

2020 MANFRED LACHS SPACE LAW MOOT COURT COMPETITION

Team No. 22



IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE
PEACE PALACE, THE HAGUE

CASE CONCERNING
JURISDICTION AND CONTROL IN OUTER SPACE, SPACE SITUATIONAL
AWARENESS, AND ORBITAL DEBRIS
THE CONFEDERATION OF VALENKOVA
v.
THE REPUBLIC OF SARIDIA

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE
- MEMORIAL FOR THE APPLICANT -
THE CONFEDERATION OF VALENKOVA

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LIST OF ABBREVIATIONS

AASL	Annals of Air and Space Law
AJIL	American Journal of International Law
AO	Advisory Opinion
ARRA	Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art./Arts.	Article/Articles
BCICLR	Boston College International and Comparative Law Review
BYIL	British Yearbook of International Law
CDM	Conjunction Data Message
CIL	Customary International Law
CJTN	Columbia Journal of Transnational Law
CoC	Crew Code of Conduct
CoCoSL	Cologne Commentary on Space Law
COPUOS	United Nations Committee on the Peaceful Uses of Outer Space
DO	Dissenting Opinion
Doc.	Document
ed./eds.	Editor/Editors
EJIL	European Journal of International Law
EJLR	European Journal of Law Reform
GA	General Assembly
GACSSA	Global Astronautical Consortium for Space Situational Awareness
GAOR	General Assembly Official Records
ICLQ	International and Comparative Law Quarterly

ICLR	International Criminal Law Review
I.C.J.	International Court of Justice
I.C.J Statute	Statute of the International Court of Justice
IGA	Intergovernmental Agreement
IISL	International Institute of Space Law
IJMCL	International Journal of Marine and Coastal Law
IL	International Lawyer
ILC	International Law Commission
ILR	International Law Reports
Int'l	International
ISS	International Space Station
J	Journal
JALC	Journal of Air Law and Commerce
JCJS	Journal of Criminal Justice and Security
JSL	Journal of Space Law
JSO	Joint Separate Opinion
L	Law
LIAB	Convention on International Liability for Damage Caused by Space Objects
lit.	litera (Letter)
LTS Guidelines	Guidelines for the Long-term Sustainability of Outer Space Activities
MPEPIL	Max Planck Encyclopedia of Public International Law
NLR	Nebraska Law Review
No.	Number
OCULR	Oklahoma City University Law Review
OST	Treaty on the Principles Governing the Activities Of States in the Exploration and Use of Outer Space, including The Moon and Other Celestial Bodies
para./paras.	paragraph/paragraphs

P.C.I.J.	Permanent Court of International Justice
PSOs	Protected Space Operations
REG	Convention on the Registration of Objects Launched into Outer Space
Rep.	Report
S.	Sentence
SHR	Security and Human Rights
SSA	Space Situational Awareness
SSH	Space Station Hypatia
SSH-IGA	Space Station Hypatia Intergovernmental Agreement
TILJ	Texas International Law Journal
TLR	Tennessee Law Review
UK	United Kingdom of Great Britain and Northern Ireland
ULR	Utrecht Law Review
US	United States of America
UN	United Nations
UN Charter	Charter of the United Nations
UNGA	United Nations General Assembly
UWALR	University of Western Australia Law Review
v.	versus
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
Vol.	Volume
WMLR	William and Mary Law Review
ZaöRV	Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht
ZLW	Zeitschrift für Luft- und Weltraumrecht

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[hereinafter: **CoC**]

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QUESTIONS PRESENTED

I. Whether SaRidia violated international law when its crewmembers challenged the legitimacy of the Valenkovan CDM.

- i. Whether the conduct of the SaRidian governmental astronauts is attributable to SaRidia.
- ii. Whether SaRidia violated Sections II.A. and III.B. CoC.
 - (1) Whether the CoC is applicable.
 - (2) Whether SaRidia breached the CoC when the SaRidian astronauts challenged the legitimacy of the Valenkovan CDM.
- iii. Whether SaRidia violated the Outer Space Treaty.
 - (1) Whether SaRidia violated Art. IX 1S. OST when breaching its obligation to cooperate.
 - (2) Whether SaRidia had any right to demand consultation under Art. IX 3S. and 4S. OST.
- iv. Whether Valenkova violated the LTS Guidelines.
 - (1) Whether the LTS Guidelines are legally binding.
 - (2) Whether Valenkova violated the LTS Guidelines.

II. Whether SaRidia is liable under international law for unauthorized use of, and failure to return, the Bondar and for the loss of the Valenkovan life on the Sharman.

- i. Whether SaRidia's international responsibility is based on LIAB or Art. VII OST.
- ii. Whether SaRidia is liable under international law for the loss of the Valenkovan life on the Sharman.

- (1) Whether SaRidia bears international responsibility due to the inapplicability of the cross-waiver of liability contained in Art. 16 SSH-IGA.
- (2) Whether the conduct of the SaRidian astronaut adheres to the exemption for wilful misconduct from the cross-waiver of liability.
- iii. Whether SaRidia is responsible under international law for unauthorized use of the Bondar.
 - (1) Whether Valenkova has the right to exercise jurisdiction and control over the Bondar under Art. VIII OST as the State of Registry.
 - (2) Whether the conduct of the SaRidian astronaut and the unauthorized use are a direct breach of the Sections II.A. and III.B. Code of Conduct.
- iv. Whether SaRidia is responsible under international law for failure to return the Bondar.
 - (1) Whether SaRidia is under the obligation to return the Bondar under Art. 5(3) ARRA.
 - (2) Whether SaRidia is under the obligation to return the Bondar under Art. VIII OST.
 - (3) Whether SaRidia's unauthorized retention of the Bondar prevents Valenkova to exercise their right of jurisdiction and control over the Bondar conferred to the State of Registry in Art. VIII OST.

III. Whether the SaRidian crewmember should be extradited to Valenkova for prosecution for the death of the Valenkovan astronaut and for endangering the safety of the SSH crew and the Valenkovan transport vehicle.

- i. Whether Valenkova has jurisdiction over the Bondar.

- (1) Whether Valenkova has jurisdiction under Art. VIII OST.
 - (2) Whether Valenkova has jurisdiction pursuant to Art. 5(2) SSH-IGA.
 - (3) Whether Valenkova has jurisdiction under Art. 22(2) SSH-IGA.
 - (4) Whether Valenkova has jurisdiction under CIL, based on the passive personality principle.
- ii. Whether SaRidia has to extradite McKenzie to Valenkova.
- (1) Whether SaRidia has to extradite McKenzie based on Art. 22(4) SSH-IGA in connection with Art. 22(3) SSH IGA.
 - (2) Whether SaRidia has to extradite McKenzie pursuant to Art. 4 ARRA.

STATEMENT OF FACTS

1. The year is 2040 and missions to and through space are done regularly and human activity in space is manifold. Space transportation is sophisticated and reusability of vehicles is routine.
2. After the success of the first International Space Station, other multilateral space habitats emerged, one of them being the Space Station Hypatia (SSH), which is a shared project by four States: the Republic of SaRidia, the Confederation of Valenkova, the Chimuk Nation and the Haigneran Union. The purpose of the station is to be a permanently crewed civil space station for peaceful purposes in accordance with international law. The crew at the time of the events in question comprised of two governmental astronauts from each Partner State and a private astronaut who was a Professor of Aerospace Engineering at the State University of Valenkova. She financed her residence on board and the transportation to it through a grant from the university.
3. The Global Astronautical Consortium for Space Situational Awareness (GACSSA) is a consortium of intergovernmental and non-governmental entities, which shares space situational awareness (SSA) information in a data repository and is a non-negotiating forum.
4. The products provided by GACSSA assist in decision-making, using multi-source SSA data. The sources are either physics-based or human-based. GACSSA does not make any recommendations or advises which actions to take.
5. The Confederation of Valenkova as well as the Republic of SaRidia have been actively involved in GACSSA and both States ingest data into it. Valenkova prefers data and conjunction data messages (CDM) from governmental providers, as opposed to SaRidia which is not as selective as Valenkova and which uses data from non-governmental sources as well. Valenkova challenges the legitimacy of private sector participation in SSA data provision.

6. In July 2040, two CDMs reached the SSH, one from the government of Valenkova and the other one from the GACSSA. They were contradictory. The CDM from the government of Valenkova was clear in its prediction of imminent collision with orbital debris if the SSH would not be moved. The GACSSA CDM only described a low-valued probability of a collision. In general, the purpose of CDMs is to offer aid in the guidance and control of the space station.

7. The astronauts from Valenkova voiced their concerns of the GACSSA CDM. The SaRidian crewmembers believed the opinions of the Valenkovan astronauts to be not fact-based but grounded upon Valenkova's ideological disagreement with accepting CDMs from non-governmental providers.

8. Katie James, one of the SaRidian astronauts, challenged the Valenkovan CDM as a Type I Error that is a false positive. However, the Commander of the SSH, Myrka S. Curieux, from the Haigneran Union found the more severe and imminent hazard that was identified by the Valenkovan CDM to be more credible. She was also of the opinion that the SaRidians challenged the CDM from Valenkova only out of personal prejudice and not based on empirical evidence since the SaRidan and Valenkovan crewmembers had a history of disagreeing with each other on various issues. Commander Curieux believed the GACSSA CDM was a Type II Error, that is, a false negative.

9. Following a heated debate over the issue, the SaRidians accused the Commander of breaching the United Nations Long Term Sustainability Guideline B-4.1. Since this debate took so long, the time to implement the manoeuvre to save the SSH from the debris had exceeded. Following the Valenkovan CDM, a collision was imminent and the Commander choose to evacuate the station to at least save the crew. Two transfer vehicles were docked to the SS, the Sharman and the Bondar. The Sharman was registered to the Haigneran Union and the Bondar was registered to Valenkova.

They were used for protected space operations including transporting payloads and personnel between Earth and space.

10. The second SaRidian crewmember, astronaut Christine McKenzie, supported her SaRidian colleague, and also was of the opinion that the Valenkovan CDM was a Type I Error, that is a false positive. Both Christine McKenzie and Katie James were displeased with the Commander's decision. McKenzie told the crew that, if necessary, there would be adequate time to maneuver the SSH and lower the probability of a collision. Careful maneuvering would further lower the probability of collision and thereby save the SSH and all personnel with a minimum of potential harm. She proposed that the Commander follow an alternative course of action, specifically, to take additional time to evaluate the disparities in the data rather than taking immediate action.

11. Commander Curieux refused to consider McKenzie's proposal in, what the Commander stated, was the interest of maximizing space safety. In fact, any action can be disputed as there are often multiple opinions at hand, but it is the Commander who holds the highest authority of command. McKenzie challenged the chain of command and secured herself in the Bondar. On the previous day, the Bondar was reported to have transmission problems with its communications system with the SSH. There was also a reported communication failure between the station and ground control. When she learned of the malfunctioning communications system, the Commander ordered the Valenkovan Partner to immediately form a task team to investigate the dysfunctional communications system. The task team had not been convened before the CDM was received. The Commander used the SSH-to-transport-vehicle communications system to give McKenzie a direct and clear order to exit the Bondar and evacuate with the rest of the crew. McKenzie was silent.

12. Because they took time to attempt to change astronaut McKenzie's mind, the delay impacted the escape of the Commander and the rest of the crew. Sensing that McKenzie would not change

her mind, the Commander again ordered her out of the Bondar and onto the Sharman one last time. The Commander also informed McKenzie that not doing so was tantamount to a criminal act. Astronaut McKenzie did not exit the Bondar.

13. Commander Curieux and the other crewmembers, including astronaut Tatyana K. Mikaela the Valenkovan university professor and private astronaut, charted their course on the Sharman to avoid the area implicated by the Valenkovan message. The Sharman transfer vehicle was maneuvered into an actual region of increased collision probability. The Sharman collided with the debris. The collision caused Commander Curieux to lose control of the Sharman. It began an uncontrolled reentry and plummeted to Earth, landing in international waters. The Sharman transfer vehicle was severely damaged. Astronaut-Prof. Mikaela lost her life as a result of the impact. The Commander and the rest of the crew survived. In time, evidence and analytics show that the Valenkovan CDM did suffer from a Type I Error.

14. No harm was caused to the SSH, the Bondar, or astronaut McKenzie. McKenzie piloted the Bondar back to SaRidian territory where she began training for her next SSH mission. The Bondar was placed in a hangar leased to Valenkova.

15. The Confederation of Valenkova initiated diplomatic negotiations and consultations to try to resolve issues surrounding the SaRidian challenge to the Valenkovan CDM, the ensuing delay, and subsequent loss of life and misuse of property. When these negotiations stalled, Valenkova commenced proceedings by Application to the International Court of Justice. SaRidia accepted the Court's jurisdiction and the Parties submitted the foregoing Agreed Statement of Facts. There are no issues of jurisdiction before the Court.

16. All of the SSH Partners and cooperating nations are Parties to the UN Charter, the Outer Space Treaty, the Return and Rescue Agreement, the Liability Convention, and the Registration Convention. Only the Haignerian Union is Party to the Moon Agreement. All of the SSH Partners, cooperating nations, and their Cooperating Agencies are Parties to the Space Station Hypatia Intergovernmental Agreement (SSH IGA); the Code of Conduct for International Space Stations Crews (CoC); and, the concomitant MOUs and Letters of Agreement. The SSH-IGA contains the same terms of the 1998 International Space Station Intergovernmental Agreement (ISS-IGA) and is the SSH governing agreement. The CoC was enacted within each Partner State and thereby made part of each Partner's national law. SaRidia and Valenkova do not have a bilateral extradition treaty. SaRidia and Valenkova have a bilateral agreement that allows use and leasing of SaRidian launch and landing facilities for Valenkovan vehicles.

SUMMARY OF ARGUMENT

I. SaRidia violated international law when its crewmembers challenged the legitimacy of the Valenkovan CDM

A. Art. VI OST sets forth that States bear responsibility in ensuring that all national activities are performed in conformity with the OST. In general international law, State responsibility has been codified by the ILC in the ARSIWA.

B. SaRidia violated Sections II.A. and III.B. CoC. The CoC is applicable pursuant to Art. 11(2) SSH-IGA which obliges Partner States to ensure compliance by their crewmembers. SaRidia breached it when the SaRidian crewmembers of the SSH disobeyed the Commander who is the highest authority on the Space Station as stipulated in the CoC.

C. SaRidia violated Art. IX of the Outer Space Treaty. Its first sentence sets forth the obligation for States to cooperate with each other, which the SaRidians breached as they challenged the CDM from the government of Valenkova based solely on ideological reasons. Furthermore, Valenkova was under no obligation to conduct consultations with SaRidia following Art. IX 3S., as the activity in question was planned by the Haigneran Commander of the station.

D. Valenkova did not violate the LTS Guidelines. Firstly, the LTS Guidelines are not legally binding since they are soft law and do not entail any legal obligations. Nevertheless, even if they were legally binding, Valenkova did not breach them. Guideline B-4 does not entail a duty for States to exclusively use non-governmental sources for CDMs. It is irrelevant which sources Valenkova uses.

II. SaRidia is liable under international law for unauthorized use of, and failure to return, the Bondar and for the loss of the Valenkovan life on the Sharman

A. Despite the wording of the claim, as there is no damage caused by a space object for which SaRidia can be considered a launching State, therefore the liability provisions of space law in Art. VII OST and LIAB are not applicable in this case.

B. The cross-waiver of liability in Art. 16 SSH-IGA does not apply to private spaceflight participants, as they do not fall under the scope of Protected Space Operations, as Mikaela did not conduct any activities on board that would fall under SSH-IGA implementation or could be considered SSH-activities. There is also an exemption from the cross-waiver of liability regarding wilful misconduct on board.

C. Valenkova retains jurisdiction and control under Art. VIII OST over its space object, the Bondar, and McKenzie is not authorized either by Valenkova, the State of Registry, or by the Commander, to interfere with it. Art. 11(2) SSH-IGA sets an obligation for States to ensure that their crewmembers observe the Code of Conduct, and McKenzie directly challenges the chain of command, which is attributable to SaRidia.

D. Valenkova is the State of Registry of the Bondar, which is currently situated in SaRidia. Under Art. VIII OST, a State Party to the OST has the obligation to return space objects to the State of Registry. A similar obligation is contained in Art. 5(3) ARRA, under which a State Party has to return an object found on its territory to the launching authority. Valenkova has initiated diplomatic negotiations to deal with, among other topics, the misuse of property, which triggers the obligation under Art. 5(3) ARRA. Furthermore, the retention of the Bondar prevents Valenkova to exercise their rights of jurisdiction and control under Art. VIII OST.

III. The SaRidian crewmember should be extradited to Valenkova for prosecution for the death of the Valenkovan astronaut and for endangering the safety of the SSH crew and the Valenkovan transport vehicle

A. Valenkova has jurisdiction over the Bondar based on Art. VIII OST. Since the Bondar is a space object, registered to Valenkova and McKenzie was located on it during the events in question, Valenkova retains jurisdiction over it and over McKenzie. Furthermore, Valenkova can claim jurisdiction based on Art. 5(2) SSH-IGA. Valenkova also has criminal jurisdiction pursuant to Art. 22(2) SSH-IGA. Lastly, under the passive personality principle of jurisdiction, the State of the nationality of the victim has the right to exercise its jurisdiction over the perpetrator.

B. SaRidia has to extradite McKenzie to Valenkova based on Art. 22(4) SSH-IGA in conjunction with Art. 22(3) SSH-IGA. Following Art. 22(4) SSH-IGA, each State has to afford the other States Parties assistance in connection with misconduct on orbit. Mutual legal assistance includes extradition. Art. 22(3) provides the possibility for a State to use the IGA as the legal basis for extradition, if there is no bilateral extradition treaty between the States in question. There is no bilateral extradition treaty between Valenkova and SaRidia. Consequently, SaRidia is obliged to extradite McKenzie. Moreover, Valenkova can demand extradition pursuant to Art. 4 ARRA which stipulates that personnel of a spacecraft have to be returned to representatives of the launching authority of the spacecraft in case of an accident, distress, emergency or unintended landing. The launching authority of the Bondar is Valenkova. Therefore, McKenzie has to be turned over to representatives of Valenkova.

ARGUMENT

I. SaRidia violated international law when its crewmembers challenged the legitimacy of the Valenkovan CDM

A. The conduct of the SaRidian governmental astronauts is attributable to the Republic of SaRidia

As a point of departure, it has to be established that the actions of the SaRidian crewmembers are attributable to SaRidia. Pursuant to Art. VI OST "State Parties to the Treaty shall bear international responsibility for national activities in outer space, [...] and for assuring that national activities are carried out in conformity with the provisions set forth in the present treaty".¹ International responsibility relates to all forms of legal relations which might arise as a result of a wrongful act attributable to a State.² The responsibility established in Art. VI covers not only violations of space law, but of general international law as well.³ National activities in the meaning of Art. VI include governmental and non-governmental activities.⁴ The State has to authorise the conduct of non-governmental entities and supervise them.⁵ Consequently, States bear responsibility in ensuring that all national activities are performed in conformity with the OST.⁶

¹ Art. VI OST.

² MCCORQUODALE/DIXON 404 (2003); Wiewiorowska, *Some Problems of State Responsibility in Outer Space Law*, JSL 30 (1979); *Chorzów Factory* case 29 (1928).

³ Wiewiorowska, *Some Problems of State Responsibility in Outer Space Law*, JSL 31 (1979).

⁴ Von der Dunk, *The Origins of Authorisation*, National Space Legislation in Europe 9 (2011); LACHS 113-114 (1972); Wiewiorowska, *Some Problems of State Responsibility in Outer Space Law*, JSL 25 (1979); HOBE 79 (2019); Schaefer, *Analogues between Space Law and Law of the Sea*, IISL PROCEEDINGS 318-319 (2013); Hintz, *Weltraumgegenstände*, Handbuch des Weltraumrechts 188 (1991); Uchitomi, *State Responsibility/Liability*, IISL PROCEEDINGS 52 (2002); Bourelly, *La régime juridique*, Droit de l'espace 37 (1988).

⁵ LYALL/LARSEN 60 (2018); Bonin, *Responsibility and Liability in International Space Law*, IISL PROCEEDINGS 30 (2010); Bourély, *Quelques Particularités du Régime de la Responsabilité du Fait des Activités Spatiales*, AASL 253 (1990).

⁶ Gerhard, *Article VI*, CoCoSL 116 (2009); Kerrest, *Remarks on Responsibility and Liability*, IISL PROCEEDINGS 138-139 (1998) Cheng, *Article VI of the 1967 Space Treaty Revisited*, JSL 13 (1998).

In general international law, State responsibility has been codified by the ILC in the ARSIWA.⁷ International law is applicable to human activities in outer space, as stipulated in Art. III OST,⁸ which prescribes that States “shall carry on activities in the exploration and use of outer space [...] in accordance with international law”.⁹ Although they have not been adopted as a treaty, the ARSIWA can express custom¹⁰ which the ICJ has acknowledged in numerous cases.¹¹ Art. 1° ARSIWA sets forth that “every internationally wrongful act of a State entails the international responsibility of that State”.¹² Such an act has to be attributable to the State.¹³

All of the astronauts, except for Mikaela, are governmental astronauts.¹⁴

According to Art. VI OST, a State is international responsible for its national activities in outer space. Since this also covers non-governmental activities, the actions of the SaRidian astronauts are attributable to SaRidia.

⁷ CRAWFORD 523 (2019); SHAW 591 (2017); ARSIWA.

⁸ Ribbelink, *Article III*, CoCoSL 64 (2009); Francke, *Zur Anwendbarkeit des Völkerrechts auf die Raumfahrt*, ZLW 39 (1970); Argüelles Arredondo, *Space Law as a Source of International Cooperation*, IISL PROCEEDINGS 65 (2017); Breccia, *Article III*, IISL PROCEEDINGS 17 (2017); Galloway, *Interpreting the Treaty on Outer Space*, IISL PROCEEDINGS 144 (1968).

⁹ Art. III OST.

¹⁰ CRAWFORD 524 (2019); LOWE 120 (2007); Hobér, *State Responsibility and Attribution*, Investment Law 550 (2008); CRAWFORD 43 (2013); *Bosnian Genocide* case 43 (2007).

¹¹ Yamada, *Revisiting the ILC’s Draft Articles on State Responsibility*, International Responsibility Today 118 (2005); *Arrest Warrant* case para. 75 (2007); *LaGrand* case 466 (2001); *Wall* (AO) paras. 138–142, 154–160 (2004).

¹² Art. 1 ARSIWA; *Corfu Channel* case 23 (1949); *Nicaragua* case paras. 283, 292 (1986); *Rainbow Warrior* para. 75 (1986).

¹³ Art. 2 ARSIWA; *Phosphates in Morocco* case 28 (1938); *Nicaragua* case 117-118 (1986); *Gabčíkovo-Nagymaros* case 54 (1997).

¹⁴ Compromis, §2.

B. SaRidia violated the CoC

1. The CoC is applicable

Art. 11(2) SSH-IGA provides for the implementation of the CoC,¹⁵ stating that “[t]he Conduct for the Space Station crew will be developed and approved by all the Partners in accordance with the individual Partner’s internal procedures”.¹⁶ The provision further declares that the “Partner must have approved the Code of Conduct before it provides Space Station crew”.¹⁷ It is an instrument that has been agreed upon to regulate the conduct of the astronauts, establishing an obligation in stating that “States shall ensure that their crewmembers observe the CoC”.¹⁸ The norms contained in the SSH-IGA are obligatory and have to be performed in good faith.¹⁹ Following Art. 31(1) VCLT, treaties have to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.²⁰ The ICJ has been adamant in its view that the rules of treaty interpretation contained in the VCLT reflect CIL.²¹

¹⁵ Art. 11(2) SSH-IGA; MASSON-ZWAAN/HOFMANN 83 (2019); De Roos, *Disciplinary Law in Space*, ISS 116 (2006); HOBE 171 (2019).

¹⁶ Art. 11(2) SSH-IGA; Veldhuyzen/Masson-Zwaan, *Impending ESA Legal Framework*, ISS 53 (2006); Farand, *The Code of Conduct for International Space Station Crews*, ESA BULLETIN 65 (2001); Brünner/Soucek, *Regulating ISS*, ACTA ASTRONAUTICA 597 (2007); Frankle, *Legal Aspects of Space Station Utilization*, IISL PROCEEDINGS 19 (2000).

¹⁷ Art. 11(2) SSH-IGA; LYALL/LARSEN 129 (2018).

¹⁸ Art. 11(2) SSH-IGA; CATALANO SGROSSO 312 (2011); LYALL/LARSEN 129-130 (2018); De Roos, *Disciplinary Law in Space*, ISS 117 (2006); De Faramiñán Gilbert, *L’expérience des astronautes*, SPACE SOJOURNS 50-51 (2005); BLACK’S LAW DICTIONARY 1499 (2009).

¹⁹ Fukushima, *Legal analysis of the International Space Station*, SPACE POLICY 35 (2008); Ferrazzani/Farand, *European Perspective on Lessons Learned from the IGA on ISS Cooperation*, IISL PROCEEDINGS 293 (2015); Yakovenko, *The intergovernmental agreement on the ISS*, SPACE POLICY 82 (1999).

²⁰ Art. 31(1) VCLT; *Polish Postal Service in Danzig* 37 (AO) (1925).

²¹ CRAWFORD 354 (2019); VILLIGER 439-440 (2009); *LaGrand* case 466 (2001); *Kasikili/Sedudu Island* case 1045, 1059 (1999); ILC Report 218-5 (1966); *Arbitral Award of 31 July 1989* 53, 70 (1989).

Shall ensure in its ordinary meaning signifies an obligation.²² This is further established when interpreting shall ensure in its context, since the right to provide crewmembers²³ requires the approval of the CoC.²⁴ Moreover, the object and purpose of a treaty can be derived from its preamble,²⁵ which in this case expresses the willingness of the States to establish a “framework for the design, development, operation, and utilization of the Space Station”.²⁶ Therefore, shall ensure is to be interpreted as stipulating an obligation for a State to secure that its crewmembers act in accordance with the provisions of the CoC.²⁷ Consequently, Art. 11(2) requires the establishment of the CoC to regulate activities on board.²⁸ All States must ensure that their national space legislation contains sufficient provisions for the effective implementation of the rights and responsibilities that they have accepted.²⁹

In the present case, Valenkova and SaRidia are both Parties to the CoC, which they incorporated into their national law.³⁰

The CoC is applicable and Valenkova can base its claim on it.

²² BLACK’S LAW DICTIONARY 1499 (2009).

²³ Art. 11(1) SSH-IGA.

²⁴ Art. 11(2) SSH-IGA.

²⁵ GARDINER 216 (2015); SHAW 367 (2017); *Oil Platforms* case 14 (1996).

²⁶ Preamble, SSH-IGA.

²⁷ Art. 11(2) SSH-IGA; Catalano Sgrosso, *Legal Status, Rights and Obligations of the Crew in Space*, JSL 170 (1998); HOBE 171 (2019); LYALL/LARSEN 129 (2018).

²⁸ Art. 11(2) SSH-IGA; Veldhuyzen/Masson-Zwaan, *Impending ESA Legal Framework*, ISS 53-54 (2006); Tronchetti, *A Soft Law Approach to Prevent Weaponisation of Outer Space*, Soft Law in Outer Space 376 (2012); Hafner, *The SB Declaration*, Soft Law in Outer Space 276 (2012).

²⁹ Brus/Von der Dunk, *European Legal Regime for Commercial Utilisation of the ISS*, ISS 2 (2006); Farand, *The Code of Conduct for International Space Station Crews*, ESA BULLETIN 67-68 (2001); Farand, *Astronauts’ behaviour onboard the ISS*, SPACE SOJOURNS 75 (2005).

³⁰ Compromis, §16.

2. SaRidia breached Sections II.A. and III.B. CoC

The CoC regulates the conduct of all crewmembers from the moment they took on the assignment for a mission until the end of the post-flight activities³¹ and stipulates that “[d]uring all phases of on-orbit activity, the ISS Commander [...] shall have the authority to use any reasonable and necessary means to fulfill his or her responsibilities”.³² The scope of authority of the Commander includes “the ISS elements, equipment, and payloads; (2) the ISS crewmembers; (3) activities of any kind occurring in or on the ISS; and (4) data and personal effects in or on the ISS where necessary to protect the safety and well-being of the ISS crewmembers and the ISS elements, equipment, and payloads”.³³ It is the Commander’s responsibility to ensure the safety of the crew and equipment.³⁴ The Commander “is the highest authority” among the crewmembers,³⁵ which “shall comply with the ISS Commander’s orders”.³⁶

³¹ CoC, I.B.; Farand, *The Code of Conduct for International Space Station Crews*, ESA BULLETIN 64-65 (2001); LYALL/LARSEN 129 (2018); Brünner/Soucek, *Regulating ISS*, ACTA ASTRONAUTICA 594, 597 (2007); Soucek, *International Law*, *Outer Space in Society, Politics and Law* 392-393 (2011).

³² CoC, III.A.(2)(c).

³³ CoC, III.A.(2)(c); CATALANO SGROSSO 313 (2011); Catalano Sgrosso, *Legal Status, Rights and Obligations of the Crew in Space*, JSL 171 (1998); Catalano Sgrosso, *Application of the Rules of the Code of Conduct*, IISL PROCEEDINGS 78 (2003).

³⁴ CoC, III.A.(2)(a); De Roos, *Disciplinary Law in Space*, ISS 119 (2006); CATALANO SGROSSO 315-316 (2011).

³⁵ CoC, III.B.(1); Farand, *The Code of Conduct for International Space Station Crews*, ESA BULLETIN 68 (2001); Catalano Sgrosso, *Legal Status, Rights and Obligations of the Crew in Space*, JSL 168 (1998); Yakovenko, *The intergovernmental agreement on the ISS*, SPACE POLICY 82 (1999).

³⁶ CoC, II.A.; Brünner/Soucek, *Regulating ISS*, ACTA ASTRONAUTICA 597 (2007); Chatzipanagiotis, *Criminal Issues in International Space Law*, EJLR 108 (2016).

The SaRidian astronauts questioned the decision of the Commander to trust the Valenkovan CDM. Moreover, the SaRidian crewmember McKenzie challenged the chain of command and secured herself on the Bondar.³⁷

As laid out above, the Commander is the highest authority on board and the crewmembers have to follow her orders. The SaRidians had to accept her decision and they violated the CoC in disobeying her orders.

C. SaRidia violated the Outer Space Treaty

1. SaRidia violated Art. IX 1S. OST when breaching its obligation to cooperate

According to Art. IX 1S. OST States “shall be guided by the principle of cooperation and mutual assistance”.³⁸ Cooperation means that States coordinate their efforts and actions to achieve a common goal.³⁹

In the context of space law, international cooperation is an important element in the outer space treaties and UNGA resolutions related to space activities.⁴⁰ The SB Declaration for instance further developed the obligation to cooperate.⁴¹

There have been long-standing differences between Valenkova and SaRidia concerning private data as a source for CDMs. Valenkova claims that the SaRidians challenged the Valenkovan CDM

³⁷ Compromis, §9, 11.

³⁸ Art. IX OST.

³⁹ Wolfrum, *International Law of Cooperation*, MPEPIL (2010); BLACK’S LAW DICTIONARY 384 (2009).

⁴⁰ Haanappel, *Co-Operation between Canada and the US*, AASL 235 (1987); Noichim, *International Cooperation*, JSL 315, 324 (2005).

⁴¹ SB Declaration; Marchisio, *Article IX*, CoCoSL 174 (2009); Hafner, *The SB Declaration*, Soft Law in Outer Space 272 (2012); Carpanelli/Cohen, *A Legal Assessment of the SB Declaration*, JSL 13-14, 22 (2012); Hobe/Tronchetti, *Historical Background and Context*, CoCoSL 315 (2015).

due to ideological disagreements.⁴² The situation itself was dangerous as a collision with debris was possible.⁴³

Since the SaRidians challenged the Valenkovan CDM and the decision of the Commander based on ideological reasons, they neglected their duty to cooperate.

2. SaRidia did not have any right to demand consultation under Art. IX 3S. and 4S. OST Art. IX 3S. OST sets forth the obligation of a State to “undertake appropriate international consultations”⁴⁴, when it “has reason to believe that an activity or experiment planned by it or its nationals in outer space, [...] would cause potentially harmful interference with activities” of another State.⁴⁵ Has reason to believe in this context means having knowledge which could prove that a planned activity would cause a potentially harmful interference.⁴⁶ Art. IX OST does not describe the process of consultation.⁴⁷ Nevertheless, it usually contains the notification of the affected State, the right to demand and the obligation of the other State to start consultation.⁴⁸ A harmful activity refers to any activity that interferes with the future use of outer space.⁴⁹ It is for

⁴² Compromis, §5, 8.

⁴³ Compromis, §6.

⁴⁴ Art. IX OST; HACKET 123 (1994); LACHS 107 (1972); HOBE 89 (2019); Baker, *Protection of the Outer Space Environment*, AASL 163 (1987); Palkovitz, *Exploring the Boundaries of Free Exploration and Use of Outer Space*, IISL PROCEEDINGS 97 (2015); Verplaetse, *International Consultation and the Space Law Treaties*, IISL PROCEEDINGS 64 (1969).

⁴⁵ Art. IX OST.

⁴⁶ Mineiro, *FY-1C and USA-193 ASAT Intercepts*, JSL 336 (2008).

⁴⁷ LACHS 107 (1972); Mineiro, *FY-1C and USA-193 ASAT Intercepts*, JSL 338 (2008); Palkovitz, *Exploring the Boundaries of Free Exploration and Use of Outer Space*, IISL PROCEEDINGS 97 (2015); Viikari, *Environmental aspects of space activities*, Handbook of Space Law 730 (2015); Dolzer, *International Co-operation in Outer Space*, ZaöRV 536-537 (1985).

⁴⁸ Nakamura, *Consultation Regime in Space Law*, IISL PROCEEDINGS 412-414 (1993); these three steps were mentioned in *Pulp Mills* case para. 51 (2010); Plakokefalos, *Current Legal Developments ICJ*, IJMCL 169-173 (2011).

⁴⁹ Baker, *Protection of the Outer Space Environment*, AASL 167 (1987); HACKET 123-124 (1994); Sztucki, *International Consultations and Space Treaties*, IISL PROCEEDINGS 158

the planning State to assess whether the activity is harmful and if it has the obligation to start consultations.⁵⁰

Furthermore, Art. IX 4S. OST stipulates that the affected State “may request consultation” if it has reason to believe that a planned activity by another State is potentially harmful.⁵¹ Nevertheless, the consultations do not have to come to any results.⁵²

After receiving the CDMs, the SaRidian astronaut James shared her personal opinion. Afterwards the Commander chose to trust the Valenkovan CDM.⁵³

Valenkova was under no obligation to start consultations with SaRidia under Art. IX 3S. OST, since the activity was planned by the Haigneran Commander of the station. Furthermore, there is no right for States under Art. IX 4S. OST to demand consultations.

Moreover, even if Valenkova was under the obligation to consult, it did not violate this duty. The SaRidian astronauts did consult with the Commander and they even had a chance to share their view. It is of no importance whether the Commander follows their opinion or not.

(1975); Bittlinger, *Grundbegriffe und Grundprinzipien des Weltraumrechts*, Handbuch des Weltraumrechts 132-133 (1991).

⁵⁰ Mineiro, *FY-1C and USA-193 ASAT Intercepts*, JSL 337-338 (2008); HOBE 89 (2019); Sztucki, *International Consultations and Space Treaties*, IISL PROCEEDINGS 164 (1975).

⁵¹ Art. IX, OST; Baker, *Protection of the Outer Space Environment*, AASL 163 (1987); HACKETT 130 (1994); Marchisio, *Article IX*, CoCoSL 179 (2009).

⁵² Viikari, *Environmental aspects of space activities*, Handbook of Space Law 730 (2015); Sztucki, *International Consultations and Space Treaties*, IISL PROCEEDINGS 165 (1975); DIEDERIKS-VERSCHOOR/KOPAL 30 (2008).

⁵³ Compromis, §8.

D. Valenkova did not violate the LTS Guidelines

1. The LTS Guidelines are not legally binding

The LTS Guidelines are of a voluntary nature and are “not legally binding under international law”.⁵⁴ Furthermore “[n]othing in the guidelines should be interpreted as giving rise to any new legal obligation for States”.⁵⁵ These characteristics qualify them as soft law,⁵⁶ which is not a source of international law,⁵⁷ although under exceptional conditions parts of soft law instruments can express a rule of CIL.⁵⁸ Two elements of custom can be detected, the actual practice and the *opinio iuris* of States.⁵⁹ Practice can be any official act made by a State,⁶⁰ including acts from the exercise of the States’ executive, legislative or judicial function.⁶¹ *Opinio iuris* can be demonstrated *inter*

⁵⁴ LTS Guidelines, 3; Martinez, *Development of an international compendium of guidelines*, SPACE POLICY 13-14 (2018); Volynskaya/Zhukov, *Long-Term Sustainability of Space Activities*, IISL PROCEEDINGS 363 (2014); Report of the Scientific and Technical Subcommittee 35 (2019).

⁵⁵ LTS Guidelines, 3.

⁵⁶ Marboe, *The Importance of Guidelines and Codes of Conduct*, Soft Law in Outer Space 119 (2012); BLACK’S LAW DICTIONARY 1519 (2009); Jankowitsch, *The background and history of space law*, Handbook of Space Law 24-25 (2015); Tronchetti, *Soft Law*, Outer Space in Society, Politics and Law 619 (2011).

⁵⁷ Art. 38(1) ICJ Statute; Freeland, *The use of “soft law” within the international regulation of outer space*, AASL 430 (2011); Hillgenberg, *A Fresh Look at Soft Law*, EJIL 499 (1999); Jakhu/Freeland, *The Sources of International Space Law*, IISL PROCEEDINGS 472 (2014).

⁵⁸ Ferrazzani, *Soft Law in Space Activities*, Soft Law in Outer Space 111-112 (2012); Jakhu/Freeland, *The Sources of International Space Law*, IISL PROCEEDINGS 474 (2014); Freeland, *The Role of Soft Law*, Soft Law in Outer Space 22 (2012).

⁵⁹ SHAW 55 (2017); Jakhu/Freeland, *The Sources of International Space Law*, IISL PROCEEDINGS 467 (2014); Nie/Yang, *Revisit the Concept of International Custom in International Space Law*, IISL PROCEEDINGS 348 (2013); *Continental Shelf* case para. 27 (1985); *North Sea Continental Shelf* cases para. 77 (1969); *Jurisdictional Immunities* case para. 55 (2012).

⁶⁰ LOWE 43 (2007); SHAW 60 (2017); Treves, *Customary International Law*, MPEPIL (2006); Draft conclusions on identification of customary international law, 130, conclusion 4.

⁶¹ Draft conclusions on identification of customary international law, 132, conclusion 5; CRAWFORD 21-22 (2019); LOWE 43-44 (2007); SHAW 60 (2017).

alia through public statements, official publications, diplomatic correspondence, decisions of national courts and treaty provisions.⁶²

Nevertheless, in this case, there is no indication of state practice and *opinio iuris*. Thus, the LTS Guidelines do not entail any legal obligations.

2. Valenkova did not violate the LTS Guidelines

Even if the LTS Guidelines were legally binding, Valenkova did not breach them. They entail measures that shall ensure the “long-term sustainability of outer space activities and, in particular, enhancing the safety of space operations”.⁶³ According to Guideline B-4 States “should encourage entities, including spacecraft operators and conjunction assessment service providers under their jurisdiction and/or control to perform conjunction assessments through national mechanisms, when applicable”.⁶⁴

Art. 22 ARSIWA stipulates that “[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State”.⁶⁵ The condition for a lawful countermeasure is an internationally wrongful act, injuring the State that carries out the countermeasure.⁶⁶

⁶² Draft conclusions on identification of customary international law, 140, conclusion 10; Nie/Yang, *Revisit the Concept of International Custom in International Space Law*, IISL PROCEEDINGS 348 (2013); LOWE 51-53 (2007); Slama, *Opinio Juris in Customary International Law*, OCULR 646-647 (1990).

⁶³ LTS Guidelines, 1-2; Volynskaya/Zhukov, *Long-Term Sustainability of Space Activities*, IISL PROCEEDINGS 359, 361 (2014).

⁶⁴ LTS Guidelines, B-4(1).

⁶⁵ Art. 22 ARSIWA; CRAWFORD 685 (2013); *Naulilaa* 1025-1026 (1928).

⁶⁶ SHAW 602 (2017); CRAWFORD 572-573 (2019); ILC Report 130, para. 2 (2001); *Gabčíkovo-Nagymaros* case para. 83 (1997).

The SaRidian astronauts claimed that the refusal of the Haigneran Commander to heed the GACSSA CDM violated Guideline B-4, as the Valenkovan CDM only uses governmental sources.⁶⁷

The conduct of the astronauts attributable to SaRidia cannot be qualified as a countermeasure, because the primary prerequisite, the existence of a violation of international law, is not met since Valenkova acted in conformity with Guideline B-4. Furthermore, the actions of the Haigneran Commander may not render Valenkova the injuring State in this respect. Guideline B-4 does not entail a duty for the Commander to exclusively follow CDMs from non-governmental sources. States should merely encourage non-governmental entities to provide data for CDMs. It is irrelevant which sources Valenkova uses.

⁶⁷ Compromis, §9, 5.

II. SaRidia is liable under international law for unauthorized use of, and failure to return, the Bondar and for the loss of the Valenkovan life on the Sharman

A. SaRidia's international responsibility is not based on LIAB or Art. VII OST

Responsibility and liability in international law are closely interrelated, however space law contains separate provisions distinguishing the liability for damage caused by space objects in Art. VII OST and LIAB from responsibility for activities in outer space in Art. VI OST, which is a *lex specialis* to the ARSIWA, according to which a breach of an international obligation attributable to a State entails its responsibility.⁶⁸ Despite the wording of the claim, as there is no damage caused by a space object for which SaRidia can be considered a launching State,⁶⁹ so the liability regime for damage caused by a space object of Art. VII OST and LIAB will not be used.

B. SaRidia is liable under international law for the loss of the Valenkovan life on the Sharman

1. SaRidia bears international responsibility due to the inapplicability of the cross-waiver of liability in Art. 16 SSH-IGA

A broadly constructed cross-waiver is applied to damage suffered in the context of Protected Space Operations, a wide scope of SSH-activities by Partner States in implementation of the SSH-IGA.⁷⁰ Non-material private claims regarding bodily injury or death are excluded from the cross-waiver of liability, as are cases of non-involvement in the aforementioned PSOs, as private passengers

⁶⁸ CRAWFORD 51-52, 62-63 (2013); Uchitomi, *State Responsibility/Liability*, IISL PROCEEDINGS 51 (2001); LYALL/LARSEN 77-78, 95-102 (2018); CATALANO SGROSSO 106, 109-111 (2011); Gál, *Space Liability*, IISL PROCEEDINGS 157-158, 160 (2001); *Corfu Channel* case 23 (1949); *Nicaragua* case paras. 283, 292, 117-118 (1986); *Rainbow Warrior* para. 75 (1986); *Tehran Hostages* case para. 56 (1980); *Phosphates in Morocco* case 28 (1938); *Gabčíkovo-Nagymaros* case 54 (1997); Von der Dunk, *International Space Law*, Handbook of Space Law 50-54 (2015); Kerrest/Smith, *Article VII*, CoCoSL 128-129 (2009).

⁶⁹ Compromis, §9, 13.

⁷⁰ Art. 16(1)&(2) SSH-IGA; HOBE 172 (2019); Von der Dunk, *International Legal Framework*, ISS 24 (2006); Von der Dunk, *Private Manned Spaceflight*, Handbook of Space Law 700 (2015); Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 638 (2015).

paying their own way to outer space are in a greater risk of misjudging the dangers of space activity, lacking the rigorous training and preparation of professional astronauts.⁷¹

Professional astronauts serving as space station crewmembers are highly qualified individuals who have been approved for flight to the SSH following an official selection process, resulting in their sole eligibility for specific positions on board.⁷² Private visitors to the SSH are called spaceflight participants, who privately pay for their travels as opposed to governmental funding and do not conduct SSH-operational activities.⁷³

Mikaela is a private astronaut from Valenkova who used a university grant to pay for her stay on board and transportation to the SSH, and there is no mention of her conducting any duties on board the SSH.⁷⁴

Mikaela's visit was privately funded and does not fall into the scope of PSOs, as she did not participate in any SSH-activity in implementation of the SSH-IGA nor did she have specifically designated duties or responsibilities on board. It is therefore apparent that the cross-waiver does not apply to her as she was not a Valenkovan space station crewmember involved in PSOs.

⁷¹ Art. 16(3d) SSH-IGA; Farand, *Jurisdiction and Liability*, ISS 92 (2006); Von der Dunk, *International Legal Framework*, ISS 24 (2006); Iavicoli, *Italy and the ISS*, ISS 194-195 (2006); Farand, *Space Tourism*, ARRA. Lessons Learned 64 (2011); Cocca, *Legal Status of the Astronaut*, IISL PROCEEDINGS 141 (1963); Abeyratne, *Space Tourism*, ZLW 184-185 (2004).

⁷² Lafferanderie, *La station spatiale*, Droit de l'espace 181 (1988); Veldhuyzen/Masson-Zwaan, *Impending ESA Legal Framework*, ISS 54-55 (2006); Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 648-649 (2015); Steptoe, *Astronaut Rescue*, ARRA. Lessons Learned 205 (2011); Marchisio, *Reviewing ARRA*, ARRA. Lessons Learned 154 (2011).

⁷³ Veldhuyzen/Masson-Zwaan, *Impending ESA Legal Framework*, ISS 54-55 (2006); Steptoe, *Astronaut Rescue*, ARRA. Lessons Learned 205 (2011); Marboe/Neumann/Schrogl, *ARRA*, CoCoSL 42-43 (2013); Von der Dunk, *Private Manned Spaceflight*, Handbook of Space Law 666-667, 700, 710-711 (2015); Hobe, *Space Tourism*, ARRA. Lessons Learned 78 (2011); CATALANO SGROSSO 265 (2011); HOBE 168 (2019).

⁷⁴ Compromis, §2.

2. SaRidia bears international responsibility due to the exemption for wilful misconduct from the cross-waiver of liability

Damage resulting from wilful misconduct is excluded from the protection of the cross-waiver of liability.⁷⁵ The ordinary meaning of wilful misconduct is an intentional, not necessarily malicious dereliction of duty that is not within the scope of the mission.⁷⁶ Astronauts have to agree to the flight rules set in the CoC, including the chain of command on board.⁷⁷

McKenzie assumed control of the Bondar against direct orders of her superior, challenging the chain of command and breaching the designated order on board set forth in the CoC.⁷⁸

McKenzie's deliberate actions against the CoC affected the evacuation preparations of the rest of the crew, which ultimately led to Mikaela's death. She disregarded orders and challenged the chain of command while committing the act in question, which points to an act of wilful misconduct that is not covered by the cross-waiver. The actions are attributable to a wilful misconduct because McKenzie, as a crewmember, was aware of the CoC and the rules within, including the chain of command which she breaches. There is no need for malicious intent by McKenzie.

C. SaRidia is responsible under international law for unauthorized use of the Bondar

1. Valenkova has the right to exercise jurisdiction and control over the Bondar under Art. VIII OST

Art. VIII OST sets forth that the State of Registry "shall retain jurisdiction and control"⁷⁹ over a space object launched into outer space, with Art. 5 SSH-IGA being established pursuant to

⁷⁵ Art. 16(3d) SSH-IGA; Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 638 (2015).

⁷⁶ BLACK'S LAW DICTIONARY 1089, 1737 (2009); Gaubert, *Insurance*, Handbook of Space Law 931, 936, 942 (2015); Moller, *Verschulden der Luftfrachtführer*, ZLW 250 (1955); Abraham, *Rechtsprechung zum Warschauer Abkommen*, ZLW 72 (1954); HAANAPPEL 81-82 (2003).

⁷⁷ HOBE 78, 170-171 (2019); CATALANO SGROSSO 312 (2011); De Roos, *Disciplinary Law in Space*, ISS 117 (2006).

⁷⁸ Compromis, §11-12.

⁷⁹ Art. VIII OST.

Art. VIII.⁸⁰ The State of Registry can require other States to refrain from interfering with the space object as well as dispose over its operations.⁸¹ While Art. I LIAB states that the term space object includes its “component parts as well as its launch vehicle and parts thereof”⁸², there is no universal definition of the term space object, a common understanding being an object launched or intended to be launched into outer space.⁸³

Valenkova is the State of Registry of the Bondar, which is situated in SaRidia following the seizure of the Bondar and disregard of the Commander’s orders by the SaRidian astronaut.⁸⁴

Valenkova as the State of Registry retains jurisdiction and control over its space object. McKenzie is not authorized to interfere with the Bondar either by Valenkova or by the Commander.

2. McKenzie’s unauthorized use of the Bondar is a direct breach of Sections II.A. and III.B. CoC and results in international responsibility for SaRidia

The CoC is an instrument that has been agreed upon by the SSH-IGA State Parties in order to regulate astronauts’ conduct, pursuant to the obligation in Art. 11(2) SSH-IGA “States shall ensure

⁸⁰ Von der Dunk, *International Legal Framework*, ISS 22 (2006); HAANAPPEL 23-24 (2003); Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 151 (2009); Von der Dunk, *International Space Law, Handbook of Space Law* 86-87 (2015); HOBE 87-88 (2019); Veldhuyzen/Masson-Zwaan, *Impending ESA Legal Framework*, ISS 48 (2006); Haanappel, *ISS-IGA*, ISS 109-110 (2006); LYALL/LARSEN 81 (2018); Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 632-633 (2015).

⁸¹ LACHS 68-70 (1972); HOBE 88 (2019); Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 157 (2009); HAANAPPEL 23-24 (2003); Lafferranderie, *Jurisdiction and Control of Space Objects*, ZLW 230-231 (2005).

⁸² Art. I(d) LIAB.

⁸³ Art. I(d) LIAB; Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 150 (2009); Smith/Kerrest, *Article I*, CoCoSL 114-115 (2013); HOBE 79-81 (2019); Gorove, *Toward a Clarification of the Term Space Object*, JSL 21 (1993); Von der Dunk, *Effective Exercise of in-Space Jurisdiction*, JSL 147, 157 (2015-2016); Lafferranderie, *La station spatiale*, Droit de l’espace 171-172 (1988); Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 651 (2015).

⁸⁴ Compromis, §9, 11, 14.

that their crewmembers observe the CoC”.⁸⁵ Astronauts must approve the CoC, as Section II.A.CoC further develops the obligation that “all SSH-crewmembers shall comply with the CoC and the SSH-Commander’s orders” during all orbital activities, Section III.CoC stipulates that the SSH-Commander is “the highest authority among SSH-crewmembers” on-orbit, who can use “any reasonable and necessary means to fulfil her responsibilities” in any occurring event, including situations where ground control cannot be consulted.⁸⁶ The regulation of the highly complex environment of space stations, including the crucial human component as well as the SSH-Commander’s quasi-monopoly of authority on board are an indispensable consequence of the military-analogue environment and ultra-hazardous nature of space exploration.⁸⁷

Additionally, Art. IX OST highlights the importance of States conducting activities in outer space with due regard to and being guided by the corresponding interests of other States while not compromising the safety of space operations, which might be considered especially important in

⁸⁵ Art. 11(2) SSH-IGA; HOBE 170-171 (2019); LYALL/LARSEN 129-130 (2018); De Roos, *Disciplinary Law in Space*, ISS 117 (2006); De Faramiñán Gilbert, *L’expérience des astronautes*, SPACE SOJOURNS 50-51 (2005); CATALANO SGROSSO 312 (2011); BLACK’S LAW DICTIONARY 1499 (2009); Brünner/Soucek, *Regulating ISS*, ACTA ASTRONAUTICA 597 (2007).

⁸⁶ CoC, II.A; CoC, III.A.(2)(c); CoC, III.B; De Roos, *Disciplinary Law in Space*, ISS 117-119 (2006); CATALANO SGROSSO 312 (2011); Brünner/Soucek, *Regulating ISS*, ACTA ASTRONAUTICA 597 (2007); Lafferranderie, *La station spatiale*, Droit de l’espace 182 (1988); LYALL/LARSEN 129-130 (2018); Catalano Sgrosso, *ISS*, IISL PROCEEDINGS 181 (2001); HOBE 170-171 (2019).

⁸⁷ Brünner/Soucek, *Regulating ISS*, ACTA ASTRONAUTICA 597 (2007); Dennerley, *State Liability for Collisions*, EJIL 281 (2018); De Roos, *Disciplinary Law in Space*, ISS 117 (2006); LYALL/LARSEN 113, 431-432 (2018); Robinson, *Space Station Legal Theory*, IISL PROCEEDINGS 223, 235 (1974); CATALANO SGROSSO 106-107 (2011); Kerrest/Smith, *Article VII*, CoCoSL 129 (2009); Lafferranderie, *La station spatiale*, Droit de l’espace 181 (1988); Robinson, *Responsible Legal Regime*, IISL PROCEEDINGS 35-37 (1972).

a venture successfully built on international cooperation such as the SSH.⁸⁸ Furthermore, Art. V OST establishes an obligation of astronauts to provide all possible assistance to astronauts of other State Parties in case of threatening circumstances in outer space.⁸⁹

After Commander Curieux had denied the SaRidian proposition regarding the course of action, McKenzie challenged the chain of command and secured herself in the Bondar.⁹⁰ She acted against orders of her superior by entering the Bondar without authorization of the Commander.⁹¹ The Commander further ordered McKenzie to exit the vehicle and evacuate with the rest, albeit there were alleged transmission problems.⁹² The ensuing delay impacted the escape of the crew.⁹³

As a crewmember, McKenzie has to approve the CoC and ensure the compliance with therein covered situational measures and the stipulated authority of the SSH-Commander. Her usage of the Bondar has clearly not been authorized by her superior and is not in adherence to the CoC. It is in fact a breach of the chain of command and therefore a breach of Section III. CoC. The ultra-hazardous environment of outer space conduct intensifies the graveness of this breach. Unwarranted action in space can lead to disastrous consequences, which explains the object and purpose of this provision. While it is not certain whether McKenzie could communicate with the Commander from inside the Bondar due to alleged transmission problems, her previous actions already disregard the chain of command and are thus in breach of the CoC.

⁸⁸ Art. IX OST; Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 619 (2015); LACHS 117 (1972); Marchisio, *Article IX*, CoCoSL 175-177 (2009); HOBE 60, 88-89 (2019); LYALL/LARSEN 458 (2018).

⁸⁹ Art. V OST; Von der Dunk/Goh, *Article V*, CoCoSL 98-100 (2009); CHENG 257-258 (1997).

⁹⁰ Compromis, §10-11.

⁹¹ Compromis, §11.

⁹² Compromis, §10-11.

⁹³ Compromis, §12.

By delaying the escape plan of the rest of the crew, McKenzie acts contrary to Art. IX OST as she simultaneously disregards the interests of the other State Parties to the OST and SSH. As she puts other astronauts in danger, McKenzie *e contratio* also breaches the obligation of assistance in Art. V OST.

SaRidia was under the obligation to ensure its' astronauts' adherence to the CoC according to Art. 11(2) SSH-IGA. As McKenzie's actions as a SaRidian astronaut are attributable to SaRidia, SaRidia breaches its obligation under Art. 11(2) SSH-IGA as a consequence of McKenzie's conduct.

D. SaRidia is responsible under international law for failure to return the Bondar

1. SaRidia is obliged to return the Bondar according to Art. 5(3) ARRA

Art. 5(3) ARRA obliges each State Party that has jurisdiction over territory on which a space object has been discovered to take action and practicable measures within the limits of the facilities at its disposal to recover the space object and upon request, return it to the launching authority.⁹⁴ The recovery and return obligation is contingent on the request of the launching State, usually communicated by way of diplomatic correspondence.⁹⁵ While the terminology is not coherent, launching authority in Art. 6 ARRA definitely includes a State responsible for launching and for the sake of effective assistance, there should be a uniform interpretation of the terms launching

⁹⁴ Art. 5(2)&(3) ARRA; LYALL/LARSEN 90-94 (2018); De Faramiñán Gilbert/Muñoz Rodríguez, *Return of Space Objects*, ARRA. Lessons Learned 44 (2011); CHENG 278 (1997); CATALANO SGROSSO 298 (2011); Von der Dunk, *International Space Law*, Handbook of Space Law 81 (2015).

⁹⁵ Marboe/Neumann/Schrogl, *ARRA*, CoCoSL 68 (2013); LACHS 83 (1972); Marchisio, *Reviewing ARRA*, ARRA. Lessons Learned 144 (2011); CHENG 418 (1997); Hintz, *Weltraumgegenstände*, Handbuch des Weltraumrechts 183 (1991); Hodgkins, *Procedures under ARRA*, UN/IISL Proceedings 61-66 (2003).

authority and State of Registry where one exists, to ensure allocation of a launching State to a space object as postulated by Art. VIII OST and further developed by the REG.⁹⁶

During the unauthorized use, the Bondar was piloted to SaRidia, which prompted Valenkova, the State of Registry, to initiate diplomatic negotiations to deal with the misuse of its property, however these negotiations were fruitless.⁹⁷

As State of Registry, Valenkova is responsible for the launching of the Bondar. The placement within a hangar in SaRidia means that recovery and return is within the limits of SaRidian facilities: the location is known and there are no perceptible obstacles in the way of return. The obligation to return in Art. 5(3) ARRA was triggered by Valenkova initiating diplomatic negotiations in an appropriate manner to deal with the misuse of property.

2. SaRidia is under an obligation to return the Bondar according to Art. VIII OST

Art. VIII 3S. OST establishes an obligation for space objects found beyond the limits of the State of Registry to be returned to that State Party.⁹⁸

The Bondar is registered to Valenkova and is currently situated in SaRidia following McKenzie's unauthorized use.⁹⁹

⁹⁶ Art. 6 ARRA; Art. II REG; LACHS 86, 94-95 (1972); Schmidt-Tedd, *Article I*, CoCoSL 244-246, 248 (2013); LYALL/LARSEN 77-78, 123-126 (2018); Bourely, *La régime juridique*, *Droit de l'espace* 38 (1988).

⁹⁷ Compromis §9, 14-15.

⁹⁸ Art. VIII OST; Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 165 (2009); LYALL/LARSEN 58-59 (2018); CHENG 259 (1997); Hintz, *Weltraumgegenstände*, *Handbuch des Weltraumrechts* 182 (1991).

⁹⁹ Compromis, §9, 11, 14.

Art. VIII's aim is the return of objects found outside the territory of the State of Registry. As the Bondar is situated beyond the borders of Valenkova, it is to be returned to its State of Registry.

3. SaRidia's unauthorized retention of the Bondar prevents Valenkova to exercise its right of jurisdiction and control under Art. VIII OST

As discussed above, Art. VIII OST establishes the right of the State of Registry to jurisdiction and control.¹⁰⁰ The two elements, jurisdiction, the expression of power of the State to legally enforce, and control, the factual element of State powers, are linked and serve as baseline for States fulfilling their international responsibilities and for the exclusion of other States interfering with a space object.¹⁰¹ Jurisdiction encompasses legislative, executive and judicial powers of a State as well as the competence of a State to regulate the conduct of natural and juridical persons.¹⁰²

Continuing breaches of international obligations extend over a period of time during which the obligation is not met and a State has to cease the act causing the breach. The wrongful acquisition of property without consent disrupts the State's rights and the failure to return the object would constitute a continuing breach.¹⁰³

McKenzie seized the Bondar, whose State of Registry is Valenkova, and piloted it back to SaRidian territory without authorization from the Commander or from Valenkova, where the

¹⁰⁰ See II.B.1.

¹⁰¹ Art. VI OST; Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 150, 157 (2009); Lafferranderie, *Jurisdiction and Control of Space Objects*, ZLW 231 (2005); Kyriakopoulos, *Jurisdiction and Control over Installations and Facilities*, IISL PROCEEDINGS 451 (2015); LACHS 69 (1972); HOBE 60, 88 (2019); HAANAPPEL 23-24 (2003); Lafferanderie, *La station spatiale*, *Droit de l'espace* 173-175 (1988).

¹⁰² CRAWFORD 440 (2019); Kyriakopoulos, *Jurisdiction and Control over Installations and Facilities*, IISL PROCEEDINGS 448 (2015); O'KEEFE 3 (2015); BLACK'S LAW DICTIONARY 927 (2009).

¹⁰³ ARSIWA 14, 30; ILC Report 59-1, 60-3,4,8, 86-3, 88-1 (2001); *Gabčíkovo-Nagymaros* case 63-101 (1997); *Rainbow Warrior* 264-101 (1986); *Tehran Hostages* case 27-80 (1980); CRAWFORD 431-433 (2019); Sohn/Baxter, *State Responsibility*, AJIL 553 (1961); LOWE 115 (2007); *Jurisdictional Immunities* case 113 (2012).

Bondar remains to this day as the diplomatic negotiations regarding misuse of property initiated by Valenkova were fruitless.¹⁰⁴

Valenkova, as the State of Registry, has the right to jurisdiction and control and is prevented from exercising its rights because of McKenzie's unauthorized conduct. If Valenkova had consented or acquiesced to the Bondar's placement, it would not have initiated diplomatic negotiations or filed an application with the Court to rule on the "failure to return" the Bondar. As the ongoing unauthorized retention of the Bondar amounts to a continuous breach of Art. VIII OST, SaRidia is obliged to end the wrongful retention and return the Bondar.

¹⁰⁴ Compromis, §9, 11, 14-15.

III. The SaRidian crewmember should be extradited to Valenkova for prosecution for the death of the Valenkovan astronaut and for endangering the safety of the SSH crew and the Valenkovan transport vehicle

A. Valenkova has jurisdiction over the Bondar

1. Valenkova has jurisdiction under Art. VIII OST

As previously mentioned,¹⁰⁵ Art. VIII OST stipulates that the State “on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space”.¹⁰⁶ This provision is comparable to the flag state principle,¹⁰⁷ which derives from the law of the sea and declares that States hold jurisdiction over ships that bear their flag.¹⁰⁸ The meaning of having control over a space object has been discussed above.¹⁰⁹ This jurisdiction also encompasses crimes that have been partly committed in the territory of the State.¹¹⁰ As a consequence, the State of Registry is able to apply its national law on the space object and the personnel on it, including criminal law matters.¹¹¹

¹⁰⁵ See II.C.1.

¹⁰⁶ Art. VIII OST.

¹⁰⁷ Sloup, *Legal Regime of International Space Flight*, IISL PROCEEDINGS 151 (1979); HOBE 88 (2019); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 327 (2015); Hardenstein, *In Space, No One Can Hear You Contest Jurisdiction*, JALC 275-276 (2016).

¹⁰⁸ Honniball, *The Exclusive Jurisdiction of Flag States*, IJMCL 502 (2016); SHAW 455 (2017); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 327 (2015); McGinley, *The Achille Lauro Affair*, TLR 708 (1985); O’KEEFE 14 (2015); also “vessels on the high seas are subject to no authority except that of the State whose flag they fly”; *Lotus case* 25 (1927).

¹⁰⁹ See II.D.3.

¹¹⁰ SHAW 490 (2017); RYNGAERT 75-76 (2008).

¹¹¹ Kyriakopoulos, *Jurisdiction and Control over Installations and Facilities*, IISL PROCEEDINGS 451 (2015); Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 159 (2009); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 328 (2015); Bittlinger, *Menschen im Weltall*, Handbuch des Weltraumrechts 210 (1991); Von der Dunk, *The Origins of Authorisation*, National Space Legislation in Europe 25 (2011); Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 627 (2015).

Personnel in the meaning of Art. VIII includes all persons aboard the space object,¹¹² not only nationals of the State of Registry but also nationals of other States.¹¹³ In case of the latter, the personal jurisdiction of the national State is being set aside in favour of the quasi-territorial jurisdiction of the State of Registry.¹¹⁴ Under quasi-territorial jurisdiction, a State exercises its jurisdiction over criminal acts that have been committed on ships, aircrafts or space objects that bear its nationality.¹¹⁵

The transfer vehicle Bondar is registered to Valenkova. McKenzie, a SaRidian national, secured herself on it¹¹⁶ and refused to leave, even after the crew tried to persuade her. This led to their delayed escape, collision with debris and crash, which cost the life of a Valenkovan national. During the crash, McKenzie was on board the Bondar in outer space.¹¹⁷

Although Mikaela died on earth, the actions that caused her death have taken place in outer space. Without McKenzie's behaviour the crew would have escaped on time and would not have collided with debris and crashed to earth. Since Valenkova is the State of Registry, it retains jurisdiction and control over the Bondar, resulting in the applicability of Valenkovan national law on the vehicle and over all personnel thereof. The Bondar is a space object since it was launched into

¹¹² LACHS 67 (1972); Vereshchetin, *Legal Status of International Space Station Crews*, IISL PROCEEDINGS 166 (1979); Bittlinger, *Menschen im Weltall*, Handbuch des Weltraumrechts 212 (1991); for the term space object see I.I.C.1.

¹¹³ CHENG 231 (1997); Hermida, *Crimes in Space*, AASL 409 (2006); Vereshchetin, *Legal Status of International Space Station Crews*, IISL PROCEEDINGS 166 (1979); Catalano Sgrosso, *Legal Status, Rights and Obligations of the Crew in Space*, JSL 180 (1998).

¹¹⁴ Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 627 (2015); Von der Dunk, *Effective Exercise of in-Space Jurisdiction*, JSL 156 (2015-2016); CHENG 231 (1997); Von der Dunk, *From Space Tourists to unruly Passengers?* IISL PROCEEDINGS 392 (2015).

¹¹⁵ Chatzipanagiotis, *Criminal and Disciplinary issues*, IISL PROCEEDINGS 217-218 (2008); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 326 (2008); CHENG 459 (1997); LOWE 175 (2007).

¹¹⁶ Compromis, §9, 11.

¹¹⁷ Compromis, §13-14.

outer space to be used there. Because all personnel thereof include nationals from other States and McKenzie was on board the Bondar, Valenkova has jurisdiction.

2. Valenkova has jurisdiction pursuant to Art. 5(2) SSH-IGA

Art. 5(2) SSH-IGA provides that “each Partner shall retain jurisdiction and control over the elements it registers [...] and over personnel in or on the Space Station who are its nationals”.¹¹⁸

This provision corresponds with the principle of jurisdiction and control in Art. VIII OST.¹¹⁹

Following Art. 5(1), flight elements are space objects registered by a State which are listed in the annex of the SSH-IGA.¹²⁰ Those space objects can be the modules or other main components a State contributes to the space station.¹²¹

Valenkova and SaRidia are Parties to the SSH-IGA.¹²² The Bondar is a space object, docked to the SSH and Valenkova is the State of Registry.¹²³

Following the above, the Bondar is to be regarded as a flight element in the meaning of Art. 5(2), especially as this provision is based on Art. VIII OST. Consequently, Valenkova has jurisdiction over it and over any personnel on it, in particular McKenzie.

¹¹⁸ Art. 5(2) SSH-IGA.

¹¹⁹ Moenter, *The ISS*, JALC 1033, 1046 (1999); Reifarth, *Rechtliche Aspekte des Übereinkommens über die Internationale Raumstation*, ZLW 46 (1989); LYALL/LARSEN 113 (2018); CATALANO SGROSSO 240 (2011); Schmidt-Tedd/Mick, *Article VIII*, CoCoSL 160 (2009); CHENG 489 (1997); Sharpe/Tronchetti, *Public Manned Spaceflight*, Handbook of Space Law 633 (2015).

¹²⁰ Art. 5(1) SSH-IGA.

¹²¹ Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 329 (2015).

¹²² Compromis, §16.

¹²³ Compromis, §9.

3. Valenkova has criminal jurisdiction under Art. 22(2) SSH-IGA

Art. 22(2) stipulates that if there has been “a case involving misconduct on orbit”¹²⁴ the State of nationality of the victim or of the flight object can request consultation with the State of nationality of the perpetrator.¹²⁵ After such consultation the State can exercise its jurisdiction, if the State of the nationality of the perpetrator agrees to the prosecution in the other State or if it fails to assure that the person will be prosecuted in its home state.¹²⁶

McKenzie disobeyed the Commander and secured herself on the Bondar, which is registered to Valenkova.¹²⁷ She refused to leave, although the rest of the crew tried to persuade her. This directly resulted in their delayed escape, a collision with debris and the death of a Valenkovan national.¹²⁸ Concurrently, McKenzie was situated on the Bondar. Valenkova subsequently initiated diplomatic consultations with SaRidia, which failed. There is no evidence that SaRidia provided assurances that it will submit the case to its competent authorities for the purpose of prosecution.¹²⁹ On the contrary, McKenzie resumed her training in SaRidia and is preparing for her next mission to the SSH.¹³⁰

¹²⁴ Art. 22(2) SSH-IGA.

¹²⁵ Art. 22(2) SSH-IGA; Farand, *Jurisdiction and Liability*, ISS 91 (2006); LYALL/LARSEN 129 (2018); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 331 (2015); Yakovenko, *The intergovernmental agreement on the ISS*, SPACE POLICY 83-84 (1999).

¹²⁶ Art. 22(2) SSH-IGA; Nagel, *Das neue Regierungsübereinkommen über die Internationale Raumstation*, ZLW 147 (1998); LYALL/LARSEN 129 (2018); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 331 (2015); Yakovenko, *The intergovernmental agreement on the ISS*, SPACE POLICY 83-84 (1999).

¹²⁷ Compromis, §9.

¹²⁸ Compromis, §12-13.

¹²⁹ Compromis, §14-15.

¹³⁰ Compromis, §14.

Valenkova is the State of nationality of the victim and of registry of the space object. Since McKenzie caused the death of a Valenkovan national and was on the Bondar during the events, Valenkova had the right to demand consultations. They failed without assurances by SaRidia that it will submit the case to its authorities for the purpose of prosecution. Consequently, Valenkova can exercise criminal jurisdiction.

4. Valenkova has jurisdiction under CIL, based on the passive personality principle

Following the passive personality principle, jurisdiction of a State can be determined through the nationality of the victim of a crime.¹³¹ Its objective is to protect the nationals of a State abroad.¹³²

This principle is CIL in the meaning of Art. 38(1)(b) ICJ Statute,¹³³ which is a source of space law,¹³⁴ as argued by Judge Lachs in his dissenting opinion in the *North Sea Continental Shelf* cases.¹³⁵ As mentioned before, there are two elements of CIL, namely the actual practice and the *opinio iuris* of States.¹³⁶

¹³¹ SHAW 497 (2017); LOWE 175 (2007); Akande, *Passive Personality Principle*, Oxford Companion 451 (2009); Ratner, *Establishing the Extraterrestrial*, BCICLR 329 (1999); Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism*, VJIL 201 (1983); O'KEEFE 12 (2015); Watson, *The Passive Personality Principle*, TILJ 2 (1993); BASSIOUNI 408 (2014).

¹³² BASSIOUNI 408 (2014); Watson, *The Passive Personality Principle*, TILJ 18 (1993); Akande, *Passive Personality Principle*, Oxford Companion 451 (2009); Sarkar, *The Proper Law of Crime in International Law*, ICLQ 461 (1962).

¹³³ Art. 38(1)(b) ICJ Statute.

¹³⁴ Jakhu/Freeland, *The Sources of International Space Law*, IISL PROCEEDINGS 466 (2014); Vereshchetin/Danilenko, *Custom as a Source of International Law of Outer Space*, JSL 22-23, 25 (1985); Böckstiegel, *Grundlagen des Weltraumrechts*, Handbuch des Weltraumrechts 28 (1991).

¹³⁵ “[T]he first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time.”, *North Sea Continental Shelf* cases (DO) 230 (1969).

¹³⁶ See I.D.1.

In the *Cutting* case a Mexican court based its jurisdiction on the passive personality principle.¹³⁷ Furthermore, an US-court has applied the principle in *US v. Yunis*,¹³⁸ when it stated that “the international community recognizes” the legitimacy of this principle.¹³⁹ Moreover, in a joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal state that the passive personality principle “meets with relatively little opposition”.¹⁴⁰ France even incorporated it in their national law.¹⁴¹ Nowadays many international criminal law treaties provide for jurisdiction under this principle,¹⁴² as does Art. 22(2) SSH-IGA.¹⁴³

Following the above, practice and *opinio iuris* are evident through the fact that States have applied it through national judgements and incorporated it into their national law. Moreover, there are many international conventions that contain this principle. Consequently, the passive personality principle can be regarded as CIL.

¹³⁷ Beckett, *Exercise of Criminal Jurisdiction over Foreigners*, BYIL 46 (1925); Watson, *The Passive Personality Principle*, TILJ 5 (1993); McGinley, *The Achille Lauro Affair*, TLR 712 (1985); Cafritz/Tene, *Article 113-7 of the French Penal Code*, CJTN 593 (2003); SHAW 497 (2017).

¹³⁸ SHAW 498 (2017); Watson, *The Passive Personality Principle*, TILJ 11 (1993); MCCORQUODALE/DIXON 281-282 (2003); the US used this principle also *inter alia* in *US v. Felix-Gutierrez* (1991); *US v. Benitez* (1984).

¹³⁹ *US v. Yunis* II.A.2. (1988).

¹⁴⁰ *Arrest Warrant* case (JSO) 77 (2007).

¹⁴¹ Cafritz/Tene, *Article 113-7 of the French Penal Code*, CJTN 587 (2003); Akande, *Passive Personality Principle*, Oxford Companion 452 (2009); BASSIOUNI 410 (2014); Akehurst, *Jurisdiction in International Law*, BYIL 162-164 (1972-1973); Echle, *The Passive Personality Principle*, ULR 61 (2013); also Germany and Switzerland.

¹⁴² Bantekas, *Criminal Jurisdiction of States under International Law*, MPEPIL (2007); Akande, *Passive Personality Principle*, Oxford Companion 451 (2009); SHAW 498 (2017); O’KEEFE 13 (2015); Watson, *The Passive Personality Principle*, TILJ 9-10 (1993); also International Convention against the Taking of Hostages; 1994 Convention on the Safety of UN and Associated Personnel.

¹⁴³ Ratner, *Establishing the Extraterrestrial*, BCICLR 342 (1999); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 323 (2015).

Mikaela, who died in the crash, was a Valenkovan national.¹⁴⁴

Under the passive personality principle, Valenkova, as the State of nationality of the victim, has jurisdiction over McKenzie.

B. SaRidia has to extradite McKenzie to Valenkova

1. SaRidia is under the obligation to extradite McKenzie based on Art.°22(4)°SSH-IGA, in conjunction with Art.°22(3)°SSH IGA

Extradition means to transfer a person suspected or convicted of a crime in one State to another State.¹⁴⁵ Usually extradition is subject to either bilateral or multilateral treaties¹⁴⁶ and there is no duty for a State under CIL to extradite someone.¹⁴⁷

Following Art. 22(4) SSH-IGA, “[e]ach Partner State shall [...] afford the other Partners assistance in connection with alleged misconduct on orbit”.¹⁴⁸ Mutual legal assistance refers to cooperation between States regarding criminal matters¹⁴⁹ and it can come in many forms, including extradition.¹⁵⁰

¹⁴⁴ Compromis, §13.

¹⁴⁵ CRAWFORD 465 (2019); SHAW 514 (2017); BLACK’S LAW DICTIONARY 667 (2009); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 326 (2015); LOWE 181 (2007); O’KEEFE 35 (2015); Stefanovska, *Diplomatic Assurances*, JCJS 173 (2017).

¹⁴⁶ Cullen/Burgess, *Extradition from A to Z*, UWALR 210 (2015); SADOFF 138, 141 (2017); O’KEEFE 35 (2015); LOWE 182 (2007); BASSIOUNI 500-501 (2013).

¹⁴⁷ BASSIOUNI 8 (2014); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 327 (2015); CRAWFORD 465 (2019); Chatzipanagiotis, *Criminal Issues in International Space Law*, EJLR 107 (2016).

¹⁴⁸ Art. 22(4) SSH-IGA.

¹⁴⁹ Salomon, *Mutual Legal Assistance in Criminal Matters*, MPEPIL (2013); KRÜßMANN 65 (2009); De Busser, *The Digital Unfitness of Mutual Legal Assistance*, SHR 162 (2017).

¹⁵⁰ CRAWFORD 663 (2019); Sinha, *Criminal Jurisdiction on the ISS*, JSL 123 (2004); Cullen/Burgess, *Extradition from A to Z*, UWALR 210 (2015); De Busser, *The Digital Unfitness of Mutual Legal Assistance*, SHR 162, 164 (2017).

Art.°22(3) provides the possibility for a State to “consider this Agreement as the legal basis for extradition”, if there is no extradition treaty between States.¹⁵¹ The SSH-IGA is not the only treaty that gives States the opportunity to regard an agreement as a basis for extradition, if the States concerned do not have bilateral extradition treaties.¹⁵²

McKenzie is situated in SaRidia.¹⁵³ Valenkova wants to prosecute her, but negotiations with SaRidia ended unsatisfactorily. There is no bilateral extradition treaty between the two States.¹⁵⁴

Valenkova can demand the extradition of McKenzie based on Art.°22(4) in connection with Art.°22(3). Firstly, the IGA can be used as a basis for extradition. Secondly, the duty for legal assistance entails the extradition of persons suspected of criminal behaviour. Since Valenkova and SaRidia do not have a bilateral extradition treaty, but are parties to the IGA, Valenkova can base its claim on SaRidia’s duty for mutual legal assistance.

2. Art.°4°ARRA is applicable

Art.°4°ARRA stipulates that if “owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party [...], they shall be safely and promptly returned to representatives of the launching authority”.¹⁵⁵ Although

¹⁵¹ Art. 22(3) SSH-IGA; MASSON-ZWAAN/HOFMANN 82 (2019); Yakovenko, *The intergovernmental agreement on the ISS*, SPACE POLICY 84 (1999).

¹⁵² See Art. 8, Hague Hijacking Convention; Chatzipanagiotis, *Criminal and Disciplinary issues*, IISL PROCEEDINGS 5 (2008); BASSIOUNI 11 (2014); Chatzipanagiotis/Moro-Aguilar, *Criminal Jurisdiction in International Space Law*, IISL PROCEEDINGS 327 (2008); SADOFF 144 (2017).

¹⁵³ Compromis, §14.

¹⁵⁴ Compromis, §15-16.

¹⁵⁵ Art. 4 ARRA.

there is no definition of the term personnel of a spacecraft,¹⁵⁶ it refers to all persons aboard the vehicle.¹⁵⁷ As previously stated,¹⁵⁸ launching authority in this context means the State responsible for launching the spacecraft.¹⁵⁹ The duty to return is unconditional.¹⁶⁰ Art.º4 does not elaborate on what is meant by “accident, distress, emergency or unintended landing”.¹⁶¹ However, the landing can be regarded as unintentional if it would not have taken place without an accident, distress or emergency.¹⁶² Consequently, this also covers instances in which the astronaut was able to select a specific landing spot, but the landing itself was due to one of the situations mentioned in Art.º4.¹⁶³

After the events stated above, McKenzie piloted the Bondar, a transfer vehicle registered to Valenkova, to SaRidia.¹⁶⁴ SaRidia and Valenkova are parties to ARRA.¹⁶⁵

Valenkova, as the State of Registry of the Bondar, is the launching authority. McKenzie is aboard the Bondar, therefore she is personnel of a spacecraft in the meaning of Art.º4. The landing was unintentional since there has been a case of emergency during which McKenzie seized the Bondar

¹⁵⁶ Hobe, *Legal Aspects of Space Tourism*, NLR 455 (2007); Marboe/Neumann/Schrogl, *Preamble*, CoCoSL 35 (2013).

¹⁵⁷ LACHS 67, 75 (1972); Hobe, *Legal Aspects of Space Tourism*, NLR 455-456 (2007); Wood, *Applicability of Rescue and Return Provisions under the OST*, IISL PROCEEDINGS 117-118 (2014); Dembling/Arons, *Treaty on Rescue and Return of Astronauts and Space Objects*, WMLR 643 (1968).

¹⁵⁸ See II.D.1.

¹⁵⁹ Art. 6 ARRA; Marboe/Neumann/Schrogl, *Article 4*, CoCoSL 61 (2013); Von der Dunk, *International Space Law*, Handbook of Space Law 81 (2015); LACHS 80 (1972).

¹⁶⁰ Marboe/Neumann/Schrogl, *Article 4*, CoCoSL 61 (2013); Dembling/Arons, *Treaty on Rescue and Return of Astronauts and Space Objects*, WMLR 652 (1968); LYALL/LARSEN 125 (2018).

¹⁶¹ Art. 4 ARRA; Gorove, *Legal Problems of the Rescue and Return of Astronauts*, IL 899 (1969).

¹⁶² Gorove, *Legal Problems of the Rescue and Return of Astronauts*, IL 900 (1969).

¹⁶³ Dembling/Arons, *Treaty on Rescue and Return of Astronauts and Space Objects*, WMLR 647 (1968); Gorove, *Legal Problems of the Rescue and Return of Astronauts*, IL 900 (1969).

¹⁶⁴ Compromis, §9-10, 14.

¹⁶⁵ Compromis, §16.

and caused the unintended landing. Consequently, McKenzie has to be turned over to the representatives of Valenkova.

SUBMISSIONS TO THE COURT

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

- I. SaRidia violated international law when its crewmembers challenged the legitimacy of the Valenkovan CDM.
- II. SaRidia is liable under international law for unauthorized use of, and failure to return, the Bondar and for the loss of the Valenkovan life on the Sharman.
- III. The SaRidian crewmember should be extradited to Valenkova for prosecution for the death of the Valenkovan astronaut and for endangering the safety of the SSH crew and the Valenkovan transport vehicle.

Respectfully submitted on behalf of the Applicant,

Agents for the Applicant.