# BENCH MEMORANDUM

## CASE CONCERNING THE J-VID-18 PANDEMIC

Version 1.0

9 January 2021

*** * * CONFIDENTIAL * * ***

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# TABLE OF CONTENTS

# 1 PURPOSE OF THE BENCH MEMORANDUM

The Bench Memorandum provides judges with basic factual and legal information to evaluate the written memorials and oral pleadings of participating teams. It should be read in conjunction with the 2021 Jessup Problem and the 2021 Corrections and Clarifications.

The Problem was designed to present the competitors with legal issues that have strengths and weaknesses on each side. Jessup teams should be able to construct logical arguments as both Applicant and Respondent. As a judge, your task is to evaluate the quality of each team's analysis, knowledge of international law, and advocacy skills. Please make sure not to confuse this task with an evaluation of the merits of the case.

The Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Problem. It cannot cover every last detail, though we do aim to contextualize the law both within society and within the events of the Problem. In many instances, relevant case law and State practice is alluded to, but may not be discussed in depth. Competitors should address cases and principles of law. State practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or cite authorities that may not be discussed in this Memorandum. This is perfectly appropriate, and does not suggest that such arguments are not relevant or credible. Similarly, judges should keep in mind that Jessup teams are under both word count limitations in memorials and time restrictions during oral rounds that will make it necessary for them to condense their arguments in certain instances.

As always, judges are encouraged to engage in their own independent research on the issues or examine the suggested research materials given to students. These materials are available online under the "Competition Materials" section of the Jessup Competitors website.

One of the most rewarding parts of Jessup for students is being asked questions during oral arguments. To this end, there are sample questions (some of which come with suggested answers) embedded throughout the Bench Memorandum that you should feel free to ask oralists, as you consider appropriate.

# 2 SUMMARY OF THE FACTS

The 2021 Jessup Problem concerns four issues: (1) an entry regulation in response to a disease outbreak; (2) refuge on consular premises; (3) reservations to the ICJ's jurisdiction; and (4) the shoot-down of a civil aircraft.

The Applicant (Aprepluya) and the Respondent (Ranovstayo) are two developed, democratic States sharing a border. Aprepluya's capital (Beauton) lies just 130 kilometers west of Ranovstayo's capital (Bogpadayo). Another 100 kilometers west of Beauton is Aprepluya's Segura Province, where Ranovstayo has a consulate.

Aprepluya has historically had an active tourism industry. From 2013 to 2017, approximately 25% of foreign tourists in Aprepluya were either Ranovstayan nationals or residents, and another 40% were third-country nationals who traveled to or from Aprepluya through the Bogpadayo Airport, the busiest airport in the region.

In March 2018, health authorities in Hadbard, a country located eight time zones away from Aprepluya and Ranovstayo, reported a large number of cases of a respiratory condition called J-VID-18, caused by an unknown strain of virus called J-18. The virus quickly spread to other countries, such that on 20 April 2018 the WHO Director-General declared the outbreak a public health emergency of international concern ("PHEIC"). The Director-General nonetheless stated that "travel and trade restrictions are not recommended."

In response, on 22 April 2018 Ranovstayo adopted an entry regulation that, among other things, prohibited all non-Ranovstayan nationals who had been in a "high-risk country" (as listed by Ranovstayo's Ministry of Health) within the previous 18 days from entering the territory of Ranovstayo. On 15 May 2018, WHO declared that J-VID-18 constituted a pandemic.

Meanwhile, Aprepluya had undertaken to develop a vaccine for J-VID-18 at its National Bioresearch Laboratory ("NBL") in Segura Province. In late May, various NBL employees working on the project started getting sick. On 3 June 2018, one of the lab technicians, Ms. Keinblat Vormund, published on Twitter that eight of her colleagues had developed symptoms of J-VID-18. After being pursued by the Aprepluyan police, she fled to the Ranovstayan consulate in Segura Province.

The next day, 4 June 2018, the Governments of Aprepluya and Ranovstayo had a meeting by video conference. Aprepluya reported that just a few hours earlier the results of the first two J-VID-18 tests had been received, and both were confirmed to be positive. Ranovstayo expressed its disappointment with Aprepluya's failure to take precautionary measures prior to this confirmation, and stated that it intended to list Aprepluya as a "high-risk country." It furthermore stated that it had decided to consider Ms. Vormund to be an applicant for asylum, and so would allow her to remain at the consulate for the time being.

The following day, 5 June 2018, Aprepluya publicly announced the confirmed cases of J-VID-18 in Segura Province, and barred travel into and out of the Province. From 5 to 7 June 2018, approximately 80% of tourists in Aprepluya left the country. On 7 June, Ranovstayo's Ministry of Health added Aprepluya to the list of "high-risk countries," effective at 00:01 local time on 8 June.

That day, 8 June 2020, Aprepluya's Prosecutor's Office formally charged Ms. Vormund with violating the National Penal Code by, among other things, breaching her non-disclosure agreement

with the government. The next day, Aprepluya formally requested that Ranovstayo surrender Ms. Vormund, who was still at Ranovstayo's consulate in Segura Province. Ranovstayo refused, but it was in any case planning to close its consulate in Segura Province on 26 June because of the outbreak of J-VID-18.

Some time on 24 or 25 June 2020, Ms. Vormund secretly left the consulate, and arranged with her pilot friend Ms. Gwo Hye to travel to Segura Airport and fly a Mantyan Airways aircraft to Ranovstayo, in order to seek asylum there. Their aircraft took off in the early morning of 26 June. Aprepluya's Air Force noticed the unauthorized departure and tried to communicate with the aircraft, but Ms. Vormund and Ms. Hye refused to respond. Concerned that the aircraft could be used in a terror attack on Beauton in light of recent intelligence reports, the Air Force sent a fighter jet to intercept the aircraft. After unsuccessfully attempting communication, making signals, and firing tracers, the pilot of the fighter jet fired a short burst at the wing root area of the aircraft, in the hope that it would be forced to land. Ms. Hye, however, was unable to maintain control after being hit, and the plane crash landed in a forest 12 kilometers from the presidential palace in the heart of Beauton.

On 12 July 2020, Aprepluya filed an Application with the ICJ instituting proceedings against Ranovstayo, alleging that the entry restrictions affecting Aprepluya and its nationals, as well as the decision allowing Ms. Vormund to stay at the Segura Consulate, were in violation of international law. Four days later, Ranovstayo notified the Court that it wished to file a counter-claim against Aprepluya, asserting that the shoot-down of the Mantyan Airways aircraft violated international law. Two days later, Aprepluya noted its intention to contest the Court's exercise of jurisdiction over that counter-claim.

Both States have made declarations under Article 36(2) of the ICJ Statute accepting the jurisdiction of the Court, but Aprepluya's declaration also includes a reservation that excludes "any dispute concerning Aprepluyan military activities," as well as "any dispute with regard to matters which are essentially within the domestic jurisdiction of the United Republic of Aprepluya, as determined by the Government of the United Republic of Aprepluya."

# 3 ANALYSIS OF THE LAW

## 3.1 PRELIMINARY MATTERS

### 3.1.1 Jurisdiction

The jurisdiction of the International Court of Justice ("**ICJ**" or "**the Court**") over the disputes between Aprepluya and Ranovstayo derives from the two States' declarations under Article 36(2) of the ICJ Statute (also called "optional clause declarations"). Article 36(2) provides in relevant part that the State Parties to the Statute, including Aprepluya and Ranovstayo, may "declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes." Aprepluya and Ranovstayo both made such declarations in the early 2000s (Agreed Facts, para. 48), so the Court may found its jurisdiction on those declarations. It should be noted, however, that Aprepluya included a reservation in its declaration (Agreed Facts, para. 49), which is the subject of Question 3, discussion in Section 3.4 below.

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| **Q:** | Agent, what is the basis for the Court's jurisdiction over the disputes between Aprepluya and Ranovstayo?<br>• The Parties' optional clause declarations under Article 36(2) of the ICJ Statute. |

Because the Court's jurisdiction is based on these optional clause declarations, the Parties did not need to—and indeed did not—conclude a "compromis" (i.e., "special agreement") granting the Court jurisdiction. This differs from most prior Jessup problems, and carries two major practical consequences for the participants:

- First, teams should not refer to the Problem as a "compromis" or "special agreement" in their written memorials and oral pleadings. When citing specific paragraphs of the Problem, teams should refer to it as "the Statement of Agreed Facts," "the Agreed Facts," or simply "the Problem."
- Second, teams should not refer to a "compromis" or "special agreement" in the Statement of Jurisdiction of their written memorials. Rather, they should state that the Court's jurisdiction is based on the optional clause declarations that the Parties deposited with the UN Secretary-General under Article 36(2) of the ICJ Statute.
- Because of the long history of Jessup cases being referred to as the "compromis", however, we also do not recommend that teams who utilize that term be penalized severely in terms of points, particularly when judges may use that term as well as a matter of habit.

In any case, all oralists should be able to answer general questions concerning the Court's jurisdiction.

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| **Q:** | Agent, what are the four bases for the Court's jurisdiction generally?<br>• optional clause declarations (under Article 36(2) of the ICJ Statute)<br>• compromis (*i.e.*, special agreement) |

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| | • compromissory clause (*i.e.*, dispute resolution clause, dispute settlement clause)<br>• *forum prorogatum* |

It should be noted that Article 36(2) requires the existence of a "dispute" for the Court to have jurisdiction. This requirement of a "dispute" has engendered a lot of jurisprudence and commentary. Nevertheless, in the present case, the Order of the Court states that "the Parties have agreed that a 'dispute' between them exists with respect to each of the issues presented" (Problem, p. 3), so teams should not raise any jurisdictional objections based on the existence or absence of a "dispute."

### 3.1.2 Claims and Counter-Claims

Because Aprepluya initiated the proceedings against Ranovstayo, the claims Aprepluya makes against Ranovstayo are called "claims" and the claims Ranovstayo makes against Aprepluya are called "counter-claims."

- Aprepluya has two claims: (1) Ranovstayo violated international law by applying its entry regulation to Aprepluya (Question 1); and (2) Ranovstayo violated international law by failing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities after they requested her surrender on 9 June 2018 (Question 2).
- Ranovstayo has just one counter-claim: Aprepluya violated international law by shooting down the Mantyan Airways aircraft (Question 4).

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| **Q:** | Agent, what is the difference between a claim and a counter-claim? |

With respect to counter-claims, Article 80 of the ICJ's Rules of Court provides: "The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party." This provision contains two requirements.

- First, the counter-claim must come within the jurisdiction of the Court. This is the subject of Question 3 of the Problem.
- Second, the counter-claim must be directly connected with the subject matter of the claim of the other party. The Order of the Court notes that "the Parties have agreed ... that the counter-claim is 'directly connected with the subject matter' of at least one of the claims within the meaning of Article 80 of the Rules of Court" (Problem, p. 3), so Aprepluya cannot make an objection on this ground.

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| **Q:** | Agent, what are the two requirements for counter-claims under the ICJ's Rules of Court? |

## 3.2 QUESTION 1: ENTRY REGULATION

| *Aprepluya's Claim* | *Ranovstayo's Claim* |
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| Ranovstayo violated international law by applying its entry regulation to Aprepluya, and is thus obligated to compensate it for the resulting economic losses. | Ranovstayo did not violate international law by applying its entry regulation to Aprepluya, and even if it did, it should not be required to compensate Aprepluya for any claimed economic losses. |
| ***Aprepluya's Anticipated Argument*** | ***Ranovstayo's Anticipated Argument*** |
| Ranovstayo violated: (1) the International Health Regulations; (2) the human right to enter one's own country as enshrined in Article 12 of the ICCPR; and/or (3) the obligation to cooperate with WHO. Ranovstayo is obligated to compensate Aprepluya as a matter of reparation. | Ranovstayo did not violate: (1) the International Health Regulations; (2) the human right to enter one's own country as enshrined in Article 12 of the ICCPR; and (3) the obligation to cooperate with WHO. And even if it did, Ranovstayo is not obligated to compensate Aprepluya because compensation is inappropriate in this context. |

Question 1 recalls the issues that have arisen as a result of the widespread implementation of entry regulations in response to COVID-19. These issues have largely been dealt with as political matters. This Question, however, invites students to examine the legal aspects of these issues, in particular the legality of such entry regulations under international law.

Aprepluya's principal legal argument is that Ranovstayo has violated the International Health Regulations (**Section 3.2.1**). This is the core of this Question, and during oral arguments you should feel free to let this argument take up the vast majority of the time allotted for Question 1. Relatedly, Aprepluya may also argue that Ranovstayo violated human rights law, in particular the right to enter one's own country as enshrined in Article 12 of the ICCPR (**Section 3.2.2**). Finally, Aprepluya may also argue that Ranovstayo breached its obligation to cooperate with WHO (**Section 3.2.3**). After these arguments on the merits, Aprepluya will also have to argue that Ranovstayo must compensate it for these violations (**Section 3.2.4**).

### 3.2.1 International Health Regulations

As a general rule, States have the sovereign right to regulate entry into their own territories. Nevertheless, the 2005 International Health Regulations ("**IHR**"), which are binding on all WHO Member States (i.e., practically all States in the world),[1] impose limitations on the sovereign right of States to adopt "additional health measures" (including entry regulations) in response to disease

[1] The IHR were adopted under Article 21 of the WHO Constitution, and Article 22 provides in relevant part that "[r]egulations adopted pursuant to Article 21 shall come into force for all Members." Moreover, WHO refers to the IHR as a "binding instrument of international law." See WHO, *International Health Regulations (2005)*.

outbreaks. The IHR were adopted by the World Health Assembly, which is composed of representatives of WHO Member States. Although it might seem counter-intuitive that WHO Member States agreed to limit their own sovereign right to regulate entry into their territories, there were various reasons why they did so. Three are presented below.

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| **Q:** | Agent, are the International Health Regulations legally binding on Ranovstayo?<br>• Yes, they are legally binding on Ranovstayo because they were adopted under Article 21 of the WHO Constitution, and Article 22 provides in relevant part that "[r]egulations adopted pursuant to Article 21 shall come into force for all Members." |

First, according to WHO, history shows that travel restrictions, contrary to popular belief, are not actually very productive in stemming the spread of disease. As WHO has noted:

> Travel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and social impact.[2]

Second, as hinted at the end of this last passage, evidence shows that travel restrictions have severe economic and social repercussions on the countries targeted. According to WHO:

> In general, evidence shows that restricting the movement of people and goods during public health emergencies is ineffective in most situations and may divert resources from other interventions. Furthermore, restrictions may interrupt needed aid and technical support, may disrupt businesses, and may have negative social and economic effects on the affected countries.[3]

Third, in light of the severe economic and social consequences of travel restrictions, it is understood that States would be disincentivized to report disease outbreaks on their territories if they believed they could be targeted by such restrictions.[4]

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| **Q:** | Agent, for what policy reasons did the World Health Assembly, by adopting the International Health Regulations, wish to limit the sovereign right of States to regulate entry into their territories in response to disease outbreaks? |

For these three reasons, among others, WHO Member States decided to limit their sovereign right to impose entry regulations in response to disease outbreaks. It is also for these three reasons that WHO has repeatedly issued recommendations to States *not* to impose travel restrictions during public health emergencies of international concern ("**PHEICs**"), such as Ebola, zika, Kivu Ebola,

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[2] WHO, "Updated WHO recommendations for international traffic in relation to COVID-19 outbreak" (29 February 2020).
[3] WHO, "Updated WHO recommendations for international traffic in relation to COVID-19 outbreak" (29 February 2020).
[4] Ali Tejpar & Steven J. Hoffman, "Canada's Violation of International Law during the 2014–16 Ebola Outbreak," *Canadian Yearbook of International Law*, Vol. 54 (2016), pp. 369-370; Roojin Habibi et al., "Do not violate the International Health Regulations during the COVID-19 outbreak," *The Lancet*, Vol. 395, No. 10225 (13 February 2020), p. 664.

COVID-19,[5] just as was the case in the Problem (Agreed Facts, para. 8). Some commentators, including the head legal counsel of WHO from 2005-2016, have expressly taken the position that many States adopting travel restrictions in response to COVID-19 are in violation of the IHR.[6]

State practice over the last eight months, however, tells another story. The reality is that the large majority of States in the world have imposed entry restrictions in response to COVID-19. Some scholars have defended their legality.[7] And in WHO's April 2020 Strategy Update, it appeared to reverse its prior views, as it listed as a "global strategic objective":

> Suppress community transmission through context-appropriate infection prevention and control measures, population level physical distancing measures, and appropriate and proportionate restrictions on non-essential domestic and international travel.[8]

The result of all this is that there appears to be an incongruity between the text of the IHR, which imposes rather stringent conditions on travel restrictions, and State practice. This incongruity raises many general questions of international law that you should ask students during oral rounds.

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| **Q:** | Agent, how does the widespread State practice of entry regulations in response to COVID-19 affect the interpretation and application of the IHR? |
| **Q:** | Agent, does your answer to my previous question change in light of the fact that the State practice in response to COVID-19 occurred *after* the adoption and implementation of Ranovstayo's entry regulation? |
| **Q:** | Agent, on a more general level, if there is widespread State practice contrary to a rule of international law, what happens to that rule? Can you give me any examples of this? |

In any case, the students are expected to examine the precise provisions of the IHR that deal with "additional health measures," in particular Articles 43, 3, and 32. Although only these three articles are discussed in detail below, students should feel free to discuss other provisions of the IHR that they consider relevant.

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[5] For H1N1 and polio, on the day the WHO Director-General declared a PHEIC, he did not say anything about travel restrictions (H1N1, polio). For Ebola, zika, Kivu Ebola, and COVID-19, on the day the WHO Director-General declared a PHEIC, he and/or the Emergency Committee recommended against travel restrictions, stating "[t]here should be no general ban on international travel or trade" (Ebola), "[t]he Committee found no public health justification for restrictions on travel or trade" (zika), "[n]o country should close its borders or place any restrictions on travel and trade" (Kivu Ebola), and "[t]he Committee does not recommend any travel or trade restriction based on the current information available" (COVID-19).

[6] *See* Roojin Habibi et al., "Do not violate the International Health Regulations during the COVID-19 outbreak," *The Lancet*, Vol. 395, No. 10225 (13 February 2020), p. 664 ("In imposing travel restrictions against China during the current outbreak of 2019 novel coronavirus disease (COVID-19), many countries are violating the IHR."); *see also* Benjamin Mason Meier, "Travel restrictions violate international law," *Science*, Vol. 367, No. 6485, p. 1436.

[7] *See, e.g.*, Caroline Foster, "Justified Border Closures do not violate the International Health Regulations 2005," *EJIL: Talk!* (11 June 2020); *see also* Pedro A. Villarreal, "COVID-19 Symposium: "Can They Really Do That?" States' Obligations Under the International Health Regulations in Light of COVID-19 (Part I)," *Opinio Juris* (31 March 2020).

[8] WHO, COVID-19 Strategy Update (April 2020), p. 5 (emphasis added).

Article 43 restricts the ability of State Parties to take "additional health measures" beyond the Temporary Recommendations that "significantly interfere with international traffic," such as the entry restrictions in question. In particular, the determination to take such measures must be based on "scientific principles," "available scientific evidence of a risk to human health," and "any available specific guidance or advice from WHO" (**Section 3.2.1.1**), and must "not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives" (**Section 3.2.1.2**). In addition, Article 3 of the IHR provides that "[t]he implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons," and Article 32 similarly provides that "[i]n implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms" (**Section 3.2.1.3**).

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| **Q:** | Agent, what are the principles of interpretation applicable to the IHR? May the Court have recourse to the principles contained in Articles 31 to 33 of the VCLT? |

Before examining these three requirements in detail, it should be noted that there is of course no jurisprudence on or authoritative interpretation of Articles 43, 3, 32, or any other provision of the IHR. Nevertheless, students may invoke the jurisprudence of other areas of international law in order to interpret these articles. In particular, the Agreement on the Application of Sanitary and Phytosanitary Measures ("**the SPS Agreement**"), which has been interpreted by panels and the Appellate Body of the World Trade Organization ("**the WTO**"), contains various provisions similar to those found in Article 43. Indeed, as one scholar notes, various provisions of Article 43 were modeled off of the SPS Agreement.[9] Additionally, Articles 3 and 32 contain references to human rights law, to which the work of the Human Rights Committee in interpreting the International Covenant on Civil and Political Rights ("**the ICCPR**") could be of relevance. Some of the relevant jurisprudence and authoritative interpretations are mentioned in the sections below.

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| **Q:** | Agent, may WTO jurisprudence on similar provisions in the SPS Agreement be used to help interpret the IHR? What is the source of the Court's authority to rely on such jurisprudence? |

#### 3.2.1.1 Legitimate Basis (Article 43(2))

Article 43(2) of the IHR requires that State Parties must "base their determinations [on whether to implement entry restrictions] upon: (a) scientific principles; (b) available scientific evidence of a risk to human health . . . ; and (c) any available specific guidance or advice from WHO." Importantly, the conjunction "and" makes clear that the determinations must be based on *all three* of the bases listed.

For the first two bases, Article 2.2 of the SPS Agreement, like Article 43(2) of the IHR, requires that SPS measures be "based on scientific principles"[10] and "not [be] maintained without sufficient

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[9] *See* David P. Fidler, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations Security: The New International Health Regulations," *Chinese Journal of International Law* (2005), pp. 382-383.

[10] SPS Agreement, art. 2.2.

scientific evidence."[11] Students may thus draw from the rich body of WTO jurisprudence to interpret the first two bases listed in Article 43(2).[12]

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| **Q:** | Agent, what is the definition of "scientific principles," as used in Article 43(2) of the IHR? Can you give me an example of a principle that is "scientific," and a principle that is not "scientific"? |

The key takeaway from international trade law jurisprudence is that WTO panels and the Appellate Body do *not* assess the merits of the scientific principles or scientific evidence relied on by a State; rather, they merely verify that the State based its measures on what it considered to be scientific principles and evidence. As the United States stated in its Uruguay Round Statement of Administrative Action:

> It is clear that the requirement in the [SPS Agreement] that measures be based on scientific principles and not be maintained 'without sufficient scientific evidence' would not authorize a dispute settlement panel to substitute its scientific judgment for that of the government maintaining the sanitary of phytosanitary measure. For example, by requiring that measures be based on scientific principles (rather than, for instance, requiring measures to be based on the 'best' science) and not to be maintained without sufficient scientific evidence (rather than, for instance, requiring an examination of the 'weight of evidence'), [the SPS Agreement] recognizes ... that scientific certainty is rare and many scientific determinations require judgments between differing scientific views.[13]

This view has since been accepted by other States and commentators.[14] The principal means by which WTO panels and the Appellate Body determine whether an SPS measure complies with Article 2.2 of the SPS Agreement is by ascertaining whether the State conducted a risk assessment. In the *Australia – Salmon* case, the panel held, and the Appellate Body agreed, that "in the event a sanitary measure is not based on a risk assessment ..., this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence."[15] By analogy, a necessary (though perhaps not sufficient) condition for satisfying the first two bases of Article 43(2) would be for the entry regulation to be "based on a risk assessment." In the Problem, it is undisputed that Ranovstayo "conducted an urgent and intensive risk assessment, taking into account what it called the best scientific evidence available," and that this assessment served as the basis for Ranovstayo's entry regulation (Agreed Facts, para. 10). Ranovstayo could thus rely on this fact to argue that its determinations with respect to the entry regulation were based on the first two bases in Article 43(2).

WTO panels and the Appellate Body have also made additional pronouncements specifically with regard to the requirement that the measure "not [be] maintained without sufficient scientific evidence" in Article 2.2 of the SPS Agreement (which corresponds to the second basis of Article

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[11] SPS Agreement, art. 2.2.

[12] *See* WTO, *WTO Analytical Index: SPS Agreement – Article 2 (Jurisprudence)*.

[13] Statement of Administrative Action, Pub. L. No. 103-465, 108 Stat. 4809 (1994), reprinted in 1994 USCCAN 3773 (emphasis added).

[14] *See, e.g.*, Public Citizen et al., "Comments to the Appellate Body of the World Trade Organization Concerning European Communities – Measures Concerning Meat and Meat Products (Hormones)" (31 October 1997), p. 6.

[15] WTO, Appellate Body, *Australia – Salmon*, paras. 137-138; WTO, Panel, *Australia – Salmon*, para. 8.52.

43(2) of the IHR). The panel in *Japan – Apples* came the closest to defining "scientific evidence," observing that it is "evidence gathered through scientific methods," and that "scientific evidence may include evidence that a particular risk may occur ... as well as evidence that a particular requirement may reduce or eliminate that risk."[16] Considering the fact that the characteristics of the virus accepted by the Parties are similar to those of past viruses causing pandemics, there is certainly evidence that there is a risk of spread into Ranovstayan territory.

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| **Q:** | Agent, what is the definition of "scientific evidence," as used in Article 43(2) of the IHR? |

WTO jurisprudence also makes clear that a lot of discretion is given to a State in adopting measures in response to a risk ascertained on the basis of scientific evidence. In the *US – Poultry (China)* case, the panel held that "the scientific evidence must bear a rational relationship to the measure, be sufficient to demonstrate the existence of the risk which the measure is supposed to address, and be of the kind necessary for a risk assessment."[17] And in the *EC – Hormones* case, the Appellate Body stated that it should "bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life terminating, damage to human health are concerned."[18] In view of these statements, as well as the characteristics of the virus, it would not be difficult to conclude that there was "available scientific evidence of a risk to human health," as required by Article 43(2) of the IHR.

In light of the above, teams representing Ranovstayo would have a strong argument that Ranovstayo's entry regulation met the requirements of the first two bases. Aprepluya thus may not even choose to challenge Ranovstayo's entry regulation on these first two bases.

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| **Q:** | (for Aprepluya) Agent, to clarify, are you saying that Ranovstayo's determinations with respect to the entry regulation are not based on *any* of the three bases listed in Article 43(2) of the IHR? Or are they based on one or two of the bases? |

The third basis, however, is a different story, and it is this basis that Aprepluya may wish to emphasize in arguing that Ranovstayo's entry regulation was unlawful. As noted above, Article 43(2) of the IHR requires that the measure be based on "any available specific guidance or advice from WHO." Aprepluya could argue that Ranovstayo failed to meet this requirement because it adopted and maintained its entry regulation despite WHO's guidance and advice to the contrary. Aprepluya could point out that: on 20 April 2018, WHO stated that "travel and trade restrictions are not recommended" (Agreed Facts, para. 8); on 27 April, WHO requested that Ranovstayo reconsider the application of its entry regulation, but Ranovstayo declined to modify or revoke it (Agreed Facts, para. 14); and by 15 May, WHO had not altered its position on travel restrictions (Agreed Facts, para. 16). Indeed, there is no indication that it ever did.

In light of this, Aprepluya could argue that Ranovstayo's regulation was not "based on" such guidance or advice, particularly since Ranovstayo did not modify or revoke the regulation when specifically asked by WHO to reconsider its application.

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[16] WTO, Panel, *Japan – Apples*, para. 8.92.
[17] WTO, Panel, *US – Poultry (China)*, para. 7.200.
[18] WTO, Appellate Body, *EC – Hormones*, para. 124.

Ranovstayo, however, could respond that the words "based on" cannot possibly mean "in compliance with." Otherwise, WHO's recommendations with respect to "additional health measures" (such as travel restrictions) would effectively become binding. That would be directly contrary to the meaning of the word "recommendation." Ranovstayo could instead argue that the words "based on" mean simply that a State must *consider* WHO's guidance or advice. To show that such consideration was given, Ranovstayo could point to its Health Minister's comment on 23 April 2018 that Ranovstayo was "aware of what WHO has recommended and not recommended" (Agreed Facts, para. 12), as well as the Minister's reply on 1 May to WHO's request that Ranovstayo reconsider its entry regulation (Agreed Facts, para. 14).

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| **Q:** | Agent, what is the definition of the phrase "based on," as used in Article 43(2) of the IHR? Can you cite to any jurisprudence on the meaning of this phrase? |

In sum, Ranovstayo probably satisfied the first two requirements of Article 43(2), but based on the facts of the Problem, the argument on Article 43(2) may boil down to the Parties' interpretation of the words "based on" with respect to WHO's guidance and advice—a purely legal question, not one based on scientific or factual research. Teams could have recourse to many different areas of international law in an attempt to define the words "based on" in their favor.

#### 3.2.1.2 Least Restrictive Means (Article 43(1))

The second requirement, contained in Article 43(1) of the IHR, is that the entry restrictions must "not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection." This requirement has two prongs: (i) restrictiveness; and (ii) invasiveness or intrusiveness. Because Ranovstayo's entry restrictions are not invasive or intrusive, only the first prong of restrictiveness is at issue.

Here, again, WTO jurisprudence may be of assistance. Article 5(6) of the SPS Agreement similarly provides that SPS measures must "not [be] more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection."[19] There is, in fact, also a lot of WTO case law interpreting Article 5(6).[20]

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| **Q:** | (for Aprepluya) Agent, in order to show that Ranovstayo did not comply with Article 43(1) of the IHR, there must be "reasonably available alternatives" that are less "restrictive of international traffic" and that would achieve "the appropriate level of health protection." Could you give me at least one such "reasonably available alternative"? |

WTO jurisprudence is clear that in order for a measure to violate this provision, the complaining State has the burden to prove that there is another measure that: (i) is reasonably available; (ii) achieves the country's appropriate level of sanitary or phytosanitary protection; and (iii) is significantly less restrictive than the contested measure.[21] Aprepluya should be able to identify (i)

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[19] SPS Agreement, art. 5(6).
[20] *See* WTO, *WTO Analytical Index: SPS Agreement – Article 5 (Jurisprudence)*.
[21] WTO, Appellate Body, *Australia – Salmon*, para. 194.

another reasonably available measure. Aprepluya should also be able to propose a measure that is (iii) "significantly less restrictive" than the restrictions adopted by Ranovstayo. For example, Aprepluya could propose decreasing the 18-day figure to 7, or increasing the 50-confirmed-cases figure to 500. Aprepluya, however, is likely to have more difficulty showing that the alternative (ii) "achieves [Ranovstayo's] appropriate level of sanitary or phytosanitary protection."

On this issue, WTO panels and the Appellate Body have repeatedly made clear that it is the State implementing the measure that has full discretion to decide its "appropriate level of sanitary or phytosanitary protection." For example, in *Australia – Salmon*, the Appellate Body held: "The determination of the appropriate level of protection ... is a *prerogative* of the Member concerned and not of a Panel or of the Appellate Body."[22] That said, the Appellate Body in *US/Canada – Continued Suspension* held:

> The Appellate Body has also found that 'the SPS Agreement contains an implicit obligation to determine the appropriate level of protection.' Although it need not be determined in quantitative terms, the level of protection cannot be determined 'with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement ... becomes impossible'.[23]

| **Q:** | Agent, who is responsible for determining "the appropriate level of health protection" referenced in Article 43(1) of the IHR? What is that level in this case? |
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Applying these legal pronouncements by analogy to the Problem, Ranovstayo had full discretion in choosing its appropriate level of protection, but it was obligated to determine such a level. Ranovstayo could argue that various paragraphs of the Agreed Facts make clear that Ranovstayo's desired level of protection was "0 cases," i.e., completely preventing the spread of the virus into its territory.[24] So the burden would then be on Aprepluya to identify a reasonably available alternative measure that was significantly less restrictive, but could achieve the same level of protection desired by Ranovstayo. This would be difficult, because even Ranovstayo's entry restrictions could not completely eliminate the possibility of the virus spreading into its territory, particularly in light of asymptomatic cases. All this said, Aprepluya may argue that Ranovstayo never clearly determined the appropriate level of protection.

Aprepluya may also attempt to distinguish Article 43(1) of the IHR from Article 5(6) of the SPS Agreement. In particular, Aprepluya may argue that Ranovstayo does *not* have complete discretion in determining the "appropriate level of health protection" because: (1) Article 43(1) of the IHR speaks of "*the* appropriate level of health protection," whereas Article 5(6) of the SPS Agreement speaks of "*their* [i.e., the State's] appropriate level of sanitary or phytosanitary protection"; (2) the object and purpose of the IHR was, arguably, to establish a careful balance between health protection, economic protection, and human rights protection; and (3) WHO issued recommendations against travel restrictions in the IHR context, but no such recommendations are issued in the trade context.

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[22] WTO, Appellate Body, *Australia – Salmon*, para. 199.
[23] WTO, Appellate Body, *US/Canada – Continued Suspension*, para. 523.
[24] See, for example, Agreed Facts, paras. 11, 12, 14, 34.

| Q: | Agent, may the Court rely on interpretations of Article 5(6) of the SPS Agreement to interpret Article 43(1) of the IHR? Are there any significant differences between the two provisions? |
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#### 3.2.1.3 Human Rights (Articles 3 and 32)

The third and final requirement is that the entry restrictions must have been implemented "with full respect for the dignity, human rights, and fundamental freedom of persons." This obligation is set forth in Articles 3 and 32 of the IHR. Arguably, this language requires only that the entry restrictions comply with international human rights law, though teams are of course be free to argue otherwise.

| Q: | Agent, do Articles 3 and 32 of the IHR go beyond requiring States to comply with their international human rights obligations? If so, how so? If not, what is the *effet utile* (i.e., utility) of these provisions? |
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Ranovstayo could attempt to invoke various rules of international human rights law that Aprepluya is alleged to have violated. We cannot address all potentially relevant human rights in this memorandum. But the most relevant one is arguably the right to enter one's own country, as enshrined in Article 12(4) of the ICCPR, to which both Aprepluya and Ranovstayo are parties (Agreed Facts, para. 54). That provision states: "No one shall be arbitrarily deprived of the right to enter his own country."[25]

It would be difficult for Aprepluya to argue that Ranovstayo's entry regulation violates this provision with respect to Ranovstayan nationals. It is true that Section 2 of the regulation requires certain Ranovstayan nationals entering the territory of Ranovstayo be quarantined at a government quarantine center, but this is likely not a "depriv[ation]" of the right to enter one's own country, as the individual would still be entering the country. Rather, the mandatory quarantine would instead implicate Articles 12(1) and 12(2) of the Covenant concerning the freedom of movement within a State's territory. But Article 12(3) makes clear that those two provisions are subject to restrictions "which are provided by law, are necessary to protect ... public health ... , and are consistent with the other rights recognized in the present Covenant." Ranovstayo's entry regulation would seem to fall within the scope of that provision.

Aprepluya could nonetheless assert a violation of Article 12(4) by referring not to Ranovstayan *nationals*, but rather to either family members of Ranovstayan nationals or Ranovstayan permanent residents (who are not Ranovstayan nationals). Those individuals would fall under Section 1 of the regulation, and therefore would be prohibited from entering the country for a certain period of time. Two questions would thus arise.

First, there is the question of whether such an individual could call Ranovstayo "his own country" for the purposes of Article 12(4) despite not being a Ranovstayan national. In General Comment No. 27, the Human Rights Committee stated:

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[25] ICCPR, art. 12(4).

> The scope of "his own country" is broader than the concept "country of his nationality." It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.[26]

The Committee therefore made clear that Article 12(4) could apply to non-nationals, but it is not clear whether it applies to family members of Ranovstayan nationals or Ranovstayan permanent residents. Students could develop arguments for or against this proposition by reference to human rights body jurisprudence, as well as to State practice. On this latter point in particular, Aprepluya could point out that many States that have imposed entry restrictions in response to COVID-19 include exceptions not only for their own nationals, but also for family members and/or permanent residents.

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| **Q:** | Agent, what does the phrase "his own country" in Article 12(4) of the ICCPR mean? Is it the same as saying "his country of nationality"? If not, what is the difference? |

The second question that would arise is whether being prohibited from entering one's own country *for a certain period of time* would constitute an "arbitrary depriv[ation]" of that right. While Ranovstayo could emphasize the public health rationale for the entry regulation, Aprepluya could point out that Human Rights Committee in General Comment No. 27 (on Article 12) stated that any such deprivation must be "reasonable in the particular circumstances" and that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."[27] Aprepluya could also observe that Ranovstayo's entry regulation was considered to be the "most stringent," suggesting that it was not reasonable, even in the particular circumstances of J-VID-18 (Agreed Facts, para. 16). Students may rely on case law from the Human Rights Committee and regional human rights courts to further elucidate the law on Article 12(4). Students might also refer to State practice in response to COVID-19 to determine whether Ranovstayo's entry regulation was "reasonable."

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| **Q:** | Agent, how does State practice in response to COVID-19 affect your assessment of Article 12(4) of the ICCPR? |

[26] Human Rights Committee, *General Comment No. 27*, para. 20 (emphasis added).
[27] Human Rights Committee, *General Comment No. 27*, para. 21.

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| **Q:** | Is it appropriate to examine State practice in response to COVID-19 given that such practice occurred *after* the adoption and implementation of Ranovstayo's entry regulation? |

Article 12(4) is certainly not the only human right implicated by Aprepluya's implementation of its entry regulation. Students are free to explore other avenues of argument relying on human rights law. For example, Aprepluya could also argue that, by not allowing family members of Ranovstayan nationals who are not themselves Ranovstayan nationals to enter the country for a certain period of time, Ranovstayo is violating the right to family under Article 17(1) of the ICCPR.

### 3.2.2 Human Rights Law

Aprepluya could also make an independent argument that Ranovstayo's entry regulation violates international human rights law. The legal analysis here would effectively be the same as the one presented under Section 3.2.1.3 above.

### 3.2.3 Obligation to Cooperate

Creative teams representing Aprepluya could also argue that Ranovstayo has violated its obligation to cooperate with WHO under general international law. This is probably not a strong argument, but if a team raises this argument it is worth evaluating. Even if a team does not raise this argument, a judge may inquire about this issue to see how the oralist thinks on his or her feet.

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| **Q:** | Agent, did Ranovstayo have the obligation to comply with WHO's recommendations? |
| **Q:** | Agent, did Ranovstayo have the obligation to cooperate with WHO? Did it fulfill that obligation? |

In the *WHO/Egypt Agreement* case, the Court held: "The very fact of Egypt's membership in the [World Health] Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and the Organization."[28] Accordingly, the very fact of Ranovstayo's membership in WHO entails certain obligations of cooperation and good faith incumbent upon Ranovstayo.

Aprepluya could argue that Ranovstayo's implementation of its entry regulation violated its obligation to cooperate with WHO because: (1) the regulation was contrary to the WHO Director-General's "Temporary Recommendation" under Article 15 of the IHR against travel restrictions (Agreed Facts, para. 8); (2) Ranovstayo not only implemented the regulation, but also encouraged other States to implement similar restrictions in contravention of the Temporary Recommendation (Agreed Facts, para. 12); and (3) Ranovstayo refused to modify or revoke its regulation after WHO requested Ranovstayo to reconsider its application (Agreed Facts, para. 14).

The leading ICJ case on the issue of recommendations by intergovernmental organizations is the *Whaling in the Antarctic* case between Australia and Japan. That case concerned the International

[28] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, para. 43.

Convention for the Regulation of Whaling ("**ICRW**"), to which both Australia and Japan were parties. Australia argued, among other things, that Japan had violated certain recommendations by the International Whaling Commission ("**IWC**"). The ICJ held that "[t]hese recommendations, which take the form of resolutions, are not binding,"[29] but also observed that "the States parties to the ICRW have a duty to co-operate with the IWC ... and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives."[30] In fact, Japan *itself* "accept[ed] that it has a duty to give due consideration to these recommendations."[31] The Court later found that Japan had violated international law because its conduct was "difficult to reconcile with Japan's obligation to give due regard to IWC resolutions."[32] The Court appeared to base this conclusion on its assessment that Japan had not seriously considered the IWC's recommendations when engaging in the impugned conduct.[33]

Aprepluya could rely on this case to argue that Ranovstayo has violated its duty to cooperate with WHO. Ranovstayo, however, may distinguish the *Whaling in the Antarctic* case by noting that the recommendations in question were all adopted by consensus of the members of the IWC, which is in turn comprised of all States Parties to the ICRW. In response, Aprepluya could point out that the Court did not expressly limit the due-regard obligation to IWC recommendations adopted by consensus.

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| **Q:** | Agent, even if there is no legal obligation to comply with WHO's recommendations, do these recommendations create any legal obligations at all? |
| **Q:** | Agent, could you give me an example of a case where the Court has found a State to have violated international law because of its conduct with respect to a recommendation from an intergovernmental organization? Is that case similar to the present one, or are there ways to distinguish it? |

In any case, the *Whaling in the Antarctic* case is not the only authority supporting the argument that recommendations from intergovernmental organizations can create legal obligations. In the *Voting Procedure* case, Judge Lauterpacht stated in his separate opinion: "A Resolution recommending to an Administering State a specific course of action creates some legal obligation .... The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith."[34] Similarly, Judge Klaestad stated in his own separate opinion: "As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly ... and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter

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[29] *Whaling in the Antarctic*, Judgment, para. 46.
[30] *Whaling in the Antarctic*, Judgment, para. 83.
[31] *Whaling in the Antarctic*, Judgment, para. 80.
[32] *Whaling in the Antarctic*, Judgment, para. 144; *Whaling in the Antarctic*, Counter-Memorial of Japan, para. 8.63 ("Japan accepts that, even in the absence of binding effect, there is a duty on the part of the Contracting Governments to consider a recommendation in good faith and, if requested, to explain their action or inaction.")
[33] *See Whaling in the Antarctic*, Judgment, para. 144.
[34] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Separate Opinion of Judge Lauterpacht, pp. 118-119.

referred to in the recommendation."[35] Professor Amerasinghe has thus written: "Under the Charter, ... the better view is that there is a duty on the part of [UN] member states to consider a recommendation in good faith and, if requested, to explain their action or inaction. This obligation arises implicitly from the fact of membership."[36]

Once again, strong Ranovstayo teams may attempt to distinguish the aforementioned authorities by pointing out that they all concerned the UN Charter. But there is no reason why the same logic would not apply to recommendations in the context of all intergovernmental organizations. Indeed, both Japan in the *Whaling in the Antarctic* case and Professor Amerasinghe derive support for the due-regard obligation for recommendations from the ICJ's observation in the *WHO/Egypt Agreement* case quoted in the beginning of this sub-section.

All in all, Aprepluya probably does not have a very strong claim here, particularly in light of State practice during COVID-19 practically ignoring WHO's Temporary Recommendations. In any case, Aprepluya does not have to make this argument to win; it is merely an option for it to pursue should it wish to do so.

### 3.2.4 Compensation

The final element of Question 1 concerns compensation. Aprepluya's argument is straightforward: Article 36 of the Articles on State Responsibility provides that in cases where restitution is not possible (such as this one, as one cannot go back in time to reverse the entry regulation), compensation should be provided. Aprepluya can then point to the lost tourism income as a direct consequence of the imposition of Ranovstayo's entry restrictions against Aprepluya. Aprepluya could make this claim on its own behalf, or also on behalf of its nationals, as the Parties agree that there was no possibility for these losses to be recovered through any domestic judicial or administrative process in either country (Agreed Facts, para. 46).

In response, Ranovstayo could challenge the causality of Aprepluya's claim. It could argue that it was not the prospect of Aprepluya being added to Ranovstayo's list of "high-risk countries" that led the tourists to leave Aprepluya; rather, it was the outbreak of J-VID-18 and Aprepluya's poor management thereof that caused the loss in tourism. Even putting that aside, Ranovstayo could also emphasize that it did not force the tourists to leave Aprepluya's territory; it just so happens that many of them planned to return to Ranovstayo or transit through the Bogpadayo Airport, and that they decided to change their plans in light of the potential that Ranovstayo might add Aprepluya to its list of high-risk countries. Aprepluya would point to the survey that shows that the "primary reason" why two thirds of those who responded left the country from 5 to 7 June 2018 was linked with the prospect of Aprepluya being designated a "high-risk country" by Ranovstayo (Agreed Facts, para. 30). But Ranovstayo could emphasize that there could have been other secondary reasons for leaving that contributed to their decision.

Additionally, Ranovstayo may argue that compensation is not appropriate here because Ranovstayo did not directly cause any economic losses. Aprepluya could point to the long line of investment arbitration jurisprudence where States are liable for compensating investors for lost

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[35] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Separate Opinion of Judge Klaestad, p. 88.
[36] CF Amerasinhe, Principles of the Institutional Law of International Organizations (2005), p. 177.

profits. Ranovstayo, on the other hand, could try to analogize the present case to those arbitrations where tribunals declined to award lost profits. Ranovstayo could also invoke the many ICJ cases where compensation was requested, but the Court decided to give only satisfaction instead.

## 3.3 QUESTION 2: CONSULAR REFUGE

| *Aprepluya's Claim* | *Ranovstayo's Claim* |
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| Ranovstayo violated international law by failing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities after they requested her surrender on 9 June 2018. | Ranovstayo did not violate international law by refusing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities. |
| ***Aprepluya's Anticipated Argument*** | ***Ranovstayo's Anticipated Argument*** |
| Ranovstayo violated the principles of territorial sovereignty and non-intervention, as affirmed by the Court in the *Asylum* case, as well as the Vienna Convention on Consular Relations. There was no legal basis for Ranovstayo to give refuge to Ms. Vormund at its consulate, as there is no right to diplomatic asylum under international law. | Ranovstayo had both the right and the responsibility to give refuge to Ms. Vormund at its consulate. In doing so, Ranovstayo did not violate the principles of territorial sovereignty or non-intervention, nor did it violate the Vienna Convention on Consular Relations. |

Question 2 is inspired by the many high-profile incidents of individuals taking refuge in diplomatic and consular missions, including Julian Assange in the Ecuadorian embassy in London, Wang Lijun in the US consulate in Chengdu, Chen Guangcheng in the US embassy in Beijing, and—most recently—nine members of the Evo Morales administration in Mexico's embassy in La Paz.[37] None of these incidents were ever adjudicated on the basis of international law. This question gives students the opportunity to assess the legality of such acts giving refuge to foreign nationals under international law.

Aprepluya has two principal claims: Ranovstayo violated the principles of territorial sovereignty and non-intervention, as affirmed by the Court in the *Asylum* case (**Section 3.3.1**) and Ranovstayo violated the Vienna Convention on Consular Relations (**Section 3.3.2**). In addition to challenging these arguments on their own merits, Ranovstayo could assert that it had a legal basis for giving refuge to Ms. Vormund at its consulate (**Section 3.3.3**).

### 3.3.1 Territorial Sovereignty and Non-Intervention

Aprepluya's first argument is that, by failing to hand over Ms. Vordenmund, Ranovstayo was effectively giving her diplomatic asylum at its consulate, thereby violating the principles of territorial sovereignty and non-intervention. Aprepluya could rely on the Court's judgment in the *Asylum* case, where it held:

> In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves

[37] Other examples may be found here.

> a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.[38]

Aprepluya could emphasize how, according to the Court, the grant of diplomatic asylum constitutes an intervention and a derogation from sovereignty "unless its legal basis is established in each particular case." As a result, Aprepluya would no longer have the burden of proving its claim; instead, Ranovstayo would have the burden of proving the existence of a "legal basis" for granting diplomatic asylum to Ms. Vordenmund. Aprepluya would, of course, argue that no such legal basis exists.

Ranovstayo could respond by asserting that there was a legal basis for its giving refuge to Ms. Vormund. This is discussed in detail in Section 3.3.3 below. In addition, Ranovstayo may also attempt to challenge the applicability of the passage from the *Asylum* case mentioned above in multiple ways, three of which are discussed below.

First, Ranovstayo could contest the characterization of its conduct as granting diplomatic asylum. Ranovstayo never officially granted asylum to Ms. Vormund. She requested "protection" in her initial letter of 3 June 2018 (Agreed Facts, para. 21), and the Consul in response simply "agreed to let Ms. Vormund stay in an unused room in the consulate building until a decision could be made on her request for protection" (Agreed Facts, para. 22). The next day, President Kalkan of Ranovstayo at the meeting with Aprepluyan officials "acknowledged that her government had decided to consider Ms. Vormund to be an applicant for asylum, allowing her to remain at the consulate for the time being" (Agreed Facts, para. 24). And in its 10 June *note verbale*, Ranovstayo declined Aprepluya's request to surrender Ms. Vormund, noting that "Ranovstayo has no obligation under international law to surrender individuals who seek asylum at our diplomatic or consular missions abroad." (Agreed Facts, para. 34). In light of these facts, Ms. Vormund was only an applicant for asylum; she had never actually received it.

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| **Q:** | Agent, did Ranovstayo grant diplomatic asylum to Ms. Vormund? If not, what is the legal qualification for Ranovstayo's allowing Ms. Vormund to stay on its consular premises? |
| **Q:** | Agent, what is the definition of diplomatic asylum? |

Aprepluya may argue in response that Ranovstayo had *effectively* granted Ms. Vormund diplomatic asylum, as Ranovstayo let her stay on its consular premises, outside of the reach of Aprepluyan authorities, from 3 June to 24 or 25 June 2018. This is particularly the case after they formally requested her surrender on 9 June 2018 (Agreed Facts, para. 33), and Ranovstayo declined (Agreed Facts, para. 34). Moreover, even if Ranovstayo had not *technically* granted Ms. Vormund diplomatic asylum, Aprepluya could argue that the principles enounced in the *Asylum* case still apply, as they are intended to apply to any situation where an individual is granted refuge in a diplomatic or consular mission.

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[38] ICJ, *Asylum*, Judgment, pp. 274-275.

Second, Ranovstayo could point out that the *Asylum* case did not actually concern the right to grant diplomatic asylum under general international law. In that case, the Parties had agreed that there was an applicable right of diplomatic asylum[39] (whether due to a treaty or a local custom); they merely disagreed on whether the State granting asylum had the right to unilaterally qualify the offence committed by the asylee. As a result, Ranovstayo could emphasize how the Court's pronouncement above was merely dicta, and how it was intended only to apply to the limited right of diplomatic asylum applicable in that case, not to diplomatic asylum under general international law.

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| **Q:** | Agent, in the *Asylum* case the parties, Colombia and Peru, had agreed that there was an applicable right of diplomatic asylum, whether under a treaty or local custom. So why is that case relevant to us here? |

Third and finally, Ranovstayo could argue that the *Asylum* judgment is outdated, as it was rendered in 1950. Ranovstayo could invoke the significant amount of State practice of giving refuge on diplomatic and consular premises since 1950 to show that things have changed. It could also argue that international law, particularly international human rights law, has undergone a paradigm shift from a focus on territory to a focus on jurisdiction, such that the principles of diplomatic asylum should be more readily assimilated with those of territorial asylum.

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| **Q:** | Agent, the *Asylum* judgment was rendered in 1950. Why is it still applicable today? |

Having distinguished the *Asylum* case, Ranovstayo could then invoke authorities on the principles of territorial sovereignty and non-intervention to show that its conduct on the premises of its consulate did not run afoul of those principles. For example, it could point to standard for "intervention" developed in the *Military and Paramilitary Activities* case, where the Court held:

> A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[40]

Ranovstayo could accordingly argue that its giving Ms. Vordenmund refuge at its consulate did not involve an "element of coercion," nor did it interfere with Aprepluya's "choice of a political, economic, social and cultural system, and the formulation of foreign policy." Aprepluya would, of course, respond that interfering with its judicial system would effectively be coercion with respect to its social system.

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[39] pp. 282-283

[40] ICJ, *Military and Paramilitary Activities*, Merits, Judgment, para. 205.

At the end of the day, Aprepluya probably has the stronger argument that at least the principles contained in the passage from the Court's *Asylum* judgment applies. The burden would thus, as stated above, be on Ranovstayo to establish a "legal basis" for granting diplomatic asylum to Ms. Vordenmund. Again, this is discussed in Section 3.3.3 below.

### 3.3.2 Vienna Convention on Consular Relations

Aprepluya could also assert that Ranovstayo violated the Vienna Convention on Consular Relations ("**the VCCR**"), to which both States are party (Agreed Facts, para. 54). The VCCR does not contain any specific provisions on giving refuge to foreign nationals on consular premises. But students may find some provisions of the Convention nonetheless relevant. Articles 55(1) and 55(2) are discussed below, but students may identify and assess other provisions of the Convention that they consider relevant.

Article 55(1) provides: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State." In light of this provision, Aprepluya could argue that Ranovstayan consular officials, whose conduct was attributable to Ranovstayo, did not "respect the laws and regulations" of Aprepluya because they refused to surrender Ms. Vormund, a fugitive from the Aprepluyan legal system. Aprepluya could also argue that the Ranovstayan officials violated their "duty not to interfere in the internal affairs of the State." This would raise similar arguments as those raised above in Section 3.3.1.

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| **Q:** | Agent, in light of Article 55(1) of the VCCR, does any violation by any consular official of the laws of the receiving State automatically make the sending State responsible for a violation of international law? |

Aprepluya might also argue that Ranovstayo breached Article 55(2), which provides: "The consular premises shall not be used in any manner incompatible with the exercise of consular functions." Aprepluya could cite to the enumerated list of consular functions in Article 5, and argue that granting refuge to fugitives is incompatible with the exercise of those functions. Ranovstayo could respond by saying that there is no real "incompatibility" between granting refuge and the consular functions, and moreover note that the list of functions in Article 5 is not exhaustive, so such functions could potentially include conduct allowing for the giving of refuge in certain circumstances.

In addition to the above, Ranovstayo could also more generally argue that the VCCR was not intended to cover the issue of giving refuge to local nationals. As this argument goes, the VCCR was based on the Vienna Convention on Diplomatic Relations ("**VCDR**"), and during the development of the VCDR, the Sixth Committee of the UN General Assembly expressly excluded from the ILC's mandate the subject of diplomatic asylum, and no study or proposals on it were made by the Special Rapporteur.[41] As Professor Eileen Denza – a leading authority on diplomatic law -- summarizes, "[t]he omission of any provision on diplomatic asylum was endorsed by governments and neither in comments on the draft articles of the ILC, in Sixth Committee

[41] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 17.

discussion, or at the Vienna Conference were there proposals that express provision should be included in the VCDR."[42] As a result, as Ranovstayo's argument would go, there is no way that the grant of diplomatic asylum could violate the VCDR or, consequently, the VCCR. The Preamble, moreover, affirms that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention," such as the giving of consular refuge.

Ranovstayo could even argue that, if anything, the drafters of the VCDR intended there to be an exception of diplomatic asylum. At the ILC, Sir Gerald Fitzmaurice proposed two alternatives for a draft text on diplomatic asylum: (1) "Except ... to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under local law ...."; and (2) "Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds."[43] These were ultimately not included because other members of the ILC noted that the subject of diplomatic asylum was outside its mandate.[44]

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| **Q:** | Agent, does diplomatic asylum fall within the scope of the VCCR? Is there anything from the preparatory works (i.e., *travaux préparatoires*) of the Convention that sheds light on this point? |

Aprepluya could point to key distinctions between the VCDR and the VCCR to undermine this argument. First, Aprepluya could point out that Article 55(2) of the VCCR differs from Article 41(3) of the VCDR in one key respect: the omission of the words "as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State." The preparatory works show that the purpose of the reference to "special agreements" in the VCDR was to allow for the regional treaties on diplomatic asylum in Latin America.[45] The fact that the VCCR does not have corresponding language suggests that the drafters did not intend consular premises to ever be used for diplomatic asylum.

In addition, Aprepluya could point to the fact that, at the Vienna Conference, the United Kingdom proposed the text: "Consular premises shall not be used to afford asylum from fugitives from justice."[46] The only reason why the States decided not to include this provision was because the VCDR did not contain any language on diplomatic asylum.

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[42] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 17.
[43] *Yearbook of the International Law Commission 1957*, Vol. I, p. 54.
[44] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 17.
[45] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 19.
[46] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 30.

### 3.3.3 Legal Basis

In light of the above, the core of Question 2 may boil down to whether there was a legal basis for Ranovstayo to give refuge to Ms. Vormund. Teams representing Ranovstayo should feel free to invoke any arguments that they wish. Ranovstayo would probably have a difficult time arguing diplomatic asylum in general (**Section 3.3.3.1**), but it could make a more convincing case for humanitarian diplomatic asylum (**Section 3.3.3.2**) or temporary protection (**Section 3.3.3.3**), and creative students might attempt to develop an argument based on the principle of *non-refoulement* (**Section 3.3.3.4**). The fact that only these four legal theories are examined here should not preclude the possibility of students raising other arguments.

#### 3.3.3.1 Diplomatic Asylum

Ranovstayo could argue that it gave refuge to Ms. Vormund in exercise of its right to grant diplomatic asylum to foreign nationals at its consulate. As mentioned above in Section 3.3.1, the facts make it difficult to say that Ranovstayo formally granted diplomatic asylum to Ms. Vormund, but one could certainly argue that Ranovstayo *effectively* did so. In any case, even if it were accepted that Ms. Vormund was not granted diplomatic asylum, Ranovstayo could still argue that, *a fortiori*, if it had the right to grant diplomatic asylum to Ms. Vormund, then it certainly also had the right to give her refuge.

In order to succeed on this claim, Ranovstayo would have to show not only that the right of diplomatic asylum exists in general international law, but also that the requirements for exercising this right were met on the facts of the case.

Although the right of diplomatic asylum is widely discussed in the literature, the large majority of authors conclude that such a right does not exist in general international law. Still, students are expected to be knowledgeable about this area of law, given its relevance to the case. Judges should not hesitate to ask questions about this during oral rounds, even if teams do not raise it as their core argument.

The question of whether there exists a general right to grant diplomatic asylum is widely debated in the literature. The ICJ did not directly address this question in the *Asylum* judgment, as the Parties in that case agreed that diplomatic asylum was permitted in that particular context. Commentators generally agree that there is a local customary right in Latin America to grant diplomatic asylum, but the majority of commentators are of the view that such a right does not exist in general international law.

In 1974, Australia sought to achieve worldwide agreement on the concept of diplomatic asylum, and as a consequence the United Nations undertook a comprehensive study on the subject. The UN Secretary-General in 1975 issued a report entitled *Question of Diplomatic Asylum*, in which he collected the views of many States on the question, and also examined in detail how many institutions (e.g., the International Law Commission, the Institute of International Law, and the International Law Association) and scholars have taken different positions on the legality and the contours of diplomatic asylum.[47] The report demonstrates that States and commentators outside of

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[47] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975).

Latin America did not recognize a *general* right to grant diplomatic asylum,[48] even though there is significant authority for a right to grant *humanitarian* diplomatic asylum, as is discussed further below in Section 3.3.3.2.

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| **Q:** | Agent, in 1975 the UN Secretary-General issued a report entitled *Question of Diplomatic Asylum*. What are the main conclusions of this report with respect to the question of whether a right of diplomatic asylum exists in general international law? |

Ranovstayo could, of course, attempt to argue that things have changed since 1975, citing to multiple instances of State practice where diplomatic asylum was granted. In nearly all these cases, however, the receiving State protested against the asylum, so these examples probably cannot contribute to establishing a clear custom in favor of a general right to grant diplomatic asylum.

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| **Q:** | Agent, has the legal status of the notion of diplomatic asylum changed since the 1975 repo 1975 the UN Secretary-General issued a report entitled *Question of Diplomatic Asylum*. What are the main conclusions of this report with respect to the question of whether a right of diplomatic asylum exists in general international law? |

Assuming that Ranovstayo could convince the Court that there is a general right to grant diplomatic asylum, the next question would be what conditions exist for granting such asylum. It would not be credible for Ranovstayo to take the position that it has full discretion to grant diplomatic asylum to *anyone*. The relevant authorities, however, do not agree on the conditions for granting diplomatic asylum.

Perhaps the most commonly cited criterion for granting diplomatic asylum is that the asylee must be a "political offender," as opposed to a "common criminal." For example, the Havana Convention, which was applicable between Colombia and Peru in the *Asylum* case, provides that State Parties may grant diplomatic asylum to "political offenders,"[49] but not to "persons accused or condemned for common crimes, or to deserters from the army or navy."[50] Along the same lines, the International Law Association's Draft Convention on Diplomatic Asylum (1968) provides that State Parties may grant diplomatic asylum to "those whose prosecution is sought for political offences,"[51] but not to "[d]eserters from the armed services."[52] Interestingly, the Draft Convention

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[48] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), p. 156, para. 292 ("[t]he position of principle of [non-Latin American jurists] is that diplomatic asylum does not form part of general international law").
[49] Havana Convention on Asylum (1928), art. 2.
[50] Havana Convention on Asylum (1928), art. 1.
[51] International Law Association, *Draft Convention on Diplomatic Asylum* (1968), art. 2, *reproduced in* UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), p. 145, para. 284.
[52] International Law Association, *Draft Convention on Diplomatic Asylum* (1968), art. 3, *reproduced in* UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), p. 146, para. 284.

also provides that "[t]he qualification of the alleged offence or persecution as political appertains to the State which grants asylum."[53]

The ICJ had the opportunity to interpret the relevant provisions of the Havana Convention in the *Asylum* case, in terms that could potentially be extrapolated to apply generally under international law. There, the Court held:

> In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.[54]

Judge Fitzmaurice commented on this passage by observing that political offenders are those who are in danger arising from "from the threat of extra-legal action by the local authorities or from the subordination of the local courts to political direction."[55]

Perhaps more importantly, the Court also held in the *Asylum* case that "the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum."[56] In other words, a State granting asylum cannot unilaterally determine whether an asylee is a "common criminal" or a "political offender." Such a determination would, presumably, have to be made on an objective basis.

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| **Q:** | Agent, assuming that there is a general right to diplomatic asylum, what are the conditions under which it may be granted? |

If teams adopt the notion that "political offenders" may be granted diplomatic asylum, Ranovstayo would have to show that Ms. Vormund is a "political offender" rather than a "common criminal." On the one hand, Ms. Vormund could be seen as a political offender because she is a government employee arguably being prosecuted for whistleblowing. Aprepluya, however, could employ the ICJ's *Asylum* judgment and Judge Fitzmaurice's commentary above to reach the conclusion that Ms. Vormund is a "common criminal" since Aprepluya's prosecution of her would not be "extra-legal," and there is no evidence that Aprepluya's courts are subordinated to political discretion.

On the whole, it would be difficult for Ranovstayo to argue that a general customary right of diplomatic asylum exists, and it might also be difficult to argue that the criteria for granting such asylum have been met in this case. All this said, oralists should be given the opportunity to make their case on these grounds.

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[53] International Law Association, *Draft Convention on Diplomatic Asylum* (1968), art. 5, *reproduced in* UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), p. 146, para. 284.
[54] *Asylum (Colombia v. Peru)*, Judgment, p. 284.
[55] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), p. 174, para. 313 (citing Fitzmaurice).
[56] *Asylum (Colombia v. Peru)*, Judgment, p. 274.

#### 3.3.3.2 Humanitarian Diplomatic Asylum

Ranovstayo has a stronger argument that there exists a right to grant *humanitarian* diplomatic asylum under general international law. This notion of "humanitarian diplomatic asylum" is not as well-established as the notion of "diplomatic asylum." But there is some authority supporting this concept. Professor Eileen Denza, a leading authority on diplomatic law, summarizes the distinction between general diplomatic asylum and humanitarian diplomatic asylum as follows:

> It has often been claimed that under certain conditions a State has a 'right' to grant asylum within its embassies abroad to fugitives and even that the individual fugitive has a 'right' to asylum if he has taken shelter in a foreign embassy. But the existence of such 'rights' is not generally accepted as a matter of customary international law. Within Latin America there exists an extensive network of treaties which for the States parties do create a right of granting diplomatic asylum. But it has not been shown that these treaties have created even a regional rule of customary international law and in other parts of the world there has been no disposition to accept the existence of any customary rule of international law or to regulate practices of diplomatic asylum in any formal treaty rules. What is widely accepted is a right of the State in whose embassy refuge has been taken ('the sending State') to grant asylum on a temporary basis as a matter of humanitarian protection. Such protection may be given either for the purpose of saving life or preventing injury where there is immediate physical threat to the refugee or where the sending State determines that there is no prospect of his or her being given a fair trial on any charges by the authorities of the territorial State ('the receiving State'). Diplomatic asylum has in practice been accorded on a wider basis on many occasions, but without the consistency in practice or the assertion of legal rights which might have created a customary rule of international law.[57]

Professor Denza goes on to explain:

> While under customary international law any general right of a State to grant diplomatic asylum to fugitives is denied, it has long been accepted that refuge in embassies may be accorded in the face of an immediate threat to the refugee. The threat may be of immediate death or injury at the hands of a mob or of a failure by the receiving State to provide guarantees of fair trial. In either case it is irrelevant whether the potential charge is political or not. The ICJ in the *Asylum* case acknowledged both kinds of justification.[58]

It is of course the latter scenario ("failure by the receiving State to provide guarantees of fair trial") that is relevant in our case. Professor Denza's reference to the *Asylum* judgment for the second scenario is specifically referring to the passage, also quoted earlier, where the Court held:

> In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is

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[57] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 1 (emphasis added).

[58] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 11 (emphasis added).

> substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims.[59]

It is not crystal clear from the context whether the Court was discussing this in terms of general international law or in the specific context of the Havana Convention. Ranovstayo may argue that the Court was discussing general international law, whereas Aprepluya may argue that the Court was merely interpreting the Havana Convention, or at the very least was not supplying an independent "legal basis" for diplomatic asylum. Professor Denza views the Court's pronouncement as reflecting general international law. In any case, there are multiple additional authorities supporting a right to grant *humanitarian* diplomatic asylum.

First, one of the most recent domestic court judgments on the question of the legality of diplomatic asylum under general international law—the 2005 judgment of the Court of Appeal of England and Wales in *B v. Secretary of State*—supports such a right. In that case, two young Afghan boys applied for territorial asylum in Australia, but when Australia made clear that it would return the boys, they sought diplomatic asylum in the British consulate in Melbourne. The British consular officials told them that they had to apply for asylum in Australia, and the boys then sued the British government, claiming violations of the UK Human Rights Act and the European Convention on Human Rights ("**the ECHR**"). The Court of Appeal held:

> [T]he duty to provide refuge can only arise under the [ECHR] where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. ... Should it be clear ... that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum. ... It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum. This is an area where the law is ill-defined. ... We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act to decline to hand over the applicants unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury.[60]

The Court of Appeal thus recognized the right to grant humanitarian diplomatic asylum as a matter of general international law (incorporated into the ECHR), though the Court did not clearly articulate the conditions for doing so. It observed that diplomatic asylum may be granted if the receiving States "intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity," which appears to set a rather high threshold, but then later stated that "[i]t may be that there is a lesser level of threatened harm that will justify ... diplomatic asylum," and finally

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[59] ICJ, *Asylum*, Judgment, p. 284.

[60] England & Wales, Court of Appeal, *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office*, [2004] EWCA Civ 1344, pp. 88-89 (emphasis added).

suggested that anything "necessary in order to protect [the asylee] from the immediate likelihood of experiencing serious injury" would be permitted.

In addition to this judgment, there is plenty of State practice supporting the grant of diplomatic asylum on humanitarian grounds.[61] Professor Denza also notes that, among the many States providing their views to the UN Secretary-General's report on the *Question of Diplomatic Asylum*, "[t]he United Kingdom, France, Spain, India, and the United States ... all maintained that there was no international law permitting the grant of diplomatic asylum except on a temporary basis for humanitarian reasons ...."[62]

Third, there is significant scholarly literature in favor of a right to humanitarian diplomatic asylum, as seen in the UN Secretary-General's report.[63] For example, Judge Lauterpacht stated that "there is no right to refuse to surrender to the territorial State persons who have been granted asylum within diplomatic premises," but recognized "the possible exception of the most compelling consideration of humanity."[64] Similarly, Judge de Visscher wrote: "[E]xcept for the temporary protection which an overriding humanitarian duty may make necessary, diplomatic asylum ... owes more to considerations of expediency, convenience and courtesy than to principles of law."[65] The Institute of International Law's Bath Resolutions (1950) similarly support such a right, though with broader language: "Asylum may be granted on the premises of diplomatic missions ... to any person whose life, liberty or person is threatened by violence emanating from the local authorities or against which they are obviously powerless to protect him ...."[66]

Ranovstayo could comfortably rely on these sources to demonstrate the existence of a right to grant humanitarian diplomatic asylum. It would be up to Ranovstayo to articulate a precise formulation of the condition for granting such asylum, whether it be "failure by the receiving State to provide guarantees of fair trial" (*Asylum*), intention of the receiving State "to subject the fugitive to treatment so harsh as to constitute a crime against humanity" (*B v. Secretary of State*), "the immediate likelihood of experiencing serious injury" (*B v. Secretary of State*), "the most compelling consideration of humanity" (Judge Lauterpacht), or "the temporary protection which an overriding humanitarian duty may make necessary" (Judge de Visscher). One condition shared by multiple authorities is notably that the grant of humanitarian diplomatic asylum must be temporary. It will then be on Ranovstayo to show that its giving refuge to Ms. Vormund satisfied the articulated condition.

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[61] *See* Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), paras. 12, 14-15.

[62] Eileen Denza, "Diplomatic Asylum," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 25.

[63] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), pp. 157-158, para. 293.

[64] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), pp. 157-158, para. 293.

[65] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc. A/10139 (22 September 1975), p. 157, para. 292 (citing Charles de Visscher, *Theories et realites en droit international public* (3rd ed. 1960), pp. 233-234).

[66] Institute of International Law, *Resolutions adopted at its Bath Session, September, 1950*, art. 3(2), *reproduced in American Journal of International Law*, Vol. 45, No. 2, pp. 15-23 (1951), p. 16.

#### 3.3.3.3 Temporary Protection

Another term that Ranovstayo might choose to use to justify its conduct towards Ms. Vormund is "temporary protection." Like "humanitarian diplomatic asylum," this notion is not as well established as "diplomatic asylum." One could make the argument that "humanitarian diplomatic asylum" is a form of "temporary protection." But given that neither of these two terms is well defined, students should have the liberty to treat them together or as separate concepts.

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| **Q:** | Agent, what is the relationship between "diplomatic asylum" and "temporary protection"? Are they the same thing? Is one a form of the other? |

The entry on "temporary protection" in the *Max Planck Encyclopedia of Public International Law* states: "In a generic sense, temporary protection is a flexible tool of international protection, which offers sanctuary for a limited period of time to persons fleeing humanitarian crises."[67] This language effectively incorporates the "humanitarian" aspect of humanitarian diplomatic asylum, by asserting that the refuge must be given only "for a limited period of time" and only "to persons fleeing humanitarian crises."

Ranovstayo would have no problem asserting that the refuge it gave to Ms. Vormund was intended only for a limited period of time. Indeed, Ranovstayo never stated that it was granting permanent asylum to Ms. Vormund. Its statements instead suggested that it was only giving her refuge on a temporary basis, while it evaluated her application for asylum. Moreover, the fact that Ranovstayo was planning to close its consulate in Segura Province without any guarantees for Ms. Vormund suggests that the refuge it was giving was not intended to be permanent.

Ranovstayo, however, would have much greater difficulty showing that Ms. Vormund was fleeing a humanitarian crisis. Although there may have been humanitarian reasons for giving her refuge, her situation cannot qualify as a "humanitarian crisis," which brings to mind instances of mass violence, genocide, and the like.

In light of the above, if Ranovstayo wishes to pursue this line of argumentation, it will have to put forth a standard for temporary protection that could more feasibly apply. At the end of the day, it is perhaps likely that any argument made on the basis of humanitarian diplomatic asylum will be similar to any argument made on this basis of temporary protection.

#### 3.3.3.4 Non-Refoulement

Creative teams representing Ranovstayo might come up with additional arguments, such as one based on the customary principle of *non-refoulement*. This principle prohibits a State from expelling or returning a refugee to the State where he or she is being persecuted. Although the principle is of a fundamental nature in asylum law in general, it is not frequently invoked in the context of giving refuge to foreign nationals at diplomatic and consular premises. In order for this theory to succeed, Ranovstayo would have to prevail on two principal arguments.

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[67] Meltem Ineli-Ciger & Achilles Skordas, "Temporary Protection," *Max Planck Encyclopedia of Public International Law* (October 2009).

First, Ranovstayo would have to show that Ms. Vordenmund has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[68] This phrase is part of the widely accepted definition of a "refugee" as codified in the Refugee Convention. The key term in the definition is "persecution." The leading commentary on the Refugee Convention observes that "the violation of any human right may constitute persecution and thus lead to refugee status."[69] Ranovstayo would thus have to argue that the penalty to be given to Ms. Vormund for her conduct is disproportionate, and thereby constitutes persecution. Ranovstayo would also have to show that Ms. Vormund's revelations of the outbreak of J-VID-18 were an expression of "political opinion." Both of these arguments would probably be difficult to make.

Second, Ranovstayo would have to show that the *non-refoulement* principle applies to the situation of Ms. Vormund at the consulate in Segura Province. The obligation as contained in the Refugee Convention would not directly apply for two reasons. First, Article 1(1) defines a refugee as someone who is "outside the country of his nationality," and Ms. Vordenmund was technically not outside her country of nationality (Aprepluya), even though she was on the premises of the Ranovstayan consulate. And second, Article 33(1) prohibits expelling or returning a refugee "to the *frontiers of territories* where his life or freedom would be threatened,"[70] and arguably the edge of a consulate is not a "frontier[] of territor[y]." To be sure, the *non-refoulement* principle in the Refugee Convention does apply extraterritorially (e.g., on the high seas, in the coastal waters of another State, and on land territory not belonging to any State[71]), but it does not appear to directly apply to embassies or consulates.

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| **Q:** | Agent, does the Refugee Convention apply to a situation like the present one concerning refuge on consular premises? |

The non-refoulement principle is, however, a customary principle, and arguably the customary principle is broader than what is codified in the Refugee Convention. Indeed, Ranovstayo could argue that the customary principle applies in the present situation on the basis of its codification in other human rights instruments. For example, the *non-refoulement* obligations in the ICCPR,[72]

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[68] Refugee Convention, art. 1(A)(2).

[69] Andreas Zimmermann & Claudia Mahler, "Article 1 A, para. 2," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 248.

[70] Refugee Convention, art. 33(1).

[71] *See, e.g.*, Andreas Zimmermann & Claudia Mahler, "Article 1 A, para. 2," in Andreas Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (2011), para. 582.

[72] The Human Rights Committee has interpreted Article 2 of the ICCPR to mean that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." HRC, General Comment No. 31, para. 12.

the Convention Against Torture,[73] the American Convention on Human Rights,[74] the ECHR,[75] although varying in scope, apply to all areas under the jurisdiction or control of the State (not just the territory of the State),[76] which would include diplomatic and consular missions. The Inter-American Court of Human Rights has specifically held that, as a matter of general international law, the *non-refoulement* obligation applies to diplomatic missions[77] And the European Commission of Human Rights held that various rights under the ECHR applied in a situation where asylum-seekers in the Danish Embassy in East Germany were handed over to the East German police.[78]

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| **Q:** | (for Ranovstayo) Agent, are you relying on the principle of *non-refoulement* as contained in the Refugee Convention, or the customary principle of *non-refoulement*. If the latter, what is your authority for the proposition that it is customary? |

If Ranovstayo were to successfully argue that it had the *non-refoulement* obligation not to surrender Ms. Vormund to Aprepluya, then the next question would be whether this constitutes sufficient legal basis to excuse Ranovstayo from any violation of the principles of territorial sovereignty and non-intervention (as discussed above in Section 3.3.1) or the VCCR (as discussed above in Section 3.3.2). Aprepluya would argue that just because a State has an obligation to take a certain action does not necessarily mean that taking such action does not violate other rules of international law. Ranovstayo, however, may assert that the *non-refoulement* obligation effectively provided a "legal basis" for it to give refuge to Ms. Vormund. Ranovstayo might also assert that the principle of *non-refoulement* is a *jus cogens* principle, thereby trumping any other violation of international law. There is a lively debate in the literature on whether the principle has achieved *jus cogens* status, though there is no consensus on this front.

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[73] Article 3(1) of the CAT provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT, art. 3(1).

[74] Article 22(8) of the ACHR provides: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

[75] The ECtHR has interpreted Article 3 of the ECHR in such a way that "expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country." ECtHR, *Chahal v. United Kingdom*, Application No. 22414/93, Judgment (15 November 1996), para. 74.

[76] Article 2(1) of the ICCPR provides that it applies to "all individuals within [a State Party's] territory and subject to its jurisdiction." Article 1(1) of the ACHR provides that it applies to "all persons subject to [State Parties'] jurisdiction." Article 2(1) of the CAT, though slightly ambiguous, provides that State Parties must "prevent acts of torture in any territory under its jurisdiction." And Article 1 of the ECHR provides that State Parties must "secure to everyone within their jurisdiction the [listed] rights and freedoms."

[77] Inter-American Court of Human Rights, Advisory Opinion OC-25/18 (30 May 2018), para. 107. The Court also made this point as a matter of Inter-American law. *See ibid.*, para. 188. The Court more generally pronounced: "The principle of non-refoulement is enforceable for any foreign person ... over whom the State concerned is exercising authority or which is under its effective control." *Ibid.*, para. 200(4); *see also ibid.*, para. 122.

[78] European Commission of Human Rights, *M v. Denmark*, Application No. 1392/90, Decision on Admissibility (14 October 1992), para. 1.

## 3.4 QUESTION 3: JURISDICTIONAL RESERVATIONS

| *Aprepluya's Claim* | *Ranovstayo's Claim* |
|---|---|
| The Court may not exercise jurisdiction over Ranovstayo's counter-claim concerning the Mantyan Airways aircraft. | The Court may exercise jurisdiction over Ranovstayo's counter-claim concerning the Mantyan Airways aircraft. |
| ***Aprepluya's Anticipated Argument*** | ***Ranovstayo's Anticipated Argument*** |
| Ranovstayo's counter-claim falls within Aprepluya's reservation for two independently sufficient reasons. First, the shoot-down of the aircraft was an Aprepluyan military activity. Second, the shoot-down was essentially within Aprepluya's domestic jurisdiction, as determined by Aprepluya. Therefore, the Court may not exercise jurisdiction over Ranovstayo's counter-claim. | Ranovstayo's counter-claim does not fall within Aprepluya's reservation. The shoot-down of the aircraft was a law enforcement activity rather than a military activity. And it was not essentially within Aprepluya's domestic jurisdiction. Therefore, the Court may exercise jurisdiction over Ranovstayo's counter-claim. |

Question 3 introduces a procedural element. As explained above in Section 3.1.1, the Court's jurisdiction in this case derives from the two Parties' optional clause declarations. Aprepluya's declaration, however, contained a reservation with two elements, which form the subject of this Question. Aprepluya can invoke one or both elements to argue that the Court does not have jurisdiction over Ranovstayo's counter-claim concerning the shoot-down of the Mantyan Airways aircraft.

First, Aprepluya can argue that the shoot-down concerned Aprepluyan "military activities," thereby falling within the first element of the reservation (**Section 3.4.1**). Second, Aprepluya can argue that the shoot-down was a matter essentially within its domestic jurisdiction, as determined by Aprepluya, and thereby falls within the second element of the reservation, the so-called Connally Reservation (**Section 3.4.2**). Importantly, Aprepluya only needs to succeed on one of these claims to prevail on this Question. Strategic teams representing Aprepluya may choose to present only one of these two arguments. This should not, however, prevent judges from asking about the other argument during oral rounds.

### 3.4.1 Military Activities

Aprepluya's declaration under Article 36(2) of the ICJ Statute provides in relevant part: "This Declaration shall not apply to any dispute concerning Aprepluyan military activities ...." (Agreed Facts, para. 49). Aprepluya may argue that the dispute over the shoot-down of the Mantyan Airways aircraft (Question 4) is one "concerning Aprepluyan military activities."

From the language of the reservation, Aprepluya would seem to have the stronger argument that the reservation applies and thus excludes the jurisdiction of the Court over Question 4. This is because the shoot-down was an act by a military officer in a military aircraft firing military weapons. This argument is rather straightforward.

| | |
|---|---|
| **Q:** | Agent, how do you define "military activities," as used in Aprepluya's reservation to its optional clause declaration? |
| **Q:** | Agent, more generally speaking, what are the principles of interpretation applicable to optional clause declarations, and in particular to reservations to these declarations? |

Ranovstayo, however, could argue that the shoot-down is best characterized as a "law enforcement activity" rather than a "military activity." Although there is no universally accepted definition of either term, Ranovstayo could assert that the shoot-down was an act of enforcing Aprepluyan law, not an act of military combat.

Ranovstayo could seek support from the ongoing *Ukrainian Naval Vessels* arbitration between Ukraine and Russia under the United Nations Convention on the Law of the Sea ("**UNCLOS**"). The arbitration is currently at the preliminary objections phase, so no final decision on jurisdiction has been rendered by the arbitral tribunal. Nevertheless, at the stage of provisional measures, the International Tribunal for the Law of the Sea ("**ITLOS**") had to rule on a *prima facie* basis whether the arbitral tribunal had jurisdiction over the dispute. Russia had made a declaration under Article 298(1)(b) of UNCLOS, which excludes "disputes concerning military activities" from the jurisdiction of arbitral tribunal, and argued that its detention of Ukrainian naval vessels passing through the Kerch Strait was a "military activity" and thus fell outside the arbitral tribunal's jurisdiction. Ukraine, on the other hand, argued that the detention was a "law enforcement activity," and therefore fell within the tribunal's jurisdiction.

In its Order on provisional measures of April 2019, ITLOS first made a few general pronouncements on the matter:

> In the view of the Tribunal, the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question. This may be a relevant factor but the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred. ...
>
> Nor can the distinction between military and law enforcement activities be based solely on the characterization of the activities in question by the parties to a dispute. ...
>
> In the view of the Tribunal, the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.[79]

[79] ITLOS, *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order (25 May 2019), paras. 64-66.

ITLOS then highlighted three relevant circumstances in the facts of the case before it: (1) the underlying dispute concerned passage through the Kerch Strait; (2) the cause of the incident was Russia's denial of passage because of the Ukrainian vessels' non-compliance with Russia's regulations; and (3) "the Russian Coast Guard used force, first firing warning shots and then targeted shots." The Tribunal concluded from these circumstances that the detention of the vessels was a law enforcement activity.[80]

Ranovstayo could use this precedent to argue that the shoot-down of the aircraft should also be considered to be a law enforcement activity. It could point to similarities with the *Ukrainian Naval Vessels* case, in particular that: (1) the reason for the shoot-down was the aircraft's non-compliance with Aprepluya's regulations; and (2) although the fighter jet used force, it similarly first fired warning shots (tracers) and then targeted shots (at the wingroot of the aircraft). Ranovstayo could even muster an *a fortiori* argument, saying that in the *Ukrainian Naval Vessels* case, there were Coast Guard vessels firing on *naval* vessels *in the broader context of an armed conflict*, whereas in our case, there was a military jet firing on a *civilian* aircraft *outside of the context of an armed conflict*. So, as the argument goes, if the incident in the *Ukrainian Naval Vessels* case was not a military activity, then the shoot-down of the aircraft must not be one either.

| **Q:** | Agent, what are the key factual differences between the *Ukrainian Naval Vessels* arbitration and the present case? How do they affect your reliance on that arbitration? |
|---|---|

Aprepluya, in addition to making a straightforward argument (i.e., the shoot-down was an act by a military officer in a military aircraft firing military weapons), could attempt to rebut Ranovstayo's reliance on the *Ukrainian Naval Vessels* case by pointing out that: (1) ITLOS was ruling on a provisional measures request in that case, which means that its jurisdictional determination was made only on a *prima facie* basis; and (2) the decision was heavily criticized by commentators on this point.

Another decision that Ranovstayo could rely on is the *South China Sea* arbitration between the Philippines and China, where the tribunal applied the military activities exception:

> In the Tribunal's view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.[81]

Ranovstayo could point out that such a "quintessentially military situation" does not exist in this case because there are no two forces arrayed in opposition to one another. Aprepluya, however, could point to the very next sentence of the *South China Sea* decision, where the tribunal stated:

> As these facts fall well within the exception, the Tribunal does not consider it necessary to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b).[82]

More generally, Ranovstayo could argue that military forces are often called on to engage in law enforcement activities, such as in dealing with violent protests and—importantly—terrorist threats.

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[80] ITLOS, *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order (25 May 2019), paras. 68-75.
[81] Arbitral Tribunal, *South China Sea (Philippines v. China)*, Award, para. 1161.
[82] Arbitral Tribunal, *South China Sea (Philippines v. China)*, Award, para. 1161.

If Aprepluya relies on the Chicago Convention for its arguments on Question 4, Ranovstayo could also point out the inconsistency for Aprepluya to rely on the Convention on International *Civil* Aviation (the full name of the Chicago Convention), but refer to the conduct in question as a "military activity."

Aprepluya may attempt to undermine the premise of Ranovstayo's arguments on this point by saying that the notions of "military activities" and "law enforcement activities" are not mutually exclusive. That is, there can be activities that are *both* "military activities" *and* "law enforcement activities." This would appear to run contrary to ITLOS's analysis of the question in its 2019 Order on provisional measures. Ranovstayo could also argue that it contradicts Article 298(1)(b) of UNCLOS, which provides an exclusion of jurisdiction not only over "disputes concerning military activities," but also over certain "disputes concerning law enforcement activities." But neither of these instructions are directly applicable to the present case, and Aprepluya seems able to make a convincing argument that the notions of "military activities" and "law enforcement activities" are not mutually exclusive.

| | |
|---|---|
| **Q:** | Agent, are the notions of "military activities" and "law enforcement activities" mutually exclusive? Should they be treated as mutually exclusive in the context of interpreting Aprepluya's optional clause declaration? |

### 3.4.2 Connally Reservation

Aprepluya's declaration contains a second exception: "This declaration shall not apply ... to any dispute with regard to matters which are essentially within the domestic jurisdiction of the United Republic of Aprepluya as determined by the Government of the United Republic of Aprepluya." This is popularly called the Connally Reservation, named after US Senator Tom Connally, although he was responsible for adding only the last part of the reservation onto the United States' declaration: "as determined by the United States of America." The United States later withdrew its declaration, but some other States have followed its example.

Today, quite a few States have a reservation to their optional clause declaration excluding matters within their "domestic jurisdiction" from the jurisdiction of the Court (e.g., Botswana, Cyprus, Djibouti, eSwatini, Hungary, India, Nigeria, Pakistan, Poland, Romania, Slovakia). It appears that only four States, however, have such a reservation with self-judging language as in the Connally Reservation:

- Malawi: "this declaration shall not apply to ... disputes with regard to matters which are essentially within the domestic jurisdiction of the Republic of Malawi <u>as determined by the Government of Malawi.</u>"
- Mexico: "This Declaration, which does not apply to disputes arising from matters that, <u>in the opinion of the Mexican Government</u>, are within the domestic jurisdiction of the United States of Mexico ..."
- Philippines: "this declaration shall not apply to any dispute ... which <u>the Republic of the Philippines considers</u> to be essentially within its domestic jurisdiction."

- Sudan: "excluding the following ... disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of the Sudan as determined by the Government of the Republic of the Sudan."

Turning first to the jurisprudence of general "domestic jurisdiction" reservations, although many States have in past cases argued that their disputes fell under such a reservation, the Court has never found such a reservation to apply. Indeed, the Court has made various pronouncements on this question in multiple cases, such that it is now clear that, as long as one State asserts that an international treaty or other rule of international law that applies (which occurs in practically every case), then the reservation does not apply.[83] As one commentator adequately summarizes, "[the] domestic jurisdiction [reservation] has lost any real significance as a defence against becoming the victim of illegitimate claims asserted by other States."[84]

| **Q:** | (for Aprepluya) Agent, would your position be the same if the reservation in question did not include the phrase "as determined by the Government of the United Republic of Aprepluya"? Why or why not? |
|---|---|

In our case, Aprepluya could try to argue that the shoot-down concerns solely Aprepluya (the aircraft is registered in Aprepluya, owned by Aprepluyan nationals, took off from Aprepluya with Aprepluyan nationals on board, and was shot down by an Aprepluyan officer in an Aprepluyan jet over Aprepluyan territory) and, thus, it falls within its "domestic jurisdiction" reservation. Ranovstayo, however, could argue that the aircraft was flying towards Ranovstayo and, moreover, that the Chicago Convention, an international treaty, applies. Considering the Court's jurisprudence on "domestic jurisdiction" reservations, Ranovstayo likely has the stronger argument here; the mere fact that Ranovstayo asserts the violation of an international treaty should mean that the dispute does not fall within the domestic jurisdiction of Aprepluya.

Things, however, get more interesting once we add the self-judging clause of the Connally Reservation into the debate. There are two ICJ cases dealing with such a reservation.

- In the *Norwegian Loans* case between France and Norway, Norway successfully invoked France's Connally Reservation to deprive the Court of jurisdiction. In that case, France had tried to argue that two international treaties applied, but the Court found that the two treaties were irrelevant.[85] The Court, however, did not rely on the self-judging language of France's Connally Reservation to reach its conclusion, so it is not clear what the Court's position on such language would have been. Interestingly, Judge Lauterpacht argued in a Separate Opinion that France's Connally Reservation was invalid (because of its incompatibility with Article 36(6) of the ICJ Statute, which gives the Court jurisdiction to decide on its own jurisdiction), and that France's Article 36(2) declaration was thereby invalid. (The Court did not deal with this question because it observed that both Parties considered the declaration to be valid.)

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[83] ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment (12 April 1960), p. 33.
[84] Christian Tomuschat, "Article 36," *The Statute of the International Court of Justice: A Commentary* (3rd ed. 2019), para. 97.
[85] *Certain Norwegian Loans*, Judgment, pp. 24-25.

- The second case is the *Interhandel* case between Switzerland and the United States. There, the United States unsuccessfully tried to invoke its Connally Reservation to deprive the Court of jurisdiction. The Court accepted Switzerland's argument that a treaty governed the issue at stake, and thereby rejected the applicability of the Connally Reservation.[86] Interestingly, the Court gave no weight at all to the self-judging language in the United States' Connally Reservation, though it also did not expressly reject its applicability.

| **Q:** | Agent, could you please remind the Court of its previous jurisprudence interpreting Connally Reservations? |
|---|---|

Aprepluya will likely rely on the *Norwegian Loans* case in arguing that its own Connally Reservation applies. Ranovstayo, however, could point out that the Court – as was the case in *Interhandel* – did not expressly give any weight to the self-judging language. Ranovstayo could then rely on *Interhandel* to show that the Court treats Connally Reservations just like any other "domestic jurisdiction" reservations.

Aprepluya and Ranovstayo could also point to broader jurisprudence on self-judging clauses, including the *Mutual Assistance* case between Djibouti and France, to show that States still have to exercise their judgment in good faith. Therefore, the Court would still be entitled to review whether Aprepluya's own determination of what falls within its domestic jurisdiction is made in good faith.

| **Q:** | Agent, could you please remind the Court of its previous jurisprudence on self-judging clauses in treaties? Is such jurisprudence relevant to the present exercise of interpreting a reservation to an optional clause declaration? |
|---|---|

Creative teams might also take Judge Lauterpacht's approach and argue that the Connally Reservation is invalid. Teams representing Ranovstayo would have to argue that the invalidity of the reservation does *not* lead to the invalidity of Aprepluya's declaration as a whole (i.e., the Connally Reservation is separable), such that there would still be a jurisdictional basis for Question 4. Moreover, both Parties already agreed that the Court has jurisdiction over Questions 1 and 2 and, as such, it would not be consistent for either side to argue that Aprepluya's declaration as a whole is invalid.[87]

| **Q:** | Agent, is the Connally Reservation contained in Aprepluya's declaration valid? Assuming that it is not valid, would its invalidity invalidate Aprepluya's entire declaration? |
|---|---|

[86] *Interhandel*, Judgment, pp. 24-25.

[87] Teams could, however, potentially argue that the stipulation as to the Court's jurisdiction over Questions 1 and 2 is a form of *forum prorogatum*, such that the Court would still have jurisdiction over those two questions even without a valid declaration on the part of Aprepluya.

## 3.5 QUESTION 4: AIRCRAFT SHOOT-DOWN

| *Aprepluya's Claim* | *Ranovstayo's Claim* |
|---|---|
| Even if the Court were to exercise jurisdiction over the counter-claim, Aprepluya did not violate international law by shooting down the aircraft. | Aprepluya violated international law by shooting down the aircraft. |
| ***Aprepluya's Anticipated Argument*** | ***Ranovstayo's Anticipated Argument*** |
| Aprepluya did not violate the Chicago Convention because the Convention is not applicable to domestic matters like the shoot-down in question and, in any case, the shoot-down was a necessary and proportionate action taken in self-defense. Aprepluya also did not violate the right to life for similar reasons. | Aprepluya violated the Chicago Convention, Article 3*bis* of which clearly prohibits the use of weapons against civil aircraft. Aprepluya also violated the right to life of Ms. Vormund and Ms. Hye. |

Question 4 recalls the numerous tragic incidents of civil aircraft shoot-downs in human history, including that of Malaysian Airlines Flight 17 (MH17) over eastern Ukraine in 2014, and that of Ukraine International Airlines Flight 752 (PS752) over Iran in 2020. This Question invites students to assess the implications of such shoot-downs as a matter of international law.

Ranovstayo has two principal claims for why Aprepluya's shoot-down of the Mantyan Airways aircraft violated international law: a violation of the Chicago Convention (**Section 3.5.1**); and a violation of the right to life (**Section 3.5.2**). Teams that are able to come up with other violations of international law should be permitted to pursue those options and make their case accordingly.

### 3.5.1 Chicago Convention

History is unfortunately replete with examples of shoot-downs of civil aircraft, usually because the aircraft accidentally crossed into the airspace of another State. For a long time, there was a debate over whether shoot-downs were an appropriate means of responding to such aerial incursions. The principal instrument governing international civil aviation is the Convention on International Civil Aviation ("**Chicago Convention**"), to which virtually all States in the world, including Aprepluya and Ranovstayo (Agreed Facts, para. 54) are parties. The Convention, however, originally did not have a provision on the use of weapons against civil aircraft.

It was only in 1984 that the parties to the Chicago Convention amended the Convention by adding Article 3*bis*, which provides in its first paragraph:

> The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.

Ranovstayo's primary argument would be that Aprepluya violated Article 3*bis* of the Chicago Convention. Aprepluya has four principal responses: the Chicago Convention does not apply (**Section 3.5.1.1**); Ranovstayo does not have standing (**Section 3.5.1.2**); Aprepluya was acting in self-defense (**Section 3.5.1.3**); and Aprepluya made a justifiable mistake (**Section 3.5.1.4**).

#### 3.5.1.1 Applicability of the Chicago Convention

Aprepluya could first argue that the Chicago Convention does not apply because it concerns only *international* civil aviation, and the shoot-down was an entirely domestic incident: the aircraft was registered in Aprepluya, owned by Aprepluyan nationals, had only Aprepluyan nationals on board, took off from Aprepluya, was shot down by an Aprepluyan officer in an Aprepluyan fighter jet over Aprepluyan territory, and crashed in Aprepluyan territory.

Ranovstayo could point out that the flight was headed towards Ranovstayo, and argue that the flight was, therefore, international. Ranovstayo may also point out that, even though the title of the convention is "Convention on International Civil Aviation," Article 3*bis* does not specify that it applies only to *international* civil aircraft. Teams might reference the preparatory works of Article 3*bis* to evaluate whether it was intended to apply to a situation like this one.

Aprepluya could also argue that the Chicago Convention does not apply because it concerns only international *civil* aviation and this was not civil aviation because the aircraft was unlawfully being operated.

| | |
|---|---|
| **Q:** | Agent, does the Chicago Convention apply to the present situation? |
| **Q:** | Agent, what is the definition of "*international* civil aviation"? What distinguishes international civil aviation from domestic civil aviation? |
| **Q:** | Agent, what is the definition of "international *civil* aviation"? Is an unauthorized flight of an aircraft normally uses for civil aviation still "civil"? |

#### 3.5.1.2 Standing

In addition to asserting that the Chicago Convention does not apply, Aprepluya could also argue that Ranovstayo does not have standing to raise this claim. As the argument goes, the right to invoke Aprepluya's responsibility would lie only with the State of registration of the aircraft, which is Aprepluya (Agreed Facts, para. 42).

Ranovstayo, however, could assert that it has standing on the grounds of: (1) being "specially affected" by the incident (Article 42(b)(i) of the Articles on State Responsibility); (2) *erga omnes partes* (Article 48(1)(a) of the Articles on State Responsibility); and/or (3) *erga omnes* (Article 48(1)(b) of the Articles on State Responsibility). The ICJ has never affirmatively upheld a State's standing on the basis of being "specially affected" or on the basis of an *erga omnes* obligation. But the Court has upheld the standing of States to bring claims on a theory of *erga omnes partes* (expressly in *Obligation to Prosecute or Extradite (Belgium v. Senegal)* and impliedly in *Whaling in the Antarctic (Australia v. Japan)*). It would thus be up to Ranovstayo to show that Article 3*bis*

is an obligation *erga omnes partes*, which will probably not be difficult to show given the nature of the prohibition contained therein.

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| **Q:** | (for Ranovstayo) Agent, what is the basis of your standing for this claim? That is, what gives Ranovstayo the right to invoke Aprepluya's responsibility for violating the Chicago Convention? |

#### 3.5.1.3 Self-Defense

Aprepluya's next potential argument is self-defense. Aprepluya could argue that, given the situation at the time (the terror threat, the trajectory of the aircraft, the aircraft being just minutes away from entering the outskirts of Beauton, and the aircraft not responding to standard signals and tracers), it credibly believed that the aircraft posed a threat, and therefore had the right to fire at it out of self-defense. It indeed makes sense that if an aircraft is on the verge of crashing into a government building as an act of terrorism, the State may fire at it and even shoot it down. This is not, however, a clearly codified rule in international law.[88]

| | |
|---|---|
| **Q:** | Agent, do States have the right to shoot down a civil aircraft if it is reasonably perceived to pose a terrorist threat? If so, does this right emanate from the inherent right of self-defense, or somewhere else? |

Aprepluya could rely on two concrete sources to support its argument here. First, it could rely on Article 21 of the Articles on State Responsibility, which provides: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations." Second, it could rely on the second sentence of Article 3*bis*(a), which provides: "This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations." Both of these provisions refer to the UN Charter. The Charter's provision on self-defense, Article 51, provides in relevant part:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations .... Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council ....

| | |
|---|---|
| **Q:** | (for Aprepluya) Agent, are you invoking self-defense under (1) Article 21 of the Articles on State Responsibility; (2) Article 51 of the UN Charter; or (3) Article 3*bis* of the Chicago Convention? |

One of the principal issues with invoking Article 51 in this context, however, is that it is intended to govern external armed attacks, not internal armed attacks. Therefore, it is not clear that Article 21 of the Articles on State Responsibility and Article 3*bis*(a) would be that helpful. Rather, it appears that the shoot-down should be a matter of domestic law, not international law (as Aprepluya will argue in QP3 for the Connally Reservation).

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[88] *See* Robin Geiss, "Civil Aircraft as Weapons of Large-Scale Destruction," *Michigan Journal of International Law*, Vol. 27, No. 1 (2005).

Assuming that Article 51 (or a similar rule) applies, the shoot-down raises three classic questions of international law: (1) what is an "armed attack"; (2) how imminent must the "armed attack" be; and (3) whether a State can employ self-defense against a non-State actor. Although the law is not settled on any of these three points, Aprepluya would have to argue on the facts that: (1) an attempted attack by crashing an aircraft into a government building constitutes an "armed attack"; (2) the attack was imminent (or at least expected to be imminent); and (3) self-defense may be employed against a non-State actor. On the law, Aprepluya would have to argue that this incident fits into some accepted legal exception to Article 3*bis* of the Chicago Convention.

Ranovstayo could in any case still argue that, at the end of the day, the aircraft was actually *not* engaging in terrorist activity, such that the shoot-down could not be justified by Article 51 (or rather, an analogous rule of self-defense that would apply to this situation). Aprepluya could argue that what matters is the State's reasonable perception of the imminent threat, not the actual threat itself. This leads us into the next and final argument under the rubric of the Chicago Convention.

#### 3.5.1.4 Mistake

Aprepluya may argue that the shoot-down was a mistake. The relationship between this argument and the previous one complicated. It seems that even if Aprepluya were to successfully argue that the shoot-down was a mistake, it would still have to show that—had the threat been real—the shoot-down would have been lawful as a matter of self-defense.

In any case, the question of mistake is itself quite complicated in international law, indicated in recent commentary on this subject as it relates to the recent shoot-down of Ukraine International Airlines Flight 752.[89] The general rule is that intention is not required for there to be a violation of international law. As the International Law Commission ("**the ILC**") stated in its commentaries to the Articles on State Responsibility:

> A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

It is true that the violation of many primary obligations in international law *do* require an element of intention, in particular in international criminal law. But in the context of the use of force, it appears that intent is not relevant to the analysis of whether an act violates international law.[90]

| | |
|---|---|
| **Q:** | Agent, can you give me an example international law of where a mistake renders an otherwise unlawful act lawful? |

Ranovstayo could make this argument, and rely in particular on the *Oil Platforms* case, where the ICJ analyzed whether Iran committed armed attacks against the United States on an objective basis, not on the basis of a perceived threat from the latter. In particular, the Court stated "the requirement

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[89] https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/

[90] *See* Marko Milanovic, "Mistakes of Fact when Using Lethal Force in International Law: Part II," *EJIL: Talk!* (15 January 2020).

of international law that measures taken avowedly in self-defense must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion.'"[91] Aprepluya, on the other hand, could point to the multiple instances of State practice of shoot-downs of civil aircraft where the State paid only an *ex gratia* compensation to the victims. This was the case, for example, for Iran Air Flight 655. Aprepluya could also attempt to rely on the very recent *Enrica Lexie* award, where an UNCLOS tribunal excused two Italian marines for firing at and killing Indian fisherman because of a reasonable perceived threat that they were pirates.[92] But Ranovstayo could distinguish this case by noting that the use of limited force is permitted in the law of the sea, unlike under Article 3*bis* of the Chicago Convention.

### 3.5.2 Right to Life

Finally, Ranovstayo could argue that Aprepluya violated the right to life of Ms. Vormund and Ms. Hye. Aprepluya could again raise a standing objection, but because the right to life is widely considered to be *erga omnes partes* (with respect to the parties to the ICCPR), *erga omnes*, and by some even *jus cogens*, Ranovstayo should not have much difficulty overcoming this objection.

Article 6(1) of the ICCPR provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The Human Rights Committee in General Comment No. 36 stated:

> The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.[93]

The Committee, however, further noted in the General Comment:

> Article 6, paragraph 1 implicitly recognizes that some deprivations of life may be non-arbitrary. For example, the use of lethal force in self-defence, under the conditions specified in paragraph 12 below would not constitute an arbitrary deprivation of life.[94]

The Committee elaborated in paragraph 12 on this concept of using lethal force in self-defense:

> The notion of "arbitrariness" is not to be fully equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality. In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defense, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly

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[91] ICJ, *Oil Platforms*, para. 73.
[92] Arbitral Tribunal, *Enrica Lexie (Italy v. India)*, para. 1076.
[93] Human Rights Committee, *General Comment No. 36*, para. 3.
[94] Human Rights Committee, *General Comment No. 36*, para. 10.

> needed for responding to the threat; the force applied must be carefully directed only against the attacker; and the threat responded to must involve imminent death or serious injury. The use of potentially lethal force for law enforcement purposes is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat. It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others. The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.[95]

There is of course much more jurisprudence and commentary on the right to life, as elaborated not only by the Human Rights Committee but also by regional human rights courts and other bodies. The passage above nonetheless makes clear that a lot of the facts on which the argument of self-defense turns will also be the key facts for the debate over the right to life.

Aprepluya could also resort to a defense of mistake, as in the Chicago Convention context. According to Professor Marko Milanovic, the standard for mistake in human rights law is one of objective reasonableness: if the alleged perpetrator took an action that was objectively reasonable, then he or she may not have violated international human rights law.[96] The extent to which the defense of mistake applies would thus depend on many of the same facts examined for self-defense.

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[95] Human Rights Committee, *General Comment No. 36*, para. 12.

[96] *See* Marko Milanovic, "Mistakes of Fact when Using Lethal Force in International Law: Part II," *EJIL: Talk!* (15 January 2020).

# 4 APPENDIX A: INTRODUCTION TO INTERNATIONAL LAW

This Appendix is a primer on public international law for judges who may not have any background in the field.

## 4.1 SOURCES OF INTERNATIONAL LAW

The sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice (ICJ). The first three subparagraphs are the three sources of international law: (a) treaties (*i.e.*, conventions); (b) custom; and (c) general principles of law. The fourth subparagraph is not a source of international law; rather, it is a "subsidiary means" for the determination of rules of law: (d) judicial decisions and teachings (e.g., treatises, commentaries, monographs, articles, and other scholarly works). In other words, one can use judicial decisions and teachings to help identify and determine the rules of treaties, custom, and general principles of law.

> ICJ Statute, Article 38
>
> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is no hierarchy between the three sources of international law. Some commentators argue that unilateral acts—of both States and international organizations—are a fourth source of international law.

### 4.1.1 Treaties

The first source of international law is treaties (*i.e.*, conventions). Treaties are international agreements between States. The rules governing treaties are set forth in the Vienna Convention on the Law of Treaties (VCLT). Many, but not all, provisions of the VCLT are considered to reflect customary international law.

Article 26 of the VCLT sets out the fundamental principle relating to treaties: *pacta sunt servanda*. Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Ordinarily, the provisions of a treaty bind only the States party to the treaty. Nevertheless, the provisions of a treaty may reflect customary international law, in which case

they bind all States. It is not uncommon for certain provisions of a treaty to reflect customary international law while other provisions of the same treaty do not reflect customary international law.

Article 31 of the VCLT sets out the general rule of interpretation. Article 31(1) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In short, three elements must be examined in interpreting a treaty: (1) the text; (2) the context; and (3) the object and purpose. Article 31(2) provides that the "context" of a treaty includes the text, the preamble, the annexes, and other agreements and instruments specified in subparagraphs (a) and (b). Article 31(3) further provides that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties.

### 4.1.2 Custom

The second source of international law is custom. Custom is established if there is sufficient (1) State practice; and (2) *opinio juris*. State practice refers to the conduct of States. *Opinio juris* refers to the belief on the part of the State engaging in the practice that "this practice is rendered obligatory by the existence of a rule of law requiring it."[97] Evidence of State practice and *opinio juris* may be found in, *inter alia*, a State's military acts, executive acts, administrative acts, legislative acts, judicial decisions, policy decisions, policy statements, conclusion of treaties, diplomatic correspondence, opinions of national legal advisers, comments at conferences, and voting in U.N. General Assembly resolutions, as well as in the conduct of international organizations.

The degree of State practice and/or *opinio juris* necessary to qualify a rule as customary is not clear. Nevertheless, the ICJ has given some vague guidance on this issue. In the *North Sea Continental Shelf* cases, the ICJ held that "State practice, including that of States whose interests are specially affected, [must be] both extensive and virtually uniform."[98] And in the 1974 *Fisheries Jurisdiction* cases, the ICJ considered a "generally accepted" rule to be customary.[99] Nevertheless, in *Military and Paramilitary Activities*, the ICJ held that "the corresponding practice [does not have to] be in absolutely rigorous conformity with the rule."[100]

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[97] ICJ, *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Merits, Judgment (20 February 1969), 1969 ICJ Rep. 3, ¶ 77.

[98] ICJ, *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Merits, Judgment (20 February 1969), 1969 ICJ Rep. 3, ¶ 74.

[99] ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 3, ¶ 52; ICJ, *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 175, ¶ 44.

[100] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 186.

### 4.1.3 General Principles of Law

The third source of international law is general principles of law. There is no consensus over the definition of general principles of law. The majority of such general principles of law are procedural in nature, such as good faith, estoppel, *res judicata*, and clean hands.

### 4.1.4 Judicial Decisions and Teachings

As noted above, judicial decisions and teachings, though listed in Article 38(1), are not a source of international law. Rather, they are a "subsidiary means for the determination of rules of law." In other words, the ICJ may use them to identify and determine the rules of treaties, custom, and general principles of law.

Judicial decisions include international and domestic decisions of both permanent courts and arbitral tribunals. As a matter of practice, however, the ICJ most often cites to its own precedent and the precedent of its predecessor, the Permanent Court of International Justice (PCIJ). Because judicial decisions are not a source of international law (but only a subsidiary means for the determination of rules of law), the ICJ is not bound by its own precedent. This is reinforced by Article 59 of the ICJ Statute, which provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Teachings refer primarily to scholarly writings. Notably, they include only the teachings of "the most highly qualified publicists," such as Grotius, Lauterpacht, Oppenheim, McNair, Brownlie, current and former ICJ judges (including their declarations, separate opinions, and dissenting opinions), as well as the documents produced by the International Law Commission (ILC). Many students cite the scholarly writings of individuals who are not among "the most highly qualified publicists." As a result, you may question oralists about the identity of the author of any scholarly source they cite.

## 4.2 INTERNATIONAL DISPUTE SETTLEMENT

### 4.2.1 Terminology

The terminology used before the ICJ (and in international dispute settlement more generally) differs in various ways from the terminology used in domestic dispute resolution. The following differences should be noted.

- The words "settle" and "settlement" are for the most part synonymous with "resolve" and "resolution." The ICJ tends to use the words "settle" and "settlement."
- The party that filed the case is called the "applicant" (not the "plaintiff").
- The party against whom the case is filed is called the "respondent" (not the "defendant").
- The written pleadings filed by the parties are called "memorials" (not "briefs" or "cases").

- The individuals representing States are called "agents" (if they are direct representatives) or "counsel" (if they are external legal advisers).[101] In Jessup, the oralists should be called "agents."
- The judges on the ICJ may be referred to as "Your Excellency" (not "Your Honor"), though in practice this is not common. In Jessup, the oralists should refer to the judges as "Your Excellency" and/or the President of the bench as "Mr./Madame President."

### 4.2.2 Jurisdiction

The fundamental principle in international dispute settlement is the principle of consent: a court or tribunal has jurisdiction to settle a dispute only if the parties consented to the court or tribunal doing so. This consent may be given before or after the dispute arises. There are four bases for the ICJ's jurisdiction:

- optional clause declarations (under Article 36(2) of the ICJ Statute) – Both States make a declaration stating that they will accept the jurisdiction of the Court over any dispute (or certain disputes) filed against it by another State that has also made such a declaration.
- compromis (*i.e.*, special agreement) – Both States conclude a treaty to submit the dispute to the Court after the dispute has arisen.
- compromissory clause (*i.e.*, dispute resolution clause, dispute settlement clause) – Both States concluded a treaty (often before the dispute arose), which provides for submission of any dispute (or certain disputes) to the Court.
- *forum prorogatum* – One State institutes proceedings against a second State over which the Court does not have jurisdiction, but the second State consents to the Court's jurisdiction for the case.

### 4.2.3 Admissibility

The distinction between jurisdiction (of the court or tribunal) and admissibility (of the claim) is often unclear. Indeed, international courts and tribunals have diverged on the exact differences between jurisdiction and admissibility. In general, the ICJ considers issues of jurisdiction to be those relating to the jurisdictional provisions of the ICJ Statute (Articles 34-37), such as whether the parties consented to the Court's jurisdiction, whereas issues of admissibility include a range of other issues that could prevent the Court from adjudicating the merits of the dispute. Commentators generally agree that the *Monetary Gold* principle, mootness, and standing are issues of admissibility.

### 4.2.4 Burden of Proof

The burden of proof is about which party has the burden of proving a matter of fact or law.

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[101] More specifically, there are "agents," "co-agents," "deputy agents," "assistant agents," "advocates," "counsel," and others.

With respect to matters of general international law (e.g., jurisdiction, admissibility, the law of treaties, the law of State responsibility), the Court adopts the principle of *jura novit curia* ("the court knows the law"), according to which the Court is the one that is supposed to know the law.[102] As a result, neither party has the burden of proof. As the Court held in the 1974 *Fisheries Jurisdiction* cases, "the burden of establishing or proving rules of international law cannot be imposed on any of the parties, for the law lies within the judicial knowledge of the Court."[103]

With respect to matters of specific international law (e.g., bilateral treaties, local customs) and national law (if relevant), the Court treats the existence of such rules of law as matters of fact, such that the party asserting it has the burden of proof.[104] For example, the Court held in *Asylum* that "[t]he Party which relies on a [local custom] must prove that this custom is established in such a manner that it has become binding on the other Party."[105]

With respect to matters of fact, the Court adopts the principle of *onus probandi incumbit actori* ("the burden of proof is on the claimant"). As the Court has held on multiple occasions, the party alleging the fact bears the burden of proving it.[106] However, the Court clarified in *Croatian Genocide* and *Diallo* that this principle "is not an absolute one."[107] For example, the Court has held that neither party has the burden of proof with respect to facts that are "notorious" or "undisputed,"[108] and that sometimes a party cannot be required to prove a "negative fact."[109]

### 4.2.5 Standard of Proof

The standard of proof is about the degree of certainty that must be proven by the party that bears the burden of proof.

The ICJ has not articulated consistent standards of proof, employing a variety of terminology, such as "(in)sufficient," "satisfying," "convincing," "conclusive," and "decisive." The Court has, however, recognized that "claims against a State involving charges of exceptional gravity [e.g., use of force, genocide] must be proved by evidence that is fully conclusive [*i.e.*, a higher

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[102] Robert Kolb, *International Court of Justice* 934-35 (Hart 2013).

[103] ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 3, ¶ 17; ICJ, *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 175, ¶ 18.

[104] Robert Kolb, *International Court of Justice* 935 (Hart 2013).

[105] ICJ, *Asylum (Colombia/Peru)*, Judgment (20 November 1950), 1950 ICJ Rep. 266, p. 276.

[106] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 172 (Nov. 18); ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment (26 November 1984), 1984 ICJ Rep. 392, ¶ 101; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (20 April 2010), 2010 ICJ Rep. 14, ¶ 162.

[107] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 172 (Nov. 18); ICJ, *Ahmadou Sadio Diallo (Guinea v. DRC)*, Merits, Judgment (30 November 2010), 2010 ICJ Rep. 639, ¶ 54.

[108] Robert Kolb, *International Court of Justice* 935 (Hart 2013).

[109] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 172 (Nov. 18); ICJ, *Ahmadou Sadio Diallo (Guinea v. DRC)*, Merits, Judgment (30 November 2010), 2010 ICJ Rep. 639, ¶ 54.

standard]."[110] In addition, the Court held in *Corfu Channel* that if evidence is in the "exclusive territorial control" of the respondent, then the claimant "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[111]

[110] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 178 (Nov. 18) (quoting *Bosnian Genocide*); ICJ, *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment (9 April 1949), 1949 ICJ Rep. 4, p. 17.

[111] ICJ, *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment (9 April 1949), 1949 ICJ Rep. 4, p. 17.

# 5 APPENDIX B: TIMELINE OF EVENTS

| Date | Event |
|---|---|
| March 2018 | The Hadbard health authorities reported that a large number of cases of J-VID-18 had been identified in a rural village. (Problem, para. 4) |
| 20 April 2018 | The WHO Director-General declared the outbreak of J-VID-18 a public health emergency of international concern ("PHEIC"). The Director-General issued Temporary Recommendations, stating that "travel and trade restrictions are not recommended." (Problem, para. 8) |
| 22 April 2018 | The Ranovstayan Home Office published its entry regulation, which, among other things, prohibited all non-Ranovstayan nationals who had been in a "high-risk country" within the previous 18 days from entering Ranovstayo. (Problem, para. 10) |
| 15 May 2018 | WHO declared that J-VID-18 constituted a pandemic. (Problem, para. 15) |
| 3 June 2018 | Ms. Vormund published a tweet stating that eight lab technicians working on the J-VID-18 vaccine project at Aprepluya's National Bioresearch Laboratory ("NBL") had developed symptoms of the disease. (Problem, para. 18) Two Aprepluyan police officers chased Ms. Vormund by car, until she drove through the front gates of Ranovstayo's consulate in Segura Province. (Problem, para. 20) |
| 4 June 2018 | President Kalkan of Ranovstayo and Prime Minister Haraka of Aprepluya, with members of their staffs, met by videoconference to discuss the outbreak of J-VID-18 in Segura Province and the status of Ms. Vormund. (Problem, paras. 23-26) |
| 5 June 2018 | The Aprepluyan Health Minister announced the outbreak of J-VID-18 in Segura Province, and stated that Aprepluya was barring travel into or out of the Province. (Problem, para. 27) |
| 5-7 June 2018 | Approximately 80% of tourists in Aprepluya left the country. (Problem, para. 30) |
| 7 June 2018 | Ranovstayo's Ministry of Health announced that Aprepluya was added to the list of "high-risk countries," effective at 00:01 local time on 8 June 2018. (Problem, para. 29) |
| 8 June 2018 | Aprepluya's Prosecutor's Office formally charged Ms. Vormund with three offenses under the National Penal Code. (Problem, para. 32) |

| | |
|---|---|
| 19 June 2018 | The Justice Ministers of both Aprepluya and Ranovstayo received identical reports from INTERPOL indicating that a clandestine organization calling itself "Friends of Justice" ("FOJ"), was planning a terror attack on a national capital in the region, using a bomb-laden civilian airplane as a weapon. (Problem, para. 38) |
| 23 June 2018 | The Ranovstayan Foreign Ministry announced that it intended to permanently close its consulate in Segura Province at noon on 26 June 2018. (Problem, para. 40) |
| 24 or 25 June 2018 | Ms. Vormund left the premises of the Ranovstayan consulate, and traveled with her friend Ms. Gwo Hye to Segura Airport. (Problem, para. 43) |
| 26 June 2018 | At 2:57 in the morning, Ms. Vormund and Ms. Gwo Hye took off from Segura Airport without authorization on a small Mantyan Airways aircraft, intending to fly to the international airport in Bogpadayo, Ranovstayo. (Problem, paras. 42-43) At 3:12, the Aprepluyan Air Force shot down the aircraft. (Problem, paras. 41-42) |
| 8 July 2018 | The Aprepluyan Ministry of Tourism published a study entitled *The Effect of Ranovstayo's Entry Restrictions on Tourism in Aprepluya*, concluding that, from its inception through 30 June 2018, the Ranovstayan entry regulation had resulted in over €130 million in revenue lost by Aprepluya and its nationals. (Problem, para. 46) |
| 12 July 2018 | Aprepluya filed an Application with the Court instituting the present proceedings against Ranovstayo. (Problem, para. 47) |
| September 2018 | It was discovered that certain previously existing and widely available antiviral medications were very effective at combating J-VID-18 symptoms and reducing the contagiousness of the disease. (Problem, para. 52) |
| 1 December 2018 | Aprepluya and Ranovstayo requested a suspension of the proceedings in order to pursue settlement negotiations. (Problem, para. 53) |
| 3 August 2020 | Aprepluya and Ranovstayo requested that the proceedings before the Court be continued. (Problem, para. 53) |