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IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING THE J-VID-18 PANDEMIC

UNITED REPUBLIC OF APREPLUYA

(APPLICANT)

v

DEMOCRATIC STATE OF RANOVSTAYO

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

2021 Philip C. Jessup International Law Moot Court Competition

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STATEMENT OF JURISDICTION

The Democratic State of Ranovstayo submits the present dispute concerning alleged violations of international law by the United Republic of Aprepluya by notice of intention to file a counter-claim pursuant to Article 80 of the Rules of Court on 16 July 2018. The Democratic State of Ranovstayo accepts the jurisdiction of this Court pursuant to Article 36(2) of the *Statute of the International Court of Justice*. The parties have submitted to this Court a Statement of Agreed Facts. The Democratic State of Ranovstayo undertakes to accept the judgment of this Court as final and binding, and shall execute it in its entirety and in good faith.

QUESTIONS PRESENTED

The Democratic State of Ranovstayo respectfully asks this Honourable Court:

A. Whether Ranovstayo violated international law by applying its entry regulation to Aprepluya, and if it did, whether it is required to compensate Aprepluya for any claimed losses;

B. Whether Ranovstayo violated international law by refusing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities;

C. Whether this Court may exercise jurisdiction over Ranvostayo's counter-claim concerning the Mantyan Airways aircraft; and

D. Assuming this Court may exercise jurisdiction over the counter-claim, whether Aprepluya violated international law by shooting down the aircraft.

STATEMENT OF FACTS

APREPLUYA AND RANOVSTAYO

The United Republic of Aprepluya ('Aprepluya') and the Democratic State of Ranovstayo ('Ranovstayo') are neighbouring States. Aprepluya is a developed democracy with a population of three million and gross domestic product ('GDP') of €160 billion. Ranovstayo is also a developed democracy, with a population of 25 million and GDP of €1 trillion. Aprepluya has an active tourism industry, drawing approximately nine million tourists each year. 25% of foreign tourists in Aprepluya are Ranovstayan nationals or residents and 40% are third-country nationals who transit via Ranovstayo's Bogpadayo Airport.

J-VID-18 PANDEMIC

In March 2018, the first cases of J-VID-18 were reported in Hadbard. J-VID-18 can cause a respiratory condition resembling pneumonia and be fatal. In April 2018, J-VID-18 spread to States neighbouring Hadbard. J-VID-18's reproduction rate is 1.2-1.4. Its incubation period is 7-14 days, and human-to-human transmission is possible during this period. Moreover, asymptomatic patients can spread the virus. On 15 May 2018, the World Health Organisation ('WHO') declared J-VID-18 a pandemic.

RANOVSTAYO'S REGULATION

On 23 April 2018, Ranovstayo adopted a regulation restricting the entry of individuals who had been in 'high-risk countries' in the previous 18 days, based on a Ministry of Health risk assessment. The regulation defined 'high-risk countries' as States including but not limited to all countries

which have recorded 50 cases of J-VID-18.

By 15 May 2018, Ranovstayo had designated 52 countries ‘high-risk’.

On 4 June 2018, Ranovstayo learnt that Aprepluya had recorded two cases of J-VID-18 in Segura Province, had 10 outstanding tests, and had not implemented any precautionary measures since the cases were first suspected 10 days prior. Ranovstayo informed Aprepluya that it intended to designate Aprepluya a ‘high-risk country’ if Aprepluya did not control the outbreak.

On 5 June 2018, Aprepluya applied restrictions only to Segura. Ranovstayo announced that it would apply the regulation to Aprepluya from 8 June. Before the regulation was applied, approximately 80% of tourists left Aprepluya.

By mid-June 2018, Aprepluya had recorded 52 cases in Segura. Media reports indicated Aprepluyans were reluctant to leave their homes and there was a substantial contraction in economic activity.

On 8 July 2018, the Aprepluyan Ministry of Tourism claimed that the Ranovstayan entry regulation had resulted in €130 million of economic losses to the Aprepluyan tourism industry and related sectors.

By 20 November 2018, Aprepluya had recorded 2445 cases of J-VID-18, including 450 outside of Segura, while Ranovstayo had experienced no community transmission.

MS. VORMUND

On 3 June 2018, an anonymous tweet reported that eight lab technicians at National Bioresearch Laboratory ('NBL') in Segura had developed J-VID-18 symptoms and that this had been kept secret. Aprepluya's police traced this tweet to Ms. Vormund, an Aprepluyan national who worked as a lab technician at NBL. At 14:33 on 3 June 2018, two Aprepluyan police officers arrived at Ms. Vormund's residence to question her. Ms. Vormund fled, and the officers chased her until she entered Ranovstayo's consulate in Segura at 14:52.

Upon arriving at the consulate, Ms. Vormund requested protection. In her written request, she admitted that she posted the tweet. She stated that her director was aware that multiple lab technicians had reported J-VID-18 symptoms, and refused to alert health authorities or suspend the project and temporarily close down NBL, on the basis that there were no confirmed J-VID-18 cases at NBL. Ms. Vormund stated that she feared what would happen to her if she were arrested by Aprepluyan authorities.

Ranovstayo's Consul allowed Ms. Vormund to stay in the consulate. On 8 June 2018, Aprepluya's Prosecutor's Office requested Ms. Vormund's surrender and formally charged her with three offences under the National Penal Code: (i) causing public disorder; (ii) violation of a governmental non-disclosure agreement; and (iii) interference with a police investigation. The Prosecutor's Office intended to seek the maximum penalty on all charges. The maximum penalty for violating a governmental non-disclosure agreement is 20 years imprisonment.

On 9 June 2018, Aprepluya again insisted that Ranovstayo surrender Ms. Vormund and stated that failure to do so would violate international law. On 10 June 2018, Ranovstayo stated

that it would not surrender Ms. Vormund and had no obligation to do so.

The Terrorist Threat

On 19 June 2018, Aprepluyan and Ranovstayan authorities received warnings from INTERPOL that the terrorist organisation ‘Friends of Justice’, was planning an attack on a national capital in the region, using a bomb-laden civilian airplane as a weapon. Both countries put their Air Forces on heightened alert.

Aprepluya’s Shooting Down of the Mantyan Airways Aircraft

On 26 June 2018, at 02:57, Ms. Vormund and a pilot, Ms. Hye, took off from Segura Airport in a 12-person civilian aircraft owned by Mantyan Airways, a low-cost charter airline. The aircraft was made available to them by airport personnel. Ms. Hye left a voice recording with the Mantyan Airways office in Bogpadayo Airport informing them of her flight plan and asking the office to make the necessary arrangements.

The Commanding Officer of the Beauton Area Air Force Base was notified by radar operators of an aircraft flying towards Aprepluya’s capital city, Beauton. The Air Force attempted to initiate radio communication with the aircraft but received no response.

At 02:59, after two minutes of attempting radio communication, Aprepluya sent a fighter-jet piloted by Lieutenant Defesa to intercept the aircraft.

At 03:06, Lieutenant Defesa attempted radio communication, visual and other interception signals to instruct the pilot to deviate from their flight path and to follow him, but his interception

signals were not followed.

At 03:09, Lieutenant Defesa fired tracers across the path of the aircraft.

At 03:12, Lieutenant Defesa fired a short burst at the aircraft's wing root area. Ms. Hye lost control of the aircraft and it crashed, killing Ms. Hye and Ms. Vormund.

On 4 July 2018, Ranovstayo condemned the killing of Ms. Vormund and the pilot, and stated that it was against their interests as Ms. Vormund was seeking asylum.

RELEVANT CONVENTIONS

Aprepluya and Ranovstayo are parties to the *Charter of the United Nations*, *Statute of the International Court of Justice* ('ICJ Statute'), *Constitution of the World Health Organization*, *2005 International Health Regulations*, *Convention on International Civil Aviation*, *1984 Protocol Relating to an Amendment to the Convention on International Civil Aviation* (Article 3*bis*), *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *Convention Relating to the Status of Refugees*, *Vienna Convention on Diplomatic Relations*, *Vienna Convention on Consular Relations*, and the *Vienna Convention on the Law of Treaties*.

On 7 January 2002, Aprepluya deposited a Declaration accepting the compulsory jurisdiction of the Court pursuant to ICJ Statute Article 36(2). Aprepluya's Declaration excluded from the Court's jurisdiction any disputes concerning Aprepluyan military activities, and any matters which are essentially within the domestic jurisdiction of Aprepluya, as determined by Aprepluya.

On 10 March 2003, Ranovstayo deposited its own Declaration, which declaration did not contain any reservations.

Outside of the reservations raised to the ICJ Statute, neither State has issued any relevant reservations.

SUMMARY OF PLEADINGS

A

The entry regulation's application to Aprepluya did not violate international law. Therefore, Ranovstayo is not obligated to pay any compensation.

Ranovstayo is not obliged to admit non-nationals into its territory.

Ranovstayo applied the regulation to Aprepluya based on scientific evidence, scientific principles and World Health Organisation advice, complying with the *2005 International Health Regulations*. As Aprepluya posed a high risk, there were no reasonably available alternatives to achieve Ranovstayo's deemed appropriate level of health protection.

Ranovstayo did not violate prohibitions on discrimination under the *International Covenant on Civil and Political Rights* ('*ICCPR*') and the *International Covenant on Cultural, Social and Economic Rights*, as prohibiting the entry of non-Ranovstayans from Aprepluya was reasonable.

Alternatively, the situation of distress caused by the pandemic and necessity precluded any wrongfulness of Ranovstayo's actions.

In any event, any economic harm Aprepluya suffered would have occurred irrespective of the regulation, due to Aprepluya's self-imposed restrictions. Further, the regulations were only applied after 80% of tourists left Aprepluya. Regardless, any loss caused after the application of the regulation was too remote.

B

Ranovstayo did not violate international law by refusing to surrender Ms. Vormund to Aprepluya upon its request.

There is an exception for granting diplomatic asylum on humanitarian grounds under customary international law. Ms. Vormund qualifies for the exception as she was being prosecuted for political reasons and she feared for her life and safety. Ranovstayo granted Ms. Vormund diplomatic asylum.

Granting diplomatic asylum on humanitarian grounds is an established exception under customary international law to Ranovstayo's obligations under the *Vienna Convention on Diplomatic Relations* and *Vienna Convention on Consular Relations*. In any event, Ranovstayo did not breach these obligations.

Further, Ranovstayo was obligated to keep Ms. Vormund within the consulate to protect her rights under the *ICCPR*.

C

The dispute is not excluded from the Court's jurisdiction by Aprepluya's reservations to its Declaration accepting the Court's compulsory jurisdiction.

Aprepluya's reservations to its Declaration exclude any disputes concerning Aprepluyan military activities, or matters which are essentially within Aprepluya's domestic jurisdiction as determined by Aprepluya (the automatic reservation).

The counter-claim does not concern 'Aprepluyan military activities' as the shooting down of the aircraft occurred in the context of a law enforcement operation.

Aprepluya's automatic reservation is invalid, as it is contrary to the provisions of the optional clause regime.

If the automatic reservation is invalid, it is severable from Aprepluya's Declaration.

Alternatively, if the automatic reservation is valid, Aprepluya's determination that a matter is within its domestic jurisdiction is subject to a duty of good faith. The determination cannot be in good faith in relation to the counter-claim as the counter-claim is directly connected to the claim, and concerns alleged breaches of international law.

D

Aprepluya's shooting down of the aircraft violated international law.

Ranovstayo has standing to bring a claim before the Court. It has been specially affected by a breach of the *Convention on International Civil Aviation* ('*Chicago Convention*') Article 3*bis*, and the *ICCPR*. Regardless, both treaties impose *erga omnes* obligations, giving Ranovstayo standing.

Aprepluya breached *Chicago Convention* Article 3*bis* by using weapons against a civilian aircraft, as other means could have been utilised to influence the aircraft's trajectory.

Aprepluya violated *ICCPR* Article 6. The deprivation of life was arbitrary and violated

international laws of law enforcement as no serious crimes were committed that would necessitate the shooting down of the aircraft. The shooting was not reasonable or proportionate.

Neither of the breaches is precluded by a claim of self-defence. The conditions for an armed attack cannot be established as the aircraft did not pose a grave threat, nor was the threat attributable to a State. Regardless, Aprepluya's acts were not necessary or proportionate and therefore do not constitute legitimate self-defence.

No circumstances of distress or necessity precluded wrongfulness of Aprepluya's breaches. Shooting down the aircraft violated essential tenets of the *Chicago Convention* and *ICCPR*, jeopardised human life, and impaired the interests of the international community.

QUESTIONS PRESENTED

The Democratic State of Ranovstayo respectfully asks this Honourable Court:

A. Whether Ranovstayo violated international law by applying its entry regulation to Aprepluya, and if it did, whether it is required to compensate Aprepluya for any claimed losses;

B. Whether Ranovstayo violated international law by refusing to hand over Ms. Keinblat Vormund to the Aprepluyan authorities;

C. Whether this Court may exercise jurisdiction over Ranvostayo's counter-claim concerning the Mantyan Airways aircraft; and

D. Assuming this Court may exercise jurisdiction over the counter-claim, whether Aprepluya violated international law by shooting down the aircraft.

PLEADINGS

A. RANOVSTAYO DID NOT VIOLATE INTERNATIONAL LAW BY APPLYING ITS ENTRY REGULATION TO APREPLUYA, AND EVEN IF IT DID, IT SHOULD NOT BE REQUIRED TO COMPENSATE APREPLUYA FOR ANY CLAIMED ECONOMIC LOSSES.

I. CUSTOMARY INTERNATIONAL LAW ('CIL') DOES NOT PROHIBIT THE APPLICATION OF THE ENTRY REGULATION TO APREPLUYA.

No right of admission requiring Ranovstayo to allow Aprepluyan travellers to enter its territory exists under international law.[1] The freedom of movement guaranteed by the *International Covenant on Civil and Political Rights* Article 12,[2] and under CIL, does not extend extra-territorially and only obliges States to guarantee freedom of movement to their nationals, and to aliens lawfully in their territory.[3] Moreover, by May 2018, one month before the entry regulation's application to Aprepluya, 24 States had adopted similar regulations 'limiting or barring the entry into their territories of individuals who had recently been in "high-risk countries," as designated by their own respective authorities'.[4] This indicated there was no custom prohibiting Ranovstayo's application of its entry regulation against States of its choosing.

[1] *Nishimura Ekiu v United States* 142 US 651, 659 (1892); Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country' (1973) 49(3) *International Affairs* 341, 344; see Human Rights Committee ('HRC'), *General Comment No. 15*, UN Doc HRI/GEN/1/Rev.9(VOL.1) (2008) [5].
[2] (1966) 999 UNTS 171.
[3] HRC, *General Comment No. 27*, UN Doc CCPR/C/21/Rev.1/Add.9 (1999) [4].
[4] Statement of Agreed Facts [16] ('SAF []').

II. APPLYING THE ENTRY REGULATION TO APREPLUYA WAS NECESSARY TO ACHIEVE RANOVSTAYO'S APPROPRIATE LEVEL OF HEALTH PROTECTION ('ALOHP') AND DID NOT BREACH *2005 INTERNATIONAL HEALTH REGULATIONS* ('*IHR*') ARTICLES 43 OR 42.

1. The entry regulation's application to Aprepluya was based on scientific principles, scientific evidence and WHO advice.

IHR[5] Article 43(2) requires that public health decisions be 'based on' scientific principles, scientific evidence and WHO advice. This does not require that any particular measure 'conform to' a dominant opinion, but rather it must be 'rationally related to' at least one of the views expressed.[6] Applying the entry regulation to Aprepluya was 'rationally related to' a 'qualitative'[7] assessment of Aprepluya's specific risk factors such as quantity of traffic and uncertainty as to community spread, combined with the initial risk assessment.[8] Given the speed at which J-VID-18 spreads and the practical difficulties of conducting detailed risk assessments for individual States, an informal qualitative assessment of the scientific evidence concerning the risk posed by Aprepluya satisfies Article 43(2).[9]

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[5] (2005) 2509 UNTS 79.
[6] Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc WT/DS293/R (29 September 2006) [7.3067] ('*EC – Approval and Marketing*'); Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R (16 January 1998) [194].
[7] *EC – Approval and Marketing* [7.3053].
[8] SAF [10].
[9] *EC – Approval and Marketing* [7.3053].

2. Ranovstayo was entitled to implement any additional health measure required to achieve its deemed ALOHP.

IHR Article 43 must be read consistently with other international instruments.[10] Similar WTO agreements give States the prerogative to choose an ALOHP and implement measures to achieve this.[11] Reading the *IHR* consistently with such agreements necessitates allowing States to select their own ALOHP, and this interpretation is supported by subsequent State practice, where States have implemented travel restrictions despite the WHO expressing reservations as to whether they were commensurate with public health risks.[12] In any event, the measures taken were commensurate with the public health risks of J-VID-18.

3. Applying the entry regulation to Aprepluya was necessary to achieve Ranovstayo's ALOHP.

Ranovstayo's entry regulation determined that any State would pose an unacceptably high risk once it had recorded 50 cases, regardless of its individual circumstances.[13] However, this threshold did not preclude the designation of States as 'high-risk' based on their specific risk factors, notwithstanding lower case numbers. The object of this regulation was to bar 'the entry of anyone who may be carrying the virus'.[14] These factors indicate a very conservative ALOHP. As a result,

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[10] *IHR* Art 57.
[11] *IHR* Art 57; *Agreement on Technical Barriers to Trade* (1994) 1868 UNTS 120 preamble; *Agreement on the Application of Sanitary and Phytosanitary Measures* (1994) 1867 UNTS 493 Annex 1 (Definitions); Panel Report, *Japan — Measures Affecting Agricultural Products*, WTO Doc WT/DS76/R (27 October 1998) [8.81].
[12] Rhymer and Speare, 'Countries' response to WHO's travel recommendations during the 2013–2016 Ebola outbreak' (18 September 2016) 95(1) *Bulletin of the WHO* 10.
[13] SAF [34].
[14] SAF [11].

Ranovstayo experienced zero community transmission.[15]

Aprepluya objectively posed a level of risk greater than that tolerated under Ranovstayo's ALOHP. The frequent travel between Aprepluya and Ranovstayo increased the likelihood of Ranovstayo importing cases from Aprepluya, even when Aprepluya was experiencing low levels of community transmission. Further, Aprepluya's small population of 3 million people indicated that the incidence of J-VID-18 as a proportion of the Aprepluyan population was greater than average.[16]

Aprepluya also posed a higher degree of risk than other States due to uncertainty regarding the true spread of J-VID-18. Aprepluya's failure to report suspected cases transparently until a whistle-blower came forward raised doubt as to the credibility of its reported case numbers. Further, the 12-day delay between individuals reporting J-VID-18 symptoms and implementing public health measures indicated an unacceptably high likelihood of undetected community transmission. This was compounded by the lack of universal access to testing.[17] These factors created uncertainty as to the risk posed by travel from Aprepluya, and entitled Ranovstayo to exercise precaution in applying its entry regulation to Aprepluya to achieve its ALOHP.[18]

4. Further, there were no reasonably available alternatives to applying the entry regulation to Aprepluya in order to achieve Ranovstayo's ALOHP.

As a result of the heightened uncertainty regarding community transmission, applying the entry

[15] Corrections and Clarifications [7] ('C []').
[16] SAF [1].
[17] Universal testing in Segura was only made available on June 16: see SAF [37].
[18] *EC – Approval and Marketing* [7.3065].

regulation to Segura alone would have been insufficient to achieve Ranovstayo's ALOHP. Aprepluya implemented restrictions on travel from Segura 12 days after the initial outbreak. There was a non-negligible chance that the virus had spread to the rest of Aprepluya. Given Aprepluya's unreliable reporting, there were no reasonably available alternative measures to achieve Ranovstayo's conservative ALOHP.

III. APPLYING THE ENTRY REGULATION TO APREPLUYA DID NOT UNLAWFULLY DISCRIMINATE AGAINST NON-RANOVSTAYANS UNDER *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* ('*ICCPR*') ARTICLES 2(1) AND 26 OR *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* ('*ICESCR*') ARTICLE 2(2).

1. *ICCPR* and *ICESCR* obligations do not apply extraterritorially.

Ranovstayo only owes obligations under the *ICCPR* to 'individuals within its territory and subject to its jurisdiction'.[19] While this may extend extraterritorially to areas where Ranovstayo exercises 'effective control',[20] it does not extend to individuals merely contemplating travel to or via Ranovstayo. Although there is no article which limits the application of *ICESCR*,[21] *ICESCR* obligations are also 'essentially territorial', owed only to individuals over whom Ranovstayo exercises territorial jurisdiction.[22] Therefore, Ranovstayo owes no *ICCPR* and *ICESCR* obligations

[19] *ICCPR* Art 2(1).
[20] HRC, *Burgos v Uruguay*, UN Doc CCPR/C/OP/1 (1979) [12.1]; HRC, *Casareigo v Uruguay*, UN Doc CCPR/C/OP/1 (1984) [10.1]-[10.3]; HRC, *Montero v Uruguay*, UN Doc CCPR/C/OP/2 (1990) [5]; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [109] ('*Wall Opinion*').
[21] (1966) 993 UNTS 3.
[22] *Wall Opinion* [112].

to non-Ranovstayans outside its territory.

2. Regardless, Ranovstayo did not unlawfully discriminate against non-Ranovstayans.

Ranovstayo will not have breached *ICCPR* Articles 2(1) and 26 and *ICESCR* Article 2(2) if its criteria for differentiating between nationals were 'reasonable and objective'.[23] Applying Ranovstayo's entry regulation to Aprepluya differentiated between Ranovstayan and non-Ranovstayan nationals, by allowing only Ranovstayan nationals to enter Ranovstayo. The aim of the regulation was to prevent the spread of J-VID-18 in Ranovstayo, protecting Ranovstayans' right to life guaranteed by *ICCPR* Article 6 and right to health guaranteed by *ICESCR* Article 12. As above,[24] it was difficult to assess the spread of J-VID-18 in Aprepluya at the time of the entry regulation's application. By 15 June 2018 there were 52 confirmed cases of J-VID-18 in Segura,[25] indicating evident community transmission, and by 20 November 2018 there were 2445 cases recorded in Aprepluya including 450 cases outside of Segura.[26] In those circumstances, travel from Aprepluya objectively posed a significant risk to Ranovstayo and restrictions on travel were reasonable. As Ranovstayo was obligated to allow its nationals to re-enter Ranovstayo under *ICCPR* Article 12(4), it was reasonable to differentiate between Ranovstayans and non-Ranovstayans.

Further, there was a 'clear and reasonable relationship of proportionality' between the

[23] HRC, *General Comment No. 18*, UN Doc HRI/GEN/1/Rev.9(VOL.1) (2008) [13]; HRC, *Broeks v The Netherlands*, UN Doc CCPR/C/OP/2 (1990) [13]; Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, UN Doc E/C.12/GC/20 (2009) [13] ('CESCR GC-20').
[24] Memorial [A](II)(3).
[25] SAF [35].
[26] C [7].

regulation's aim and its effects as required by *ICESCR*.[27] As J-VID-18 was potentially fatal and highly contagious, the entry regulation, although impacting all foreign nationals, was proportional to its aim of ensuring the health of Ranovstayan nationals.

IV. ALTERNATIVELY, THERE WERE CIRCUMSTANCES PRECLUDING THE WRONGFULNESS OF APPLYING THE ENTRY REGULATION TO APREPLUYA.

1. Distress precluded the wrongfulness of applying the regulation to Aprepluya.

A State act is not wrongful if there is a 'situation of distress' and 'no other reasonable way' of saving the lives of persons entrusted to the care of the actor.[28] J-VID-18 was contagious and potentially fatal. Therefore, the spread of J-VID-18 in Ranovstayo had the potential to jeopardise lives.[29] Exceptional circumstances of extreme urgency involving medical considerations, such as this, constitute a situation of distress.[30]

Moreover, at the time no other reasonable means of preventing importing J-VID-18 cases from Aprepluya existed. The Segura restrictions came into effect 12 days after Aprepluya first recorded symptoms of J-VID-18. As above,[31] there was no reasonable way of assessing the spread of J-VID-18 in Aprepluya. In the circumstances, immediate action was necessary to prevent the

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[27] CECSR GC-20 [13].
[28] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83 (2001) annex Art 24 ('*ARSIWA*').
[29] SAF [11].
[30] *Difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (New Zealand v France)* (1990) 82 ILR 500 [79].
[31] Memorial [A](II)(3).

virus' spread from Aprepluya to Ranovstayo given the frequent travel between the two States. Conducting a more thorough risk assessment or seeking additional scientific advice specific to Aprepluya would have required time, delaying the entry regulation's implementation and risking importing cases of J-VID-18 into Ranovstayo.

2. Necessity precluded the wrongfulness of applying the regulation to Aprepluya.

Necessity precluded wrongfulness as Ranovstayo's entry regulation was 'the only way' for Ranovstayo 'to safeguard an essential interest against a grave and imminent peril' and did 'not seriously impair an essential interest' of Aprepluya.[32] Applying the entry regulation to Aprepluya was the only way to protect the lives of Ranovstayans against the risk of importing J-VID-18 from Aprepluya. Any other course of action, including waiting to conduct a risk assessment and only applying the regulation to Segura, would necessarily have endangered the lives of Ranovstayans by exposing them to the risk of community transmission of the virus. Further, applying the entry regulation did not 'seriously impair an essential interest'. Aprepluya's economic interest in avoiding loss of tourism revenue did not constitute an essential interest as it did not 'outweigh all other considerations'.[33] Aprepluya's interests must be weighed against Ranovstayo's.[34] In the circumstances, the non-derogable imperative to guard the right to life, guaranteed under *ICCPR* Article 6, outweighed the potential of economic injury to Aprepluya which in any case may have been the inevitable result of the Segura restrictions.

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[32] *ARSIWA* Art 25.

[33] *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Supp) Ch IV.E.2 (2001) Art 25 [17] ('*ARSIWA* Commentary').

[34] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgement)* [1997] ICJ Rep 7 [58] ('*Gabčíkovo-Nagymaros*').

V. ALTERNATIVELY, RANOVSTAYO IS NOT OBLIGATED TO COMPENSATE APREPLUYA FOR ITS ECONOMIC LOSSES.

1. Ranovstayo is not liable for any economic harm its regulation may have caused prior to 8 June 2018.

States are only liable to compensate for damage caused by their failure to comply with an international obligation.[35] Ranovstayo applied its regulation to Aprepluya on 8 June 2018. Ranovstayo's earlier announcement on 5 June 2018 of its intention to apply the entry regulation to Aprepluya did not 'pre-determine' the regulation's eventual application and thus did not constitute an 'anticipatory breach'.[36]

2. In any event, Ranovstayo's announcement of its intention to apply its entry regulation to Aprepluya did not cause any economic harm.

Aprepluya may only claim compensation if it can demonstrate with a 'sufficient degree of certainty' that the harm 'would in fact have been averted' if Ranovstayo had complied with its obligations.[37] It is likely that the loss in tourism revenue from the departures between 5-8 June would not have been averted had Ranovstayo not announced its regulation, as tourists would have departed based on fears of new Aprepluyan restrictions. Tourists began leaving before Ranovstayo's entry regulation was announced.[38] Further, the exit survey was optional and thus

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[35] *ARSIWA* Art 31(1).
[36] *Gabčíkovo-Nagymaros* [79]; *ARSIWA* Commentary Art 14 [13].
[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 [462].
[38] SAF [30].

unreliable. In any event, it did not suggest any statistically significant disproportion in departures by those who were affected by the entry regulation. 65% of all tourists in Aprepluya were affected by the regulations,[39] and two-thirds of departures from Aprepluya cited the regulations as the cause, suggesting those affected were no more likely to depart Aprepluya than any other tourist.[40]

3. Ranovstayo's application of its entry regulation did not cause compensable economic harm.

Aprepluya has not demonstrated that any economic harm suffered after the entry regulation's application was caused by the regulation, rather than concern over J-VID-18 or Aprepluya's restrictions. Aprepluya's Ministry of Tourism report is not sufficiently certain to prove factual causation. Such reports have been considered insufficiently reliable to found proof of causation.[41]

4. Even if Ranovstayo's announcement of its intention to apply its entry regulation, or the regulation's actual application, did cause harm, the loss claimed by Aprepluya is too remote.

Compensation can only be claimed for harm that is 'direct' and if the 'normal and natural course of events would indicate that the injury is a logical consequence'.[42] The economic damage Aprepluya suffered was likely substantially exacerbated and changed by the economic effects of Aprepluyan public health measures,[43] such that Ranovstayo's entry regulation was not the 'real

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[39] SAF [3].
[40] SAF [30].
[41] See *Ethiopia's Damages Claim (Ethiopia v Eritrea) (Final Award)* (2009) 26 RIAA 631 [460]-[461].
[42] Arangio-Ruiz, *Second Report on State Responsibility*, UN Doc A/CN.4/425 (1989) [37].
[43] See SAF [35].

cause' of the economic harm Aprepluya suffered.[44]

5. In any event, Ranovstayo is not liable for any economic harm its regulation may have caused after June 15.

After Aprepluya recorded 50 cases, it would have automatically become subject to the entry regulation. Therefore, applying the entry regulation to Aprepluya put it in no worse position than it would otherwise have occupied from 15 June 2018 onwards.

[44] *Lauder v Czech Republic (Final Award)* [2001] IIC 205 [234]; *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)* (1928) 2 RIAA 1011, 1031.

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

As there were legal bases for refusing to surrender Ms. Vormund to Aprepluya, Ranovstayo did not violate international law.[45]

I. RANOVSTAYO GRANTED MS. VORMUND DIPLOMATIC ASYLUM ON HUMANITARIAN GROUNDS UNDER INTERNATIONAL LAW.

1. Diplomatic asylum may be granted on humanitarian grounds under CIL.

a. Constant and uniform State practice exists.

There is constant and uniform practice of numerous States granting diplomatic asylum on humanitarian grounds.[46]

In the United States, 'temporary refuge' is the equivalent of diplomatic asylum and it can be granted to people in 'imminent physical danger for any reason' or in 'imminent danger of persecution' due to their political opinion.[47] United States embassies have granted temporary

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[45] See *Asylum (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 274-275 ('*Asylum Case*'); *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643, 673 ('*R(B)*') citing Jennings and Watts, *Oppenheim's International Law: Volume 1* (Longman, 9th ed, 1992) [495].

[46] See *Asylum Case* 277; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3, 43 ('*North Sea Continental Shelf*').

[47] See United States Embassy Cable, *Walk-in Guidance for 2009: Handling Foreign National Walk-ins, Defectors, and Asylum Seekers* (2009) <https://www.theguardian.com/world/us-embassy-cables-documents/235430> [40], [43], [46] ('*Walk-in Guidance*').

refuge many times on humanitarian grounds, including protection from political persecution.[48]

Australia accepts that diplomatic asylum may be granted on humanitarian grounds under CIL to people who were persecuted, or had their lives and liberty threatened, due to their political opinions.[49] Australia has indicated its acceptance on numerous occasions.[50]

Canada accepts that diplomatic asylum may be granted on humanitarian grounds.[51] Its diplomatic missions have granted asylum on many occasions, including to protect people from political persecution.[52]

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[48] US embassies granted refuge to Cardinal Mindszenty in 1956: Denza, 'Diplomatic Asylum' in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1431 ('Denza'); Svetlana Alliluyeva in 1967: Den Heijer, 'Diplomatic Asylum and the Assange Case' (2013) 26(2) *Leiden Journal of International Law* 399, 404 ('Den Heijer'); Bernhard Marquardt in 1989: Kovács and Ádány, 'The Non-Customary Practice of Diplomatic Asylum' in Behrens (ed), *Diplomatic Law in a New Millennium* (Oxford University Press, 2017) 194 ('Kovács and Ádány'); Fang Lizhi after the Tiananmen Square massacre: Den Heijer 405.

[49] *Report of the Secretary-General: Question of Diplomatic Asylum*, UN Doc A/10138 (Part I) (1975) 12-13 ('Asylum Report'); *Official Records of the General Assembly, Twenty-Ninth Session, Sixth Committee, Legal Questions, Summary Records of Meetings 18 September-9 December 1974* UN Doc A/C.6/SR.1460-1521 (1974) 241 ('*1974 GA Records*').

[50] Taylor, 'Australia's diplomatic asylum initiative at the United Nations: comparing international law rhetoric with foreign policy practice' (2019) 73(4) *Australian Journal of International Affairs* 376, 387, 390-391; During the Tiananmen Square protests, Australia granted diplomatic asylum: Australian Broadcasting Corporation ('ABC'), *Tiananmen Square crisis station: the Australian embassy in 1989* (2014) <https://www.abc.net.au/news/2014-06-03/tiananmen-square-crisis-station-the-australian-embassy-in-1989/5498406?nw=0>.

[51] Asylum Report 17-18.

[52] Canadian embassies granted asylum during Operation Danube in 1968: Kovács and Ádány 192; Pinochet's coup d'état in 1973: Kovács and Ádány 182; the Iran hostage crisis in 1979: Den Heijer 404; and to North Korean escapees in 2002 and 2004: CNN, *North Korean defectors arrive in Seoul* (2002) <http://edition.cnn.com/2002/WORLD/asiapcf/east/05/16/china.asylum/>; CBC News, *North Koreans leave Canadian embassy in Beijing* (2004) <https://www.cbc.ca/news/canada/north-koreans-leave-canadian-embassy-in-beijing-1.468182>; ABC, *North Korean asylum seekers break into Canadian Embassy in Beijing* (2004) <https://www.abc.net.au/worldtoday/content/2004/s1210524.htm>.

In Asia, South Korean consulates in Beijing, Hong Kong and South-East Asian cities, including Bangkok, Yangon, and Hanoi, have granted asylum to North Korean defectors.[53] Japan's embassies in Bangkok and Beijing have granted diplomatic asylum to North Koreans in 2003 and 2004, respectively.[54] In 2009, the Republic of China granted diplomatic asylum to a Honduran politician's daughter.[55] Mongolia accepts granting diplomatic asylum on humanitarian grounds.[56]

Many European States accept that diplomatic asylum may be granted on humanitarian grounds. In the United Kingdom, the England and Wales Court of Appeal ('EWCA') has expressed that diplomatic asylum can be granted where there is immediate likelihood that a fugitive will experience serious injury.[57] Austria, Belgium, Denmark, Italy, Norway and Sweden have stated that diplomatic asylum may be granted on humanitarian grounds.[58] During the Spanish Civil War, 14 States, including Belgium, France, the Netherlands, Norway, Poland, Romania, Switzerland

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[53] Roundtable before the Congressional-Executive Commission on China, One Hundred Eighth Congress, Second Session, *The Plight of North Koreans in China: A Current Assessment* (2004) 12; ABC, *South Korea closes Beijing Consulate to cope with asylum seekers* (2003) <https://www.abc.net.au/worldtoday/content/2003/s962693.htm>; The Telegraph, *North Korean maths prodigy completes defection to Seoul after two months in Hong Kong* (2016) <https://www.telegraph.co.uk/news/2016/09/29/north-korean-maths-prodigy-completes-defection-to-seoul-after-tw/>.
[54] Radio Free Asia, *29 North Korean Defectors Burst into Japanese School in Beijing* (2004) <https://www.rfa.org/english/news/noko_schooldefect090104-20040901.html>; The Age, *North Korean asylum seekers shelter in Japan's Bangkok embassy* (2003) <https://www.theage.com.au/world/north-korean-asylum-seekers-shelter-in-japans-bangkok-embassy-20030801-gdw55n.html>.
[55] Taiwan Today, *Deposed Honduran leader's daughter granted asylum* (2009) <https://taiwantoday.tw/news.php?unit=2&post=604>.
[56] *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Legal Questions, Summary Records of Meetings 17 September-5 December 1975* UN Doc A/C.6/SR.1522-1582 (1975) 140 ('*1975 GA Records*').
[57] *R(B)* 674.
[58] Asylum Report 14-16, 19, 26, 29; *1975 GA Records* 138.

and Turkey, granted political refugees diplomatic asylum.[59] During WWII, Swiss, Swedish, Portuguese and Spanish diplomatic missions granted asylum to Hungarian Jews.[60] Additionally, Turkey and Germany granted diplomatic asylum to political figures.[61] In 1975, the French embassy in Phnom Penh granted asylum to Cambodian refugees.[62] From 1988 to 1989, Hungary granted diplomatic asylum to persecuted minorities fleeing Romania.[63] In 1989, West German embassies granted refuge to East German defectors.[64] In 1989 and 1990, during Enver Hoxha's Communist dictatorship, Belgian, Dutch, German, Italian, French, Norwegian, Polish, Turkish and Yugoslav embassies granted refuge to Albanians.[65] In 2008, Romania granted diplomatic asylum to protect people from political persecution.[66]

Latin American States practice granting diplomatic asylum on humanitarian grounds, including to protect people from political persecution.[67] Argentina and Uruguay accept the practice.[68] During the Spanish Civil War, Argentina, Chile and Panama granted diplomatic asylum.[69] In 1949 and 2009, Colombia granted diplomatic asylum to individuals who opposed

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[59] Kovács and Ádány 184; Ronning, *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (Martinus Nijhoff, 1965) 17; Jeffery, 'Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights' (1985) 1(1) *South African Journal on Human Rights* 10, 13 n 26.
[60] Kovács and Ádány 187-188.
[61] Kovács and Ádány 185.
[62] Denza 1430; New York Times, *French Express Concern On Embassy in Cambodia* (1975) <https://www.nytimes.com/1975/04/27/archives/french-express-concern-on-embassy-in-cambodia.html>.
[63] Kovács and Ádány 193.
[64] Kovács and Ádány 194; Den Heijer 405.
[65] Balkan Insight, *Balkan Transitional Justice: Albanians Turn Memory of Embassy Break-in Into Art* (2017) <https://balkaninsight.com/2017/07/06/albanians-turn-memory-of-embassy-break-in-into-art-07-05-2017/>.
[66] Kovács and Ádány 195.
[67] *1974 GA Records* 243.
[68] Asylum Report 6, 31.
[69] Kovács and Ádány 184.

their governments.[70] In 1973, approximately 25 diplomatic missions, including Mexican, Panamanian and Venezuelan missions, granted asylum to Chilean opponents of the government.[71] In 1980, Peru granted diplomatic asylum to Cuban refugees.[72] In 2009, Brazil granted diplomatic asylum to a political figure.[73] In the Caribbean, Grenada accepts that diplomatic asylum can be granted under CIL,[74] and Jamaica has expressly stated that diplomatic asylum may be granted on humanitarian grounds.[75]

The Ecuadorian embassy in London granted diplomatic asylum to Julian Assange, who released confidential government information, to protect him from extradition to the United States and political persecution that would threaten his life, safety and freedom.[76]

It is evident from the abundant State practice that diplomatic asylum on humanitarian grounds has been granted to individuals who have opposed and conducted political acts against their governments. Such individuals often faced an immediate threat to life and liberty and risk of injury, or political persecution.[77]

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[70] Haya de la Torre (1949) and Pedro Carmona (2009): *Asylum Case* 272; Kovács and Ádány 183.
[71] Kovács and Ádány 182; Den Heijer 404; *1975 GA Records* 135.
[72] Den Heijer 404.
[73] The former president of Honduras: Kovács and Ádány 184.
[74] *1974 GA Records* 242.
[75] Asylum Report 24.
[76] Cancillería de Colombia, *Statement of the Government of the Republic of Ecuador on the asylum request of Julian Assange* (2012) <https://web.archive.org/web/20171126151219/https://www.cancilleria.gob.ec/statement-of-the-government-of-the-republic-of-ecuador-on-the-asylum-request-of-julian-assange/> ('Ecuador Declaration').
[77] *Asylum Case* 284; Denza 1439; Ecuador Declaration.

b. States granting diplomatic asylum on humanitarian grounds do so out of a sense of legal entitlement.

Acts of diplomatic and consular officials, who are State agents, evidence their States' beliefs.[78] The abundance of diplomatic missions which grant asylum suggests that States believe they have a legal right to grant diplomatic asylum on humanitarian grounds.[79] This has been expressly confirmed by Australia, which has stated that granting diplomatic asylum on humanitarian grounds is established under CIL.[80] The United Kingdom's EWCA has stated diplomatic asylum may be lawfully granted on humanitarian grounds.[81] It is well-established that Latin American States accept they are legally entitled to grant diplomatic asylum.[82] Therefore, States grant diplomatic asylum on humanitarian grounds out of a sense of legal entitlement.[83]

2. Ms. Vormund's circumstances satisfied the humanitarian grounds on which diplomatic asylum may be granted.

a. Ms. Vormund was being prosecuted for political reasons.

The offences of 'causing public disorder' and 'violation of a governmental non-disclosure agreement' were political, as they involved acts that negatively impacted the Aprepluyan government's interests and activities. Ms. Vormund's disclosure of information about the J-VID-

[78] Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 172.
[79] See *North Sea Continental Shelf* 246-247.
[80] Asylum Report 12.
[81] *R(B)* 673-674.
[82] Foakes and Denza, 'Privileges and Immunities of Diplomatic Missions' in Roberts (ed), *Satow's Diplomatic Practice* (Oxford University Press, 7th ed, 2016) 234.
[83] See *Asylum Case* 277.

18 outbreak was in the public interest. Ms. Vormund strongly rebuked the Aprepluyan government. In those circumstances, Aprepluya's Prosecutor's Office's statement that it intended to seek 'the maximum penalty on all charges' appeared politically motivated. As Ms. Vormund was a vocal opponent of the government, she faced prosecution for political reasons.

b. There was an immediate threat to Ms. Vormund's life and risk of injury.

The release of information by Ms. Vormund was greatly detrimental to Aprepluya's reputation and credibility, and was likely to negatively impact its government-run J-VID-18 vaccine project. Ms. Vormund stated she had been threatened, was going to be in 'deep trouble' for releasing the information, and believed she would be arrested with the 'fear that they might do worse'.[84] Aprepluyan police chased her from her residence to Ranovstayo's consulate.[85] Three weeks later, Aprepluyan police were stationed outside the consulate.[86] Ms. Vormund had felt the need to escape the police and flee Aprepluya.[87]

3. Ranovstayo granted Ms. Vormund diplomatic asylum on humanitarian grounds.

Ms. Vormund's plea, 'I need protection. I beg you to help me' in her request for protection is broad and not limited to diplomatic asylum.[88] Ranovstayo had granted her diplomatic asylum by permitting her to stay in its consulate. Ranovstayo's pending decision and consideration of her as an 'applicant for asylum'[89] related to whether further protection, additional to diplomatic asylum,

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[84] SAF [21].
[85] SAF [20].
[86] SAF [43].
[87] SAF [43].
[88] SAF [21]-[22].
[89] SAF [25].

would be provided.

II. GRANTING DIPLOMATIC ASYLUM ON HUMANITARIAN GROUNDS TO MS. VORMUND AND REFUSING HER SURRENDER IS CONSISTENT WITH RANOVSTAYO'S OBLIGATIONS UNDER THE *VIENNA CONVENTION ON DIPLOMATIC RELATIONS* ('*VCDR*') AND *VIENNA CONVENTION ON CONSULAR RELATIONS* ('*VCCR*').

1. Granting diplomatic asylum on humanitarian grounds is an exception under CIL to the relevant *VCDR* and *VCCR* obligations.

As the issue of granting diplomatic asylum is not expressly regulated by the *VCDR*[90] and *VCCR*[91], rules of CIL govern this issue.[92] Ranovstayo was permitted under CIL to grant diplomatic asylum on humanitarian grounds as an exception to its treaty obligations.[93]

2. Alternatively, granting Ms. Vormund diplomatic asylum on humanitarian grounds and refusing her surrender did not breach the relevant *VCDR* and *VCCR* obligations.

Ranovstayo did not breach its duty not to interfere in Aprepluya's internal affairs.[94] Aprepluya's potential human rights breaches were not merely its 'internal affairs' but concerned other States, including Ranovstayo, as the protection of human rights is of fundamental and universal

[90] (1961) 500 UNTS 95.
[91] (1963) 596 UNTS 261.
[92] *VCDR* preamble; *VCCR* preamble.
[93] See *Asylum Case* 274-275.
[94] *VCDR* Art 41(1); *VCCR* Art 55(1).

importance.[95]

Ranovstayo did not breach its duty to respect Aprepluya's laws and regulations.[96] Ranovstayo granted diplomatic asylum to Ms. Vormund on humanitarian grounds, not 'as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals'.[97]

Ranovstayo did not use its consular premises in any manner incompatible with the exercise of consular or mission functions.[98] Granting diplomatic asylum to Ms. Vormund assisted Ranovstayo in negotiating with Aprepluya and ascertaining conditions and developments there regarding its scientific life and J-VID-18.[99] Further, granting diplomatic asylum on humanitarian grounds was not incompatible with Ranovstayo's function of promoting friendly relations between it and Aprepluya — it fell outside Ranovstayo and Aprepluya's normal relations as it was only granted in exceptional circumstances where all relevant requirements were met.[100]

III. THE *ICCPR* OBLIGATED RANOVSTAYO TO KEEP MS. VORMUND WITHIN THE CONSULATE'S PROTECTION.

Under *ICCPR* Article 2(1), Ranovstayo was obligated to protect Ms. Vormund's human rights as

[95] *Victims of the Tugboat '13 de Marzo' v Cuba* [1997] Case 11.436 Inter-American Commission on Human Rights [79].
[96] *VCDR* Art 41(1); *VCCR* Art 55(1).
[97] *Asylum Case* 284.
[98] *VCDR* Art 41(3); *VCCR*, Art 55(2).
[99] See *VCDR* Art 3(c), (d); *VCCR* Art 5(c).
[100] See Asylum Report 11; *VCDR* Art 3(e); *VCCR* Art 5(b).

she was under its 'effective control' while in the consulate and thus subject to its jurisdiction.[101] Ranovstayo was obligated to refuse her surrender as it was 'foreseeable' that Aprepluya would violate her rights under the *ICCPR*.[102] She faced prosecution for political reasons, which threatened her right to a fair trial under *ICCPR* Article 14.[103] If she had been imprisoned as a result of the politically motivated prosecution, she would have been arbitrarily detained in contravention of *ICCPR* Article 9(1). Prosecuting her for exercising her right to freedom of expression would have violated *ICCPR* Article 19 as the disclosure of suspected J-VID-18 cases was in the public interest, and did not threaten the rights or reputations of other individuals or jeopardise national security, public order or public health.[104]

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[101] HRC, *Concluding Observations on Israel* UN Doc CCPR/C/ISR/CO/3 (2010) [5]; see *Wall Opinion* 136; *R(B)* 666.
[102] See HRC, *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991 (1993); *R(B)* 671, 674.
[103] Memorial [B](I)(2)(a); see HRC, *General Comment No. 32* UN Doc CCPR/C/GC/32 (2007) [25].
[104] See *ICCPR* Art 19(2), (3).

C. THE COURT MAY EXERCISE JURISDICTION OVER RANOVSTAYO'S COUNTER-CLAIM.

I. RANOVSTAYO'S COUNTER-CLAIM RAISES A JUSTICIABLE DISPUTE OF INTERNATIONAL LAW.

For the Court to exercise jurisdiction over a contentious matter, there must be a dispute of international law.[105] The parties have agreed that there is a 'dispute' for the purposes of *Statute of the International Court of Justice* ('ICJ Statute') Articles 36 and 38 in relation to all the issues before the Court.[106] The shooting down of the Mantyan Airways aircraft is alleged to have infringed obligations owed under international law, and the counter-claim is positively opposed by Aprepluya.

II. RANOVSTAYO'S COUNTER-CLAIM DOES NOT CONCERN THE MILITARY ACTIVITIES OF APREPLUYA.

1. Aprepluya's Declaration must be interpreted according to its natural and reasonable meaning.

Aprepluya's Declaration must be interpreted according to a 'natural and reasonable'[107] reading of

[105] Rosenne, *The Law and Practice of the International Court 1920-2005* (Martinus Nijhoff Publishers, 4th ed, 2006) 505.
[106] (1946) 33 UNTS 993; Order of the Court dated 11 September 2020 ('Order').
[107] *Anglo-Iranian Oil Company (United Kingdom v Iran) (Preliminary Objection)* [1952] ICJ Rep 93, 105 ('*Anglo-Iranian Oil*').

the 'words actually used',[108] in light of Aprepluya's intention.[109] The Court's ultimate inquiry is to ascertain the scope of Aprepluya's consent.[110]

Optional clause declarations are *sui generis* unilateral acts of State sovereignty,[111] with multi-lateral effects.[112] Aprepluya's intention is therefore relevant to the interpretation of the Aprepluyan Declaration. General principles of international treaty law governing treaty interpretation embodied in the *Vienna Convention on the Law of Treaties*[113] apply by analogy to Aprepluya's Declaration.[114] In the absence of evidence of Aprepluya's intentions at the time of depositing the Declaration, the Court must focus on an objective reading of the term 'Aprepluyan military activities'.[115]

2. Ranovstayo's counter-claim does not concern an Aprepluyan military activity.

A natural and reasonable reading of the words 'Aprepluyan military activities' requires the Court

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[108] *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1998] ICJ Rep 432, 454 [49] ('*Fisheries Jurisdiction*'); *Anglo-Iranian Oil* 105.
[109] *Certain Norwegian Loans (France v Norway) (Preliminary Objections)* [1957] ICJ Rep 9, 27 ('*Norwegian Loans*'); *Aerial Incident of 10 August 1999 (Pakistan v India) (Jurisdiction)* [2000] ICJ Rep 12 [44].
[110] Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International, 2003) 584-585; *Fisheries Jurisdiction* 453 [44]; *Phosphates in Morocco* 1938 PCIJ (ser A/B) No 28, 23.
[111] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392 [46], [52] ('*Military and Paramilitary Activities (Jurisdiction)*'); *The Legal Status of Eastern Greenland (Denmark v Norway)* [1933] PCIJ (ser A/B) No 53, 69 ('*Eastern Greenland*'); *Fisheries Jurisdiction* [48]-[49].
[112] *Electricity Corporation of Sofia and Bulgaria (Belgium v Bulgaria) (Preliminary Objections)* [1939] PCIJ (ser A/B) No 77, 87; *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections)* [1957] ICJ Rep 125, 146 ('*Right of Passage*'); *Military and Paramilitary Activities (Jurisdiction)* [59]-[60].
[113] (1969) 1155 UNTS 331 ('*VCLT*').
[114] *Fisheries Jurisdiction* [46]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275 [30].
[115] *Military and Paramilitary Activities (Jurisdiction)* [52].

to differentiate between military and law enforcement activities. The task facing the Court is objectively to assess the nature of the impugned conduct. The term 'military activities' only encapsulates activities which were primarily related to the operation of Aprepluya's armed forces. Mere use of military resources cannot support a finding that the impugned conduct was necessarily a 'military' activity.

The distinction drawn by *United Nations Convention on the Laws of the Sea* ('UNCLOS')[116] Article 298(1)(b) between 'military' and 'law enforcement' activities reflects a natural and ordinary reading of 'military' activities. The provision allows States to exclude military activities from the system of arbitral decision-making established by UNCLOS. 'Quintessentially military' circumstances where armed forces are 'arrayed in opposition to one another' fall within the scope of the reservation.[117] However, the use of military resources in a law enforcement operation, such as preventing the illegal crossing of a channel, is not enough to bring conduct within the reservation.[118]

Similarly, Aprepluya's reservation cannot apply to the shooting down of the aircraft as it merely involved the use of military resources, such as a fighter-jet, in pursuit of a law enforcement objective: preventing a terrorist attack. Whilst the 'blurred' nature of counterterrorism operations through employing military resources in a law enforcement context makes the delineation less clear,[119] this operation's domestic focus suggests that it was a law enforcement activity. This is reinforced by the fact that the operation involved both 'civilian and military authorities' acting in

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[116] (1982) 1833 UNTS 397.
[117] *South China Sea Arbitration (Philippines v China) (Award)* (2016) 33 RIAA 153, 597 [1161].
[118] *The Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Provisional Measures)* (ITLOS, Case No 26, 25 May 2019) [74] ('*Ukraine v Russia*').
[119] *Ukraine v Russia* [64]-[65].

tandem.[120]

III. RANOVSTAYO'S COUNTER-CLAIM IS NOT OUTSIDE THE COURT'S JURISDICTION BY VIRTUE OF APREPLUYA'S AUTOMATIC RESERVATION.

1. Aprepluya's automatic reservation is invalid.

The validity of a reservation must be determined by the Court pursuant to Article 36(6), as determining the validity of an optional clause declaration is essential to the exercise of the Court's duty to render a judgment on jurisdiction. If the Court were not vested with power to determine whether a reservation is valid or invalid, it would be incapable of fulfilling its duty.

The Court may rule a reservation invalid where it is inconsistent with the terms of the ICJ Statute establishing the optional clause system,[121] or with the object and purpose of the ICJ Statute, or provisions of international law.[122] These circumstances render a reservation invalid as the Court is unable to give legal effect to the terms of the Declaration.[123] States cannot derogate from the ICJ Statute either unilaterally or by agreement.[124]

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[120] SAF [45].

[121] *Norwegian Loans* 46 (Judge Lauterpacht); Briggs, 'Reservations to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice', (1959) (93) *Hague Recueil* 229, 342 ('Briggs').

[122] *VCLT* Art 19(c); Briggs 342; Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013) 475-476 ('Kolb').

[123] *Interhandel (Switzerland v United States of America) (Preliminary Objections)* [1959] ICJ Rep 6, 97 (Judge Lauterpacht) ('*Interhandel*').

[124] *Fisheries Jurisdiction* 501 [21]-[22] (Vice-President Weeramantry); Kolb 468.

a. Aprepluya's automatic reservation is inconsistent with ICJ Statute Article 36(6).

Article 36(6) provides that only the Court may determine disputes regarding its jurisdiction.[125] The ICJ Statute imposes a duty on the Court to determine jurisdictional questions,[126] and imposes an obligation on States to submit to this determination. *Charter of the United Nations* ('UN Charter') Article 92 provides that the ICJ Statute is an 'integral part' of the Charter.[127] The obligations and powers under the ICJ Statute are therefore non-derogable obligations under the UN Charter.[128]

Aprepluya's automatic reservation purports to exclude from determination any disputes which, in Aprepluya's subjective opinion, are solely matters within its domestic jurisdiction.[129] The automatic reservation removes the power of determining jurisdiction from the Court and vests it solely in Aprepluya.[130] The Court's *compétence de la compétence* is nullified by the automatic reservation, and it is therefore contrary to the express conferral of jurisdictional decision-making on the Court.[131]

b. Aprepluya's automatic reservation is inconsistent with ICJ Statute Article 36(2).

Aprepluya's automatic reservation is invalid as it has deprived Aprepluya's Declaration of legal character. Article 36(2) provides that States may accept the Court's jurisdiction 'in relation

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[125] *Nottebohm (Lichtenstein v Guatemala) (Preliminary Objections)* [1953] ICJ Rep 111, 119; *Norwegian Loans* 46-47 (Judge Lauterpacht); *Interhandel* 97 (Judge Lauterpacht); Crawford 'The Legal Effect of Automatic Reservations to the Jurisdiction of the international Court' (1979) 50(1) *British Yearbook of International Law* 63, 69 ('Crawford').
[126] See *Norwegian Loans* 44; ICJ Statute Art 36(6).
[127] UN Charter 1 UNTS XVI; ICJ Statute Art 1; Crawford 69.
[128] UN Charter Art 103.
[129] SAF [45].
[130] *Norwegian Loans* 43-48 (Judge Lauterpacht).
[131] *Norwegian Loans* 46 (Judge Lauterpacht); *Interhandel* 97 (Judge Lauterpacht); Kolb 475.

to any other State accepting the same obligation'. The automatic reservation results in Aprepluya accepting that obligation only to the extent that it 'considers that it has done so'.[132] Despite Aprepluya evincing an intention to be subject to the Court's compulsory jurisdiction and representing this to all other States accepting that obligation, it purports not to have accepted the substantive obligation to be subject to the jurisdiction.[133] Aprepluya's automatic reservation is contrary to the entire purpose of the optional clause scheme because the only obligation Aprepluya has purported to take on in its Declaration is to assess whether it wishes a dispute to be heard by the Court.[134] To remove from the Court's jurisdiction a class of cases depending entirely upon a unilateral State decision would denude the Declaration of legal meaning. Aprepluya has impermissibly purported to dispense with its 'obligation' under Article 36(2).[135]

c. Aprepluya's automatic reservation is contrary to the hierarchy of international law over municipal law.

Aprepluya cannot utilise municipal law to interpret, or excuse a breach of, its international obligations.[136] Aprepluya has accepted the 'obligation' under ICJ Statute Article 36(2), but purported to reserve determination, by its own laws and processes, of what falls within the 'reserved domain'.[137] The Court's approach to interpreting optional clause declarations must accord with the 'principle of a hierarchy of norms' in which international obligations are

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[132] *Norwegian Loans* 48 (Judge Lauterpacht).
[133] Crawford 75.
[134] Crawford 77.
[135] Crawford 82-83.
[136] Greig, 'Nicaragua and the United States: Confrontation over the Jurisdiction of the International Court' (1991) 62(1) *British Yearbook of International Law* 119, 193 ('Greig'); Kolb 474-475; *VCLT* Arts 27, 46(1); *Eastern Greenland* 69.
[137] Kolb 475-476.

determined without recourse to a State's municipal law.[138] This is particularly important as there is no regime of *renvoi* from international to municipal law, and the Court should err against enabling Aprepluya to impose a domestic view of its obligations upon both the Court and Ranovstayo.[139]

2. Aprepluya's automatic reservation is severable from Aprepluya's Declaration under Article 36(2).

Aprepluya's Declaration is made pursuant to Article 36(2), whilst the automatic reservation accompanying the Declaration is made pursuant to Article 36(3). They are two elements of a legal act, and there is no indication in the Statute's text that these elements are inseparable.[140] The act of depositing the Declaration manifests Aprepluya's consent to be bound by the system of compulsory jurisdiction, whilst that consent to the Court's jurisdiction is separately limited by the automatic reservation entered under Article 36(3). The automatic reservation merely expresses an ancillary limitation to the State's primary wish to be bound by the optional clause regime.[141] If the automatic reservation is invalid, that should not compromise the State's primary intention, which should be interpreted in favour of the validity of its legal act.[142]

If the Court determines that the automatic reservation is invalid but not severable, then the entirety of Aprepluya's Declaration is vitiated.[143] As a result Aprepluya would not be entitled to utilise its Declaration to bring the claim in relation to Ranovstayo's entry regulation and Ms.

[138] Kolb 475.
[139] Greig 193.
[140] *Interhandel* 76 (Judge Klaested), 91 (Judge Armand-Ugon).
[141] Kolb 476.
[142] *Right of Passage* 142; Kolb 477.
[143] *Norwegian Loans* 24.

Vormund.

IV. ALTERNATIVELY, APREPLUYA'S AUTOMATIC RESERVATION IS SUBJECT TO A DUTY OF GOOD FAITH.

If, consistent with the principle that reservations should be interpreted *in favorem validitatis*, the Court finds the automatic reservation valid, the Court should also find that Aprepluya's subjective determination of whether a matter falls within its domestic jurisdiction must be subject to a duty to act in good faith.[144] The Court should not permit an abuse of its process by enabling Aprepluya to avoid its international obligations through making unreasonable determinations that a matter falls entirely within its domestic jurisdiction.[145] Therefore, the Court should inquire as to whether it was 'reasonably possible' to reach the determination that the counter-claim was essentially within Aprepluya's domestic jurisdiction.

1. The automatic reservation cannot be invoked in good faith in relation to the counter-claim.

Aprepluya has accepted the Court's jurisdiction in the claim, which is 'directly connected with the subject matter' of the cross-claim.[146] Aprepluya's subsequent invocation of the automatic reservation is inconsistent with its acceptance of jurisdiction in the claim. Here, there are alleged violations of international obligations owed by Aprepluya both to Ranovstayo specifically and the international community at large. As there is a justiciable dispute of an international legal character

[144] Kolb 482
[145] Kolb 482.
[146] Order.

before the Court,[147] Aprepluya's contention that Ranovstayo's counter-claim is entirely within Aprepluya's domestic jurisdiction must be held to be contrary to good faith and an *abus de droit*.[148]

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[147] Memorial [C](I).
[148] Crawford 67; *Norwegian Loans* 72-74 (Judge Basvedant).

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

I. RANOVSTAYO HAS STANDING TO CLAIM AGAINST APREPLUYA FOR VIOLATING INTERNATIONAL LAW BY SHOOTING DOWN THE AIRCRAFT.

1. Ranovstayo has a special interest in the shooting down of the aircraft.

Ranovstayo has a special interest in Aprepluya's breaches of its international obligations and therefore has standing before the Court.[149] Ranovstayo had expressed an interest in the attack of the aircraft;[150] it had previously granted diplomatic asylum to Ms. Vormund,[151] and had a vested interest in maintaining her safety, given the consulate's protection of her in Segura.

2. Ranovstayo has standing to claim in relation to breaches of *erga omnes* obligations.

Absent a special interest, States may bring claims in relation to breaches of treaties to which they are party, so long as the obligations are 'conferred by international instruments of a universal or quasi-universal character'.[152] The general acceptance of States' ability to bring such claims reflects the interest all States have in upholding international obligations, especially in cases where no

[149] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)* [2012] ICJ Rep 422 [66] ('*Belgium v Senegal*'); *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ 319, 328.
[150] SAF [44].
[151] Memorial [B](I)(3).
[152] *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ 1 [34] ('*Barcelona Traction*'); *Belgium v Senegal* [69].

State would be in a position to bring a claim.[153]

a. The obligations under the **Convention on International Civil Aviation** *('***Chicago Convention***') are owed* **erga omnes partes.**

The *Chicago Convention*[154] establishes an objective régime in relation to shared airspaces binding upon third parties, it is an international instrument of a 'quasi-universal character'. Objective régimes established under a treaty provide all State parties a general interest in the compliance with treaty obligations in relation to the relevant territories, so long as the State with territorial competence over the region is party to the treaty.[155]

The object and purpose of the *Chicago Convention* is to establish the freedom of air navigation, guarantee aircraft's right of innocent passage, and guarantee the right to land for technical purposes.[156] These rights are central to the workings of States and are universal concerns applicable to every State, therefore the obligations relating to these rights established by the *Chicago Convention* are of a 'quasi-universal character'.

As Aprepluya is a party to the *Chicago Convention*, the counter-claim is admissible.

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[153] *Belgium v Senegal* [69], *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures)* (International Court of Justice, General List No 178, 23 January 2020) [40] ('*The Gambia v Myanmar*').
[154] (1948) 15 UNTS 295.
[155] Waldock, *Third Report on the Law of Treaties*, UN Doc A/CN.4/167 (1964) 26.
[156] Foont, 'Shooting Down Civilian Aircraft: Is there International Law?' (2007) 72(4) *Journal of Air Law and Commerce* 695, 699; *Chicago Convention* Arts 5, 6.

b. The right to life is an obligation owed **erga omnes.**

The duty to protect the right to life is an obligation to be upheld by all States,[157] and is part of CIL as an *erga omnes* obligation, such that 'all States can be held to have an interest in [its] protection'.[158] Third-party States may invoke the responsibility of States allegedly breaching *erga omnes* obligations without being specially affected.[159]

Ranovstayo has standing to claim for a breach of *ICCPR* Article 6 as it has a 'quasi-universal character' because it enshrines rights and freedoms 'inherent [to the] dignity of the human person'.[160]

II. APREPLUYA BREACHED *CHICAGO CONVENTION* ARTICLE 3*BIS*.

Article 3*bis*[161] prohibits the 'use of weapons against civil aircraft in flight' and provides that, 'in case of interception, the lives of persons on board and the safety of aircraft must not be endangered'.[162] Aprepluya breached this prohibition by firing tracers across the aircraft's path and shooting at its wing root area.

Deploying military weapons was not an 'appropriate means' to achieve the purported aim of the Aprepluyan Air Force, which was to encourage the aircraft to deviate from its flight path

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[157] HRC, *General Comment No. 36*, UN Doc CCPR/C/GC/36 (2018) ('GC-36').
[158] *Barcelona Traction* [33]-[34]; *Belgium v Senegal* [68]; International Law Commission ('ILC'), *Official Records of the General Assembly, Fifth-sixth Session* UN Doc A/56/10 (2003) 283-284.
[159] *The Gambia v Myanmar* [39]; *Belgium v Senegal* [69].
[160] *ICCPR* preamble.
[161] *1984 Protocol Relating to an Amendment to the Convention on International Civil Aviation* (1984) 2122 UNTS 337.
[162] Klenka, 'Aviation Safety: Legal Obligations of States and Practice' (2017) 10(3) *Journal of Transportation Security* 127, 133.

over Beauton.[163] Aprepluya could have influenced the aircraft's trajectory by other means which did not endanger the lives of the aircraft's passengers. Safety considerations discourage the use of weaponry, including tracers.[164] Instead of using weaponry, Aprepluya should have followed universally recognised interception methods, including boxing in the aircraft,[165] and using reheat or afterburner to direct the aircraft.[166]

III. APREPLUYA VIOLATED THE RIGHT TO LIFE.

Aprepluya violated the right to life if the deprivation of Ms. Vormund and Ms. Hye's lives were arbitrary.[167] The deprivation of life is arbitrary where it is not reasonable, necessary and proportionate, or it is inconsistent with international law,[168] including international law governing law enforcement.[169]

1. The deprivation of Ms. Vormund's and Ms. Hye's lives was not reasonable, necessary or proportionate.

No 'serious crime' or 'imminent threat' existed to justify shooting down the aircraft. It is not

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[163] See *Chicago Convention* Art 3*bis*(b).
[164] International Civil Aviation Organization, *Manual Concerning Interception of Civil Aircraft* UN Doc 9433-AN/926, Principle 4.1.2.10 ('Interception Manual').
[165] Cheng, 'The Destruction of KAL Flight KE007, and Article 3*bis* of the Chicago Convention' in Cheng (eds), *Studies in International Air Law* (Brill | Nijoff, 2018) 369.
[166] Interception Manual Principle 4.1.2.9.
[167] *ICCPR* Art 6.
[168] GC-36 [12].
[169] Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011) 163; International Committee of the Red Cross, *Violence and the Use of Force* (2011) 0943/002, 37, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* ('BPUFF') A/CONF.144/28/Rev.1 (1990) 110; UN General Assembly, *Code of Conduct for Law Enforcement Officials* UN Doc A/RES/34/169 (1980).

uncommon for aircraft to violate restricted airspace, and recognised procedures exist for managing such violations following a process of recognition, assessment, warning, interdiction, recovery and follow-up.[170] Aprepluya's assessment of the risk the aircraft posed was unreasonable, considering that such situations are not uncommon.

Moreover, the likelihood of the aircraft being the one apprehended by the terrorist threat identified by the Aprepluyan Defence Minister was low. The threat was to a national capital in the region, not specific to Beauton.[171] Even if the aircraft was not responding to communication signals for a criminal purpose there is no indication that the pilot's intention was violent.

Aprepluya's shooting down of the aircraft would only be necessary if Aprepluya had no less invasive means of influencing the aircraft's trajectory prior to the perceived armed attack, and shooting down the aircraft was itself essential to preventing that attack. As above, other alternative means of influencing the aircraft existed.[172]

Firing at the wing root area was excessive and disproportionate, as a small 'low-cost charter' civilian aircraft would be unlikely to withstand damage caused by the fighter-jet. Further, it was foreseeable that a pilot of a civilian plane would not be adequately trained to control a plane which had been damaged. Moreover, Aprepluya ought to have known that it was likely civilians were on board the aircraft and would perish as a result of the shooting down of the aircraft.

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[170] D'Agostino, *Homeland Security: Agency Resources Address Violations of Restricted Airspace, but Management Improvements Are Needed* (Government Accountability Office, 2005) GAO-05-928T 7.
[171] SAF [38].
[172] Memorial [D](II).

2. The deprivation of life was inconsistent with international laws of law enforcement.

Deprivation of life is arbitrary where it fails to conform with international law.[173] Law enforcement officials are prohibited from using firearms except in self-defence against the imminent threat of death or serious injury,[174] where alternative means have been insufficient. As above,[175] alternative means would have been sufficient.

IV. SELF-DEFENCE DOES NOT PRECLUDE THE WRONGFULNESS OF APREPLUYA'S ACTIONS.

1. Aprepluya did not have the right to self-defence.

Self-defence can be established only if there was an armed attack against Aprepluya's territorial integrity. There was no threat or use of force against Aprepluya that would reach this threshold. A mistake of fact in the exercise of self-defence does not render the purported self-defence valid.[176]

a. Any perception of a potential terrorist attack did not amount to an armed attack.

An armed attack requires that two criteria be met: *first*, that the 'armed force' was a 'most grave

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173 GC-36 [12].

174 *BPUFF* Principle 9; Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 85-86.

175 Memorial [D](II).

176 Milanovic, *Mistakes of Fact When Using Lethal Force in International Law: Part II* (2020) <https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-ii/>; Linnan, 'Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility' (1991) 16(2) *Yale Journal of International Law* 245, 339; ILC, *Draft Articles on State Responsibility with Commentaries thereto adopted by the International Law Commission on First Reading* UN Doc 97-02583 (1997) 306.

use of force',[177] as assessed by its 'scale and effects',[178] and; *second*, that the armed force was perpetuated by a State, or non-State actors whose actions are attributable to a State.[179]

The aircraft did not actually engage in an armed attack against Aprepluya. The use of force in self-defence is restricted to responding to an actual armed attack.[180] As there was no actual use of force by the aircraft, Aprepluya is precluded from claiming its actions were in self-defence.

In any event, an attack must be 'most grave' to enliven a State's right to self-defence.[181] As above,[182] the threat posed by a small civilian aircraft did not meet this threshold.

The aircraft was not a State, nor an actor whose actions could be attributable to a State other than Aprepluya.

b. No claim of anticipatory self-defence is sustainable.

Anticipatory self-defence cannot be founded on UN Charter Article 51. The only circumstance in which self-defence may occur is an actual armed attack.[183]

Alternatively, any right to anticipatory self-defence would still be qualified by

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[177] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* 1986 ICJ 14 [191], [195] ('*Military and Paramilitary Activities (Merits)*').
[178] *Military and Paramilitary Activities (Merits)* [195].
[179] UN Charter Art 51.
[180] Gray, *International Law and the Use of Force* (Oxford University Press, 4th ed, 2018) 214 ('Gray').
[181] *Military and Paramilitary Activities (Merits)* [191], *Oil Platforms (Iran v USA) (Merits)* [2003] ICJ Rep 161 [51] ('*Oil Platforms*').
[182] Memorial [D](III)(1).
[183] Arend and Beck, *International Law and the Use of Force* (Routledge, 1st ed, 1993) 78.

considerations of 'scale and effects', gravity, necessity and proportionality.

c. No right to self-defence exists.

Even if an armed attack occurred, Aprepluya could not exercise its inherent right of self-defence under UN Charter Article 51 against non-State actors.[184] There is no permissible situation contemplated under UN Charter Article 51 in which a State may engage in forcible self-defence against an attack originating from its own territory.[185] The limited exception recognised in United Nations Security Council Resolutions 1368 and 1373 relates to threats originating from non-State actors outside the bounds of the originating State's territory.[186] Here, any perceived threat existed solely within Aprepluya's territory.

2. Alternatively, Aprepluya's act of self-defence was not necessary or proportionate.

Even if the requirements of UN Charter Article 51 are not prescriptive, when objectively assessed,[187] Aprepluya's use of force was disproportionate, as its failure correctly to identify the aircraft and ascertain the status of its passengers reflected an immediate assumption that the aircraft was hostile, without a proper determination. The likelihood of a terrorist attack was uncertain, and

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[184] *Wall Opinion* [139]-[141]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 [145]-[146]. This has not been modified by *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1368, UN Doc S/RES/1368 (2001) ('Resolution 1368'), as UN Approval of US intervention in Afghanistan was predicated on the assumption that Afghanistan and Al-Qaeda operated as a joint entity: *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1378, UN Doc S/RES/1378 (2001).

[185] Gray 209; *Wall Opinion* [139].

[186] Resolution 1368; *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN Doc S/RES/1373 (2001).

[187] *Oil Platforms* [73].

accordingly Aprepluya's use of force was disproportionate to the degree of certainty assessable on the Commanding Officer's knowledge. The use of weapons against civilian aircraft is only proportionate in circumstances where actual hostility has been, or is about to be, committed.[188]

Aprepluya's use of force was also unnecessary, as demonstrated above.[189]

V. NO CIRCUMSTANCES OF DISTRESS OR NECESSITY EXISTED SO AS TO PRECLUDE THE WRONGFULNESS OF APREPLUYA'S ACT.

1. No situation of distress existed.

The wrongfulness of a State's actions is only precluded in situations of distress if that State's conduct creates a lesser peril than that of the established threat.[190] Distress concerns the safeguarding of fundamental rights of human life.[191]

The shooting of the aircraft endangered human lives. As there was no way of ascertaining who was on board, there was the potential of killing 12 people and was contrary to the right to life. As above,[192] alternative means of response existed that would amount to a lesser peril.

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[188] Brown, 'Shooting Down Civilian Aircrafts: Illegal, Immoral and Just Plane Stupid' (2007) 20(1) *Revue Québécoise de droit international* 57, 77-78.
[189] Memorial [D](III)(1).
[190] *ARSIWA* Art 24. The elements of distress are set out at Memorial [A](IV)(1).
[191] Szurek, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Distress' in Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 483.
[192] Memorial [D](III)(1).

2. No situation of necessity existed.

Necessity may only be invoked in exceptional circumstances.[193] It requires that actions taken be necessary to safeguard an essential State interest against a grave and imminent peril, without impairing the interests of the international community.[194]

The requirements of gravity and imminence cannot be satisfied in this case.[195] It has not been established that shooting down the aircraft served to protect human life, or was necessary to safeguard territorial integrity; indeed, shooting down the aircraft endangered the passengers onboard, impairing the interests of the international community in protecting the non-derogable right to life.

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[193] *ARSIWA* Commentary, Art 25, [2], [14]; *Gabčíkovo-Nagymaros* [51].
[194] *ARSIWA* Art 25*, Gabčíkovo-Nagymaros* [51]-[57]. The elements of necessity are set out at Memorial [A](IV)(2).
[195] *Gabčíkovo-Nagymaros* [51].

PRAYER FOR RELIEF

For the foregoing reasons, the Democratic State of Ranovstayo respectfully requests this Honourable Court to declare that:

A. Ranovstayo did not violate international law by applying its entry regulation to Aprepluya, and even if it did, it should not be required to compensate Aprepluya for any claimed economic losses;

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

C. The Court may exercise jurisdiction over Ranovstayo's counter-claim concerning the Mantyan Airways Aircraft; and

D. Aprepluya violated international law by shooting down the aircraft.