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11th Manfred Lachs Space Law Moot Court Competition 2002

The Case Concerning International Liability Utopia v. Friendlistan

PART A: INTRODUCTION

The 11th Manfred Lachs Space Law Moot Court Competition was held during the Houston Colloquium. Semi-finals were held on Tuesday 15 October, and the Finals were held on Thursday 17 October. Three Judges of the ICJ judged the Finals: H.E. Judge Koroma, H.E. Judge Buergenthal and H.E. Judge Elaraby. The Institute is very grateful that they accepted to travel to Houston, thus enabling us to continue our unique tradition of having World Court Judges for the Finals.

In the European Round, 7 teams participated, in the USA 5, and in the Asia-Pacific region there were 11 teams. The winners of the preliminary rounds were, respectively, the University of Warwick, UK, Georgetown University Law Center, Washington DC, USA, and the University of New South Wales, Sydney, Australia. Australia, the team with the highest score for written briefs, moved directly to the Finals, whereas the USA and UK first met in the Semi Final. The USA won this, then met Australia in the Final, was victorious there as well, and brought home the Manfred Lachs Trophy. The Sterns and Tennen Award for Best Oralist was won by Victoria Williams of the US team, and the Eilene M. Galloway Award for Best Brief was won by the Australian team. All students received certificates.

With the invaluable help of Ms Daria Lopez-Alegria of SpaceBridges, a Houston-based consultant, we had managed to secure the support of a large number of law firms, space corporations, universities, government agencies, international organizations and individual IISL Members, to whom IISL is most grateful. Their names are mentioned in an annex.

The Colombe d'Or, an elegant restaurant in Houston was the location for the IISL Dinner that followed the Finals. The University of Houston had provided the location for the finals, and had also hosted a special luncheon for the ICJ Judges, the IISL Board and Faculty officials.

For the first time, a Brochure had been prepared for the World Finals, which, apart from general information about the IISL and the Competition, gave all relevant information regarding the moot court, such as a summary of the case, the full programme, the names of all sponsors, all judges and juries for written briefs in the semi-final and final, all universities that participated in each regional round, the names of members of the three finalist teams, and a list of all prizes and awards, including a photo of the Manfred Lachs Trophy. Another major innovation for this year is that we will have video coverage of the finals, recorded by a professional company, as well as digital photographs. All these will be used for promotion of the moot court in various regions.

Summary information:

RESULTS OF THE WORLD FINALS:

- Winner: Georgetown University Law Center, Washington DC USA (Victoria Williams, Kelly Gable, Petra Vorwig)

- Runner up: University of New South Wales, Sydney Australia (Victoria-Anne Davidson, Caroline Ang, Johanna O'Rourke)

- 2nd runner up: University of Warwick School of Law, UK (Sethu Nandakumar, Sagee Sasikumar)

- Eilene M. Galloway Award for Best Written Brief: University of New South Wales, Sydney Australia

- Sterns and Tennen Award for Best Oralist: Victoria Williams, Georgetown University Law Center

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University of Mississippi, Mississippi
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H.E. Judge Thomas Buergenthal, ICJ
H.E. Judge Nabil Elaraby, ICJ

PART B: THE PROBLEM

Spaceliner Inc., a private company incorporated in the State of Utopia, operates from its home port in Utopia which it owns as well as from air/spaceports which it serves in other places mentioned herein, a fleet of three similar transportation vehicles for both passengers and cargo from its equatorial port to the International Space Station (ISS), the Moon and several points on the surface of the Earth. In order to capture a highly profitable market, Spaceliner Inc. uses exclusively one of these vehicles for the carriage of high paying business passengers between different cities on the Earth as Spaceliner can reach its destination on the other side of the globe within an hour by passing through both air space and outer space. Its flight path takes it through the airspace of all of the states named herein. There exists an open sky policy with respect to all reusable vehicles that can be operated in airspace and outer space. Under Utopia law no flight plan is required and Utopia as a matter of practice does not notify the United Nations of each flight.

Utopia is located on the equator and does not have a strong financial position. The World Bank financed the operations of Spaceliner Inc. up to 65 percent with a view to encourage private enterprises in this developing country and on the condition that at least 25 percent of the remaining financing should come from foreign private investors. Only 10 percent of the shares of Spaceliner Inc. are owned by the private sector in Utopia. Being a member of the World Trade Organization, Utopia is committed to total privatization and deregulatory industrial policies in all economic activities and the Spaceliner Inc.

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venture is not an exception. Thus, as a matter of practice, Utopia adopts a somewhat hand-off regulatory policy towards Spaceliner Inc. Utopia does not carry insurance, nor does it require Spaceliner Inc. to carry insurance or obtain an airworthiness certificate for its fleet of Spaceliner transporters. Utopia Law requires Spaceliner Inc. to include in its transportation contracts with all passengers and cargo shippers a provision limiting its liability in accordance with the 1929 Warsaw Convention (i.e. the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, October 12, 1929). In addition, passengers are able to purchase higher coverage limits in the private insurance market should they so desire. Utopia and a few of its equatorial neighbors provide limited navigational services. It routinely relies upon the Global Positioning Satellite (GPS) system, operated by the State of Friendlistan, which is the only such system available for use by aircraft, ships and other various vehicles worldwide. However, the system was encrypted on 1st July 2030 due to anonymous threats of terrorism directed toward Friendlistan. On the same day, Friendlistan issued a worldwide notification that GPS signals would not be available for the near future.

On 2nd June 2030, Utopia signed a five-year agreement worth US$200 million with the State of Equatorian to image remotely certain areas of Friendlistan. In this agreement, Spaceliner Inc. was named the prime contactor for actually performing such imagery activities when a Spaceliner passes over Friendlistan territory, though with some technical help from the Equatorian remote-sensing experts. Equatorian is friendly towards, but is in economic and industrial competition with, Friendlistan. Friendlistan, a rich and strong space-faring nation, objected to such imaging because the areas to be imaged were possibly highly profitable mining areas and Utopia refused to provide copies of the imagery to Friendlistan and its companies. Friendlistan sent Utopia a formal diplomatic note objecting to the capture of the imagery unless copies were made available to Friendlistan. The Utopian Embassy in Friendlistan replied to this note stressing that international law allows its citizens to carry out all remote sensing activities, Spaceliner Inc. would continue such activities, and would not make the copies of the captured imagery available to Friendlistan and its companies, since under the June 2nd agreement the State of Equatorian is exclusively entitled to all proprietary rights in all forms of the collected remote sensing data.

On 4th July 2030, a Spaceliner vehicle commenced its journey from Utopia and after a short stopover in Equatorian picking up an Equatorian passenger, it continued flying with 40 passengers and a crew of 5 with the ISS as immediate destination and Equatorian as the return destination. Nine of the passengers were officials from various nations on an inspection mission of the ISS, one was an Equatorian remote sensing expert and the remaining 30 from various nations were tourists who were to spend twenty four hours on the ISS before returning to Earth. The flight path of the Spaceliner took it over Friendlistan at an altitude of 110 kilometers (approximately 70 miles). While the Spaceliner was at this altitude over Friendlistan territory, a Friendlistan Air Force station lit a laser beam illuminating the Spaceliner in an attempt to frustrate the capturing of imagery. As a result of this illumination, several computers and other electronic equipment on board the Spaceliner malfunctioned. Such malfunctions caused the Spaceliner to be unstable but it continued its flight towards the ISS.

Learning about the instability of the Spaceliner, the Commander of the ISS refused to allow it to dock with the ISS even though the Captain of the Spaceliner had declared an emergency. Having no other choice, the Spaceliner began its journey back to Earth. Being unstable and uncontrollable, the right wing of Spaceliner hit Milsat, a private remote sensing satellite belonging to Davidson Corporation, which was carrying out reconnaissance activities under a multi-million dollar commercial contract with several like-minded States, including Friendlistan. Davidson Corporation is a multinational corporation having its headquarter in Equatorian but 70% of its shares are owned by the citizens of Friendlistan. Within a few minutes of the accident, Milsat developed a serious malfunction and all communications with the ground stations stopped. It was later

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discovered that in the accident with Spaceliner, the antennae and solar arrays of Milsat were damaged. Consequently, Milsat had to be declared totally dead. The destruction of Milsat forced Davidson Corporation to declare bankruptcy, as it was unable to pay its creditors due to the lack of sufficient and timely cash flow.

The Spaceliner continued its return to home base in Utopia. However, On its way back, it collided with the Stationary High Altitude Relay Platform (SHARP) belonging to Airspacecom, a company incorporated in the Peoples Republic of Hitono, a colony of Friendlistan. This unmanned lightweight platform, circling at an altitude of 20 kilometers, was a fuel-less platform powered by microwave energy transmitted from a ground station on Earth. At the time of collision, SHARP was relaying television signals from the final match of World Soccer Competition to a major broadcasting system for global coverage. SHARP was operating with the use of radio frequency band of 47.2 - 47.5 GHz, which had been allocated by ITU World Radiocommunication Conference in 1997 to the Fixed Service for High-Altitude Radio-Relay Platform Stations. SHARP was destroyed and after floating for some time in the air, its debris smashed to the ground in the territory of Hitono creating a large (200 m diameter) crater on a wheat field.

Thereafter, while attempting to return to its home base in Utopia and being even closer to the Earth, the Spaceliner crossed through international air traffic lanes inadvertently due to its inability to navigate and control its descent. As it crossed, there was a near miss with a Friendlistan aircraft, but the resulting air turbulence caused the Captain of the Spaceliner to lose total control and ditch within the territorial waters of Utopia. Although all of the crew and passengers were alive at the time of crash landing it took two days for the Utopian rescue teams to reach the Spaceliner. By that time the Spaceliner had sunk in 600 m of water and everyone had drowned. Friendlistan had refused repeated requests by Utopia for assistance in finding the location of the crash and rescuing the crew and passengers. Friendlistan's refusal was based on its belief that Utopia and Spaceliner, Inc. were operating illegally.

After several unsuccessful attempts to resolve the dispute between the Government of Utopia and the Government of Friendlistan, on 20th September 2031, Utopia commenced this action against Friendlistan before the International Court of Justice.

In particular, the Applicant, Utopia, requests the Court to adjudge and declare:

1. that Friendlistan has violated international law and consistent state practice by objecting to Utopia and Spaceliner Inc's. carrying out of remote sensing activities over the territory of Friendlistan and thereafter illuminating the Spaceliner by laser beam which resulted in the on-board malfunctions of several computers and other electronic equipment;
2. that Friendlistan has violated international law by not providing the requested timely assistance to Utopia and Spaceliner crew and passengers; and
3. that Friendlistan is responsible and liable under international law to adequately compensate Utopia for the loss of the Spaceliner vehicle, its equipment, its crew and passengers, and
4. that Utopia is not responsible or liable under international law for the destruction of Milsat and SHARP and thus for any payment of compensation for the loss suffered by the Friendlistan shareholders of Milsat or the operators of SHARP.

The Respondent, Friendlistan, asks the Court to adjudge and declare:

1. that Friendlistan was not required by any rule of international law or consistent state practice to allow Utopia's Spaceliner to carry out remote sensing of Friendlistan's territory contrary to Friendlistan's vital interests;
2. that Friendlistan is entitled under international law to take unilaterally

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all precautionary measures to protect its vital interests, and thus the foregoing claims of Utopia in this regard must be rejected;

3. that Utopia and Spaceliner, Inc. were operating illegally and thus Friendlistan had no obligation under international law to assist Utopia and the Spaceliner astronauts following the accident and emergency landing, and
4. that Utopia is responsible and liable under international law for the destruction of Milsat and SHARP and thus must adequately compensate for the loss suffered by the Friendlistan shareholders of Milsat and by the operators of SHARP.

Both States have accepted the jurisdiction of the International Court of Justice without any reservation; there are no issues of exhaustion of local remedies or of the jurisdiction of the Court. All relevant international law and consistent state practice are as they existed on 1 July 2001, and have not during the interim thirty years changed or been revised to take into account the developments and evolution in the use of re-usable space vehicles.

Both the Applicant and Respondent are members of the United Nations, the International Telecommunication Union, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of the Earth of 1958, and the International Civil Aviation Organization (i.e., the Chicago Convention of 1944). They are also parties to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, the 1972 Convention on International Liability for Damage caused by Space Objects, and the 1975 Convention on Registration of Objects Launched into Outer Space.

On 2nd February 2010, Utopia ratified the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies. Both States had participated in the discussions on and adoption of the UN Principles Relating to Remote Sensing of the Earth from Outer Space, that were adopted without vote on 3 December 1986. The State of Utopia is a party to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, October 12, 1929, but Friendlistan withdrew from this Convention effective 4th July 2020.

PART C: WINNING BRIEFS

A. WRITTEN BRIEF FOR UTOPIA

AGENTS:

Victoria Williams, Kelly Gable, Petra Vorwig, Georgetown University Law Center, Washington DC, USA

ARGUMENT

I. INTRODUCTION

The events of July 4, 2030 resulted in a terrible, yet avoidable, tragedy. As activity in outer space increases, so does the need for application of international law to preserve peace and security in the outer space arena. Utopia respectfully submits to this Court a petition requesting allocation of international liability and reparation for the great losses suffered.

II. FRIENDLISTAN VIOLATED INTERNATIONAL LAW AND PRACTICE WHEN IT INTERFERED WITH UTOPIA'S RIGHT TO USE OUTER SPACE BY FIRING THE LASER THAT SEVERELY DAMAGED THE SPACELINER.

Friendlistan breached its obligations under international law when it obstructed by force the remote sensing activities conducted by Utopia and Spaceliner Inc. Under international law, Utopia has a right to conduct remote sensing activities in outer space without interference. While Friendlistan attempts to justify its actions, its claims cannot stand under the applicable law. International

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law and practice make clear that Friendlistan, not Utopia, acted illegally.

A . Friendlistan Violated International Law When It Interfered with Utopia's Right to Use Outer Space by Firing a Laser at the Spaceliner to Prevent it from Gathering Data.

Outer space is free for use and exploration to all States.[1] Peripheral data gathering[2] from outer space, such as the remote sensing conducted by the Spaceliner, whether of data in outer space or of the Earth, is permissible under international law. Any interference with this right by another state constitutes a violation of international law.[3]

1. *Friendlistan Violated the Principle of Equality Under Article I of the 1967 Outer Space Treaty.*
Friendlistan's refusal to allow Utopia to conduct remote sensing activities violated the fundamental principle of the most important legal instrument governing the activities of States in space, the Outer Space Treaty. Article I sets forth the principle of equality, declaring outer space "free for exploration and use by all States without discrimination of any kind."[4] The treaty also declares outer space free for scientific investigation, to be facilitated and encouraged by all States.[5] Contrary to the demands of Article I, Friendlistan not only refused to acknowledge Utopia's right to use outer space, but also went so far as to deny Utopia access to the resources of outer space by beaming a laser at the Spaceliner.[6] Friendlistan's actions are even more indefensible in light of the legislative history of Article I, whose principle of equality was established primarily to protect the interests of developing countries, such as Utopia, which feared being squeezed out of access to space by space powers like Friendlistan.[7] The actions taken by Friendlistan legitimate the developing countries' concerns. Using its significant scientific and military resources, Friendlistan denied Utopia its right to use outer space in direct contravention of the guarantee of equality extended to all States in Article I of the Outer Space Treaty.

2. *Friendlistan Violated the Principle of Non-Appropriation of Space in Article II of the Outer Space Treaty and Acted Contrary to State Practice.*
Friendlistan also breached a binding obligation under Article II, which clearly prohibits any claims of sovereignty in outer space, by use, occupation, or any other means.[8] Friendlistan violated this provision by treating the outer space above its territory, where the Spaceliner was flying at the time it was struck by the Friendlistan laser, as its sovereign territory. By firing a laser at the Spaceliner, Friendlistan effectively treated the vehicle as a threat within its sovereign air space, while in actuality the Spaceliner, flying at an altitude of 110 kilometers, was in outer space.[9]

While the delineation between air space and outer space has not been codified, the practice of states in the use of satellites has led to the formation of a customary rule of international law that the region at and above the line determined by the lowest perigee[10] of satellites so far placed in orbit constitutes outer space. Customary law is formed when states agree to accept a constant and uniform practice as binding law.[11] By not protesting that any of the satellites thus far put into orbit

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. I, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. [hereinafter "Outer Space Treaty"]

[2] Peripheral data gathering is performed from outside a state's sovereign territory, as opposed to penetrative data gathering, which is conducted from within another State's territory. BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 578 (1997).

[3] *Id.* at 578.

[4] Outer Space Treaty, *supra* note 1, art. 1.

[5] *Id.*

[6] Compromis, ¶ 4.

[7] NANDASIRI JASENTULIYANA, INTERNATIONAL SPACE LAW AND THE UNITED NATIONS 175 (1999).

[8] Outer Space Treaty, *supra* note 1, art. 2.

[9] Compromis, ¶ 4.

[10] The lowest perigee refers to the lowest point above the surface of the Earth that is passed by a satellite on its elliptic orbit around the Earth. ROBERT GOEDHART, THE NEVER ENDING DISPUTE: DELIMITATION OF AIR SPACE AND OUTER SPACE 47 (1996).

[11] *See Case Concerning Right of Passage Over Indian Territory* (Port. v. Ind.), 1960 I.C.J. 6; *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3.

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have entered sovereign airspace, states have expressly or tacitly agreed that the lowest perigee of satellites constitutes the baseline demarcation of outer space. The lowest perigee thus far achieved is 96 kilometers,[12] though most satellites have perigees at or above 110 kilometers. Therefore, "one is arguably in outer space when one reaches 96 kilometres above the earth, clearly so at 110 kilometres, and definitely so at 130 kilometres."[13] Several states have even urged that the boundary be set at 100 kilometers.[14] Thus, at 110 kilometers, where the Spaceliner was attempting to gather data when hit by the laser, even a conservative estimate would place the Spaceliner in outer space, outside the jurisdiction of any assertion of sovereignty.

Even if the Court is not inclined to determine a spatial boundary, a functional approach confirms the Spaceliner's position in outer space.[15] When struck by the Friendlistan laser, the Spaceliner was performing an outer space activity en route to an outer space destination. The applicable legal regime is therefore the law of outer space, which prohibits Friendlistan from making any territorial claims.

Nor can Friendlistan make any claim of sovereignty to the data gathered from its territory by the Spaceliner. Such an extension of the concept of sovereignty does not exist in international treaty or customary law, and would directly conflict with the principle of freedom of exploration and use of outer space resources set forth in Article I of the Outer Space Treaty.[16]

3. *Friendlistan Violated the Principle of Peaceful Use of Outer Space in Article IV of the Outer Space Treaty.*

Friendlistan also violated Article IV of the treaty, which establishes that outer space is to be used for peaceful purposes only.[17] When Friendlistan directed its Air Force to fire the laser at the Spaceliner, Friendlistan breached its duty to act peacefully in outer space by ordering aggressive military action in an arena where the use of such a weapon is expressly prohibited.[18] Friendlistan's act of aggression is all the more deplorable considering it was directed without cause at a civilian commercial entity.

Friendlistan may attempt to justify its military action as a self-defense measure, but this argument is invalid under the circumstances. Under the United Nations Charter, a self-defense measure must be both necessary and proportional and may only be executed against an *armed attack*.[19] The laser was not necessary because military threats were not involved, and even Friendlistan's economic concerns were purely speculative.[20] Furthermore, the laser was not proportional, as evidenced by the tragedy that occurred. Having suffered no damage and with no evidence of any legitimate threat, Friendlistan directed its military to employ a weapon against an unarmed civilian party, destroying the Spaceliner and killing the forty-five civilians it carried on board.

4. *Friendlistan Violated the Principle of International Cooperation By Refusing to*

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[12] The United Kingdom's Skynet-IIA achieved a perigee of 96 kilometers in 1974. CHENG, *supra* note 2, at 498.

[13] CHENG, *supra* note 2, at 498.

[14] Russia and the former Soviet Union have long advocated a 100 km limit, and this boundary has also been implicitly recognized by others such as the United States and South Africa. *See* Frans G. von der Dunk, *The Delimitation of Outer Space Revisited: The Role of National Space Laws in the Delimitation Issue*, Proceedings of the 41st Colloquium on the Law of Outer Space 254, 256 (Sept. 28-Oct. 2, 1998) (1999).

[15] The spatial approach focuses on where the vehicle was located, and requires drawing some distinction between air space and outer space in order to determine the applicable legal rules. The functional approach determines the applicable legal regime by focusing on the capabilities and activities of the vehicle. *See* CARL CHRISTOL, *Legal Aspects of Aerospace Planes, in* THE HIGHWAYS OF AIR & OUTER SPACE OVER ASIA (Chia-Jui Cheng ed., 1992).

[16] Jefferson Weaver, *Lessons in Multilateral Negotiations: Creating a Remote Sensing Regime*, 7 TEMP. INT'L & COMP. L.J. 29, 53 (1993).

[17] Outer Space Treaty, *supra* note 1, art. IV.

[18] Friendlistan also violated the provision in art. IV of the Outer Space Treaty outlawing the use of weapons of mass destruction in outer space. While weapons of mass destruction have traditionally been interpreted as nuclear, biological, or chemical, a laser could arguably be used in such a way to achieve the same effect, especially in an area of heightened risk such as outer space.

[19] U.N. CHARTER, art. 51. (emphasis added)

[20] Compromis, ¶ 3.

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Respect the Needs of Utopia as a Developing Country.

By disregarding the special concerns of Utopia as a developing State, Friendlistan also violated international law by acting contrary to the principle of international cooperation, mentioned no less than six times in the Outer Space Treaty.[21] The principle of international cooperation is complemented in Article IX, which requires "due regard" for the interests of other States.[22] Developed countries' obligations to cooperate internationally and to encourage space science development in developing countries is clarified in the United Nations Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries.[23] Friendlistan failed to cooperate and take into account Utopia's needs as a developing country by preventing a Utopian company from maximizing its revenues, and by disregarding Utopia's contractual obligations to Equatorian. Given the extraordinarily high investment required for entry into the remote sensing market,[24] a breach of the contract by Utopia would result in dire consequences. Not only would Utopia have sustained major losses, but it also would have gained a dishonorable business reputation, thereby jeopardizing all future commercial remote sensing opportunities. Friendlistan ignored these considerations in violation of its duty to cooperate internationally.

B. Utopia's Remote Sensing Activities Did Not Violate International Law or Practice.

Remote sensing is the collection of data from outer space that can be processed into imagery of the Earth. Remote sensing has many applications, including weather forecasting, environmental monitoring, and military reconnaissance.[25] While there are no treaties on remote sensing, there is general agreement that the Outer Space Treaty permits remote sensing by virtue of Article I, which declares outer space free for exploration and use by all states.[26]

Friendlistan may argue that Utopia's remote sensing activities were illegal, relying primarily on the Principles Relating to Remote Sensing of the Earth from Outer Space,[27] which mention respect for the sovereignty of the sensed state[28] and access to the processed data for the sensed state.[29] Even if these Principles represented binding law, which they do not, the actions of Utopia and Spaceliner Inc. were consistent with both international law and practice.

Furthermore, Friendlistan should be estopped from claiming Utopia's remote sensing activities were unlawful, as Friendlistan itself conducts remote sensing. Friendlistan performs remote sensing for reconnaissance purposes and does not automatically provide the states it senses with the data gathered.[30] Friendlistan cannot protest against the very same activities it conducts.[31]

1. *The Principles on Remote Sensing Impose No Binding Obligations on Utopia as They Are Neither Treaty Nor Customary Law.*

Any claim by Friendlistan that Utopia acted contrary to the Principles on Remote Sensing is irrelevant to determining whether Utopia's remote sensing was legal because the Principles are not binding. The Principles on Remote Sensing emerged as a General Assembly resolution rather than a legally binding treaty, or even a more formal

[21] Outer Space Treaty, *supra* note 1, preamble and articles I, III, IX, X, XI.

[22] *Id.* art. IX.

[23] United Nations Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries, G.A. Res. 51/122, U.N. Doc. A/AC.105/572/Rev. 1 (1996).

[24] Youssef Sneifer, *The Implications of National Security Safeguards on the Commercialization of Remote Sensing Imagery*, 19 SEATTLE UNIV. L.R. 539, 568 (1996).

[25] CHENG, *supra* note 2, at 578.

[26] JASENTULIYANA, *supra* note 7, at 317.

[27] G.A. Res. 41/65, 42 U.N. GAOR, 28th Sess, 95th plen. Mtg., U.N. Doc. A/RES/41/65 (1987). [hereinafter "Principles on Remote Sensing" or "Principles"]

[28] *Id.* principle IV.

[29] *Id.* principle XII.

[30] Compromis, ¶ 5.

[31] *See Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nig.), 1998 I.C.J. 275, 303 (Preliminary Objections) (Order of June 11).

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"declaration of principles."[32] Under the Charter of the United Nations, the General Assembly may make only *recommendations.*[33] As such, the Principles created no new legal rights or obligations; instead, they merely "underscore the legitimacy of the customary rules of international law which do little more than support the right of states to engage in remote sensing activities."[34]

The Principles on Remote Sensing also lack binding force as customary international law because they lack the elements necessary to constitute custom. A customary rule of law comprises two elements: state practice, the material element, and *opinio juris*, the subjective element.[35] There is little evidence of any state practice based on the Principles, and no indication that States have accepted the Principles as binding law. To give one example, the domestic remote sensing legislation of the United States, a major space power, contains several provisions that are not consistent with the Principles on Remote Sensing.[36] In addition, customary international law must follow from state practice that is "both extensive and virtually uniform" within the period of time required for the evolution of a custom into law.[37] The lack of such uniformity with respect to remote sensing is evidenced by the arduous nature of the negotiations of the Principles on Remote Sensing. Consensus came only after many years of battling between developed and developing states and resulted in little more than a tenuous compromise of their views. Therefore, the Principles have no significant legal effect on remote sensing activities – not only because they are non-binding, but also because they are the product of nearly twenty years of intense debate among countries with radically different viewpoints, which indicates their inability to form a basis for custom.[38]

2. *Even If the Principles on Remote Sensing Were Binding, Utopia and Spaceliner Inc. Did Not Violate Them.*

Friendlistan is likely to point to Principles IV and VII as establishing obligations that Utopia breached, but the remote sensing activities conducted by Spaceliner Inc. violated neither provision. Principle IV declares that remote sensing activities "shall be conducted on the basis of respect for the principle of full and permanent sovereignty of all States and people over their own wealth and natural resources ... Such activities shall not be conducted in a manner detrimental to the legitimate rights and interests of the sensed State."[39] Given the vague wording of the Principle IV, it is unclear what the nature of the obligation is, if there is any obligation at all. There is certainly no duty to obtain the prior consent of the sensed country, as Friendlistan would argue, nor is there any duty to attempt prior consultation, as both of these proposals were specifically rejected during the negotiation of the Principles.[40] With respect to Principle IV, "stripped of all the verbiage about respect for this and respect for that, the bottom line is that data gathering from outer space directed at any object anywhere on earth is permissible."[41] Furthermore, the remote sensing was not "detrimental" to the "legitimate rights and interests" of Friendlistan. Friendlistan had no evidence of any potential adverse effects resulting from the remote sensing; in fact, the activities were being conducted to protect the environment.[42]

Friendlistan may attempt to rely on Principle XII to claim it had a right to the remote sensing data gathered over its territory,

[32] JASENTULIYANA, *supra* note 7, at 314.
[33] U.N. CHARTER, *supra* note 19, art. 11.
[34] WEAVER, *supra* note 6, at 59.
[35] *See North Sea Continental Shelf Cases*, (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3; *Case Concerning Military and Paramilitary Activities in Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14.
[36] The U.S. Land Remote Sensing Commercialization Act, 15 U.S.C. § 4201 (1998), contains different categorizations of data than those in the Principles, and obligates the State to provide copies of "unenhanced data" only. *See* Cynthia Hayward, *Remote Sensing: Terrestrial Laws for Celestial Activities*, 8 B.U. INT'L L.J. 157, 177 (1990).
[37] *North Sea Continental Shelf Cases*, (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at para. 74.
[38] Susan Jackson, *Cultural Lag and the International Law of Remote Sensing*, 23 BROOK. J. INT'L L. 853, 871 (1998).
[39] Principles on Remote Sensing, *supra* note 27, principle IV.
[40] The requirements of prior consent and consultation were put forth in the Argentina/Brazil draft and rejected. CHENG, *supra* note 2, at 66-67.
[41] *Id.* at 67.
[42] Clarifications to Compromis, Set 4, #5.

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and to argue that Utopia breached an obligation by making it available only to Equatorian. This argument fails for two reasons. First, the Principles do not address commercial remote sensing, and thus do not prohibit exclusive commercial contracts such as the one held between Utopia and Equatorian. The practice of many states, including Canada and the United States, demonstrates the legality of such exclusive contracts under international law.[43] Therefore, Utopia was under no obligation to breach its contract with Equatorian in order to make the data available to Friendlistan.

Second, by the terms of Principle XII, Utopia had no duty to make the data available at the time it was requested. Principle XII entitles the sensed state to access "as soon as the primary data[44] *and* the processed data[45] concerning the territory under its jurisdiction are *produced*."[46] While Utopia had primary data, it did not have processed data, which would be available only after Equatorian completed the processing of the data.[47] At the time Friendlistan requested the data, Utopia was not obligated to honor the request because the data was not yet processed. In fact, the request should have been put to Equatorian, the country responsible for processing the data, but Friendlistan addressed its demand to Utopia only.[48] Because Utopia was not obligated to provide Friendlistan with raw data, its actions did not violate the Principles on Remote Sensing.

C. Spaceliner Inc. Was a Legal Operation Under International Law.

Utopia satisfied its duties under international law even though it did not require Spaceliner Inc. to file flight plans and did not notify the United Nations of each flight. Similarly, Utopia's "hands-off" regulatory policy was not unlawful. While detailed industry regulation may be required of aircraft under the Chicago Convention,[49] the Spaceliners are specialized dual-use vehicles, not airplanes. The Spaceliners' outer space capabilities and services subject them to the legal regime of outer space,[50] which does not require insurance, airworthiness certificates, or report modifications for registered space objects.[51]

While Friendlistan argues that Utopia failed its obligations under the Registration Convention, Utopia did fulfill its obligations in good faith as required by the Vienna Convention on the Law of Treaties. The Vienna Convention states: "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 light of its

[43] Canada's RADARSAT has exclusive dissemination rights over the remote sensing data it collects. Martha Mejia-Kaiser, *An International Remote Sensing Cartel?*, Proceedings of the 36th Colloquium on the Law of Outer Space 322, 325 (Oct. 16-22, 1993). The United States Department of Defense has an exclusive contract with Space Imaging, Inc. for all its imagery of Afghanistan. *See* James Risen, *Afghanistan Maps for Pilots Were Delayed by Foul-Ups*, N.Y. TIMES, May 11, 2002, at A12.

[44] Primary data is defined as "raw data." Principles on Remote Sensing, *supra* note 27, principle I.

[45] Processed data is the product of processing the raw data in order to make it usable. *Id.*

[46] Principles on Remote Sensing, *supra* note 27, principle XII. (emphasis added)

[47] *See* Clarifications to Compromis, Set 5, #5. The processing of remote sensing data, which requires specialized computer application and interpretation by experts, was beyond the capabilities of Utopia as a developing country. Charles Davies, Susan Hoban, and Braden Penhoet, *Moving Pictures: How Satellites, the Internet, and International Environmental Law Can Help Promote Sustainable Development*, 28 STETSON L. REV. 1091, 1114 (1999).

[48] Clarifications to Compromis, Set 1, #1.

[49] Convention on International Civil Aviation (Chicago), 61 Stat. 1180 T.I.A.S. No. 1591, 15 U.N.T.S. 295 (Dec. 7, 1944).

[50] The U.S. Shuttle, an early dual-use vehicle and predecessor to the Spaceliner, was determined by the United States to be a "space object," and was subject to regulation by the National Aeronautics and Space Administration, rather than the Federal Aviation Authority. *See* Claudio Zanghi, *Aerospace Object*, *in* OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS (Gabriel Lafferrandere ed. 1997).

[51] *See* Convention on Registration of Objects Launched into Outer Space, 28 U.S.T.695, T.I.A.S. 8480, 1023 U.N.T.S. 15, art. IV (2): Each State of registry *may*, from time to time, provide the Secretary-General of the United Nations with additional information concerning a space object carried on its registry. [hereinafter, "Registration Convention"] (emphasis added)

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object or purpose."[52] Therefore, while the treaty language of the Registration Convention calls for registration, the object and purpose of the treaty can be upheld without actual registration.

The *travaux préparatoires* of the Registration Convention explain that the essential function of registration is twofold. First, registration discourages the furtive placement of weapons of mass destruction in outer space. Second, registration serves the important purpose of identifying a space object that has caused damage.[53] These concerns were not implicated, however, with respect to the Spaceliner's operations. As a purely commercial enterprise, the Spaceliner was never involved in the transport of weapons, and because its operations were publicly based in Utopia, registration was not necessary to trace the Spaceliner in the event of an accident. Thus, the nature of the Spaceliner's operations rendered the registration requirement moot. Even though Utopia may not have fully complied with the Registration Convention, it fulfilled its obligations under the treaty by acting consistently with the Convention's object and purpose.

Furthermore, state practice does not indicate that Utopia acted contrary to any established international custom. Several parties to the Registration Convention, including China, France, Germany, Great Britain, Italy, Canada, Japan and the United States, routinely fail to register their space objects.[54] Evidence of a lack of *opinio juris* among states indicates that the Registration Convention, unlike the Outer Space Treaty, does not have the force of customary international law. Spaceliner Inc. acted legally, operating consistently with the object and purpose of the Registration Convention as well as general state practice.

III. FRIENDLISTAN VIOLATED INTERNATIONAL LAW BY REFUSING TO ASSIST UTOPIA'S RESCUE ATTEMPT OF THE SPACELINER CREW AND PASSENGERS.

After disabling the Spaceliner with the laser, Friendlistan again violated international law by breaching its duty to assist in the recovery of the vehicle after it crashed. Friendlistan defied its obligations under international law, resulting in the loss of the vehicle and the lives of those on board.

A. Friendlistan Breached Its Duty Under International Law to Render Humanitarian Assistance.

The duty to provide humanitarian assistance in an international emergency is imposed by international treaties, state practice, and general principles of law. Friendlistan's refusal to provide even slight assistance is condemned by each of these sources of international law.

1. *Friendlistan Violated International Treaty Law of Outer Space by Refusing to Assist the Rescue Effort.*

States' recognition of the importance of international cooperation and assistance in outer space activities and recovery efforts is evidenced by the rescue provisions in both the Outer Space Treaty and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Space Objects Launched into Outer Space.[55]

(i) Friendlistan Breached Its Obligations Under Article V of the Outer Space Treaty.

Article V of the Outer Space Treaty imposes a duty to regard astronauts as "envoys of mankind," and to render to them "all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas." While "astronaut" has never been specifically

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[52] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. XXXI, opened for signature May 23, 1969, 115 U.N.T.S. 331, UN Doc. A/CONF.39/27. [hereinafter Vienna Convention]

[53] I.H. Ph. Diederiks-Verschoor, AN INTRODUCTION TO SPACE LAW 47 (2d rev. ed., 1999).

[54] Christopher Noble Reuters, *U.S., China, G7 Countries Flout Satellite Registry*, (Aug. 16, 2001), available at http://www.space.com/news/satellite_orbits_010816.html.

[55] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Space Objects Launched into Outer Space, Apr. 12, 1968, 19 U.S.T. 7570, T.I.A.S. 6599, 672 U.N.T.S. 119. [hereinafter "Rescue Agreement" or "Agreement"]

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defined in international law, the term has been understood to include "any person who ventures into outer space or who travels on board a spacecraft."[56] Under this definition, all of the people on board the Spaceliner were astronauts and deserved the immediate attention of State parties in a position to render assistance. Even if "astronaut" were interpreted more narrowly, so as to encompass only those individuals traveling in outer space in an official capacity, Friendlistan's duty to assist would still be implicated, as nine of the Spaceliner passengers were officials on an inspection mission of the International Space Station.[57] At the least, those nine officials were astronauts, and Friendlistan violated the Outer Space Treaty by refusing to come to their aid, even to locate the crash site, when they crashed in the territory of another State, Utopia.[58]

(ii) Friendlistan Breached Its Obligations Under the Rescue Agreement.

The duty to assist imposed by the Outer Space Treaty is bolstered by the Rescue Agreement, which extends assistance to "personnel of a spacecraft," indicating a desire among States to extend benefits to all persons on board.[59] Under the Rescue Agreement, if the personnel of a spacecraft land "in territory under the jurisdiction of a Contracting Party," that party shall "immediately take all possible steps to rescue them and render them all necessary assistance."[60] By refusing to respond to Utopia's call for help, Friendlistan failed to fulfill its obligations under the Agreement with requisite good faith.[61]

Friendlistan attempts to justify its blatant disregard of its commitment to international cooperation and respect for human life by denying any obligation to help because the Spaceliner crashed into Utopian waters, but Friendlistan's reliance on formal distinctions does not disguise the illegality of its conduct. Even if Friendlistan were not obligated to render assistance under Article 2, it would be obligated under Article 3, which extends the duty to rescue to "the high seas or in any other place not under the jurisdiction of any State" and obligates all Contracting Parties "in a position" to render assistance to do so.[62] The Spaceliner was effectively in an area "not under the jurisdiction of any state" within the meaning of Article 3, because Utopia did not have the resources to reach it. Friendlistan, by contrast, with its significant resources, was "in a position" to render assistance and violated the Agreement by failing to do so.

It is important to note that there are no limitations or restrictions on the obligations of States to rescue and return under the Rescue Agreement.[63] In fact, during negotiations of the Rescue Agreement, a proposal that States should be obligated only to assist to the extent they deemed practicable was not included in the final agreement.[64] This signals the broad reach of the Agreement, obligating its Contracting Parties to provide assistance *whenever possible.* The specific mandates of the Outer Space Treaty and the Rescue Agreement indicate that the drafters intended to establish a general atmosphere of cooperation among states.

2. *Friendlistan Violated Customary Law by Refusing to Assist the Rescue Effort.*

The Rescue Agreement may also be seen as customary law because it is humanitarian by nature and forms part of international custom, even if there is little or no state practice.[65] There is strong evidence that states are dedicated to providing assistance in the event of an emergency related to space activities without hesitation or qualification. The speed with which the Agreement was passed – less than six weeks – is one reflection of the commitment by all States to international cooperation in rescue efforts.[66] During negotiations of the Agreement, a number of states, including France and India, indicated their willingness to give every assistance to astronauts in distress, for humanitarian

[56] CHENG, *supra* note 2, at 457.
[57] Compromis, ¶ 4.
[58] Compromis, ¶ 7.
[59] Rescue Agreement, *supra* note 55, art. 1; CHENG, *supra* note 2, at 277.
[60] Rescue Agreement, *supra* note 55, art 2.
[61] States are obligated to fulfill in good faith their treaty obligations. U.N. CHARTER, *supra* note 19, art. 2.
[62] Rescue Agreement, *supra* note 55, art. 3.
[63] JASENTULIYANA, *supra* note 7, at 189.
[64] *Id.* at 277.
[65] *Id.* at 195 (Comment by Maureen Williams).
[66] CHENG, *supra* note 2, at 265.

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reasons.[67] Both the *Asylum Case*[68] and the *Right of Passage Case*[69] indicate that *opinio juris* may be established by a small number of States, or even between two States. In addition, given States' wide acceptance of the Outer Space Treaty as binding customary law, even non-parties to the treaty probably have a duty to provide general assistance to a rescue effort.[70]

States also recognize a similar duty to assist in international maritime law.[71] The United States Coast Guard, for example, follows as a guiding principle that its "vessels and aircraft have a duty to provide assistance to other vessels, aircraft or persons in distress, without regard to location, nationality or circumstances."[72]

The breadth of this recognized commitment forms the basis for a duty to render assistance as a matter of customary international law. By failing to render any assistance, even to locate the crash, Friendlistan acted contrary to the practice of States under customary international law.

3. *Friendlistan Violated General Principles of International Law By Refusing to Assist the Rescue Effort.*

This Court may also consider "general principles of law recognized by civilized nations" to determine Friendlistan's violation of international law in refusing to aid the Spaceliner.[73] Chief among the principles disregarded by Friendlistan but recognized by civilized nations is the notion of respect for human life. General principles may be divided into categories, one of them involving the concept of "natural justice."[74] Natural justice manifests itself in international law in two respects: first, as a minimum standard of decency and respect for human life, and second, as related to the concept of equity.[75]

The requirement of respect for human life appears in the United Nations Charter and has been elaborated in several international human rights instruments.[76] As such, it may be considered an obligation *erga omnes*, one of a class of obligations owed to the international community as a whole, whose breach "shocks the conscience of mankind."[77] In the *Corfu Channel Case*, this Court recognized "elementary considerations of humanity" as a general and well-recognized principle "even more exacting in peace than in war."[78] Respect for human rights was again emphasized in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, where the Court also invoked the duty of states not to encourage disrespect for humanitarian law.[79] Friendlistan not only encouraged disrespect for humanitarian law; it actively flouted the law by dismissing the value of the lives of the forty-five people it refused to assist.

The natural justice inherent in equity balancing is also relevant to this case. This Court may also render its decision based on equity, *ex aequo et bono*, according to what is right and good.[80] Notwithstanding Friendlistan's legal duties, its blatant disregard for the lives lost aboard the Spaceliner was deplorable and must be deemed a violation of

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[67] *Id.* at 276.

[68] *Asylum Case*, (Col. v. Peru), 1950 I.C.J. 266.

[69] *Case Concerning Right of Passage Over Indian Territory* (Port. v. Ind.), 1960 I.C.J. 6.

[70] Vienna Convention, *supra* note 52, art. 38. Under Article 38 of the Vienna Convention, a treaty is binding on non-parties if it becomes customary international law.

[71] *See, e.g.*, International Convention on Maritime Search and Rescue, Apr. 27, 1979; International Convention for the Safety of Life at Sea, Nov. 1, 1974, *available at* http://www.imo.org.

[72] U.S. Coast Guard Search and Rescue Manual, *available at* http://www.uscg.mil/.

[73] Statute of the International Court of Justice, June 26, 1945, 59 Stat 1055, T.S. No. 993, 3 Bevans 1179, art. 38.

[74] OSCAR SHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 54-55 (1991).

[75] *Id.*

[76] *See, e.g.*, U.N. CHARTER, *supra* note 19, art. 55; Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970).

[77] James R. Crawford, *The Earl A. Snyder Lecture in International Law: Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 314 (2001).

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

[79] *See Case Concerning Military and Paramilitary Activities in Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14.

[80] Statute of the International Court of Justice, *supra* note 73, art. 38.

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international law. Furthermore, even assuming *arguendo* that Utopia and Spaceliner Inc. were acting illegally, Friendlistan acted in bad faith by refusing to aid the passengers, who were not responsible for any breach of law. Unless Friendlistan's conduct is condemned, it may be repeated, resulting in another avoidable tragedy.

B. Even if There Was No Duty to Render Assistance, Friendlistan's Refusal to Aid Would Still Be Unlawful as an Illegal Countermeasure.

Friendlistan refused to aid the Spaceliner rescue effort because it believed that Utopia and Spaceliner Inc. were operating illegally.[81] By denying aid in response to the perceived illegal acts of Utopia, Friendlistan's refusal effectively constituted a countermeasure.[82] Friendlistan's countermeasure was unlawful under the circumstances of this case.

1. *Utopia and Spaceliner Inc. Were Not Operating Illegally.*

A State may only take countermeasures if it is injured by another State's violation of an international obligation.[83] Friendlistan suffered no injury, and neither Utopia nor Spaceliner Inc. violated international law. Utopia has a right under the Outer Space Treaty to use outer space and send vehicles there, and it acted in compliance with the law applicable to the operations of Spaceliner Inc. Because Utopia was not operating illegally, Friendlistan's countermeasure of refusing to aid the rescue was unjustified and unlawful.

2. *Even if Utopia and Spaceliner Inc. Were Operating Illegally, Friendlistan's Refusal to Assist the Rescue Was an Unlawful Countermeasure.*

Friendlistan's countermeasure would be unlawful even if Utopia and Spaceliner Inc. were operating illegally. A lawful countermeasure must be proportional to the original alleged breach, because the proper aim of a countermeasure is "to restore equality between the Parties and to encourage them to continue negotiations to reach an acceptable solution."[84] Friendlistan's refusal to assist the rescue of the Spaceliner did not restore equality nor foster negotiation; the denial of assistance was a grossly disproportionate response to any breach committed by Utopia. Friendlistan suffered no harm, while Utopia lost the Spaceliner and all forty-five of its passengers. International law does not legitimate any countermeasures that violate fundamental rules of human rights.[85] Friendlistan's refusal to aid the rescue blatantly disregarded the human rights of the people who lost their lives in the Spaceliner tragedy. Friendlistan cannot justify its refusal to provide assistance as a countermeasure.

IV. FRIENDLISTAN IS RESPONSIBLE AND LIABLE UNDER INTERNATIONAL LAW FOR THE LOSS OF PROPERTY AND LIFE RESULTING FROM THE SPACELINER DISASTER.

The Outer Space Treaty distinguishes responsibility and liability in Articles VI and VII. A State incurs responsibility when it breaches an international obligation; if the breach causes injury to another State, the breaching State incurs liability and an obligation to provide reparation for the damage it caused.[86] Friendlistan is both responsible and liable for the loss of the Spaceliner and its passengers. Friendlistan breached international law by firing the laser at the Spaceliner and then refusing to aid the rescue effort, causing the loss of the Spaceliner and the deaths of the people on board.

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[81] Compromis, ¶ 7.

[82] Friendlistan's countermeasure could be viewed as either reprisal or retorsion. Reprisal refers to countermeasures that would be unlawful if not for the prior illegal act of the State against which it was taken. Retorsion refers to countermeasures against an offending State that are generally permissible in international law. LOUIS HENKIN ET AL, INTERNATIONAL LAW: CASES & MATERIALS, (3d ed. 1993) 570.

[83] *See Case Concerning Air Services Agreement Between France and the United States*, (Fr. v. U.S.), 18 U.N.R.I.A.A. 417 (1978).

[84] *Id.* at para. 90.

[85] *See* Draft Articles on State Responsibility, II Yb. I.L.C. (1974), art. 14 (1) (b) (i): "An injured State shall not resort, by way of countermeasure, to any conduct which is not in conformity with the rules of international law on the protection of fundamental human rights."

[86] *See id.*

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A Friendlistan Is Responsible Under International Law for the Spaceliner Tragedy.

Article VI of the Outer Space Treaty requires States to bear "international responsibility for national activities in outer space ... whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty."[87] Certainly Friendlistan must bear responsibility for the violations of law it committed directly: its military discharged the laser at the Spaceliner, and its government made the decision to deny assistance to the rescue effort.[88] Friendlistan must answer for the consequences of its illegal actions.

B. Friendlistan Is Liable Under International Law for the Spaceliner Tragedy and Must Compensate Utopia for the Loss of the Spaceliner and Its Passengers.

Friendlistan's liability follows from its responsibility for the Spaceliner tragedy. Friendlistan's breaches of international law caused tremendous loss of life and property and it is now obligated to compensate Utopia.

1. *Friendlistan Is Liable for the Loss of Property and Life Under the Outer Space Treaty.*

Under the Outer Space Treaty, Article VII, a State that "launches or procures the launching of an object into outer space" is liable for damage to another State party caused by the object on the Earth, in air, or in outer space.[89] The laser was an object launched into outer space,[90] where it caused severe damage to the Spaceliner. As a result of that damage, the Spaceliner crashed, causing the complete loss of the vehicle and the deaths of the people it carried on board. Under the Outer Space Treaty, Friendlistan is liable to compensate the losses stemming from its illegal use of force in outer space.

2. *Friendlistan Is Liable for the Loss of Property and Life Under the Convention on International Liability for Damage Caused by Space Objects.*[91]

Friendlistan is also liable under the Liability Convention, which divides fault into two categories: absolute liability and fault-based liability. Absolute liability applies when damage has been caused on the surface of the Earth or to an aircraft in flight.[92] Fault must be shown for liability to apply to damage caused "elsewhere than on the surface of the Earth."[93]

Under Article II, Friendlistan is *absolutely* liable for the damage caused to the Spaceliner as an aircraft in flight. While the Spaceliner was in outer space when fired upon by Friendlistan, it is a specialized dual-use vehicle and may be considered simultaneously as a spacecraft and an aircraft. Indeed, Utopia treats the Spaceliner as an aircraft in certain contexts, requiring Spaceliner Inc. to limit its liability under the Warsaw Convention, an instrument of international aviation law providing for air carrier liability to passengers and for cargo.[94] Because Friendlistan damaged the Spaceliner while it was in flight, Friendlistan is absolutely liable to pay for the damage it caused. Alternatively, under Article III, Friendlistan is liable because it was at fault. Friendlistan breached international law when it fired the laser at the Spaceliner with the intent to cause damage, and when it refused to minimize the damage it had caused by denying any aid to the Spaceliner rescue.

Friendlistan is not eligible for exoneration under the Liability Convention. Under Article VI (I), exoneration from absolute liability is granted only when the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on

[87] Outer Space Treaty, *supra* note 1, art. VI.
[88] Compromis, ¶ 4, 7.
[89] Outer Space Treaty, *supra* note 1, art. VII.
[90] The laser may be construed as a "space object." "Space object" has not been precisely defined under the outer space treaties, but it has been interpreted to include "anything that human beings launch or attempt to launch into space." CHENG, *supra* note 2, at 599. The photons in the laser beam constitute matter, making it possible to consider the laser an "object."

[91] Convention on International Liability for Damage Caused by Space Objects, Oct. 9, 1973, T.I.A.S. No. 7762, 961 U.N.T.S. 2389. [hereinafter "Liability Convention"].
[92] Liability Convention, *supra* note 91, art. II.
[93] *Id.* art. III.
[94] Compromis, ¶ 2.

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the part of the claimant state.[95] Neither of these conditions is present here. Utopia did not act in a grossly negligent manner or with any intent to cause damage; on the contrary, Utopia merely attempted to carry out a commercial activity that it had a legal right to perform. In addition, Article VI (2) revokes any exoneration where damage has resulted from activities not in conformity with international law.[96] Friendlistan's use of force in outer space and subsequent refusal to aid the victims of its aggression were in direct contravention of international law. As a result of its illegal actions, Friendlistan may not be exonerated from liability.

3. *Friendlistan Is Liable for the Loss of Property and Life Under General International Law.*

Under general international law, a State is at fault for damages caused to another state if it has failed to carry out an international obligation.[97] In the *Chorzow Factory Case*, this Court outlined three elements necessary to prove fault under international law: (1) a legal obligation imputable to a state; (2) a breach of the obligation by that state; and (3) a discernible link between the illicit act and the harm suffered.[98] Each of these elements applies to Friendlistan, making it liable for the damages it caused.

First, Friendlistan clearly had a legal obligation under international law not to use force against the Spaceliner. In the *Corfu Channel Case*, this Court emphasized "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[99] Similarly, the tribunal in the *Trail Smelter Arbitration* held that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."[100] If a State must prevent its territory and its citizens from committing harm, surely it must refrain from causing injury itself. In addition to the obligation not to use force, Friendlistan had a legal obligation to offer assistance to the Spaceliner rescue effort, especially given that its own act of aggression caused the Spaceliner's crash.

With respect to the second element outlined in *Chorzow Factory*, Friendlistan breached both obligations under international law by firing the laser at the Spaceliner and by refusing to aid the rescue of the vehicle after it crashed.

Finally, there is a direct link between Friendlistan's breaches of international law and the damages suffered by Utopia and the Spaceliner. Not only did Friendlistan disable the Spaceliner with the laser, but it also denied the Spaceliner GPS guidance, and then allowed a Friendlistan aircraft to fly into the path of the Spaceliner, which had been forced to fly blind. This last near collision is what finally sent the Spaceliner down.[101] Finally, Friendlistan magnified the damage it caused by refusing to aid the rescue of the craft or even to pinpoint its location.[102] Friendlistan's actions led directly to the destruction of the Spaceliner and the deaths of the people on board. It is liable for these losses and must provide reparation. Under the *Chorzow Factory Case*, "reparation must, as far as possible, wipe out all the consequences of the illegal act."[103] While it is impossible to recover the forty-five lives lost, Friendlistan must compensate the loss of the Spaceliner and its passengers to the fullest extent possible.

V. UTOPIA IS NOT RESPONSIBLE OR LIABLE UNDER INTERNATIONAL LAW FOR THE DESTRUCTION OF MILSAT OR SHARP.

The destruction of Milsat and SHARP adds to the tragedy of the Spaceliner disaster, but did not result from any breach of international law

[95] Liability Convention, *supra* note 91, art. VI (1).
[96] *Id.* art. VI (2).
[97] *See Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14; *Barcelona Traction, Light & Power* (Belg. v. Spain), 1970 I.C.J. 3; *Corfu Channel Case* (U.K. v. Alb), 1949 I.C.J. 4.
[98] *Chorzow Factory Case* (Germany v. Pol), 1928 P.I.C.J. 47.
[99] *Corfu Channel Case* (U.K. v. Alb), 1949 I.C.J. 4, 23.
[100] *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905, 1911 (1941).
[101] Compromis, ¶ 2, 7.
[102] Compromis, ¶ 7.
[103] *Chorzow Factory Case*, 1928 P.I.C.J. (ser. A) No. 17 at 47.

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by Utopia. On the contrary, Friendlistan caused the objects' destruction by disabling the Spaceliner with the laser. Severely damaged by the laser, the Spaceliner was unable to navigate its descent, and struck Milsat and SHARP through no fault of its own.

A. Utopia Is Not Responsible Under International Law for the Destruction of Milsat or SHARP.

While Article VI of the Outer Space Treaty declares that States "shall bear international responsibility for national activities in outer space,"[104] Utopia cannot be held responsible for the destruction of Milsat or SHARP because the cause of the damage did not follow from any breach of international law by Utopia. Neither Milsat nor SHARP would have been destroyed had Friendlistan not illegally fired upon the Spaceliner. After being crippled by the laser fired by Friendlistan, the Spaceliner lost control and could not avoid striking either Milsat or SHARP.[105]

Even if Utopia were found to be responsible for the damage to Milsat or SHARP, its responsibility would be absolved under the doctrine of *force majeur*. In the *Rainbow Warrior Case*, the arbitral tribunal found that a State may invoke *force majeur* to justify "involuntary, or at least unintentional conduct" due to an irresistible force or an unforeseen external event."[106] Utopia's conduct was both involuntary and unintentional; indeed, the Spaceliner would have steered away from Milsat and SHARP if it could have in order to avoid causing further harm to itself. The shooting of the laser by Friendlistan was an unforeseen external event that deprived the Spaceliner of any ability to control its path. Utopia is not responsible for the damages it caused due to *force majeur*.

B. Utopia Is Not Liable Under the Liability Convention for the Destruction of Milsat Because Friendlistan Lacks Standing to Bring Its Claim and Cannot Recover Remote Damages.

Friendlistan's claims for Milsat and SHARP cannot be brought under the Liability Convention. Friendlistan lacks standing and asks for irrecoverable damages, attempting to apply the Liability Convention beyond its proper scope.

Friendlistan lacks standing to claim damages on behalf of the shareholders of Davidson Corporation, the owner of Milsat. In the *Case Concerning Barcelona Traction, Light and Power Company*, this Court rejected Belgium's standing to bring a claim on behalf of its nationals who were shareholders in a Canadian corporation: "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action."[107] Similarly, Friendlistan cannot claim on behalf of its nationals because they were shareholders in an Equatorian corporation.[108] The Friendlistan shareholders can look only to Equatorian to obtain relief.

Even if Friendlistan had standing to bring the claim, Utopia cannot be held liable to the shareholders of the Davidson Corporation because the damages claimed are remote and indirect. The bankruptcy of the Davidson Corporation may be linked to Milsat's destruction, but only remotely, and any damage suffered by the shareholders is indirect. Remote and indirect damages are not recoverable under the Liability Convention, nor are they recoverable under international law generally.[109] This rule is embodied in the Liability Convention, which expressly limits recovery to direct losses such as "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of person, natural or juridical, or property of international intergovernmental

[104] Outer Space Treaty, *supra* note 1, art. VI.
[105] Compromis, ¶ 5, 6.
[106] *Rainbow Warrior Case*, (N.Z. v. Fr.), 82 I.L.R. 499 (1990), at para. 77.

[107] *Case Concerning Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain), 1970 I.C.J. 3, para. 44.
[108] Clarifications to Compromis, Set 1, #4.
[109] *See The Naulilaa Claims*, (Port. v. Germany), 2 R.I.A.A. 1013 (1928), where the arbitral tribunal found that the damages caused to Portuguese colonial territory were too remote to be attributable to Germany's activities. *See also* Stephen Gorove, *Some Comments on the Convention on International Liability for Damage Caused by Space Objects*, PROCEEDINGS OF THE SIXTEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE (1973).

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organizations."[110] The losses claimed by the Davidson Corporation shareholders simply do not fall within the definition of compensable damages under the Liability Convention and cannot be recovered.

C. Even of the Liability Convention Does Apply, Utopia Is Not Liable for the Destruction of Milsat or SHARP.

Utopia would not be absolutely liable nor liable for proof of fault under the Liability Convention. No fault can be attributed to Utopia for fault-based liability, and Utopia is exonerated from any absolute liability because of the illegal acts of Friendlistan.

1. *Utopia Is Not Liable Under the Liability Convention Because It Was Not at Fault.*

Both Milsat and SHARP were damaged "elsewhere than on the surface of the earth," which invokes Article III and requires a showing of fault.[111] The circumstances make clear, however, that Utopia was not at fault. Friendlistan, not Utopia, was at fault for disabling the Spaceliner. Friendlistan's illegal use of force severely damaged the Spaceliner, depriving it of control over its flight path. Friendlistan further disabled the Spaceliner by denying it navigational services, rendering it unable to avoid striking Milsat or SHARP. While SHARP was positioned only 20 kilometers above the Earth, the Liability Convention defines damage as including all personal and property damage caused by a space object. Therefore, Friendlistan's actions absolve Utopia of liability for SHARP in the same way they do for Milsat. Utopia is not at fault for the destruction of Milsat or SHARP and cannot be held liable under the Liability Convention.

2. *Utopia Is Exonerated from Absolute Liability Under the Liability Convention.*

While Utopia may be absolutely liable for the damage caused by SHARP's fall to the surface of the Earth,[112] Utopia is exonerated from liability under the Liability Convention. Under Article VI (1), Friendlistan cannot demand reparation for damage that it caused by its own gross negligence and deliberately injurious acts.[113] First, Friendlistan's use of a laser in outer space was grossly negligent, given the heightened risk associated with space activity, and even amounted to a violation of international law. Second, Friendlistan fired the laser beam with intent to cause the Spaceliner damage; indeed, Friendlistan's aim was to disable the vehicle's remote sensing capabilities.[114] Even if Friendlistan did not intend to damage the Spaceliner to the extent that it did, Friendlistan was still grossly negligent in failing to consider the risks involved. Because Friendlistan's act was both grossly negligent and injurious, Utopia is exonerated from any liability.

D. Utopia Is Not Liable Under General International Law for the Damage to Milsat or SHARP.

A state cannot be held liable for damages unless there is a direct causal link between its actions and the damage caused.[115] Utopia is not liable, first, because it has breached no international obligation, and second, because there is no direct casual link between Utopia's conduct and the damages caused. Under established tort standards, the breach must be the proximate cause of the damages.[116] Proximate causes requires avoidability and foreseeability of risk, neither of which applies to Utopia in this case.[117] The Spaceliner could

[110] Liability Convention, *supra* note 91, art. I (a).
[111] Liability Convention, *supra* note 91, art. III.
[112112] Liability Convention, *supra* note 91, art. II. If the Court finds that art. II liability applies to all damage suffered in air space, then Utopia would also be absolutely liable for the damage caused to SHARP upon impact with the Spaceliner. Utopia is absolved of this liability, however, under art. VI (1).
[113] Liability Convention, art. VI (1).
[114] Compromis, ¶ 4.
[115] *Chorzow Factory Case*, 1928 P.I.C.J. 47.
[116] While the concept of proximate cause has not been widely applied in the international realm, the principles of international tort law are informed by domestic laws, particularly of the Anglo-American tradition, which rely upon proximate causation. *See* Jay Ginsburg, *The High Frontier: Tort Claims and Liability for Damages Caused by Man-Made Space Objects*, 12 SUFFOLK TRANSNAT'L L.J. 515 (1989).
[117] Liability only applies when the risk involved is both real and not farfetched, and when avoidance of the risk could have been easily achieved. *See*

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not avoid the damage caused to Milsat and SHARP because its navigational capabilities had been destroyed by the Friendlistan laser.[118] Furthermore, the Spaceliner could not have foreseen the damage to Milsat or SHARP because it could not possibly have anticipated the series of unfortunate events that prevented it from completing its journey safely, including being hit and disabled by the Friendlistan laser and being refused landing at the ISS. Each of these events broke any chain of causality that could be traced to Utopia. Under general international law, as under the Liability Convention, Utopia cannot be held liable for damages.

VI. CONCLUSION

Friendlistan's actions are completely unjustifiable whether Utopia acted legally or illegally. The loss of the Spaceliner, its equipment, and the lives of the forty-five people on board directly resulted from Friendlistan's violations of international law. The Court has found monetary damages to be an appropriate remedy where there has been a breach of international law.[119] Accordingly, Utopia asks the Court to require Friendlistan to compensate Utopia for the costs of the Spaceliner and its equipment and for the great loss of life suffered. Friendlistan must make reparations to the fullest extent possible.

SUBMISSIONS

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

1. Friendlistan violated international law and practice by interfering with the remote sensing activities conducted by Utopia and Spaceliner Inc. and discharging the laser which crippled the Spaceliner vehicle;
2. Friendlistan violated international law by refusing assistance to Utopia in the rescue of the Spaceliner crew and passengers;
3. Friendlistan is responsible and liable under international law to adequately compensate Utopia for the property and lives lost by the destruction of the Spaceliner;
4. Utopia is not responsible or liable under international law for the destruction of Milsat or SHARP and thus owes no compensation to the Friendlistan shareholders or operators

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Overseas Tankship (U.K.) Ltd. V, Miller Steamship Co. Pty. Ltd., (1966) 1 All E.R. 709.

[118] Clarifications to Compromis, Set 4, #1.

[119] *Corfu Channel Case*, (U.K. v. Alb.), 1949 I.C.J. 4, 23.