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IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

CASE CONCERNING THE J-VID-18 PANDEMIC

UNITED REPUBLIC OF APREPLUYA
(APPLICANT)

V.

DEMOCRATIC STATE OF RANOVSTAYO
(RESPONDENT)

MEMORIAL FOR RESPONDENT

THE 2021 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

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STATEMENT OF JURISDICTION

The United Republic of Aprepluya (**Aprepluya**) instituted proceedings against the Democratic State of Ranovstayo (**Ranovstayo**) before the International Court of Justice (**the Court**) on 12 July 2018 pursuant to Article 40(1) of the Statute of the International Court of Justice (**the Statute**) regarding the dispute concerning alleged violations of international law by Ranovstayo. Ranovstayo filed a counter-claim under Article 80 of the Rules of Court on 16 July 2018, and Aprepluya noted its intention to contest the Court's exercise of jurisdiction over that counter-claim on 18 July 2018. The Parties accepted the jurisdiction of the Court over Aprepluya's claims, and agreed to have all the claims and counter-claims heard together in a single set of proceedings, and the Parties jointly communicated to the Court the Statement of Agreed Facts on 10 September 2020. Both States have made Declarations under Article 36(2) of the Court's Statute recognizing this Court's jurisdiction compulsory *ipso facto*.

QUESTIONS PRESENTED

I. Whether Ranovstayo violated international law by applying its entry regulation or Ranovstayo is otherwise owing compensation to Aprepluya;

II. Whether Ranovstayo was in compliance with international law in refusing to hand over Ms. Vormund to the Aprepluyan authorities;

III. Whether the Court may exercise jurisdiction over Ranovstayo's counter-claim concerning the Mantyan Airways aircraft;

IV. Whether Aprepluya's shoot-down of the aircraft violated international law.

STATEMENT OF FACTS

BACKGROUND

Aprepluya is a developed parliamentary democracy and the principal contributors to its GDP are the banking and financial services sectors. Ranovstayo, which lies directly to the east of Aprepluya, is also a developed, democratic nation. Its economy is centered on petroleum, agricultural, and the manufacturing sectors. Given its historical culture and scenery, Aprepluya has an active tourism industry particularly in Segura Province. A large portion of the tourists to this province are Ranovstayans or nationals of other States who travel through Ranovstayo's Bogpadayo Airport.

J-VID-18

In March 2018, a previously unknown virus called "J-VID-18" struck Hadbard and caused 6 deaths. Scientists then discovered the virus was capable of human-to-human transmission even during the incubation period and in an asymptomatic way. By 20 April, the WHO declared that J-VID-18 constituted a public health emergency of international concern (**PHEIC**), with 626 cases confirmed in 3 countries. By 15 May, J-VID-18 was declared a pandemic, and spread to 65 countries with 15,274 confirmed cases and 212 deaths.

No vaccine or effective antiviral medication was discovered until September 2018, and the number of active cases only began to decrease in October. On 20 November 2018, the WHO declared that J-VID-18 was no longer a pandemic.

RANOVSTAYO'S ENTRY REGULATION

On 22 April 2018, Ranovstayo published a 3-month entry regulation in combating J-VID-18, prohibiting entry of people from those deemed "high-risk country" as designated by Ranovstayo. The entry regulation was based on an intensive risk assessment, best scientific evidence available and enforced in accordance with national law. On 23 April, Ranovstayo informed the WHO of its entry regulation, providing it with the public health rational and relevant scientific information.

Ranovstayo and Aprepluya are intricately interconnected. On 25 May, Aprepluya first discovered suspected J-VID-18 cases within Segura Province, but it did not take any precautionary measures until 5 June. Ranovstayo warned Aprepluya that it may be added to the list of "high-risk countries" unless Aprepluya properly managed the virus outbreak in Segura

Province. Over a few days, from June 5 to June 7, the confirmed cases in Aprepluya rapidly increased to a total of 9 cases. On the afternoon of 7 June, Aprepluya was added to the list of "high-risk countries", taking effect at 00:01 local time on 8 June.

MS. KEINBLAT VORMUND (MS. VORMUND)

Ms. Keinblat Vormund was an Aprepluyan national and a lab technician working in the National Bioresearch Laboratory (**NBL**) of Aprepluya. As an employee of NBL, she was required to sign a non-disclosure agreement which forbade her from disclosing things about her work at NBL. On 25 May 2018, after realizing the spread of J-VID-18 in the NBL, Ms. Vormund reported the situation to her superior. However, her superior refused to inform the public of the epidemic situation and menaced her not to deliver it. Knowing that the information regarding the epidemic was of vital importance to the protection of the public, Ms. Vormund posted an anonymous tweet out of her sense of responsibility, making the cases at NBL known to the public.

Soon afterwards Aprepluyan police traced the tweet back to Ms. Vormund and showed up at her doorstep. Fearing for her life, she fled the scene under police pursuit. She entered the consulate of Ranovstayo. There she wrote down her experiences and asked for protection as she feared persecution. She was declared an applicant for asylum by Ranovstayo and the Consul allowed her to stay in the consulate while her application was being considered.

Ms. Vormund was subsequently charged with three offences. Moreover, Aprepluya's Prosecutor's Office stated that they would seek the maximum penalty on all charges, meaning Ms. Vormund could face a sentence of 20 years. Ms. Vormund, with the help of her friend Ms. Gao Hye, attempted to fly to Ranovstayo on 25 of June to claim asylum, one day before Ranovstayo would permanently close the consulate. Unfortunately, their plane was shot down by Aprepluya and neither Ms. Vormund nor Ms. Hye survived.

THE MANTYAN AIRWAYS AIRCRAFT

The Mantyan Airways aircraft in question is a small 12-seat propeller-driven aircraft with a clear tail number. It is a civil aircraft privately owned by Aprepluyan nationals. On 26 June 2018, the aircraft took off carrying two innocent civilians who intended to fly to Bogpadayo, so that Ms. Vormund may seek asylum. No weapons or explosives were on board. After being

mistakenly suspected of conducting a terrorist attack, an Aprepluyan fighter jet fired upon the aircraft. The pilot lost control and it crashed nearby, killing both occupants.

RESERVATION IN APREPLUYA'S DECLARATION

Aprepluya and Ranovstayo made Declarations under Article 36(2), the Optional Clause, of the Statute of the International Court of Justice on 7 January 2002 and 10 March 2003 respectively, recognizing the Court's jurisdiction compulsory *ipso facto*. Aprepluya's Declaration includes the reservation *ratione materiae*, which may preclude the Court's jurisdiction in disputes concerning Aprepluyan military activities and disputes regarding matters essentially within Aprepluya's domestic jurisdiction as determined by Aprepluya.

FRIENDS OF JUSTICE (FOJ)

FOJ is a terrorist organization included on the United Nations Security Council Consolidated List and has adherents in over 100 countries.

In January 2018, Aprepluyan authorities monitoring FOJ activities intercepted a message that it intended to launch a terrorist attack. Aprepluya did not take any further measure to prevent the attack. On 19 June, the Justice Ministers of both Aprepluya and Ranovstayo received warnings from INTERPOL, which indicated a possible FOJ terrorist attack using a bomb-laden civilian airplane as a weapon, on a national capital in the region. Both countries were on heightened alert.

THE REPORT BY APREPLUYAN COMMANDING OFFICER

On 27 June 2018, the Commanding Officer of the Beauton Area Air Force Base issued a report disclosing the process of the shoot-down. The report confessed that only 15 minutes after takeoff, Aprepluya's fighter jet mistakenly identified the aircraft, fired upon it, causing it to crash, and killing all people on board. There is no sufficient evidence to support Aprepluya's mistaken belief that it was being used for terrorist purposes.

THE REPORT BY THE INTERNATIONAL LEAGUE FOR SAFETY IN AVIATION (ILSA)

On 2 July 2018, ILSA published a report of the flight. The aircraft, carrying two innocent

civilians, was intended to fly to Bogpadayo to seek asylum. Although irregular, the pilot made some arrangements before taking off. At the time of the shoot down, no effective communication could be established between the aircraft and the outside world since the radio was malfunctioning.

SUMMARY OF PLEADINGS

PLEADING I

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.

Ranovstayo complied with the IHR in taking additional measures exceeding those recommended by the WHO. Adding Aprepluya to the list of "high-risk countries" with less than 50 confirmed cases was not discriminatory, based on science and not more restrictive of international traffic.

Ranovstayo also complied with the International Covenant on Economic Social and Cultural Rights (**ICESCR**) and the International Covenant on Civil and Political Rights (**ICCPR**) Under the ICESCR, Ranovstayo owes no extraterritorial obligations, and in any event, had no causal nexus with Aprepluya's economic loss. International freedom of movement under the ICCPR was not infringed as Ranovstayans were free to exercise their right to leave and right to enter. Concerning the quarantine, such restriction on internal movement can be justified by "public health" and "rights and freedoms of others".

In any event, Ranovstayo could preclude its wrongfulness under distress or necessity, and thus no obligation to compensate shall arise.

PLEADING II

Ranovstayo did not violate international law by refusing to hand over Ms. Keinblat Vormund. Ranovstayo could lawfully consider Ms. Vormund's asylum in its consulate because she had the right of requesting asylum extraterritorially, and Ranovstayo had the right to grant asylum in the consulate.

Ranovstayo had the obligation of non-refoulement. For one thing, the non-refoulement principle under refugee law can be applied extraterritorially and Ms. Vormund could enjoy this principle as a refugee. For another thing, the non-refoulement principle under the ICCPR shall be considered since Ranovstayo was under the obligation to protect Ms. Vormund.

Furthermore, Ranovstayo had no obligation to hand over Ms. Vormund. To begin with, lacking treaties or conventions, there was no obligation of surrender between the two States. Furthermore, Ranovstayo was not obligated to surrender Ms. Vormund as a political offender.

In any event, Ranovstayo did not violate the non-intervention principle for the lack of coercive measure and in any event, Ranovstayo's conduct could be justified as to protect Ms. Vormund against violations of human rights.

PLEADING III

The Court may exercise jurisdiction over Ranovstayo's counter-claim as both States have made Declarations recognizing this Court's jurisdiction compulsory *ipso facto*.

Aprepluya's military activities reservation cannot be applied as the present dispute in the counter-claim does not concern military activities and in any event the activity is not of a military activity.

Aprepluya's self-judging reservation cannot preclude jurisdiction, as this reservation is contrary to the Court's Statute and therefore invalid. The invalidity of this reservation does not entail Aprepluya's Declaration invalid as the reservation is separable from the Declaration and Aprepluya is estopped from claiming the invalidity of the Declaration. Furthermore, the invocation of the self-judging reservation violates the principle of good faith. In any event, the shoot-down is not essentially within Aprepluya's domestic jurisdiction.

Aprepluya's shoot-down breaches its obligations *erga omnes partes* under the Chicago Convention and the ICCPR, and Ranovstayo as a Party to these conventions has *locus standi* to bring this counter-claim. Furthermore, the shoot-down has infringed the *erga omnes* right - the right to life, and thus Ranovstayo has *locus standi* to contend that such conduct is unlawful.

PLEADING IV

Aprepluya's shoot-down of the aircraft is in contravention of international law.

Aprepluya failed to comply its obligation under the Chicago Convention to refrain from the use of weapons against civil aircraft and endangered the lives of people when it shot down the aircraft.

Aprepluya violated the right to life under the ICCPR by killing innocent people on board, being careless in analyzing intelligence and using excessive force against an unarmed civil aircraft based merely on suspicion.

Aprepluya's shoot-down could not be justified by self-defence because its basis, a manifestly unfounded mistake, is unlawful. Moreover, the precondition of self-defence has not been met

since there existed no armed attack and the FOJ is a non-State actor. Furthermore, anticipatory is not recognized by Article 51. In any event, even if anticipatory self-defence is valid, the aircraft could not amount to an imminent threat and Aprepluya failed to fulfill the requirements of necessity and proportionality.

PLEADINGS

I. 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.

Ranovstayo complied with [**A**] the 2005 International Health Regulations (**IHR**),[1] and [**B**] human rights covenants. Even assuming otherwise, [**C**] Ranovstayo can preclude its wrongfulness and owes no compensation to Aprepluya.

A. Ranovstayo did not violate the IHR by applying its entry regulation to Aprepluya.

The IHR resembles requirements of the Agreement on the Application of Sanitary and Phytosanitary Measures (**SPS Agreement**) on applying additional measures exceeding those recommended by the World Health Organization (**WHO**).[2] Interpreted compatibly,[3] the application to Aprepluya was legitimate under Article 42 and 43 of the IHR.

1. The application was not discriminatory.

Situations posing higher risks entail stricter measures to achieve the same level of protection.[4] Such measures shall not be deemed discriminatory.[5]

In confronting J-VID-18, Ranovstayo set its overall policy threshold as 50 confirmed cases,

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[1] International Health Regulations (2005) 2509 UNTS 79 [**IHR**].

[2] IHR, Arts 42, 43(1), 43(2); Agreement on the Application of Sanitary and Phytosanitary Measures (1951) 1867 UNTS 493 [**SPS**], Arts 2(2), 2(3), 5(5), 5(6); Caroline Foster, 'Justified Border Closures do not Violate the IHR 2005' < https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/ > accessed 31 December 2020 [**Foster**], 3.

[3] IHR, Art 57.

[4] WTO, *Australia: Measures Affecting Importation of Salmon* (1988) WT/DS18/R [***Australia-Salmon* (Panel)**], ¶8.123.

[5] WTO, *Australia: Measures Affecting Importation of Salmon* (1988) WT/DS18/AB/R [***Australia-Salmon* (AB)**], ¶154.

while leaving room for flexibility.[6] Such flexibility applies here, as the close interconnectivity and regular population exchange increased the risk of infection.[7] Also, given the high transmissibility and Aprepluya's late response,[8] it was unlikely, and later proven to be true,[9] that Aprepluya would contain the virus within Segura Province. Thus, adding Aprepluya to the list of "high-risk countries" with less than 50 confirmed cases was non-discriminatory.

2. The application was based on science.

a. The application followed scientific principles.

Scientific principles include the laws of nature known through scientific methods.[10] The most effective strategy to contain a pandemic is to reduce contact between infected and uninfected persons.[11] Ranovstayo's entry regulation prohibited entry of people from the affected Aprepluya into unaffected Ranovstayo,[12] and thus followed scientific principles.

b. The application was supported by scientific evidence and information.

General harm[13] and the specific risk[14] shall be jointly considered in assessing risks to human

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[6] *Agreed Facts*, ¶10, Section 3.

[7] *Agreed Facts*, ¶¶2-3, 23, 34.

[8] *Agreed Facts*, ¶¶7, 24, 27.

[9] *Clarifications*, ¶7.

[10] IHR, Art 1.

[11] WHO, 'Non-pharmaceutical Public Health Measures for Mitigating the Risk and Impact of Epidemic and Pandemic Influenza' (2019) 4.

[12] *Agreed Facts*, ¶¶23, 29, 36.

[13] WTO, *Canada: Continued Suspension of Obligations in the EC-Hormones Dispute* (2018) WT/DS 231/AB/R [***Canada-Continued Suspension***], ¶¶696-697.

[14] WTO, *European Communities: Measures Concerning Meat and Meat Products (Hormones)* (1998) WT/DS26/AB/R [***EC-Hormones***], ¶¶199-208.

health. Whereas scientific evidence is based on scientific methods,[15] relevant information in a complementary way, does not predetermine sources by describing "involving".[16] In principle, "information" includes any material, *inter alia*, non-demonstrated hypotheses[17] and ascertainable, real world risks.[18]

Generally, J-VID-18 endangers human health and could be fatal.[19] In support, the WHO's emergency declarations was highly reputable[20] and based on science.[21] Specifically addressing Aprepluya, health risk actually existed concerning the virus's spread in Aprepluya, where a large number of Ranovstayans vacationed.[22] Given the regular population exchange between the two countries,[23] a well-founded hypothesis that Aprepluya posed urgent risk of introducing virus was thus established. Above all, Ranovstayo had solid scientific evidence and information to apply the regulation to Aprepluya.

3. The entry regulation was not more restrictive of international traffic.

A measure is not more traffic-restrictive unless:[24] there exists a reasonably available

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[15] IHR, Art 1.

[16] IHR, Art 43(2)(b); Black's Law Dictionary (8th edn 2004), 2229.

[17] WTO, *Japan: Measures Affecting the Importation of Apples* (2003) WT/DS245/R [***Japan-Apples***], ¶¶8.92-8.93.

[18] *EC-Hormones*, ¶187.

[19] *Agreed Facts*, ¶4; *Clarifications*, ¶7.

[20] *Canada-Continued Suspension*, ¶591.

[21] IHR, Arts 17, 48, Annex 2.

[22] *Agreed Facts*, ¶¶23, 34.

[23] *Agreed Facts*, ¶34.

[24] IHR, Art 43(1); *Australia-Salmon* (AB), ¶194; WTO, *Australia: Measures Affecting the Importation of Apples from New Zealand* (2010) WT/DS367/R [***Australia-Apples***], ¶7.1098.

alternative, which is significantly less restrictive,[25] that also achieves the level of protection the State deems appropriate.[26] Hence, evaluating the entry regulation as a whole[27] or considering each component under these three elements, none of the aspects shall be considered more restrictive of international traffic.

a. The overall entry prohibition was not more restrictive.

Under an objective and scientifically proven risk, A State has the prerogative[28] to determine its appropriate level of health protection (**ALOP**) even to "zero-risk".[29]

In confronting the severe risk established through the WHO's declarations,[30] Ranovstayo enforced an "undisputedly zero-risk level"[31] entry prohibition. To achieve this, the law-enforced entry prohibition was not more restrictive, given voluntary containment measures and measures allowing entry were proven unlikely to contain the disease,[32] while utilization of antiviral medications was not discovered to be feasible until September 2018.[33]

b. The stipulation of 18-day was not more restrictive.

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[25] SPS, Art 5(6), note 3; *Australia-Apples*, ¶7.1264.

[26] IHR, Art 3(4); WHO, 'Second US Government Comments on the First Draft of the Proposed Revision of the IHRs' (2004) [**US Comments**], 4; WHO, 'Preliminary Comments of the European Community and its Member States on the Draft-revised IHRs' (2004) [**EC Comments**], 4.

[27] WTO, *European Communities: Measures Affecting Asbestos and Asbestos-containing Products* (2001) WT/DS135/AB/R [***EC-Asbestos***], ¶64; *Japan-Apples*, ¶8.19.

[28] *EC-Asbestos*, ¶168; *Canada-Continued Suspension*, ¶523.

[29] *Australia-Salmon* (AB), ¶125.

[30] *Agreed Facts*, ¶¶8, 15.

[31] *Australia-Salmon* (AB), ¶197.

[32] *Agreed Facts*, ¶¶6, 8, 13, 29, 37; *Clarifications*, ¶7.

[33] *Agreed Facts*, ¶52.

For purpose of Article 43(1) and in view of the synergy[34] between the IHR and the SPS Agreement, an alternative shall be "significantly" less restrictive, namely "important, notable, consequential",[35] rather than simply less restrictive to traffic.

In contrast with a total entry prohibition, only alternatives allowing entry would qualify as significantly less restrictive.[36] While 18-day was 4 days longer than the virus's incubation period and was described as "the most stringent",[37] with essentially the same effect of entry prohibition, merely 4-days short is not significantly less restrictive. Moreover, the WHO provided authoritative guidance that any quarantine measure shall last "at least 14 days".[38] Therefore, Ranovstayo's 18-day prohibition was not more restrictive.

c. The extension of prohibition to non-Ranovstayans with family members and permanent residence in Ranovstayo or individuals transiting in Ranovstayo's airports was not more restrictive.

An alternative entailing a higher level of risk than the State's ALOP is not permitted.[39] Corresponding to human rights obligations,[40] States shall institute border actions commensurate to their ALOPs according to national sovereignty.[41] In regards to admission of aliens, a person enjoys no right to enter a State of which he is not a national,[42] and a State is not required to admit

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[34] Foster, 3.

[35] *Australia-Apples*, ¶7.1261.

[36] *Australia-Salmon* (Panel), ¶8.182; WTO, *India: Measures Concerning the Importation of Certain Agricultural Products* (2014) WT/DS430/R, ¶7.590.

[37] *Agreed Facts*, ¶¶7, 16.

[38] *Agreed Facts*, ¶8.

[39] *EC-Asbestos*, ¶174.

[40] IHR, Art 43(1).

[41] US Comments, 4; EC Comments, 4; WHO, 'Revision of the IHRs: Comments by the Swiss Government' (2004).

[42] UNHRC, 'General Comment No 15' (1986) UN Doc HRI/GEN/1/Rev.9 (Vol I) [**GC 15**], 189.

aliens whose family unity can reasonably be established outside its territory.[43]

For purpose of Ranovstayo's zero-risk approach, the extended entry prohibition to all non-Ranovstayans, involving those with permanent residence, family members or merely transit in Ranovstayo, was not more restrictive. *First and foremost*, the said persons as non-Ranovstayans only enjoy a right not to be expelled, but are not granted the right to return.[44] *Second*, border controls not restricting asymptomatic persons were evidenced failed to contain the global spread of virus.[45] *Moreover*, the entry regulation did not infringe upon family rights as people were not prevented from leaving and reuniting with their families in Aprepluya.[46]

B. Ranovstayo did not violate the ICESCR and the ICCPR by applying its entry regulation to Aprepluya.

1. Ranovstayo did not violate Aprepluyans' economic rights under the ICESCR.

a. Ranovstayo owes no extraterritorial obligation to Aprepluyans.

Extraterritorial application of the ICESCR[47] is only admitted under military occupation where "effective control" is established.[48] In our case, Aprepluya was never under Ranovstayo's military control. Thus, Ranovstayo owes no ICESCR obligations to Aprepluyans.

b. In any event, Ranovstayo did not hamper Aprepluyans' economic rights.

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[43] *Aristimuño Mendizabal v France* App no 51431/99 (ECtHR 2006), ¶¶55-56.

[44] GC 15, ¶¶5, 8-9.

[45] *Agreed Facts*, ¶¶8-9, 15.

[46] *Agreed Facts*, ¶10.

[47] International Covenant on Economic Social and Cultural Rights (1966) 993 UNTS 3 [**ICESCR**].

[48] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [***Wall***], ¶112; *Cyprus v Turkey* App no 25781/94 (ECtHR 2001), ¶¶71, 74.

A causal nexus between an act and the injury should be established by the Applicant[49] to a "sufficiently direct and certain" extent.[50] Here, Aprepluya's increased unemployment and loss of business concerning ICESCR Article 6 and 11 were primarily due to its lockdown of Segura Province, the mandatary closure of industries and people's reluctance to go to work.[51] Thus, the alleged violation owing to its Government's mishandling of the outbreak[52] cannot be wrongfully made good by Ranovstayo, and Aprepluya failed to discharge its burden by providing the sole evidence as a self-serving tourism report.[53]

2. Ranovstayo did not violate the freedom of movement under the ICCPR.

a. Ranovstayo did not infringe on international freedom of movement.

International freedom of movement includes both the interrelated[54] right to leave and right to enter.[55] While the right to leave is without limit, the right to enter is irrelevant to non-nationals [***supra* I.A.3.c**]. In any event, the right to enter is derogable in time of public emergency which threatens the life of the nation.[56]

To examine Ranovstayo's entry regulation, *firstly*, it concerned the admission of people, while not interfering with anyone leaving its territory. *Secondly*, epidemics have always justified

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[49] *Trail Smelter (United States v Canada)* (1938) III RIAA 1905, 1930-1931.

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, ¶462; *Ahmadou Sadio Diallo (Guinea v Congo)* (Compensation) [2012] ICJ Rep 324, ¶14.

[51] *Agreed Facts*, ¶¶27, 35, 37.

[52] *Agreed Facts*, ¶¶24, 34.

[53] *Agreed Facts*, ¶46.

[54] UNGA, 'Universal Declaration of Human Rights' (1948) UN Doc A/810 [**UDHR**], Art 13(2).

[55] International Covenant on Civil and Political Rights (1966) 999 UNTS 171 [**ICCPR**], Arts 12(2), 12(4).

[56] ICCPR, Art 4.

States in derogating ICCPR rights.[57] J-VID-18 has constituted an emergency posing exceptional and unprecedent threats to more than 65 countries,[58] and thus entitled Ranovstayo to derogate non-Ranovstayans' right to enter.

b. The limitation imposed on internal freedom of movement was justifiable.

Internal movement is subject to restrictions provided by law and necessary to protect "public health" or "rights and freedoms of others".[59] Restrictions on internal movement of persons who with infectious disease or those who represent a threat to the public is generally agreed to be justifiable,[60] where quarantine measures are usually applied.[61]

In our case, the quarantine was enforced in accordance with national law,[62] corresponded to a pressing public need[63] to combat J-VID-18 and was proportionate in balancing between the temporal limitation on individual's freedom and the right to health[64] of all Ranovstayans.

C. In any event, Ranovstayo should not compensate Aprepluya for any claimed economic loss.

1. Ranovstayo can preclude its wrongfulness under distress.

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[57] Guatemala, 'Notification under Article 4(3)' UN Doc CN/347/2009; Georgia, 'Notification under Article 4(3)' UN Doc CN/231/2006.

[58] *Agreed Facts*, ¶¶12, 15.

[59] ICCPR, Art 12(3); UNHRC, 'Report of the Special Rapporteur on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms' (1983) UN Doc E/CN.4/Sub.2/432/Rev.2, ¶199.

[60] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) [**Nowak**], 282.

[61] Nowak, 280.

[62] *Agreed Facts*, ¶10.

[63] UNHRC, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1984) UN Doc E/CN.4/1985/4, Principle 10(b).

[64] ICESCR, Art 8.

Distress is accepted to justify a State's well-grounded choice of action[65] in protecting the well-beings and lives of its citizens.[66] In light of the absence of vaccines and effective antiviral medications until September 2018,[67] refusing entry of infected (symptomatic and asymptomatic) people from Aprepluya constitutes a reasonable and effective measure to protect Ranovstayans from infection.[68] Therefore, Ranovstayo can preclude its wrongfulness under distress and no compensation shall be paid.

2. Alternatively, Ranovstayo can preclude its wrongfulness under necessity.

Necessity arises when an "essential interest" is infringed upon by a "grave and imminent peril", provided the act in question is "the only way", which "not seriously impairing an essential interest of another State".[69] Ranovstayo fulfilled all four requirements. *Firstly*, preservation of public health and human life constitutes an essential interest.[70] *Secondly*, the possible fatal result and the fact that J-VID-18 spread to more than 60 countries within one month[71] indicated the situation was both grave and imminent. *Moreover*, as proved to be the only way [***supra* I.A.3**], the non-derogable[72] right to life overrides economic interest,[73] and entails protection form States

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[65] *Kate A Hoff, Administratrix of the Estate of Samuel B Allison, Deceased (USA) v Mexico* (1929) 4 RIAA 444, 447-448.

[66] *Rainbow Warrior (New Zealand v France)* (Arbitration Tribunal) (1990) 82 ILR 499, ¶78; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 [**ARSIWA Commentaries**], Art 24(1).

[67] *Agreed Facts*, ¶51.

[68] *Clarifications*, ¶7.

[69] ARSIWA Commentaries, Art 25.

[70] *Wall*, ¶¶140-141; *Impregilo SpA v Argentine*, ICSID Case No ARB/07/17, ¶346.

[71] *Agreed Facts*, ¶¶8, 15.

[72] ICCPR, Arts 4(2), 6.

[73] *M/V 'Saiga' (No 2) (St Vincent v Guinea)* (Judgment of 1 July 1999) ITLOS Rep 1999, ¶¶157-159.

towards their nationals.[74] Therefore, in protecting the lives of Ranovstayans,[75] the entry regulation did not impair Aprepluya's essential interest, and Ranovstayo was not obligated to pay any compensation arising from its acts.

[74] ICCPR, Art 6(1).

[75] *Agreed Facts*, ¶11.

II. RANOVSTAYO DID NOT VIOLATE INTERNATIONAL LAW BY REFUSING TO HAND OVER MS. KEINBLAT VORMUND TO THE APREPLUYAN AUTHORITIES.

Ranovstayo's conduct of refusing to hand over Ms. Keinblat Vormund (**Ms. Vormund**) did not violate international law as [**A**] Ranovstayo could lawfully consider granting Ms. Vormund asylum in its consulate, and [**B**] Ranovstayo shall not surrender Ms. Vormund due to the non-refoulement principle. Alternatively, [**C**] Ranovstayo had no obligation to surrender Ms. Vormund. In any event, [**D**] Ranovstayo's conduct did not violate the non-intervention principle.

A. Ranovstayo could lawfully consider granting Ms. Vormund asylum in its consulate.

1. Ms. Vormund had the right of asylum extraterritorially.

The right of individuals to apply for asylum outside the territory of the hosting State has been widely accepted by European Union,[76] the USA,[77] Latin America,[78] and Australia.[79] Here, Ms. Vormund sought protection in the consulate outside the territory of Ranovstayo,[80] and thus her right to apply for asylum in the consulate shall be respected.

2. Ranovstayo had the right to grant asylum in the consulate.

a. Ranovstayo had the right to grant asylum based on the Vienna Convention on Consular Relations.

i. The inviolability of Article 31 constitutes the basis of diplomatic asylum.

The consular premises enjoy inviolability respected by the receiving States without

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[76] Council of Europe 'Extra-territorial Processing of Asylum Claims and the Creation of Safe Refugee Shelters Abroad' CoE Res 2227 (2018), ¶9.

[77] Harold Hongju Koh, 'The "Haiti Paradigm" in United States Human Rights Policy' (1994) 103 Yale LJ 2391, 2408.

[78] Convention on Asylum (1929) OEA/Ser.X/I.TS.34, Art 2; Convention on Diplomatic Asylum (1954) 1438 UNTS 101 (OAS), Art 1.

[79] Hardi Alunaza SD and Ireng Maulana, 'The Pacific Solution as Australia's Policy towards Asylum Seeker and Irregular Maritime Arrivals (IMAS) in the John Howard Era' (2018) 14 JOHO 61, 66.

[80] *Agreed Facts*, ¶21.

exception.[81] Based on the inviolability of consulates, States have the right to legally grant diplomatic asylum.[82] Here, Aprepluya shall respect the inviolability of Ranovstayo's consulate in any event,[83] including granting Ms. Vormund asylum.[84] Thus, Ranovstayo had the right to legally grant diplomatic asylum to Ms. Vormund.

ii. Ranovstayo did not violate Article 55 of the VCCR.

Consulates shall be used compatibly with its consular functions.[85] Within Article 55, no express provision provides that the sending States must not grant diplomatic asylum.[86] Furthermore, granting diplomatic asylum by the sending State is not a violation of international law as this domain is controversial.[87] Thus, Ranovstayo's conduct did not violate Article 55 of the Vienna Convention on Diplomatic Relations (**VCCR**).

b. Ranovstayo could lawfully grant diplomatic asylum to Ms. Vormund based on humanitarian grounds.

Granting diplomatic asylum to individuals whose liberty is threatened by the local authorities[88] based on humanitarian grounds is customary international law (**CIL**).[89] As long as

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[81] Vienna Convention on Consular Relations (1967) 596 UNTS 261 [**VCCR**], Arts 1(1)(a), 1(1)(j), 31; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Order) [1979] ICJ General List No 64, ¶40.

[82] UNGA, 'Question of Diplomatic Asylum: Report of the Secretary-General' (1975) UN Doc A/10139 (Part II), ¶304.

[83] *Agreed Facts*, ¶3.

[84] *Agreed Facts*, ¶25.

[85] VCCR, Art 55(2).

[86] *Ibid.*

[87] ILC, 'Yearbook of the International Law Commission' (1967) Vol I UN Doc A/CN.4/Ser.A/1967, 105-106.

[88] *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*, Advisory Opinion OC-25/18, IACHR Series A No 25 (2018) 2, 36-37.

[89] UNGA, 'Question of Diplomatic Asylum: Report of the Secretary-General' (1975) UN Doc

individuals' life, liberty or integrity[90] faces likely harm[91] of unreasonable[92] or arbitrary imprisonment,[93] the sending State can grant diplomatic asylum on such humanitarian grounds.[94]

Here, Aprepluyan prosecutor intended to charge Ms. Vormund with the longest penalty of 20-year for her revelation of the essential public health messages,[95] which clearly manifested as unreasonable and arbitrary. As a result, Ms. Vormund's liberty and integrity was in jeopardy. Thus, Ranovstayo could consider granting her diplomatic asylum based on humanitarian grounds.

B. Ranovstayo shall not surrender Ms. Vormund due to the non-refoulement principle.

1. Ranovstayo was obligated not to surrender Ms. Vormund under refugee law.

a. The non-refoulement principle applies to Ms. Vormund extraterritorially.

The non-refoulement principle applies to refugees so long as they are subject to the jurisdiction of the State Party.[96] Such jurisdiction can be established through the activities of

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A/10139 (Part I) [**Question of Diplomatic Asylum (Part I)**], 3, 6, 7, 12, 14.

[90] Question of Diplomatic Asylum (Part I), 17.

[91] *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1 (High Court of Australia), ¶3.

[92] Oliver Dörr, 'Detention, Arbitrary' (2007) MPIL, ¶3.

[93] *Kordić and Čerkez Case* (Judgment) (2004) ICTY-95-14/2-A, ¶116; European Convention for the Protection of Human Rights and Freedoms (1950) 213 UNTS 222, Art 5.

[94] *Asylum Case (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266, 282-283.

[95] *Clarifications*, ¶4.

[96] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (2007), ¶24; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007) 246.

consular agents abroad.[97]

Here, Ranovstayan Consul arranged Ms. Vormund to temporarily reside in the consulate[98] and provided her with protection for the next three weeks.[99] Thus, Ms. Vormund was subject to Ranovstayo's jurisdiction and could enjoy protection of non-refoulement principle.

b. Ms. Vormund was a refugee who could be protected against refoulement.

State Parties are obligated not to surrender a refugee[100] who has a well-founded fear of persecution of his or her political opinions upon return.[101] Ms. Vormund could be protected against refoulement as a refugee as [***i***] she had a well-founded fear of persecution and [***ii***] the risk of persecution was based on the political ground.

i. Ms. Vormund evidenced a well-founded fear of persecution.

A well-founded fear of persecution refers to the minimal likelihood[102] of something unwelcome happening.[103] Here, Ms. Vormund was chased by Aprepluyan authorities[104] with the belief in her mind that she did nothing wrong.[105] This pressing chase indicated that Ms. Vormund

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[97] *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR 2001) [***Bankovic***], ¶73; *Coard et al. v United States*, IACHR Report No 109/99 (1999) [***Coard***], ¶37.

[98] *Agreed Facts*, ¶20.

[99] *Agreed Facts*, ¶43.

[100] Convention relating to the Status of Refugees (1951) 189 UNTS 137 [**Refugee Convention**], Art 33(1).

[101] Refugee Convention, Art 33.

[102] *Immigration and Naturalization Service v Cardoza-Fonseca Luz Marina* 480 US 421 (1987), ¶23; *Chan v The Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (High Court of Australia), ¶12.

[103] Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement* (Intersenita 2009) 84.

[104] *Agreed Facts*, ¶20.

[105] *Agreed Facts*, ¶21.

was likely to be arrested,[106] which reasonably arouse her fear.

ii. The risk of persecution was based on political grounds.

Political opinions can generally be interpreted to be the opinion on matters in which the machinery of State, government, and policy may be engaged,[107] irrespective of whether such opinions are contrary to the government.[108] These expressed opinions catch the attention of governments, and because of which, the individual has a well-founded fear.[109]

Here, Ms. Vormund publicized her disagreement with the hiding of the truth by Aprepluya.[110] Soon Aprepluyan polices traced the post,[111] arrived at her door and pursued her until she reached the consulate to seek protection out of her well-founded fear.[112] Therefore, Ms. Vormund faced a risk of persecution based on political grounds.

2. The non-refoulement principle applies to Ms. Vormund under the ICCPR.

a. Ranovstayo owes its obligations to protect Ms. Vormund extraterritorially.

Under the ICCPR, States have obligations to persons who subject to their jurisdictions[113] through exercising consular agents' activities abroad.[114] Here, Ms. Vormund was subject to Ranovstayo's jurisdiction [***supra* II.B.1.a**]. Thus, Ranovstayo owes ICCPR obligations towards her.

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[106] *Agreed Facts*, ¶21.

[107] *Klinko v Canadian (Minister of Citizenship and Immigration)* [2000] 3 FC 327, ¶22.

[108] *Canada (Attorney General) v Ward* [1993] 2 SCR.689, 746.

[109] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1992) UN Doc HCR/IP/4/Eng/Rev.1, ¶¶80, 82.

[110] *Agreed Facts*, ¶¶18, 21.

[111] *Agreed Facts*, ¶19.

[112] *Agreed Facts*, ¶¶20-21.

[113] ICCPR, Art 2; *Wall*, ¶109.

[114] *Bankovic*, ¶73; *Coard*, ¶37.

b. Ranovstayo had the obligation to protect Ms. Vormund under Article 7.

State Parties are obligated not to surrender individuals to a place where they may face a real risk of degrading treatment[115] regardless of their status.[116] Degrading treatment refers to execution that arouses individuals' feelings of fear and anguish towards their freedom.[117] Following such rationale, Ms. Vormund was warned to face execution of 20-years confinement upon return, representing a manifested degrading treatment[118] posing her freedom at stake.[119] Thus, Ranovstayo shall not surrender her to Aprepluya, where a degrading treatment existed.

c. Ranovstayo had the obligation to protect Ms. Vormund under Article 19.

Each person enjoys the right to express opinions freely through the Internet,[120] restrictions on which must conform to the principle of proportionality[121] in the legislative, administrative, and judicial domains.[122] It means that the compelling State interest must clearly outweigh the need to protect freedom of expression.[123] Besides, expression concerning public interest enjoys greater protection.[124]

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[115] ICCPR, Arts 2, 7; *Soering v United Kingdom* App no 14038/88 (ECtHR 1989), ¶88.

[116] UNHCR, 'Non-refoulement' No 6 (XXXVIII) (1977) UN Doc A/32/12/Add.1, ¶(c); *Charles Chitat Ng v Canada* (1993) Communication No 469/1991 CCPR/C/49/D/369/1991, ¶14.1.

[117] *Price v United Kingdom* App no 33394/96 (ECtHR 2001), ¶¶24, 30; *Valašinas v Lithuania* App no 44558/98 (ECtHR 2001), ¶117.

[118] *Clarifications*, ¶4.

[119] *Agreed Facts*, ¶21.

[120] ICCPR, Art 19; UNHRC, 'General Comment No 34' (2011) UN Doc CCPR/C/GC/34 [**GC 34**], ¶12.

[121] *Marques de Morais v Angola* (2005) Communication No 1128/2002 CCPR/C/83/D/1128/2002, ¶6(8); GC 34, ¶35.

[122] *Coleman v Australia* (2006) Communication No 1157/2003 CCPR/C/87/D/1157/2003, ¶7(2).

[123] GC 34, ¶34; *Sunday Times v United Kingdom* App no 6538/74 (ECtHR 1979), ¶67.

[124] *Herrera Ulloa v Costa Rica* (Judgment), IACHR Series C No 107 (2004), ¶127; *Thoma v*

Here, Ms. Vormund publicized valuable information concerning J-VID-18,[125] which deserved significant protection. However, Aprepluyan authorities violently shut her up by tracing her post,[126] chasing her to the consulate and charging her for the expressed information with unclear purposes.[127] Thus, the restriction was disproportionate and infringed on Ms. Vormund's freedom of expression. Therefore, Ranovstayo was obligated to protect Ms. Vormund.

C. Apart from protection, Ranovstayo had no obligation to hand over Ms. Vormund.

1. Ranovstayo was not obligated to surrender Ms. Vormund as there existed no treaties or conventions requiring it.

In the absence of treaties or conventions establishing surrender, there is no general obligation for States to do so.[128] Here, as there is no treaty on surrender between Aprepluya and Ranovstayo,[129] Ranovstayo had no obligation to enforce Aprepluya's request.

2. Ranovstayo was not obligated to surrender Ms. Vormund as a political offender.

When one is prosecuted by his or her political opinion,[130] States have rights to refuse to surrender such political offenders.[131] Here, Aprepluya prosecuted Ms. Vormund[132] as she

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Luxembourg App no 38432/97 (ECtHR 2001), ¶62.

[125] *Agreed Facts*, ¶18.
[126] *Agreed Facts*, ¶19.

[127] *Agreed Facts*, ¶¶20, 32.

[128] ILC, 'Third Report on the Obligation to Extradite or Prosecute' (2008) UN Doc A/CN.4/603, ¶98; *Haya de la Torre (Columbia v Peru)* (Judgment) [1951] ICJ Rep 266, 81.

[129] *Agreed Facts*, ¶54.

[130] European Convention on Extradition (1957) 359 UNTS 273, Art 3(2); ILC 'Third Report of the Special Rapporteur of the ILC on the Topic 'Crimes Against Humanity'' (2017) UN Doc A/CN.4/704, ¶49.

[131] Torsten Stein, 'Extradition' (2019) MPIL, ¶31; *Arambasic (Mitar) v Ashcroft (John) and others* (2005) 403 F.Supp.2d 951, ¶15.

[132] *Agreed Facts*, ¶32.

publicized her critical opinions towards policies in the NBL.[133] Thus, Ranovstayo could refuse to hand over her as a political offender.

D. In any event, the conduct of Ranovstayo did not violate the non-intervention principle.

The non-intervention principle is CIL.[134] Here, Ranovstayo' conduct did not violate this principle as [**1**] Ranovstayo did not take any coercive measure, and [**2**] Ranovstayo's conduct could be justified by protecting human rights.

1. Ranovstayo did not take any coercive measure.

Intervention is defined as positively taking coercive measures, which includes the use of force.[135] Similarly, in the diplomatic field, intervention only exists when measures threaten to apply military forces.[136]

Here, Ranovstayo in no way implied a coercive measure as it merely put Ms. Vormund in the consulate[137] without any communication of threating tone.[138] Thus, the sole action of refusing to hand over[139] in securing Ms. Vormund's safety did not violate the non-intervention principle.

2. Ranovstayo's conduct could be justified by protecting human rights.

Conducts protecting fundamental human rights of an individual cannot be regarded as interferences with State's internal affairs.[140] The freedom from degrading treatment is a

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[133] *Agreed Facts*, ¶18.

[134] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [***1986 Nicaragua***], ¶202; VCCR, Art 55.

[135] *1986 Nicaragua*, ¶205.

[136] Philip Kunig, 'Intervention, Prohibition of' (2008) MPIL, ¶27.

[137] *Agreed Facts*, ¶22.

[138] *Agreed Facts*, ¶34.

[139] *Agreed Facts*, ¶34.

[140] UNESC 'Commission on Human Rights Forty-seventh Session Summary Record of the 43rd

non-derogable human right.[141] In response to Aprepluya's probable degrading treatment to Ms. Vormund [***supra* II.B.2.b**], Ranovstayo protected her human rights by refusing to hand over her,[142] and thus did not violate the non-intervention principle.

Meeting' (1991) UN Doc E/CN.4/1991/SR.43, ¶32; W. M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 Am J Int'l L 21, 866, 869.

[141] ICCPR, Arts 4, 7.
[142] *Agreed Facts*, ¶34.

III. THE COURT MAY EXERCISE JURISDICTION OVER RANOVSTAYO'S COUNTER-CLAIM CONCERNING THE MANTYAN AIRWAYS AIRCRAFT.

The Court may entertain a counter-claim when the "jurisdictional requirement" and the "direct-connection requirement" are satisfied.[143] Since the direct connection has been established,[144] the Court may exercise jurisdiction over Ranovstayo's counter-claim because [**A**] the Court has jurisdiction over the dispute, and [**B**] Ranovstayo has *locus standi* to bring this counter-claim before the Court.

A. The Court has jurisdiction over the dispute.

Aprepluya's reservation, in its Declaration under Article 36(2) of the Court's Statute (**the Declaration**), excludes disputes concerning Aprepluyan military activities, and disputes regarding matters essentially within Aprepluya's domestic jurisdiction determined by Aprepluya (**the self-judging reservation**).[145] The Court has jurisdiction over the dispute as [**1**] this is not a dispute concerning Aprepluyan military activities, and [**2**] the self-judging reservation cannot be invoked to preclude jurisdiction.

1. This is not a dispute concerning Aprepluyan military activities.

The former reservation cannot be applied as [**a**] the dispute does not concern military activities, and [**b**] in any event, the shoot-down is not a military activity.

a. The dispute does not concern military activities.

This Court[146] and other tribunals[147] have indicated that the interpretation on the reservation

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[143] ICJ Rules of Court, *ICJ Acts and Documents No 6* (2007), Art 80.

[144] *Case concerning the J-VID-18 Pandemic* (Order), 2.

[145] *Agreed Facts*, ¶49.

[146] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226 [***Whaling***], ¶40; *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, ¶¶81, 86.

[147] *Case concerning the Detention of Three Ukrainian Naval Vessels (No 26) (Ukraine v Russian Federation)* (Order of 25 May 2019) ITLOS Rep 2019 [***Ukraine Naval Vessels***], ¶72; *South China Sea Arbitration (Philippines v China)* (Award) [2016] PCA Case No 2013-19 [***South Sea***

should focus on the term "concerning", namely whether the dispute itself concerns military activities. Here, the core of the dispute is whether the shoot-down has violated relevant international law, and Ranovstayo did not contend that the shoot-down was unlawful as a military activity.[148] Hence, the nature of this activity is immaterial to the present dispute.

b. In any event, the incident is not a military activity.

The determination of "military activities" should be made on objectively evaluating the nature and intent of the activities,[149] considering relevant circumstances and the context in which the activities take place.[150]

The term "military" in "military activities" refers to the State's national interest against external armed threats.[151] Here, the intent of Aprepluya's activity was not of military character as it was to identify and intercept a domestic civilian aircraft, instead of combating an external armed threat.[152] Furthermore, a quintessentially military situation exists only when military forces of both sides are arrayed opposite each other.[153] The circumstance in our case was that Aprepluya's civilian and military authorities[154] did not effectively inform the innocent aircraft of

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Arbitration], ¶1158.

[148] *Agreed Facts*, ¶¶44, 50; *Whaling*, ¶40.

[149] *Ukraine Naval Vessels*, ¶¶66-74; *Case concerning the Detention of Three Ukrainian Naval Vessels (No 26) (Ukraine v Russian Federation)* (Separate Opinion of Judge Gao) ITLOS Rep 2019 [**Judge Gao's Separate Opinion**], ¶22.

[150] *Ukraine Naval Vessels*, ¶¶66, 67; Judge Gao's Separate Opinion, ¶22.

[151] Yurika Ishii, 'The Distinction between Military and Law Enforcement Activities' <https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/> accessed 26 December 2020.

[152] *Agreed Facts*, ¶¶41-43.

[153] *South Sea Arbitration*, ¶1161.

[154] *Agreed Facts*, ¶45.

their intent of identification.[155] This was not in a military context as there was no confrontation of military forces.

2. Aprepluya cannot invoke the self-judging reservation to preclude the Court's jurisdiction.

This self-judging reservation cannot preclude jurisdiction as [**a**] the self-judging reservation is invalid, and [**b**] the invalidity of this reservation does not entail Aprepluya's Declaration invalid. Besides, [**c**] the invocation of this reservation violates the principle of good faith. [**d**] In any event, the shoot-down is not essentially within Aprepluya's domestic jurisdiction.

a. The self-judging reservation is invalid.

The reservation in the Declaration is invalid when it is contrary to the Court's Statute.[156] The self-judging reservation lays down that it is Aprepluya rather than the Court that holds the power to determine jurisdiction.[157] This reservation is invalid as it contravenes the Statute.

First, the purpose of Article 36(2) of the Statute is to establish the compulsory jurisdiction of the Court between States acceding to the Optional Clause.[158] However, this self-judging reservation entails Aprepluya's undertaking ceasing to be compulsory *ipso facto* by unilaterally determining the jurisdiction.[159]

Second, under Article 36(6) of the Statute, the Court shall determine its own jurisdiction,[160] which embodies the principle of the *compétence de la compétence*.[161] The self-judging

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[155] *Agreed Facts*, ¶41-43.

[156] *Certain Norwegian Loans (France v Norway)* (Separate Opinion of Judge Sir Hersch Lauterpacht) [1957] ICJ Rep 34 [**Judge Lauterpacht's Separate Opinion**], 46.

[157] *Agreed Facts*, ¶49.

[158] Statute of the International Court of Justice (1946) 33 UNTS 993 [**ICJ Statute**], Art 36(2).

[159] Judge Lauterpacht's Separate Opinion, 48-49.

[160] ICJ Statute, Art 36(6).

[161] *Nottebohm (Liechtenstein v Guatemala)* (Preliminary Objections) [1953] ICJ Rep 111, 119-120; Judge Lauterpacht's Separate Opinion, 44.

reservation clearly breaches this principle.

b. The invalidity of the self-judging reservation does not entail Aprepluya's Declaration invalid.

i. The self-judging reservation is separable from the Declaration.

The law of treaties can be applied analogously to the reservation,[162] for the question of separability.[163] The self-judging reservation is separable from the Declaration for it satisfies the following three conditions.[164]

First, the separation of the reservation would not interfere with the remainder of the Declaration.[165] This condition focuses on the practical possibility of executing the remaining Declaration,[166] and here the Declaration is capable of functioning as if the reservations are not invoked.

Second, this reservation is not essential bases of other States' Declarations.[167] Here, it is States' freedom to make reservations,[168] and hence this self-judging reservation cannot be deemed as essential bases for other States' Declarations.

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[162] *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432 [***Fisheries Jurisdiction***], ¶46; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275 [***Land and Maritime Boundary***], ¶30.

[163] Giovanni Distefano and Aymeric Hêche, 'Optional Clause Declarations: International Court of Justice (ICJ)' (2018) MPIL, ¶10.

[164] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 [**VCLT**], Art 44(3).

[165] VCLT, Art 44(3)(a).

[166] Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1057.

[167] VCLT, Art 44(3)(b).

[168] *Fisheries Jurisdiction*, ¶44; *Aerial Incident of 10 August 1999 (Pakistan v India)* (Jurisdiction of the Court) [2000] ICJ Rep 12, ¶38.

Third, continued performance of the Declaration would not be unjust.[169] Here, under the principle of reciprocity,[170] the remaining Declaration would be equally binding on all Parties under the Optional Clause, and thus its continued performance would not be unjust.

ii. In any event, Aprepluya is estopped from claiming the invalidity of the Declaration.

Applicant may argue that the invalid self-judging reservation is inseparable from the Declaration, affecting the entire Declaration. However, under the general principle of estoppel,[171] this cannot be established.

Estoppel prevents a State from making claims contrary to its previous acts *vis-à-vis* another State if that latter State has acted in reasonable reliance on such acts.[172] Here, Aprepluya, as a State declaring this Court's jurisdiction *ipso facto*,[173] filed an Application instituting the principal claim.[174] Ranovstayo subsequently relied on such act to raise the counter-claim.[175] Thus, Aprepluya is estopped from denying the validity of its Declaration.

c. The invocation of the self-judging reservation violates the principle of good faith.

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[169] VCLT, Art 44(3)(c).

[170] ICJ Statute, Art 36(2); *Certain Norwegian Loans (France v Norway)* (Judgment) [1957] ICJ Rep 9, 23-24.

[171] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246, ¶130; *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* (Judgment) [1969] ICJ Rep 3 [***Continental Shelf***], ¶30; *Temple of Preah Vihear (Cambodia v Thailand)* (Dissenting Opinion of Sir Percy Spender) [1962] ICJ Rep 101 [**Judge Spender's Dissenting Opinion**], 143.

[172] Judge Spender's Dissenting Opinion, 143-144.

[173] *Agreed Facts*, ¶48.

[174] *Agreed Facts*, ¶47.

[175] *Agreed Facts*, ¶50.

The Declaration is a consensual bond between States,[176] upon which the principle of good faith plays an important role.[177] In *Nuclear Tests* such principle was understood by this Court as "interested States may take cognizance of unilateral Declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."[178]

Here, Ranovstayo has confidence *vis-à-vis* Aprepluya's performance of its Declaration.[179] The invocation of the self-judging reservation would entail Aprepluya's obligation cease to be compulsory *ipso facto* [***supra* III.A.2.a**] and thus violates the principle of good faith.

d. In any event, the incident is not essentially within Aprepluya's domestic jurisdiction.

Once a matter in dispute is governed by international agreements, it is no longer "essentially" within a State's domestic jurisdiction.[180] Here, the shoot-down clearly falls within the regime of the ICCPR[181] and the Convention on International Civil Aviation (**Chicago Convention**).[182]

Furthermore, matters related to human rights issues are of international concern,[183] and accordingly a State cannot characterize them as matters essentially within its domestic

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[176] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392 [***1984 Nicaragua***], ¶60; *Land and Maritime Boundary*, ¶25.

[177] *1984 Nicaragua*, ¶60; VCLT, Art 26.

[178] *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253, ¶46.

[179] *1984 Nicaragua*, ¶60; VCLT, Art 26.

[180] Bruno Simma and Daniel-Erasmus Khan (eds), *The Charter of the United Nations: A Commentary, Volume I* (3rd edn OUP 2012) [**UN Charter Commentary**] 295; Stanimir A Alexandrov, 'Accepting the Compulsory Jurisdiction of the International Court of Justice with Reservations' (2001) 14 LJIL 89, 113.

[181] ICCPR, Arts 4, 6.

[182] Convention on International Civil Aviation (1944) 15 UNTS 295 [**Chicago Convention**], Art 3bis.

[183] UNGA, 'General Assembly Official Records, 51st Session: 78th Plenary Meeting' (1996) UN Doc A/51/PV.78, 3; A Verdross, 'The Plea of Domestic Jurisdiction before an International Tribunal and a Political Organ of the United Nations' (1928) 28 ZaöRV 33, 39.

jurisdiction to evade international responsibility.[184] The shoot-down lawlessly deprived the right to life of individuals, and Aprepluya is barred from alleging that it is essentially within its domestic jurisdiction.

B. Ranovstayo has *locus standi* to bring this counter-claim before the Court.

This Court has consistently affirmed States' *locus standi* based on common interest.[185] Ranovstayo has *locus standi* in our case for Aprepluya's breaches of [**1**] obligations *erga omnes partes*; and [**2**] obligation *erga omnes* for the right to life.

1. Ranovstayo has *locus standi* for the principle of *erga omnes partes*.

A State is entitled to bring a claim for another State's breach of obligation *erga omnes partes*.[186] Such obligation refers to the obligation derived from the multilateral treaties protecting the collective interest of a group of States.[187] Ranovstayo has *locus standi* for Aprepluya's breaches of obligations *erga omnes partes* under [**a**] the Chicago Convention, and [**b**] the ICCPR, to which both States have acceded.[188]

a. Ranovstayo has *locus standi* for the obligation *erga omnes partes* under the Chicago Convention.

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[184] Institut de Droit International, 'The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States' (Eighth Commission, 1989), Art 2; Malcolm Shaw, *International Law* (8th edn CUP 2017) 689.

[185] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 [***Obligation to Prosecute or Extradite***], ¶¶66-70; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, ¶29.

[186] *Obligation to Prosecute or Extradite*, ¶¶66-70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) [2020] ICJ General List No 178, ¶¶41-42; ARSIWA Commentaries, Art 48(1)(a); Institut de Droit International, 'Obligation *Erga Omnes* in International Law' (Fifth Commission, 2005) [**2005 IDI**], Arts 1(b), 3.

[187] *Obligation to Prosecute or Extradite*, ¶¶68-69; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 [***Barcelona Traction***], ¶33; 2005 IDI, Art 1(b).

[188] *Agreed Facts*, ¶54.

The Chicago Convention's collective interest is ensuring a safe and orderly international civil aviation.[189] Aprepluya's shoot-down breached the obligation *erga omnes partes* by threatening the security of the international aviation system.[190]

b. Ranovstayo has *locus standi* for the obligation *erga omnes partes* under the ICCPR.

The ICCPR's collective interest is promoting universal respect and observance of human rights.[191] Aprepluya's lawless killing breached the obligation *erga omnes partes* by infringing the right to life,[192] which is deemed as the supreme human right under the ICCPR.[193]

2. Ranovstayo has *locus standi* for Aprepluya's breach of obligation *erga omnes* for the right to life.

A State is entitled to bring a claim for another State's breach of obligation *erga omnes*.[194] The obligations *erga omnes* are owed to the international community as a whole,[195] and all States have a legal interest in these obligations.[196]

The right to life is understood to be *jus cogens*,[197] and thus has *erga omnes* effect.[198] Here,

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[189] Chicago Convention, Preamble; VCLT, Art 31(2).

[190] *Agreed Facts*, ¶¶43-44.

[191] ICCPR, Preamble; VCLT, Art 31(2); UNHRC, 'General Comment No 31' (2004) UN Doc CCPR/C/21/Rev.1/Add.13 [**GC 31**], ¶2.

[192] *Agreed Facts*, ¶¶43-44.

[193] ICCPR, Art 6; UNHRC, 'General Comment No 36' (2019) UN Doc CCPR/C/GC/36 [**GC 36**], ¶2.

[194] UNGA, 'Report of the International Law Commission Seventy-first Session' (2019) UN Doc A/74/10 [**2019 UNGA**], 145; ARSIWA Commentaries, Art 48(1)(b); 2005 IDI, Arts 1(a), 3.

[195] *Barcelona Traction*, ¶33; 2019 UNGA, 142; ARSIWA Commentaries, Art 48(1)(b).

[196] *Barcelona Traction*, ¶33.

[197] 2019 UNGA, 142; GC 36, ¶2; Erika de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-first Century' (2013) 37 SAYIL 2, 9.

Ranovstayo has a legal interest in Aprepluya's performance of protecting the right to life,[199] and Ranovstayo has direct concern[200] in this case since Ms. Vormund is an asylum seeker for Ranovstayo.[201] Aprepluya's shoot-down has lawlessly deprived the right to life of innocent citizens,[202] breaching the obligation *erga omnes*. Thus, Ranovstayo is entitled to bring the counter-claim, seeking the Court's declaration on Aprepluya's unlawful conduct.[203] Aprepluya's blatant disdain for this supreme human right should not be tolerated by the Court.

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[198] 2019 UNGA, 145; GC 31, ¶2; GC 36, ¶2; 2005 IDI, Preamble.

[199] *Barcelona Traction*, ¶33; GC 31, ¶2.

[200] *East Timor (Portugal v Australia)* (Dissenting Opinion of Judge Skubiszewski) [1995] ICJ Rep 224, ¶101.

[201] *Agreed Facts*, ¶¶43-44.

[202] *Agreed Facts*, ¶¶42-43.

[203] ARSIWA Commentaries, Art 49, ¶11.

IV. APREPLUYA VIOLATED INTERNATIONAL LAW BY SHOOTING DOWN THE AIRCRAFT.

Ms. Vormund and her friend flew to Bogpadayo to seek asylum. After being mistakenly suspected of conducting an attack, the aircraft was shot down by Aprepluya's fighter jet.[204] Without any reliable evidence showing the aircraft posed a threat, it cannot be regarded as a potential terrorist attack.[205] Aprepluya's shoot-down of the aircraft [**A**] violated international law, and [**B**] Aprepluya could not preclude its wrongfulness by invoking self-defence.

A. Aprepluya violated international law by shooting down a civil aircraft.

1. Aprepluya's shoot-down contravened the Chicago Convention.

a. The Mantyan Airways aircraft is a civil aircraft.

All aircraft, except those used in military, customs, or police services, fall within the scope of the Chicago Convention.[206] To determine the status of an aircraft in peacetime, the markings of the flight and the nature of the passengers are key criteria.[207] The Mantyan Airways aircraft, with a clear tail number, and carrying two innocent civilians on board,[208] qualifies as a civil aircraft under the Convention.

While a purposed-oriented approach is common, it is adopted only in times of armed conflicts.[209] Since there was no armed conflict in our case, this approach could not be used.[210]

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[204] *Agreed Facts*, ¶¶42-43.

[205] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1978) 1125 UNTS 3 [**Protocol**], Art 52(3).

[206] Chicago Convention, Art 3.

[207] ICAO, 'Report of the Secretariat: Secretariat Study on Civil/State Aircraft' (1994) ICAO Doc LC/29-WP/2-1 Attachment 1, ¶1(3); Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Springer 2014) 54, 62.

[208] *Agreed Facts*, ¶43.

[209] Robin Geiß, 'Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3BIS of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz"' (2005) 27 MJIL 227, 242.

Alternatively, a civil aircraft whose status is in doubt must be presumed to be used for civil purposes.[211] Here, Aprepluya should regard the aircraft as a civil aircraft.[212]

b. Aprepluya's shoot-down breached Article 3bis.

i. Aprepluya failed to refrain from the use of weapons.

States must refrain from the use of weapons against civil aircraft in flight.[213] *Firstly*, Article 3bis extends its scope to aircraft of a State's own registration.[214] *Secondly*, States cannot fire weapons during interception.[215] Using armed force against an unidentified civil aircraft after an unsuccessful interception[216] constitutes a grave threat to the safety of international civil aviation.[217]

Here, Aprepluya fired a short burst at the aircraft's wing root area during interception.[218] Even if the aircraft was registered in Aprepluya,[219] Aprepluya breached its obligation.

ii. Aprepluya's shooting endangered the lives of people on board.

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[210] *Agreed Facts*, ¶42.

[211] Protocol, Art 52(3).

[212] *Agreed Facts*, ¶42.

[213] Chicago Convention, Art 3bis.

[214] Chia-Jui Cheng (ed), *Studies in International Air Law* (BRILL 2017) 359.

[215] UNSC, 'Security Council Meeting Records, the 2470th Meeting' (1983) UN Doc S/PV.2470 ¶¶15, 61, 82, 95; UNSC, 'Letter from the Republic of Korea to the United Nations' (1983) UN Doc S/15948; ICAO, 'Minutes of the Fourth Meeting' (1984) ICAO Doc 9438 A25-Min EX/4, 30.

[216] ICAO, 'Destruction of Korean Air Lines Flight 007 on 31 August 1983: Report of ICAO Fact-Finding Investigation' (1983) ICAO Doc C-WP/7764, 898, 909.

[217] ICAO, 'Destruction of KAL 007 - ICAO Report' (1984) 1984 Austl Int'l News 125 [**ICAO Report 1984**], 130.

[218] *Agreed Facts*, ¶42.
[219] *Agreed Facts*, ¶43.

In instances of interception, the lives of persons on board and the safety of aircraft must not be endangered.[220] This rule reflects the elementary considerations of humanity, which is a general principle of international law.[221] Here, Aprepluya cannot use weapons even though the aircraft was not able to respond since its radio was malfunctioning.[222] Thus, Aprepluya's shooting endangered the lives of people on board.

2. Aprepluya's shoot-down of the Mantyan Airways aircraft was contrary to the ICCPR.

The right to life is the supreme right from which no derogation is permitted.[223] This requires States to refrain from depriving life arbitrarily,[224] which means [**a**] to take precautionary measures before shooting, and [**b**] that the amount of force must be proportionate.

a. Without precaution, Aprepluya's deprivation of life was unlawful.

States have violated the right to life by being careless in analyzing intelligence.[225] Only a solid factual basis, strong enough to permit interdiction before a terrorist operation begins, can justify the use of lethal force.[226]

In peacetime, States must distinguish between persons who do and do not present a threat.[227]

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[220] Chicago Convention, Art 3bis.

[221] UNSC Res 1067 (1996) UN Doc S/RES/1067, ¶6; *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 4, 22.

[222] *Agreed Facts*, ¶43.

[223] ICCPR, Arts 4, 6; UDHR, Preamble.

[224] GC 36, ¶7.

[225] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston' (2006) UN Doc E/CN.4/2006/53 [**Alston**], ¶¶50-51; *McCann and others v United Kingdom* App no 18984/91 (ECtHR 2019), ¶¶203-205, 208-213; *Alejandre Jr v Cuba*, IACHR Report No 86/99 (1999), ¶44.

[226] Alston, ¶¶50-51.

[227] IACHR, 'Report on Terrorism and Human Rights' (2002) Doc OEA/Ser.L/V/II.116, ¶111.

As a result, using force against innocent civilians,[228] or based on mere suspicion of a threat,[229] is entirely illegitimate.

In our case, Aprepluya's act was solely based solely on suspicion, as the Commanding Officer did not know "who was on board" and was merely "concerned of a threat".[230] Without careful analysis of the intelligence, Aprepluya's fatal shooting caused the death of two innocent civilians,[231] violating the right to life.

b. Aprepluya's shoot-down was not proportionate.

Proportionality requires the force is within the needed amount to achieve a legitimate purpose.[232] To reserve the intrinsic value and dignity of humans,[233] human lives in any event, cannot be treated as an instrument for any purpose. Here, Aprepluya disregarded the lives on board merely out of an unsubstantiated suspicion of terrorism and utilized multiple excessive force, resulting in the crash of the aircraft and two people's deaths.[234] These actions went beyond their alleged purpose of forcing the aircraft to land.[235] Hence, Aprepluya's shoot-down of the aircraft was not proportionate.

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[228] Declaration of Minimum Humanitarian Standards (1990) UN Doc E/CN.4/Sub.2/1991/55 (UNHRC) [**Minimum Standards**], Art 5(1); Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221 (ECHR), Art 2.

[229] Nils Melzer, *Targeted Killing in International Law* (OUP 2009) 102-103.

[230] *Agreed Facts*, ¶42.

[231] *Agreed Facts*, ¶¶42-43.

[232] Minimum Standards, Art 5(2); GC 36, ¶12; *Camargo v Colombia* (1982) Communication No 45/1979 CCPR/C/15/D/45/1979 ¶¶13.1-13.3; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns' (2014) UN Doc A/HRC/26/36, ¶67; UNGA, 'Code of Conduct for Law Enforcement Officials' (1980) UN Doc A/RES/34/169 [**Code**], Art 3.

[233] Code, Art 2; *Aviation Security Act Case* (2006) 1 BvR 357/05 (BVerfG Germany), ¶¶39, 121, 124, 134; *Public Committee against Torture in Israel v Government of Israel* (2005) HCJ 769/02 (High Court of Israel), ¶25.

[234] *Agreed Facts*, ¶42.

[235] *Agreed Facts*, ¶42.

B. Aprepluya's shoot-down could not be justified by self-defence.

1. Aprepluya could not invoke self-defence based on a mistake of fact.

Self-defence based on a mistake of fact is not permissible. *First*, a mistake of fact cannot trigger self-defence since the precondition is limited to an actual armed attack.[236] *Second*, measures taken in self-defence must be strict and objective, prohibiting any "measure of discretion".[237] *Third*, an error in judgment does not constitute an exemption from State responsibility.[238]

Here, Aprepluya mistakenly identified the civil aircraft as a terrorist attack and fired at it based solely on the Commanding Officer's subjective concern.[239] As there is no justifiability of self-defence in instances of a mistake of fact, Aprepluya could not invoke its subjective purpose to preclude its wrongfulness.

2. Alternatively, Aprepluya's shooting was an unlawful exercise of self-defence.

a. There existed no armed attack.

To invoke a valid exercise of self-defence, there must be an intentional[240] armed attack[241] to the extent of the most grave and large-scale aggression.[242] A terrorist attack using a small aircraft

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[236] Charter of the United Nations (1945) 1 UNTS 16 [**UN Charter**], Art 51; UN Charter Commentary, 149.

[237] *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161 [***Oil Platforms***], ¶73.

[238] ICAO, 'Council Resolution of June 4, 1973' (1973) 12 ILM 1180; ICAO Report 1984, 130; ARSIWA Commentaries, Art 49, ¶3; *Air Services Agreement Case (France v United States of America)* (1978) 18 RIAA 416, ¶81; *1986 Nicaragua*, ¶194; *Oil Platforms*, ¶74.

[239] *Agreed Facts*, ¶42.

[240] *Oil Platforms*, ¶64.

[241] UN Charter, Art 51; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [***Armed Activities***], ¶147; *1986 Nicaragua*, ¶100; UNGA Res 3314 (XXIX) (14 December 1974), Art 3; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 55-56.

[242] UN Charter Commentary, 1408-1409; *Armed Activities*, ¶¶146-154; *1986 Nicaragua*, ¶¶103,

does not reach such threshold.[243]

Here, the aircraft did not use any force or have the intention to launch any attack, as it was merely on its way to Bogpadayo to seek asylum.[244] Moreover, the suspected terrorist operation is insufficient to trigger the right of self-defence by using a small propeller-driven aircraft.[245] Accordingly, there was no armed attack.

b. Self-defence could not be exercised against non-State actors.

Self-defence can only be applied to military operations by a State's armed bands or attacks imputable to the State.[246] Even after the 9/11 attacks, the Security Council never recognized self-defence against non-State actors in the absence of a State's involvement.[247] If we were to assume that it was a terrorist attack, then it was suspected to be carried out by a non-State actor called Friends of Justice (**FOJ**).[248] Therefore, Aprepluya has no standing to invoke self-defence against non-State actors.

c. The right of anticipatory self-defence was invalid.

Anticipatory self-defence is rejected by States[249] and experts.[250] While there have been some

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191, 195.

[243] UNSC Res 1368 (2001) UN Doc S/RES/1368; Major C. Darren Huskisson, 'The Air Bridge Denial Program and the Shootdown of Civil Aircraft under International Law' (2005) 56 AF L Rev 109, 145.

[244] *Agreed Facts*, ¶¶42-43.

[245] *Agreed Facts*, ¶43.

[246] *Armed Activities*, ¶¶146-147; *1986 Nicaragua*, ¶195, 205; *Wall*, ¶139.

[247] UNSC Res 487 (1981) UN Doc S/RES/487; UNSC Res 1530 (2004) UN Doc S/RES/1530; UNSC Res 1618 (2005) UN Doc S/RES/1618; UNSC Res 1611 (2005) UN Doc S/RES/1611.

[248] *Agreed Facts*, ¶39.

[249] UNSC, 'Security Council Meeting Records, the 2471st Meeting' (2016) UN Doc S/PV.7621, 33-34; UNGA, 'Letter from the Union of Soviet Socialist Republic' (1967) UN Doc A/6717; UNGA, 'Outbreak of Hostilities and Consideration by the Council at the 1347th to 1350th Meetings' (1967) UN Doc A/6702, ¶¶347-348, 356, 359.

attempts to justify anticipatory self-defence, they were condemned by the United Nations[251] and did not amount to systemic state practice required for crystalizing CIL.[252] Therefore, when resorting to self-defence against terrorists, States cannot launch preventive measures before an armed attack.[253] In this case, Aprepluya's preventive measures before an actual armed attack[254] had no valid legal basis.

d. Even if Aprepluya could exercise anticipatory self-defence, Aprepluya's wrongful conduct was impermissible.

i. The aircraft did not constitute an imminent threat.

Anticipatory self-defence can be invoked only when the State is faced with an imminent threat.[255] An "imminent threat" requires "proximity" which goes far beyond "possibility",[256] and thus, excludes a "remote danger"[257] such as potential or abstract threats.[258] Here, under great

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[250] ILC, 'Addendum to Report of the Special Rapporteur on State Responsibility, Roberto Ago' (1980) UN Doc A/CN.4/318/Add.5-7, 64-67; Ian Brownlie, *International Law and the Use of Force by States* (OUP 2012) 279.

[251] UNSC Res 487 (1981) UN Doc S/RES/487, ¶1; UNGA Res 41/38 (1986) UN Doc A/RES/41/38, ¶1.

[252] *Continental Shelf*, ¶70.

[253] *1986 Nicaragua*, ¶51; *Armed Activities*, ¶148; Institut de Droit International, 'Present Problems of the Use of Armed Force in International Law' (Tenth Commission, 2007) 10A RESOLUTION EN [**2007 IDI**], Art 6; Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2017) [**Dinstein**] 248.

[254] *Agreed Facts*, ¶42.

[255] UNGA, 'Report of the High-level Panel on Threats, Challenges and Changes' (2004) UN Doc A/59/565, ¶188.

[256] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 [***Project***], ¶¶42, 54.

[257] Dinstein, ¶¶611, 614; Kinga Tibori Szabó, *Anticipatory Action in Self-defence* (Springer 2011) 314.

[258] Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 704, 707; Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force by States in Self-defence' (2006) 55 ICLQ 963, 8.

uncertainty, the aircraft cannot be classified as an imminent threat.[259] Therefore, there exists no basis to trigger anticipatory self-defence.

ii. Aprepluya's shoot-down was inconsistent with the principle of necessity and proportionality.

Self-defence must meet the requirements of necessity and proportionality.[260]

Necessity requires the threat to be real.[261] Here, Aprepluya recklessly made a subjective determination about a future attack, which ultimately did not exist.[262] Thus, Aprepluya's shoot-down was not necessary.

Limited by the requirement of proportionality,[263] actions taken in response to the attack must not be excessive.[264] However, it is impossible to assess proportionality with speculative concerns about a possible attack.[265] In our case, actions cannot be justified as proportionate since Aprepluya's decision was based merely on speculation.[266] Consequently, Aprepluya violated the principle of proportionality.

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[259] *Agreed Facts*, ¶43.

[260] 2007 IDI, Art 2; *Oil Platforms*, ¶77; *Armed Activities*, ¶147; *Legality of the Threat or Use of Nuclear Weapons* (Advisory opinion) [1996] ICJ Rep 26, ¶245.

[261] *1986 Nicaragua*, ¶282; *Project*, ¶¶42, 54; *Oil Platforms*, ¶64.

[262] *Agreed Facts*, ¶¶42-43.

[263] *Armed Activities*, ¶147; *1986 Nicaragua*, ¶176.

[264] Robert Jennings and Arthur Watts KCMG QC (eds), *Oppenheim's International Law* (OUP 2008) 422.

[265] *Oil Platforms*, ¶77; Mary Ellen O'Connell, 'The Myth of Preemptive Self-Defense' (2002) 27 ASIL 1, 19, 21.

[266] *Agreed Facts*, ¶¶42-43.

PRAYER FOR RELIEF

The Democratic State of Ranovstayo, the Respondent, respectfully requests the Court to **DECLARE** that:

I. 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 loss;

II. Ranovstayo did not violate international law by refusing to hand over Ms. Vormund to the Aprepluyan authorities;

III. The Court may exercise jurisdiction over Ranovstayo's counter-claim concerning the Mantyan Airways aircraft;

IV. Aprepluya's shoot-down of the aircraft violated international law.

Respectfully submitted,

AGENTS FOR THE RESPONDENT