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IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE 2021 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE J-VID-18 PANDEMIC

UNITED REPUBLIC OF APREPLUYA

(APPLICANT)

v.

DEMOCRATIC STATE OF RANOVSTAYO

(RESPONDENT)

MEMORIAL FOR APPLICANT

TABLE OF CONTENT

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

UNITED NATIONS DOCUMENTS

ICJ CASES

OTHER INTERNATIONAL CASES

NATIONAL CASES

DOCTRINE

an emerging infectious disease disaster control measure. Journal of Emergency Management, (2020).

FERHANI, A., & Rushton, S., *The International Health Regulations, COVID-19, and bordering practices: Who gets in, what gets out, and who gets rescued?* Contemporary Security Policy, (2020). 1

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STATEMENT OF JURISDICTION

By virtue of the Joint Notification and the Statement of Agreed Facts ["**Compromis**"], concluded on September 11, 2020, and in accordance with Article 40(1) of the Statute of the International Court of Justice **["ICJ"]**, the United Republic of Aprepluya ["**Aprepluya"/ "Applicant**"] and the Democratic State of Ranovstayo **["Ranovstayo"/ "Respondent"**] hereby submit the present dispute concerning the J-VID-18 Pandemic to this Honourable Court. The parties have accepted the compulsory jurisdiction of the Court, pursuant to article 36 (3) and article 36 (2) of the Statute of the Court, respectively.

Both parties agreed that the Court would determine all issues of jurisdiction and admissibility alongside the merits in one single set of proceedings. The Compromis constitutes a statement of agreed facts and is without prejudice to Aprepluya's objection regarding the Court's jurisdiction on Ranovstayo's counterclaim. Each party shall accept the judgment of the Court as final and binding and shall execute it in good faith.

QUESTIONS PRESENTED

I. Whether Ranovstayo violated international law by applying its entry regulation to Aprepluya, and is thus obligated to compensate it for the resulting economic losses;

II. Whether 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;

III. Whether the Court may not exercise jurisdiction over Ranovstayo's counterclaim concerning the Mantyan Airways aircraft; and

IV. Whether, even if the Court were to exercise jurisdiction over the counter-claim, Aprepluya did not violate international law by shooting down the aircraft.

STATEMENT OF FACTS

Background

The United Republic of Aprepluya is a developed parliamentary democratic nation, eight times smaller in population than its neighbour, the Democratic State of Ranovstayo. Aprepluya is very well known for its tourism industry, mainly located in two regions: its capital city, Beauton, and the Segura Province.

Before the pandemic, of the 9 million tourists who visited Beauton between 2013 and 2017, approximately 25% of them were Ranovstayan nationals or residents. Of those 9 million tourists, 40% were coming through the airport located in the capital city of Ranovstayo, Bogpayado. Due to the large number of Ranovstayan tourists in Segura Province, Ranovstayo established its only consulate there in 1980.

Ranovstayo's entry regulation in response to the J-VID-18 outbreak

Following the emergence of the J-VID-18 virus in Hadbard, located eight time zones from Aprepluya and Ranovstayo, the Health Ministry of Ranovstayo conducted a risk assessment using what it described as the best scientific evidence available. Based on this report, the Ranovstayan Home Office published a regulation governing entry into the country.

As of April 25, 2018, all non-Ranovstayan nationals who had been in a "high-risk country" were prohibited from entering the country. Even though the World Health Organization's ("**WHO**") Director-General did not recommend the adoption of travel restrictions, nonetheless Ranovstayo adopted the entry regulation.

On May 15, 2018, the WHO declared that J-VID-18 constituted a pandemic and was to be treated as a PHEIC. Following this announcement, 24 countries, -including Ranovstayo- adopted regulations limiting or barring entry into their territories to individuals coming from "high-risk countries". Ranovstayo's was "the most stringent".

In June, President Kalkan of Ranovstayo notified her counterpart that the Ranovstayan authorities were willing to add Aprepluya to its list of "high-risk countries", even though there were only two confirmed cases at the time in the Segura Province.

In response, Aprepluya's Prime Minister, Haraka, expressed a "strong objection" to the decision. There was no sufficient scientific evidence for this "gross overreaction". Quarantine had already been imposed in this Province with the objective to regulate people coming in and out to limit the spread of the virus.

As a consequence of this regulation, from June 5 to June 7, 2018, approximately 80% of tourists in Aprepluya left the country. The mass departures were due to the fear of tourists and Ranovstayan residents of being stuck in Aprepluya.

In addition, Ranovstayo recalled all nonessential diplomats and consular officers. This led Aprepluya's Ministry of Foreign Affairs to deliver a note verbal stating that the application of Ranovstayo's regulation to Aprepluya was in violation of international law.

However, Ranovstayo refused to change its regulation policy regarding Aprepluya. Due to Ranovstayo's lack of cooperation, unemployment had risen sharply, and residents accumulated stocks of food and other provisions.

The tweet and the request for surrender

Ms. Kleinbat Vormund was a worker of the Aprepluyan National Bioresearch Laboratory ("**NBL**") located in Segura Province. The NBL has been researching a vaccine against J-VID-18 since April 10, 2018. As a staff member, Ms. Vormund signed a non-disclosure agreement in which she undertook not to disclose anything about her work. If she does not comply, she may be dismissed and prosecuted.

On May 20, 2018, NBL made a declaration on significant progress on the J-VID-18 vaccine project.

On the morning of June 3, 2018, a tweet accused the Aprepluyan authorities not to have done anything to prevent the spread of the virus. Apparently, eight lab technicians working on the J-VID-18 vaccine project at NBL had developed symptoms of the disease. Within a few hours, this information was shared around the world.

By tracing the tweet, the Aprepluya's police were able to retrieve Ms. Vormund's address. Two police officers came to her door to question her about this tweet and its origins. Indeed, the authorities did not confirm the information disclosed and wanted to know where she had obtained it. However, Ms. Vormund did not even open the door. Rather than collaborate with the authorities, she preferred to flee to the consulate of Ranovstayo in the Province of Segura while police was chasing her.

At the Consulate, Ms. Vormund completed a written request in which she explained that her director at NBL was aware of some suspected cases of J-VID-18. However, he did not want to stop the research for a vaccine until he had a first confirmed case.

On June 4, a videoconference was held between the Prime Minister of Aprepluya and the President of Ranovstayo regarding the positive cases of J-VID-18. On this occasion, Prime Minister Haraka requested clarification of Ms. Vormund's status, as they were unable

to question her. Ranovstayo thus let them know that they considered her to be an asylum seeker.

On June 8, 2018, Ms. Vormund was charged with three offenses under Aprepluyan national penal code: (i) causing public disorder, (ii) violation of a governmental nondisclosure agreement, and (iii) interference with a police investigation. On June 9, a public statement requesting the surrender of Ms. Vormund to Aprepluya was made by the prosecutor's Office. However, Ranovstayo continued to deny the request.

On June 24, 2018, Ms. Vormund secretly left the consulate premises, even avoiding a police patrol vehicle at the gates.

The crash

On June 19, 2018, INTERPOL warned Ranovstayo and Aprepluya of the possibility of a terrorist attack by Friends of Justice ("**FOJ**") against one of the two capitals. Aprepluya then quickly put its Air Forces on high alert. The UN Security Council had listed the organization FOJ as a terrorist group since 2016. Its alleged members were under surveillance in Aprepluya. This allowed Aprepluyan authorities to intercept a message confirming a planned attack.

On June 26, a Mantyan Airways plane took off without authorization from Segura Airport. Spotted by the Beauton area air base, the suspicious aircraft did not identify itself or follow standard operating procedures as it approached the capital of Aprepluya. Faced with the silence of the pilot and fearing an imminent terrorist attack, an Aprepluyan fighter plane fired on the aircraft's wing, hoping to force its landing. The plane was indeed only just three-minute flight from the outskirts of Beauton. Unfortunately, the pilot was not able to keep the control of the plane and crashed in an Aprepluyan forest.

Two days later, on June 28, the Aprepluyan Ambassador to the United Nations submitted a letter to the President of the Security Council, informing the Council that Aprepluya had shot down an aircraft over its territory "to protect [its] capital from an apparent terrorist attack".

On July 2, 2018, the International Civil Aviation Organization issued a report accepted by both countries in dispute. This report identifies Ms. Gwo Hye and Ms. Vormund to be the sole occupants of the aircraft. It also demonstrated that the aircraft's defective radio made communication between the plane in flight and any other third party impossible. No weapons or explosives were found in the wreckage.

On July 5, Minister Haraka confirmed the need to take action in the face of what appeared to be a terrorist attack. She also stated that Aprepluya was not responsible and that Ranovstayo was not entitled to any complaint after interfering in their internal affairs.

Firstly, Ranovstayo's entry regulation is to be considered as an additional measure pursuant to Article 43 of the International Health Regulation ("**IHR**")[1]. When additional measures are taken, under Article 43.2 IHR, they must be based on scientific principles or on "available scientific evidence of a risk to human health" or on "advice from WHO" which was not the case here. In addition, pursuant to Article 43.1 IHR, States have the obligation to implement measures that are not more restrictive of international traffic and to use alternative measures that provide appropriate health protection. Moreover, Article 43.6 IHR requires reviewing these additional measures within a period of 90 days, whilst considering advice from the WHO and scientific principles and evidence. Since Aprepluya suffered losses as a result of those violations, Ranovstayo must pay compensation.

Secondly, Ranovstayo's denial of Ms. Vormund's extradition request constitutes an illegal intervention in the internal affairs of Aprepluya as made clear by the Court in the *Asylum* case. Moreover, it violates Article 55 § 1 of the Vienna Convention on Consular Relations. Ranovstayo also violated international law by considering Ms. Vormund as an asylum seeker and consular officials do not have the authority to grant asylum. Moreover, even if it could be considered that Ranovstayo could grant asylum to Ms. Vormund, the conditions were not fulfilled. She committed common crimes, Aprepluya is a democratic republic with elected assemblies and there is no threat to Ms. Vormund's life and no disturbance that could put her in serious danger.

Thirdly, Ranovstayo's counterclaim concerning the Mantyan Airways does not come within the jurisdiction of the Court, as provided by Article 80 of the Statute of the Court. Aprepluya's valid reservation to the Court compulsory jurisdiction prevents the Court from exercising its jurisdiction. The counterclaim concerns Aprepluya's military activities and, alternatively, its domestic jurisdiction. Moreover, the counter-claim is not admissible since Ranovstayo has no interest in its settlement. For lack of nationality link between Ms. Vormund, Ms. Hye and the plane, Ranovstayo may not act in diplomatic protection. Ms. Vormund does not either fulfill the conditions set out by Art. 8 of ILC's Draft Articles on Diplomatic Protection, which does not constitute customary international law. Finally, the essential condition of exhaustion of local remedies was not fulfilled. Therefore, the Court

[1] *International Health Regulations*, World Health Organization (2005). ['IHR'].

may not exercise its jurisdiction on Ranovstayo's counterclaim concerning the Mantyan Airways Aircraft.

Fourthly, the shooting down of the ABP7-744 aircraft did not violate international law, Article 3bis a) of the Chicago Convention being not applicable in an exclusively national context. The other provisions of the Chicago Convention have duly been complied with. If the Court still finds that Aprepluya has violated international law, the circumstances of the case preclude its wrongfulness. The state of necessity and distress are circumstances precluding wrongfulness that apply in this case. Finally, Aprepluya did not violate Article 6 of the ICCPR because the deaths resulting from the shooting down of the aircraft were not arbitrary. The conditions of necessity, proportionality, and reasonableness were also met. Moreover, an error of fact is admissible if it is honest and reasonable, as in this case.

PLEADINGS

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

Following the J-VID-18 outbreak, on April 20, 2018, the World Health Organization's ("**WHO**") Director-General declared it a public health emergency of international concern ("**PHEIC**"). Simultaneously, he issued Temporary Recommendations pursuant to Articles 15 and 49 of the 2005 International Health Regulation ("**IHR**"). These Recommendations urged member states to respect "*social distancing and the use of face coverings […] and the self-quarantine […] travel and trade restrictions [were] not recommended*."[2] Despite these Recommendations, on April 22, 2018, Ranovstayo adopted a regulation governing entry into the country allegedly based on "*the best scientific evidence available*".[3]

There can be no doubt that Ranovstayo is bound by IHR **(A.)** and that Ranovstayo's entry regulation is an additional measure pursuant to Article 43 IHR **(B.)**. However, Ranovstayo violated the strict conditions set out in Article 43 IHR for imposing such measures **(C.)**. Finally, Ranovstayo is obligated to compensate **(D.)**.

A. Ranovstayo is bound by IHR

When it comes to global health law, IHR is the main international legal framework.[4] In 2005, there was a global move towards the institutionalization of "*the "Global Health Security"*[5] *with the aim of avoiding unnecessary interference with international traffic and trade, favoring international cooperation"*[6] as provided in Article 2 of IHR.[7]

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[2] *Compromis*, §8.
[3] *Compromis*, §10.
[4] L. O. GOSTIN, R. HABIBI & B. M. MEIER, (2020), *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats* (SSRN Scholarly Paper ID 3598165).
[5] A. FERHANI & S. RUSHTON, (2020), *The International Health Regulations, COVID-19, and bordering practices: Who gets in, what gets out, and who gets rescued?* Contemporary Security Policy, p.41.
[6] *Id*.
[7] IHR, Art. 2.

According to Article 22 IHR, the regulations adopted by the Organization enter into force for WHO members unless a member States object by a certain date. Since neither Ranovstayo nor Aprepluya objected, they are both bound by IHR.

B. Ranovstayo's entry Regulation is an additional measure within the meaning of Article 43 IHR

Under Article 43 IHR, when a State Party adopts measures not covered by WHO's Temporary Recommendations, it is considered as "additional measures" and must respect specific obligations[8]. Ranovstayo's entry regulation is therefore qualified as an "additional measure".

C. Ranovstayo violated provisions of article 43 IHR

When additional measures are taken, they must be based on scientific principles or on "*available scientific evidence of a risk to human health*" or on "*advice from WHO*"[9] which was not the case here (***1.***). In addition, pursuant to Article 43.1 IHR, States must implement measures not more restrictive of international traffic (***2.***) and to use alternative measures that provide appropriate health protection (***3.***). Moreover, Article 43.6 IHR requires reviewing these additional measures within a period of 90 days (***4.***).

1. Ranovstayo's entry regulation violates article 43.2 IHR

Ranovstayo purports to have adopted its entry regulation pursuant to a risk assessment it conducted based on allegedly "*the best scientific evidence available*".[10] However, Article 43.2 IHR requires that *"[i]n determining whether to implement … additional health measures … States Parties shall base their determinations upon*" the following cumulative conditions:

> (a) "*scientific principles*;
>
> (b) *available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO* (…);
>
> (c) *any available specific guidance or advice from WHO*".[11]

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[8] B. J. VON TIGERSTROM, et Al. (2020), *The International Health Regulations (2005) and the re-establishment of international travel amidst the COVID-19 pandemic*, Journal of Travel Medicine, taaa127.
[9] IHR, Art. 43.2.
[10] *Compromis*, §10.
[11] IHR, Art. 43.2.

Ranovstayo's determinations failed to meet each of these requirements, and were thus implemented in violation of Article 43.2 IHR altogether.

a. Ranovstayo did not base its determination on scientific principles

Minister Adapi stated on April 24, 2018, that Ranovstayo "*fel[t] compelled to take these precautions [talking about the entry regulation]*"[12]. The travel ban was clearly taken under the so-called precautionary principle, meaning that proof of risk had not yet been established. By resorting to this principle, Ranovstayo confused it with the scientific principles required under Article 43.2 IHR.

First, the precautionary principle is not an established principle of customary law that can be invoked by Ranovstayo according to the ICJ and the Appellate Body of the World Trade Organization ("WTO").[13,14] That is why some States speak of a precautionary approach and not of a principle.

In the *Gabčíkovo-Nagymaros Case*, the Court did not consider the precautionary principle as a principle that could bypass the obligations contained in a treaty.[15] By having to recourse solely to this principle, Ranovstayo wrongly assumed that it amounts to a "scientific principle" within the meaning of Article 43.2(a) while it only is a guiding principle for political action deprived of any binding content under international law.

Moreover, Article 43.2(b) IHR excludes that the precautionary principle could be considered as a scientific principle under Article 43.2(a). Indeed, when a risk for human health is not sufficiently scientifically evidenced, States cannot take additional measures on the precautionary principle's basis; rather, it requires that such measures be based on "*the available information including from WHO*". As will be demonstrated below, Ranovstayo also failed to do so.

Even if the Court finds that the precautionary principle was justified in regard to the scientific principles, its use was disproportionate. The precautionary principle does not

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[12] *Compromis*, §12.
[13] M. SCHRODER (2014), *Precautionary Approach/Principle*, Oxford Public International Law.
[14] WTO (1998a), EC – Measures concerning Meat and Meat Products (Hormones), Report of the Appellate Body, AB 1997-4 (WT/DS26/AB/R, WT/DS48/AB/R, January 16, 1998, adopted).
[15] Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, §7. ['Gabčíkovo'].

supplant the proportionality principle[16] as confirmed by the ECJ in *Pesce*".[17] Ranovstayo's entry regulation was not proportionate as it went beyond what was necessary to limit the virus's spread.

Additionally, the principle recognizes that science is just one factor, alongside social and economic considerations[18] which Ranovstayo did not consider when it imposed its travel ban on Aprepluya. The huge economical loss suffered by Aprepluya is significant of Ranovstayo's neglect of these factors in its entry regulation.

Consequently, by not resorting to scientific principles, Ranovstayo violated Article 43.2(a) IHR.

b. Ranovstayo based its determinations on insufficient scientific evidence and did not consider information given from WHO

Ranovstayo based its determination on insufficient scientific evidence (i.) and should have considered information given from WHO (ii.).

i. Ranovstayo based its determination on insufficient scientific evidence

While Ranovstayo purports to have based its determination upon "scientific evidence", it was plainly insufficient, having been collected in the course of a short week[19]. The SPS Agreement case law[20] defined "scientific evidence", as well as what is to be considered sufficient. In *Japan – Apples*, "scientific evidence" was defined as "*evidence gathered through scientific methods*". Ranovstayo did not specify on which scientific method, if any, it was relying on to establish its scientific evidence, pursuant to Article 2.2 SPS Agreement[21]. Moreover, in *Japan – Apples*, the panel distinguished "evidence" from "information"[22]. The

[16] K. MEßERSCHMIDT, (2020), *COVID-19 legislation in the light of the precautionary principle*, The Theory and Practice of Legislation, 8(3), pp.267–292.
[17] Arrêt Pesce and others, Joined Cases C-78/16 and C-79/16, ECLI:EU:C:2016:428, §48.
[18] K. MEßERSCHMIDT, *op. cit.*
[19] *Compromis*, §10.
[20] Panel Report, Japan – Apples, §§8.92-8.93-8.98; Panel Report, *EC – Approval and Marketing of Biotech Products*, §7.1424.
[21] *Id*.
[22] H. NIU, (2007), *A Comparative Perspective on the International Health Regulations and the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures* (SSRN Scholarly Paper ID 1019740).

"relevant scientific information"[23] based on which Ranovstayo adopted its entry regulation is inconsistent with the identical requirements of Article 2.2 SPS Agreement as interpreted by the WTO case-law.

Consequently, Ranovstayo based its determinations on insufficient scientific evidence.

ii. Ranovstayo did not consider information given by WHO

Hence, Ranovstayo entirely failed to meet the conditions under Article 43.2(b) IHR. When scientific evidence is insufficient, States must still base their decisions on "*available information from WHO*"[24]. Even though Ranovstayo conducted its risk assessment on the best available scientific evidence, it is insufficient. Indeed, from April 22 till May 24, 2018, Ranovstayo was the only country that had scientifically established the necessity of closing borders. Consequently, Ranovstayo should have based its entry regulation on available information from WHO which is therefore inconsistent with Article 43.2(b) IHR.

c. Ranovstayo did not base its determinations on available specific guidance or advice from WHO

Third, Ranovstayo did not base its decision on any available specific guidance or advice from WHO pursuant to Article 43.2(c) IHR. On April 27, 2018, WHO's Director-General reminded Ranovstayo that the Temporary Recommendation did not recommend travel restrictions. He also requested from Ranovstayo to reconsider the application of its entry regulation. By formulating such a request, the Director-General implicitly refuted the public health rationale submitted by Ranovstayo to justify its border restrictions. Otherwise, he would have formulated new Temporary Recommendations establishing travel restrictions.

Consequently, Ranovstayo's travel restriction is in violation with Article 43.2 IHR.

2. Additionally, Ranovstayo's entry regulation did not avoid unnecessary disturbance with international traffic and is inconsistent with Article 43.1 IHR

States have the obligation to use the least restrictive measures to provide appropriate health protection, as explicitly stated by Article 43.1 IHR.

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[23] *Compromis*, §12.
[24] IHR, Art. 43.2(b).

Article 43.5 IHR further details the formal obligation that a State must respect when adopting an additional measure that significantly interferes with international traffic. The State must inform WHO within 48 hours of the measure's implementation and "*their health rationale unless these are covered by a temporary or standing recommendation*".[25]

Ranovstayo fulfilled the formal obligation of Article 43.5 IHR by sending the public health rationale to the WHO within 48 hours. However, concerning the substantial obligation, the public health rationale is inconsistent with Article 43.1 IHR. As established in the previous section, Ranovstayo's risk assessment was not based on sufficient scientific evidence, principles or advice from WHO, to justify such a significant interference with international traffic.

The entry regulation taken by Ranovstayo had a severe impact on international traffic since 80% of tourists left Aprepluya. They feared of being stranded in Aprepluya if it were designated a high-risk country[26].

Consequently, Ranovstayo's entry regulation is in breach of Article 43.1 IHR by adopting an unjustified more restrictive measure than WHO's recommendations.

3. Additionally, Ranovstayo's travel ban is more restrictive and invasive than alternatives that were reasonably available and would have achieved the appropriate level of health protection

Article 43.1, § 2 IHR requires that *"[the additional measures] shall not be more restrictive of international traffic and not more invasive to persons than reasonably available alternatives that would achieve the appropriate level of health protection*". Under Article 18 IHR, possible alternatives would have been "*risk communication, surveillance, patient management, and screening at ports of entry and exit*".[27]

Such measures would have been less restrictive and invasive and would have achieved the "appropriate level of health protection" [28] because they are in accordance with WHO's Temporary Recommendation.[29] Additionally, there are no scientific studies asserting the efficiency of stricter measures such as travel bans.[30] Moreover, Article 5.6 SPS Agreement

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[25] IHR, Art. 43.5.
[26] *Compromis,* §30.
[27] R. HABIBI, et Al. (2020). *Do not violate the International Health Regulations during the COVID-19 outbreak.* The Lancet, *395*(10225), 664–666.
[28] IHR, Art. 43.1.
[29] *Compromis,* §8.
[30] N. A. ERRETT, et Al. (2020), *An integrative review of the limited evidence on international*

offers more insight regarding alternative measures before imposing travel restrictions as listed in Australia – Salmon.[31]

It is clear that Ranovstayo did not consider technical and economic feasibility. Ranovstayo had no intention of changing its regulation policy regarding Aprepluya, with no regard whatsoever of the economic consequences on Aprepluya. Due to the lack of cooperation of Ranovstayo, unemployment sharply increased, and residents were stockpiling food and other provisions in Aprepluya. As a consequence, the Ranovstayan entry regulation had resulted in over €130 million in revenue lost by Aprepluya and its nationals.[32]

Additionally, Ranovstayo's decision of closing its borders was significantly out of proportions. The low number of cases was only reported in Segura Province. Aprepluya was handling the spread of the virus very well and had successfully confined it.

Finally, Ranovstayo adopted a measure more trade-restrictive than required to stop the virus's spread. Ranovstayo could have resorted to alternative measures, recommended by WHO before closing its borders and has violated Article 43.1, paragraph 2 IHR.

4. Moreover, the additional measure was not subject to another risk assessment within 90 days as required by article 43.6 IHR

According to Article 43, § 6, IHR "*[a] State Party implementing a health measure pursuant to paragraph 1 or 2 of this Article shall within three months review such a measure taking into account the advice of WHO and the criteria in paragraph 2 of this Article*".

Whether the additional measure adopted by Ranovstayo complied or not with paragraphs 1 and 2 of Article 43 IHR at the time it was adopted, they clearly failed to meet the requirements set out in paragraph 6.

While the travel ban was published on April 22, 2018, it was renewed on 20 July 2018, a short two days before the lapse of a three-month period. Ranovstayo asserted that such renewal was based on a fresh risk assessment and allegedly the "best scientific evidence available".[33] However, it did not conduct a proper review, of its travel ban in light of the criteria set out in paragraph 2. Moreover, it entirely failed to consider advice from the WHO, which was still not recommending travel restrictions, and scientific principles and evidence.

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travel bans as an emerging infectious disease disaster control measure, Journal of Emergency Management, 18(1), 7–14.

[31] Appellate Body Report, *Australia – Salmon*, §194; and Panel Report, *Japan – Apples* §8.162.

[32] *Compromis*, §46.

[33] *Compromis*, §51.

A continuous review based on the evolving scientific evidence is necessary for a better understanding of the best way to tackle the pandemic.

Consequently, the renewal of Ranovstayo's entry regulation is in breach with Article 43.6 IHR.

D. Ranovstayo is obligated to compensate Aprepluya for the resulting economic losses

The obligation to compensate is well-established principle of International Law since the Chorzow Factory case. Codifying the principles applicable in that regard, Article 36 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides that: "*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby."*

Aprepluya has successfully proven in the previous section that Ranovstayo acted in breach of its international obligations under IHR. Those breaches caused significant injury to Aprepluya. The study conducted by the Aprepluyan Ministry of Tourism clearly shows that Ranovstayo's entry regulation resulted in losses in Aprepluya, from tourists' revenues, transport sector and related industries. Those losses were evaluated at over €130 million. Loss profits are a well-established head of damage under international law, as recognized by the ILC in Article 36, § 2, ARSIWA.[34] There is no doubt that Aprepluya's loss profits are duly established under the mentioned report, so that the €130 million should be awarded by the Court as reparation in the form of compensation.

Should the Court consider that compensation amount is insufficiently established, and failing agreement between the Parties in that regard, Aprepluya requests that the question of compensation be settled by the Court in a subsequent phase of the proceedings in this case.[35]

[34] International Law Commission, Draft Articles on State Responsibility with commentaries, p.98. ['ILC State Responsibility'].

[35] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p.168 ['Congo v. Uganda']; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, p.639 ['Diallo case']; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, ICJ Reports 2018, p.15.

II. RANOVSTAYO VIOLATED INTERNATIONAL LAW BY FAILING TO HAND OVER MS. VORMUND TO THE APREPLUYAN AUTHORITIES AFTER THEY REQUESTED HER SURRENDER ON JUNE 9, 2018

On June 4, 2018, Ms. Vormund was still located in Aprepluya when she entered Ranovstayo's Consulate. A derogation to Aprepluya's territorial sovereignty occurred (**A.**) by welcoming her on consular premises to protect her from lawful arrest.[36] Ranovstayo violated its international obligations by considering Ms. Vormund as an asylum seeker[37] (**B.**). Moreover, Ms. Vormund did not fulfill the conditions to be granted consulate asylum (**C.**).

A. Ranovstayo violated international law by interfering in Aprepluya's internal affairs

Ranovstayo intervened in Aprepluya's domestic affairs (***1.***) Indeed, granting asylum to a person wanted in its Home State was recognized by the Court as an unlawful intervention in another State's internal affairs (***2.***) Moreover, Ranovstayo did not respect the receiving State's laws and regulations (***3.***)

1. Ranovstayo intervened in the domestic affairs of another State[38]

Ranovstayo violated the duty not to intervene in matters within another State's domestic jurisdiction. The principle of non-intervention is a fundamental right for states to choose and to implement their sovereign policy[39] in international law.[40] As observed by the Court, this rule "*forbids all states to intervene directly or indirectly in internal or external affairs of*

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[36] Colombian-Peruvian asylum case, Judgment of November 20, 1950: ICJ Reports 1950, p.275. ['Asylum case'].
[37] *Compromis*, §25.
[38] United Nations General Assembly, *Question of Diplomatic Asylum*, Report of the Secretary-General, 13th session, A/10150, September 2, 1975. ['UNGA Report A/10150'], Bahrain, p.15.
[39] United Nations, *Charter of the United Nations*, October 24, 1945, Art. 2.7; Annex Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (1970), Art. 3(1), ['Friendly Relations Declaration']; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 ICJ, §§202-203. ['Nicaragua'].
[40] Friendly Relations Declaration; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103, Annex, §§1-2, (1981) ['Resolution 36/103'].

other states".[41] By allowing Ms. Vormund to stay in the consular premises and by considering her as asylum seeker, Ranovstayo indirectly intervenes in a criminal decision regarding Aprepluya's sovereignty.

The duty not to interfere is confirmed by Article 55 §1 of the Vienna Convention on Consular Relations (VCCR)[42]. For consular officers, this implies a duty of reserve: they may not cause disturbances in the receiving state. Ranovstayo's consular agents did the opposite by allowing Ms. Vormund to remain on the mission's premises.[43]

A political goal can be deduced from this indirect intervention. Because of those statements, Ranovstayo saw an opportunity to add Aprepluya to its "high-risk" countries list.[44] Furthermore, to participate even indirectly in the creation of public disorder in another state is a flagrant violation of international law.[45] Article 2 (e) of Resolution 2131 states that "*the principle of non-interference (...) includes the duty of a State to refrain from any action or attempt, in any form or under any pretext, to destabilize or undermine the stability of another State or any of its institutions*".[46] By not acceding to the extradition request, Ranovstayo tends to promote political unrest in Aprepluya.

2. The ICJ confirmed that when the person concerned is wanted by the local authorities, granting diplomatic asylum is an illegal interference in the internal affairs[47]

Aprepluya was prevented from exercising its sovereign criminal power on its territory because Ms. Vormund entered Ranovstayo's Consulate and was not surrendered. Ranovstayo's conduct is in clear violation of Article 55 § 1 of the VCCR.[48]

In the *Asylum* case, although the premises of the mission are not subject to the host country's laws, the decision to grant diplomatic asylum constitutes a serious interference with the sovereignty of the receiving state.[49] This ruling was reflected by many states.[50]

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[41] Nicaragua, §205.
[42] Vienna Convention on Consular Relations, April 24, 1963, United Nations, Art. 55, §1. ['VCCR'].
[43] *Compromis,* §34
[44] *Compromis*, §29.
[45] Resolution 36/103, Art. 2(e).
[46] *Id.*
[47] Asylum case, p.274.
[48] VCCR, Art. 55, §1.

3. Ranovstayo violated its duty to respect the receiving State's laws and regulations

Pursuant to Article 55 § 1 VCCR, individuals enjoying consular privileges and immunities must respect laws and regulations of the receiving State.[51] Moreover, the Court stated that "*the safety arising from asylum cannot be construed as a protection against the regular application of the laws, (...). This protection would authorize the diplomatic agent to obstruct the application of the State's laws whereas it is his duty to respect them (…)*".[52]

Therefore, this duty implies respect for the national criminal law and its application to Ms. Vormund since she is accused of common crime under Aprepluya's national law.[53] Ranovstayo has the duty to surrender her. Besides, by allowing Ranovstayo's Consulate in Segura Province, Aprepluya was expecting the respect of the International treaties signed by both states. However, Ranovstayo deliberately violated those obligations.

B. Ranovstayo violated international law by considering Ms. Vormund as an applicant for asylum

Ranovstayo had the obligation to surrender Ms. Vormund since there is no legal basis or customary rules justifying is position (***1.***) Moreover, Ranovstayo's Consulate did not have the authority to grant asylum (***2.***). Ranovstayo is thus responsible of omission by not responding to the surrendering requests (***3.***).

1. There is no established legal basis and no customary rule wherefrom Ranovstayo could have not surrender Ms. Vormund

Diplomatic asylum has neither legal basis, nor recognition in international law[54]. As the Court stated in the Asylum case, "*when there is no established legal basis, […], a refugee must be surrendered to the territorial authorities […]*".[55]

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[49] England and Wales, Court of Appeals, "B" and Others v. Secretary of State for the Foreign and Commonwealth Office, Judgment (October 18, 2004) [2004] EWAC Civ 1344, §86. ['"B" and Others'], quoting the Asylum case.
[50] UNGA Report A/10150, Austria p.11.
[51] VCCR, Art. 55, §1.
[52] Asylum case, p.284.
[53] *Compromis*, §32.
[54] Asylum case, p.282 et seq; UNGA Report A/10150, Denmark, p.19.
[55] "B" and Others, §85.

Granting asylum is only a regional practice but is anyway an accepted norm of State practice[56]. Then, granting refuge to an accused person in the receiving state on the premises of the consular mission is not generally recognized in international law[57] unless there is an agreement between the two states. No such agreement exists between the parties. Moreover, several lawful requests have been made by the Aprepluyan authorities to surrender Ms. Vormund[58].

In "B" and Others, the Supreme Court of Appeal has ruled that "*the authorities of the receiving state can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction*".[59] This implies a customary rule of accepting extradition, contrary to Ranovstayo's action.

Finally, the asylum is historically deprived of any juridical basis and is simply an infringement of the territorial state's sovereignty, whatever the nature of the crime underlying the request.[60]

2. Ranovstayo's Consulate has no legal authority considering granting asylum for a person

It was already established in 1953[61] that a consulate is not a place that can be used to escape the normal course of justice. Articles 55 § 1 and § 3 VCCR[62] set out the duty to respect the laws and regulations of the receiving state and not to use the premises of the consulate mission in a manner inconsistent with its functions. Therefore, the consul has no right to offer asylum to anyone whose surrender is lawfully requested by local authorities, if any special custom or entitlement under local law. [63] Most people granted asylum are sought by the local judicial authorities and the consuls' job is not to protect them in violation of the law.[64] The British Government confirmed in the Durban Six case that it exists no right to

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[56] UNGA Report A/10150, Canada p.17.
[57] *Id*., Czechoslovakia, p.18.
[58] *Compromis*, §25, §33 and §45.
[59] "B" and Others, §88.
[60] UN General Assembly, *Question of Diplomatic Asylum*, Report of the Secretary-General, 13th session, A/10139 (Part II), September 22, 1975. ['UNGA Report A/10139'], §§1-23; Satow's Diplomatic Practice, 7th ed., edited by SIR IVOR ROBERTS, Oxford University press 2017, p.233 et seq. ['Satow'].
[61] UNGA Report A/10139, p.54 by referring to the case of Heirs of Shababo v. Heilen of the Jerusalem District Court Execution Office of October 15th, 1953.
[62] VCCR, Art. 55, §1 and §3.
[63] UNGA Report A/10150, Czechoslovakia, p.18.
[64] Satow, p.235 about the Julien Assange case.

grant asylum when this occurs in a consulate premise[65] and a U.S. ambassador also agreed, denying asylum to a person because he attended the consulate and not the diplomatic mission.[66]

3. Ranovstayo is guilty of omission

By not responding to the extradition request, Ranovstayo violated international law by omission.[67] The obligation was not to interfere in the internal affairs of another state. Furthermore, the alleged justification of necessity[68] has no grounds in this case. No essential interest of Ranovstayo was at stake, nor was there any serious and imminent danger. Then, Ranovstayo violated the principle of equity. The Friendly Relations Declaration exposes that judicial equality and respect for the obligation of territorial integrity and independence of other states are fundamental in international law.[69] Nevertheless, Ranovstayo violated this equality when according refuge to Ms. Vormund.

Secondly, under the VCCR, states must collaborate with each other.[70] However, Ranovstayo cut off this collaboration as soon as possible.

Finally, Article 5, b) VCCR promotes friendly relations between the receiving and sending states.[71] These relations have effectively existed between both States for many years. However, Ranovstayo has unanimously decided to stop them.

C. The conditions to grant asylum were not met

The conditions for granting consular asylum are particularly strict because such asylum entails a limitation of the territorial sovereignty. The conditions are related to humanitarian reasons.[72] However, those are not met in this case: Ms. Vormund is guilty of common crimes (***1.***), asylum cannot be opposed to the operation of justice[73] (***2.***) and there is no direct and existing threat to her life (***3.***).

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[65] *Consular Law and Practice*, 3th ed., L.T. LEE and J. QUIGLEY, Oxford University Press 2008, p.365.
[66] *Id.*
[67] Responsibility of States for internationally wrongful acts, Art. 2 and 14, (A/RES/56/83, December 12, 2001). ['ARSIWA'].
[68] ARSIWA, Art. 25.
[69] Friendly Relations Declaration.
[70] VCCR, Art. 5, b).
[71] *Id*.
[72] UNGA Report A/10150, Canada p.18.
[73] UNGA Report A/10139, §135.

1. Ms. Vormund has committed common crimes

Ms. Vormund was charged with common crime by Aprepluya's Prosecutor's Office and those accusations could not possibly become political crimes. Indeed, her motive to publish the tweet was to generate public disorder. She may have had concerns about the pandemic but has never shown any worries about Aprepluya's policies. Therefore, her motive was not political and her surrender must be considered as unobjectionable.[74]

a. Ms. Vormund's tweet was not a political crime because it was made against civil servants and concerned sanitary considerations

The first charge against Ms. Vormund is "causing public disorder"[75]. The E.C.H.R. specified in *Janowski* that "*offensive and abusive verbal attacks*" made against civil servants' actions in a public space had no justification when made on sanitary considerations[76]. The offender made outrageous accusations against the authorities who are civil servants, and on worldwide social networks.[77] Moreover, at the time of the tweet, Aprepluya's public health was well handled. The authorities had taken appropriate measures, in accordance with WHO and therefore, deserved public confidence.[78] Instead, the tweet created public disorder which is a common crime. The Prosecutor's office followed the law by charging Ms. Vormund.

b. Ms. Vormund violated a governmental nondisclosure agreement

The offender was working for a government service at that time and was well-aware of the risks to break her non-disclosure agreement.[79] A governmental nondisclosure agreement is created to prevent the revelation of an invention and therefore may restrict a person's freedom of expression in the State's interest.

Article 19 § 3, ICCPR authorizes restrictions on the freedom of expression.[80] Ms. Vormund has overtaken Aprepluya's restrictions by damaging the NBL's reputation. In her

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[74] *Id*, p.54.
[75] *Compromis*, §32.
[76] Janowski v Poland, Judgment (Merits), App No 25716/94, ECHR 1999-I, (2000), European Court of Human Rights; Grand Chamber; §34. ['Janowski'].
[77] *Compromis*, §18.
[78] Janowski, §33.
[79] *Compromis*, §6.
[80] International Covenant on Civil and Political rights, December 16, 1966, GA resolution 2200A (XXI), Art. 19 §3. ['I.C.C.P'.].

tweet, she accused people and organizations without evidence.[81] Moreover, her statement concerns public health which is of national security matter. She divulged information about what happened in NBL and did it in contravention to her non-disclosure agreement.[82]

2. Aprepluya's prosecution respects the rule of law

To grant consular asylum on the basis of compelling reasons of humanity and arbitrary action, it must be shown that justice would be subordinated to political dictation and that the usual judicial guarantees would be disregarded, *quod non* here. It is not enough to show that a refugee is tried for political offence.[83]

3. There is no existing and direct threat to Ms. Vormund's life

The main reason for granting consular asylum or refusing to surrender persons so protected is the existence of an immediate threat to the life or to the liberty of those persons. According to the European countries and the USA, the only reason to grant diplomatic asylum is on a humanitarian ground, on a case-by-case basis.[84] Ms. Vormund did not fear for her life or her security and she was not fleeing from a situation where she could not have received a fair trial or due process: Aprepluya is recognized as "*a developed parliamentary democracy*"[85] and as a party to multilateral agreements in respect of the fundamental rights and liberties.[86]

Ranovstayo could thus not decline to surrender Ms. Vormund on the grounds of threat to her life or liberty.[87]

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[81] *Compromis*, §18.
[82] *Compromis*, §6.
[83] Asylum case, p.284.
[84] S. RIVELES, "*Diplomatic Asylum as a human right: The case of the Durban Six*", Human Rights Quaterly, February 1989, Vol. 11, No. 1, The Johns Hopkins University Press, p.148.
[85] *Compromis*, §1.
[86] *Compromis*, §54.
[87] E. DENZA, "Diplomatic Asylum", in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011), §21.

III. THE COURT MAY NOT EXERCISE JURISDICTION OVER RANOVSTAYO'S COUNTERCLAIM CONCERNING THE MANTYAN AIRWAYS AIRCRAFT

Under Article 80 of the Rules of Court, there are two conditions to be met in order for a counter-claim to be, "admissible as such[88]". It must come within the jurisdiction of the Court and be directly connected with the subject-matter of the claim of the other party.[89]

The parties jointly recognized that the direct connection requirement under Article 80 is met. In this regard, the Court recorded the agreement of the Parties and there is no need to elaborate any further on it.[90] However, regarding the first condition, Ranovstayo's counterclaim does not come within the jurisdiction of the Court (**A.**).

Moreover, the counter-claim is not admissible (**B.**).

A. The counter-claim does not come within the jurisdiction of the Court

On January 7, 2002, and March 10, 2003, Aprepluya accepted the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2 of the Statute. However Aprepluya attached a reservation to its acceptance of the Court's jurisdiction. There is thus no "jurisdictional link[91]" that would allow the Court to entertain Ranovstayo's counterclaim.

Aprepluya's reservation reads as follows: *"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."*

The Court has no jurisdiction over Ranovstayo's counterclaim based on the terms of this reservation. First, the automatic character does not apply to the part of the reservation concerning Aprepluyan military activities, according to the intention of Aprepluya.[92] Since the counterclaim is based on Aprepluya's military activities, Aprepluya did not consent to the jurisdiction of the Court (***1.***). Second, even if the Court finds the dispute to not fall within the military activities of Aprepluya, it falls within the domestic jurisdiction of Aprepluya and this second part of the reservation, which is automatic, is valid (***2.***).

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[88] Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, ICJ Reports 2010, p.310, §35.
[89] Rules of Court, Art. 80, §1.
[90] See Order of 11 September 2020.
[91] Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, p.432, §46.
[92] *Id*, §48.

1. The counterclaim concerns Aprepluya's military activities, which are excluded from the jurisdiction of the Court

Since the first part of the counter-claim is not self-judging, the Court does not need to address its validity. Aprepluya's intention was to include an automatic character to its reservation but only for the part concerning the domestic jurisdiction of Aprepluya. This intention needs to be taken into consideration, as the Court stated in the Fisheries Jurisdiction case.[93]

The Court agreed in the Case concerning the detention of three Ukrainian naval vessels that the military character of an activity needed to be determined based on an objective evaluation.[94] Based on the information known by Aprepluya at the time of the incident, a rogue airplane was on its way to Beauton and the only possible response from the military was to stop it, based on the terrorist threat posed by Friends of Justice (FOJ). Moreover, the actions of Aprepluya before and after the shoot-down were consistent with the military nature of the incident.[95] Aprepluya's pilot tried to engage with the rogue aircraft and followed all international procedures applicable in such situations. When he was left without response and since the airplane continued its route, it had no choice but to try to force it to land. A report was also conducted the day following the incident. Those elements prove the military character of the incident, which prevents the Court to exercise its jurisdiction on the counter-claim.

2. Alternatively, the counterclaim concerns Aprepluya's domestic jurisdiction, which is validly excluded from the jurisdiction of the Court

Aprepluya is clearly within its sovereignty right to retain parts of its consent to the jurisdiction of the Court. The second part of the reservation, even though self-judging, is valid (*a.*). The counterclaim falls within the domestic jurisdiction of Aprepluya (*b.*). If the Court found the reservation to be invalid, this invalidity would make Aprepluya's consent to the jurisdiction of the Court pursuant to Article 36, paragraph 2, of the Statute disappear (*c.*).

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[93] *Id*.
[94] ITLOS, Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order (25 May 2019), §66.
[95] *Id.*, §54.

a. Aprepluya's domestic jurisdiction reservation is valid, even though it is self-judging

Self-judging ("automatic") reservations are valid. In the Norwegian Loans case, the Court authorized Norwegian to invoke the automatic reservation contained in the French acceptance of the compulsory jurisdiction of the Court by the application of the condition of reciprocity. The Court found in that case that it was without jurisdiction to entertain the dispute, even if it did not clearly examine the validity of such reservation.[96] Aprepluya requests from the Court to declare the second part of its reservation concerning its domestic jurisdiction valid and to declare its incompetence to examine Ranovstayo's counterclaim.

b. The counterclaim falls within the domestic jurisdiction of Aprepluya

Aprepluya's claim that the counter-claim falls within its domestic jurisdiction is based first on a territorial principle (i.) and second on a protective principle (ii.).

i. Aprepluya has jurisdiction based on the territorial principle

First, the alleged crime has taken place within Aprepluya's borders, which triggers Aprepluya's jurisdiction based on a territorial principle.[97] The plane was shot-down while it was flying above Aprepluya and crashed within its territory. Moreover the aircraft was registered in Aprepluya by a company where the shareholders are Aprepluyan. Finally, Ms. Vormund and Ms. Hye, who died in this tragic event, were Aprepluyan citizens. There is thus no reason for Ranovstayo to argue that the Court has jurisdiction over a matter which is clearly within the domestic jurisdiction of Aprepluya.

ii. Aprepluya has jurisdiction based on a protective principle

Second, Aprepluya's national security was threatened.[98] Based on INTERPOL's report of June 19, a terror attack was planned on one of the capitals in the region which would use a bomb-laden civilian airplane as a weapon. When Aprepluyan radar operators spotted the rogue airplane flying towards Beauton, many attempts were made to enter into communication. Based on the absence of response and since the plane continued its route, the

[96] Certain Norwegian Loans (France v. Norway), ICJ Reports 1957, pp.26-27.
[97] Jurisdictional Immunities of the State (Germany v. Italy), ICJ Reports 2012, p.124, §57.
[98] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Separate opinion of President Guillaume, Reports 2002, p.37, §4.

fighter jet had no choice but try to force it to land, unfortunately causing the death of the two persons on board.[99]

Moreover, it was recognized by the United States in the Aerial Incident of July 27, 1955, that Bulgaria was allowed to invoke reciprocally any part of the Unites States' Declaration. In this case, Bulgaria presented the argument that the protection of its territory and airspace fell within the ambit of the domestic jurisdiction reservation made by the United States.[100] In this case, there is no doubt that, based on the protective principle, the interception of the aircraft was a matter "*essentially within the domestic jurisdiction of the United Republic of Aprepluya*".

c. There is no consent from Aprepluya to the jurisdiction of the Court if the second part of its reservation were deemed to be invalid

If the reservation was to be deemed invalid by the Court, it would lead to the disappearance of Aprepluya's consent to the jurisdiction of the Court altogether, as it was made clear by both Judge Lauterpacht in the *Norwegian Loans* case[101] and by Judge Spender[102] in the *Interhandel* case. Aprepluya decided to accept the compulsory jurisdiction of the Court but only with regard to a crucial limitation: its unilateral right to determine whether the dispute falls within its domestic jurisdiction.[103] It is an essential condition of Aprepluya's acceptance of the compulsory jurisdiction of the Court since Aprepluya would otherwise never have made such Declaration.[104]

Moreover, Aprepluya would not have gone through the necessary procedure to adopt such limitation of the compulsory jurisdiction of the Court if its intention was to have the Court regard it as non-existent. There is a well-established principle, according to which there needs to be an unequivocal intention to confer jurisdiction to the Court "in a voluntary and indisputable manner" in order for the Court to uphold it. In this regard, Aprepluya clearly denied the jurisdiction of the Court for matters concerning its domestic jurisdiction.[105]

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[99] *Compromis*, §§38-45.
[100] J. HERBST, *Norwegian Loans* case, In Max Planck Encyclopedia of Public International Law Online.
[101] Separate opinion of Judge Sir Hersch Lauterpacht, ICJ Reports, 1957, pp.57-58.
[102] Separate opinion of Judge Sir Percy Spender, ICJ Reports, 1959, p.57.
[103] See fn 101.
[104] See fn 102.
[105] Arbitral Award of 3 October 1899 (Guyana vs. Venezuela), ICJ Reports 2020, p.31, §113.

B. The counter-claim is not admissible

Ranovstayo cannot invoke Aprepluya's responsibility since Ranovstayo was not personally injured. In Ranovstayo's statement of July 4, Ranovstayo invoked the destination of the plane and the fact that one of its passengers was seeking asylum to prove that it had an interest to introduce a counterclaim before the Court. This is, however, such a tenuous link with Ranovstayo that it does not suffice to establish its legal interest in bringing an admissible counterclaim.

Moreover, because neither Ms. Vormund, nor Ms. Hye, nor Mantyan Airways have Ranovstayo's nationality, the basic condition for the exercise of diplomatic protection is not met (***1.***). Also, local remedies were not exhausted prior Ranovstayo's counterclaim submission (***2.***).

1. Ranovstayo may not act in diplomatic protection of Ms. Vormund, Ms. Hye or Mantyan Airways

Concerning Ms. Vormund and Ms. Hye, Ranovstayo cannot act in diplomatic protection since they were Aprepluyan nationals. Moreover, the plane was registered in Aprepluya and was the property of a company privately owned by Aprepluyan nationals. According to Articles 1 and 3 of the Draft Articles on Diplomatic Protection which reflect customary international law[106], a State has the right to protect one of its nationals or registered companies if he/it was injured by an internationally wrongful act committed by another State[107]. In this regard, Ranovstayo has no right to act in diplomatic protection for Ms. Hye and Mantyan Airways which have no nationality link with that country.

In addition, concerning Ms. Vormund specifically, Ranovstayo cannot act in diplomatic protection based on the fact that she was seeking asylum there. Article 8 of the Draft Articles on Diplomatic Protection does not reflect state practice. When applying the Article in Al Rawi & Others, the English Court recognized that the article was only to be considered *lex ferenda* and "*not yet part of international law*".[108]

Finally, even if the Court found Article 8 to be reflecting state practice, the conditions set out by that article are not fulfilled since they require from Ms. Vormund to have been a

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[106] Diallo Case, §39.
[107] ILC's Draft Articles on Diplomatic protection, 2006, Art. 1 and 3. ['ILC's Draft DP'].
[108] Al Rawi & Others, R. (on the Application of), v. Secretary of State for Foreign Affairs & Another, 2006, EWHC 972, §63.

refugee, lawfully and habitually resident of Ranovstayo at the time. First, concerning the absence of her refugee status, Ranovstayo refers to Ms. Vormund as a person seeking asylum. She was, in fact, never recognized as a refugee. Second, she was maybe lawfully residing on the premises of Ranovstayo's mission in the Segura Province but not a habitual resident. It is impossible to deduce from her short stay of only 22 days that she was a habitual resident of Ranovstayo.[109] Ranovstayo has no right to act in diplomatic protection in this case.

2. Local remedies were not exhausted

According to Article 14 (1) of ICL's Draft Articles on Diplomatic Protection, all local remedies need to be exhausted before a State can internationally act in diplomatic protection.[110] This rule has a customary principle as recognized by the Court in the *Interhandel* case.[111] In this regard, there has been no attempt for reparation before the jurisdictions of Aprepluya concerning Ms. Vormund, Ms. Hye or the aircraft lost by the Mantyan Airways. This important condition was not respected.

Moreover, no exceptions to this rule contained in Article 15 of ILC's Draft Articles on Diplomatic Protection apply here. Aprepluya is a developed parliamentary democracy with an independent judicial power. There was thus a possibility for Aprepluya's jurisdiction to provide for an effective redress[112] if such an effective redress had been required.

For all of those reasons, Ranovstayo could not act in diplomatic protection regarding any of the victims of the shoot-down of the Mantyan Airways Aircraft. The counter-claim is not admissible.

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

Aprepluya did not violate Article 3bis of the Chicago Convention (**A.**). Moreover, the concrete circumstances of the case will lead to the exclusion of the alleged wrongfulness of the conduct (**B**.). Finally, Aprepluya did not violate the right to life provided in Article 6 ICCPR (**C.**).

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[109] *Compromis*, §25.
[110] ILC's Draft DP, Art. 14 (1).
[111] Interhandel Case, Preliminary Objections, ICJ Reports 1959, pp. 6-27.
[112] ILC's Draft DP, Art. 15 (a).

A. Article 3bis of the Chicago Convention has not been violated

Article 3bis of the Chicago Convention sets the framework for the use of force against civil aircraft. The various provisions of the article are either inapplicable (***1.***) or complied with (***2.*** and ***3.***).

1. Article 3bis (a) of the Chicago Convention does not apply in this case because of its exclusively domestic context

On the one hand, Article 3*bis* (a) of the Chicago Convention prohibits the use of weapons against civil aircraft in flight under reserve of the states' rights and obligations under the UN Charter.

On the other hand, the UN Charter, in Article 2, paragraph 1, enshrines the principle of state sovereignty. It reaffirms the right of a State to use domestic force provided compliance with its human rights and humanitarian law obligations.[113]

The downed aircraft was registered in Aprepluya and was flying over Aprepluya territory when it was intercepted by Aprepluya authorities.[114] In this exclusively national context, a combined reading of the two aforementioned articles leads to the recognition of the latitude that a State has when it considers that it must use force on its own territory. Thus, the legality of the forceful measures must be evaluated only in light of Aprepluya's national law and its international human rights obligations[115].

Moreover, the application of Article 3*bis* in an exclusively national context is unsustainable. Indeed, self-defence under the UN Charter is the only effective mechanism that allows a state to protect itself, without violating the Chicago Convention, from an attack perpetrated by a civil aircraft. However, according to Article 51 of the UN Charter, self-defence can only apply in an interstate context[116], which deprives any state of any reaction in this type of scenario. Robin Geiß argues that thinking that this provision is intended to apply in a national context is a misinterpretation that leads to an inconsistent result. He recommends a teleological reading which limits the scope of the application of Article 3*bis* (a) to foreign-

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[113] S. BESSON, *Sovereignty*, In Max Planck Encyclopaedia of Public International Law Online. n° 76 and 130 to 140.
[114] *Compromis*, §41.
[115] R. GEIß, "*Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3bis of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz*", p.250.
[116] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p.136, §139; Congo v. Uganda, §146.

registered civil aircraft.[117] Professor Milde also recalled that the purpose of this article is to regulate mutual relations between States, never national situations.[118]

Situations without a foreign element do not fall within the scope of Article 3bis. Therefore, this provision is inappropriate since the incident is exclusively domestic.

2. Article 3bis (b) of the Chicago Convention has not been violated

According to Article 3*bis* (b) of the Chicago Convention, Aprepluya had the right to order the plane's landing because it was flying over its territory without authorization. In addition, there were reasonable grounds to conclude that the aircraft was being used for purposes inconsistent with the objectives of the Chicago Convention. Indeed, a heightened state of alert was necessary because of the threat of an airborne terrorist attack on the country. In such a context, an unidentified aircraft that does not respond to air force orders cannot be considered peaceful.

The state agent followed all the procedures in force. He closely followed the international regulations and the rules of domestic law. The ghost plane did not respond to any of the signals. No radio contact could be established despite several attempts. The standard procedure using light signals also remained unanswered. Tracers fired across the path of the aircraft also had no effect. The final conversation of the passengers recorded in the black box testifies to the veracity of these statements[119]. Ms. Vormund and Ms. Hye can be heard wondering how to react to the signals and tragically decided not to do so in order to continue on their way. The possibility of a terrorist attack could not have been ruled out.

Aprepluya therefore had the right to intercept the aircraft and to demand its landing in accordance with the Chicago Convention.

3. Article 3bis (d) of the Chicago Convention has not been violated

Article 3*bis* (d) of the Chicago Convention states that: "*Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention*."

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[117] R. GEIß, *op. cit.*, p.251.
[118] V. J. AUGUSTIN, *ICAO and the use of force against civil aerial intruders*, 1998. p.189.
[119] *Compromis*, §43.

In this paragraph, the verb “prohibit” indicates an obligation of conduct. If the authors of the treaty had wanted to express an obligation of result, the word "prevent" would have been inserted. Therefore, a State satisfies this obligation if adequate laws and regulations exist.[120] This is the only acceptable interpretation since an obligation of result would create a disproportionate burden on the Contracting States. Aprepluya cannot therefore be accused of any breach because there are regulations to this effect in its domestic law and the State acted with due diligence.

Blaming Aprepluya for shortcomings in its air safety system is without merit. A broad interpretation of this provision cannot impose new obligations on Aprepluya.

B. Any wrongful character of the shooting down of the aircraft is precluded by the specific circumstances of the case

In international law, the occurrence of certain events makes it possible to exclude the wrongfulness of conduct that is not in conformity with a State’s international obligations. These circumstances precluding wrongfulness are set out in chapter V of ARSIWA. If the Court finds that Aprepluya violated international law by shooting down the aircraft, the specific circumstances of the incident preclude its wrongfulness.

1. Necessity

Article 25 recalls that a state of necessity can preclude the wrongfulness of an act.[121] In the Gabčíkovo-Nagymaros case[122], the Court established strict conditions of applications.

Firstly, an essential interest of the State (1) must have been threatened by a "grave and imminent peril" (2). In this case, Aprepluya’s main interest lies in the safety of its citizens and the protection of the capital’s infrastructure. The threat of an airplane hijacked to serve as an air-to-ground weapon by crashing into Beauton must be qualified as a serious danger. The danger was also imminent as the plane was approaching the capital. Lieutenant Defesa waited until the last moment to act, i.e., just before the plane entered the outskirts of the city. If the plane had been able to reach Beauton, it would have been too late to act and forcing it to land. Otherwise, it would have led to an unpredictable and certainly disastrous result.

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[120] V. J. AUGUSTIN, *op. cit.*, p.207.
[121] ARSIWA, Art. 25.
[122] Gabčíkovo, §§40-42.

Secondly, the objectively wrongful act must have been the "only means" (3) of safeguarding this essential interest. It is clear that Aprepluya considered the use of a weapon against the aircraft only as a last resort. Lieutenant Defesa first tried to communicate with the airplane but without success. It was only after having warned the suspect aircraft by means of a tracer that it was finally decided to resort to force in the face of its silence or absence of any other reaction.

Nor must the unlawful act have seriously impaired an essential interest of the State to which the obligation existed (4). No other state can claim to have an essential interest infringed since it is of Aprepluya's internal matter.

Finally, Aprepluya cannot have contributed to the occurrence of the state of necessity. *In casu,* Aprepluya cannot be held responsible for the reckless and illegal behaviour of private persons.

2. Distress

Article 24 codifies distress.[123] The perpetrator of a wrongful act cannot be held responsible if he has no other reasonable means in a situation of distress to save his life or the lives of other persons entrusted to his care than to violate the obligation of which he is a debtor.

The military authority that ordered the pilot to fire on the aircraft is the author of the act. It is inherent in the military function of a state to have a duty to protect its citizens. Thus, the air force has a duty to protect civil society from air attacks. It is reasonable to say that those who would have been affected by the potential attack were entrusted to their care. The ILC reiterated that distress can only apply in cases where life is at stake, which is the case here.[124]

There was no other option in this state of distress to avoid the crash of the aircraft. Aprepluya took all necessary precautions before deciding that the use of a weapon was the only remaining solution.

[123] ARSIWA, Art. 24.
[124] ILC State Responsibility, §§192–193.

C. Aprepluya did not violate the right to life under Article 6 of the ICCPR.

Two people died in the plane crash. However, Aprepluya did not violate the right to life because these deprivations of life are not arbitrary. Moreover, even if Aprepluya relied on an error of fact, it is admissible if it is honest and reasonable.

1. Deprivation of life is not arbitrary.

Article 6 ICCPR enshrines the right to life: "*Every human being has the inherent right to life. [...] No one shall be arbitrarily deprived of his life*."

Although it is inherent to human beings, this right is not absolute. The provision implicitly recognizes that some deprivations of life are not arbitrary.[125] The arbitrariness of a deprivation of life must be interpreted broadly. The inappropriateness, unfairness and unpredictability of the act must be analysed. To this must be added considerations of reasonableness, necessity, and proportionality.[126]

The Human Rights Committee has recalled that: "*The use of potentially lethal force in the course of law enforcement is an extreme measure which should be used only when strictly necessary to protect life or prevent serious harm arising from an imminent threat*".[127] In this case, the use of potentially lethal force took place in a situation of imminent threat. The state of air alert coupled with the illegal and suspicious behaviour of the aircraft could only lead to such an incident. The Aprepluya authorities had no other choice to protect citizens' lives and the security of their capital city to act in such a manner. Bearing in mind the context, it can be stated without any doubt that this would have been the behaviour of any reasonable agent of the state.

As a qualified pilot, Ms. Hye had to expect such consequences. A properly trained pilot cannot ignore and violate the rules of civil aviation. Even less could she ignore the terrorist threats to her profession. Moreover, any prudent and diligent aircraft commander cannot ignore the warnings of a military aircraft by thinking that "*they are not far from the airspace of Ranovstayo and that by continuing their route, they will be let go*".[128]

Aprepluya also acted in accordance with the principle of proportionality. Faced with the endangerment of thousands of lives, the felling of a plane over a forest is the lesser evil. In addition, the Aprepluya's authorities ordered a short burst of ammunition to be fired at the

[125] CCPR/C/GC/36, §10.
[126] *Id.*, §12.
[127] *Id*.
[128] *Compromis*, §43.

wing root, forcing the plane to land while giving it a chance to land in an emergency. The loss of life of the passengers could have been foreseeable but was therefore unintentional.
Aprepluya cannot be found guilty of violating the right to life. While there is a deprivation of life, it is not arbitrary and therefore does not violate Article 6 ICCPR.

2. In the field of human rights, Aprepluya can rely on honest and reasonable factual mistakes

As demonstrated above, Aprepluya did not violate the right to life under Article 6 ICCPR. However, it seems useful to recall that to the extent that Aprepluya made an error of fact when it acted, it cannot be held liable.

The European Court of Human Rights held in the case of McCann v. United Kingdom that deprivation of life based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently proves to be false may still be justified.[129] Had it held otherwise, it would have imposed an unrealistic burden on the state and its law enforcement agencies in the performance of their duty, perhaps to the detriment of their own lives and the lives of others.[130]

In that case, the ECtHR recognized a violation of the right to life only because there had been shortcomings in the overall planning of the operation. However, the circumstances of this case are different in that regard because, given the urgency of the situation and the data to the knowledge of Aprepluya, no other reaction could be envisaged.
An error, provided that it is honest, may therefore suffice to excuse an objectively unjustified use of lethal force according to the teachings of the McCann decision.

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[129] M. MILANOVIC, "*Mistakes of Fact When Using Lethal Force in International Law*", EJIL: Talk! (January 14, 2020) (Part I).
[130] *Id.*

PRAYER FOR RELIEFS

The United Republic of Aprepluya respectfully requests the Honourable Court to adjudge and declare that:

I. Ranovstayo violated international law by applying its entry regulation to Aprepluya, and is thus obligated to compensate it for the resulting economic losses;

II. Ranovstayo violated international law by failing to hand over Ms. Kleinbat Vormund to the Aprepluyan authorities after they requested her surrender on June 9, 2018;

III. The Court may not exercise jurisdiction over Ranovstayo's counterclaim concerning the Mantyan Airways Aircraft; and

IV. Even if the Court were to exercise jurisdiction over the counter-claim, Aprepluya did not violate international law by shooting-down the aircraft.

Respectfully submitted,

Agents for the Applicant.

266R

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE 2021 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE J-VID-18 PANDEMIC

UNITED REPUBLIC OF APREPLUYA

(APPLICANT)

v.

DEMOCRATIC STATE OF RANOVSTAYO

(RESPONDENT)

MEMORIAL FOR RESPONDENT

TABLE OF CONTENT

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

UNITED NATIONS DOCUMENTS

ICJ and PCIJ CASES

OTHER INTERNATIONAL CASES

NATIONAL CASES

DOCTRINE

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FOSTER, C., *Justified Border Closures do not violate the International Health Regulations 2005,* EJIL : Talk !, (2020). 2, 7

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STATEMENT OF JURISDICTION

By virtue of the Joint Notification and the Statement of Agreed Facts ["**Compromis**"], concluded on September 11, 2020, and in accordance with Article 40(1) of the Statute of the International Court of Justice **["ICJ"]**, the United Republic of Aprepluya ["**Aprepluya"/ "Applicant**"] and the Democratic State of Ranovstayo **["Ranovstayo"/ "Respondent"**] respectfully submit the present dispute to this Honourable Court. The parties have accepted the compulsory jurisdiction of the Court, pursuant to article 36 (3) and article 36 (2) of the Statute of the Court, respectively.

Both parties agreed that the Court would determine all issues of jurisdiction and admissibility alongside the merits in one single set of proceedings. The Compromis constitutes a statement of agreed facts and is without prejudice to Aprepluya's objection regarding the Court's jurisdiction on Ranovstayo's counterclaim. Each party shall accept the judgment of the Court as final and binding and shall execute it in good faith.

QUESTIONS PRESENTED

I. Whether 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;

II. Whether Ranovstayo did not violate 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; and

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

STATEMENT of FACTS

Background

The Democratic State of Ranovstayo and the United Republic of Aprepluya are two neighboring states. Ranovstayo has a larger surface area and at least eight times more people to protect than Aprepluya. Ranovstayo is a developed democratic nation. Bogpadayo is its capital city. Its economy is centered on its petroleum, agricultural and manufacturing sectors.

The busiest airport in the region, in terms of the number of flights and passengers, is located in Bogpadayo. A large number of Ranovstayans spend their vacations in the Segura Province in Aprepluya. Those tourists represent 25% of the tourists in Aprepluya. For this reason, Ranovstayo decided to establish a consulate there in 1980.

Ranovstayo's entry regulation in response to the J-VID -18 outbreak

In March 2018, Hadbard, a country located eight time zones from Ranovstayo, reported the emergence of a dangerous and deadly unknown virus strain called J-VID-18. By the end of March, six patients diagnosed with the virus had died.

Due to the rapid spread of the virus, the Ministry of Health in Ranovstayo responded quickly with an intensive risk assessment. This assessment was based on the best scientific evidence available. According to this, the Ranovstayan Home Office has issued a regulation governing entry into the country. The regulation barred entry to the country to all non-Ranovstayan nationals who had traveled to a "high-risk country" within the past 18 days. Ranovstayan nationals in the same situation had to be quarantined for 18 days.

Less than 48 hours after the regulations were communicated, Ranovstayo informed the World Health Organization **("WHO")** of these measures, providing the Organization with the public health rationale and relevant scientific information underlying the government's decision.

The Ranovstayan Minister of Health stressed the need to adopt the above-mentioned regulations to ensure the safety of Ranovstayan nationals. He emphasized that it was "*absolutely necessary to have a mechanism in place to protect our nationals and residents from the serious threat posed by J-VID-18*".The relevance of these measures has proven to be effective. Indeed, on May 15, 2018, WHO declared J-VID-18 a pandemic and should be treated as a public health emergency of international concern. As a result of this announcement, twenty-four countries followed Ranovstayo's example and adopted

regulations restricting or barring entry into their territories of individuals from "high-risk countries".

Afterwards, President Kalkan of Ranovstayo notified her counterpart that the Ranovstayan authorities were willing to add Aprepluya to its list of "high-risk countries", unless Aprepluya "properly managed the virus outbreak in Segura Province".

The unknown evolution of this pandemic forced the Ranovstayan government to act quickly and call for precaution. Ranovstayo therefore had no choice but to put Aprepluya on the list of "high risk countries". On November 20, 2018, there were only 31 confirmed cases, all of whom had just returned from abroad and were quickly quarantined upon arrival. To date, the cases of J-VID-18 confirmed by Aprepluya have reached 2,445, including 1,995 in Segura Province.

Ms. Vormund's request for asylum

On the morning of June 3, 2018, an anonymous tweet was published regarding positive cases of J-VID-18 National Bioresearch Laboratory **("NBL")** in the Aprepluya. Although some people developed symptoms of the disease, research continued and the government kept this fact secret.

Later that day, Ms. Vormund, an Aprepluyan employee at NBL, came to the Ranovstayo Consulate in Segura Province, after fleeing her home. She was seeking asylum. In her written request made at the Consulate, she indicated that she was the author of the anonymous tweet.

She published this because a life-threatening issue was kept secret. It was a worldwide problem and her authorities, whether at work or at the national level, did nothing about it. She took refuge in Ranovstayo's Consulate because she knew she would be in trouble if she stayed in Aprepluya. Indeed, her director had made that clear: she could not make public what was happening at NBL.

Despite these threats, Ms. Vormund felt that the confirmed case of J-VID-18 was of national and international interest and was not directly relevant to the research. She informed the consular officer that she was afraid to remain in her country.

On June 4, 2018, President Kalkan granted Ms. Vormund the right to seek asylum because the Ranovstayan authorities considered her revelations to be of great importance. He allowed her to remain in the Consulate until it could be determined whether she was under criminal investigation in Aprepluya and, if so, for what offense.

On the same day, Aprepluya made a public statement about the confirmed cases of J-VID-18 in NBL. Ranovstayo took this statement as a consequence of Ms. Vormund's tweet.

On June 8, 2018, Ms. Vormund was officially charged by the Aprepluyan Prosecutor's office with three offenses. She was facing 20 years in prison, as the authorities of Aprepluya made clear. However, Ranovstayo did not consent to her surrender.

The crash of the Mantyan Airways aircraft

On June 25, 2018, Ms. Gwo Hye, a pilot with Mantyan Airways, warned her office airline at night that she was going to take a plane to head to Ranovstayo. She added that she was transporting Ms. Vormund in order for her to apply for asylum there.

On June 26, the plane transporting the two women was shot down by the Aprepluya Air Force and crashed in an Aprepluyan forest between the Province of Segura and Beauton. The Prime Minister of Aprepluya made a public statement on the event a few hours later, trying to justify the shooting by the failure of the plane to respond to Aprepluya's injunctions. It would appear that the defective radio in the aircraft made it impossible to communicate between the plane in flight and any other third party. No weapons or explosives were found in the wreckage. Ms. Hye and Ms. Vormund both died in this display of strength.

On July 4, Ranovstayan President's office issued a statement on the incident. They condemned the shooting down by Aprepluya of the Mantyan Airways plane and the illegal killing of Ms. Vormund and her pilot.

Firstly, even if Ranovstayo is bound by obligations of the IHR it can act in accordance with its national law. Ranovstayo acted in accordance with the precautionary principle which is an established customary law principle. Even if the Court considers Ranovstayo's entry regulation as an additional measure, it did not violate the relevant IHR provisions. Ranovstayo's entry regulation was based on scientific principles or on "available scientific evidence of a risk to human health" or on "advice from WHO"[131]. In addition, pursuant to Article 43.1 IHR, States can implement a measure that is more restrictive of international traffic and to use alternative measures, if they exist. However, they must achieve the same or greater level of health protection. Moreover, Article 43.6 IHR requires reviewing these additional measures within a period of 90 days, whilst considering advice from the WHO and scientific principles and evidence, which was the case here.

Secondly, Ranovstayo did not violate international law by not returning Ms. Vormund to Aprepluya's authorities. First of all, Aprepluyan authorities violated several of her fundamental rights, such as the right to freedom of expression, the right to leave and return freely to her country, and in particular the right to work in safe sanitary conditions. As a result of these violations, Ranovstayo had the right and duty to grant her refuge in its Consulate under Article 14 of the Universal Declaration of Human Rights and under Article 33 of the Geneva Convention Relating to the Status of Refugees. Furthermore, the conditions for granting asylum to Ms. Vormund were met. She was accused of committing political crimes and a direct and urgent threat to her freedom existed. Finally, Ranovstayo did not intervene in the internal affairs of Aprepluya. It was a sovereign state that granted refugee status to a person on the basis of humanitarian considerations.

Thirdly, Ranovstayo's counterclaim concerning the Mantyan Airways comes within the jurisdiction of the Court, as provided by Article 80 of the Statute of the Court. Aprepluya's reservation is invalid as a whole based on its self-judging character. In any case, the dispute does not concern nor military activities nor Aprepluya's domestic jurisdiction. Moreover, the counter-claim is admissible since Ranovstayo can act in diplomatic protection and since the local remedies were exhausted. In any case, based on the *erga omnes partes* character of the obligations at stake, Ranovstayo had an interest in bringing the question to the Court. Therefore, the Court may exercise its jurisdiction on the counter-claim brought by Ranovstayo concerning the Mantyan Airways Aircraft.

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[131] *International Health Regulations*, World Health Organization (2005). ['IHR'], Art. 43.2.

Finally, Aprepluya violated international law by shooting down the plane. Article 3bis of the Chicago Convention prohibits the use of weapons against civil aircraft in flight. This case falls within the scope of the Convention and Aprepluya is bound by it. The various obligations provided for in the article have not been complied with. There are no circumstances justifying killing. Aprepluya also violated the right to life under Article 6 ICCPR. Two murders were committed as arbitrary deprivations of life. Finally, Aprepluya cannot escape responsibility because it relied on an error of fact to act.

PLEADINGS

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

Following the J-VID-18 outbreak, on April 20, 2018, the World Health Organization's **("WHO")** Director-General declared the J-VID-18 a public health emergency of international concern **("PHEIC")**. Simultaneously, he issued Temporary Recommendations pursuant to Articles 15 and 49 of the 2005 International Health Regulation **("IHR")**. Ranovstayo reacted quickly by conducting an intensive risk assessment based on the best scientific evidence available. Based on this scientific report, Ranovstayo adopted a regulation governing entry into the country, to combat the spread of the disease. Less than 48 hours after, Ranovstayo informed the WHO of these measures providing the Organization with the public health rationale and relevant scientific information underlying the government's decision.

Ranovstayo highlighted the necessity of adopting the aforementioned regulations to guarantee the safety of its nationals[132]. The relevance of these measures proved to be effective. Indeed, Ranovstayo's response to tackle the spread of the J-VID-18 was groundbreaking; more than twenty countries followed by adopting travel restrictions. Additionally, Ranovstayo's number of confirmed cases was very low compared to Aprepluya who did not opt for such regulation.

Even if Ranovstayo is bound by the IHR, it does not prevent it from acting in accordance with its national law (**A.**). Secondly, even if Ranovstayo's entry regulation is an additional measure, Ranovstayo did not violate provisions of Article 43 IHR (**B.**).

A. Ranovstayo can act in accordance with its national law

Ranovstayo is bound by the IHR, however Aprepluya failed to interpret properly the Article 3.4 IHR and Article 43 IHR.

Article 3.4 IHR explicitly leaves room for State Parties to act in conformity with their sovereign rights. During the negotiations of the IHR in 2005, the Swiss government made crystal clear that "*in accordance with the WHO constitution […] the State's sovereignty to choose a higher level of protection for its population than the internationally agreed minimal*

[132] *Compromis*, §14.

standard should be respected by the IHR".[133] This position is undisputed. In other words, the IHR is a minimum health protection and it does not impair the right of Member States to take containment measures. In this vein, Ranovstayo adopted the entry regulation in accordance with its national law.[134]

Moreover, the interpretation of Article 43 IHR "clearly leaves room for action going beyond that recommended by the WHO, consistent with respect for States' sovereign rights (IHR, Article 3.4)".[135] The IHR acknowledges that State Parties are not prohibited from adopting health policies that are more restrictive than those recommended by the WHO in relation to particular public health threats or PHEIC, pursuant to Article 43.1 IHR. A similar principle exists under Article 3.3 SPS Agreement.[136,137]

B. Ranovstayo's entry regulation conforms with article 43 IHR

Even if Ranovstayo's entry regulation is considered as an additional measure, Ranovstayo fulfilled all its obligations under Article 43 IHR.

First, Ranovstayo's entry regulation was based on scientific principles or on "*available scientific evidence of a risk to human health*" or on "*advice from WHO*"[138] (***1.***). In addition, pursuant to Article 43.1 IHR, States can implement a measure that is more restrictive of international traffic and to use alternative measures. However, they must achieve the same or greater level of health protection (***2.***). Moreover, Article 43.6 IHR requires reviewing these additional measures within a period of 90 days, whilst considering advice from the WHO and scientific principles and evidence, which was the case here (***3.***).

1. Ranovstayo's entry regulation is in conformity with Article 43.2 IHR

Aprepluya purports that Ranovstayo's entry obligation was adopted in contradiction of obligations under Article 43.2 IHR. However, Ranovstayo adopted its entry regulation pursuant to a risk assessment it conducted taking into account "*the best scientific evidence*

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[133] A. SPAGNOLO, (2017), *(Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility*, Global Jurist, 18(1).
[134] *Compromis*, §10.
[135] C. FOSTER (2020), *Justified Border Closures do not violate the International Health Regulations 2005*, EJIL: Talk!
[136] *Id.*
[137] *Agreement on the Application of Sanitary and Phytosanitary Measures*, World Trade Organization (1995) [SPS Agreement].
[138] IHR, Art. 43.2.

available".[139] Ranovstayo acted in accordance with Article 43.2 IHR which requires that *"[i]n determining whether to implement … additional health measures … States Parties shall base their determinations upon"* the following cumulative conditions*:*

> *"(a) scientific principles;*
>
> *(b) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies; and*
>
> *(c) any available specific guidance or advice from WHO*".[140]

In the present case, Ranovstayo's determinations met each of these requirements.

a. Ranovstayo based its determination on scientific principles

Minister Adapi stated on April 24, 2018 that Ranovstayo "*in light of the scientific evidence, fel[t] compelled to take these precautions [talking about the entry regulation]*".[141] While scientific agreement might not yet have been achieved, the precautionary principle justifies taking preventive measures to avoid any harmful situation, such as the current J-VID-18 pandemic. Indeed, the precautionary principle arose from the concern that complete scientific proof is a too stringent criterion for intervention and that, beyond the scope of science, some form of reasonable argument should be sought.[142] Ranovstayo did not confuse the precautionary principle with the scientific principles required under Article 43.2 IHR, interpreted in light of the similar requirement contained in Art. 2.2 of the SPS Agreement[143].

First, the precautionary principle is an established principle of international law which is explicitly included in a number of international environmental agreements.[144] This principle "*justifies measures to prevent damage in some cases even though the casual link cannot be clearly established on the basis of available scientific evidence*".[145] In *Etimine*, the

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[139] *Compromis*, §10.
[140] IHR, Art. 43.2.
[141] *Compromis*, §12.
[142] E. VECCHIONE, (2012), *Is it Possible to Provide Evidence of Insufficient Evidence? The Precautionary Principle at the WTO*, Chicago Journal of International Law: Vol. 13: No. 1, Art. 7.7.
[143] SPS Agreement, Art. 2.2.
[144] Such as the United Nations Framework Convention on Climate Change, and the Marrakech Agreement of 1994 establishing the World Trade Organization.
[145] K. MEßERSCHMIDT, (2020), *COVID-19 legislation in the light of the precautionary principle*, The Theory and Practice of Legislation, 8(3), 267–292.

ECJ had to analyze the claim that precautionary steps be deferred for the sole reason that research was ongoing. The ECJ considered that "*the principle […] has now achieved the status of regional customary law to the extent that it has been embodied as 'constitutional law' in Article.191 (2) TFEU*".[146] Hence, Ranovstayo can invoke the precautionary principle as customary law.

The recourse to the precautionary principle upholds that it must be based on scientific principles. In *Afton Chemical*, the ECJ specified the application criteria of the precautionary principle: "*first, identification of the potentially negative consequences for health […] and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available […]*".[147] Ranovstayo fulfills both requirements. The negative consequences of the J-VID-18 on human health were critical.[148] Ranovstayo "*conducted an urgent and intensive risk assessment, taking into account […] the best scientific evidence available*".[149] Therefore, even if Ranovstayo acted on basis of the precautionary principle it relied on scientific principles.

Additionally, the precautionary principle is justified as long as its application remains proportionate and prudent[150] and that no new elements prove the inefficiency of the measure taken under this principle. There was no new evidence showing "*that risk can be contained by less restrictive measures than the existing measures*".[151] On the contrary, all new elements were confirming the necessity of adopting travel restrictions, such as the virus' spread and the increasing confirmed cases.[152] The position taken by Ranovstayo was also confirmed by the fact that more countries were following Ranovstayo's lead and closing their borders.[153]

Finally, the principle recognizes that science is just one factor, alongside social and economic considerations.[154] Ranovstayo considered these considerations when it imposed its travel ban on Aprepluya. Ranovstayo was aware of the "*inconvenience that this temporary*

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[146] ECJ Case, C-15/10 Etimine, (2011), ECR I-6681, §§128-129.
[147] ECJ Case, C-343/09 Afton Chemical, (2010) ECR I-7027.
[148] *Compromis*, §4.
[149] *Compromis*, §10.
[150] Health Council of the Netherlands, Advisory Report Prudent Precaution, September 26, 2008.
[151] ECJ Joined Cases C-78/16 and C-79/16, §50 referring to Case C-504/04 Agrarproduktion Staebelow (2006) ECR I-679, §40.
[152] *Clarifications*, §7.
[153] *Compromis*, §16.
[154] K. MEßERSCHMIDT, *op. cit.*

measure may cause but protecting the lives of all Ranovstayans outweighs this small disruption".[155]

Consequently, Ranovstayo based its determination on scientific principles as required by Article 43.2(a) IHR.

b. Ranovstayo based its determinations on scientific evidence

Aprepluya claims that Ranovstayo did not base its determinations on sufficient scientific evidence (i). Even if the Court finds that scientific evidence was insufficient, Ranovstayo acted out of precaution, according to the interpretation of Article 5.7 SPS Agreement which applies here *mutatis mutandis* (ii). Pursuant to Article 43.1 IHR, Ranovstayo can implement health measures in accordance with its national law and is not bound by information given from WHO or by specific guidance or advice from WHO for that matter (iii).

i. Ranovstayo based its determinations on scientific evidence

Ranovstayo considered the best scientific evidence available before closing its borders.[156] Minister Adapi expressed how Ranovstayo, "*on light of the scientific evidence*"[157], felt compelled to take these precautions. Ranovstayo also invited other countries to consider adopting the same regulation in order to prevent the spread of the virus.[158] The accuracy of Ranovstayo's scientific evidence proved to be sufficient. Indeed, as of November 2018, there were 2,445 confirmed cases of J-VID-18 reported in Aprepluya whereas only 31 were recorded in Ranovstayo.[159] Those 31 confirmed cases were contracted from nationals coming from abroad.[160]

ii. Ranovstayo rightly acted out of precaution

Even if the Court finds that scientific evidence was insufficient, Ranovstayo acted out of precaution. In another context, Article 5.7 of the SPS Agreement, as interpreted in *EC-*

[155] *Compromis,* §11.
[156] *Compromis,* §10.
[157] *Compromis,* §12.
[158] *Id.*
[159] *Clarifications,* §7.
[160] *Id.*

Biotech Products[161] and in *Australia – Apples* [162], allows "*Members [to] provisionally adopt sanitary or phytosanitary measures... [while they] ...seek to obtain...additional information...and renew the sanitary or phytosanitary measure accordingly within a reasonable period of time*".[163] Here also, Ranovstayo had to act quickly and could not wait for scientific certainty to be established.[164] Therefore, Ranovstayo could implement the entry regulation according to a precautionary approach that is similarly well-established under the SPS Agreement. Moreover, as made clear below, Ranovstayo respected the specific 90-day revision requirement under the IHR.

iii. Ranovstayo was not limited by the information given from WHO or by specific guidance or advice from WHO for that matter

Aprepluya purports that Ranovstayo did not base its determinations information given from WHO or on any available specific guidance or advice from WHO pursuant to paragraph (b) and (c) of Article 43.2 IHR.

However, as established in section (A), Article 43.1 IHR leaves room for States to adopt measures beyond what is recommended by the WHO, provided that rationality requirements are met, which is the case here.

2. Additionally, Ranovstayo's entry regulation caused no unnecessary disturbance with international traffic and was not more restrictive nor more invasive than alternatives

Article 43 IHR does not preclude States from adopting a measure that might cause significant disturbance to international traffic as long as it is justified. It would be contrary to the purpose of the IHR not to adopt effective measures that would considerably limit the spread of the virus.[165] Once again, the efficiency of Ranovstayo's travel restrictions is a proof that it achieved a greater level of health protection than WHO's Temporary

[161] Panel Report, *EC – Approval and Marketing of Biotech Products*, §§7.2939 and 7.240.
[162] Appellate Body Report, *Australia – Apples*, §238.
[163] See fn. 31.
[164] L. CROSBY, & E. CROSBY, (2020). "*Applying the precautionary principle to personal protective equipment (PPE) guidance during the COVID-19 pandemic: Did we learn the lessons of SARS?*", Canadian Journal of Anaesthesia, 1–6.
[165] IHR, Art. 2.

Recommendation.[166] Therefore, even if the Court finds that Ranovstayo's entry regulation caused disturbance to international traffic, it was necessary and justified.

Consistent with the SPS Agreement, the IHR recognizes that the adoption of health policies, by State Parties, which are stricter than those recommended by WHO in response to health measures are not precluded.[167] Indeed, Aprepluya contented itself with "'*Public Health Advice', which contained reminders, but not orders, to use face coverings and to practice social distancing*".[168] Those are the suggested "alternatives" available that Aprepluya is criticizing Ranovstayo not to have implemented. However, it is clear from Aprepluya's confirmed cases as of November 20, 2018[169] that they did not achieve the appropriate level of health protection. Additionally, Ranovstayo adopted other measures recommended by WHO, such as quarantine upon arrival.[170]

3. Ranovstayo complied with the revision requirement under article 43.6 IHR

According to Article 43, §6, IHR *"[a] State Party implementing a health measure pursuant to paragraph 1 or 2 of this Article shall within three months review such a measure taking into account the advice of WHO and the criteria in paragraph 2 of this Article*".

While the travel ban was published on April 22, 2018, it was renewed within the lapse of a three-month period. Ranovstayo based the renewal on a fresh risk assessment and best scientific evidence available.[171]

C. Even if Ranovstayo violated international law, it should not be obligated to compensate Aprepluya for the resulting economic losses

According to the Court in the case concerning Armed Activities on the Territory of Congo, there are three conditions to be met for Ranovstayo to be condemned to make full reparation. There needs to be a wrongful act, an injury and a causal link uniting the two.[172] The causal link between the breach and the loss profits is here difficult to establish. Indeed, since there are cases of J-VID-18 in Aprepluya, there is another reason for the loss of profit:

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[166] *Clarifications*, §7.
[167] C. FOSTER, *op. cit.*
[168] *Compromis*, §13.
[169] *Clarifications*, §7.
[170] *Id*.
[171] *Compromis*, §51.
[172] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p.168.

the virus. As the number of cases grew rapidly, many retail outlets and recreation venues closed. Transportation was becoming sporadic and residents were reluctant to leave their house. In such a context, the damages alleged by Aprepluya were not the result of Ranovstayo's entry regulation but of the pandemic.

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

Under general international law, diplomatic asylum is regarded as a matter of humanitarian practice[173]. Its essential purpose is "*to protect individuals from persecution in times of internal upheaval within States*".[174] On June 3rd, 2018, Ms. Vormund came to Ranovstayo's Consulate to seek asylum. She explained that she feared for her safety because of a tweet she had posted a few hours earlier. On that basis, the consular agents allowed her to stay before analyzing her situation in more detail. They concluded that Aprepluya's authorities had violated some of her fundamental rights. Therefore, the consular officials had a duty to grant her refuge (**A.**). In addition, Ms. Vormund requested asylum and was eligible for it (**B.**). Finally, since Ranovstayo's Consulate did not fall under the jurisdiction of Aprepluya, it did not intervene in Aprepluya's domestic affairs (**C.**).

A. Ranovstayo was entitled to welcome Ms. Vormund into its Consulate

Aprepluya's actions violated several of Ms. Vormund's fundamental rights (***1.***). Based on these violations, Ranovstayo had the duty to welcome her in its Consulate (***2.***).

1. Aprepluya violated Ms. Vormund's fundamental rights

Under Article 1(3) of the Charter[175], the respect of fundamental rights is fundamental in international law. However, Aprepluya violated several of them in the case of Ms. Vormund.

First, article 19 ICCPR[176] states that the freedom of expression which is "*the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either*

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[173] R. VAŘK, "*Diplomatic asylum: Theory, Practice and the Case of Julian Assange*", University of Tartu, December 12, 2007, Vol. 11 (2012), p.257.

[174] United Nations General Assembly, *Question of Diplomatic Asylum*, Report of the Secretary-General, 13th session, A/10150, September 2, 1975. ['UNGA Report A/10150'] Argentina p.6.

[175] United Nations, *Charter of the United Nations*, October 24, 1945, Art. 1, (3).

[176] UN General Assembly, *International Covenant on Civil and Political rights*, Art. 19 §§ 1-

orally, in writing, (...) or through any other media of one's choice". Aprepluya restricted her right to freedom of expression by accusing her of disturbing public order and other charges[177]. Ms. Vormund did not commit a crime by publishing her tweet but merely exercised her freedom of expression.

According to Article 12, 2 ICCPR, everyone has the fundamental right to leave any country, including his own.[178] Therefore, Ms. Vormund could freely go to the Ranovstayo's Consulate and the authorities had no obligation to prevent her from doing so.

Additionally, according to Article 7, b) ICESC[179], Aprepluya violated its obligations to provide safe and healthy working conditions to Ms. Vormund at her workplace. However, the number of cases of J-VID-18 proved that the Aprepluyan authorities did not take this right into account. Ms. Vormund's tweet was substantially important and urgent because it revealed the truth about these conditions.

2. Ranvostayo had the duty to welcome Ms. Vormund into the Consulate premises

According to article 14 UDHR, "*in the face of persecution, everyone has the right to seek and enjoy asylum in other countries*".[180] This illustrates perfectly the actions taken by Ranovstayo to protect Ms. Vormund. Indeed, as of June 3rd, 2018, Ms. Vormund was being prosecuted by the police for posting a tweet[181] and making use of her freedom of expression's right. She then came to Ranovstayo's Consulate to seek refuge. Consular officials complied with fundamental human rights by allowing her in. Then, under Article 2, 3, a) ICCPR, Ranovstayo has an obligation to ensure that Ms. Vormund was treated fairly and lawfully. In view of the circumstances, a more than reasonable doubt exists.

Moreover, Article 33 of the Geneva Convention explains that the non-refoulement principle prohibits states from expelling or returning refugees to territories where their life or freedom would be endangered on account of political opinion.[182] It is considered as a

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2, December 16, 1966, GA resolution 2200A (XXI). ['ICCPR'.]; *Universal Declaration of Human Rights*, December 10, 1948, 217 A (III), Art. 19. ['UDHR'].

[177] *Compromis,* §32.

[178] ICCPR, Art. 12, 2; UDHR, Art. 13, §2.

[179] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, United Nations, Art. 7, b). ['ICESC'].

[180] UDHR, Art. 14.

[181] *Compromis,* §20.

[182] Executive Committee of the High Commissioner's Programme, *Déclaration de Genève*

conventional international practice.[183] Ms. Vormund did express a view which may be considered as a political opinion in her tweet: she showed her concerns about the positive cases of J-VID-18 and explained that the government has to disclose the existence of these facts to the people, and not keep them secret.[184] She expressed a political opinion because she did not agree with the authorities about the handling of such situation. The non-refoulement provision in particular has prevented the return of refugees to places where their imprisonment was to be feared.[185]

Furthermore, the ECHR ruled in *Soering* that a state can be amenable if it decides to surrender a person which might suffer of abuse in the receiving state[186] . This was confirmed in the "B" and Others case. The consular officials were required to permit Ms. Vormund to remain within the protection of the Consulate because having her to leave would expose her to the risk to be treated by Aprepluyan authorities in a manner inconsistent with the rights recognized by the International treaties.[187]

Finally, the ICJ stated that even if the asylum should be brought to an end, this did not mean that Ranovstayo was under a duty to send Ms. Vormund back to Aprepluya.[188]

B. The conditions to grant consular asylum to Ms. Vormund were met

First, Ms. Vormund's situation falls within the definition of refugee status which states that a person "*owing to a well-founded fear of being persecuted for (...) political opinion, is outside the country of its nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*".[189] In this case, prosecution for holding a different political opinion than the authorities is indeed present. Ms. Vormund is accused of creating

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sur la Convention des Nations Unies de 1951 et le Protocole de 1967 relatifs au statut des réfugiés, October 13, 1986, No. 43 (XXXVII), Art. 33. ['Convention de Genève'].

[183] S. RIVELES, *Diplomatic Asylum as a human right: The case of the Durban Six"*, Human Rights Quaterly, February 1989, Vol. 11, No. 1, The Johns Hopkins University Press, p.152. ['The case of the Durban Six'].

[184] *Compromis* §18.

[185] The case of the Durban Six, p.152.

[186] Soering v. The United Kingdom, Council of Europe: European Court of Human Rights, July 7, 1989.

[187] England and Wales, Court of Appeals, "B" and Others v. Secretary of State for the Foreign and Commonwealth Office, Judgement (October 18, 2004) EWAC Civ 1344, §80. ['"B" and Others']

[188] Haya de la Torre Case *(Colombia v. Peru)*, Jugment of June 13, 1951. ICJ Reports 1951.

[189] Convention de Genève, Art. 2.

public disorder and the prosecutor stated that he wanted to seek the heaviest sentence.[190] It is understandable that she would be afraid to return to Aprepluya. Furthermore, by going to the Consulate's buildings, Ms. Vormund is no longer under Aprepluya's jurisdiction and she consecutively has the right to seek protection.

Refugee status is a first step but is not enough to be granted asylum: the crimes for which she is accused must also have a political aspect[191] (***1.***), a real and direct threat to her life must exist (***2.***), and rules of law were not respected (***3.***).

1. Ms. Vormund is accused of committing crimes that are political

Ms. Vormund was not guilty of common crimes in the territory of Aprepluya, she only expressed her opinion according to Article 19, §1 and §2 ICCPR[192]. Aprepluya accused her under ordinary criminal law and order violations. However, the facts show no disturbance emerging as a result of her tweet. On the contrary, citizens have been able to receive additional and accurate informations about the situation in their country, and Ranovstayo has been able to implement measures to prevent the spread of the virus.

Moreover, the charges against her are of a political nature. Aprepluya's authorities were fully aware of the existence of cases of J-VID-18 in their laboratories and did nothing to prevent the spread of the virus. On the contrary, they have imposed silence to anyone with knowledge of the virus. Indeed, if this information had become public, the world would have known that not all the measures were being followed. The sequence of events proves this: sanitary measures affecting Aprepluya's economy were taken following Ms. Vormund's revelations.

Secondly, even if these crimes were to find a basis in common law, and not political law, one of the main fundamental rights is that everyone is presumed innocent until proven guilty under Article 14 §2 ICCPR.[193] Ms. Vormund could not take advantage of this opportunity and was directly charged as a criminal by the authorities. Aprepluya is therefore in total violation of this provision and Ranovstayo, by providing assistance to Ms. Vormund, has filled Aprepluya's international law omissions.

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[190] *Clarifications*, §4.
[191] Colombian-Peruvian asylum case, Judgment of November 20, 1950: ICJ Reports 1950, p.278. ['Asylum case'].
[192] ICCPR, Art. 19, §§1-2; UDHR, Art. 19.
[193] ICCPR, Art. 14, §2; UDHR, Art. 11 §1.

Finally, even if this honorable Court was to doubt of the nature of these crimes, Aprepluya would have to prove that the charges against Ms. Vormund constitute common crimes.[194]

2. There is a threat to her liberty

The Court ruled that "*the justification for asylum lies in the imminence or persistence of a danger to the person of the refugee*".[195] The Durban Six case confirmed that "*the reasons for according refugee status are based on the asylee's well-founded fears of persecution in the country of his nationality*".[196] If Ms. Vormund wanted to return to her country, she would be judged and sent directly to jail.

3. Aprepluya's prosecution does not respect the rule of law

The ICJ ruled that "*asylum can only be opposed to the action of justice, there is an exception to this principle if, under the cover of justice, arbitrariness replaces the rule of law*".[197] Under Article 9 ICCPR[198], no one shall be subject to arbitrary detention and everyone has the right to liberty and security. Although Ms. Vormund has not yet been arrested, the charges and accusations against her leave no doubt as to what would have happened, had she not sought refuge at the Consulate.

Furthermore, Article 15 §1[199] states that no one can be convicted for acts that didnot constitute a criminal act under national or international law at the time they were committed. As explained above, Ms. Vormund only used her right to freedom of expression which is a fundamental human right. Therefore, the charges against her are unlawful and do not meet the criteria under international law.

C. Ranovstayo did not interfere in Aprepluya's internal affairs

In the Asylum case, the ICJ has ruled that: "the granting of territorial asylum is "normal exercise of the territorial sovereignty" because the "refugee is outside the territory of the State

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[194] Asylum case, p.281.
[195] *Id.*, p.282.
[196] The case of the Durban Six, p.151.
[197] Asylum case, p.284.
[198] ICCPR, Art. 9.
[199] ICCPR, Art. 15, §1.

where the offense was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State"[200].

Ranovstayo is a sovereign state and has no obligation under international law to respond to Aprepluya's request.[201] Indeed, under existing positive international law, "*no rule denies a foreign state the right either to expel the person to whom it has granted asylum from its territory or to deny him asylum when he requests it*".[202]

In addition, Ms. Vormund found refuge in the Consulate, which is not under Aprepluya's jurisdiction but under Ranovstayo's. From then on, Ranovstayo only responded to the request of a visitor[203] and did not violate the territorial sovereignty because the decision of granting asylum to Ms. Vormund was taken under its jurisdiction.

Furthermore, Aprepluya's sovereignty was not violated since Ranovstayo had the obligation to take care of those who requested protection, regardless of whether they were in the territory or not.[204]

Finally, the Latin American states that have always been very attached to their sovereignty, are perfectly in agreement with granting asylum.[205] The United Nations General Assembly has stated that the granting of asylum is a peaceful and humanitarian act, a normal exercise of state sovereignty, and that it should be respected by all other states.[206]

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

Under Article 80 of the Rules of Court, a counter-claim is "admissible as such"[207] provided that "*it comes within the jurisdiction of the Court and [that it] is directly connected with the subject-matter of the claim of the other party*".[208]

The two conditions set out in that provision are met. First, as the Parties jointly recognized, the direct connection requirement under Article 80 is duly met. The Court

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[200] Asylum case, p.274.
[201] *Compromis*, §34.
[202] UNGA Report A/10150, Madagascar p.25.
[203] "B" and Others, §44.
[204] *Id*., §29.
[205] UNGA Report A/10150, Australia p.10.
[206] UN General Assembly, *Declaration on Territorial Asylum*, December 14, 1967, A/RES/2312(XXII), Art. 1.
[207] Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of July 6, 2010, ICJ Reports 2010, p.310, §35.
[208] Rules of Court, Art. 80, §1.

recorded the agreement of the Parties in that regard and there is no need to elaborate any further on it.[209] Second, Ranovstayo's counter-claim also comes within the jurisdiction of the Court (**A.**).

Moreover, the counter-claim is admissible (**B.**).

A. The counter-claim comes within the jurisdiction of the Court

On January 7, 2002 and March 10, 2003, Aprepluya and Ranovstayo have respectively accepted the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2, of the Statute. The "jurisdictional link"[210] so established between the Parties allows the Court to entertain Ranovstayo's counter-claim. The Court's jurisdiction is unaffected by Aprepluya's reservation to its optional clause because it is invalid (***1.***). Then, Aprepluya's reservation is inapposite and of no effect on the jurisdiction of the Court in this case (***2.***).

1. Aprepluya's reservation to its optional clause is invalid

Aprepluya's reservation reads as follows: *"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".*[211]

The words "as determined by the Government of the United Republic of Aprepluya" are preceded by a comma (","). As a result, they apply in a distributive way to both types of disputes mentioned in the reservation: disputes concerning "*matters which are essentially within [its] domestic jurisdiction*", and also disputes concerning "*military activities*".

The intended effect of Aprepluya's reservation is to defeat the jurisdiction of the Court by retaining the discretionary right to qualify any dispute as concerning military activities or domestic jurisdiction matters while excluding at the same time the power of the Court to assess such qualification. Such far reaching reservation is clearly invalid and of no effect (*a.*). The invalidity of Aprepluya's reservation does not affect its consent to the jurisdiction of the Court pursuant to Article 36, paragraph 2, of the Statute (*b.*).

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[209] See Order of September 11, 2020.
[210] Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, p.432, §46.
[211] *Compromis*, §49.

a. Aprepluya's reservation is invalid because it is self-judging.

From its very terms, Aprepluya's reservation is self-judging. The "automatic"[212] character of such reservation stems from the fact that it allows the reserving state to unilaterally and discretionarily opt out from an international obligation[213], and to do so, pursuant to its own assessment of the situation.[214] That is exactly the case here since the application of Aprepluya's reservation depends on the determination made by its government.

Self-judging reservations are invalid because they nullify the very acceptance of the Court's compulsory jurisdiction by allegedly retaining the right to unilaterally determine the extent and the very existence of such acceptance[215]. Such reservations also run counter the fundamental statutory principle of *compétence de la compétence* enshrined in Article 36, paragraph 6, of the Statute.[216] There is indeed no meaning to this principle if the compulsory jurisdiction of the Court depends on the arbitrary will of Aprepluya's Government.[217]

b. The invalidity of Aprepluya's reservation does not affect its consent to the jurisdiction of the Court

Although invalid, Aprepluya's automatic reservation can be separated from its overall consent to the Court's jurisdiction, as made clear by both Judge Armand-Ugon[218] and Juge Klaestad[219] in the Interhandel case. Saying that the invalidity of the reservation would affect Aprepluya's consent renders futile the adoption of a declaration of acceptance of the compulsory jurisdiction of the Court. A government would not go through the difficulties necessary to adopt such Declaration if, at the end, the invalidity of the reservation places the country in the same legal situation as States which have not filed such Declaration[220]. Since this reservation is invalid, Aprepluya accepted the Court's compulsory jurisdiction as such.

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[212] Y. TANAKA, The Peaceful Settlement of International Disputes, Cambridge University Press, UK, 2018, p.157.
[213] S. SCHILL & R. BRIESE, "'*If the State Considers': Self-Judging Clauses in International Dispute Settlement*," Max Planck Yearbook of United Nations Law, Vol. 13 (2009), p.67.
[214] *Id*., p.68.
[215] Separate opinion of Judge Sir Hersch Lauterpacht, ICJ Reports, 1957, p.48. [Sir Lauterpacht].
[216] *Id*., p.44.
[217] *Id*., p.47.
[218] Dissenting opinion of Judge Klaestad, ICJ Reports, 1959, pp.77-78. ['Judge Klaestad']
[219] Dissenting opinion of Judge Armand-Ugon, ICJ Reports, 1959, pp.93-94. ['Judge Armand-Ugon'].
[220] Judge Klaestad, p.77.

Moreover, the mere fact that Aprepluya submitted an application instituting the present proceedings proves that Aprepluya's acceptance of the Court's jurisdiction is not without value. The clear intention of the demanding State was to accept the jurisdiction of the Court[221], no matter the invalidity of Aprepluya's automatic reservation.

2. Aprepluya's reservation to its optional clause is inapposite and of no effect in this case under any good faith interpretation of its terms

In the unlikely event that the Court were to find Aprepluya's reservation valid, it should nevertheless consider it inapposite and of no effect on its jurisdiction because the subject-matter of the counter-claim does not fall within the exclusion of "Aprepluyan military activities" (*a.*) and does not concern a matter which is "essentially within the domestic jurisdiction of the United Republic of Aprepluya" (*b.*).

a. The shooting of the Mantyan Airways aircraft does not "concern Aprepluyan military activities"

According to the Tribunal in the South China Sea Arbitration, "*a quintessentially military situation" is a situation "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another*".[222] When Aprepluya decided to have its fighter jet fire at the wing root area, it shot-down a civilian plane with civilians inside, which hence is a different target than military or paramilitary forces.

Moreover, as stated in the case concerning the detention of three Ukrainian Naval Vessels, the situation needs to be objectively evaluated to determine its military character. It does not depend on the characterization of the activities made by the parties to the dispute or the type of vessels used.[223]

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[221] Judge Armand-Ugon, p.93.
[222] South China Sea Arbitration, PCA, Award of July 12, 2016, p.456, §1161.
[223] ITLOS, Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order (May 25, 2019), §§64-65.

b. The subject-matter of the counter-claim does not fall within the domestic jurisdiction of Aprepluya

Under Article 36(2) of the Statute of the Court[224], such reservation does not prevent the Court from exercising its jurisdiction[225] as long as the dispute has an international character[226], which is confirmed by the agreed facts.

The events clearly show this international character, based on Aprepluya's justification for the shoot-down. Since Aprepluya invoked the fear of an on-going terrorist attack, it is a matter of international security. Indeed, according to INTERPOL, the attack planned by Friends of Justice ("**FOJ**") would target one of the capitals in the region. Both Beauton and Bogpadayo and their population were possible victims. In fact, Ranovstayo had also put its Air Forces on heightened alert on June 19. Subsequently, the mere fact that FOJ has been added to the United Nations Security Council Consolidated List as a terrorist group entails the international character of this organization.

For all those reasons, Ranovstayo trusts that the Court will find it may exercise its jurisdiction over the counter-claim concerning the Mantyan Airways Aircraft.

B. The Counter-claim is admissible

The Counter-claim is admissible since Ms. Vormund fulfills the conditions related to consular protection. Second, if the Court finds the rules of consular protection not to be applicable to Ms. Vormund, Ranovstayo is still able to submit the counter-claim to the Court based on the erga omnes partes character of the obligations contained in Article 3bis of the Chicago Convention and the right to life.

1. The rules of consular protection can apply to Ms. Vormund

The Counter-claim is admissible as it conforms to the customary rules on Diplomatic Protection, as reflected in Articles 8 and 15 of the International Law Commission ("ILC") Draft Articles on Diplomatic Protection.

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[224] See fn. 82.
[225] Case concerning the right of passage over Indian territory (Preliminary objections), Judgment of November 26, 1957, ICJ Reports 1957, p.150.
[226] C. TOMUSCHAT, "*Article 36*", in Andreas Zimmermann et Al. (eds.), The Statute of the International Court of Justice: A Commentary (3rd ed. 2019), §36.

a. Ms. Vormund was lawfully and habitually resident of Ranovstayo at the time

A State is not only allowed to protect one of its nationals when he or she suffered from an internationally wrongful act committed by another State.[227] It can also do so, according to art. 8 of ILC's Draft Articles on Diplomatic Protection, if a person is a refugee, lawfully and habitually resident of the country at the time.

Article 8 of ILC's Draft Articles reflects state practice. In *Al. Rawi and others*[228], the United Kingdom Courts recognized that the UK could come to represent a Jordanian national to whom it had granted consular protection and given asylum status on its territory when he was incarcerated in Guantanamo Bay by the United States.[229] This action was rendered possible since he was lawfully and habitually resident in the UK. Based on this prior case, Ranovstayo can act in diplomatic protection of Ms. Vormund who was lawfully and habitually resident on its territory and was also seeking asylum.

Ms. Vormund was granted consular protection by Ranovstayo on June 4, 2018. She had been living on the premises of its Consulate in the Segura Province from the date she was chased out of her home by Aprepluyan policemen until the tragic plane shoot-down by Aprepluya's officer. Moreover, she was also lawfully residing on the premises of the mission since she was recognised by Ranovstayo as an applicant for asylum.

b. There is no need to exhaust ineffective and futile local remedies

According to Article 15 (a) of the Draft Articles, the absence of a "*reasonable possibility of an effective remedy*" [230] needs to be examined. This test was extended by the ILC and is to be understood as not providing effective redress or at least a reasonable possibility of such redress.[231] This condition is however irrelevant (i). In the unlikely event that the Court would consider this requirement to be applicable, there is indeed no "*reasonable possibility of an effective remedy*" (ii).

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[227] ILC's Draft Articles on Diplomatic protection, 2006, Art. 1.
[228] R. (application of Al. Rawi and others) v. Secretary of the State, Court of Appeal, 2006, ECWA 1279, October 12, 2006, §§21-22.
[229] L. T. LEE, J. B QUIGLEY, *Consular Functions, 11 Refugees*, Consular Law and Practice (3rd Edition), 2008.
[230] Sir Lauterpacht, p.39.
[231] ILC Draft Articles on Diplomatic Protection with commentaries (2006), Commentary 3 on Art. 15, a), p.47.

i. The need to exhaust local remedies is irrelevant.

Ms. Vormund had no possibilities to exhaust local remedies since she passed away in that tragic shoot-down of the Mantyan Airways Aircraft. Based on this fact, Ms. Vormund falls within the exception set out by Article 15 (d) of ILC's Draft Articles. The circumstances of the case undeniably prove that to expect compliance with the rule asking to exhaust local remedies would be manifestly unreasonable.[232]

ii. There is "no reasonable possibility of an effective remedy"

As stated in Article 15 (a) of ILC's Draft Article, supported by the Court in the Diallo case, an obligation to exhaust local remedies appears only when they are effective, and available in the circumstances faced by the injured person.[233] It is clear that there is no possibility of an effective remedy or an effective redress before Aprepluya's courts since they are lacking independence.[234]

Lacking independence was recognized as one of the criterion to prove the absence of an effective redress according to the ILC[235] and entails the absence of national jurisdiction of the Aprepluyan courts. It is indeed difficult to sincerely believe that Ms. Vormund could obtain an effective remedy before the same courts before which she would be prosecuted. It is of Aprepluya's duty to prove that an effective and available local remedy is accessible and it failed to do so.[236]

For those reasons, Ranovstayo considers that the conditions for the exercise of consular protection are met.

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[232] *Id*, Commentary 11 on Art. 15 d), p.25.
[233] Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo), Judgement of May 24, 2007, ICJ Reports 2007, §44.
[234] See fn. 101.
[235] Velasquez Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights, Series C, No. 4.
[236] J. DUGARD, *Diplomatic Protection*, 2009, In Max Planck Encyclopedia of Public International Law Online.

2. In any case, the right to life contained in Article 6 of the ICCPR and the obligations contained in Article. 3bis of the Chicago Convention are of an erga omnes partes character

The Counter-claim is also admissible because all states have an interest in bringing proceedings, based on the character of the obligations at stake.[237] In the Belgium vs. Senegal Case, the Court notably recognized that there was a right to invoke a State's responsibility, even without special interest, when an *erga omnes partes* obligation was breached.[238] First, concerning the right to life, enshrined in Article 6 of the ICCPR, the Court has used "*the basic rights of the human person*" as an example of obligations *erga omnes partes*. Since the right to life is considered to be a fundamental inherent right for every person which cannot suffer from any exception, it constitutes an *erga omnes partes* obligation.[239]

Second, concerning Article 3 bis of the Chicago Convention, the erga omnes partes character is made notably clear through two incidents involving civil airplanes, shot down by State's military forces. In the first case, flight MH17 of the Malaysian Airlines was shot by Russia while flying over Ukraine. In response, the Netherlands and Australia jointly issued a statement holding Russia responsible for the shoot-down of the civilian airplane.[240] Moreover, a treaty was concluded between the Netherlands and Ukraine to render possible the prosecution of all victims' cases. In this case, the respect of Article 3 bis of the Chicago Convention was assured by the Netherlands, regardless of the nationality of the victims.[241]

In another case concerning Korean Air Lines Flight 007, the Soviet Air Forces shot-down what they thought to be an intruding U.S. spy plane but which was in fact a civilian airplane.[242] This action was denounced by the United Nations, even if the Soviet Union

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[237] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, ICJ Reports 1970, §33; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, §68. [Belgium v. Senegal].

[238] Belgium v. Senegal, §68, confirmed by the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of January 23, 2020, indicating provisional measures, §41.

[239] ICCPR, art. 4; Human Rights Committee, General Comment No. 36, §2; UDHR, Preamble.

[240] Government of the Netherlands, 05/25/2018.

[241] Government of the Netherlands, "Minister of Security and Justice signs MH17 treaty with Ukraine", 07/07/2017.

[242] T. W. MAIER, KAL 007 Mistery.

vetoed the resolution actually condemning the shoot-down of the aircraft.[243] Moreover, Article 54 of the Convention which relates to the Mandatory functions of the ICAO, enshrines the obligation to first report to the contracting States any infraction of the Convention and then to report to the Assembly if a contracting State failed to take appropriate actions in a reasonable time.[244].

For those reasons, Ranovstayo has a legal interest in submitting its counter-claim to the Court, based on the erga omnes partes character of both the right to life and the obligations contained in Article 3bis of the Chicago Convention.

IV. APREPLUYA VIOLATED INTERNATIONAL LAW BY SHOOTING DOWN THE PLANE

This section will first address Aprepluya's violation of the Chicago Convention (**A.**). It will then focus on the violation of the right to life perpetrated (**B.**). Finally, it will address the role of the error of fact in the context of the use of lethal force by a State (**C.**).

A. Article 3bis of the Chicago Convention prohibits the use of weapons against civil aircrafts

According to Article 3bis of the Chicago Convention the use of weapons against civil aircrafts is prohibited. Aprepluya has violated the article and has no circumstances to justify its behaviour.

1. The use of a weapon against a civil aircraft in flight is prohibited by the Chicago Convention

On June 26, 2018, an Aprepluya fighter plane opened fire on a civilian aircraft attempting to reach Ranovstayo. The plane was damaged by fire and crashed, killing all occupants. The shooting down of the Aircraft only adds to the long list of tragedies resulting from the weapons' use against civilian aircraft in flight[245].

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[243] "*Infractions of the Convention On International Civil Aviation*", Montreal: International Civil Aviation Organization, March 5, 1999 (158th session).

[244] Convention on International Civil Aviation, Art. 54, §j and k.

[245] See e.g., the shooting down of El Al Constellation (1955) and of the Libyan Arab Airlines (1973).

The use of weapons against civil aviation is clearly forbidden under Article 3*bis*, a), of the Chicago Convention. It was added to the Convention in response to the tragedy of the Boeing KE007 on September 1st, 1983.[246] The FRG representative stated that "*the shooting down of a civil aircraft under any circumstances is an inhumane act and a clear violation of international law and the international civil aviation community's principles*".[247] The delegation of the Republic of Korea declared that: "*The use of armed force against civilian aircraft is unjustified, inexcusable and inadmissible under any circumstances*".[248]

The ICAO Council finally adopted a resolution[249] in which it recognized that such use of armed force was incompatible with the norms governing elementary considerations of humanity. The Council also reaffirmed that when intercepting civil aircraft, States should not use weapons.

2. The conditions for the application of Article 3bis of the Chicago Convention are met

Aprepluya and Ranovstayo are parties to the Chicago Convention and its Article 3*bis* was binding on Aprepluya. At the time of the deadly interception, the aircraft was flying over Aprepluya and was close to reaching Ranovstayo airspace.

The Aircraft targeted by Aprepluya's Air Force was unquestionably a civilian aircraft. Article 3 of the Chicago Convention distinguishes between state and civil aircraft. A state aircraft is an aircraft performing military, customs, or police service. Otherwise, it is deemed to be a civil aircraft. This functional criterion contains no reference to ownership or control.[250] Even if the plane had really been hijacked by FOJ, it would not have lost its quality and consequently its protection.

Article 3*bis* of the Chicago Convention protects all civil aircrafts, whatever their size or range. Nor is the carriage of goods or passengers a condition for its application.[251]

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[246] J-C PIRIS, *L'interdiction du recours à la force contre les aéronefs civils, l'aménagement de 1984 à la Convention de Chicago*, In: *Annuaire français de droit international*, volume 30, 1984. pp.711-712.
[247] J. V. AUGUSTIN *ICAO and the use of force against civil aerial intruders*, 1998, p.68.
[248] *Id.*, p.72.
[249] *Id.*, p.70.
[250] R. GEIß *"Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3BIS of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz"* p.238.
[251] *Id*, p.236.

3. Aprepluya violated the obligations under Article 3bis of the Chicago Convention

The plane took off at 2:57 am and crashed at 3:12 am.[252] Fifteen minutes was the time it took Aprepluya's Air Force to try to establish communication with the plane, consider it a nuisance and finally shoot it down. Apart from a faulty radio, the Aprepluyan authorities could not provide any proof to establish with certainty that the silent plane had been hijacked by terrorists. The use of weapons against the aircraft is an inadmissible behaviour in total disregard of Article 3*bis* of the Chicago Convention.

That provision contains two specific obligations: first, to "*refrain from the use of weapons against civil aircraft in flig*ht" and, second, not to "*endanger* (...) *the lives of persons on board of the aircraft and the safety of the aircraft* (...) *in the event of interception*".

The first obligation is a negative obligation of result; it is breached by the simple fact of using weapons against civil aircrafts in flight. Aprepluya has failed to comply with that obligation.

The second obligation is not only a negative obligation that applies in case of interception, but it also implies a positive duty of due diligence to take all measures needed to preserve the lives of persons on-board and their safety. Aprepluya has also failed to comply with that obligation: Lieutenant Defesa claims to have fired a short burst into the wing neck in an attempt to land the aircraft, but such use of weapon was entirely reckless.[253]

Next, Article 3*bis* b) frames the procedure for intercepting civil aircraft. Aprepluya was entitled to require the Aircraft's landing because it was flying over its territory without title. However, the article requires the use of appropriate means consistent with relevant rules of international law, including subparagraph (a) of Article 3*bis* thereof. The provision thus re-enacts the prohibition on the use of weapons that has not been complied with.

Finally, Article 3*bis* d) states that: "*Each Contracting State shall take appropriate measures to prohibit the intentional use of any civil aircraft registered in that State or used by an operator which has its principal place of business or permanent residence in that State for purposes inconsistent with the purposes of this Convention"*.

The Aircraft is registered in Aprepluya and Mantyan Airways has its main operating headquarters in Aprepluya.[254] The disconcerting ease with which the Aircraft was able to take

[252] *Compromis*, §42.
[253] *Compromis*, §42.
[254] *Clarifications*, §2.

off from Segura Airport raises questions. It is obvious that its security system has some glaring flaws. No appropriate measures seem to exist to prevent unidentified aircraft from taking off. It is obvious that such failures in the airport system of a State jeopardize the security of civil aviation as a whole. For this also Aprepluya is responsible for violating international law.

4. No circumstance justifies the shooting down of the Aircraft

The second sentence of Article 3bis a) reads as follows: "*This provision shall not be interpreted as modifying in any manner the rights and obligations of States under the Charter of the United Nations*".

This sentence allows for certain exceptions to the obligation to refrain from the use of weapons against civil aircraft in flight. However, it is clear from the discussions leading up to the article's adoption that the parties "*considered self-defence in accordance with Article 51 of the Charter of the United Nations as the only legitimate exception justifying the use of force against civil aircraft*".[255]

However, Article 51 can only apply in the case of an armed attack by a State against another.[256] Thus, the mechanism of self-defence is irrelevant, because to be relevant, the Aircraft would have to be used by a State in an armed attack. The use of a civil aircraft in an armed attack would, however, cause it to precisely lose its status.[257] It would in fact become, by its use for military purposes, a state aircraft and therefore no longer be subject to the Chicago Convention and its article 3*bis*.

Moreover, even if the Court were to accept that an attack by a non-state actor may give rise to the right to self-defence, although contrary to the requirements identified in the Nicaragua case[258], a single terrorist attack cannot be considered an armed attack.

Distress and necessity, as provided for in chapter V of Responsibility of States for Internationally Wrongful Acts, may also be excluded. Lieutenant Defesa "*was flying alongside the Aircraft*".[259] He therefore could see that it was not descending or threatening to descend towards Beauton. The pilot therefore had the room for manoeuvre to wait and react according to the Aircraft's behaviour. There was therefore no "*grave and imminent danger*"

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[255] R. GEIß, *op. cit.*, pp.246 to 250.
[256] *Id*, p.237.
[257] J. V. AUGUSTIN, *ICAO and the use of force against civil aerial intruders*, 1998. p.213.
[258] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p.14.
[259] *Compromis,* §42.

to trigger the necessity. Similarly, the distress situation had not yet materialized because it was not yet necessary to save lives.

Moreover, both of these two circumstances precluding wrongfulness are inapplicable when the State seeking to purge the wrongfulness of its conduct is responsible for the situation.

On the one hand, Article 24, paragraph 2 (a), provides that: "*If the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it*", distress cannot apply. On the other hand, Article 25, paragraph 2 (b) excludes the possibility of invoking a state of necessity if "*the State has contributed to the occurrence of the situation*". Consequently, on a combined reading of Article 3bis d) of the Convention and the above-mentioned provisions, Aprepluya can be held responsible for the take-off of the Aircraft.

B. Aprepluya Violated the Right to Life

Article 6 of the ICCPR states that: "*The right to life is inherent in the human person. This right must be protected by law*".

As the Aircraft is registered by Aprepluya, the jurisdictional requirement of Article 2 of the Pact is met. Indeed, the Human Rights Committee recalled that: "*States Parties are also under an obligation to respect and protect the lives of all persons on board ships or aircraft registered by them or flying their flag*".[260] The Aircraft was registered by Aprepluya.[261]

Deprivation of life is arbitrary if it is inconsistent with international or domestic law.[262] In assessing the arbitrariness of a deprivation of life, it is appropriate to consider the inappropriateness, unfairness and unpredictability of the act leading to death.[263] The use of potentially lethal force is an extreme[264] measure that requires the utmost caution. Intentional deprivation of life by any means is permitted only if it is strictly necessary to protect life from an imminent threat.[265]

The aircraft shot down in violation of the Chicago Convention and its passengers posed no threat whatsoever. There was no hostile behaviour. Two unjustifiable murders were

[260] CCPR/C/GC/36 n°63.
[261] *Compromis*, §41.
[262] African Commission on Human and Peoples' Rights, General Comment No. 3: The Right to Life, Art. 4, 2015, §12.
[263] Gorji-Dinka v. Cameroon (CCPR/C/83/D/1134/2002), §5.1.
[264] Code of Conduct for Law Enforcement Officials, commentary to Art. 3.
[265] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, §9.

committed. There was no real indication that the Aircraft was being hijacked by terrorists, thus posing an imminent threat, except for a faulty radio. The orders given to the fighter that shot down the plane were unfounded and resulted in the death of innocent subjects.

C. Aprepluya cannot escape its responsibility for having been factually misled

Aprepluya cannot invoke a factual error to justify its illegal and lethal use of force. Aprepluya's authorities alleged they used weapons because they thought it was a terrorist attack, and that the plane would crash into government buildings.[266] In fact, the week before, Aprepluya's Ministry of Defence had indicated that such threat existed.[267] However, no established practice in public international law allows states to base the use of force on erroneous facts. When a state contemplates the use of force, it must think critically about the intelligence information at its disposal, which is often limited and fallible.

Moreover, it cannot rely on an honest belief that an attack against it is underway or imminent[268]. The ILC has affirmed that: "*A state resorting to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own unlawful conduct in the event of such assessment. In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness*"[269].

Furthermore, the Court in the *Oil platforms* case rightly based its investigation on objective facts, rather than on what the United States honestly or reasonably believed.[270] This teaching on self-defense must logically apply to our situation. Self-defence is applicable only between States. But it would be surprising if the Court authorized the use of lethal force based on a subjective belief for the sole reason that the perpetrator of the attack is a non-state actor.

The use of lethal force therefore does not admit error of fact. It is justifiable only in purely objective terms. The Court must therefore judge the facts presented to it for what they are objectively and not on the basis of subjective convictions that no one can invoke in such a case.

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[266] *Compromis,* §45.
[267] *Compromis,* §39.
[268] M. MILANOVIC, "*Mistakes of Fact When Using Lethal Force in International Law: Part II*", 2020.
[269] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, p.130.
[270] *Oil platforms case* (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports 2003, p.161.

PRAYER FOR RELIEFS

For the aforementioned reasons, the Democratic State of Ranovstayo respectfully requests that this Court:

I. **DECLARE** that 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;

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

III. **DECLARE** that The Court may exercise jurisdiction over Ranovstayo's counterclaim concerning the Mantyan Airways aircraft; and

IV. **DECLARE** that Aprepluya violated international law by shooting down the aircraft.

Respectfully submitted on this date,

January 6, 2021

Agents for Ranovstayo

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