

IN THE INTERNATIONAL COURT OF JUSTICE



THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

**THE 2021 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION**

THE CASE CONCERNING THE J-VID-18 PANDEMIC

UNITED REPUBLIC OF APREPLUYA
(*APPLICANT*)

v.

DEMOCRATIC STATE OF RANOVSTAYO
(*RESPONDENT*)

MEMORIAL FOR THE APPLICANT

2021

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INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

Agreement on the Application of Sanitary and Phytosanitary Measures, 1 January 1995, 1867 U.N.T.S. 493 (“SPS Agreement”)	4
Caracas Convention on Diplomatic Asylum, 28 March 1954, OAS T.S. No. 18 (“CCDA”)	15
Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S. 295 (“ICAO Convention”)	22, 23, 25, 29
Havana Convention on Asylum, 20 February 1928 (“HCA”)	15
International Covenant on Civil and Political Rights, 23 March 1976, 999 U.N.T.S. 171 (“ICCPR”)	6, 7, 28
International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, 993 U.N.T.S. 171 (“ICESCR”)	6, 7
Montevideo Convention on Political Asylum, 26 December 1933, OAS T.S. No. 34 (“MCPA”)	12, 15
Statute of the International Court of Justice, 18 April 1946, 33 U.N.T.S. 993 (“ICJ Statute”)	18, 21, 23
United Nations, Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI (“UN Charter”)	25, 26, 29
Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261 (“VCCR”)	10, 11, 18
Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (“VCDR”).....	10, 11
Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (“VCLT”)	20, 26

UNITED NATIONS RESOLUTIONS AND OTHER DOCUMENTS

Economic Social and Cultural Rights, General Comment 14, E/C.12/2000/4, 2 November 1999 (“General Comment No. 14”)	7, 8
Federal Republic of Germany, <i>Declaration Recognizing the Jurisdiction of the Court as Compulsory</i> , 30 April 2008, https://www.icj-cij.org/en/declarations/de (“Germany Declaration”)	21
General Assembly, <i>Question of Diplomatic Asylum, Report of the Secretary-General</i> , A/10139 (Part I), 2 September 1975 (“UNGA Question Pt. I”)	13
General Assembly, <i>Question of Diplomatic Asylum, Report of the Secretary-General</i> , A/10139 (Part II), 22 September 1975 (“UNGA Question Pt. II”)	13
High Commissioner for Refugees, <i>Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees</i> , HCR/1P/4/ENG/REV.3, December 2011 (“Handbook”)	16

Human Rights Committee, General Comment 16, CCPR/C/GC/16, 8 April 1998 (“General Comment No. 16”)	7
Human Rights Committee, General Comment 27, CCPR/C/GC/27, 2 November 1999 (“General Comment No. 27”)	6, 7
Human Rights Committee, General Comment 36, CCPR/C/GC/36, 30 October 2018 (“General Comment No. 36”)	29
International Law Commission, <i>Draft Articles on the Responsibility of States for Internationally Wrongful Acts</i> , UN Doc.A/CN.4/L.602/Rev.1 (2001) (“DARSIWA”)	8, 9
Republic of India, <i>Declaration Recognizing the Jurisdiction of the Court as Compulsory</i> , 27 September 2019, https://www.icj-cij.org/en/declarations/in (“India Declaration”)	21
World Health Organization, <i>International Health Regulations</i> , (2d ed.) 2005 (“IHR”)	1, 3, 4, 5
INTERNATIONAL CASES AND ARBITRAL DECISIONS	
<i>Aerial Incident of 10 August 1999 (Pakistan v. India)</i> , Jurisdiction, 2000 I.C.J. Rep. 12 (“ <i>Aerial Incident (Jurisdiction)</i> ”)	19
<i>Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation</i> (Bahrain, Egypt, Saudi Arabia, & United Arab Emirates v. Qatar), International Court of Justice, 14 July 2020, https://www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-00-EN.pdf (“ <i>ICAO Jurisdiction</i> ”)	25
<i>Asylum (Colombia v Peru)</i> , Judgement, 1950 I.C.J. Rep. 266 (“ <i>Asylum (Judgement)</i> ”)	8, 12, 15
<i>Australia — Measures Affecting the Importation of Apples from New Zealand</i> , Appellate Report, 2010 WTO Doc. WT/ DS367/AB/R, (“ <i>Australia-Apples</i> ”)	5
<i>Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)</i> , Order, 2019 ITLOS Case No. 26 (“ <i>Three Ukrainian Naval Vessels</i> ”)	24
<i>Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)</i> , Compensation, Judgement 2018 I.C.J. Rep. 15 (“ <i>Certain Activities Carried Out By Nicaragua (Compensation)</i> ”)	8, 9
<i>Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)</i> , Judgment, I.C.J. Rep. 1986 (“ <i>Nicaragua (Judgement)</i> ”)	30
<i>Factory at Chorzów</i> , Merits, Judgement, 1928, P.C.I.J., Series A, No. 17 (“ <i>Chorzów Factory (Merits)</i> ”)	9
<i>Fisheries Jurisdiction (Spain v. Canada)</i> , Judgement, 1998 I.C.J. Rep. 432 (“ <i>Fisheries Jurisdiction (Judgement)</i> ”)	19
<i>Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)</i> , Judgement, 1997 I.C.J. Rep. 7 (“ <i>Gabčíkovo-Nagymaros Project (Judgement)</i> ”)	9
<i>Interhandel (Switzerland v. United States)</i> , Judgement, 1959 I.C.J. Rep. 6 (“ <i>Interhandel (Judgement)</i> ”)	21, 23

<i>Japan—Measures Affecting the Importation of Apples</i> , Panel Report, 2005 WTO Doc. WT/DS245/RW, (“Japan-Apples”)	5
<i>Legality of the Threat or Use of Nuclear Weapons</i> , Advisory Opinion, 1996 I.C.J. Rep. 226 (“Nuclear Weapons”)	30
<i>Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)</i> , Jurisdiction, 1984 I.C.J. Rep. 392 (“Nicaragua (Jurisdiction)”)	19
<i>Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921</i> , Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (“Nationality Decrees”)	23
<i>Nuclear Tests (Australia v. France)</i> , Judgement, 1974 I.C.J. Rep 253 (“Nuclear Tests (Judgement)”)	21
<i>Phosphates in Morocco (Italy v. France)</i> , Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74, (“Phosphates in Morocco”)	21
<i>South China Sea Arbitration (Philippines v. China)</i> , Award, 2016 PCA Case No. 2013-19, (“South China Sea Arbitration (Award)”)	24

TREATISES, BOOKS, ESSAYS, AND CHAPTERS

Christian Tomuschat, <i>Competence of the Court, Article 36, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY</i> (Andreas Zimmermann et al. eds., 3d ed. 2019) (“Tomuschat (2019)”)	19, 20
Eileen Denza, <i>Part Six: Administrative Measures, Diplomatic Asylum in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY</i> (Andreas Zimmermann, ed. 2011) (“Denza (2011)”)	10, 12, 14, 18

PERIODICALS

Ali Tejpar & Steven J. Hoffman, <i>Canada's Violation of International Law During the 2014-16 Ebola Outbreak</i> , 54 C.Y.I.L. 366 (2016) (“Tejpar & Hoffman (2016)”)	4, 8
Ana LP Mateus et al., <i>Effectiveness of Travel Restrictions in the Rapid Containment of Human Influenza: a Systematic Review</i> , 92 BULL. WORLD HEALTH ORGAN. 868 (2014) (“Mateus et al. (2014)”)	4
Annelies Wilder-Smith, <i>Can we Contain the COVID-19 Outbreak with the Same Measures as for SARS?</i> , 20 LANCET INFECTIOUS DISEASES e102 (2020) (“Wilder-Smith (2020)”)	2
Annelies Wilder-Smith, <i>Experience of Severe Acute Respiratory Syndrome in Singapore: Importation of Cases, and Defense Strategies at the Airport</i> , 10 J. OF TRAVEL MEDICINE 259 (2006) (“Wilder-Smith (2006)”)	2
Barbara von Tigerstrom & Kumanan Wilson, <i>COVID-19 Travel Restrictions and the International Health Regulations (2005)</i> , BMJ GLOBAL HEALTH (2020) (“Von Tigerstrom & Wilson (2020)”)	6
Chiara Poletto et al., <i>Assessing the impact of travel restrictions on international spread of the 2014 West African Ebola epidemic</i> , 19 EURO SURVEIL. (2014) (“Poletto et al. (2014)”)	4

Isabelle Duyvesteyn, <i>Great Expectations: The Use of Armed Force to Combat Terrorism</i> , 19 SMALL WARS & INSURGENCIAS 328 (2008) (“Duyvesteyn (2008)”)	24
John S. Brownstein et al., <i>Empirical Evidence for the Effect of Airline Travel on Inter-Regional Influenza Spread in the United States</i> , 3 PLOS MEDICINE 1826 (2006) (“Brownstein et al. (2006)”)	4
Keyuan Zou & Qiang Ye, <i>Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal</i> , 48 OCEAN DEV. & INT’L L. 331 (2017) (“Zou & Ye (2017)”)	25
Maarten Den Heijer, <i>Diplomatic Asylum and the Assange Case</i> , 26 LEIDEN J. INT’L L. 399 (2013) (“Den Heijer (2013)”)	10, 11, 13, 15
Malgosia Fitzmaurice, <i>The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice</i> , 20 AUSTL.Y.B. INT’L L. 127 (1999) (“Fitzmaurice (1999)”)	20, 21
Michael Aidan O’Connor, <i>International Extradition and the Political Offense Exception: The Granting of Political Offender Status to Terrorists by United States Courts</i> , 4 N.Y.L. SCH. J. INT’L & COMP. L. 613 (1983) (“O’Connor (2013)”)	17
Michael Milde, <i>Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)</i> , 11 ANNALS AIR & SPACE L. 105 (1986) (“Milde (1986)”)	26
Monica Hakimi, <i>Defensive Force Against Non-State Actors: The State of Play</i> , 91 INT’L L. STUD. 1 (2015) (“Hakimi (2015)”)	30
Rebecca Crootof, <i>Change Without Consent: How Customary International Law Modifies Treaties</i> , 41 YALE J. INT’L L. 238 (2016) (“Crootof (2016)”)	27
René Värk, <i>Diplomatic Asylum: Theory, Practice and the Case of Julian Assange</i> , 11 SISEKAITSEAKADEEMIA TOIMETISED 240 (2012) (“Värk (2012)”)	12
Robin Geiß, <i>Civil Aircraft as Weapons of Mass Destruction: Countermeasures, Article 3bis of the Chicago Convention, and the Newly Adopted German “Luftsicherheitsgesetz,”</i> 27 MICH. J. INT’L L. 227 (2005) (“Geiß (2005)”)	22, 26, 27
Roojin Habibi et al., <i>Do Not Violate the International Health Regulations During the COVID-19 Outbreak</i> , 395 THE LANCET 664 (2020) (“Habibi et al. (2020)”)	3
Sompong Sucharitkul, <i>Procedure for the Protection of Civil Aircraft in Flight</i> , 16 LOY. L.A. INT’L & COMP. L.J. 513 (1994) (“Sucharitkil (1994)”)	26
Susanne Riveles, <i>Diplomatic Asylum as a Human Right: The Case of the Durban Six</i> , 11 HUM. RTS. Q. 139 (1989) (“Riveles (1989)”)	13
Tatjana Hörnle, <i>Hijacked Airplanes: May They Be Shot Down?</i> , 10 NEW CRIM. L. REV. 582 (2007) (“Hörnle (2007)”)	27
OTHER	
Christopher Greenwood, <i>Self-Defence</i> , in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2011) (“Greenwood (2011)”)	29, 31

<i>Defense Minister: Germany Would Shoot Down Hijacked Plane</i> , DEUTSCHE WELLE, 17 September 2008, https://p.dw.com/p/BgUe (“DW (2008)”)	28
European Council on Refugees and Exiles, <i>Position on Exclusion From Refugee Status</i> , PP1/03/2004/Ext/CA, March 2004 (“ECRE (2004)”)	17
Garret M. Graff, <i>Behind the 9/11 White House Order to Shoot Down U.S. Airliners: ‘It Had to be Done’</i> , HISTORY, (12 September 2019), https://www.history.com/news/september-11-attacks-shutdown-order-cheney-bush (“Graff (2019)”)	27
<i>India:Hijacked Can Be Shot</i> , CBS NEWS, 14 August 2005, https://www.cbsnews.com/news/india-hijacked-planes-can-be-shot/ , (“CBS (2005)”)	28
International Law Association Use of Force Committee, 2018, <i>Final Report on Aggression and the Use of Force</i> , https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6 (“ILA Report (2018)”)	30
John V. Augustin, <i>ICAO and the Use of Force Against Civil Aerial Intruders</i> , 1998, (LL.M. Thesis, McGill University) (“Augustin (1998)”)	26
Mark D. Kielsingard, <i>The Political Offense Exception: Punishing Whistleblowers Abroad</i> , EJIL: TALK!, 14 November 2013, https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/ (“Kielsingard (2020)”)	17
Marko Milanovic, <i>Mistakes of Fact When Using Lethal Force in International Law: Part II</i> , EJIL: TALK!, 15 January 2020, https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-ii/ (“Milanovic II (2020)”)	31
Marko Milanovic, <i>Mistakes of Fact When Using Lethal Force in International Law: Part III</i> , EJIL: TALK!, 15 January 2020, https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-iii/ (“Milanovic III (2020)”)	32
National Academy of Sciences, <i>Summary and Assesment in LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK</i> , 2004, https://www.ncbi.nlm.nih.gov/books/NBK92444/ (“National Academy (2004)”)	2
<i>Poland to Down Hijacked Aircraft</i> , BBC, 13 January 2005, http://news.bbc.co.uk/2/hi/europe/4172487.stm (“BBC (2005)”)	27
<i>Putin Reveals He Was Ready to Shoot Down Hijacked Jet in 2014</i> , NBC NEWS, 12 March 2018, https://www.nbcnews.com/news/world/putin-reveals-he-was-ready-shoot-down-hijacked-jet-2014-n855776 (“NBC (2014)”)	27
William Hague, <i>Foreign Secretary Statement on Ecuadorian Government's Decision to Offer Political Asylum to Julian Assange</i> , U.K. GOVERNMENT, 16 August 2012, https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange (“U.K. Foreign Secretary (2012)”)	12
Yurkia Ishii, <i>The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation)</i> , <i>Provisional Measures Order</i> , EJIL: TALK!, 31 May 2019, 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 (“Ishii (2019)”)25

DOMESTIC COURTS

“B” & Others V. Secretary of State for the Foreign & Commonwealth Office, EWCA Civ 1344, U.K. Court of Appeal (Eng. & Wales), 18 October 2004, (“R (2004)”)14

BVerfG, 1 BvR 357/05, Feb. 15, 2006, http://www.bverfg.de/e/rs20060215_1bvr035705en.html (“BVerfG (2006)”)27

Permissibility of Shooting Down a Passenger Aircraft in the Event of a Danger That It Has Been Used for Unlawful Acts, and Where State Security Is Threatened, K44/07, Trybunał Konstytucyjny [Constitutional Tribunal] Sept. 30, 2008 (Pol.), https://web.archive.org/web/20101201044248/http://trybunal.gov.pl/eng/summaries/documents/K_44_07_GB.pdf (“Permissibility (2008)”)27

STATEMENT OF JURISDICTION

The United Republic of Apreluya (“Apreluya”) has initiated proceedings against the Democratic State of Ranovstayo (“Ranovstayo”) before the International Court of Justice (“the Court”) with regard to a dispute concerning alleged violations of international law by Ranovstayo pursuant to an application filed with the Registry of the Court under Article 40(1) of the Court’s Statute. Apreluya has submitted claims pursuant to the compulsory jurisdiction of the Court under Article 36(2) of the Court’s Statute. Ranovstayo has submitted a counterclaim against Apreluya pursuant to Article 80 of the Rules of the Court.

Both Apreluya and Ranovstayo have agreed to have the merits of all claims and counterclaims heard together in a single set of proceedings based on a Statement of Agreed Facts, subject to Apreluya’s reservation of its objection to the jurisdiction of the Court with respect to Ranovstayo’s counterclaim. Apreluya maintains that the Court is without jurisdiction over Ranovstayo’s counterclaim because Apreluya’s Declaration to the Court’s jurisdiction pursuant to Article 36(2) of the Court’s Statute excludes “any dispute concerning Apreluyan military activities, or to any dispute with regard to matters which are essentially within the domestic jurisdiction of the United Republic of Apreluya, as determined by the Government of the United Republic of Apreluya.” Apreluya submits that the reservation contained within its Declaration to the Court’s jurisdiction is enforceable and covers this counterclaim. Alternatively, Apreluya reserves the right to defend the merits of the counterclaim in the event that the Court rejects this jurisdictional challenge.

QUESTIONS PRESENTED

- I. *Whether* Ranovstayo violated international law by applying its entry regulation to Aprepluya and Aprepluya is entitled to compensation for any claimed economic losses.

- II. *Whether* Ranovstayo violated international law by refusing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities.

- III. *Whether* the Court may exercise jurisdiction over Ranovstayo's counterclaim concerning the Mantyan Airways aircraft.

- IV. *Whether* Aprepluya violated international law by shooting down the aircraft.

STATEMENT OF FACTS

I. Overview of Parties

The United Republic of Aprepluya and the Democratic State of Ranovstayo are neighboring countries. Both are developed democracies sharing strong economic and cultural links. Tourism constitutes a significant portion of Aprepluya's €160 billion gross domestic product. In the four years immediately preceding the J-VID-18 pandemic, Aprepluya hosted around nine million tourists annually, generating about €7.5 billion in revenue.

II. J-VID-18 Pandemic

In March 2018, a contagious, novel virus was identified in Hadbard, a State eight time zones away from Aprepluya and Ranovstayo. Public health organizations—including Aprepluya's National Bioresearch Laboratory ("NBL") in Segura Province—began work on a vaccine.

On 20 April 2018, the World Health Organization ("WHO") declared J-VID-18 a public health emergency of international concern and issued Temporary Recommendations which did not recommend travel and trade restrictions. On 22 April 2018, Ranovstayo adopted regulations prohibiting all non-Ranovstayan nationals who had been in a "high-risk country" within the past eighteen days from entering Ranovstayo. This included non-Ranovstayans with Ranovstayan national family members and legal permanent residents of Ranovstayo. Ranovstayo's Ministry of Health was to develop a list of "high-risk countries" which included any country which had at least fifty confirmed cases of J-VID-18 over the previous two months. Ranovstayo was the only country at the time barring asymptomatic individuals from entry. WHO requested Ranovstayo reconsider the application of travel restrictions, but it declined to do so.

On 4 June 2018, Aprepluya confirmed that two employees at NBL tested positive for J-VID-18. Ranovstayan President Kalkan warned her Aprepluyan counterpart that her government intended to add Aprepluya to the high-risk list unless steps were taken to manage the virus's spread. The next morning, Aprepluya's Health Minister announced restrictions throughout Segura Province including the barring of travel into and out of Segura, to control the spread of the virus. Nevertheless, on 7 June, Ranovstayo's Ministry of Health announced Aprepluya was added to the high-risk list. As of mid-June 2018, Aprepluya had no suspected or confirmed cases of J-VID-18 outside of Segura Province.

On 9 June 2018, Aprepluya's Ministry of Foreign Affairs delivered a *note verbale* to Ranovstayo's embassy, objecting to the listing of Aprepluya as a "high-risk country" as violative

of international law. It noted the mandatory quarantine on Segura Province would ensure the virus would not spread and highlighted that there were no other cases in Apreluya. Ranovstayo refused to remove Apreluya from the list.

From 5 to 7 June 2018, approximately 80% of tourists in Apreluya departed. Two thirds responded to a survey indicating the primary reason for their departure was that they were either from or had flight connections in Ranovstayo and were concerned that if Apreluya were designated a “high-risk country,” they would be stranded. Additionally, Apreluya conducted a study that found that Ranovstayo’s entry regulation resulted in over €130 million in unrecoverable revenue loss for Apreluyan industries.

III. Keinblat Vormund

After discussing her concerns with her supervisor, Keinblat Vormund, an Apreluyan NBL employee, posted a Tweet from an anonymous account on 3 June 2018 indicating that several staff had J-VID-18 symptoms. Apreluyan police arrived at Vormund’s residence to discuss the Tweet, but she fled and hurried to the Ranovstayan consulate, where she requested protection. Ranovstayo treated her as an asylum applicant and allowed her to remain there while processing her claim.

As a condition of her employment, Vormund had signed a non-disclosure agreement prohibiting her from releasing information related to her work, warning that a breach of the agreement could result in prosecution. Apreluya charged Vormund with violating the agreement, interfering with a police investigation, and causing public disorder. Apreluya, via *note verbale*, requested that Ranovstayo surrender Vormund, considering the failure to do so violative of international law. Ranovstayo refused and Vormund remained at the consulate until she departed on 25 June.

IV. Shootdown of Mantyan Airways Aircraft

On 19 June 2018, INTERPOL notified both countries that a clandestine organization called “Friends of Justice” (“FOJ”) was planning an attack on a national capital in the region, and that the group planned to utilize a civilian aircraft as a weapon. Several intelligence agencies consider FOJ responsible for several bombings over the last three years. In January 2018, Apreluyan security services intercepted communications of suspected FOJ operatives, which suggested the planning of a future attack.

On 26 June 2018, Vormund and Gwo Hye, the latter a pilot for Mantyan Airways and an Apreluyan national, traveled together to Segura Airport. There, Hye piloted a 12-person aircraft

Mantyan Airways, a charter airline privately owned by Aprepluyan nationals. Hye intended to pilot the aircraft to Ranovstayo, where Vormund was seeking asylum.

After radar operators at the Beauton Area Air Force Base noticed the rogue aircraft flying towards Aprepluya's capital city Beauton, the Air Force attempted repeatedly to initiate radio contact with it, both through military and civilian channels. When that failed, a fighter jet was scrambled with instructions to intercept the aircraft if it continued to ignore the communications.

The fighter jet used visual and other signals instructing the pilot to deviate from its course, and tracers were fired across the path of the aircraft, eliciting no response. The cockpit voice recording revealed that Hye saw the visual signals but chose to ignore them, believing she would be allowed to fly into Ranovstayo.

Concerned that the aircraft was being used in a terrorist attack on government buildings in Beauton, a short burst was fired to force the aircraft to land. Hye lost control of the aircraft and crash landed in the forest, killing both on board.

In a 28 June letter to the President of the United Nations ("UN") Security Council, Aprepluya confirmed it had shot down the aircraft "to protect the capital from an apparent terrorist attack." On 5 July 2018, Aprepluyan Prime Minister Haraka issued a statement explaining that the aircraft was shot down to prevent what was believed to be an impending terrorist attack, and that "this is a purely domestic matter."

V. Relevant Conventions

Ranovastayo and Aprepluya are members of the UN and have acceded to the Statute of the International Court of Justice. While both have accepted the Court's compulsory jurisdiction under Article 36(2) of the Statute, Aprepluya's Declaration of acceptance was made with the reservation that the Declaration "shall not apply to any dispute concerning Aprepluyan military activities, or 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."

Both are also parties to the Convention on International Civil Aviation (including Article 3 *bis*), the Constitution of the World Health Organization, the 2005 International Health Regulations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Relating to the Status of Refugees, the

Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, and the Vienna Convention on the Law of Treaties.

SUMMARY OF PLEADINGS

Pleading I

Ranovstayo's entry regulation ("Regulation") violated international law. First, the Regulation breached WHO's 2005 IHR by implementing restrictions that severely restricted international travel, beyond what had been deemed reasonable by WHO and where other alternatives to the restrictive measures were available. The Regulation violated the IHR because it did not follow WHO guidance or advice, was not based on available scientific evidence, and was discriminatory against Aprepluya.

Second, the Regulation violated the fundamental human rights of Aprepluyan nationals. The Regulation violated the right to freedom of movement in ICCPR Article 12 by prohibiting Aprepluyan nationals to travel internationally. The Regulation also violated the right to family, in ICCPR Articles 17 and 23, by preventing Aprepluyan nationals with Ranovstayan family members from entering the country. The Regulation further violated Ranovstayo's obligations under ICESCR Article 12 because it did not adopt the least intrusive measures necessary to restrict the freedom of movement of people with J-VID-18.

Third, the Regulation was inconsistent with customary international law ("CIL"), under which there is no legal basis for enacting travel restrictions. Consequently, Ranovstayo is obligated to compensate Aprepluya for the economic damage it has caused.

Pleading II

Ranovstayo further violated international law by failing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities. By harboring Vormund at its consulate and considering her request for diplomatic asylum, Ranovstayo contravened the VCDR and the VCCR. Diplomatic asylum is not a recognized diplomatic or consular function and violates the principles of non-interference in Aprepluya's domestic affairs and promoting friendly relations.

Second, there is no legal basis in CIL to justify Ranovstayo's failure to hand over Vormund. Diplomatic asylum is not generally recognized in CIL, and there is no widespread practice to support diplomatic asylum as a customary instrument of humanitarian intervention either.

Third, even if Ranovstayo was permitted to grant Vormund diplomatic asylum, Vormund was not eligible. In accordance with internationally recognized criteria of crimes contained in

refugee and extradition law, Vormund's crimes were not political crimes but common crimes for which there can be no right to diplomatic asylum.

Ranovstayo was obliged to return Vormund to the Aprepluyan authorities. Ranovstayo's consulate did not have absolute immunity when it harbored Vormund because granting diplomatic asylum is outside the regular functions of consulates. Ranovstayo did not owe positive human rights obligations to Vormund either because Vormund was not in Ranovstayo's territory or subject to its jurisdiction when she entered its consulate.

Pleading III

The Court may not exercise jurisdiction over Ranovstayo's counter claim that Aprepluya violated international law by shooting down the Mantyan Airways aircraft. Pursuant to Article 36(2) of the ICJ Statute, Aprepluya's declaration to the Court's jurisdiction contains a reservation which is enforceable and covers this counterclaim.

Ranovstayo's counterclaim is covered by Aprepluya's reservation because the shutdown of the Mantyan Airways aircraft was within Aprepluya's domestic jurisdiction, in accordance with the government's own determination, and consistent with the ICAO Convention and an objective assessment of the facts.

Additionally, and alternatively, this counterclaim also concerns Aprepluyan military activities and is covered by Aprepluya's reservation.

Pleading IV

Even if the Court were to exercise jurisdiction over Ranovstayo's counterclaim, Aprepluya did not violate international law by shooting down the Mantyan Airways aircraft. First, the shutdown did not contravene the ICAO Convention or the UN Charter because these conventions exclude the domestic use of force against civilian aircraft from their remit.

Second, the shutdown was consistent with CIL. In accordance with customary international practice, Aprepluya was permitted to shoot down the Mantyan Airways aircraft because the civilian status of the aircraft had been abused.

By shooting down the Mantyan Airways aircraft, Aprepluya also complied with its obligations in ICCPR Article 6. Aprepluya took measures to protect the lives of its citizens, and only used force against the Mantyan Airways aircraft as a last resort.

Apreluya's shutdown was also justified by the doctrine of self-defense, as enshrined in the UN Charter, the ICAO Convention, and CIL. Apreluya reasonably believed it was experiencing an armed attack and took steps that were proportionate and necessary to respond to the threat. Apreluya's mistaken belief that a terrorist attack was imminent was honest and reasonable and did not render the shutdown unlawful.

PLEADINGS

I. RANOVSTAYO VIOLATED INTERNATIONAL LAW BY APPLYING ITS ENTRY REGULATION TO APREPLUYA AND IS OBLIGATED TO COMPENSATE IT FOR THE RESULTING ECONOMIC LOSS.

A. RANOVSTAYO'S REGULATION BREACHED THE WHO'S 2005 IHR.

1. Ranovstayo breached IHR Article 43(1) because its Regulation was more restrictive than reasonable alternative means to accomplish Ranovstayo's goals.

The IHR aims to improve States' ability to respond to international health threats "in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade."¹ Article 43(1) does not prohibit States from implementing additional health measures to those recommended by WHO, "provided such measures are otherwise consistent with [IHR] Regulations."² However, "such measures shall 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."³

i. The Regulation severely restricted international traffic.

Ranovstayo's Regulation prohibits non-Ranovstayo nationals who have been in "high-risk" countries (as determined by Ranovstayo's Health Ministry) within the past eighteen days from entering Ranovstayo. This includes transiting at one of Ranovstayo's airports.⁴ This was the most restrictive response of any State to J-VID-18, despite the fact that there were no cases in Ranovstayo.⁵ Furthermore, by including airport transits as entry, arbitrarily selecting an eighteen-day cutoff (where the J-VID-18 incubation period is seven to fourteen days), and barring asymptomatic individuals, the Regulation significantly interfered with international travel and trade.⁶

¹ IHR, Foreword.

² *Id.*, art. 43(1).

³ *Ibid.*

⁴ *Facts*, [10].

⁵ *Id.*, [15], [16].

⁶ *Id.*, [7].

This interference is evidenced by the fact that during the period when restrictions against Aprepluya were announced, 80% of tourists in Aprepluya left the country.⁷ Two thirds of tourists responding to an exit survey confirmed they were from or had flight connections in Ranovstayo and were leaving because of the Regulation.⁸ On average, 40% of third-country national tourists traveling to and from Aprepluya use Ranosvtayo’s Bogpadayo Airport, the busiest in the region.⁹

ii. *Recommendations made by the WHO were a reasonable alternative to the Regulation.*

Ranovstayo could have implemented WHO’s less restrictive recommendations in lieu of its ban. On 20 April 2018, WHO recommended social distancing, face coverings, and fourteen days self-quarantine for anyone with symptoms.¹⁰ WHO’s recommendations clearly indicated that “travel and trade restrictions are not recommended.”¹¹

iii. *There were other reasonable alternatives to the Regulation.*

In addition to WHO recommendations, Ranovstayo could have implemented contact tracing or screening at entry and exit ports. During the 2003 SARS pandemic, Singapore controlled its outbreak by implementing a combination of measures without banning travel,¹² including: entry and exit temperature screenings of travelers and health declaration cards to facilitate contact tracing.¹³ A country with one of the busiest airports in Southeast Asia, Singapore’s pandemic management enabled it to curb transmission.¹⁴

The Singaporean example of virus control was widely hailed as a public health success.¹⁵ The adoption of such reasonable measures would likely have met Ranovstayo’s health goals without being more restrictive than necessary.

⁷ *Id.*, [3], [30].

⁸ *Id.*, [30].

⁹ *Id.*, [3].

¹⁰ *Id.*, [8].

¹¹ *Ibid.*

¹² Wilder-Smith (2020), p. e104.

¹³ Wilder-Smith (2006), pp. 260-62.

¹⁴ *Ibid.*

¹⁵ National Academy (2004), p. 9.

2. Ranovstayo breached IHR Article 43(2) because its Regulation did not follow WHO guidance or advice.

i. *WHO did not recommend travel restrictions.*

Article 43(2) requires all State public health measures be based on specific WHO guidance.¹⁶ Travel restrictions were explicitly not recommended by WHO when Ranovstayo implemented its Regulation on 22 April 2018.¹⁷ Further, on 27 April, WHO sent a communication to the Ranovstayo Ministry of Health reminding Ranovstayo that WHO was not recommending travel restrictions and requesting that Ranovstayo reconsider the Regulation.¹⁸ Not only did Ranovstayo refuse the request, but it also encouraged other States to follow its example by enacting entry restrictions.¹⁹

ii. *Deliberately violating WHO recommendations frustrates the object and purpose of the IHR.*

Ignoring WHO guidelines undermines the purpose of the IHR, which urges States to “collaborate actively with each other and WHO in accordance with the relevant provisions of [IHR], so as to ensure their effective implementation.”²⁰ IHR Article 3 affirms that sovereign rights to legislate and implement health policies “should uphold the purpose of [the IHR].”²¹ Travel restrictions contravene WHO recommendations. When Ranovstayo selects which parts of international law to follow, and explicitly “encourage[s] other countries to follow [its] lead,” it undermines the rules-based global order.²²

¹⁶ IHR, art. 43(2).

¹⁷ *Facts*, [8], [10].

¹⁸ *Id.*, [14].

¹⁹ *Id.*, [12], [14].

²⁰ IHR, Revision art. 5.

²¹ IHR art. 3(4).

²² *Facts*, [12]; Habibi et al. (2020), p. 665.

3. Ranovstayo breached IHR Article 43(2) because its Regulation was not based on available scientific evidence.

- i. *Empirical evidence suggests travel restrictions are ineffective in combatting the spread of diseases.*

Article 43(2) also requires that measures be grounded in “scientific principles” and “available scientific evidence.”²³ At the time Ranovstayo implemented its plan, scientific evidence rejected travel restrictions.²⁴ Travel restrictions have not been shown to make States safer.²⁵ Whilst they may postpone the spread of disease, they do not eliminate the risk of an outbreak.²⁶ During the 2009 outbreak of the H1N1 flu, studies found restricting 90% of air travel would only delay infections by fourteen days.²⁷ Despite travel restrictions, the virus reached “pandemic proportions in a short time.”²⁸ Studies of travel bans to Ebola-stricken countries in West Africa reached similar conclusions, finding that reduced traffic was “insufficient to prevent the exportation of Ebola cases.”²⁹

Any objective review of “available scientific evidence” would not have led Ranovstayo to the conclusion that entry restrictions were necessary to “ensure that the J-18 virus does not spread into our country.”³⁰

- ii. *The Regulation was not based on sufficient scientific evidence under the SPS Agreement.*

Similar to the IHR, the WTO’s SPS Agreement provides guidance on trade-inhibiting measures that protect human, animal, or plant life. Article 2 requires State parties to base determinations of trade-restrictive measures on scientific principles and scientific evidence.³¹

²³ IHR art. 43(2).

²⁴ *Facts*, [12].

²⁵ Brownstein et al. (2006), pp. 1832-33; Mateus et al. (2006), pp. 870-73; Poletto et al. (2014), p. 5.

²⁶ Tejpar & Hoffman (2016), p. 373.

²⁷ Mateus et al. (2014), p. 872.

²⁸ Tejpar & Hoffman (2016), pp. 373-74.

²⁹ Poletto et al. (2014), p. 4.

³⁰ *Facts*, [8], [11].

³¹ SPS art. 2.

WTO case law explains that scientific evidence must be “sufficient to demonstrate the existence of the risk which the measure is supposed to address.”³² Further, there must be a rational or objective relationship between a measure and the risk assessment it relies on.³³

The scientific evidence Ranovstayo relied on was not proportionally linked to the health risk it faced when the measure was adopted. When Ranovstayo implemented the Regulation, only 626 cases and 22 deaths were reported in States eight time zones away and there were no domestic cases.³⁴ When Ranovstayo applied its Regulation to Aprepluya, there were still no cases in Ranovstayo and only nine confirmed cases in Aprepluya, contained in one province (Segura), and from one known source (NBL).³⁵ Further, Aprepluya had already instituted strict control measures, including isolating confirmed cases, and implementing quarantines and mandatory social distancing measures for all of Segura Province.³⁶ Therefore, what Ranovstayo considered “best scientific evidence available” did not sufficiently address causation.

4. Ranovstayo breached IHR Article 42 by discriminating against Aprepluya in labeling it a “high-risk country.”

i. *The process for determining “high-risk” was opaque and arbitrary.*

Article 42 requires a State’s additional health measures be “applied in a transparent and non-discriminatory manner.”³⁷ Ranovstayo’s entry restriction allows Ranovstayo’s Health Ministry to select “high-risk countries” subject to the ban, which include, but are not limited to, States where there are at least fifty confirmed cases of J-VID-18 within two months.³⁸ That threshold is arbitrary. More concerning, the provision shields the decision-making process from scrutiny and transparency. With flexibility to apply the ban to countries that have not reached the fifty-case benchmark, Ranovstayo has *carte blanche* to rely on unscientific and discriminatory principles in labeling countries as “high-risk.”

³² *Japan-Apples*, [8.45].

³³ *Australia-Apples*, [201]–[215].

³⁴ *Facts*, [4], [8].

³⁵ *Id.*, [15], [29].

³⁶ *Id.*, [27].

³⁷ IHR art. 42.

³⁸ *Facts*, [10].

- ii. *Categorizing Aprepluya as a “high-risk” country was opaque and arbitrary.*

Ranovstayo’s labeling Aprepluya as “high-risk” was not transparent. It did not follow Ranovstayo’s own Regulation since there were only nine confirmed cases, well below the fifty required.³⁹ Additionally, on 4 June, three days before Ranovstayo listed Aprepluya as “high-risk,” Aprepluya disclosed twelve NBL employees and their contacts were being tested and were isolating.⁴⁰ When the results were finalized three days later on 7 June, Aprepluya’s attempts to manage the outbreak by mandating social distancing and imposing quarantine (implemented on 5 June) were not given a chance before Ranovstayo labeled Aprepluya “high-risk.” Ranovstayo’s own warning that it would “without further notice” label Aprepluya as “high-risk” “unless” it took steps to manage the situation was not heeded.

5. Ranovstayo breached IHR Article 42 by discriminating against non-Ranovstayan nationals.

The Regulation distinguishes between Ranovstayan nationals and non-Ranovstayan nationals, banning the entry of the latter if they were in a “high-risk country” within eighteen days.⁴¹ Ranovstayo’s action targets not the J-VID-18 virus but rather the people of Aprepluya as well as other non-Ranovstayans, which contributes to stigma and discrimination.⁴²

B. RANOVSTAYO’S TRAVEL RESTRICTIONS VIOLATED THE ICCPR AND ICESCR.

1. The Regulation violated ICCPR Article 12.

ICCPR Article 12 enshrines the fundamental right to freedom of movement.⁴³ The Human Rights Committee’s General Comment No. 27 affirms that this provision includes the right to travel internationally.⁴⁴ Article 12 also delineates when freedom of movement may be lawfully restricted. Such curtailments must be provided by law; necessary to protect national security, public order, health, morals, or others’ rights; and consistent with other ICCPR rights.⁴⁵

³⁹ *Ibid.*

⁴⁰ *Id.*, [27].

⁴¹ *Id.*, [10].

⁴² Von Tigerstrom & Wilson (2020), p. 2.

⁴³ ICCPR art. 12.

⁴⁴ General Comment No. 27, [8], [23].

⁴⁵ ICCPR art. 12(3).

Restrictions authorized by law must “use precise criteria and may not confer unfettered discretion on those charged with their execution.”⁴⁶ They must also be proportional, appropriately suited to the goals, and the least intrusive method.⁴⁷

Ranovstayo’s Regulation contravenes Article 12. First, the Regulation does not define the precise criteria by which “high-risk” countries are labeled; its vague wording gives “unfettered discretion” to the Ministry of Health to prevent non-Ranovstayan nationals from traveling to Ranovstayo. Second, the Regulation was not the least intrusive instrument available. Airport screenings, contact tracing, and quarantines were all less restrictive measures.

2. The Regulation violated ICCPR Articles 17 and 23.

ICCPR Article 17 confirms that individuals shall not be “subjected to arbitrary interference” with family.⁴⁸ This provision extends to “interference provided for under the law.”⁴⁹ Article 23 affirms that “the family is [...] entitled to protection.”⁵⁰ Ranovstayo’s Regulation prohibited non-Ranovstayan nationals with Ranovstayan family members from entering the country.⁵¹ This restriction arbitrarily interfered with family by preventing family reunification.

3. The Regulation violated ICESCR Article 12.

ICESCR Article 12 recognizes the right to enjoy the highest attainable standard of health and allows States to control epidemics in service of that right.⁵² CESCR General Comment No. 14 places the burden on States which restrict the movement of people with transmissible diseases to justify such “strictly necessary” measures.⁵³ Ranovstayo’s Regulation was not the least restrictive means available.

⁴⁶ General Comment No. 27, [13].

⁴⁷ *Id.*, [14].

⁴⁸ ICCPR art. 17.

⁴⁹ General Comment No. 16, [4].

⁵⁰ ICCPR art. 23.

⁵¹ *Facts*, [10].

⁵² ICESCR art 12.

⁵³ General Comment No. 14, [28].

C. CUSTOMARY INTERNATIONAL LAW (“CIL”) DOES NOT SUPPORT THE USE OF ENTRY RESTRICTIONS.

1. Entry restrictions are inconsistent with CIL.

A party that relies on a customary practice has the burden of establishing that the custom exists in such a way that it becomes binding on parties.⁵⁴ Travel restrictions are not CIL since there is no evidence of widespread state practice. During the Ebola crisis, only 58 out of 196 IHR parties enacted travel restrictions.⁵⁵ Of the States that did, there was no uniformity to their restrictions.⁵⁶ Total travel bans, like Ranovstayo’s, lack a legal basis in CIL.

D. RANOVSTAYO IS OBLIGATED TO COMPENSATE APREPLUYA FOR ITS ECONOMIC LOSSES.

1. Ranovstayo’s Regulation caused economic damage to Aprepluya.

The International Law Commission’s (“ILC”) Draft Articles on State Responsibility (“Draft Articles”) defines State responsibility for internationally wrongful acts. These are actions or omissions attributable to the State that breach its international obligations.⁵⁷

Ranovstayo’s Regulation was passed by the government and caused severe economic damage to Aprepluya.⁵⁸ There is a “sufficient causal nexus between the wrongful act and the injury suffered.”⁵⁹ During the period of time when the Regulation was announced to apply to Aprepluya, 80% of tourists left Aprepluya, eviscerating its tourism industry.⁶⁰ The majority of those who responded to an exit survey confirmed they were leaving because of the Regulation.⁶¹ A July 2018 report by Aprepluya’s Ministry of Tourism concluded that the Regulation caused revenue losses of over €130 million to Aprepluyan businesses.⁶²

⁵⁴ *Asylum* (Judgement), p. 276.

⁵⁵ Tejpar & Hoffman (2016), p. 366.

⁵⁶ *Id.*, pp. 378-79.

⁵⁷ DARSIIWA art 2.

⁵⁸ *Facts*, [10].

⁵⁹ *Certain Activities Carried Out By Nicaragua* (Compensation), [34].

⁶⁰ *Facts*, [30].

⁶¹ *Ibid.*

⁶² *Id.* [46].

2. Ranovstayo is obligated to compensate Aprepluya for the economic damages it caused.

Article 31 of the Draft Articles affirms that States which commit internationally wrongful acts are “under an obligation to make full reparation for the [resulting] injury.”⁶³ The Court has also recognized such an obligation.⁶⁴ Full reparations include restitution, compensation, and satisfaction.⁶⁵

Although the travel ban is no longer in force, Ranovstayo has not satisfied its obligation to compensate Aprepluya by restitution.⁶⁶ Restitution must “re-establish the situation which existed before the wrongful act was committed.”⁶⁷ *Chorzów Factory* affirmed restitution “must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the [prior] situation.”⁶⁸ Repealing the Regulation does not restore Aprepluya’s tourism industry to its pre-Regulation state, nor does it restore lost profits.

Since it is not possible that restitution would make Aprepluya whole, Article 36 requires compensation.⁶⁹ Compensation must cover “any financially assessable damage including loss of profits.”⁷⁰

II. 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.

A. DIPLOMATIC ASYLUM IS INCOMPATIBLE WITH TREATY LAW.

In presenting herself to the Ranovstayan consular authorities, Vormund sought diplomatic asylum, which Ranovstayo considered.⁷¹ Diplomatic asylum contravenes the VCDR and VCCR.

⁶³ DARSIIWA, art. 31.

⁶⁴ *Certain Activities Carried Out By Nicaragua (Compensation)*, [29]; *Gabčíkovo-Nagymaros Project (Judgement)*, [150].

⁶⁵ DARSIIWA, arts. 34, 36.

⁶⁶ *Facts*, [51].

⁶⁷ DARSIIWA, art. 35.

⁶⁸ *Chorzów Factory (Merits)*, p. 125.

⁶⁹ DARSIIWA, art. 36(1).

⁷⁰ *Id.*, art. 36(2).

⁷¹ *Facts*, [21], [25].

1. Neither the VCDR nor the VCCR allow for diplomatic asylum.

The exclusion of diplomatic asylum from the VCDR and VCCR demonstrates that it is incompatible with treaty law. Diplomatic asylum was intentionally excluded from the ILC's mandate on diplomatic privileges and immunities,⁷² and provisions on diplomatic asylum were rejected during both drafting Conventions.⁷³ Draft VCCR provisions on diplomatic asylum were rejected precisely because of concern that inclusion would suggest that a right of diplomatic asylum existed in the VCDR.⁷⁴

2. Diplomatic asylum contravenes the object and purpose of the VCDR and VCCR.

The VCDR and VCCR regulate the conduct of the sending state's diplomatic mission.

- i. *Diplomatic asylum contravenes the principle of non-interference in the domestic affairs of the receiving State.*

VCDR Article 41(1) affirms that diplomatic officers have a "duty" to "respect the laws and regulations of the receiving state. They also must not interfere in the internal affairs of that state."⁷⁵ Vormund has been charged by Aprepluya's Prosecutor's Office with three offenses under the National Penal Code: (1) causing public disorder; (2) violating a governmental non-disclosure agreement and (3) interfering with a police investigation.⁷⁶ By providing sanctuary to Vormund in Ranovstayo's consulate and obstructing Aprepluya's criminal jurisdiction, Ranovstayo interfered with Aprepluya's internal affairs.

- a. Aprepluya objected to Ranovstayo's actions.

VCCR Article 5(m) affirms that residual consular functions are those "which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State."⁷⁷

⁷² Denza (2011), [16], [17], [30].

⁷³ Den Heijer (2013), pp. 412-13.

⁷⁴ Denza (2011), [17], [30].

⁷⁵ VCDR art. 41(1).

⁷⁶ *Facts*, [32].

⁷⁷ VCCR art. 5(m).

Aprepluya's clear objection to harboring Vormund was registered with Ranovstayo's embassy in a *note verbale*.⁷⁸ Ranovstayo acknowledged Aprepluya's insistence on Vormund's return and registered Aprepluya's view that the failure to do so constituted an illegal act. Yet Ranovstayo continued to flout Aprepluya's objection to Ranovstayo's act, directly interfering in Aprepluya's domestic affairs.

- ii. *Granting diplomatic asylum is not a recognized diplomatic or consular function.*

VCDR Article 3 and VCCR Article 5 do not include diplomatic asylum or anything that could be construed as permitting diplomatic asylum within the functions of diplomatic and consular missions.⁷⁹ Beyond issuing "appropriate documents to persons wishing to travel to the sending state" for tourism, there is no reference to protection of non-nationals in either Convention.⁸⁰ This cannot reasonably be construed to mean that consular officers are empowered to grant asylum.

Additionally, VCDR Article 41(3) and VCCR Article 55(2) affirm that diplomatic and consular missions must not be used in any manner incompatible with their functions. Incompatibility has been understood to prohibit activities that fall outside of the ordinary scope of diplomatic functions or which constitute a crime in the receiving State.⁸¹ Diplomatic asylum is outside of the scope of the ordinary functions.

- iii. *Considering diplomatic asylum which the host state has objected to undermines the promotion of friendly relations between the states.*

VCDR Article 3(1)(e) and VCCR 5(b) affirm a common purpose of "promoting friendly relations between the sending State and the receiving State."⁸² Aprepluya registered its official disapproval of Ranovstayo's actions. Ranovstayo's disregard of Aprepluya's concerns is an affront to the friendly relations Ranovstayo's consulate is purported to advance.

⁷⁸ *Facts*, [33].

⁷⁹ VCDR art. 3; VCCR art. 5.

⁸⁰ VCCR art. 5(d).

⁸¹ Den Heijer (2013), p. 413.

⁸² VCDR art. 3(1)(e); VCCR art. 5(b).

B. DIPLOMATIC ASYLUM IS NOT RECOGNIZED AS A MATTER OF CIL.

1. There is no *opinio juris* or state practice to support the idea that diplomatic asylum is recognized under CIL.

i. *There is no global treaty law on diplomatic asylum.*

Latin America is the only place where diplomatic asylum has been codified multilaterally. Nevertheless, there is still no uniform understanding or acceptance of the concept in the region.⁸³ Latin American practices of diplomatic asylum have had limited impact globally and international efforts to codify the concept have been unsuccessful.⁸⁴

ii. *The practice of diplomatic asylum is not sufficiently extensive or uniform to constitute custom.*

Treaty law and State practices on diplomatic asylum are so inconsistent that no customary rule can exist.⁸⁵ Given the political and legal difficulties surrounding diplomatic asylum, it is rarely employed and only under the most highly exceptional circumstances.⁸⁶

iii. *Many governments reject the practice of diplomatic asylum as part of CIL.*

When given the opportunity to express their views on diplomatic asylum in a report commissioned by the UN Secretary-General, many States expressed the view that diplomatic asylum is “not a legal institution in itself”⁸⁷ and is not a “generally recognized customary law.”⁸⁸ Historically, the United States has consistently objected to the idea that international law permits diplomatic asylum.⁸⁹ Most recently, the United Kingdom affirmed that it “is far from a universally accepted concept.”⁹⁰ Widespread rejection of diplomatic asylum defeats any claim that it is CIL.

⁸³ Denza (2011) [6]; *Asylum* (Judgement), p. 277; Värk (2012), p. 248.

⁸⁴ Denza (2011) [6, 25]; Värk (2012), pp. 248-49.

⁸⁵ *Asylum* (Judgement), p. 277; Denza (2011) [35].

⁸⁶ Denza (2011), [26]–[29].

⁸⁷ UNGA Question Pt. I, pp. 17-18, 26, 28-29.

⁸⁸ UNGA Question Pt. I, pp. 19, 21-24; Denza (2011), [29].

⁸⁹ MCPA (U.S. Reservation); UNGA Question Pt. II, [220].

⁹⁰ U.K. Foreign Secretary (2012).

2. Diplomatic asylum is not an accepted practice of humanitarian intervention; even if it were, the exception would not apply to Vormund.

i. *Diplomatic asylum is not a customary instrument of humanitarian intervention.*

There is insufficient *opinio juris* and State practice to support diplomatic asylum as a widely accepted instrument of humanitarian intervention. First, many States disagree that humanitarian considerations justify the infringements on State sovereignty created by diplomatic asylum.⁹¹ Second, there is no uniform State practice to grant diplomatic asylum for humanitarian purposes, even among states that acknowledge humanitarian concerns in the decision-making calculus for diplomatic asylum.⁹²

Even if there is a humanitarian exception allowing for diplomatic asylum, there is no uniform agreement on what principles apply. For Canada, protection is only granted “in exceptional cases where life, liberty, or physical integrity” is threatened by violence,⁹³ whilst Liberia takes a more expansive view, resembling the requirements of territorial asylum.⁹⁴ The divergence reveals a lack of principled guidance to underpin the legality of a humanitarian exception. Furthermore, there is no agreement on other fundamental questions, such as whether the sending or receiving State determines whether the humanitarian threshold has been met and whether a grant includes safe conduct out of the receiving State.⁹⁵ In the limited cases of diplomatic asylum, State actions are driven more by political and diplomatic concerns than by humanitarian principles.⁹⁶

ii. *There is no duty to provide diplomatic asylum even if there is a humanitarian exception which would permit Ranovstayo to do so.*

a. Vormund was not facing severe and imminent risk of death or injury.

For States that recognize a limited exception to the general impermissibility of diplomatic asylum, such exceptions are confined to exceptional cases and for limited time periods where the

⁹¹ UNGA Question Pt. II, [202], [226], [231].

⁹² Riveles (1989) p. 140.

⁹³ UNGA Question Pt. I, [17], [18].

⁹⁴ *Id.* 24.

⁹⁵ UNGA Question, Pt. II [236], [238]; Den Heijer (2013), pp. 403, 411.

⁹⁶ Den Heijer (2013), p. 411.

asylum seeker faces imminent threat to life, physical safety, or liberty.⁹⁷ The United Kingdom Court of Appeals considered the applicability of such an exception in *R. (on the application of 'B' and others)*. There, a U.K. Consulate in Australia denied diplomatic asylum to two Afghani escapees of an Australian immigration detention center.⁹⁸

The court reasoned that diplomatic asylum could be justified to protect a fugitive “facing the risk of death or injury as the result of lawless disorder.”⁹⁹ However, the court concluded that the threat was not “immediate or severe” because “Australia is a country which observes the rule of law” and the plaintiffs had not exhausted judicial remedies for their pending asylum claim.¹⁰⁰ Furthermore, “the threat of indefinite detention, would not, of itself, suffice to justify under international law, or require . . . the grant of diplomatic asylum.”¹⁰¹

Similar to the Afghani plaintiffs, Vormund was not facing a “risk of death or injury” that was “immediate and severe” when she appeared at the Ranovstayo consulate. She chose to run from the police based on a subjective fear of arrest and that the authorities “might do worse.”¹⁰² The police had arrived at Vormund’s residence to question her about the origins of the Tweet.¹⁰³ They waited at her doorstep while Vormund chose to slip through the back door of her house.¹⁰⁴ There was no indication that the police would have caused Vormund immediate and severe harm.

b. There is no indication that Aprepluya’s criminal justice system would subject Vormund to arbitrary criminal proceedings.

Just as Australia provided the Afghani plaintiffs with fair judicial recourse for their pending asylum claim, there is nothing to suggest that Aprepluya’s criminal justice system would subject Vormund to “treatment so harsh as to constitute a crime against humanity.”¹⁰⁵ Vormund was

⁹⁷ Denza (2011), [20].

⁹⁸ *R* (2004), [17].

⁹⁹ *Id.*, [88].

¹⁰⁰ *Id.*, [93]–[95].

¹⁰¹ *Id.*, [95].

¹⁰² *Facts*, [21].

¹⁰³ *Id.*, [18]–[20].

¹⁰⁴ *Id.*, [20].

¹⁰⁵ *R* (2004), [88].

charged with ordinary criminal offenses under the National Penal Code which carry proportionate punishments to the crimes committed.¹⁰⁶ She was not charged with a capital crime or treason. If indefinite detention did not suffice to justify diplomatic asylum in *R*, then a potential maximum twenty-year prison penalty does not suffice to justify granting diplomatic asylum to Vormund.

C. EVEN IF RANOVSTAYO COULD GRANT DIPLOMATIC ASYLUM, VORMUND WAS NOT ELIGIBLE BECAUSE SHE COMMITTED A COMMON CRIME.

1. There is no right to diplomatic asylum for common crimes.

Starting in the 19th century, States denounced extending diplomatic asylum to common criminal offenders and were divided on whether perpetrators of political crimes should be granted asylum.¹⁰⁷ This reflects the recognized importance of maintaining the inviolability of the receiving state's criminal justice system.¹⁰⁸

2. Ranovstayo does not have the unilateral right to qualify whether the act is a political or common crime.

Diplomatic asylum is a derogation from territorial sovereignty.¹⁰⁹ For Ranovstayo to unilaterally decide whether the crime Vormund committed is political or common is an abuse of that derogation. As this Court recognized in *Asylum*, “derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.”¹¹⁰ The potential legal basis there was the Havana Convention which governed diplomatic asylum between Peru and Colombia. Here, Ranovstayo and Aprepluya have no similar agreement. Moreover, neither treaty law nor CIL provide such a legal basis either.

The competence of Ranovstayo to determine for itself whether or not Vormund's crimes are political cannot be inherently implied. This Court recognized that “a competence of this kind is of an exceptional character,” and competence held by the sending State “is not essential to the

¹⁰⁶ Facts, [32]; *Clarifications*, [4].

¹⁰⁷ Den Heijer (2013), [403]; UNGA Question, Pt. II, [13].

¹⁰⁸ Den Heijer (2013), p. 403. This Court recognized in *Asylum* that “protection from the operation of regular legal proceedings” is not justified under diplomatic asylum, commenting that “asylum cannot be opposed to the operation of justice.” *Asylum* (Judgement), p. 284. *See also*, HCA art. I; MCPA art. I; CCDA art. III.

¹⁰⁹ *Asylum* (Judgement), pp. 274-75 (affirming diplomatic asylum “constitutes an intervention in matters which are exclusively within the competence of that State.”).

¹¹⁰ *Id.*, 275.

exercise of asylum” and “cannot be regarded as recognized by implication.”¹¹¹ As such, the Court declined to read into the Havana Convention an implied right of the Colombian government to unilaterally qualify the asylum seeker’s act as a political rather than common crime, seeing as it would “aggravate[] the derogation from territorial sovereignty constituted by the exercise of asylum.”¹¹²

3. Vormund’s crimes are common crimes.

i. *Vormund’s crimes are common crimes under refugee law tests.*

The UN’s criteria for determining refugee status (“Handbook”) excludes from the definition of refugees, those who commit serious common crimes.¹¹³ The Handbook attempts to clarify the distinction between common and political crimes. It suggests consideration of the following factors: (1) whether the crime is “committed out of genuine political motives” or “for personal reasons or gain”; (2) whether there is a direct causal link between the crime and its political purpose; and (3) whether the political element of the offense outweighs its common law nature.¹¹⁴

Vormund’s acts clearly constitute common crimes. Vormund was charged with causing public disorder, violating a governmental non-disclosure agreement, and interfering with a police investigation.¹¹⁵ Applying the Handbook test, the common law nature of the crimes outweighs their political nature. Vormund’s Tweet, “[w]hy don’t our supervisors care about our lives?” was plainly motivated by a personal grievance with her supervisor rather than genuine political motives.¹¹⁶ If public disclosures in contravention of a non-disclosure agreement were protected as political acts, then employees like Vormund could sabotage leadership decisions they do not agree with, ultimately vitiating the purpose of non-disclosure agreements.¹¹⁷

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Handbook, [151].

¹¹⁴ *Id.*, 152.

¹¹⁵ *Facts*, [32].

¹¹⁶ *Id.*, [18].

¹¹⁷ *Id.*, [6].

ii. *Vormund's crimes are common crimes under extradition tests.*

In differentiating common crimes from political crimes, extradition law employs two tests: the incidents and the predominance test.¹¹⁸ The incidents tests, developed from the United Kingdom's 1891 *Castioni* case, states that: (1) there must be a political matter, uprising, or dispute in the State at the time of the behavior in question and (2) the act must be done in furtherance of such political dispute.¹¹⁹ The predominance test followed in France, Switzerland, and the United States balances the common criminal elements of the crime with its political character. It weighs whether the act was perpetrated in connection with an existing political struggle; whether it was causally motivated by political ideology; and whether the means were proportionate to the political objectives.¹²⁰

Vormund's acts would not pass either extradition law test. Applying *Castioni*, there was no political uprising at the time of Vormund's acts which her disclosure served to further.¹²¹ Vormund's acts similarly fail the predominance test. Vormund clearly breached her non-disclosure agreement which carried an explicit warning of possible criminal prosecution.¹²² Her Tweet expressly divulged "information concerning [her] work at the Laboratory."¹²³ It was not linked to any existing political conflict. Once the Tweet caused a media frenzy, Vormund deliberately obstructed justice by evading police questioning.¹²⁴ Running away from the consequences of her actions was not an act motivated by political ideology, but rather a consequence of fear. If this were a political act, all government critics using social media to express their frustrations could potentially claim diplomatic asylum.

¹¹⁸ O'Connor (2013), pp. 617-18.

¹¹⁹ *Id.*

¹²⁰ ECRE (2004), [22].

¹²¹ Kielsingard (2020).

¹²² *Facts*, [6].

¹²³ *Id.*

¹²⁴ *Id.*, [18], [20].

D. EVEN IF DIPLOMATIC ASYLUM IS RECOGNIZED HERE, RANOVSTAYO WAS OBLIGATED TO RETURN VORMUND TO APREPLUYAN AUTHORITIES BECAUSE THE INVIOABILITY OF CONSULAR PREMISES DOES NOT EXTEND TO DIPLOMATIC ASYLUM.

1. There is no absolute inviolability for consulates.

VCCR Article 31(2) protects the inviolability of consular premises which are “used exclusively for the purpose of the work of the consular post.”¹²⁵ Granting diplomatic asylum is not part of the work of consulates; therefore, the premises were not used *exclusively* for the work of the consulate. As such, the Ranovstayo consulate does not have absolute inviolability.

Absolute inviolability here would undermine the notion that immunities from the enforcement jurisdiction of the receiving state are granted only to the extent that it enables the performance of specified consular functions.¹²⁶

E. RANOVSTAYO HAD NO HUMAN RIGHTS OBLIGATIONS REGARDING VORMUND BECAUSE SHE WAS NEITHER IN RANOVSTAYO’S TERRITORY NOR SUBJECT TO ITS JURISDICTION.

1. The premises of a diplomatic mission are not part of the territory of the sending state.

The theory that diplomatic missions are extraterritorial enclaves of the sending state is a universally recognized legal fiction.¹²⁷ Vormund was still in Aprepluya’s territory when she entered Ranovstayo’s consulate and was subject to Aprepluya’s territorial jurisdiction. Human rights obligations that would attach when an individual is in Ranovstayo’s territory or subject to its jurisdiction do not apply.

III. THE COURT MAY NOT EXERCISE JURISDICTION OVER RANOVSTAYO’S COUNTER-CLAIM CONCERNING THE MANTYAN AIRWAYS AIRCRAFT.

A. APREPLUYA’S RESERVATION TO THIS COURT’S JURISDICTION IS ENFORCEABLE.

Article 36(3) of the Court’s Statute permits a State to enter reservations to the Court’s jurisdiction, stating that Declarations may be made “on condition of reciprocity on the part of several or certain states, or for a certain time.” Aprepluya made a Declaration accepting the Court’s jurisdiction, but it excluded “any dispute concerning Aprepluyan military activities, or [] any dispute with regard to matters which are essentially within the domestic jurisdiction of the

¹²⁵ VCCR, art. 31(2).

¹²⁶ Denza (2011), [19], [2].

¹²⁷ *Id.*, [3].

United Republic of Aprepluya, as determined by the Government of the United Republic of Aprepluya.”¹²⁸

1. The content of reservations to the Court’s jurisdiction may extend beyond Article 36(3)’s two enumerated categories.

- i. *Tailored reservations to the Court’s jurisdiction are consistent with the principle of the sovereign equality of states.*

Allowing States to limit their acceptance of the Court’s jurisdiction pursuant to Article 36(3) preserves the sovereign equality of States protected by Article 2(1) of the UN Charter, since “the [Court] views the acceptance of jurisdiction as a sovereign act.”¹²⁹ Because a State can refuse to accept the Court’s jurisdiction entirely, a State must be free to accept only part of the Court’s jurisdiction.¹³⁰

- ii. *The Court has accepted tailored jurisdictional reservations.*

Both this Court and its predecessor have accepted the validity of reservations to Article 36(3) beyond its enumerated categories of reciprocity and time limits, including for military activities and matters within a State’s domestic jurisdiction. In *Aerial Incident*, Pakistan argued that India’s reservation to the Court’s jurisdiction in cases involving other members of the Commonwealth of Nations was “extra-statutory” in the context of Article 36(3).¹³¹ The Court rejected this argument, noting that Article 36(3) “has never been regarded as laying down in an exhaustive manner the conditions under which declarations might be made.”¹³² Accordingly, the Court has never declared a reservation unlawful.¹³³

¹²⁸ *Facts*, [49].

¹²⁹ Tomuschat (2019), [85].

¹³⁰ *Ibid.*

¹³¹ *Aerial Incident*, [37].

¹³² *Ibid.*; *see also Fisheries Jurisdiction*, [44] (“It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court.”); *Nicaragua (Jurisdiction)*, [59] (“In making the declaration [of compulsory jurisdiction] a State is equally free . . . to qualify it with conditions or reservations.”).

¹³³ Tomuschat (2019), [101].

iii. *State practice supports the use of tailored jurisdictional reservations.*

Historical practice supports the use of tailored reservations, in which “States [have] engaged in a practice of carefully defined reservations suiting their individual needs, as perceived by them.”¹³⁴ During the drafting of the Statute, States did not understand Article 36 as “plac[ing] any restrictions on the right of states to place reservations.”¹³⁵ Today, States continue to maintain declarations tailored to their specific conditions, including military and domestic affairs. For example, India has carved out specific reservations related to “disputes in regard to matters which are essentially within [its] domestic jurisdiction” and “disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence.”¹³⁶ Similarly, Germany has entered a reservation to the Court’s jurisdiction for any dispute that “relates to, arises from or is connected with the use for military purposes of the territory of the Federal Republic of Germany, including its airspace.”¹³⁷ Finally, four States maintain self-judging provisions that allow them to determine which matters are within their domestic jurisdiction.¹³⁸

2. Apreluya’s reservation does not defeat the object and purpose of the acceptance of compulsory jurisdiction under Article 36.

Apreluya’s Declaration accepting the Court’s jurisdiction made the question of the domestic nature of an attack a self-judging one to be “determined by the [Apreluyan] Government.”¹³⁹ Ranovstayo may argue that because the Court has the power to accept its own jurisdiction, the self-judging provision of Apreluya’s reservation is incompatible with the object and purpose of Article 36’s provision of compulsory jurisdiction.¹⁴⁰

a. Enforcing the provision is consistent with Article 36’s acceptance of unilateral declarations.

¹³⁴ *Id.*, [85].

¹³⁵ Fitzmaurice (1999), p. 131.

¹³⁶ India Declaration, [3]–[4].

¹³⁷ Germany Declaration, [1](ii)(b).

¹³⁸ Tomuschat (2019), [98] n.377.

¹³⁹ *Facts*, [49].

¹⁴⁰ *See* ICJ Statute art. 36(6); VCLT art. 19(c) (prohibiting reservations “incompatible with the object and purpose of the treaty”).

In *Nuclear Tests*, the Court stated that “[j]ust as the very rule of *pacta sunt servada* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”¹⁴¹ Unilateral declarations define the scope of the jurisdiction.¹⁴² In this regard, States are aware of the limitations that Apreluya has created; invalidating the reservation would upset the optional-clause system because other States would be unable to “take cognizance of unilateral declarations and place confidence in them.”¹⁴³ Reshaping the scope of the reservation undermines the reciprocal, “contractual relationship[s]” enabled by Article 36.¹⁴⁴

b. The VCLT requires the performance of treaty obligations in good faith.

Apreluya’s acceptance of compulsory jurisdiction is compatible with the Statute’s object and purpose because external limits on the scope of the self-judging provision make it possible for other States to obtain jurisdiction over Apreluya in a variety of circumstances. VCLT Article 26 requires Apreluya to perform its treaty obligations in good faith. This limits the scope of Apreluya’s reservation because it is prohibited from using the reservation to escape from its acceptance of compulsory jurisdiction under Article 36 of the Statute.

3. The self-judging provision is severable from the rest of the reservation.

Even if the Court determines that the self-judging provision of the reservation is incompatible with the object and purpose of Article 36, it is severable from the rest of the reservation. Stripping Apreluya of its rights and obligations under Article 36 would frustrate its “true intention” to accept the Court’s compulsory jurisdiction, as evidenced by its Declaration and the fact that it is both bringing and responding to claims in this proceeding.¹⁴⁵ As such, if the Court finds the self-judging provision invalid, the Court should treat it as “without effect” and determine

¹⁴¹ *Nuclear Tests* (Judgement), [46].

¹⁴² *Phosphates in Morocco*, p. 23.

¹⁴³ *Nuclear Tests* (Judgement), [46].

¹⁴⁴ Fitzmaurice (1999), p. 140.

¹⁴⁵ *Interhandel*, p. 78 (dissenting opinion, Judge Klaestad); *Id.*, p. 93 (dissenting opinion, Judge Armand-Ugon).

on its own if the shutdown is within Aprepluya’s “domestic jurisdiction.”¹⁴⁶ This best gives effect to Aprepluya’s intention to exclude only certain subject matters from the Court’s review.

B. THE COURT LACKS JURISDICTION BECAUSE APREPLUYA’S RESERVATION TO JURISDICTION COVERS THE COUNTER-CLAIM.

1. The shutdown was essentially within Aprepluya’s domestic jurisdiction.

- i. *The Aprepluyan government has determined that the shutdown was within its domestic jurisdiction.*

Aprepluya’s reservation allows it to determine whether a matter is within its domestic jurisdiction. Following the incident, Aprepluya’s Prime Minister stated that the shutdown of the aircraft was “a purely domestic matter.”¹⁴⁷ Aprepluya thus “determined” that the shutdown was a domestic matter. Indeed, even before the commencement of litigation, Aprepluya objected to Ranovstayo’s attempted interference in this domestic incident by calling for an investigation and implicitly, the prosecution of “perpetrators.”¹⁴⁸ Therefore, Aprepluya has not consented to the adjudication of this claim and the Court may not exercise jurisdiction.¹⁴⁹

- ii. *The shutdown of the aircraft was objectively within Aprepluya’s domestic jurisdiction.*

Even if the Court finds the reservation not to be self-judging, the Court should nevertheless determine that the shutdown was within Aprepluya’s domestic jurisdiction.

- a. The incident involved only Aprepluyan actors and territory.

The shutdown involved an Aprepluyan military aircraft and a commercial aircraft registered in Aprepluya, making it part of the territory of Aprepluya under the ICAO Convention.¹⁵⁰ In addition, the aircraft carried Aprepluyan nationals and operated in Aprepluyan

¹⁴⁶ *Id.*, p. 93; *Facts*, [48].

¹⁴⁷ *Facts*, [45].

¹⁴⁸ *Id.*, [44]–[45].

¹⁴⁹ ICJ Statute art. 36(2).

¹⁵⁰ ICAO Convention art. 17 (“Aircraft have the nationality of the State in which they are registered.”); Geiß (2005), p. 229 (“[A]ircraft in flight are legally regarded as part of the territory of their state of registration”); *Facts*, [42].

airspace,¹⁵¹ where it has “complete and exclusive sovereignty.”¹⁵² The domestic nature of this case goes far beyond that in *Interhandel*. There, the United States seized shares from an American company that it claimed were owned by Germans through a Swiss company.¹⁵³ In response to a Swiss application, the United States asserted that the seizure of enemy property was within its domestic jurisdiction.¹⁵⁴ The Court rejected the United States’ argument because the classification of the property as “enemy” was a question of international law.¹⁵⁵ But the absence of foreign nationals, companies, or assets, in addition to the lack of a foreign territorial element, leave this case firmly within Aprepluya’s domestic jurisdiction.

b. Ranovstayo raises no question of international law with respect to the shutdown.

The fact that Vormund “intended” to seek asylum in Ranovstayo does not transform the shutdown and presents no question of international law.¹⁵⁶ Such an interpretation would render any reservation related to domestic jurisdiction meaningless. Any State has some interest in third-country passengers transiting into it, but if the passengers’ destinations alone were sufficient to create a question of international law, another State could never claim that action involving those passengers fell exclusively within its domestic jurisdiction. The fact that a dispute has an “international character” is, standing alone, insufficient to transform the claim into an issue of international law.¹⁵⁷

2. The shutdown of the aircraft concerned Aprepluyan military activities.

i. *Objective indicia demonstrate that the shutdown was a military activity.*

The Aprepluyan Air Force responded to what it believed was an imminent terrorist attack.¹⁵⁸ Then, an Air Force fighter jet flown by an experienced military officer pursued the

¹⁵¹ *Facts*, [19], [41]–[42]; *Clarifications*, [1].

¹⁵² ICAO Convention art. 1.

¹⁵³ *Interhandel*, p. 16.

¹⁵⁴ *Id.*, pp. 24–25.

¹⁵⁵ *Id.*, p. 25.

¹⁵⁶ *Facts*, [43].

¹⁵⁷ *Nationality Decrees*, [48].

¹⁵⁸ *Facts*, [39], [42], [45].

civilian aircraft.¹⁵⁹ During the interaction with the Mantyan Airways plane, the Air Force pilot took instructions from a military operations center.¹⁶⁰ In the *South China Sea Arbitration*, the Permanent Court of Arbitration tribunal concluded that China’s use of the military to perform construction in the South China Sea fell outside of a military affairs reservation because “civilian use comprise[d] the primary (if not the only) motivation underlying the extensive construction activities.”¹⁶¹ Here, in contrast, the “primary” goal of military involvement was a quintessentially military one: responding to a suspected ongoing terror attack.¹⁶²

ii. *The shutdown was a military, not law enforcement, activity.*

a. The shutdown was not an act of law enforcement.

This case involved military affairs, unlike in the International Tribunal for the Law of the Sea’s order (“ITLOS”) in *Three Ukrainian Naval Vessels*. There, the ITLOS tribunal had to decide whether the Russian Federation’s detention of Ukrainian vessels and sailors “took place in the context of a military operation or a law enforcement operation.”¹⁶³ First, the tribunal concluded that the detention was a law enforcement activity because the dispute primarily stemmed from “the Parties’ differing interpretation of the regime of passage” through a body of water.¹⁶⁴ That is very different from this case, which involves not head-to-head confrontation between the States, but rather a unilateral military operation pursuing a “rogue airplane.”¹⁶⁵ Second, the tribunal found that the incident was a law enforcement matter because “force was used by the Russian Federation in the process of arrest” on domestic charges after an eight-hour standoff and pursuit of Ukrainian naval vessels.¹⁶⁶ This case involves no such dispute about the allegedly unlawful crossing of a national border, but rather a military response to a suspected terrorist attack.

¹⁵⁹ *Id.*, [41].

¹⁶⁰ *Id.*, [42].

¹⁶¹ *South China Sea Arbitration* (Award), [938].

¹⁶² See Duyvesteyn (2008), pp. 333–34 (outlining six dimensions of military involvement in counter-terror operations, one of which includes “securing critical infrastructure”).

¹⁶³ *Three Ukrainian Naval Vessels*, [67].

¹⁶⁴ *Id.*, [72].

¹⁶⁵ *Facts*, [42] (quoting the Commanding Officer of the Beauton Area Air Force Base).

¹⁶⁶ *Three Ukrainian Naval Vessels*, [73], [59].

b. The Court should interpret the military activities reservation broadly.

Because military affairs involve “sensitive issues of sovereignty”¹⁶⁷ and are “highly political,”¹⁶⁸ the Court should interpret the exception broadly to best give effect to Aprepluya’s intent to exclude these issues from the Court’s jurisdiction.

IV. EVEN IF THE COURT WERE TO EXERCISE JURISDICTION OVER THE COUNTER-CLAIM, APREPLUYA DID NOT VIOLATE INTERNATIONAL LAW BY SHOOTING DOWN THE AIRCRAFT.

A. APREPLUYA DID NOT VIOLATE THE ICAO CONVENTION.

1. Ranovstayo has failed to present its claim to the ICAO Council.

ICAO Convention Article 84 provides: “If any disagreement between two or more contracting States relating to the interpretation or application of the of this Convention . . . cannot be settled by negotiation . . . it shall, on the application of the State concerned in the disagreement, be decided by the [ICAO] Council.” Under Article 84, this Court exercises only appellate jurisdiction.¹⁶⁹ Ranovstayo failed to present its claim to the ICAO Council, and so lacks a “disagreement” to appeal to this Court.

2. The ICAO Convention and UN Charter protect a State’s right to use force against some civil aircraft domestically.

ICAO Convention Article 3 *bis* reads: “[E]very State must refrain from resorting to the use of weapons against civil aircraft in flight.” However, this does not “modify[] in any way the rights and obligations of States set forth in the Charter of the United Nations.”

i. *The UN Charter supports excluding domestic activities from the purview of the ICAO Convention.*

Article 2(1) of the UN Charter states that “[t]he Organization is based on the principle of sovereign equality of all its Members.” An interpretation of the ICAO Convention that allows States to maintain their sovereign rights “to domestic use of force subject merely to a state’s international human rights and humanitarian law obligations” avoids the “absurd conclusion” that

¹⁶⁷ Zou & Ye (2017), pp. 331–32.

¹⁶⁸ Ishii (2019).

¹⁶⁹ ICAO Convention art. 84 (“Any contracting State may . . . appeal from the decision of the Council . . . to the Permanent Court of International Justice.”); *accord ICAO Jurisdiction*, [28].

there is an absolute prohibition on the use of force against civil aircraft, regardless of circumstances.¹⁷⁰

- ii. *Excluding domestic activities is consistent with the object and purpose of the ICAO Convention.*

VCLT Article 31 states the Convention “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” The context of Article 3 *bis*’s creation shows that the object and purpose was to regulate the potential for interstate incidents, not purely domestic ones. First, the article was adopted following the shootdown of Korean Airlines Flight 007 by the Soviet Union; accordingly, its purpose was to “prevent the violation of other states’ airspace and the use of civil aviation for purposes inconsistent with the aims of the Convention, and to enhance the safety of international safety aviation.”¹⁷¹ Tying a State’s hands in responding to the abuse of its airspace would undermine these goals. Second, this interpretation is consistent with Article 3 *bis*’s drafting history. Professor Milde has observed: “At no stage of the deliberations and drafting did the Assembly . . . contemplate regulation of the status of an aircraft in relation to the State of its own registration; such regulation would have exceeded the scope of the Convention which deal with *international* civil aviation.”¹⁷²

3. CIL allows for the shootdown of aircraft whose civilian status is abused.

- i. *Developments in CIL may reduce the scope of obligations taken on by Treaty Parties.*

Even if the Court concludes that Apreplyua’s obligation not to use weapons against civilian aircraft extends to the domestic realm, developments in CIL may reduce the obligations taken on by treaty parties. For example, the 1909 Declaration of London allowed for the destruction of captured vessels only if the safety of the crew could be guaranteed. But during World War II, signatories to the Declaration of London all engaged in contrary practice, meaning that

¹⁷⁰ Geiß (2005), p. 250; *see also* UN Charter art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”).

¹⁷¹ Sucharitkul (1994), p. 519.

¹⁷² Augustin (1998), p. 189 (quoting Milde (1986), p. 126).

“subsequent and contradictory state practice has created a vast number of customary exceptions to the treaty rules.”¹⁷³

- ii. *State practice following the adoption of Article 3 bis allows for the shootdown of civilian aircraft.*

State practice following the ratification of Article 3 *bis* has modified Aprepluya’s obligations under the treaty. The abuse of civilian aircraft by nonstate actors, particularly in light of the 11 September terrorist attacks, has led some States to accept that there is no absolute prohibition on the use of weapons against civilian aircraft in certain exceptional circumstances.¹⁷⁴

During the attacks of 11 September 2001, the United States authorized the shootdown of hijacked passenger airplanes.¹⁷⁵ It also considered shooting down a plane that entered an unauthorized area in May 2005.¹⁷⁶ Likewise, the Russian Federation gave permission to shoot down a hijacked plane during the 2014 Olympics.¹⁷⁷

Several States have made legislative interventions. Poland passed a law permitting the shootdown of hijacked aircraft, although it was later declared unconstitutional on domestic law grounds.¹⁷⁸ Germany authorized in domestic law the shoot down of a civil airplane “intended to be used as a weapon of mass destruction against a ground target.”¹⁷⁹ The Federal Constitutional Court later declared the law unconstitutional only on the domestic law ground that innocents could be killed, but conceded that if terrorists alone were on the aircraft, a shootdown would be legal.¹⁸⁰ In addition, the German Defense Minister subsequently said he would even violate domestic law

¹⁷³ Crootof (2016), pp. 269-71.

¹⁷⁴ See Geiß (2005), p. 255 (“Undoubtedly, international security concerns have shifted since the adoption of article 3bis in 1984 from state-to-state confrontations toward more asymmetrical threats posed by nonstate actors.”).

¹⁷⁵ Graff (2019).

¹⁷⁶ Geiß (2005), p. 228.

¹⁷⁷ NBC (2014).

¹⁷⁸ BBC (2005); *Permissibility* (2008), [14].

¹⁷⁹ See Geiß (2005), p. 227

¹⁸⁰ BVerfG, [84]; Hörnle (2007), p. 583.

and give the order to shoot down a hijacked aircraft.¹⁸¹ Finally, India has authorized a policy allowing for the shutdown of hijacked aircraft.¹⁸²

4. Aprepluya complied with the ICCPR.

ICCPR Article 6(1) states that “[e]very human being has the inherent right to life” and that “[t]his right shall be protected by law.”

- i. *The shutdown satisfied Aprepluya’s positive obligation to protect the lives of its citizens.*

Aprepluya is obligated “to take reasonable, positive measures . . . in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the state.”¹⁸³ This extends to “armed or terrorist groups.”¹⁸⁴ Aprepluya’s shutdown of the plane was in response to a terrorist threat that specifically identified aircraft as a weapon.¹⁸⁵ In this context, it would be unreasonable for a State to fail to take measures to protect itself, to stand by in the face of an imminent attack.

- ii. *The shutdown did not violate Aprepluya’s obligation to not arbitrarily deprive others of life.*

Ranovstayo may argue that Aprepluya’s shutdown of the aircraft violated Article 6’s prohibition on arbitrary deprivations of life. To determine arbitrariness, the Court should take a holistic view of the circumstances of the shutdown.¹⁸⁶ Here, Aprepluya’s shutdown, which followed a calibrated, gradually escalating response to what it perceived as an ongoing terrorist attack, “represent[ed] a method of last resort after other alternatives ha[d] been exhausted,” did not “exceed the amount [of force] strictly needed for responding to the threat,” “was carefully directed” at the perceived target, and responded to a threat “involv[ing] imminent death or serious

¹⁸¹ DW (2008).

¹⁸² CBS (2005).

¹⁸³ General Comment No. 36, [21].

¹⁸⁴ Ibid.

¹⁸⁵ *Facts*, [38]–[39].

¹⁸⁶ General Comment No. 36, [12].

injury.”¹⁸⁷ Aprepluya took all possible measures before resorting to the use of force and did not intend to take down the aircraft. Its response was deliberate, predictable, and organized.

5. The shutdown was justified by the doctrine of self-defense.

i. *Aprepluya was permitted to ground the aircraft.*

Prior to the invocation of self-defense, a Party is permitted under ICAO Convention Article 3 *bis* (b) “to require the landing” of an aircraft “that is being used for any purpose inconsistent with the aim of this Convention.” Far from, for example, “promoting cooperation between nations and peoples,” Hye’s use of the aircraft was unauthorized.¹⁸⁸ In addition, she received but failed to “comply with an order received in conformity” with Aprepluya’s right to require a landing.¹⁸⁹

ii. *Aprepluya complied with the UN Charter and CIL’s self-defense requirements.*

a. The ICAO Convention allows States to rely on self-defensive measures.

ICAO Convention Article 3 *bis* does not “modify[] in any way the rights and obligations of States set forth in the Charter of the United Nations.” Article 51 of the UN Charter states: “Nothing in the present Charter shall impair the inherent right of . . . self-defense if an armed attack occurs against a Member of the United Nations Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council” In addition, the Court has recognized that a State may invoke the customary right to self-defense, which is broader than the right recognized in Article 51.¹⁹⁰

b. Aprepluya reasonably believed it was experiencing an armed attack.

Aprepluya believed it was experiencing an armed attack. It previously received an INTERPOL report warning of the use of a “bomb-laden civilian airplane as a weapon” against a capital city and had intercepted communications from a terrorist organization that an attack was being planned.¹⁹¹ The Mantyan Airways aircraft, which was headed in the direction of its capital,

¹⁸⁷ Ibid.

¹⁸⁸ ICAO Convention pmb.; *Facts*, [41].

¹⁸⁹ ICAO Convention art. 3 *bis* (c); *Facts*, [43].

¹⁹⁰ Greenwood (2011), [3].

¹⁹¹ *Facts*, [38]–[39].

matched the precise type of threat that had been conveyed by Aprepluya’s Defense Minister only one week before the shutdown.¹⁹²

c. Self-defense may be invoked against non-state actors.

A growing consensus recognizes that self-defense may be invoked against non-state actors. As the International Law Association noted in 2018, “[T]here is growing recognition – including through State practice – that there are certain circumstances in which a State may have a right to self-defence against non-state actors acting extraterritorially and whose attacks cannot be attributed to the host State.”¹⁹³

iii. *Aprepluya satisfied CIL’s requirements of proportionality and necessity.*

CIL requires self-defensive measures be “proportional to the armed attack and necessary to respond to it.”¹⁹⁴

a. The shutdown was proportionate because Aprepluya gradually escalated the use of force.

The shutdown was proportionate because the Aprepluyan Air Force engaged in a variety of iterative steps in an attempt to ground the rogue aircraft: radioing the plane, ordering that the plane be approached and then intercepted only “if it continued to ignore increasingly urgent communications,” flying alongside the plane and attempting again to radio the plane or use visual and other signals, firing tracers across the plane’s path, and finally firing a “short burst” to try to require its landing.¹⁹⁵ Meanwhile, the threat grew by the second as the plane approached the capital.¹⁹⁶

b. The shutdown was necessary because Aprepluya had exhausted less forceful measures.

¹⁹² *Id.*, [42].

¹⁹³ ILA Report (2018), p. 15; Hakimi (2015), p. 7 (“Although the absolute prohibition [on the use of force without consent] is still in play, it is no longer the dominant position in the literature.”); *see also id.* at 13–14 (concluding that States have invoked self-defense in instances in which other states were “unwilling or unable” to control a non-State actor).

¹⁹⁴ *Nuclear Weapons*, [41] (quoting *Nicaragua (Judgement)*, [176]).

¹⁹⁵ *Facts*, [42].

¹⁹⁶ *Ibid.*

The shutdown was necessary because Aprepluya had used a variety of lesser tools to obtain the plane's compliance to no avail; it was only when it believed an attack was imminent that Aprepluya engaged the plane with force. Without another alternative to ground the plane, Aprepluya could not have defended itself without resorting to force, and "the degree of force did not exceed what was reasonably required for that purpose."¹⁹⁷

iv. *Aprepluya complied with the Charter's notice requirement.*

The Aprepluyan Ambassador to the UN informed the Security Council about its actions two days after the attack, stating the shutdown was necessary "to protect our capital from an apparent terrorist attack."¹⁹⁸

6. Aprepluya's mistake of fact in determining that a terrorist attack was imminent does not render its conduct unlawful.

Only in retrospect was Aprepluya able to determine that the Mantyan flight was not the aircraft-based terror attack it had been warned about.¹⁹⁹

a. State practice is not consistent with the imposition of strict liability.

When the United States shot down an Iranian airliner on the mistaken belief that it was carrying out a military mission, the response by States supports the view that an act is not internationally unlawful if the potential liability stems from a factual error. Following the Iran Air incident, the United States expressed the view that it was not legally bound to compensate the victims; ten States in the Security Council applauded the U.S. decision to compensate without arguing that the United States was liable under international law.²⁰⁰ Over Iran's objection, the subsequent Security Council resolution did not state that the United States was liable.²⁰¹

b. Aprepluya has satisfied any customary obligation that the mistake be honest and reasonable.

¹⁹⁷ Greenwood (2011), [27].

¹⁹⁸ *Clarifications*, [5].

¹⁹⁹ *Facts*, [38]–[39], [42].

²⁰⁰ Milanovic II (2020).

²⁰¹ *Ibid.*

If there is a customary obligation that the mistake be “both honest and reasonable,” Aprepluya has satisfied its burden.²⁰² First, the mistake was honest. Ranovstayo accepted the accuracy of Aprepluya’s characterization of the shootdown, in which the Air Force pilot stated that he “was concerned that [Hye] was planning to fly into government buildings, a threat raised in an alert issued by the Defense Minister last week.”²⁰³ Second, the Air Force pilot’s belief was objectively reasonable in light of the active terrorist threat against Aprepluya and Ranovstayo, which specifically identified the misuse of civilian aircraft targeting a capital,²⁰⁴ plainly matching the apparent description of the Mantyan plane.

²⁰² Milanovic III (2020).

²⁰³ Facts, [42]; *Clarifications*, [6].

²⁰⁴ *Facts*, [38]–[39].

CONCLUSION AND PRAYER FOR RELIEF

For the aforementioned reasons, the United Republic of Apreluya, the Applicant, respectfully prays that this Honourable Court:

1. **DECLARE** that Ranovstayo violated international law by applying its entry regulation to Apreluya, and is thus obligated to compensate it for the resulting economic losses
2. **DECLARE** that Ranovstayo violated international law by failing to hand over Ms. Keinblat Vormund to the Apreplyan authorities after they requested her surrender on 9 June 2018
3. **DECLARE** that the Court must not exercise jurisdiction over Ranovstayo's counter-claim concerning the Mantyan Airways aircraft
4. **DECLARE** that even if the Court were to exercise jurisdiction over the counter-claim, Apreluya did not violate international law by shooting down the aircraft.

Respectfully submitted,
6 January 2021
Agents for Apreluya