

2016 MANFRED LACHS SPACE LAW MOOT COURT COMPETITION

TEAM NUMBER 2



IN THE INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE

CASE CONCERNING

SPACE DEBRIS, COMMERCIAL SPACE FLIGHT SERVICES AND LIABILITY

THE REPUBLIC OF BANCHE

V.

THE REPUBLIC OF RASTALIA

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE APPLICANT

THE REPUBLIC OF BANCHE

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
QUESTIONS PRESENTED.....	ix
STATEMENT OF FACTS.....	x
SUMMARY OF ARGUMENT.....	xv
ARGUMENT.....	1
A. RASTALIA VIOLATED INTERNATIONAL LAW BY REFUSING TO RETURN COULEUR AND COMMANDER BORSCH AND REFUSING OF THE EARLIER RETURN OF MS PAULA TO BANCHE.....	1
I. <u>RASTALIA VIOLATED RELEVANT PROVISIONS OF THE RETURN AND RESCUE AGREEMENT</u>	1
1. <i>Rastalia breached Article 4 of the Return and Rescue Agreement by refusing the return of Commander Borsch</i>	1
2. <i>Rastalia Violated Article 4 of the Return and Rescue Agreement by Refusing the Earlier Return of Ms Paula</i>	4
a. Nature of the Case.....	4
b. Period of Delay.....	5
i. <i>Ms Paula was being Detained</i>	5
ii. <i>The Detention of Ms Paula was Arbitrary</i>	6
3. <i>Rastalia violated Article 5 of the Return and Rescue Agreement by refusing the return of Couleur</i>	7
II. <u>RASTALIA VIOLATED RELEVANT PRINCIPLES OF GENERAL INTERNATIONAL LAW</u>	9
1. <i>Rastalia violated the principle of international cooperation.</i>	9
2. <i>Illegal Grant of Political Asylum</i>	10
B. RASTALIA IS LIABLE UNDER INTERNATIONAL LAW FOR THE DAMAGE TO COULEUR.....	12
I. <u>RASTALIA IS LIABLE UNDER ARTICLE 3 OF THE LIABILITY CONVENTION</u>	12
1. <i>Rastalia’s liability is based on fault</i>	12
A. <i>OBJECTIVE FAULT</i>	13
a. Rastalia Breached Article IX of the Outer Space Treaty.....	13
i. <i>Rastalia’s declaration of Lavotto-1 as a “derelict object” violates the “no harmful contamination” principle of the outer space environment</i>	13
ii. <i>Rastalia breached the principle of due regard</i>	15
iii. <i>Rastalia breached the principle of international consultation</i>	16
b. Rastalia Breached Relevant General International Law Principles.....	17
i. <i>Rastalia breached the principle of international cooperation</i>	17
ii. <i>Rastalia breached the “no-harm” principle</i>	17

B. SUBJECTIVE FAULT.....	18
C. BANCHE IS NOT LIABLE UNDER INTERNATIONAL LAW FOR THE COSTS OF RECOVERY OF COULEUR, THE RECUE AND MEDICAL EXPENSES FOR COMMANDER BORSCH, THE COSTS OF THE EVACUATION OF LAKE TAIPO, AND THE DEATHS OF BOTH MR THOMAS AND MR. BARTON.....	19
I. <u>BANCHE IS NOT LIABLE UNDER ARTICLE 2 OF THE LIABILITY CONVENTION</u>	19
1. <i>Exoneration from Liability under Article 6 of the Liability Convention</i>	19
a. Gross Negligence.....	19
b. Conformity with International Law Principles.....	22
i. <i>Banche Complied with the Principle of Due Regard</i>	22
ii. <i>Banche Conducted Diplomatic Negotiations with Rastalia</i>	24
iii. <i>Banche’s use of the GODA Laser Satellite Removal System does not breach Article IV of the OST</i>	24
2. <i>Banche is not Liable for the Cost of Recovery of Couleur</i>	26
3. <i>Banche is not Liable for the Cost of Rescue and Medical Expenses of Commander Borsch</i>	27
SUBMISSIONS TO THE COURT.....	29

TABLE OF AUTHORITIES

TREATIES AND CONVENTIONS

U.N. CHARTER.

Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched Into Outer Space, *entered into force* Dec. 3, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Return and Rescue Agreement].

Convention on International Liability for Damage Caused by Space Objects, *entered into force* Oct. 9, 1973, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention].

International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, U.N.T.S., vol. 999.

ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts; GA U.N. Doc.A/56/10 (2001).

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *entered into force* Oct. 10, 1967, art. 6, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

Vienna Convention on the Law of Treaties, (VCLT) *entered into force* May 23, 1969, UN Doc A/Conf.39/27 / 1155 U.N.T.S. 331 / 8 ILM 679 (1969) / 63 AJIL 875.

JUDICIAL DECISIONS

• INTERNATIONAL LAW CASES

Asylum Case (Columbia v. Peru) 1950 I.C.J. 6 (November 20).....10

Corfu Channel (UK v. Albania) (Merits)1949 I.C.J.4 (Apr. 9).....18

Opel Austria GmbH v. Republic of Australia, 22 January 1997.....9

• ARBITRAL TRIBUNALS

Life Insurance Claims, (Germany v. United States of America) 1924,4 RIAA 121.....

Trail Smelter Arbitration (U.S. v. Canada) 1938/1941, R.I.A.A. 1905.....18

UNITED NATIONS MATERIALS

Committee on the Peaceful Uses of Outer Space, Scientific and Technical Subcommittee Report, 44th Sess., Annex 4, U.N. Doc.A/Ac.105/890, Feb., 12-23, 2007, [hereinafter Uncopuos Space Debris Mitigation Guidelines].....14

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, U.N.G.A. Resolution 2625 (XXV).....9,17

Draft Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Dec. 12, 1967, UN Doc. A/AC.105/C.2/L.28.....	2,22,23
Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, 31, art.31 cmt. 10 (2001).....	3
U.N.G.A. Resolution No. A/RES/1472/XIVUN Doc. A/CONF.151/26 (vol. 1)31 ILM 874 (1992).....	14
UN General Assembly, <i>Universal Declaration of Human Rights</i> , Dec., 10, 1948, 217 A (III).....	7
UN General Assembly, Human Rights Council, Working Group on Arbitrary Detention, Nov., 18, 2015, A/HRC/WGAD/2015/28, [hereinafter Working Group on Arbitrary Detention].....	4,5,6
U. N. Doc. A/AC.105/C.2/L.7/Rev. I, found in A/AC.105/21 Annex II at 18 (1964).....	20
U.N. Doc. A/AC.105/C.2/L.4 (1962).....	20
U.N. Doc. A/AC.105/C.2/L.10 (1964).....	20
U.N. Doc. A/AC.105/21/(1964).....	20

BOOKS

ALEXANDRE KISS & DINAH SHELTON, <i>GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW</i> , 90 (2007).....	23
BIN CHENG, <i>STUDIES IN INTERNATIONAL SPACE LAW</i> 530 (1997).....	26
FRANCIS LYALL AND PAUL B. LARSEN, <i>SPACE LAW: A TREATISE</i> 70-80 (2009).....	3
HART AND HONORE: <i>CAUSATION IN THE LAW</i>	21
L. VIKARI, <i>THE ENVIRONMENTAL ELEMENT IN SPACE LAW: ASSESSING THE PRESENT AND CHARTING THE FUTURE</i> (2008).....	18
MALCOLM SHAW, <i>INTERNATIONAL LAW</i> ,104 (2008).....	9
MANFRED LACHS, <i>THE LAW OF OUTER SPACE</i> , 113 (1972).....	23
P. NANDA, <i>INTERNATIONAL ENVIRONMENTAL LAW AND POLICY</i> , (1995)	18
W. PROSSER, <i>LAW OF TORTS</i> , (3 rd ed. 1964).....	20

ARTICLES

A. Cypser, <i>International Law and Policy of Extra-terrestrial Planetary Protection</i> , 33 <i>Jurimetrics- JOURNAL OF LAW, SCIENCE AND TECHNOLOGY</i> , 315,324f, (1993).....	14
Edward A. Frankle, <i>Once A Launching State, Always The Launching State?</i> , 44 <i>I.I.S.L. Proc.</i> 32, 36 (2002).....	15
Frans G. von der Dunk, <i>Liability Versus Responsibility In Space Law: Misconception Or Misconstruction</i> , 34 <i>I.I.S.L. Proc.</i> 363, 364 (1992).....	13

Gerhard, <i>Article VI</i> , I COLOGNE COMMENTARY ON SPACE LAW 31 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2009).....	3
Lesley Jane Smith &Armel Kerrest, <i>Article VII</i> , I COLOGNE COMMENTARY ON SPACE LAW, 141 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2009).....	13,19
Marboe, Neumann and Schrogl, <i>Article V (Notification, Recovery and Return of Space Objects)</i> ARRA, II COLOGNE COMMENTARY ON SPACE LAW 168 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2013).....	7,8
Marboe, Neumann and Schrogl, <i>Article IV (Prompt Return of Personnel)</i> ARRA, II COLOGNE COMMENTARY ON SPACE LAW 162-163,165 & 167 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2013).....	1,2,27
Marchisio, <i>Article IX (Commentary)</i> OST, II COLOGNE COMMENTARY ON SPACE LAW 23 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2013).....	17
Neumann and Schrogl, <i>Article IV</i> OST, I COLOGNE COMMENTARY ON SPACE LAW 24 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2009).....	25
Paul G. Dembling and Daniel M. Arons, <i>The Treaty on the Return and Rescue of Astronauts and space objects</i> 9 WM. & MARY L. REV.....	4
Ram Jakhu, Legal Issues Relating to the Global Public Interest in Outer Space, <i>Journal of Space Law</i> , Fall 2006.....	23
Ricky J. Lee, <i>Reconciling International Space Law with the Commercial Realities of the Twenty-second Century</i> ,4 SINGAPORE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 220 (2000).....	13
Schrogl, Kai-Uwe/Neuman, Julia, <i>Article VI</i> OST, I COLOGNE COMMENTARY ON SPACE LAW 70-93 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2009).....	1
Setsuko Aoki, <i>The Standard of Due Diligence in Operating a Space Object</i> , 55 I.I.S.L. Proc. 392 (2012).....	13
Stanley Mazaroff <i>Exonerations from Liability for Damage Caused by Space Activities</i> , VOLUME 54, ARTICLE 5 CORNELL LAW REVIEW, ISSUE 1 (1968).....	20
Stephan Hobe, Bernhard Schmidt-Tedd and Kai-UweSchrogl, II COLOGNE COMMENTARY ON SPACE LAW [hereinafter Commentary on Space Law, Vol. II], Return and Rescue Agreement.....	4
Stephen Gorove, <i>International Protection of Astronauts and Space Objects</i> , 20 DePaul L. Rev. 597 (1971).....	10
Stephen Gorove, <i>Space Debris in International Legal Perspective</i> , 32 Proc. Colloq. L. Outer Space 97 (1999).....	14
Stephen Gorove, <i>Toward A Clarification of the Term “Space Object”: An International Legal and Policy Imperative?</i> 21 JOURNAL SPACE LAW, 1 (199.....	15
Vladimir Kopal, <i>The Agreement on Rescue of Astronauts and Return of Space Objects</i> , in: McWhinney, Edward/Bradley, Martin A., <i>New Frontiers in Space Law</i> , Sijthoff, Leyden 1969, p. 122.....	7,8

MISCELLANEOUS

Blackstone Civil Practice: A Commentary (2013).....4

International Academy of Astronautics, Committee on Safety, Rescue and Quality, Position Paper on Orbital Debris, August 27, 1, (1992).....14

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) {1996} ICJ Rep. 243.....25

C.G.Hasselmann, Weapons of Mass Destruction, Article IV outer Space Treaty and the Relationship to General Disarmament' (1982) Proceedings of the 25thColloquim on the Law of the Outer Space. 103.....25

Mr Michael C. Mineiro, Principles of Peaceful Purposes and the Obligation to Undertake Appropriate International Consultations in Accordance with Article IX of the Outer Space Treaty. McGill University, Institute of Air & Space Law.Presented at the 5th E. Galloway Symposium on Critical Issues in Space Law Washington, D.C. December 2nd, 2010.....23

BLACK'S LAW DICTIONARY (9th ed. 2009).....5

Special Agreement between the Republic of Banche and the Republic of Rastalia.....*passim*

QUESTIONS PRESENTED

- A. Whether Rastalia violated international law by refusing to return Couleur and Commander Borsch to Banche and refusing the earlier return of Ms Paula to Banche?
- B. Whether Rastalia is liable under international law for the damage to Couleur?
- C. Whether Banche is liable under international law for the costs of recovery of Couleur, the rescue and medical expenses for Commander Borsch, the costs of the evacuation of Lake Taipo, and the deaths of both Mr Thomas and Mr Barton?

STATEMENT OF FACTS

BACKGROUND

1. The Republic of Banche and the Republic of Rastalia, are neighbouring countries; as they share a border. Although in the past, there had been hostilities due to border conflicts; their relationship in recent years has greatly improved. Banche is a highly developed State, and Rastalia, a developing one. Banche and Rastalia have initiated National plans for Space for commercial purposes, called “*Open the Gateway for Mankind*” and “*Beyond the Earth’s Surface*” respectively.
2. The major Space Agencies conducting civil space activities for each country are Mira Space Agency and Jardon Space Agency. Banche and Rastalia have been actively involved in projects and are both member states of the United Nations Committee on Peaceful uses of Outer Space (COPUOS).

THE LAUNCH OF LAVOTTO-1

3. Jardon was authorized to conduct commercial launching services from Rastalian government facilities pursuant to the country’s *National Space Commercial Launching Act (2016)*. On January 15th, 2028, Jardon launched Lavotto-1 (the first of the Lavotto series) from Rastalian territory.
4. The major structural material of Lavotto-1 was a recent composite research achievement of Jardon, and this launch marked the first operational use of the structural material in outer space.

LAVOTTO-1’S FAILURE IN OUTER SPACE

5. A little over four months after its launch, on May 18th, 2028, Lavotto-1 suddenly lost its functionality (including the de-orbit capability). Jardon immediately informed the Rastalian Government of this development and stated that it was possible to move the failed Satellite to a different parking orbit to protect the space environment.

6. After failed attempts remedy the situation, the Rastalian government admitted to their inability to de-orbit it as promised, due to a complete breakdown of its systems, and Jardon confirmed that the current inconvenient occupation of the failed Lavotto-1 of that orbit posed a serious collision risk to the Mira Space Station, which was at the same or slightly lower altitude with it. Rastalia endorsed this report, stating that any attempt to de orbit the space object with any Rastalian spacecraft was dangerous, as Lavoto-1 was too fragile.
7. Mosolia, a neutral State conducted investigations and also confirmed the fact that there was a collision risk posed by Lavotto-1 to Mira Space Agency. Consequent upon this, Banche set up a panel, which investigated and confirmed the potential hazards and collision threats to Mira.
8. Following Banche's diplomatic discussions with Rastalia, Rastalia held a press conference declaring the satellite system as a derelict object, and Banche's resolve to remedy it.

BANCHE'S EFFORTS TO DEORBIT LAVOTTO-1

9. Banche signed a contract with Solare, a company registered in Mosolia, to the effect that Solare's spacecraft, Couleur which had been successfully qualified for commercial spaceflight services following several successful trial flights launched from the Banché spaceport, be employed to remove Lavotto-1 from its current orbit using the latest robotic seizing and removing technologies to be provided by the Banché Space Agency.
10. For its debut launch, Solare selected an astronaut- Commander Mario Borsch as Couleur's commander. He had previously worked in the Ministry of National Defense of Banché, as chief program director and engineer in charge of Banché's Anti-satellite Weapons project. Other people selected for the launch were Ms Paula, a Mosolian scientist and ,Mr Andrew James.

THE LAUNCH OF COULEUR

11. Couleur was launched from the Banche spaceport and it successfully engaged Lavotto-1. Mr Borsch proceeded to operate the satellite removing system consisting of a grappling arm.
12. However, Lavotto-1 was unable to withstand the grappling process because of its frailty, and it broke into two segments. Couleur successfully captured and de-orbited a segment of Lavotto-1. In a bid to see that the outer space is completely free of all threats posed by Lavotto-1, Commander Borsch activated the GODA with the intent to increase the drag of Lavotto-1 into the atmosphere in order to burn it.

THE DAMAGE TO COULEUR

13. Station keeping thruster propellant still on-board Lavotto-1 exploded, and the Couleur was hit by a fragment seriously damaging its normal functioning, and leaving limited communications ability and reduced manoeuvrability of the spacecraft. Commander Borsch decided to make an urgent landing at Banché spaceport with permission from Solare.
14. The Couleur, due to the damage to its communications system, was unable to achieve the correct orientation and failed to land at Banché spaceport.

COULEUR'S UNSCHEDULED LANDING IN RASTALIA

15. Without sufficient ability to communicate with the ground control center, Commander Borsch had to land in Rastalian territory and was able to touch down beside Lake Taipo, a major Rastalian tourist site.
16. During the landing process, a piece of spacecraft shell, damaged by the debris collision, detached and hit a campsite near Lake Taipo, completely destroying the buildings near the lake and causing the death of a Rastalian, Mr. Dave Thomas, who was on holiday with his daughter Wendy.

BANCHE'S DEMAND FOR THE RELEASE OF COULEUR, COMMANDER BORSCH AND MS PAULA

17. Banche's diplomatic requests for the release of Couleur, Commander Borsch and Ms Paula, were disregarded by the Rastalian government. Instead, they issued frivolous claims alleging that the Couleur GODA Laser system was a nuclear and illegal weapon, and that Rastalia had the right to fully examine the spacecraft regardless of how long it would take, all this even after the spacecraft had been tested and no nuclear radiation leak was detected, and the evacuation order on Lake Taipo had been lifted.
18. Furthermore, they declared Rastalia's intention to keep Commander Borsch pending criminal charges, and that Ms. Paula would only be returned to Banché after Banché reimbursed Rastalia for the costs and damages incurred as a result of Couleur's acts.
19. The Mosolian press published a declaration signed by Commander Borsch, which was leaked to the press. In the declaration, Commander Borsch asked for political asylum in Rastalia and refused to be sent back to Banché, giving no reasons whatsoever.
20. Banché insisted on Commander Borsch's return, asserting that he was being held illegally for his knowledge of sensitive technologies and information acquired during his service in the Banché Ministry of National Defense. The Banché President condemned Rastalia's detention of Couleur's commander as a violation of international law.
21. Mosolia's domestic newspaper, IRNO reported that a Banché investigation revealed that after Couleur's landing, revealed that a representative of the Rastalian National Defense Department, secretly negotiated with Commander Borsch, and promised to drop all criminal investigations and to provide him with a key position in the Rastalian Space Research Institute, with lucrative rewards. IRNO further reported that Commander Borsch accepted the offer and signed an agreement with RSRI, which listed the core space-related technologies he was to develop for Rastalia's National Defense Department

22. After several months, following diplomatic negotiations, Rastalia released Ms. Paula to Banché. Negotiations for the return of Commander Borsch and the Couleur spacecraft were unsuccessful, and both remain in Rastalia.

BANCHE'S CLAIM

23. Banche initiated these proceedings by Application to the International Court of Justice. Rastalia accepted the jurisdiction of the Court. There is no issue of jurisdiction before the court. Both Banche and Rastalia are Member States of the United Nations, States Parties to the Outer Space Treaty, the Return and Rescue Agreement, the Vienna Convention on the law of Treaties, The Liability Convention and the Registration Convention.

SUMMARY OF ARGUMENTS

A. RASTALIA VIOLATED INTERNATIONAL LAW BY REFUSING TO RETURN COLEUR AND COMMANDER BORSCH TO BANCHE AND REFUSING THE EARLIER RETURN OF MS PAULA TO BANCHE.

- I. By refusing to return Commander Borsch and failing to promptly return Ms Paula, Rastalia breached Article 4 of the Return and Rescue Agreement. Rastalia, in stating that it would only return Couleur after Banche paid compensation for expenses incurred breached the humanitarian aid policy as laid down by Article 4 of the Return and Rescue Agreement.
- II. Rastalia's refusal to return the Spacecraft Couleur after Banche's request for it is a clear violation of Article 5 of the Return and Rescue Agreement. The precise interpretation of Article 5 of the Return and Rescue Agreement is to the effect that consideration for the costs of the return of Spacecraft can only be furnished upon the fulfilment of the condition of returning the spacecraft.
- III. Rastalia's refusal to return Couleur, Commander Borsch and Ms Paula, violates the principle of International Co-operation which imposes a duty upon States to co-operate with one another.

B. RASTALIA IS LIABLE UNDER INTERNATIONAL LAW FOR THE DAMAGE TO COULEUR.

- I. Rastalia is liable under Article III of the Liability Convention as a launching State on the grounds of objective and subjective fault, which resulted in the damage to Couleur by Lavotto-1 in outer space.
- II. Rastalia breached the provision of Article IX of the Outer Space Treaty as its declaration of Lavotto-1 as a "derelict object" violates the "non-contamination" principle of the outer space environment, and also breaches the principle of due regard in its exploration of the outer space without taking into consideration the interest, right and safety of other states and space objects.

III. Rastalia breached Article 4 of the Return and Rescue Agreement upon its failure and refusal to promptly return Miss Paula and Commander Borsch to Banche.

IV. Rastalia breached relevant general international law principles such as the principle of international cooperation and the “no-harm principle” by its actions of non-cooperation with Banche when it refused to return not only the personnel, but its space object; and also its obligation to refrain from causing damage or cause harm to the property of another state.

C. BANCHE IS NOT LIABLE UNDER INTERNATIONAL LAW FOR THE COSTS OF RECOVERY OF COULEUR, THE RESCUE AND MEDICAL EXPENSES FOR COMMANDER BORSCH, THE COSTS OF THE EVACUATION OF LAKE TAIPO, AND THE DEATHS OF BOTH MR. THOMAS AND MR. BARTON.

I. Banche is not liable under Article II of the Liability Convention, owing to the fact that Banche is exonerated from absolute liability by virtue of the provisions of Article VI of the Liability Convention.

II. Banche complied with the International Law Principle of Due Regard, as its attempt to dislodge Lavotto-1 from its precarious occupation of Outer Space was borne out of concern for the threat posed by the space object to the activities of other users and explorers of outer space.

III. Banche’s use of the GODA Laser Satellite Removal System does not breach Article IV of the Outer Space Treaty, since the system employed by Rastalia was not a weapon of mass destruction, but one whose purpose was to effect a smooth de-orbiting of Lavotto-1.

IV. Banche is consequently therefore, not liable for the costs of recovery of Couleur, the rescue and medical expenses of commander Borsch and the evacuation of Lake Taipo, and the deaths of Mr Thomas and Mr Barton.

ARGUMENTS ADVANCED

A. RASTALIA VIOLATED INTERNATIONAL LAW BY REFUSING TO RETURN COULEUR AND COMMANDER BORSCH AND REFUSING THE EARLIER RETURN OF MISS PAULA TO BANCHE.

I. RASTALIA VIOLATED RELEVANT PROVISIONS OF THE RETURN AND RESCUE AGREEMENT.

1. The preamble of the Return and Rescue Agreement¹ clearly shows the crystallization of the obligations laid down in Article V and VIII of the Outer Space Treaty (OST),² and that it should strengthen international cooperation in the peaceful exploration and use of outer space.³ It is the Applicant's contention that Rastalia acted in violation of Articles 4 and 5 of the Return and Rescue Agreement.

1. Rastalia Breached Article 4 of the Return and Rescue Agreement by Refusing the Return of Commander Borsch.

2. Article 4 of the Return and Rescue Agreement provides for an obligation on States to return personnel of a spacecraft to representatives of the launching authority. The provision introduces an absolute duty on contracting parties to return the personnel of a spacecraft when they land in their territory or when they have been found by their services on the high seas or in any other territory not under the jurisdiction of a State. The wording of the provision does not leave room for discretion on behalf of the contracting parties.⁴
3. It is the duty of Contracting States to rescue and return Astronauts or personnel of a spacecraft to the Launching State in cases of emergency, distress, accidents and unintended landing in the territory of a contracting party and to safely and promptly

¹ Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, *entered into force* Dec. 3, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Return and Rescue Agreement].

² Article 6, Outer Space Treaty.

³ *Id.*; Schrogl, Kai-Uwe/Neuman, Julia, *Article VI, I COLOGNE COMMENTARY ON SPACE LAW 70-93*, (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl eds. 2009).

⁴ Marboe, Neumann and Schrogl, *Article IV (Prompt Return of Personnel) ARAA, II COLOGNE COMMENTARY ON SPACE LAW 162-163*, (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl eds. 2013).

return them to the representatives of the launching authority.⁵ The duty to return is not conditional upon the reimbursement of any costs,⁶ as shown from the negotiation and drafting history of Art. 4.⁷

4. The Applicant contends that this provision has been totally violated by Rastalia. *In casu*, upon the discovery and rescue of Commander Borsch and Miss Paula, Banche immediately demanded the return of its personnel.⁸ However, Rastalia's response that Miss Paula and Commander Borsch would be returned upon the fulfilment of a condition to reimburse it for the medical expenses of the spacecraft's personnel while also completely refusing the return of Commander Borsch,⁹ is a clear breach of Article 4 of the Return and Rescue Agreement. This provision is in regards to humanitarian assistance between States and therefore generally not negotiable between States.¹⁰ The nature of the obligation imposed on a Contracting State under Article 4 is a duty to promptly return the personnel of spacecraft without any condition. Therefore, the delay in returning Miss Paula and refusal to return Commander Borsch fell short of this obligation.
5. The Applicant further contends that Rastalia's refusal to return Commander Borsch on the allegation of the commission of a crime,¹¹ is not only a violation of Article 4 of the Return and Rescue Agreement, but also a clear disregard of Article VI of the OST. Article VI of the OST provides that States shall bear responsibility for national activities. The term 'national' aims at distinguishing national activities from

⁵Article 4, Return and Rescue Agreement.

⁶*Supra* note 4.

⁷Article 4, Draft agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space, 12 December 1967, U.N. Doc. A/AC.105/C.2/L.28,

⁸*Compromis*, ¶17.

⁹*Compromis*, ¶19.

¹⁰*Supra*, note 4.

¹¹*Supra*, note 9.

international activities. An activity is considered to be a national activity if it is undertaken from one agency or entity alone,¹² for which the Launching State shall bear responsibility (and not its personnel).¹³ The deployment of Couleur into outer space is a national activity of Banche, therefore, Banche ought to be held responsible for such activity and not Commander Borsch.

6. Article 4 of the Return and Rescue Agreement answered the question of whether the personnel of a spacecraft should be returned even though they have committed crimes, or notwithstanding a request of political asylum,¹⁴ even as the final formulation by the United Nations General Assembly posited that astronauts or personnel of spacecraft must be returned without any conditions and that the return should be effected “safely and promptly”.¹⁵
7. Moreover, the obligation in Article 4 of the Return and Rescue Agreement is a principle of customary international law, as it was construed from Article 5 of the Outer Space Treaty, which is generally agreed to be customary international law and is thus binding on all States.¹⁶
8. Also, the ILC Draft Articles¹⁷ provides that a state will be responsible for the activities of an individual who acted beyond his scope of authority while carrying out a national activity.

¹² Gerhard, *Article VI*, I COLOGNE COMMENTARY ON SPACE LAW 31 (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl eds. 2009)

¹³ *Supra*, note 2.

¹⁴ *Supra* note 4.

¹⁵ *Supra* note 7.

¹⁶ FRANCIS LYALL AND PAUL B. LARSEN, SPACE LAW: A TREATISE 70-80 (2009)

¹⁷ Article 5, ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts; GA U.N. Doc. A/56/10 (2001).

2. Rastalia Violated Article 4 of the Return and Rescue Agreement by Refusing the Earlier Return of Ms Paula.

9. The *Compromis* provides that Ms Paula was returned to Banché after several months of diplomatic negotiations.¹⁸ This provides that Ms Paula was safely returned. The point in contention is that Rastalia did not promptly return Ms Paula.
10. There is no international law definition in line with the return of space personnel. However, the United Nations Working Group on Arbitrary Detention provides that in terms of Article 9(3) of the ICCPR, the word “promptly” means within three days.¹⁹ English Civil Practice provides the definition of promptly to be “with reasonable speed and celerity, taking into account the nature of the case and the period of delay.”²⁰

a. Nature of the case

11. Furthermore, in terms of the nature of the case, the *Compromis* provides that Ms Paula would only be returned after Banché reimbursed Rastalia for costs and damages incurred. Paul Dembling, argues that the return of astronauts is humanitarian in nature and is not dependent on compensation.²¹ This notion is further supported in the Cologne Commentary.²² Therefore, the payment of compensation or damages is not a prerequisite for the return of space personnel.

¹⁸*Compromis*, ¶23.

¹⁹UN General Assembly, Human Rights Council, Working Group on Arbitrary Detention, Nov. 18, 2015, A/HRC/WGAD/2015/28, (Hereinafter, Working Group on Arbitrary Detention), p1.

²⁰ Blackstone Civil Practice: A Commentary (2013).

²¹Paul G. Dembling and Daniel M. Arons, *The Treaty on the Return and Rescue of Astronauts and space objects* 9 Wm. & Mary L. Rev. 630, 646

²²Stephen Hobe, Bernard Schmidt-Tedd and Kai-UweSchrogl, Cologne Commentary on Space Law, Vol. II, (Hereinafter, Commentary on Space Law, Vol. II), Return and Rescue Agreement, art 4, p61.

b. Period of delay

12. The *Compromis* evidences the fact that Ms Paula was returned after “several months.”²³ We submit that due to the humanitarian nature of the return clause, the delay with returning can be taken to mean three days. If the court believes that three days would not be practical; we submit that several months cannot be accepted to mean promptly.
13. With respect to the nature of the case and the period of delay, the Applicant contends that Ms Paula was not promptly returned in line with Article 4 of the Return and Rescue Agreement.
14. Also, the Applicant contends that Rastalia violated Article 9 of the International Covenant on Civil and Political Rights (ICCPR) in relation to the rights of Ms Paula.
15. Article 9(1) of the ICCPR provides that no person may be arbitrarily detained.²⁴ For a violation of Article 9 to occur, two requirements must be met. Firstly, the person in question must be detained and secondly, the detention must be arbitrary.

i. Ms Paula was being detained.

16. The United Nations Working Group on Arbitrary Detention provides that detention is synonymous with imprisonment.²⁵ The Black’s Law Dictionary provides that imprisonment is the restraint of one’s personal liberty which is coercion exercised upon a person to prevent the free exercise of their power of locomotion.²⁶ It is not necessary that the confinement should be in a place usually appropriated to that purpose, it may be in a locality used only for specific occasion, or it may take place

²³*Supra*, note 18.

²⁴Article 9(1), ICCPR.

²⁵Working Group on Arbitrary Detention, p2.

²⁶Black’s Law Dictionary 9th edition, 2009.

without the actual application of any physical agencies of restraint, but by verbal compulsion and the display of available force.²⁷

17. Pursuant to the findings of the working group, the nature of the place of detention does need to be taken into account.²⁸ The important question which determines if a person is actually in detention or not is; whether the detained person has the freedom to exercise their power of locomotion or not.

18. The *Compromis* provides that Ms Paula would only be returned to Banché after Banché reimbursed Rastalia for the costs and damages incurred as a result of Banché's alleged illegal activities.²⁹ By virtue of this statement from Rastalia, Ms Paula has lost her freedom of movement. Ms Paula did not have the freedom to exercise her right to movement as she was being detained, thus satisfying the first requirement for arbitrary detention.

ii. The detention of Ms. Paula was arbitrary.

19. The Working Group on Arbitrary Detention provides certain categories as to when detention is arbitrary.³⁰ The category that we submit is applicable in this case is category 1 which provides that detention is arbitrary when there is no legal basis for a justification for the detention.³¹

20. The *Compromis* states that Ms Paula would be returned only after Rastalia had been reimbursed for the costs and damages caused by Banché's alleged illegal activities.³² This evidences the fact that Ms Paula was being held hostage, or in ransom.

21. Therefore, the Applicant contends that Ms Paula's arbitrary detention violates her rights in terms of the International Covenant on Civil and Political Right.

²⁷*Supra*, note 25.

²⁸*Id.*

²⁹*Supra*, note 9.

³⁰*Supra*, note 19.

³¹*Id.*

³²*Supra*, note 9.

22. The Universal Declaration of Human Rights further provides that persons may not be arbitrarily detained.³³ The Applicant has earlier established that Ms Paula was arbitrarily detained in terms of the International Covenant on Civil and Political Rights.

23. It is thus the submission of the Applicant that the refusal of Rastalia to promptly return Ms Paula, violated Article 4 of the Return and Rescue Agreement, Article 9 of the International Covenant on Civil and Political Rights and Article 9 of the Universal Declaration on Human Rights (UDHR).

3. Rastalia violated Article 5 of the Return and Rescue Agreement by Refusing the Return of Couleur.

24. Article 5 (3) of the Return and Rescue Agreement establishes that upon request of the launching authority, objects launched into outer space found beyond the territorial limit of the Launching State shall be returned to or held at the disposal of representatives of the launching authority.

25. In contrast to the obligations of assistance to and return of astronauts or personnel of spacecrafts, the recovery and return of space objects involves not just humanitarian interests, but also scientific, commercial, political and security interests.³⁴ Similarly, in Maritime Law, the Brussels Convention of 1910 provided for the remuneration of expenses only for salvaged property but lacked such provision for persons saved.³⁵

26. The obligation to return space objects is conditional upon a request by a launching authority under Article 5(3) of the Return and Rescue Agreement. Such request by implication imposes an obligation on the contracting party to return the space object

³³Article 9, UDHR.

³⁴Marboe, Neumann and Schrogl, *Article V (Notification, Recovery and Return of Space Objects) ARRA, II COLOGNE COMMENTARY ON SPACE LAW* 168 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds. 2013).

³⁵Vladimir Kopal, *The Agreement on Rescue of Astronauts and Return of Space Objects*, in *NEW FRONTIERS IN SPACE LAW* 106(McWhinney, Edward/Bradley, Martin A.Sijthoff, Leyden 1969).

to the Launching State.³⁶ This obligation to return space objects, it is submitted, is, like those imposed under article 4 of the Agreement, unconditional.

27. However, without prejudice to Article 5(5) of the Return and Rescue Agreement, which contains a provision that the expenses incurred in fulfilling obligations to recover and return a space object shall be borne by the launching authority. The expenses arising from the recovery and return of a space object are to be borne by the launching authority,³⁷ upon the fulfilment of the condition to return the space object.

28. This clearly shows that the obligation to pay expenses incurred in the recovery and return of a space object by the launching authority is a condition subsequent to the fulfilment of the obligation to recover and return a space object upon a demand imposed on the contracting party.³⁸

29. It is the contention of the Applicant that Rastalia's demand to be reimbursed or compensated for the recovery of Couleur³⁹ without first ensuring its return to Banche is a clear breach of Article 5 of the Return and Rescue Agreement.

30. As evidenced by the facts of the case⁴⁰, Banche's launch of Couleur was a national activity and assuming without conceding that it constituted an internationally wrongful act, then Banche and not Commander Borsch ought to be responsible and held liable as Commander Borsch was not acting in his personal capacity.

³⁶*Supra*, note 34.

³⁷*Supra*, note 35 at 122.

³⁸This is seen from the operative wordings of Paragraph 5, Article 5 of the Return and Rescue Agreement, to the effect that "expenses incurred in fulfilling obligations imposed on the contracting state to recover and return a space object shall be borne by the launching authority". In other words, the obligation to recover and rescue must first be complied with, before the obligation to pay for the cost and expenses for such operations can arise.

³⁹*Supra*, note 9.

⁴⁰*Compromis*, ¶15.

31. Banche can only be liable to pay compensation for the recovery operations of Couleur by Rastalia upon Rastalia's fulfilment of its obligation to return Couleur to Banche. The refusal of Rastalia to return Couleur to Banche cannot activate on Banche, the obligation to pay for the recovery operations of Couleur. Thus, the Applicant submits that Rastalia has violated Article 5 of the Return and Rescue Agreement.

II. RASTALIA VIOLATED RELEVANT PRINCIPLES OF GENERAL INTERNATIONAL LAW.

1. Rastalia violated the principle of international cooperation.

32. The Return and Rescue Agreement recognises, in its preamble, the international law principle of international co-operation. International co-operation is the very essence of international law as international law was developed to promote international peace and cooperation. This principle therefore constitutes an indispensable part of the rules of international Space law generally as it is embedded in the preamble of the Liability Convention and the Outer Space Treaty.⁴¹ As emphasized by the United Nations General Assembly, there is an obligation on States to co-operate with one another in accordance with the U.N Charter irrespective of their differences.⁴²

33. In light of Article 1(3) of the United Nations Charter, the Applicant asserts that an obligation is imputed upon states to co-operate with one another.

34. The Applicant thus submits that by failing to co-operate with Banche for the successful return of Couleur, Commander Borsch and in effecting the prompt return of Miss Paula, Rastalia violated the principle of International Co-operation.

⁴¹MALCOLM SHAW, INTERNATIONAL LAW, 104 (2008); T-115/94; Opel Austria Gmbh v. Republic of Australia, 22 January 1997

⁴²U.N.G.A. Resolution 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

2. Illegal Grant of Political Asylum.

35. Again, the Applicant contends that by granting Commander Borsch asylum,⁴³ Rastalia breached the general principles of international law governing the grant of Asylum.

36. Text writers such as Stephen Gorove,⁴⁴ have addressed the question whether a signatory state could grant asylum to an astronaut who landed in its territory. The answer would be in the affirmative if the landing had been intentional and did not involve distress or an emergency, but in the case of an unintentional landing, involving distress or emergency, the state could insist on the speedy return of its personnel.

37. Relating this to the facts of this Case⁴⁵, Commander Borsch's landing in Rastalian territory was an unintentional landing which involved distress and emergency. Hence, Banche has the right to insist on the speedy return of Commander Borsch and Rastalia cannot refuse this.

38. While States by extension of their sovereign rights have a right to grant asylum, the right to grant asylum is not absolute but qualified as affirmed by the ICJ in its Asylum Case,⁴⁶ where the Court in a vote of 14 to 2 held that Columbia was not competent to qualify the nature of the offence of the person seeking asylum in a unilateral decision binding on Peru.

39. Under Article 38 1(c) of the Statute of this court, one of the primary sources of International law is General Principles of International law as gleaned from state practices. In the Genocide Convention Case, the court held that principles underlying

⁴³*Compromis*, ¶20.

⁴⁴Stephen Gorove, *International Protection of Astronauts and Space Objects*, 20 DePaul L. Rev. 597 (1971)

⁴⁵*Supra*, note 8.

⁴⁶*Columbia v. Peru* (1950) I.C.J. 6

the convention were principles recognised by civilised states as binding regardless of conventional obligation

40. However, recognition of such principles as binding by civilised nations does not mean their recognition by all civilised nations. They only need to be drawn from relevant legal orders and have a potential for universal applicability.

41. Against this backdrop therefore, the Applicant submits that the right to grant asylum is enshrined in most constitutions of the world. The constitutions of Cuba, Nicaragua, Portugal, Mozambique, Angola, and the U.S.A., are few of the constitutions of the world that reflect the position of states on the grant of asylum. A constant attribute of all aforementioned constitutions is the requirement that asylum be granted to persecuted persons or persons under serious threat of persecution in their countries of nationality. Some of these constitutions provide that such persecution be for their ideals in defence of democracy, freedom and Human Rights as enshrined in International law instruments.

42. Furthermore, Article 14(1) of the Universal Declaration on Human Rights provides that everyone has a right to seek and enjoy in other countries, asylum from persecution.

43. Relating this to the facts of the Case, it will be observed that Commander Borsch was not under any persecution or threat of persecution by Banche, He was actually a high ranking military officer, and he would have been celebrated on arrival in his country.

44. In fact, it was stated that it was Rastalia who intended to prosecute him.⁴⁷

⁴⁷*Supra*, note 9.

45. It is thus the submission of the Applicant State that the Respondent State violated international law provisions by refusing to return Couleur and Commander Borsch, and the prompt return of Miss Paula.

B. RASTALIA IS LIABLE UNDER INTERNATIONAL LAW FOR THE DAMAGE TO COULEUR.

I. RASTALIA IS LIABLE UNDER ARTICLE III OF THE LIABILITY CONVENTION.

1. Rastalia's liability is based on fault.

46. Article III of the Liability Convention covers liability for damage suffered in outer space. It stipulates that where damage is caused elsewhere than on the surface of the Earth to the space object of one launching State by the space object of another launching State, the latter shall be liable if the damage is due to its fault or the fault of persons for whom it is responsible. Couleur was damaged by Lavotto-1 in outer space, thus, Article III is applicable to govern the liability of Rastalia in this respect.

47. The regime of liability created under Article III is fault based,⁴⁸ thus, it is the Applicant's contention that the damage to Couleur was caused by Rastalia's space object and there was fault on the Respondent's part as the launching state. The Applicant contends that the damage to Couleur was caused by Rastalia's space object as a fragment from Lavotto-1 that exploded due to its fragile nature which was known to Rastalia, struck Couleur and damaged it irreparably.

48. The fault referred to in Article III of the Liability Convention could arise in two major forms. First: objective fault, and second: subjective fault. Objective fault refers to the failure to adhere to an international obligation, or breach of an obligation imposed by law;⁴⁹ while subjective fault refers to the intent or negligence to cause damage.⁵⁰ It is the contention of the Applicant that the Respondent, Rastalia, is liable on both grounds.

⁴⁸ Article III, Liability Convention.

⁴⁹ Lesley J. Smith & Armel Kerrest, *Article VII, I COLOGNE COMMENTARY ON SPACE LAW*, 141 (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl eds., 2009).

⁵⁰ Frans G. von der Dunk, *Liability Versus Responsibility In Space Law: Misconception Or Misconstruction*, 34 I.I.S.L. Proc. 363, 364 (1992).

A. *OBJECTIVE FAULT.*

49. Objective fault merely requires proof of the violation of international law.⁵¹

International legally binding rules represented either in treaties or customary international law are the most pertinent indications of this fault.⁵²

50. It is the contention of the Applicant State that Rastalia has breached several international law and international space law provisions such as Principle 2 of the 1992 Rio Declaration on Environment and Development; the principle of international cooperation enshrined in international treaties and conventions such as Article 3 of the U.N. Charter, the “non-contamination” principle, the principle of due regard and the principle of international consultation embedded in Article IX of the Outer Space Treaty (OST) respectively.

a. Rastalia Breached Article IX of the Outer Space Treaty

i. *Rastalia’s declaration of Lavotto-1 as a “derelict object” violates the “non -contamination” principle of the outer space environment.*

51. The principle of non-contamination of the outer space environment enshrined in Article IX of the Outer Space Treaty imputes an obligation on states parties to avoid the harmful contamination of the outer space. The term ‘harmful contamination’ broadly implies that any object which would cause harm to other space operations must be avoided,⁵³ thus, space debris falls under instances of objects considered as harmful contamination.

52. This duty is not only imposed by Space treaties but by environmental rules of international law. Article III of Outer Space Treaty provides that exploration of outer

⁵¹Ricky J. Lee, *Reconciling International Space Law with the commercial Realities of the twenty-second century*, in 4 SINGAPORE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2000),P 220;UNGA, Resolution No. A/RES/1472/XIV.

⁵²Setsuko Aoki, *The Standard of Due Diligence in Operating a Space Object*, 55 I.I.S.L. Proc. 392 (2012).

⁵³D. A. Cypser, *International Law And Policy Of Extraterrestrial Planetary Protection* 33 JURIMETRICS- JOURNAL OF LAW, SCIENCE AND TECHNOLOGY 315 at 324f (1993)

space must be done in accordance with rules of international law. This means that international environmental law is also applicable to contracting states. In light of this, Principle 2 of the 1992 Rio Declaration on Environment and Development⁵⁴ establishes that states have the obligation to ensure that activities within their control do not cause damage to the environment of areas beyond the limits of their national jurisdiction. Outer space is beyond the national jurisdiction of any state⁵⁵ and is thus covered by this principle.

53. According to the 2007 Space Debris Mitigation Guidelines by the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), Space debris is “any man-made object in orbit about the Earth which no longer serves a useful purpose, or⁵⁶ is no longer functioning, no longer controlled, no longer useful or is an abandoned space object or a part of such an object, when no change can reasonably be expected in these conditions in the foreseeable future.⁵⁷ According to Stephen Gorove, space debris could result from the abandonment of space objects among other things.⁵⁸

54. *In casu*, the State of Rastalia launched Lavotto-1 with full knowledge that its composite material which constituted a recent and new research development, had never been launched into Space.⁵⁹ The Respondent State ought to have foreseen the possibility of the fragile space object suffering mishap that could render it

⁵⁴UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992)

⁵⁵Article 1, OST.

⁵⁶ Committee On The Peaceful Uses Of Outer Space, Scientific & Technical Subcommittee, Report On Its 44th Session, Feb. 12-23 2007, U.N. Doc. A/Ac.105/890, Annex 4, [Hereinafter Uncopuos Space Debris Mitigation Guidelines]

⁵⁷Stephen Gorove, *Space Debris In International Legal Perspective*, 32 PROC. COLLOQ. L. OUTER SPACE 97 (199); *Ct. International Academy Of Astronautics, Committee On Safety, Rescue And Quality, Position Paper On Orbital Debris, August 27, 1992*, at P.1.

⁵⁸Stephen Gorove, *Toward A Clarification Of The Term "Space Object" An International Legal And Policy Imperative?* 21 JOURNAL SPACE LAW 21,1(1993)

⁵⁹*Compromis*, ¶¶7 & 9.

dysfunctional which may consequently pose a threat or cause collision hazard to other space objects.

55. Unsurprisingly, four months after the launch, the satellite ceased most of its functions, and was no longer capable of de-orbiting and was announced as abandoned and derelict by Rastalia on July 30th, 2028.⁶⁰The defunct Lavotto 1, by virtue of that damage, thus became space debris and posed collision hazard to, not only, Mira space station which occupied the same orbit with a distance of 2km, but space objects of other states.⁶¹

56. It is immaterial that the Respondent declared Lavotto-1 a derelict object, as this does not remove or reduce the liability caused by it to another State. Article VIII of the OST provides that the State that registers the object retains jurisdiction and control over it while it is in space. In other words, by virtue of the rule“once a Launching State, always a Launching State”; they are liable even if in practice they have no control over the operation of the satellite.⁶²

57. The Applicant thus submits that Rastalia acted in breach of its obligation not to contaminate outer space with harmful objects or space debris.

ii. Rastalia breached the principle of due regard.

58. The principle of due regard under article IX of the OST establishes that outer space is to be explored and used with due diligence, as a *res communes omnium* in Roman law, taking into account the interests and rights of other states. The principle implies that the actions of States must be carried out with a certain standard of care, attention

⁶⁰*Compromis*, ¶¶10 & 11.

⁶¹*Compromis*, ¶9

⁶²Edward A. Frankle, *Once A Launching State, Always The Launching State?*44 I.I.S.L. Proc. 32, 36 (2002).

and observance towards other States,⁶³ and that States are bound to ensure that the exercise of their rights and freedoms in outer space does not interfere with, or compromise the safety of space operations.⁶⁴

59. *In casu*, the failure of Rastalia to remove Lavotto-1 from outer space after it had been detected that it posed massive threat to, not only Mira Space Station, but to other space objects⁶⁵ of other states and the subsequent declaration of the threatening Lavotto-1 as abandoned,⁶⁶ compromised greatly, the safety of space operations and is therefore, a breach of the due regard principle.

iii. Rastalia breached the principle of International Consultation.

60. Article IX of the OST also imposes upon States intending to carry out an experiment in Outer Space to consult properly with other States and the international community, whose interests would be affected by such action or operation.

61. Though the Respondent State contends that its launch of Lavotto-1 was not an experiment but rather, a satellite intended for permanent occupation of the outer space with an end-of-life mission plan, it is however the contention of the Applicant State that prior to its launch, having comprised of a recent development with no prior launch into or test trial in outer space, the international community and the State of Banche ought to have been properly consulted as the launch and its operation in the outer space environment would in one way or the other, adversely affect them as the object was placed in the same altitude.

⁶³Sergio Marchisio, *Article IX Principle of Due Regard and Protection of Space Environment* in I COLOGNE COMMENTARY ON SPACE LAW, 175, 176(Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds., 2009).

⁶⁴Sergio Marchisio, *Article IX (commentary) OST*, II COLOGNE COMMENTARY ON SPACE LAW 23 (Stephan Hobe, Bernhard Schmidt-Tedd& Kai-UweSchrogl eds., 2013).

⁶⁵*Supra*, note 61.

⁶⁶*Supra*, note 60.

62. Thus, the Applicant submits that the Respondent State also breached this principle which is necessary for the safety of the outer space environment in general and protection of the interests of other space faring States.

b. Rastalia Breached Relevant General International Law Principles.

i. *Rastalia breached the principle of international cooperation.*

63. There is a duty on States to co-operate with one another in accordance with the United Nations Charter irrespective of their differences.⁶⁷ This principle applies to all modes of co-operation, including governmental and non-governmental; commercial and non-commercial; global or regional, among countries.⁶⁸

64. *In casu*, Rastalia failed to cooperate with other space faring States advanced technologically in space operations and activities such as Banche and Mosolia, to aid in the removal, deorbiting or mitigation of the threat posed by the Lavotto-1 satellite after its loss of deorbiting functions and failed physical manoeuvre attempt, and has therefore breached the obligation imposed on it to co-operate with other states for the safety and protection of Individuals, States and the Outer Space Environment.

ii. *Rastalia breached the 'No-Harm' principle.*

65. The Applicant argues that the 'no-harm' principle embedded in customary international law has been breached by the Respondent. This principle states that every State has an obligation under international law to observe due diligence and refrain from causing harm or damage to the property of other states.⁶⁹ This basic duty requires States to standardize their actions so as not to injure the rights of other

⁶⁷U.N.G.A. Resolution 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

⁶⁸*Supra* note 64.

⁶⁹Trail Smelter Arbitration (U.S. v. Canada) 1938/1941, R.I.A.A. 1905 (Mar. 11).

States⁷⁰ and this is represented in the Latin maxim, *sic uteretur, ut alienum non laedas*.⁷¹

66. The obligation not to damage the property of, or cause harm to another State, has been affirmed by the ICJ in *Corfu Channel's case* where the court stated that *every State's obligation is not to allow knowingly its territory to be used for acts contrary to the rights of other States*.⁷²

67. *In casu*, the Respondent State used and abandoned its property in a manner that resulted in the damage to the Applicant state. Rastalia equally breached the *no-harm* principle by launching an object whose composite structure was a recent development which was susceptible to damage in outer space; an object which posed a serious threat to space objects of other States, and which eventually caused harm to the Applicant's space object- Couleur. The Applicant thus submits that Rastalia has breached the *no-harm* principle.

B. SUBJECTIVE FAULT

68. Subjective fault is established as intent to cause or a negligence which results in a particular damage. Failure to meet those obligations imposed by law proves negligence.⁷³ Thus, from the foregoing, it is clear that breach of international obligation proves the negligence of a State.

69. It is therefore the submission of the Applicant that the breach of the several obligations by omission or commission, imposed on Rastalia, the Respondent State, establishes negligence on its part for which it must be held liable.

⁷⁰V. P. NANDA, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, (1995); L. VIKARI, THE ENVIRONMENTAL ELEMENT IN SPACE LAW: ASSESSING THE PRESENT AND CHARTING THE FUTURE (2008)

⁷¹It literally means: 'use your property in a way as not to harm another.'

⁷²Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. (Apr. 9)

⁷³*Supra*, note 49.

C. BANCHE IS NOT LIABLE UNDER INTERNATIONAL LAW FOR THE COSTS OF RECOVERY OF COULEUR, THE RESCUE AND MEDICAL EXPENSES FOR COMMANDER BORSCH, THE COSTS OF THE EVACUATION OF LAKE TAIPO, AND THE DEATHS OF BOTH MR. THOMAS AND MR. BARTON.

I. **BANCHE IS NOT LIABLE UNDER ARTICLE 2 OF THE LIABILITY CONVENTION.**

70. Though Article II of the Liability Convention provides that the Launching State shall be held absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to an aircraft in flight,⁷⁴ which creates a regime of ‘absolute liability’, the Applicant, however contends that it is exonerated from such liability.

1. Exoneration from Absolute Liability under the Liability Convention.

71. It is the contention of the Applicant State that it is exonerated from liability for the damage suffered on the surface of the Earth pursuant to Article 6 of the Liability Convention.

72. That provision of the law states that exoneration from absolute liability shall be granted on two major grounds – first, the launching State must establish that the damage had resulted 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; and second, the activities conducted by the launching State must be in conformity with international law including, in particular, the Charter of the United Nations and the Outer Space Treaty.

a. Gross Negligence.

73. There is a consensus among the Belgian,⁷⁵ United States⁷⁶ and Hungarian⁷⁷ draft conventions on liability for damage caused by space vehicle accidents, that gross or reckless misconduct or negligence should bar recovery, although there were slight

⁷⁴ Article II, Liability Convention.

⁷⁵ U. N. Doc. A/AC.105/C.2/L.7/Rev. I, found in A/AC.105/21 Annex II at 18 (1964).

⁷⁶ U.N. Doc. A/AC.105/C.2/L.4 (1962).

⁷⁷ U.N. Doc. A/AC.105/C.2/L.10 (1964)

differences in the use of language in the various drafts. The Belgian term “rashly and in full knowledge that damage will probably result”, appears synonymous with “wilful or reckless act or omission” as used in the United States draft.⁷⁸ And although there usually is a sort of difference between reckless misconduct and gross misconduct,⁷⁹ the United States’ use of the term “reckless act”, is intended to mean the same as “gross misconduct” in the Hungarian draft.

74. The United States had used the term “gross negligence” in an earlier draft,⁸⁰ but had changed it due to widespread criticism. In order to elucidate on the United States position, the Subcommittee was advised that it was not the United States’ intention to depart from the concept of gross negligence. According to the United States’ representative, the expression “wilful or reckless act or omission”, did not mean mere negligence, but was rather equivalent to gross negligence.

75. The term “gross negligence” has often been used in international agreements. To clarify any ambiguities, it has been recommended that the term “reckless act”, as found in the United States’ proposal, be replaced with the Belgian phrase “rashly and in full knowledge that damage will probably result”. In other words, the negligible semantic discrepancies which subsist are not irreconcilable.

76. Therefore, the Applicant submits that in this case, Rastalia’s launch of Lavotto-1 for a permanent occupation of outer space, with its major structural material being untested, and its subsequent abandonment by Rastalia, with full knowledge of its obligations under general principles of international law and international space law such as international consultation; due regard; ‘no-harm’; amongst others, is a clear instance of gross negligence, wilful misconduct or reckless acts or omissions. Also, as

⁷⁸ U.N. Doc./A/AC.105/21/Add.2 at 58 (1964).

⁷⁹ W. PROSSER, LAW OF TORTS, p.74 (3rd ed. 1964).

⁸⁰ Stanley Mazaroff *Exonerations from Liability for Damage Caused by Space Activities*, VOLUME 54, ARTICLE 5 CORNELL LAW REVIEW, ISSUE 1 (1968).

earlier established, a failure to comply with obligations imposed by law is an indication of negligence.

77. The recognition of the structural material of the satellite, the threat posed by it after the windstorm which should have been predicted in selecting materials and constructing the Lavotto-1 satellite, and complete disregard for safety measures to counter the threat posed by the object, constitute and evidence complete and total disregard for the safety of the international community and outer space environment.

78. While the Applicant admits that the damage suffered by Rastalia by its own activities is separated by intermediary links, there is however an inextricable causal link between Rastalia's negligent actions and the damage eventually suffered by both parties. The test of proximate cause is two-fold.⁸¹ First, the damage must be such that would not have occurred but for the initial act; and second, the damage must be a reasonably foreseeable consequence of the initial act.

79. The damage in question- the damage that occurred on the surface of the Earth in Rastalian territory, would not have occurred but for Rastalia's initial act of launching Lavotto-1 indiscriminately without proper consultation. The damage was also undoubtedly, a reasonably foreseeable consequence of Rastalia's act. In the case of ultra-hazardous activities such as the launch of a space object, damage may be considered reasonably foreseeable if it is established that the risk of harm, however slight was inherent in the act. Rastalia's launch and subsequent abandonment of Lavotto-1 was inherently risky.

80. Having established that the Respondent was grossly negligent and the damage that occurred was partly due to this gross negligence, the Applicant further submits that Banche on its part complied with obligations under international law and international

⁸¹ HART AND HONORE: CAUSATION IN THE LAW.

space law. Therefore, the Applicant submits that it is exonerated from liability on this first ground.

b. Conformity with International Law.

81. It is the further contention of the Applicant that its acts towards the mitigation of the threat posed by the satellite and protection of the safety of the outer space environment, were in full compliance and conformity with several international law and international space law principles.

82. First, the Applicant State complied with the principle of due regard, the principle of international consultation, and the international space law principle of ‘non-weaponisation’ of the outer space environment.

i. Banche complied with the Principle of Due Regard.

83. Article IX of the OST refers to the obligation of states parties to conduct all their activities in outer space with due regard to the corresponding interests of all other states parties. The principle entails that a State in exercising its freedom and right of exploration of the outer space should take into consideration the rights of other States to ensure that in their exercise of freedom, the right of another State is not being breached.⁸² It is an obligation of all States to consider the legitimate interest of other States in its use of outer space.⁸³ In other words, the use of outer space is free, only to the extent that it does not disregard the interest of other states.⁸⁴

84. The term ‘due regard’, in the context of Article IX, is an obligation to take into account, both prior to and during space activities and experiments, the legal rights of other States Parties in the peaceful use and exploration of outer space, the moon and

⁸²*Supra*, note 7.

⁸³Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, JOURNAL OF SPACE LAW, Fall 2006.

⁸⁴MANFRED LACHS, THE LAW OF OUTER SPACE, 108 (1972).

other celestial bodies.⁸⁵ Accordingly, due regard is not an absolute duty to prevent all harm, but a requirement for a State to take reasonable measures to avoid harm.⁸⁶ ‘Due Regard’ therefore, is to be interpreted according to the particular facts and circumstances of each case.⁸⁷

85. It is the contention of the Applicant, that Banche paid due regard to the interest of Rastalia in its activities in outer space.

86. *In casu*, when it was announced that Rastalia was unable to remedy the malfunction of Lavotto-1 and had declared the spacecraft a derelict object,⁸⁸ Banche resolved to physically remove Lavotto-1 from its current orbit with the latest advanced robotic seizing and removing technologies.⁸⁹

87. Banche, in recognition of the delicate balance of the outer space environment and the threat posed by the damaged Lavotto-1, resolved to leave nothing to chance, and proceeded to do the needful. The damage suffered by Couleur and consequently, Rastalia was as a result of the fragile and untested structural material used in developing Lavotto-1.⁹⁰ This is evident from the fact that the Lavotto-1’s composite structural material did not withstand the grappling process and the satellite easily broke into two segments.⁹¹ The damage suffered by both parties in this case was not as a result of negligence or for want of due regard or due diligence on the part of Banche.

⁸⁵Michael C. Mineiro, *Principles of Peaceful Purposes and the Obligation to Undertake Appropriate International Consultations in Accordance with Article IX of the Outer Space Treaty*, McGill University, Institute of Air & Space Law. Presented at the 5th E. Galloway Symposium on Critical Issues in Space Law Washington, D.C. December 2nd, 2010.

⁸⁶ALEXANDRE KISS & DINAH SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW*, 90 (2007).

⁸⁷*Supra*, note 7.

⁸⁸*Compromis*, ¶11.

⁸⁹*Id.*

⁹⁰*Compromis*, ¶7

⁹¹*Supra*, note 40.

ii. Banche conducted Diplomatic Negotiations with Rastalia.

88. As evidenced by the statement of agreed facts,⁹² the Applicant State conducted diplomatic negotiations with the Respondent State for several weeks to reach a compromise or decision to either deorbit the failed satellite or mitigate the threat it posed to the Outer Space environment. However, this was not successful as the Respondent announced the space object derelict and abandoned.

iii. Banche's use of the GODA Laser Satellite Removal System does not Breach Article IV of the Outer Space Treaty.

89. Article IV of the Outer Space Treaty creates a regime of the “non-weaponisation” of the Outer Space. By this provision, State parties are prohibited from placing in orbit around the Earth, any object carrying nuclear weapons or any other kinds of weapons capable of perpetrating mass destruction. . However, neither Article IV of the OST nor any other Outer Space law provides a definition of “nuclear weapons” and “weapons of mass destruction”.

90. In construing the meaning of these terms, recourse can however be made to the Vienna Convention on the Law of Treaties, (VCLT)⁹³ which reflects customary international law and are applicable to the Outer Space Treaty as an international law treaty.⁹⁴ Accordingly, the fundamental criterion for treaty interpretation is the ordinary meaning of the term, to be considered in its context (including any subsequent agreement or practice relating to the treaty) and in the light of its object

⁹²*Supra*, note 87.

⁹³ Vienna Convention on the Law of Treaties, (VCLT) *entered into force* May 23, 1969, UN Doc A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875

⁹⁴*Supra*, note 3.

and purpose.⁹⁵ Supplementary means of interpretation may include the *travaux préparatoires* of the treaty and the circumstances of its conclusion.⁹⁶

91. Article IV(1) of the Outer Space Treaty is instructive in that it only prohibits certain types of weapons, namely; nuclear weapons and weapons of mass destruction. The International Court of Justice (ICJ) in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁹⁷ stated: ‘nuclear weapons are explosive devices whose energy results from fusion or fission of the atom. By their very nature, nuclear weapons release not only immense quantities of heat and energy – causing damage vastly more powerful than that caused by other weapons – but also powerful and prolonged radiation peculiar to nuclear weapons.’

92. In the specific context of outer space, the term ‘weapon of mass destruction’ refers both to weapons which, if used in space, would cause mass destruction on Earth, and to weapons that result, if detonated on Earth, in mass destruction on Earth.⁹⁸ This follows from the *ratio legis* of Article IV(1) of the Outer Space Treaty.⁹⁹

93. The reference to nuclear weapons or any other kind of weapons of mass destruction could mean that nuclear weapons are prohibited only if they are indeed capable of causing ‘mass destruction’. This would exclude from prohibition the stationing of, for

⁹⁵ Article 31 (1), VCLT.

⁹⁶ J. Neumann, ‘An Interpretation of the Outer Space Treaty after 40 years’ PROCEEDINGS OF THE 50TH COLLOQUIUM ON THE LAW OF OUTER SPACE 331 (2007).

⁹⁷ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) {1996} ICJ Rep. 243

⁹⁸ C.G. Hasselmann, *Weapons of Mass Destruction, Article IV Outer Space Treaty and the Relationship to General Disarmament*’ PROCEEDINGS OF THE 25TH COLLOQUIUM ON THE LAW OF THE OUTER SPACE.103 (1982).

⁹⁹ Neumann and Schrogl, *Article IV OST, I COLOGNE COMMENTARY ON SPACE LAW* 24 (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl eds. 2009).

example, mini-nuclear space mines in lasers, as long as their use does not lead to mass destruction.¹⁰⁰

94. *In casu*, the GODA Laser Satellite Removal System alleged by Rastalia to be a weapon of mass destruction¹⁰¹ first, is a directed energy continuous wave (CW) laser and second, is designed for use by Couleur to cause a slight adjustment in the orbit of a target satellite, which would increase drag and ultimately result in the spacecraft re-entering the atmosphere and burning up.¹⁰² The GODA Laser Satellite Removal System, contrary to the allegations and speculations made by Rastalia, is not a nuclear weapon, neither is it a weapon of mass destruction. This is evidenced by the fact that upon recovery of Couleur, after it had landed in Rastalia's territory, the spacecraft was tested and no nuclear radiation leak was detected.¹⁰³

95. Consequently, it is the final submission of the Applicant State, Banche, that it is not liable for the costs of recovery of Couleur, the costs of rescue and medical expenses for commander Borsch, the costs of the evacuation of Lake Taipo, and the deaths of both Mr Thomas and Mr Barton.

2. *Banche is not Liable for the Cost of Couleur.*

97. Article 5 of the Return and Rescue Agreement establishes that upon request of the launching authority, objects launched into outer space and found beyond the territorial limit of the launching state shall be returned to or held at the disposal of representatives of the launching authority.¹⁰⁴ Accordingly, Article 5 again, states that

¹⁰⁰BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 530(1997).

¹⁰¹*Compromis*, ¶18

¹⁰²*Compromis*, Footnote 2.

¹⁰³*Supra*, note 100.

¹⁰⁴Article 5, ¶3 of the Return and Rescue Agreement.

expenses incurred in fulfilling obligations to recover and return a space object shall be borne by the launching authority.¹⁰⁵

98. As earlier submitted, the obligation for a launching State to bear the cost of expenses incurred during the recovery and return of a space object to the launching authority is a condition subsequent and not a condition precedent to the fulfilment of the obligation to recover and return a space object upon demand that is imposed on a contracting party. Since Rastalia has not complied with the obligation imposed on it under the Return and Rescue Agreement to recover and return Couleur,¹⁰⁶ Banche is therefore not liable for the cost of recovery of Couleur.

3. Banche is not Liable for the Cost of Rescue and Medical Expenses of Commander Borsch.

99. In any event, as provided under Article 4 of the Return and Rescue Agreement, there is an absolute duty on contracting parties to return personnel of a spacecraft to representatives of the launching authority. This duty is absolute, as the wordings of the provision do not leave room for discretion on the part of the contracting parties.¹⁰⁷ Since this duty is considered to be one of a humanitarian nature, the duty to return is therefore neither unconditional; nor conditional upon reimbursement of any costs.¹⁰⁸

100. *In casu*, owing to the fact that the help rendered by Rastalia in the rescue and treatment of Couleur's personnel falls under this provision, Banche cannot be made to pay for the cost and medical expenses of its personnel (Commander Borsch).

101. The Applicant thus submits that Banche is not liable under international law for the costs of recovery of Couleur, the rescue and medical expenses for commander Borsch,

¹⁰⁵Article 5, ¶5, *Id.*

¹⁰⁶Article 5, ¶3, *Id.*

¹⁰⁷Marboe, Neumann and Schrogl, *Article IV (Prompt Return of Personnel) ARRA*, II COLOGNE COMMENTARY ON SPACE LAW 162, 163, (Stephan Hobe, Bernhard Schmidt-Tedd & Kai-Uwe Schrogl eds. 2013).

¹⁰⁸*Id.* at 165-167.

the costs of the evacuation of lake Taipo, and the deaths of both Mr. Thomas and Mr. Barton.

SUBMISSIONS TO THE COURT

For the foregoing reasons, the Government of the Republic of Banche, the Applicant respectfully requests this court to adjudge and declare that:

1. Rastalia violated international law by refusing to return Couleur and Commander Borsch to Banche and refusing the earlier return of Ms Paula.
2. Rastalia is liable under international law for the damage to Couleur.
3. Banche is not liable under international law for the costs of recovery of Couleur, the rescue and medical expenses for Commander Borsch, the costs of the evacuation of Lake Taipo, and the deaths of Mr Thomas and Mr Barton.