracuda* assumed the risk of damage. The crew of both vessels ignored Emeralda's warnings to remain at least 15 nautical miles away from the launch site, and the

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[229] *Compromis* ¶¶ 3, 7.

[230] *See Joint Separate Opinion of Judge McDonald and Judge Vohrah, Prosecutor v. Erdemovic*, Case. No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm (last visited Feb. 18, 2007).

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] Armel Kerrest, Presentation at the Third European Conference on Space Debris: *Space Debris Remarks on Current Legal Issues* (Mar. 20, 2001).

[235] *Id.*

[236] SkyQuest Code of Conduct ¶ C(25).

[237] *Compromis* ¶ 13.

[238] *Id.*

[239] David E. Tanzi, *Safety—An Integral Part of Our Mission*, Hilltop Times, Mar. 1, 2007, at 1.

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damage actually occurred within the 15 nautical mile area.

A. Mazonia is not a launching state.

The Liability Convention defines "launching state" as "[a] state which launches or procures the launching of a space object;" or "[a] State from whose territory or facility a space object is launched."[240] This definition is of extreme importance because Article II of this Convention provides that a launching state is responsible for damage on the Earth's surface or to aircraft in flight caused by its space object under the theory of absolute liability.[241]

Mazonia did not launch the *Skyhunter* nor did they procure its launch. Although 65% of the capital of SkyQuest is held by companies in Mazonia, the company is registered in the Kingdom of the Lowlands.[242] Thus since SkyQuest is the entity that procured the launching of its plane, the *Skyhunter*, the Lowlands could be considered a launching state.

Further, while the launch took place in the high seas, it was only made possible because the *Skyhunter* used a special launching ship that functioned as a platform.[243] This platform was registered in Philamina.[244] Thus, like the Lowlands, Philamina too could be considered a launching state because they controlled the "facility" from which a space object was launched.[245] Finally, Isla Roca also shares the title as a launching state because this state is where the space plane and the launcher were both registered.[246]

Since Mazonia does not meet the definition of "launching state" under Article I of the Liability Convention, it cannot be held liable under Article II. The Lowlands, Philamina, and Isla Roca therefore share joint and several liability according to Article V.[247] Unfortunately for Emeralda, while the Lowlands is a party to the Liability Convention, Philamina is not. Isla Roca did sign the Liability Convention, but they have yet to ratify it. Thus, if any compensation is sought from Isla Roca, Emeralda would need to rely on Article 18 of the Vienna Convention on the Law of Treaties wherein a state is obliged to refrain from acts that defeat the object and purpose of a treaty pending final action by the state.[248] Since Isla Roca has signed the Liability Convention, they must therefore follow its object and purpose. Philamina is under no such obligation. Any compensation sought from them would have to be under a theory of customary international law as will be discussed in the next section.

B. Customary international law does not require Mazonia to compensate Emeralda.

In order for a rule to acquire the status of customary international law it must first be considered state practice. This Court explained that this norm-creating process must not "lightly be regarded as having been attained."[249] Further, it must be "a settled practice . . . carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[250] The state practice must also be "extensive and virtually uniform," especially with regard to states whose interests are "specially affected."[251]

In the area of liability, state practice is emerging. For example, when the Soviets initially objected to the initiation of the Liability Convention, they

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240 Liability Convention, *supra* note 58, art. I (c)(i)–(ii).
241 *Id.* art. II.
242 *Compromis* ¶¶ 1, 2.
243 *Compromis* ¶ 4.
244 *Compromis* ¶ 1.
245 *See* OST, *supra* note 47, art. VII.
246 *Compromis* ¶ 4.

247 Liability Convention, *supra* note 58, art. V(1).
248 Vienna Convention, *supra* note 87, art. 18.
249 *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 43 (June 27) [hereinafter *Nicaragua*].
250 *Id.* at 46–47; *see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 253 (July 8) (reaffirming customary international law is "primarily in the actual practice and *opinio juris* of States").
251 *North Sea Continental Shelf* (F.R.G v. Den./F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

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argued that such an agreement was superfluous because in the event of damage caused by space objects, "compensation would undoubtedly be payable."[252] Based on the *Trail Smelter Arbitration* and the *Corfu Channel* Case this contention was probably correct.[253]

The *Trail SmelterArbitration* is frequently cited as standing for the proposition that no state has the right to use or permit the use of its territory in a manner that causes injury in the territory of another.[254] While it dealt with noxious fumes, the standard used could arguably be applied to any case wherein a state causes injury to another.

Applied to the context of space law, *Cosmos-954* sheds light on a situation where injuries from a space accident did in fact give rise to a settlement between Russia and Canada after a mishap.[255] Although this case occurred in 1978, and hence after the entering into force of the Liability Convention, it does give some power to the notion that customary international law recognizes a right to recover from injuries caused by one state to another arising out of outer space activity.[256] This was the first case to test the Liability Convention, but the extent of its usage is not completely clear because much of the settlement was resolved via "diplomatic circumvention" of the Liability Convention.[257] Nevertheless, the case still adds to the "state practice" necessary to form customary space law.

This being said, one pattern is recognizable from both the *Trail Smelter Arbitration* and *Cosmos-954*—they both involved state actors. In one case it was Canada and the United States, and in the other it was Russia and Canada. In the present situation, there is a huge distinction. The liability alleged here is between a private consortium and the State of Emeralda. Whatever the current state of customary space law, it has not sufficiently evolved to address the question before this Court. Additionally, even if *Trail Smelter* and *Cosmos-954* were applied to this case, it would have to be reiterated that SkyQuest is not a Mazonian consortium. It is incorporated in the Lowlands.[258] Further the *Skyhunter* was manufactured in Rhumenistan and registered in Isla Roca.[259]

In *Reparation for Injuries Suffered in the Service of the United Nations*, this Court found a circumstance where an international organization acquired a legal personality.[260] However, in that case the United Nations was the aggrieved party and it was deemed that they should be allowed to recover from Israel.[261] To apply this principle in the reverse would be hotly disputed. A review of the *traveux preparatoire* of the Liability Convention demonstrates that the status of international organizations was a major point of contention.[262] Not surprisingly, the Liability Convention does not completely address the potential liability of an international organization.[263] Rather, it provides for liability with regard to an international organization only if (among other things) it "declares its acceptance of the rights and obligations provided for in [the Liability Convention] and if a majority of the States members of the organization are States Parties to [the Liability Convention]."[264]

In SkyQuest's Code of Conduct, they declare acceptance of international law and the Outer

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[252] Cheng, *supra* note 62, at 289.
[253] *Id.*; see *Corfu Channel*, *supra* note 118; *Trail Smelter* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911 (U.S.-Can. Arb. Trib. 1941) [hereinafter *Trail Smelter*].
[254] Brownlie, *supra* note 54, at 430.
[255] Marietta Benkö, William de Graaf & Gijsbertha C. M. Reijnen, *Space Law in the United Nations* 49–51 (1985).
[256] Ernest, Van C., *Third Party Liability of the Private Space Industry: To Pay What No One Has Paid Before*, 41 Case W. Res. 503, 516 (1991).
[257] *Id.* at 524.
[258] *Compromis* ¶ 1.
[259] *Id.*
[260] *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Apr. 11).
[261] *Id.*
[262] *See generally* Cheng, *supra* note 62, at 310–318.
[263] Liability Convention, *supra* note 58, at art. II.
[264] *Id.* at art XXII(1).

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Space Treaty, but no mention is made of the Liability Convention.[265] Therefore, since SkyQuest has not specifically declared its intention to follow the Liability Convention, it is not subject to it. Furthermore, SkyQuest is not attached to or registered with Mazonia, thus even if liability attached with regard to SkyQuest, neither the Liability Convention nor customary international law would place liability on the State of Mazonia.

1. *SkyQuest's actions are not attributable to Mazonia.*

Even though the United States financed, organized, trained, supplied, and equipped the Nicaraguan *contras,* this Court held that these actions were "still insufficient" to attribute acts committed by the *contras* to the United States.[266] The Court reached this decision in part from the fact that the United States did not have "effective control" over the revolutionaries. Thus even though the support given to the *contras* was extensive, their actions were not attributable to the United States.[267]

In this case, Mazonia has no control over SkyQuest. While it is true that 65% of the consortium is controlled by Mazonian investors,[268] the actual State of Mazonia does not dictate what these investors should or should not do regarding their space activity. The United States truly tried to use the *contras* to obtain change in Nicaragua, but no such ambition can be traced back to Mazonia for the actions of SkyQuest. Indeed SkyQuest was much less involved with Mazonia than the United States was with the *contras*. It is therefore absolutely unreasonable to attribute the actions of SkyQuest to the State of Mazonia.

1. *The Condor and the Barracuda are responsible for the damage.*

Should this honorable Court determine that Mazonia is a launching state, Mazonia respectfully would then draw the Court's attention to Article 6 of the Liability Convention. This article specifies that if a launching state establishes that "the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State" then a launching state may be exonerated from any claim of liability.[269] Here, both the *Condor* and the *Barracuda* clearly chose to dismiss a warning from Emeralda indicating the danger of being within 15 nautical miles of the launching site.

This clear dismissal of the warning is an outright example of the very type of liability the United States sought to exonerate when it made a proposal (in the *travaux prėparatoire*) for a defense to absolute liability based on "a wilful or reckless act or omission" on the part of the claimant state.[270] Focusing on the ratified Liability Convention, dismissing a warning of danger, as both the *Condor* and the *Barracuda* did, is outright gross negligence. In the alternative, even if it is not gross negligence, it is clearly assumption of risk.

Tribunals have traditionally accepted the legal defense of assumption of risk.[271] The *Condor* knew of the space launch based on its connection with SkyQuest, and the *Barracuda* was warned by the Emeraldian authorities. Both vessels ignored the risk for commercial reasons.

3. *The Barracuda is barred from recovery based on assumption of risk.*

In a 1920 case, an arbitral review panel addressed the question of liability regarding missionaries in Sierra Leone.[272] Great Britain had recently passed the "hut tax" which rather

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[265] SkyQuest Code of Conduct ¶ B(7).
[266] *Nicaragua, supra* note 147, at 64–65.
[267] *Id.* (emphasis added).
[268] *Compromis* ¶ 2.

[269] Liability Convention, *supra* note 58, art. VI(1).
[270] U.N. Doc. A/AC.105/C.2/L.8/Rev. 3 (1965); *see also* Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 Am. J. Int'l L. 349, 354 (1980).
[271] *Home Missionary Society* (U.S. v. U.K.), 6 R. Int'l Arb. Awards 42 (1920) [hereinafter *Missionary*]; *Yukon Lumber* (U.K. v. U.S.), 6 R. Int'l Arb. Awards 17, 20 (1913) [hereinafter *Yukon Lumber*].
[272] *Missionary*, *supra* note 169, at 42.

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infuriated the local tribes.[273] In response to the tax, several of the locals became violent, and destroyed the lodging area of some of the members of the Home Missionary Society.[274] A few of the members of this society were also killed.[275] The society brought a claim against Great Britain arguing that the imposition of the hut tax caused the revolt, which ultimately caused the society's injuries.[276]

The arbitral review panel denied the society's claim. Assumption of risk was one of the main reasons Great Britain won the case. In the panel's words:

> [I]t is obvious that the Missionary Society must have been aware of the difficulties and perils to which it exposes itself in its task of carrying Christianity to so remote and barbarous a people. The contempt for difficulty and peril is one of the noblest sides of their missionary zeal. Indeed, it explains why they are able to succeed in fields where mere commercial enterprise can not be expected to enter.[277]

This quote is directly attributable to the *Barracuda*. "The dangers of fishing on the high seas are legendary."[278] Surely like the missionaries, fishermen regularly show contempt for difficulty and peril." Indeed, Reason magazine describes the attitude of a typical fisherman:

> There are a thousand ways to get slashed, crushed, snagged, speared, or dragged overboard, with no medical help—save for a bottle of Captain Morgan's stashed in the wheelhouse. . . . The boat is a playground for tetanus. Scorpions nest in the rope coils. Competence and sound instincts are a must, because even minor mistakes invite major disaster.[279]

The fact that the *Barracuda* received a warning from Elmeraldian authorities prior to its fishing endeavour[280] yet still chose to proceed into the potentially dangerous area, shows their contempt for danger and more clearly, a legal assumption of risk. But for the *Barracuda*'s disregard for the warning, the accident would not have occurred. Thus, like the arbitral decision in Home Missionary Society, the *Barracuda* too should be denied any form of relief.[281]

4. *The Condor is barred from recovery based on assumption of risk.*

In the early 1900s the Canadian Government failed to receive payment for a debt owed them by a timber company.[282] The United States military authorities had purchased a large amount of timber from this company.[283] No one notified the United States that the timber had any type of lien attached to it.[284] According to the tribunal, Canada had every opportunity to notify the United States, and or take action to rectify the situation prior to the sale, but they took no such action and thus incurred a large financial loss.[285] When Canada then tried to recover from the United States, the tribunal ruled that, "the Canadian Government, having been able to avoid the grievance arising from [the timber company's] acts, does not seem to be entitled now to hold the United States military authorities in any way responsible for it."[286]

Here, the same language could be used for the *Condor*. As a ship flying under the Emeraldian flag, invited by SkyQuest, and there to observe the space launch,[287] they had "every opportunity

[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* at 44.
[278] Stephen Smith, *State Study Details Deadliest Jobs*, Boston Globe, Sep. 25, 2002, at B2.

[279] Sean Paige, *Zoned to Extinction: How Government Regulations Affect Commercial Fishing*, Reason, Oct. 1, 2001, at 46.
[280] *Compromis* ¶ 7.
[281] *Missionary*, *supra* note 169, at 44.
[282] *Yukon Lumber*, *supra* note 169, at 18.
[283] *Id.* at 20.
[284] *Id.*
[285] *Id.*
[286] *Id.* at 21.
[287] *Compromis* ¶ 8.

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and facility"[288] to avoid this potentially dangerous situation. If anyone knew of the potential dangers of being within 8 nautical miles of the launch site, the *Condor* did. Clearly, the Emeraldian government "does not seem justified in now complaining of a grievance which easily could have been avoided."[289] Just as the tribunal ruled against Canada in the *Yukon Lumber* case, so too should this honorable Court rule against any Emeraldian recovery in this case.

Finally, the *Condor* was invited by SkyQuest to the danger area.[290] Hence there is an argument that they are barred from recovery pursuant to the Liability Convention because it does not apply to damage caused to foreign nationals "during such time as they are participating in the operation" of a space object.[291]

IV. There has been no violation of Emeralda's sovereignty.

Col. Van den Bergh, as an experienced space pilot, recognized the dangerous situation of the mission he was flying and sought to land his spacecraft safely.[292] Unfortunately, his plane crash landed and ultimately arrived in Emeraldian territory. But at no time did Col. Van den Bergh intend to violate Emeralda's sovereignty.

A. Airspace law has limited applicability with regard to Emeralda's sovereignty.

Article 1 of the 1944 Chicago Convention boldly declares that, "every State has complete and exclusive sovereignty over the airspace above its territory."[293] While this statement seems to give a state absolute rights over its airspace, the article is not without its exceptions. Further, as indicated in Article 1, a state only has exclusive sovereignty "over the airspace" above its territory.[294] When the Emeraldian authorities rescued the two crew members, it was done at sea.[295]

Emeralda has claimed that they rescued the two crew members after the *Skyhunter* "had come down in [Emeralda's] territorial sea."[296] But what Emeralda has not proven is when or how this spacecraft arrived there. On 6 November 2005, the ground crew responsible for the spacecraft went ten hours without any notice the plane's whereabouts.[297] Two things are possible during this timeframe: (1) the spacecraft landed in the high seas and floated into Emeraldian waters; and (2) Emeralda in all reality rescued the ship on the high seas and claimed that the rescue took place in their territorial waters. Without any further indications of proof, this court is left with the unfortunate situation of having to accept only on faith the statements of Emeralda.

If either of the alternate possibilities actually took place, then Article 1 of the Chicago Convention is superfluous as no violation of Emeralda's airspace ever took place. Until Emeralda can do more to show what occurred during this ten hour ordeal, this Court should not simply assume the spacecraft violated Emeralda's airspace.

1. *The Chicago Convention provides an exception similar to safe passage.*

Even assuming arguendo that the *Skyhunter* did in fact go from airspace over *res nullius* to territorial airspace over Emeralda, the Chicago Convention provides contracting parties the right of non-scheduled flights over each other's territory without prior permission.[298]

Article 25 of the Chicago Convention provides further justification for the *Skyhunter*'s emergency landing. It provides that contracting

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[288] *Yukon Lumber, supra* note 169, at 20.
[289] *Id.*
[290] *Compromis* ¶ 8.
[291] Liability Convention, *supra* note 58, art. VII(b).
[292] *Compromis* ¶ 13.
[293] Convention on International Civil Aviation art. 1, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].
[294] *Id.*
[295] *Compromis* ¶ 14.
[296] *Id.*
[297] *Id.*
[298] Chicago Convention, *supra* note 191, at art. 5.

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parties such as Emeralda will "provide such measures of assistance to aircraft in distress in its territory as it may find practicable."[299] Denying an aircraft in distress access to your "territorial waters" is certainly not in measure with a "practicable measure of assistance." Emeralda might have a stronger argument for denying the *Skyhunter* entry into its airspace over populated territory, but it is Emeralda's legal duty to provide at least access to a place for emergency landing over its territorial sea.

Additionally, the Chicago Convention has been amended to soften a state's potential responses to allegations of a breach of sovereignty.[300] Considering this amendment in conjunction with the current situation, it is clear that inadvertence or an emergency entrance into the national airspace of another country is not treated in the same fashion as an intentional violation of sovereignty.

In *Military and Paramilitary Activities*, this Court determined that a reconnaissance flight by the United States into Nicaragua constituted a violation of sovereignty.[301] Nevertheless, this finding was due in large part because of the intentional and intrusive nature of spying. Only if Emeralda could prove the *Skyhunter*'s entry into Emeralda's airspace was likened unto the American reconnaissance airplane's entry into Nicaragua could they show a true violation of sovereignty. This, however, is impossible since the emergency nature of the *Skyhunter*'s descent can in no way be likened unto a deliberate spying expedition.

2. *The Chicago Convention does not apply to spacecraft.*

Arguably the only tie that the *Skyhunter* has to the Chicago Convention is the fact that it is a hybrid vehicle—part airplane, part spacecraft. Nevertheless, the intended purpose of *this* spaceplane was to travel to and from outer space. Clearly the Chicago Convention of 1944 did not envision such a situation. Indeed Sputnik I solidified the inapplicability of the Chicago Convention to space. As Professor DeSaussure explained:

> No nation protested the orbiting of Sputnik over its territory, and the first freedom, the freedom of overflight, became established with that launch. The absence of any objection from other states meant that the orbiting of satellites around the Earth was not a privilege but a right given to all nations.[302]

The concept of no claim of sovereignty in outer space was solidified by the Outer Space Treaty. It states unequivocally that "[o]uter space...is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[303] Clearly then, if the *Skyhunter* flew over Emeralda in "outer space," there could be no claim of violating Emeralda's sovereignty. Many commentators would go even further to assert that Emeralda similarly has no claim of sovereignty over a spacecraft traveling to and from outer space as well. Truly, "[a]irspace differs sharply. . .from outer space, where international law generally forbids a subjacent country from asserting sovereign authority."[304]

The humanitarian nature of all the space treaties favors a more broad interpretation that would allow a spacecraft appropriate ingress and egress into outer space without concern of violating anther nation's sovereignty.[305] Thus, by the very nature of space travel, the Chicago Convention is simply not applicable.

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[299] *Id.* at art. 25.

[300] *See* Protocol Relating to an Amendment to the Convention on International Civil Aviation art. 3, May 10, 1984, 23 I.L.M. 705.

[301] *Nicaragua*, *supra* note 147, at 53.

[302] Hamilton DeSaussure, *The Freedoms of Outer Space and Their Maritime Antecedents, in Space Law Development and Scope* 1 (Nandasiri Jasentuliyana et al. eds., 1992)

[303] OST, *supra* note 47, at art. II.

[304] David A. Koplow, *Back to the Future and Up to the Sky: Legal Implications of "Open Skies" Inspection for Arms Control*, 79 Calif. L. Rev. 421, 449 (1991).

[305] *See* Ramey, *supra* note 45, at 153.

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B. Customary International Law supports the *Skyhunter*'s safe passage.

As one commentator suggests: "The Law of the Sea Convention should be adapted to govern the vacuum of outer space."[306] Because Emeralda is a party to the 1982 Law of the Sea Convention (LOSC),[307] its usage is therefore applicable to the current situation.

For example, Article 19 (2) of the LOSC provides that vessels may transit through territorial waters if the transit is considered "innocent passage."[308] Generally, innocent passage is any continuous and expeditious passage that does not adversely effect "peace, good order or security" of the coastal state.[309] While this definition is broad, the LOSC does its best to list categories of activities that are not considered innocent passage.[310] Among those activities excluded are uses of force, information collecting, and propaganda.[311] At no time did the *Skyhunter* perform any of these types of passage.

Additionally the 1958 Territorial Sea Convention states that a ship may stop and anchor if, among other things, it is made necessary by *force majeure* such as being in distress[312]— like that of the *Skyhunter*. A simple application of this exception to sovereignty would absolutely absolve the crew and the *Skyhunter* from any allegation of a violation of sovereignty.

C. There is no violation of sovereignty under the U.N. Charter.

The Charter of the United Nations recognizes the principle of territorial integrity in Article 2 (4), however it only prohibits "the threat or use of force against the territorial integrity or political independence of any state."[313] It does not prohibit every trespass. Assuming *arguendo* that there even was a trespass into Emeralda's territory, it would be unfathomable to consider the entry by the *Skyhunter* as a threat or use of force against Emeralda's territorial integrity. Clearly then, there was no breach under the definition of a violation of sovereignty under the U.N. Charter.

The fact that Emeralda was warned about the launch in September and just before the day of the launch,[314] combined with the fact that Emeralda did not object to such a launch within such close proximity to their territorial waters, strongly indicates that Emeralda accepted the possible intrusion into its territorial waters. Altogether, there is no indication that at any time Emeralda considered the possible consequences of the launch to be any indication of a potential use of force. Therefore, no U.N. Charter violation can be even remotely envisioned.

SUBMISSIONS TO THE COURT

For the foregoing reasons, the State of Mazonia, Respondent, respectfully requests this Court to adjudge and declare that:

1. The claim for return of the two crew members and of any part or element of the space plane is legally based on the international treaties and international rules to which Mazonia and Emeralda are bound;

2. There is a no legal basis for the claim for the prosecution of the two astronauts before Mazonian courts;

3. Mazonia is not liable for the damage caused to the two vessels; and

4. No violation of Emeralda's sovereignty occurred.

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306 Jonathan C. Thomas, *Spatialis Liberum*, 7 Fl. Coastal L. Rev. 579, 604 (2006).
307 U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter LOSC].
308 *Id.* at art. 19(2).
309 *Id.*
310 *Id.* at art. 19(2) a–h.
311 *Id.* at art. 19(2) a, c, d.
312 High Seas Convention, *supra* note 108, at art. 14(3).
313 U.N. Charter, art. 2(4).
314 *Compromis* ¶¶ 3,7.