BENCH MEMORANDUM FOR JUDGES

THE CASE CONCERNING THE ALFURNAN MIGRANTS

Version 4.0

20 March 2013

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2013 Philip C. Jessup Competition

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PURPOSE OF THE BENCH MEMORANDUM

The purpose of the Bench Memorandum is to provide judges in the Jessup Competition with basic factual and legal information to enable evaluation of the written and oral performances of participating teams. This Bench Memorandum should be read in conjunction with the 2013 Jessup Problem (the "Compromis) and the Corrections and Clarifications to the Compromis.

The Compromis was designed to present the competitors with a balanced problem such that each side has both strengths and weaknesses. Jessup teams should be able to construct good arguments as both the applicant and as the respondent. As a judge, your task is to evaluate the quality of each team's analysis, their knowledge of international law, and their advocacy skills. Please make sure not to confuse this task with your own personal evaluation of the merits of the case.

Please note that this memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. In particular, Judges should be aware that this Bench Memorandum has been condensed as much as possible, and does not purport to cover all relevant issues in detail. In many instances, relevant case law is not discussed, and should be addressed by the participants. The state practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or authorities which are not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

I. SUMMARY OF THE CASE

The Compromis raises four primary issues: 1) State extinction and the elements of Statehood; 2) the status and treatment of persons displaced across international borders because of environmental circumstances; 3) the treatment of detainees; and 4) the enforcement of sovereign to sovereign loans.

Alfurna was a developing nation made up of two islands, Batri and Engili, located in the Bay of Singri. Alfurna was first settled by Finutafu, a developed State approximately 800 miles west. As of 2011, Alfurna's population was approximately 53,000. Among its population is a group of about 1,500 residents of Nullatree Cove, a small coastal village in Engili, who have lived apart from other citizens for many years because they reject urbanization and technological development.

Rutasia is a large developed State on the eastern side of the Bay of Singri, about 350 miles east of Alfurna. Rutasia is heavily reliant on the burning of fossil fuels and has been slow to reform its carbon emission behavior, having committed to a massive public works program in the mid-1990s. It is also a frequent lender to impoverished nations and a member of the Paris Club, an informal group of official creditor nations.

The climate of the Bay of Singri includes rain-bearing monsoons in summer, with strong cyclones and torrential rains in spring and fall. The Bay also experiences undersea earthquakes, generating tsunamis, which have devastated the coastal regions of the nations surrounding the Bay. Within the first decade of Alfurna's settlement, it was clear that the islands were in frequent danger of being swamped. Seawalls were erected around the islands, which were maintained by Finutafu before Alfurna became an independent nation. However, Alfurna's post-independence monitoring and maintenance of the seawalls was hampered by financial difficulties.

By 1990, the rate at which sea levels were rising had increased to such an extent that many parts of the islands were underwater even at low tide. Because of its financial difficulties, Alfurna sought grants and loans from various foreign governments to finance repairs. In 1992, Rutasia agreed to a "climate change loan" of USD 125 million, tied to the use of Rutasia's expertise and resources for a long-term climate change remediation project, the Alfurna Climate Change Remediation Project (ACCR Project). Disbursement of the funds was conditioned on their use to repair the seawalls and related damage, and to implement other remedies and preventative measures, and the funds were deposited into Alfurna's account at Rutasia's provincial bank. The loan required Alfurna to contract a Rutasian company to perform the construction and maintenance work on the seawalls, and Mainline Constructions Limited (MCL) was the only such Rutasian private-sector construction company capable of performing the work. The loan agreement also required that funds be deposited into an account that Alfurna's central bank, the Alfurna Reserve Bank (ARB), maintained in the Provincial Bank of Lando, one of Rutasia's provincial reserve banks.

In January 1999, the International Monetary Fund reported that Alfurna's debt had reached 120% of GDP. In late 1999, Alfurna failed to pay any interest or principal under the climate change loan, and negotiated for debt relief. Rutasia agreed to cancel 25% of the loan, among other things. In 2001, Hurricane Caryl caused major damage throughout the Bay and Alfurna again anticipated it would be unable to meet its payment obligations. As the work in connection with the ACCR Project continued, Alfurna complained that a significant amount of MCL's repairs to portions of the seawalls were substandard. MCL rejected Alfurna's claims. In November 2001, Alfurna and MCL submitted their contractual dispute involving the repair work to arbitration, in accordance with the loan agreement. Alfurna withheld USD 20 million that MCL claimed pursuant to their contract, which it agreed to preserve in the ARB account at the Provincial Reserve Bank of Lando until the arbitral panel issued its final award.

In July 2002, Alfurna's Treasury reported to Prime Minister Fatu that based on a "best case" analysis, Alfurna would encounter severe debt servicing problems within three years, and had a high risk of missing principal payments again within the next five years. In September 2002, Rutasia agreed to cancel a further 25% of the loan and restructure payment obligations. In November 2002, the arbitrators in the case against MCL issued their final award in favor of Alfurna, authorized the release of the USD 20 million held pending the award and ordered an additional USD 35 million be paid in damages. MCL paid USD 35 million in damages to the ARB account in the Lando Bank.

Prime Minister Fatu established a Climate Emergency Committee (CEC) comprising his most senior government ministers in early 2003, to examine the future prospects of Alfurna. By 2004, the CEC concluded that Alfurna would be habitable for only a few more years before earthquakes and extreme weather events destroyed the seawalls. Alfurna began strategizing to relocate its people. The government also declared a moratorium on servicing debt to foreign lenders. By 2005, Alfurna stopped repaying any of its loans.

In mid-2006, a major earthquake destroyed much of Batri Island and also caused significant damage to Rutasia. Alfurna's government relocated to Finutafu, occupying temporary premises until Alfurna could find a new homeland. The remainder of Batri residents fled to Engili. Shortly thereafter, Batri was submerged permanently. Alfurna pleaded for assistance in negotiations with various neighboring States, asking for migration arrangements and a new homeland, and succeeded in securing a range of emergency migration arrangements. By 2007, after another series of severe storms caused damage to the Bay, Finutafu finally agreed to negotiate with Alfurna for the cessation of an offshore island.

In mid to late 2008, as world credit markets tightened, Rutasia experienced severe financial pressures, and its own loan repayment obligations and costs of dealing with the 2007 storms caused it to look at improving its collection of repayments on its official development assistance loans. Alfurna did not respond to the notice from Rutasia to remedy its breach of its payment obligations.

By early 2009, most of Engili was almost uninhabitable. Most of the remaining citizens were those in the Nullatree Cove area who had refused to take part in the migration program because they did not wish to leave, though some could not take part because they had criminal records, which meant they did not meet the good moral character requirements of receiving states. During 2009 and 2010, Rutasia's Navy encountered a large number of overcrowded boats in Rutasia's territorial waters, drifting towards Rutasia. They were intercepted and the people onboard brought to the Woeroma Immigration Processing and Detention Centre.

Of the roughly 3,000 people brought to the Woeroma Center, about 1,500 were from the Nullatree Cove and requested to be housed together, which they were, in a separate Block A. Conditions at the Woeroma Center came under criticism. After a small earthquake in 2011 caused cracks in Block A, asbestos was discovered, and Rutasia's immigration department declared it could no longer provide separate facilities for the Nullatree Cove people. Rutasia reached an agreement with the Republic of Saydee, a developing country that has a poor human rights record, to transfer those people to Saydee's existing facilities. The International Legal Support Association (ILSA), filed suit in Rutasia's highest court to stay the proposed transfer, and sought damages for the alleged mistreatment of the detainees. The court denied the motion and dismissed the case.

By the end of 2011, an earthquake destroyed the remaining sections of Alfurna's seawall and Engili became permanently submerged. Negotiations with Finutafu collapsed because Alfurna was unable to assure Finutafu it had access to sufficient funds to pay for the cession of the land. However, Finutafu agreed to lease the land to Alfurna, at an initial rental of USD 1 million per year, for a period of 99 years.

In February 2012, Rutasia directed its provincial bank to close Alfurna's account and transfer the balance to Rutasia's government. Rutasia claimed that the funds no longer belonged to any State, and that they should be applied to the debt the former State would have been obliged to pay had it continued to exist. Debates in the UN lead to the parties negotiating this special agreement to the ICJ. On the news of the prospective special agreement, ILSA filed for a stay of the transfer of the migrants, and a temporary stay was granted pending the ICJ decision in this case.

II. LEGAL ANALYSIS

QUESTION PRESENTED 1: ICJ Jurisdiction and the Relevance of Statehood and UN Membership.

Alfurna's Prayer for Relief	Rutasia's Prayer for Relief
Alfurna is still a State and, accordingly, the Court may exercise jurisdiction over its claims	Alfurna is no longer a State and, accordingly, the Court lacks jurisdiction over Alfurna's claims.

QP 1 addresses the Court's jurisdiction, focusing on whether the Applicant's complete loss of its original territory results in the loss of its Statehood. Under the Court's Statute, only *States* may be parties before the Court.[1]

The physical disappearance of the entirety of a State's original territory is unprecedented in international law and the consequences of such an event under international law are open to debate.

NB: This case is not about recognition of States or the legitimacy of governments. Teams should only address recognition as an element of Statehood under Montevideo. Though some may argue recognition is a separate path to Statehood, that approach is widely disfavored today (*see* Theories of State Recognition *infra*). Teams may also reference the current situations in Kosovo and Palestine, which concern secession and recognition of States.

Extinction of States

Traditionally, a State ceases to exist through merger, the voluntary absorption of one State by another, or the breaking up of one State into several.[2] No State previously has been extinguished because its territory ceased to exist. It is arguable that the situation before the Court has not been the subject of previous State practice (depending on one's interpretation of the treatment of the Holy See and the Order of Malta, discussed below) nor have any specific rules been contemplated for this situation. The law governing State succession is not applicable because succession assumes the continuation of an entity and asks which entity holds the rights and obligations of the original State. It is not obvious which, if any, particular rules of international law establish whether the complete disappearance of territory results in extinction of that State. Both Applicant and Respondent teams will need to articulate clear rules to guide the Court; Respondent teams cannot fall back on an argument that there are no rules at all.

Theories of State Recognition

There is no universally agreed definition of Statehood. There are, as a general matter, two principal theories of Statehood: (1) the constitutive theory; and (2) the declarative theory.

The constitutive theory holds that the existence of a State is conditioned on recognition by other States.[3] However, it is not clear that the theory goes so far as to provide that recognition is a sufficient criterion on its own in the absence of any

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1 Statute of the International Court of Justice, Art. 34(1) 1945.

2 Crawford, CREATION OF STATES 705-14.

3 James Crawford, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW (8th ed, 2012) (hereinafter, "Crawford, BROWNLIE 8TH EDITION) 145-6.

other elements. One of the major criticisms of this theory is the confusion caused when some States recognize a new entity, but other States do not. Moreover, in the modern context, the constitutive theory is heavily disfavored because recognition is an inherently political act. Many States, including the USA and UK have expressly rejected the constitutive theory. Applicant may argue in favor of the constitutive theory, because recognition provides strong evidence of status. Here, 67 States endorsed Finutafu's comments regarding the treatment of the Alfurnan migrants [Compromis [49]], arguably indicating recognition of Alfurna as a State. Applicant may also argue that UN status is the best indicator of Statehood,[4] and since no-one has taken action to formally bring about the end of Alfurna's membership of the UN (indeed, the Alfurnan UN ambassador attended the General Assembly session in early 2012 – Clarification [8]), this is yet another indicator of Statehood.

The declarative theory, by contrast, limits the legal effects of recognition to a declaration or acknowledgement of an *existing* state of law and fact, legal personality having been conferred previously by operation of law.[5] The declaratory theory was most famously expressed in the 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention).[6] Rutasia is a party to the Montevideo Convention, but Alfurna is not. Whether the Montevideo Convention codified custom in 1933 or is custom today is an open question. State practice relating to the recognition of states typically falls somewhere between the declaratory and constitutive approaches,[7] but oralists are expected to address the Montevideo criteria, even if they argue in favor of the constitutive theory of Statehood.

Montevideo Convention and its Criteria

Applicant will likely argue either (a) that it meets each of the Montevideo Convention criteria or (b) that the criteria are not determinative of Statehood. Applicant may highlight Article 1's language, specifically that states "*should*" have these elements. Professor James Crawford has suggested that the definition in Article 1 is "no more than a basis for further investigation" and further criteria are needed to make a working definition.[8] Moreover, Matthew Craven has observed that "[f]or all its significance Article 1 is still treated with a certain degree of circumspection."[9]

Applicant may also argue that the Montevideo Convention was intended to deal with the *creation* of States – not their *extinction*. Nothing in this or any other convention expressly addresses extinction of States. Applicant will emphasize that there is a presumption in favor of the continuity of Statehood and a temporary loss of territory should not end a State's existence.

Respondent may argue that Article 1 of the Montevideo Convention crystallized customary international law.[10] Criticisms of the Montevideo Convention are not criticisms of the four criteria but, rather, of the fact that the criteria are vague.[11] The same can be said for Crawford's criticisms, which merely suggest that the four requirements are *insufficient*; he does not

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4 Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th edn. Oxford 2008) 94.

5 Crawford, BROWNLIE 8TH EDITION 144-5.

6 Montevideo Convention on the Rights and Duties of States, 26 December 1933, 165 L.N.T.S. 19 (hereinafter MONTEVIDEO CONVENTION). "Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 lays down the most widely accepted formulation of the criteria of statehood in international law." Malcolm Nathan Shaw, *International Law*, Cambridge University Press, p. 178 (2003)

7 *See* Shaw, *International Law,* p. 369.

8 Crawford, BROWNLIE 8TH EDITION 128.

9 Matthew Craven, 'Statehood, Self-Determination and Recognition' in Malcolm Evans (ed), INTERNATIONAL LAW (3rd ed, 2010) 203 (hereinafter "Craven, Statehood, Self-Determination and Recognition"), 220.

10 Gillian Triggs, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES (1st ed, 2006) 150; David Harris, CASES AND MATERIALS ON INTERNATIONAL LAW (6th ed, 2004) 99.

11 *See* Craven, Statehood, Self-Determination and Recognition.

suggest that they are wrong.[12] Moreover, the loss of Applicant's territory is not temporary; the Compromis expressly describes the islands as having been *permanently* submerged.

Reference Table

Place	**UN Status**	**Status on international plane**	**Foreign elements of control**
Holy See	"Permanent Non-Member Observer State"	Widely considered a sovereign State with the territory of Vatican City but no permanent population	Defense (Italy)
Liechtenstein	UN Member State		Defense (Austria, Switzerland)
Monaco	UN Member State		Defense (France)
San Marino	UN Member State		Defense (Italy), customs (Italy), printing money (Italy)
Andorra	UN Member State		Defense (France and Spain); Head of State is jointly shared by the President of France and the Bishop of Seu d'Urgell, Spain, Head of government is the Andorran Prime Minister
Puerto Rico	No official status	Unincorporated territory of the United States	Not Sovereign
Marshall Islands, Palau, Micronesia	UN Member States		Defense (USA)
Palestine	"Permanent Non-Member Observer State"	Territory and capacity to enter relations with other States, among others	
Order of Malta	"Permanent Non-Member Non-State Observer"	Only has 3 citizens, no sovereign territory (four buildings granted extraterritoriality)	

[12] *See Id.*

A. Defined Territory

This is likely to be the primary focus of QP 1. There are two principal questions: (1) whether the "defined territory" requirement is a requirement at all; and (2) assuming it is a requirement, what is the nature of the "territory" required to satisfy the requirement.

1. Is Territory a Requirement?

Applicant will argue that there is no uniform and consistent State practice and accompanying *opinio juris* requiring that a State have a defined territory in order to *remain* a State. No State has ever been recognized as disappearing outside of a situation of State succession.[13] No State has lost Statehood for lack of territory nor has any entity claiming Statehood been denied on the basis that it does not have a "defined territory." The requirements for territory are flexible: there is no minimum size requirement,[14] and ill-defined borders or control over borders are not barriers to the creation of States.[15]

Additionally, Applicant will argue that there is a distinction between the requirements for *becoming* a State, on the one hand, and the requirements for *being* a State, on the other. The loss of some territory does not affect the legal status of a State, as it is not necessary for a State to have precisely defined boundaries.[16] The Montevideo Convention does not discuss loss of Statehood and nowhere indicates the loss of any one of the characteristics results in the end of a State.[17] For example, Article 3 refers to the political existence and rights of States irrespective of recognition and makes no mention of territory.[18] Publicists have noted that it is "common to find pronouncements to the effect that international law has no real understanding of when a state ceases to exist."[19]

Crawford indicates "there is a strong presumption against the extinction of States once firmly established."[20] This is to ensure certainty of obligations at international law. A key message from an international expert meeting on climate change and displacement convened by the United Nations High Commissioner for Refugees was that "the legal presumption of continuity of Statehood needs to be emphasized and the notion and language that such states will 'disappear' (i.e., lose their international legal personality) or 'sink' ought to be avoided."[21]

Respondent will argue that States are territorial entities,[22] and therefore must have a defined territory (although the borders may be disputed). Moreover, the concepts of Statehood and international legal personality are distinct, and recognition of

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13 Crawford, CREATION OF STATES 715.

14 *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Montserrat, New Hebrides, Niue, Pitcairn, St Helena, St Kitts-Nevis-Anguilla, St Lucia, St Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, GA Res 2709 (XXV) UN Doc A/RES/2709(XXV) (14 December 1970) [4].

15 Rwanda was admitted to the United Nations despite ill-defined borders. The same may be said for Israel.

16 *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal republic of Germany v Netherlands) Cases* [1969] ICJ Reps 3; *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 AD 11, 15 (there, the German-Polish Mixed Arbitral Tribunal noted that it is sufficient that "territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited". The State of Israel may be another example of this.

17 Jane McAdam, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (2012) 128.

18 Montevideo Convention, *supra* note XX, Art. 3.

19 Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *European Journal of International Law* 142 (hereinafter, "Craven, Problem of State Succession) 158. See, also, Marek, 7.

20 Crawford, CREATION OF STATES 715.

21 'Summary of Deliberations on Climate Change and Displacement' (UNHCR Expert Roundtable on Climate Change and Displacement), Bellagio, 22-25 February 2011).

22 Crawford, CREATION OF STATES 46.

international legal personality does not automatically give rise to Statehood, which is the basis on which an entity has standing before the Court. For example, the United Nations has international legal personality,[23] but is not a State and thus does not fall within article 34(1).

Though the Montevideo Convention does not explicitly address the demise of Statehood, the requirements for becoming a State logically should apply in connection with its 'legal demise.'[24] Loss of Statehood may occur not only as a consequence of merger, absorption, or annexation[25] but also because of disappearance of a State's territory.[26] Other sources require a State be in "possession of a fixed territory,"[27] or be "occupying a fixed territory."[28]

Oralists may cite various examples to help support their arguments. The Sovereign Order of Malta has some elements of sovereignty though it does not have a defined territory.[29] The Order has diplomatic relations with 104 States.[30] The Holy See is regarded as a sovereign juridical entity with relations with essentially every State and the territory of Vatican City, though it has no permanent population. See also the table *supra*.

2. The Nature of Territory Required

Applicant will contend that sovereignty over 'territory' (assuming there is a requirement of territory) is not required and that a broad definition of 'territory' should be applied. The Court has stated that "[t]he appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not."[31] Though a State needs some territory and cannot exist as a spirit,[32] this is satisfied where the State can be identified in a particular place over which it exercises governmental authority, in this case, Nasatima Island.

Territorial sovereignty is not ownership of, but governing power with respect to, territory.[33] Exclusive possession is an important factor.[34] Alfurna's government exercises exclusive possession over Nasatima Island. Under the lease, Alfurna is to apply its own laws, except for laws relating to defense, customs and immigration, which remain subject to Finutafuan control (Compromis [45]; Clarifications [4]). Further, the Alfurnans on Nasatima Island will have no claim to Finutafuan citizenship (Compromis [45]). Many microstates cede defense and other outward looking powers to their neighbors has Alfurna has done here, see the table *supra*.

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23 *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reps 174.

24 Craven, Problem of State Succession 159.

25 Robert Jennings and Arthur Watts, OPPENHEIM'S INTERNATIONAL LAW (9th edn. Oxford 1992) [hereinafter *Jennings and Watts*] 206-7; *Shaw* 208.

26 *Shaw* 208.

27 Percy Winfield (ed), LAWRENCE'S PRINCIPLES OF INTERNATIONAL LAW (7th ed, 1930) 50.

28 Sir Robert Phillimore, COMMENTARIES ON INTERNATIONAL LAW (3rd ed, 1879) 81

29 *See, e.g.,* San Marino acknowledging the order as a sovereign state in a treaty of amity in 1935: Dr Noel Cox, 'The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta' (2002) <http://www.reocities.com/noelcox/Malta.htm>.

30 Order of Malta, <http://www.orderofmalta.int/diplomatic-relations/862/sovereign-order-of-malta-bilateral-relations/?lang=en>.

31 *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal republic of Germany v Netherlands) Cases* [1969] ICJ Reps 3 [1969] ICJ Reps 3, [46].

32 US Ambassador Jessup, UNSCOR 383rd Meeting (2 December 1948) 11 cited in Jane McAdam, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (2012) 130.

33 Crawford, CREATION OF STATES 56.

34 Crawford, CREATION OF STATES 56.

International law defines "territory" by reference to the extent of governmental power exercised, or being capable of being exercised, with respect to some territory and population.[35] There is a good cause for regarding government as the most important single criterion of Statehood, since all the others depend upon it.[36] Here, Alfurna operates its government on Finutafu and has at least some level of clear governmental power over Nasatima Island. There is State practice to suggest that control / sovereignty is loosely tested. The Micro-States of Liechtenstein, San Marino, Monaco and Andorra were accepted into the United Nations as member States despite strong foreign elements in their respective domestic systems. For example, Switzerland maintained diplomatic relations on Liechtenstein's behalf since World War One and controlled the postal and customs officers in Liechtenstein. Swiss postal and customs legislation (as well as treaties concluded by Switzerland with third States) were applicable in Liechtenstein.[37] Nevertheless, Liechtenstein is a member of the United Nations, its Statehood is well established and it has been a party to a case before the International Court (*Nottebohm*).

Similar situations occur in other Micro-States. Italian postal legislation and currency legislation was substantially adopted in San Marino; French legislation on war material, banking, customs and postal tariffs was applicable in Monaco and Monaco was under an obligation not to ally its territory with any other power other than France; the French Prime Minister is a co-prince of Andorra while the other co-prince is a Spanish Bishop. These Micro-States are all members of the United Nations and their Statehood is not questioned.

There is also State practice indicating that a "lease" can give rise to the exercise of exclusive sovereign jurisdiction over a territory, if it amounts to a "concession." Although Hong Kong Island and much of Kowloon was ceded by the Qing Dynasty to Great Britain in perpetuity, the New Territories was only subsequently leased for a defined 99 year term under the *Convention Between Great Britain and China Respecting an Extension of Hong Kong Territory*.[38] The law of the United Kingdom was applicable in the New Territories, and governmental functions were exercised by the United Kingdom. More generally, "concessions" (with the most notable examples being those granted by China to various other States) appear to be regarded as ***extensions*** of the territory of the State exercising jurisdiction. Conceptually, there should be no reason not to base Statehood on this form of territory as well.

Respondent will argue there is insufficient state practice and *opinio juris* for Applicant to establish a custom. Land over which a purported government exercises temporary control and authority, even on an exclusive basis, cannot be sufficient. If it were, there would be little to distinguish such land from diplomatic or consular missions, which are manifestly not sovereign territory under international law and do not constitute extensions of the relevant State. Though Applicant can highlight the differences between diplomatic or consular missions and the situation here, it is logically impossible for Alfurna to be free from Finutafu's power. "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[39] At its simplest, Alfurna's independence is dependent on Finutafu.

Moreover, the nature of the relationship between Alfurna and Finutafu indicates something ostensibly short of sovereignty for Alfurna. Alfurna holds a mere lease over Nasatima Island, indicating that it is not Alfurnan territory in the sovereign

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35 Crawford, CREATION OF STATES 56.

36 Crawford, CREATION OF STATES 56.

37 Jorri Duursma, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD (1996) 167.

38 Signed at Peking 9 June 1898. See, generally, Yash Ghai, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW (2nd ed, 1999). A version is available online at <http://books.google.com.au/books?id=LbdKiUl-YNIC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>. *See, also,* <http://www.hkbu.edu.hk/~pchksar/JD/jd-full1.htm> and <http://history.cultural-china.com/en/34H6566H12215.html>.

39 Island of Palmas Case, Perm. Ct. Arb. 1928, 2 U.N. Rep. Intl. Arb. Awards 829, 837.

sense. In a territorial lease, there is a presumption that the grantor retains residual sovereignty.[40] The leasing state may repossess the territory either by expiration of the lease agreement or by rescission.[41]

Additionally, Finutafu retains control over defense, customs and immigration – arguably the hallmarks of sovereignty and Statehood. Even if one accepts a liberal definition of "defined territory," Alfurna does not have the "ability to rightfully claim the territory as a domain of exclusive authority," or "the right to exercise therein, to the exclusion of any other State, the function of a State."[42] Even if one assumes that exclusive possession is sufficient, there is no evidence that Alfurna has exclusive possession over Nasatima Island. Alfurna has only limited rights in relation to Nasatima Island and in contrast the various Micro-States that have cedes similar rights in treaties under various circumstances, Alfurna had no other choice and was required to accept these terms to get the lease.

In the Hong Kong example, the UK never had full sovereignty over the New Territories and full governmental functions could never be exercised. For example, grants of land in the New Territories were to expire in 1997 (when the lease would expire), whereas grants of land in Hong Kong Island and Kowloon did not have that limitation. The relevant question is whether the kind of control that they granted was regarded as an indication of sovereignty. Relevant State practice and *opinio juris* do not clearly support Applicant's argument that its alleged control over Nasatima Island is, in essence, sovereign.

B. Permanent Population

Oralists may address permanent population, though same may concede it is satisfied in this case. This element is intended to be used in association with territory to establish a stable community without which it is difficult to establish a State.[43]

Applicant can establish a permanent population. Alfurna's government was located in Finutafu before the transition to Nasatima began, Alfurnan infrastructure has been built on Nasatima Island since 9 March 2012, and the Alfurnan people have been moving to the Island. There is no disconnect between the Alfurnan government and the State of Alfurna. The fact that some Alfurnans live elsewhere does not eliminate the permanent population. The element does not require a minimum number or percentage be satisfied. For example, more Samoans live abroad than in Samoa, yet is has a permanent population and is a UN member State.

Respondent may argue Applicant does not have a permanent population within its territory, however that territory is defined. The Alfurnan population is no longer located in any one location. Because the requirement is "intended to be used in association with territory",[44] it cannot be said that Alfurna has a "permanent population."

C. Government

Respondent may argue that Alfurna does not satisfy the requirement because Alfurna's government has been located in Finutafu and has not yet definitively established its offices on Nasatima Island. Respondent may also argue that Alfurna has only limited rights in relation to Nasatima Island and, specifically, Alfurna does not have the right to enact or apply laws that relate to defense, customs and immigration (Clarifications [4]). The key is not the fact that Alfurna's government is not yet fully functional, but that it will *never* be able to exercise full governmental functions on Nasatima

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40 Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th edn. Oxford 2008) 111.

41 *Jennings and Watts* 569

42 Craven, Statehood, Self-Determination and Recognition , 223.

43 Crawford, BROWNLIE 8TH EDITION 128.

44 Crawford, BROWNLIE 8TH EDITION 128.

Island. The Alfurnan government is not "in general control of its territory, to the exclusion of other entities not claiming through or under it."[45]

Applicant may argue that Respondent is applying the concept of government too strictly. To the extent that Alfurna's government can be characterized as not functioning because it does not have control in exclusion of other entities, States that do not have a functioning government do not lose their status as a State merely because there is a period without an effective government. There is a strong presumption in international law that States continue to exist even if there is a period without a government (or an effective one).[46] Burundi and Rwanda were admitted to the United Nations in 1962 despite a lack of organized governments.[47] Somalia is still considered a State despite not having an effective government since 1991.

D. Capacity to Enter Relations with Other States

Alfurna's capacity to enter into relations with other States may be challenged, although its execution of the lease with Finutafu indicates it has the capacity to enter relations.

E. UN Membership and Its Relevance to ICJ Jurisdiction

The UN Charter provides, "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."[48] Article 34(1) of the ICJ's Statute provides that "Only states may be parties in cases before the Court."[49]

If the issue arises, Applicant will note that the expulsion of Member states from the UN requires a recommendation of the Security Council and a decision by the General Assembly.[50] Inability to pay the financial contributions does not mean automatic expulsion from the UN.[51] Alfurna is a member of the UN, and there has been no binding conclusion that it is no longer a member. The Secretary General has postponed consideration of Alfurna's membership pending decision by this Court, the Security Council has said nothing at all, and no States other than Rutasia have argued against Alfurna's continuing membership. Accordingly, Alfurna arguably remains *ipso facto* a party to the Statute of the Court.

Respondent's UN ambassador has already declared that: "…Alfurna has lost all of its territory and accordingly is no longer a state. Its right to participate as a member of the United Nations and to have its interests considered [at the UN General Assembly] has been extinguished" [Compromis [50]]. In this regard, Respondent will maintain that Alfurna can no longer be a member of the United Nations. There is no State to succeed to Alfurna's UN membership. Thus, ceasing to exist as a State will *de facto* end Alfurna's membership in the UN without any formal act by the UN or any of its organs.

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[45] Crawford, CREATION OF STATES 59.

[46] Crawford, CREATION OF STATES 34.

[47] Crawford, BROWNLIE 8TH EDITION 129.

[48] UN Charter, Art. 93(1).

[49] Statute of the Court, Art. 34(1).

[50] Bruno Simma, Hermann Mosler, Andreas Paulus, Eleni Chaitidou, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (2nd edn. Oxford 2002) [hereinafter, UN CHARTER COMMENTARY]. 211.

[51] *Ibid,* UN CHARTER COMMENTARY 339.

QUESTION PRESENTED 2: Obligations towards Persons Displaced by Environmental Circumstances

Alfurna's Prayer for Relief	Rutasia's Prayer for Relief
Alfurna is entitled to make claims in relation to the migrants now in Rutasia, and Rutasia has failed to process those migrants and accord them status consistent with international law.	Rutasia has not violated international law in its treatment of the migrants from (former) Alfurna and, in any event, Alfurna is foreclosed from making claims with respect to those individuals because of its failure to take available affirmative steps to protect them.

QP 2 focuses on three key issues: (A) whether Alfurna may seek relief from the Court for the Alfurnan migrants; (B) whether the Alfurnan migrants fit within any established category of protected migrant to which Rutasia must afford rights; and (C) whether there are any other rights of residence or settlement available to the Alfurnan migrants.

NB: Both QP 2 and QP3 lack certain facts regarding the specific process and treatment of the detainees. This is by design to allow more balanced arguments on both sides. Both sides will make inferences from the facts. Under the Court's jurisprudence, when the alleged breach of international law occurs within the Respondent's territory, the Applicant State "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[52]

A. May Alfurna Seek Relief for the Migrants?

This is intended to raise the issue of "unclean hands." However, it is possible that teams will read this as implicating an argument about Diplomatic Protection. These are issues of whether the specific claim is admissible despite the Court having jurisdiction, not arguments about whether the court would have jurisdiction in the first place.

1. Diplomatic Protection and Exhaustion of Local Remedies

It is well-established that, without an agreement to the contrary, a State may not bring a claim on behalf of one its nationals unless that national has exhausted the local remedies in the putative respondent State.[53] This rule does not apply where the claimant State is directly injured by the wrongful act of another State[54] and is thus bringing a claim for itself, rather than being injured only "indirectly" through injury to its national.

"Mixed claims" arise where it can be said that there is both direct injury to the claimant State and to its nationals. It can be unclear, in cases of mixed claims, whether a claim is being made for direct injury or for indirect injury.[55] However, it appears that the exhaustion of local remedies rule does not apply to mixed claims.[56]

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[52] *Corfu Channel (United Kingdom* v. *Albania), Merits. Judgment, I.C.J. Reports 1949, p. 4,* p. 18.

[53] Malcolm Evans (ed), INTERNATIONAL LAW (2003) 493. The rule is recognised as a rule of custom by the ICJ in *Interhandel (Switzerland v. United States of America)* Preliminary objections, ICJ Reports 1959 (hereinafter "*Interhandel Case*), p 6 at p 27. See also International Law Commission's *Draft Articles on Diplomatic Protection with commentaries (2006)*, Article 14(1) and Commentary (1) thereto, available here: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

[54] *Draft Articles on Diplomatic Protection with commentaries*, Article 14(3) and Commentary (9) thereto.

[55] For example, the *Interhandel Case*, the *Tehran Hostages Case (ie Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran))*, Judgment, ICJ Reports 1980, p 3, the *Arrest Warrant Case (ie Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium))*, Judgment, ICJ Reports 2002, p 3, and the *Avena Case (ie Avena and Other Mexican Nationals (Mexico v. United States of America))*, ICJ Reports 2004.

There is no obligation to exhaust local remedies where the remedies are unavailable in practice or are unlikely to yield any results.[57] The International Law Commission (ILC) has expressed the exception as, "There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."[58] In this case, even if the exhaustion of local remedies rule applies to the claim made by Alfurna, there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress. Teams should not dwell on this issue.

2. *Availability of the "Clean Hands" Doctrine*

The primary threshold issue is whether any act or omission by Alfurna precludes it from seeking relief from the Court. A general principle of equity recognizes that a person "who asks for redress must present himself with clean hands."[59] The question is whether this principle applies in international law and, if so, how.

a) Overview of the Clean Hands doctrine

Applicants may argue that the clean hands doctrine does not exist as a functioning principle of international law (though take note that this may preclude them from arguing this issue in their favor in QP4). Applicant will need to acknowledge that support for the clean hands doctrine can be found in dissenting opinions in PCIJ[60] cases, dissenting opinions in ICJ cases,[61] and elsewhere.[62] However, Applicant can point out that highly-qualified publicists have expressed doubt that the "clean hands" doctrine exists as a rule of customary international law. James Crawford, as the ILC's Special Rapporteur on State Responsibility, said it was not yet part of general international law,[63] described the cleans hands doctrine as a "new and vague maxim,"[64] and observed that even in the context of diplomatic protection the authority supporting the existence of a doctrine of "clean hands," whether as a ground of admissibility or otherwise, is "fairly long-standing and divided."[65] Charles Rousseau stated, "it is not possible to consider the 'clean hands' theory as an institution of general

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56 *Avena Case*.

57 Evans, at 494.

58 *Draft Articles on Diplomatic Protection with commentaries*, Article 15(a) and Commentaries (2)-(4) thereto.

59 Lisa Laplante, "The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition," American University International Law Review 23, no.1 (2009) 51 at 60, citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 156.

60 Judge Anzilotti's 1933 dissenting opinion in the *Legal Status of Eastern Greenland;* Judge Hudson's individual opinion in the *Diversion of Water from the Meuse* case

61 Judge Schwebel's dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua; Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ad hoc Judge Van den Wyngaert; In the *United States Diplomatic and Consular Staff in Tehran* case, in which the ICJ declined to consider the issue of clean hands, Judge Morozov wrote in his dissent that the United States had "forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation". However, Judge Morozov went to great lengths to stress that "[t]he situation in which the Court has carried on its judicial deliberation in the current case has no precedent in the whole history of the administration of international justice either before this Court, or before any international judicial institution", citing the United State's coercive and military measures against Iran which were carried out simultaneously with its application to the ICJ.

62 *See Guyana v. Surinam,* Arbitral Award of the Arbitral Tribunal constituted pursuant to article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea, 17 September 2007 ***(Guyana v Surinam Arbitration)*** at [418]-[421].

63 REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FIRST SESSION, 3 May - 23 July 1999, Official Records of the General Assembly, Fifty-fourth session, Supplement No.10, UN Doc A/54/10 (hereinafter "ILC REPORT ON ITS 51ST SESSION), Chapter V, para 412.

64 James Crawford, *Second report on State responsibility*, Addendum 2, 30 April 1999, UN Doc A/CN.4/498/Add.2 (hereinafter "Crawford, *State Responsibility Second Report Addendum 2*), para 333.

65 Crawford, *State Responsibility Second Report Addendum 2*, para 332.

customary law."[66] The Commentaries to the Articles on State Responsibility acknowledge that the doctrine has rarely been applied.[67] The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery.[68]

Respondent will counter that the core principle is well-established in international law. Respondent can also cite many publicists. John Dugard, as the ILC's Special Rapporteur on Diplomatic Protection, accepted that "the importance of the clean hands doctrine in international law could not be denied."[69] Sir Gerald Fitzmaurice said, "[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short, were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counteraction."[70]

Respondent will also be able to note that other members of the ILC at the same session at which James Crawford expressed doubt concerning the existence of the rule disagreed, noting that "the clean hands rule was a basic principle of equity and justice"[71] and that "the clean hands doctrine was a principle of positive international law."[72] Crawford recognized that clean hands has been relied on at times, "at least as a ground of inadmissibility of a claim, in State responsibility cases -- mostly, though not always, in the framework of diplomatic protection,"[73] and that, to the extent that it exists, "it corresponded to the doctrine of inadmissibility in proceedings."[74]

The cases also show that though rarely applied, the clean hands doctrine has been invoked in the context of the admissibility of claims before international courts and tribunals.[75] Though the ICJ has not specifically applied clean hands, it has never stated or suggested that the doctrine is inapplicable in inter-State claims and that it applied only to cases of diplomatic protection.[76]

b) Application of the Clean Hands Doctrine

If the clean hands doctrine applies, Respondent must show that the alleged wrongdoing by Applicant has some correspondence or connection with the alleged wrongdoing by Respondent, for example provoking it or in some way causing Respondent's conduct.

Here, Applicant complains about Respondent's treatment of the migrants. However, Respondent will argue that the migrants ended up in Rutasia as a result of Applicant's conduct. In implementing its evacuation plans and migration arrangements, Applicant tried to (but did not) secure a safe outcome for the migrants, half of whom came from Nullatree Cove. The Applicant government arguably abandoned them, giving rise to their current situation. Moreover, to the extent that Applicant is, as it contends, still a State, its failure to repatriate them (or even offer to do so), and its failure to secure Finutafu's assistance in bringing them to Finutafu or onto Nasatima Island, contributes to the migrants' current situation.

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66 Charles Rousseau, *Droit international public. Tome V. Les rapports conflictuels*, 5e éd. (Paris, Sirey, 1983), §170.

67 *Articles on State Responsibility*, Chapter V – Circumstances Precluding Wrongfulness, Commentary (9).

68 *Guyana v Surinam Arbitration* at [418].

69 *Report of the International Law Commission on the work of its fifty- seventh session*, 2 May-3 June and 11 July-5 August 2005, Official Records of the General Assembly, Sixtieth session, Supplement No.10, UN Doc A/60/10 (hereinafter "ILC REPORT ON ITS 57TH SESSION), Chapter VII, para 226.

70 Gerald Fitzmaurice, "The General Principles of International Law considered 653 from the Standpoint of the Rule of Law," *Receuil des cours*, vol. 92 (1957-II), p. 119, quoted by Judge Schwebel in *Nicaragua*, ICJ Reports 1986, p 14, at p 394 (para. 271).

71 ILC REPORT ON ITS 51ST SESSION, Chapter V, para 413.

72 ILC REPORT ON ITS 51ST SESSION, Chapter V, para 414.

73 Crawford, *State Responsibility Second Report Addendum 2*, para 330.

74 ILC REPORT ON ITS 51ST SESSION, Chapter V, para 411.

75 *Articles on State Responsibility*, Chapter V – Circumstances Precluding Wrongfulness, Commentary (9).

76 ILC REPORT ON ITS 57TH SESSION, Chapter VII, para 228.

Applicant can argue that it could not control the fact that some of the migrants could not be evacuated under the emergency migration arrangements it arranged. Specifically, the Nullatree Cove villagers chose not to leave (Compromis [32]). Some did not qualify for the migration arrangements because of criminal histories (Compromis [32]). Applicant could not force any receiving State to take the migrants and could not bring them to Finutafu against their will. In any event, Applicant will argue that it has not abandoned these migrants and has always sought to re-unify the people of Alfurna.

B. Respondent's Rights to Control its Borders

States have a sovereign right to control their borders and, if necessary, to use administrative detention for these purposes.[77] But they should do so in compliance with international human rights law[78] (as to which, see the discussion in relation to Prayer 3 below), and also subject to any other specific protections that apply to migrants. The contest between the parties is about whether there are any applicable rules which restrict the Respondent's rights to control its borders and use administrative detention in relation to these migrants and whether the Respondent has breached any of those restrictions.

C. Obligations Owed To Established Categories of Migrants

Applicant may seek to show that the migrants fall within an established category of migrant receiving protection. Categories which are expected to be discussed are outlined below.

1. The Refugee Convention

Although the migrants are not "refugees", as a matter of law, based on the accepted interpretation of the relevant conventions, judges can expect that a number of teams will present the "refugee" argument, and so it is discussed here. The essence of such argument is similar to, if not the same as, those discussed as complementary protection below, which offers more plausible grounds for Applicant to seek relief for the migrants.

Both Applicant and Respondent are parties to the Convention Relating to the Status of Refugees (Refugee Convention) and the Protocol Relating to the Status of Refugees (Refugee Convention Protocol) (Compromis [54]). If the migrants qualify as refugees, they would be entitled to heightened protection, including the right to seek and enjoy asylum, the right to freedom of movement, and rights to work, housing, education, public relief and assistance. For the migrants to qualify for refugee status, they must be able to show a "well-founded fear of being persecuted because of their race, religion, nationality, political opinion or membership of a particular social group."[79]

Individuals moving as a result of climate change or other environmental circumstances do not fit within the plain definition of a "refugee" because there is no persecution by Alfurna, and certainly none based on a particular social group. The framework of refugee law as it currently exists does not apply.[80]

Nevertheless, Applicant may argue that the unique and unprecedented nature of the circumstances of this case justify a broader interpretation of the Convention that would provide protection to the migrants. The Convention has an avowedly humanitarian character, and contemporary displacement situations as a result of environmental disasters should be recognized. Some oralists may attempt to argue that an environmental disaster itself constitutes "persecution" under the Convention. Applicants may cite various domestic laws and regional conventions expanding the definition of refugee to

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[77] The Equal Rights Trust, "Guidelines on the Detention of Stateless Persons: Consultation Draft", The Equal Rights Review, Vol. Seven (2011), p105.

[78] The Equal Rights Trust, "Guidelines on the Detention of Stateless Persons: Consultation Draft", The Equal Rights Review, Vol. Seven (2011), p105.

[79] *Refugee Convention*, Art 1A(2); *Refugee Convention Protocol*.

[80] *See, e.g.,* Jane McAdam, CLIMATE CHANGE 'REFUGEES' AND INTERNATIONAL LAW (2007); Jane McAdam, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW (2012).

include those displaced my environmental disasters. Examples include domestic laws in Sweden and Finland, the Cartagena Declaration, the Organization of African Unity's 1969 Convention on Refugee Problems in Africa, and 1994 Arab Convention, all of which have broadened definitions of refugee.

The Applicant bears the burden of showing that this domestic and regional practice creates a global custom, and that there is any accompanying *opinio juris*.

2. Stateless Persons

International legal instruments provide specific protection to stateless people, including the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.[81] Applicant cannot make an argument that the migrants should be protected as stateless people because the Conventions require the Applicant no longer be a State granting them citizenship for its people to be stateless. This argument cannot be harmonized with Applicant's claim that it is a State or seeking relief for the migrants as its nationals via diplomatic protection. Moreover, the remedy would be to grant Rutasian citizenship to the migrants and the facts do not indicate that any of the migrants desire that outcome.

Should Applicant attempt to put forward this argument, Respondent can additionally argue that the migrants are not "stateless persons" because the definition of statelessness is premised on the denial of nationality by a particular State under the operation of its law.[82] Furthermore, there is no uniform and consistent state practice and accompanying *opinio juris* to indicate that migrants in these circumstances can be considered to be stateless.

Applicant may argue that although it is still a State and the migrants still its nationals, they are nevertheless *de facto* (as opposed to *de jure*) stateless persons entitled to protection. Applicant may rely on suggestions from the UNHCR regarding this concept,[83] and regional instruments such as the 1969 Convention on Refugee Problems in Africa on the basis they give rise to some rule of custom. That convention protects persons falling within a similar refugee definition to that of the 1951 Refugee Convention/1967 Protocol and also:

> "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

There may also be an argument that if a person is unable to access the benefits of nationality (for example, if consular services are not available in the state where the person arrives), there may be *de facto*, temporary, statelessness. The difficulty for Applicant will be in proving that binding, applicable custom has emerged from such regional instruments or similar sources.

3. Migrant Workers

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention) does not apply because the Applicant and Respondent are not parties to it. Application as custom is unlikely because there is insufficient State practice. If the Convention does apply as custom, refugees and stateless people are expressly excluded from protection, thus this argument is mutually exclusive to those presented

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[81] *Convention Relating to the Status of Stateless Persons*, U.N.T.S., vol. 360, p.117, 1954 (hereinafter "*Stateless Persons Convention*); *Convention on the Reduction of Statelessness*, U.N.T.S., vol. 989, p.175, 1961 (hereinafter "*Reduction of Statelessness Convention)*.

[82] *Stateless Persons Convention*, Art. 1. Further, the provisions of the *Reduction of Statelessness Convention* do not deal with a situation where persons have become stateless because of the disappearance of the State: McAdam, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW (2012) 138-43.

[83] Hugh Massey, "UNHCR and *De Facto* Statelessness", UNHCR Legal Protection and Policy Research Series, LPPR/2010/01 (April 2010) at p 61 ff.

supra.[84] More importantly, though the Migrant Workers Convention provides certain rights to those who are employed in a State in which they are not a national,[85] here, there are no facts indicating that the migrants are employed or have sought employment in Rutasia.

D. Other Customary Obligations

Because the migrants do not fall within any of the definitions discussed above, they are best described as Environmentally Displaced Persons (EDPs). EDPs are people who, for reasons of sudden or progressive environmental change that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.[86] There are no widely recognized international norms that deal specifically with EDPs,[87] and this is particularly the case where migrants are displaced across international borders and it is another, receiving State whose obligations towards the migrants are at issue (as opposed to internally displaced persons, who are still entitled to human rights protections from their home State). Applicant teams should therefore seek to establish obligations under custom and based on various general human rights sources.

Regional instruments protect rights and provide obligations for the treatment of some similarly situated people. Kenya and Ghana, as members of the African Union, have signed a series of human rights regional instruments including the African Charter of Human and Peoples' Rights which includes a "right to a general [sic] satisfactory environment favourable to their development."[88] This provision was uncontested in the negotiations of the Charter and was the first binding international obligation relating to 'right to the environment.'[89] Sweden and Finland both have domestic legislation giving rights to EDPs.[90] However Applicant will have a very hard time establishing that regional or domestic legislation provide the necessary State practice, let alone *opinio juris* to form a custom.

Applicant will likely argue that a customary form of complementary protection has developed to fill these gaps. Complementary protection is a form of legal protection accorded to a person, such as an EDP, who is not entitled to protection under the Refugee Convention, but cannot be returned to his or her country of origin based on expanded *non-refoulement* obligations under international human rights law. Judicial bodies have found that obligations to grant complementary protection arise under, *inter alia*, Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR). The principle of *non-refoulement* is explored further in relation to Prayer 3, below. Teams that pursue this expanded concept of *non-refoulement* will need to be careful to keep their arguments on Prayers 2 and 3 as clear as possible.

EDPs from Tuvalu and Kiribati have argued that they should receive refugee protection from climate change impacts and applicants from Tonga and Bangladesh have sought protection on the basis of environmental disasters, but all have failed.[91] Given that many (if not most) States do not provide rights to detainees of the sort at issue here and the lack of any directly relevant treaty or established custom, Applicant will likely have a difficult time making its case.

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84 *Migrant Workers Convention*, Art. 3(d).

85 *Migrant Workers Convention*, Art. 2(1).

86 International Organization for Migration, Discussion Note: Migration and the Environment, 94th Session of the IOM Council, MC/INF/288, 1 November 2007, para. 6.

87 Zetter, at 16.

88 *African Charter of Human and Peoples' Rights*, Art. 24.

89 (Linde and Louw 2003:173).

90 *Aliens Act (Sweden)* (2006) 716, Ch4, s 2(3); *Aliens Act (Finland)* (2004) 301/2004 s 88a.

91 NZ cases: Refugee Appeal No.72719/2001, RSAA (17 September 2001 (Tuvalu); Refugee Appeal No. 72313/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal No. 72316/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal Nos 72179-72181/2000, RSAA (31 August 2000) (Tuvalu); Refugee Appeal Nos 72189-72195/2000, RSAA (10 August 2000) (Tuvalu).

QUESTION PRESENTED 3: International Standards of Treatment Applicable to Detained Persons, the Legality of Offshore Processing & Prolonged Detention

Alfurna's Prayer for Relief	Rutasia's Prayer for Relief
Rutasia's treatment of the detained Alfurnan migrants held in the Woeroma Centre, and the proposed transfer to Saydee, violate international law.	The Alfurnan migrants held in the Woeroma Centre are being treated in accordance with Rutasia's obligations under international law, and their proposed transfer to Saydee is legal.

QP 3 addresses two issues: **(1)** the treatment of the detained migrants at the Woeroma Centre, and **(2)** the proposed transfer of the migrants to Saydee.

For the treatment of the detained migrants, Applicant will allege that Respondent violated several human rights norms contained in the ICCPR and ICESCR. These norms apply to the migrants regardless of their status under international law. Students will have to distinguish between the obligations contained in these two international treaties. Some aspects with which Alfurna may take issue are: (i) indefinite detention, (ii) overcrowding, hygiene conditions, lack of food and water, high fences and cages at Block B, (iii) unequal treatment vis-à-vis the detainees held at Block A, and possibly (iv) health risks at Block A related to the use of asbestos.

> **NB:** Applicant teams should not be penalized for not addressing detention conditions at Block A. No cases addressing human rights violations out of contingent health risks, such as asbestos, have been found.

For the proposed transfer to Saydee, arguments will focus on the principle of *non-refoulement*. Despite the debate on whether *non-refoulement* is a customary rule,[92] both Alfurna and Rutasia are parties to the ICCPR, which itself contains a *non-refoulement* obligation.

A. Treatment of the Detained Migrants

1. Applicable Legal Standards

As addressed in QP 2 *supra*, the detainees likely do not qualify for protection as any special class of migrants.

Regardless of their migratory status, persons in the territory and under the jurisdiction of a State are protected by the ICCPR and ICESCR. ICCPR Article 2 sets out an obligation to "**respect and to ensure"** those rights. ICESCR Article 2 contains an obligation "**to take steps … with a view to achieving progressively the full realization of the rights**" recognized in that treaty. Students should be aware of the differences between these obligations.

Some relevant rights in the ICCPR are: (i) prohibition of torture and cruel, inhuman and degrading treatment (Article 7); (ii) prohibition of arbitrary detention (Article 9); and (iii) right to humane treatment while in detention (Article 10).

Australian cases: 1004726 [2010] RRTA 845 (30 September 2010) (Tonga); 0907346 [2009] RRTA 1168 (10 December 2009); N00/34089 [2000] RRTA 1052 (17 November 2000); N95/09386 [1996] RRTA 3191 (7 November 1996); N96/10806 [1996] RRTA 31915 (7 November 1996); N99/30231 [2000] RRTA 17 (10 January 2000); V94/02840 [1995] RRTA 2383 (23 October 1995).

[92] *See, e.g.* Guy Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement", 23 Int'l J. Refugee L. 443 (2011); Elihu Lauterpacht & Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", at http://www.unhcr.org/419c75ce4.pdf .

Some relevant rights in the ICESCR are: (i) right to adequate standard of living, including adequate food, clothing and housing (Article 11), and (ii) right to the enjoyment of the highest attainable standard of health (Article 12).

Teams will probably invoke General Comments and other documents by the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights. With regard to the Human Rights Committee, the International Court of Justice has held that "it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[93]

2. *Derogability*

Notwithstanding the fundamental protections of the ICCPR, there are be certain circumstances when a State is justified in curtailing certain individual rights for the greater good, which is the concept of "derogability." Article 4 specifies which rights in the ICCPR are *non-derogable*, and they include the right to life (Article 6), freedom from torture (Article 7), freedom from slavery and forced labor (Article 8), and freedom from prolonged arbitrary detention (Article 9). Other rights, such as the right to free expression (Article 19), for example, are derogable, meaning they can be regulated in exceptional circumstances, *i.e.,* in times of public emergency threatening the life of a nation. Respondent may argue that it is entitled to derogate temporarily from some of the obligations under the ICCPR as a result of the emergency facing its country from the influx of migrants.

In order to establish derogability, Respondent will have to argue that the influx of migrants amounted to a public emergency which threatened the life of the nation, a very high burden under the facts of this case. Any derogation must be for a limited period of time, proportionate to the emergency, and non-discriminatory.[94] Article 4(3) also includes a notice provision which the Respondent, if arguing a derogable right, has not complied with.

3. *Indefinite Detention*

In *A v. Australia,* the Human Rights Committee considered that the prohibition of arbitrariness in Article 9(1) of the ICCPR imposes a requirement of *proportionality*.[95] States must justify the fact of detention and the length of detention. Even where the individual entered Australian territory illegally, the Committee concluded that "the author's detention for a period of over four years was arbitrary," because "the State party has not advanced any grounds particular to the author's case, which would justify his continued detention."[96]

Applicant will argue that indefinite detention without justification is *per se* arbitrary. Respondent has not advanced any grounds in the Compromis that could justify the prolonged detention of the migrants. Attempts to make inferences are speculative at best. In any event, the possible grounds for detention have not been demonstrated for each migrant, and Respondent has not indicated an end-date for detention. Further, Applicant should contend that there is ample scientific evidence linking indefinite detention of individuals and a deterioration of their physical and mental health.[97]

Respondent will argue that the detained Alfurnans either refused to take part in the emergency migration program, or had criminal records in Alfurna and, thus, did not meet the good moral character requirements, and it is therefore seeking to process these migrants in accordance with its law. Each of these circumstances justifies their detention. It may also contend that there is State practice to suggest that these procedures are legal (*e.g.*, Australia). Although there has been

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[93] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* I.C.J. Reports 2010, p. 639, para. 66.

[94] *See* ICCPR, Art. 4 ("in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Convenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination . . .").

[95] *A. v. Australia,* 3 April 1997, CCPR/C/59/D/560/1993, para. 9.4.

[96] *Ibid.*

[97] See, eg, Australian Medical Association, *AMA Position Statement on Health Care of Asylum Seekers and Refugees* (2011) <http://ama.com.au/asylum-seekers>.

condemnation from various non-government organizations, there has been very little action taken by other States or the UN. It is possible for indefinite detention to be in accordance with international law.

4. Conditions at Block B

Some of the facts regarding the conditions at Block B are disputed by Rutasia. The ICJ has held that "[i]t will give particular attention to reliable evidence acknowledging facts or conduct unfavorable to the State represented by the person making them."[98] This rule of evidence has been applied, in particular, to incriminating statements or "statements against interest" made by senior military officers.[99] Also, when the alleged breach of international law occurs within the Respondent's territory, the Applicant State "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[100] It has been noted by the Human Rights Committee that evidence is frequently held by a State Party alone.[101] This may allow Applicant more room to draw reasonable inferences of fact from these undisputed facts.

If the allegations are taken to be true, the following facts may be invoked by the Applicant:

(i) Block B resembles a medium security prison with high fences and cages.
(ii) Block B is severely overcrowded.
(iii) Block B has hygiene problems.
(iv) There is inadequate food and water at Block B.
(v) Access to medical services is limited at Block B.

There are also two undisputed facts:

(vi) Three migrants committed suicide.
(vii) Five migrants died from dysentery.

Applicant will argue that the conditions of detention at Block B violate the standards at ICCPR Articles 6, 7, 9 and 10, and/or ICESCR Articles 11 and 12. Respondent will argue that the conditions are not comparable to those which, according to human rights monitoring bodies and tribunals, violate those treaty provisions. Case law on detention conditions is abundant before the Human Rights Committee and regional human rights tribunals. Some examples of relevant cases follow (**NOTE:** the following list does not indicate that these specific cases should be necessarily known by students whom will likely have many cases of their own):

- Overcrowding in a collective cell of 16 detainees leading to insufficient circulation of air, plus inadequate food, is a violation of Article 10(1) ICCPR (*Saidov v. Tajikistan* (2004), paras. 2.9 and 6.4).

- Overcrowding with 30 persons per cell, lack of windows, high incidence of suicide, self-mutilation, violent fights and beatings, human waste on the floor, overflowing of the toilet, sea water for drink, and urine soaked blankets, amount to a violation of Article 10(1) ICCPR (*Griffin v. Spain* (1995), paras. 3.1 and 9.3).

- Insalubrious conditions, overcrowding, deprivation of food and clothing, death threats, and incommunicado detention amount to a violation of Article 7 ICCPR (*Mukong v. Cameroon* (1994) paras. 9.1 and 9.3).

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98 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41. para. 64; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para. 61.

99 *Ibid*., para. 78.

100 *Corfu Channel (United Kingdom* v. *Albania), Merits. Judgment, I.C.J. Reports 1949, p. 4,* p. 18.

101 *Mukong v Cameroon* (1994) [9.2].

- Overcrowding, poor ventilation, and inadequate food and hygiene amount to a violation of Article 10(1) ICCPR (*Lantsova v. Russia* (2002), para. 9.1).

- Overcrowding, solitary confinement, lack of sanitation, lack of natural light, and lack of adequate food, amount to a violation of Article 10(1) ICCPR (*Kennedy v. Trinidad and Tobago* (2002), para. 7.7).

Most cases involve conditions which, as a whole, are worse than those present here. Applicant may compare specific features of inadequate detention conditions, while Respondent might try to compare the aggregate conditions of Block B against any relevant precedent. Students should justify why one or the other is the appropriate approach.

5. Equal Treatment

ICCPR Article 26 reads:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

According to the Human Rights Committee, the right to equality before the law is breached if unequal treatment to a person's detriment is not "based upon reasonable and objective grounds."[102]

Applicant will argue that Respondent has no justification for failing to maintain equal or equivalent standards of treatment between migrants housed in Block A and Block B.

Respondent will argue that the housing of the Nullatree Cove villagers in Block A is the result of their request to be housed together, as well as the available options for meeting that request. Their request can be said to be a "reasonable and objective ground" justifying the differential treatment.

B. Proposed Transfer to Saydee

General Comment No. 31 by the Human Rights Committee states that:

> "the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." (paragraph 12)

Whether the proposed transfer of the migrants to Saydee violates international law will depend on if "there are substantial grounds for believing that there is a real risk of irreparable harm."

Before going to the merits, Respondent might argue that the claim is inadmissible because it entails a legal assessment of conditions of detention at Saydee, a third State, which has not consented to the jurisdiction of the Court.[103] This argument was rejected by the European Court of Human Rights in *Soering v. United Kingdom* and this issue has not been an obstacle to finding violations of the principle of *non-refoulement* ever since. The ICJ has stated that when legal claims

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[102] *Kavanagh v. Ireland,* CCPR/C/71/D/819/1998 (2001), para. 10.2; *Borzov v. Estonia,* (1136/2002), ICCPR, A/59/40 vol. II (26 July 2004) 369, para. 7.2.

[103] *See, e.g. Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), I.C.J. Reports 1954,* p. 19; *Armed Activities on the Territory of the Congo (Congo v Uganda)* [2005] ICJ Rep 7, 65-6.

made by an applicant against a respondent in proceedings before the Court are made the subject of submissions, and require the Court merely to decide upon those submissions, binding for the parties only, it may hear the claims.[104] Where a party's conduct can be assessed independently of an absent third party and that third party's rights and duties do not form the subject matter of the court's decision on the merits, the third party is not necessary.[105]

Another preliminary question of fact is whether the report by World Immigration Watch is reliable evidence for the Court to find that the migrants should not be sent to Saydee. In *Saadi v. Italy*, the European Court considered the findings of a U.S. State Department report on prison conditions in Tunisia in order to make a finding that the applicant's deportation to Tunisia would breach the prohibition of torture and other ill-treatment.[106] Decisions on *non-refoulement* have generally been taken when evidence is found that (i) the individual applicant (ii) will suffer deliberate harm (*e.g.*, torture).[107] Thus, Applicant teams should be prepared to demonstrate how the conditions at Saydee cross the threshold of *real risk of irreparable harm* to the individual Alfurnans who are set for transfer.

Applicant will argue that Saydee is a developing State with a poor human rights record, despite having ratified the ICCPR. Further, Saydee has not ratified the ICESCR and it is therefore not legally required to provide those protections unless they apply as custom. In addition, detention conditions in Saydee are worse than those at Woeroma. Alfurnans run a real risk of suffering violations of the prohibition against forced labor, of the right to freedom of religion and freedom of expression, and the prohibition against cruel, inhuman and degrading treatment.

Respondent will argue that there is no evidence of an *actual risk* of irreparable harm. This case is unlike typical *non-refoulement* situations in which an individual is facing the return to a country that persecuted him; here, Saydee has no relationship to the migrants and, presumably, no interest in harming them. This puts this case outside the paradigm examples of *non-refoulement*. Conceptually, there should be no difference in terms of the obligations, but the rules are not as developed as "traditional" *non-refoulement*, and teams should be aware of this. Moreover, an NGO report, on its own, does not constitute proof of a *real risk*. In a diplomatic note, Saydee referenced its agreement to assist in the "interim protection of migrants," and has not taken any action to indicate it will not accord fair, humane treatment to them.

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104 *Nicaragua, Jurisdiction Phase*, Judgment of 26 November 1984, p. 431, Para. 88.

105 Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), para. 43.

106 *Saadi v. Italy,* App. 37201/06, 2008, paras. 143-149.

107 *See, e.g. Klein v. Russia,* App. 24268/08, 2010, para. 52: "The findings above that attest to the general situation in the country of destination should be supported by specific allegations and require collaboration by other evidence".

QUESTION PRESENTED 4: Rights of Creditor States Against Impoverished Debtor States

Alfurna's Prayer for Relief	Rutasia's Prayer for Relief
Rutasia's conduct disentitles it to any relief from this Court in respect of its claims over Alfurna's assets, and in any event Rutasia's actions regarding those assets are in violation of international law.	Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.

QP 4 arises from Rutasia's loan of USD 125 million (Compromis [8]). Alfurna ultimately ceased making repayments (Compromis [23]) and after the inundation of the islands, Rutasia seized Alfurna's funds from an account at one of Rutasia's provincial reserve banks (Compromis [46]) to "offset its losses" (Compromis [46] and [50]).

The primary issues involved are: 1) Is Rutasia entitled to rely on its contractual rights under the agreement to seize Alfurnan assets in the event of a default; 2) are the funds in Applicant's bank account immune from seizure under international law; 3) is Applicant's conduct in defaulting on the loan excused under the doctrine of necessity or impossibility of performance; 4) and can Alfurna rely on the doctrine of unclean hands to preclude Rutasia from seizing funds.

A. Jurisdiction to Interpret the Loan Agreement

As an initial matter, Respondent may argue that the Court has no jurisdiction over this claim, because the climate change loan agreement is not a treaty under international law.[108] Instead, Respondent may argue that it is a private agreement governed by Rutasian law (*see* Corrections and Clarifications, 3). Accordingly, the lawfulness of the seizure should solely be a matter of domestic contract interpretation, over which this Court has no jurisdiction. Under Article 36(1) of the Court's statute, however, the jurisdiction of the Court "comprises all cases which the parties refer to it." Thus, the oralists should quickly be moved on and jurisdiction of the Court should be assumed with respect to this issue.

B. Contractual Provision Permitting Attachment of Assets in Case of Default

Respondent will rely on the 'default' clause in the loan agreement (Compromis, Annex A) to argue that it acted lawfully in seizing the funds in the account. The clause expressly permits Rutasia to seize any property "subject to its control" without judicial authorization if Applicant defaults under the agreement.

1. Does Alfurna's non-repayment qualify as a "default" under the loan agreement?

Despite clear obligations under the loan terms to make repayments of particular sums at particular times, Alfurna ceased making repayments under the loan in 2005 (Compromis [23]), and did not respond to a notice of demand from RICA in 2012 (Compromis [46]). The parties had previously agreed to a repayment grace period from September 2002 - September 2010 during which Alfurna was not required to make payments (Compromis [19]). Applicant is not likely to contest that it was obliged to make repayments or the fact that it breached its obligations by failing to repay on schedule or when demanded. However, some Applicant teams may seek to excuse Alfurna's failure to pay.

To excuse its failure to pay, Alfurna may seek to invoke "force majeure"[109] and "necessity"[110] as defenses to breach. Natural disasters are widely recognized as triggers for defenses against contractual claims. The concepts of responsibility

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[108] *See* Vienna Convention on the Law of Treaties, Art. 2 (defining treaty as an "international agreement concluded between States . . . governed by international law.")

[109] *See* Article 23 of the *Articles on State Responsibility*, and the Commentaries thereto.

[110] *See* Article 25 of the *Articles on State Responsibility*, and the Commentaries thereto.

and *force majeure* and the doctrine of frustration – which qualify as general principles of law – allow a debtor to escape liability for the (temporal) nonperformance of a contract.[111]

Rutasia will argue that:

- a claim of *force majeure* cannot be sustained as there is no "material impossibility"[112] in servicing the loan; instead, it simply has become more difficult to do so. Alfurna could repay some of the loan, if it chose.
- a claim of necessity cannot be sustained, as there is an absence of an "essential interest" to be safeguarded by Alfurna in refusing to service the loan. Moreover, even had there been an essential interest at stake, Alfurna cannot show that failing to repay Rutasia was "the only means" available to it to safeguard that essential interest.

Applicant will take issue with these arguments, emphasizing that Alfurna sought to safeguard its very existence by halting its debt repayment in order to obtain a new homeland and complete the rescue and transfer of its citizens.

2. Is Rutasia entitled under the loan terms to enforce by seizing funds?

The loan terms give Rutasia the right to seize for its own account any collateral or other property of the debtor subject to its control, without further notice and without the need for any judicial authorization, up to the amount of the then-current indebtedness if the debtor has been in default for 30 days and failed to cure (Compromis [Annex A]). Notwithstanding that provision, Applicant may argue that, regardless of the loan terms, enforcement of debt, particularly in circumstances involving natural disasters, is not a remedy recognized in State practice.

Applicant will likely argue that, even though the terms of the loan may allow seizure of funds, custom prohibits such action against a small island State during an environmental crisis. Applicant may refer to the Millenium Declaration, which specifically addresses climate change and which both Alfurna and Rutasia joined (Compromis [54]). Its eighth goal includes dealing comprehensively with debt problems of developing countries. Applicant may also refer to the practices of the Paris Club, of which Rutasia is a member. The Paris Club, which has 19 other members from the world's largest economies, regularly restructures and cancels debt owed by indebted countries.[113] There are several examples of environmental catastrophes, after which members of the Paris Club have canceled or postponed debts.[114]

Alfurna may be expected to refer to these and other contextual matters to make an argument that there is no established practice of enforcing sovereign loans made by one State to another State, whether that enforcement includes seizing property or otherwise. Alfurna can be expected to argue that the practice is especially against enforcement where the sovereign loan is Official Development Assistance made to a developing country such as Alfurna.

Respondent will argue that enforcement is not prohibited under international law, even if most members of the Paris Club do not use it as a remedy. Moreover, the practice of the Paris Club does not form a customary rule against enforcement generally. Instead, the Club states on its website that one of its principles is to approach debt restructuring on a "case-by-case" basis, which undermines any support for widespread, uniform debt enforcement practices. *Opinio juris* is a firm requirement for the establishment of a customary rule, and there is no *opinio juris* to support a rule that sovereign creditors cannot enforce loans. Even if proof of *opinio juris* may be dispensed with in some circumstances (as the ILA suggests), Applicant is seeking to explain why sovereign debtors regularly do not do something – *i.e.*, enforce loans

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[111] Matthias Goldmann, *Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions* (2012) at 36.

[112] *Gabcikovo-Nagymaros Project Case*.

[113] Paris Club Types of Treatment, available at: http://www.clubdeparis.org/sections/types-traitement/reechelonnement/termes-de-traitements.

[114] For example, after the Indian Ocean Tsunami in 2004, sovereign debt obligations from Indonesia and Sri Lanka were deferred for one year. After Hurricane Mitch in 1999, a three-year deferral was granted on debt service for Honduras and Nicaragua.

against sovereign borrowers. In that context, Applicant must show that the failure to take action is accompanied by *opinio juris* that the taking of such enforcement action is prohibited.[115]

C. Immunity from Seizure

Applicant will likely argue that funds in the ARB account should be immune from seizure, notwithstanding the provisions of the loan agreement. The ICJ has recognized that there is "immunity from enforcement enjoyed by States in regard to their property situated on foreign territory."[116] The question is whether and how that immunity may apply here.

A State's property generally is immune from measures of constraint (such as attachment, arrest or execution) unless at least one of the following is established:[117]

- that the property in question is used for purposes *other than* governmental non-commercial purposes; or
- that the State which owns the property has *expressly consented* to the taking of a measure of constraint; or
- that the State has allocated the property in question for the satisfaction of a judicial claim.

Here, though Alfurna did not allocate the funds for the satisfaction of a claim, Respondent may argue that it consented to potential seizure of funds by signing the Climate Change Loan. Respondent may also contend that the funds were used for commercial purposes, as the seawall repairs and maintenance arguably constituted a commercial construction project carried out by a private commercial contractor (MCL) (Compromis [9]). Respondent may also emphasize the absence of evidence that the funds were used for Alfurna's central banking purposes, other than the mere fact that they were held in an account of the Alfurna Reserve Bank. Respondent will use these facts to argue that the seizure was the exercise of a private contractual right, making immunity inapplicable.[118]

Applicant is expected to argue that the default clause in the loan agreement should not be interpreted as an express waiver. States may waive immunity of central bank property with unequivocal language which explicitly refers to central bank assets.[119] Absent the terms 'waiver' or 'immunity', Alfurna's consent to the seizure of any 'property' should be limited only to the taking of property not subject to immunity.[120] Specifically, the consent to seizure should not extend to ARB's assets as no specific reference is made to them.

Applicant will also emphasize that funds in the account belonged to the Alfurna Reserve Bank and, thus, were being used for central banking purposes (Compromis [11]). Furthermore, to the extent that the funds included the climate change loan proceeds, these were being used for a public works project which is not commercial in character; the funds were being used for a significant program of restoration and maintenance of public infrastructure (the seawall and related damage repair) and related research, designed to protect the Alfurnan people (Compromis [12]).

D. Acquiescence By Respondent/Estoppel

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[115] *See SS Lotus Case* (1927) PCIJ Ser. A, no. 10, at p. 28; ILA Study Group on Formation of Customary (General) International Law, "Statement of Principles on the Formation of General Customary International Law" (2000) at 36-37.

[116] *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*(2012) (*Jurisdictional Immunities Case*"), at p45, para 113.

[117] *Jurisdictional Immunities Case*, at pp. 44-45, at paras 116-118.

[118] *Banco Central de Reserva Del Peru v The Riggs National Bank of Washington DC* (1996) 35 ILM 1162, 1163; Weiz et al, 'Selected Issues in Sovereign Debt Litigation' (1991) 12 *University of Pennsylvania Journal of International Business Law* 1, 44.

[119] *NML Capital Ltd v BCRA*, 652 F 3d 172, 195-196 (2nd Cir, 2011); Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) 72 (Australia); *Report of the ILC on the Work of its Forty-Third Session*, UN Doc A/46/10 (1991) 59.

[120] *Compromis*, Annex A.

Article 45 of the ILC's Articles on State Responsibility codifies the principle that, "The responsibility of a State may not be invoked if: … (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim." In this case, Alfurna ceased repaying its loans in 2005, but was granted a grace period on its repayment of principal and interest under the climate change loan until 15 September 2010 (Compromis [19]). Rutasia did not issue a notice of demand until February 2012, and the claim for repayment has not been the subject of court proceedings until these proceedings.

Alfurna will argue that Rutasia's delay of 1.5 years constitutes acquiescence in the lapse of its claim for repayment. Rutasia, on the other hand, will argue that mere lapse of time does not amount to acquiescence in the lapse of the claim,[121] and there is in any event no particular time limit for the prosecution of a claim.[122] Furthermore, Rutasia notified Alfurna of its claim for repayment by issuing the notice in February 2012 and any delay in then prosecuting the claim in Court proceedings is not acquiescence in the lapse of the claim.[123]

Similarly, Applicant might also seek to raise an argument of estoppel against Respondent based on the delay and also based on Respondent's past conduct in restructuring the debt. Estoppel is well-established in the jurisprudence of the ICJ and its predecessor, the PCIJ.[124] Broadly speaking, estoppel consists of three fundamental elements:[125]

- first, a State must make a representation to another;
- secondly, the representation must be unconditional and made with proper authority;
- third, the State invoking estoppel must rely on the representation.

If all three elements are established, an estoppel arises so that the State that made the representation may not act in a manner inconsistent with that representation. The representation may be by way of declaration or silence.[126]

In this case, Applicant will struggle to establish how Respondent made any relevant representation about the exercise of its rights upon the Applicant's default under the loan. The significance of any delay in bringing a claim has already been discussed above in relation to acquiescence. In terms of express words, Respondent has restructured the debt on the basis that Applicant must still pay, but is being given more time to pay; there is no representation arising from that conduct to the effect that Respondent will not enforce if subsequent defaults occur.

E. Relevance of Rutasia's Conduct/Unclean Hands

Applicant may attempt to raise Rutasia's conduct as a defense by invoking the general principle that "a party ought not to be able to benefit from its own wrong."[127] Although the ICJ has not denied clean hands as a general principle of international law (despite many opportunities to do so), the Court has rarely (if ever) explicitly endorsed the doctrine,

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[121] *Articles on State Responsibility*, Commentary (6) to Article 45.

[122] *Articles on State Responsibility*, Commentaries (7) and (9) to Article 45.

[123] *Articles on State Responsibility*, Commentary (10) to Article 45.

[124] See generally Alexander Ovchar, "Estoppel in the Jurisprudence of the ICJ: A principle promoting stability threatens to undermine it" (2009) Bond Law Review: Vol. 21: Iss. 1, Article 5, available at: http://epublications.bond.edu.au/blr/vol21/iss1/5 (hereafter, "Ovchar").

[125] Ovchar, 4.

[126] *Elettronica Sicula SpA (United States of America v Italy)* [1989] ICJ Rep 15, 44.

[127] Crawford, *State Responsibility Second Report Addendum 2*, para 314. Note that questions of admissibility of Alfurna's claim do not arise in this context, unlike in QP1.

particularly where States have raised it as a defense.[128] Here, Applicant will rely on the ILC's statement that: 'The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility."[129] The PCIJ also has recognized the principle that "a party ought not to be able to benefit from its own wrong":

> "It is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him."[130]

In turn, the ICJ has recognized this principle when it cited the PCIJ's comments above, in the course of noting that it could not "overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct ... Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty."[131]

Respondent will argue that, although the ILC has acknowledged the existence of the unclean hands principle, it has not codified it or the consequences to which it gives rise. The ILC has gone only so far observing that: "it is rather a general principle than a specific circumstance precluding wrongfulness."[132] The more established rule is the exception of non-performance, or *exceptio inadimpleti contractus*,[133] which "stands for the idea that a condition for one party's compliance with a synallagmatic obligation is the continued compliance of the other party with that obligation."[134] The ILC has said that the exception of non-performance is: "best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness."[135] If the relevant principle is that "a party ought not to be able to benefit from its own wrong," its true scope is narrowly focused on reciprocal obligations and causative connections between Respondent's wrong and Applicant's wrong.

James Crawford has described the principle that "a party ought not to be able to benefit from its own wrong" as being connected with the exception of non-performance.[136] The *Chorzow Factory Case* and the *Gabcikovo-Nagymaros Project Case* illustrate the principle applying in the narrow circumstances where:

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[128] *See*, *e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, ¶¶ 63-64 (finding that the Israel's argument that Palestine's unclean hands prevented it from seeking a remedy was not pertinent because "it was the General Assembly which requested the advisory opinion, and the opinion is to the General Assembly, and not to a specific State.); *see also Case Concerning the Oil Platforms (Islamic Republic of Iran v. United States*), Judgment of 6 Nov. 2003, I.C.J. Reports 2003, p. 161, ¶¶ 29-30 (deciding that the Court did not need to address the question of Iran's unclean hands on a preliminary basis as the United States had raised the issue of Iran's wrongful conduct in asking the Court to dismiss its claims, not to render them inadmissible).

[129] *Articles on State Responsibility*, Chapter V – Circumstances Precluding Wrongfulness, Commentary (9).

[130] *Case concerning the Factory at Chorzów (Jurisdiction)*, PCIJ Series A, No. 9 (1927), p. 31.

[131] *Case concerning the Gabcikovo-Nagymaros Project (Hungary v Czechoslovakia)*, ICJ Reports 1997, p. 7, at p. 67 (para. 110) (hereinafter *Gabcikovo-Nagymaros Project Case)*.

[132] *Articles on State Responsibility*, Chapter V – Circumstances Precluding Wrongfulness, Commentary (9).

[133] *See* Crawford, *State Responsibility Second Report Addendum 2*, para 326; and *Articles on State Responsibility*, Chapter V – Circumstances Precluding Wrongfulness, Commentary (9).

[134] Crawford, *State Responsibility Second Report Addendum 2*, para 314.

[135] *Articles on State Responsibility*, Chapter V – Circumstances Precluding Wrongfulness, Commentary (9).

[136] Crawford, *State Responsibility Second Report Addendum 2*, para 314.

- One party's wrong has prevented the other party from performing its obligations or having recourse to the relevant tribunal (*Chorzow Factory Case*); or

- One party's wrongful conduct has resulted in the other party's wrongful conduct (*Gabcikovo-Nagymaros Project Case*),

rather than in a broad fashion whereby one party may simply invoke the wrongful conduct of the other party in denying the claim of the other party.

1. Applying the Clean Hands Doctrine in a Non-Admissibility Context

Rutasia's relevant behavior includes: (1) Rutasia's behavior as a carbon and soot emitter; and (2) Rutasia's potential responsibility for the conduct of MCL. If Alfurna invokes the clean hands doctrine, it will need to identify the relevant test for responsibility on Rutasia's part to justify applying the doctrine and the relevance of a causative link between such conduct and Alfurna's failure to repay the climate change loan.

a) Carbon and Soot Emissions

The Compromis is not intended to invite any detailed argument regarding whether Rutasia's conduct "caused" climate change in any general or specific sense. The lack of facts in the Compromis should preclude detailed analysis of causation. Although students may try to argue this point, it is likely far too tenuous to prevail.

b) MCL

Under the climate change loan, Alfurna was obligated to engage a Rutasian company to perform work under the Alfurna Climate Change Remediation Project (Compromis [9]). Alfurna engaged MCL, the only Rutasian company with seawall construction and maintenance experience, to perform work on the seawalls (Clarifications [1]). MCL's substandard work caused or at least accelerated the destruction of the seawalls (Compromis [20]).

Applicant will argue that it need not show that Rutasia itself has committed an internationally wrongful act. In the *Gabcikovo-Nagymaros Project Case*, the ICJ refers to Hungary's "prior wrongful conduct" and conduct "prejudicing" Hungary's right to terminate against Czechoslovakia. Given that Alfurna was effectively forced by Rutasia to engage a contractor whose performance was substandard and thus caused harm to Alfurna, Rutasia should be held responsible, in the sense of having unclean hands.

Respondent will argue that, in order to invoke the clean hands defense, Applicant must show that Respondent committed an internationally wrongful act. That much is clear from the *Chorzow Factory Case* where the PCIJ refers to an "illegal act" of the relevant party. Respondent will argue that it cannot be found to have unclean hands by reason of MCL's conduct. Nothing MCL did with respect to the seawalls can fairly be said to have constituted the exercise of Rutasian governmental authority. There also is no evidence that MCL is endowed with governmental authority of any kind. Consistent with Article 5 of the Articles on State Responsibility, Respondent has a strong argument that it cannot be held responsible for MCL's conduct in this regard.

III. APPENDIX A: Introduction to International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and most domestic legal systems. The most significant for the moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (ICJ) are governed by the Statute of the Court. Under Article 38(1) of the ICJ Statute, the ICJ may consider the following sources of international law in order to decide disputes before it:

(a) treaties or conventions to which the contesting States are parties;
(b) international custom, as evidence of a general practice accepted as law;
(c) general principles of law recognized by civilized nations;
(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether the first three sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal effect as precedent. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the Vienna Convention on the Law of Treaties (VCLT).

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this “back-door” means by which a treaty may become binding on non-parties. The ICJ has also recognized this possibility in the *Federal Republic of Germany v. Denmark, North Sea Continental Shelf Cases*, 1969. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

Article 31 of the VCLT states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The article further provides that the context of a treaty can be taken from a variety of sources including the treaty's preamble and annexes, any prior or subsequent agreements between the parties related to the treaty, and any relevant rules of international law. Article 32

states that when interpretation methods under Article 31 would lead to an ambiguous or unreasonable result, supplementary methods of interpretation can be used, including reference to the preparatory work of the treaty and the circumstances of its conclusion.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of states treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a state whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

"State practice" is the objective element, and simply means a sufficient number of states behaving in a regular and repeated manner consistent with the customary norm. Evidence of state practice may include a codifying treaty, if a sufficient number of states sign, ratify, and accede. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.

Opinio juris is the psychological or subjective element of customary international law. It requires that the state action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of state practice, *opinio juris*, or both. In the *North Sea Continental Shelf Cases*, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets both requirements.

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions, utilized by the ICJ in reference to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature (e.g., burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and *force majeure,* may sound familiar to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* (within the case) application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono* (that is, to simply decide the case based upon a balancing of the equities), a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as "a subsidiary means of finding the law." Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) "teaching." However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field, there are additional scholars who would be regarded as "highly qualified publicists."

F. Burdens of Proof

In the *Corfu Channel Case* (*U.K. v. Albania*, 1949), the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim. However, the Court may draw an adverse inference if evidence is solely in the control of one party that refuses to produce it. Claims against a State involving charges of exceptional gravity must be conclusively established and proved to a high level of certainty corresponding with the seriousness of the allegation (*Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro* (2009) [210]).

IV. Appendix B: Timeline of Events

1812	Batri and Engili settled by Finutafu
1904	Independent republic of Alfurna created
Early 1900s	Seawalls erected around islands
Mid-1960s	Entrepreneurs attracted to Alfurna, tourism industry developed
1990	Rate at which sea levels were rising had increased
Mid-1990s on	Rutasia committed to massive public works programme
1992	Rutasia signed and ratified UNFCCC
1992	Alfurna seeks grants and loans
5 June 1992	Rutasia and Alfurna sign $125M climate change loan
10 June 1992	Tom Good Institute releases press release criticizing climate change loan
1997	Full amount of climate change loan funds disbursed to ARB account in Lando
1997	Alfurna signed and ratified the UNFCCC
1998	Alfurna signed and ratified the Kyoto Protocol
1998	Rutasia signed the Kyoto Protocol but did not ratify it
Jan. 1999	Alfurna's debt is 120% of GDP
Later 1999	Alfurna unable to meet debt obligations; negotiates debt relief with various lenders
Jan. 2000	Rutasia agrees to renegotiated debt – cancels 25% of loan, lowers interest rate to 1.5%, extends additional 15 years (until 2027)
2001	Alfurna's GDP = USD 200 million, Alfurna's population = 53,000
Oct. 2001	Hurricane Caryl created major damage to Bay of Singri area
Nov. 2001	Alfurna and MCL submit construction dispute to arbitration; Alfurna withheld 20M under contract pending outcome
July 2002	Alfurna's Treasury reports serious problems on the way, debt servicing problems within 3 years, risk of missing payments within 5 years
Sept 2002	Further debt forgiveness, Rutasia cancels an additional 25% of loan, reduces interest rate to 1.1%, extends term an additional 20 years (to 2047), and grants Alfurna grace period on repayments of principal and interest until 15 Sept. 2010
Nov. 2002	Arbitrators decide in Alfurna's favor; awarded 35M in damages

Early 2003	Alfurna establishes Climate Emergency Committee
Aug. 2004	CEC reports that weather events likely to destroy seawalls within a few years, recommend evacuation plans and efforts to find new homeland begin
Jan. 2005	Alfurna implements CEC's recommendations (including moratorium on debt servicing)
Mid-2006	Major earthquake makes much of Batri Island uninhabitable, also damages Rutasia
Mid to late 2006	Key government officials and agencies relocate to Finutafu, 15,000 Batri residents relocate on Finutafu; rest flee to Engili
Late 2006	Batri Island completely submerged
Late 2006	Prime Minister Fatu calls on all nations to help
Early to mid-2007	Further damage to seawalls surrounding Engili
Mid 2007	UN General Assembly advised that Alfurna behind in membership dues
Nov. 2007	Formal negotiations with Finutafu for Nasatima Island
Late 2008	Financial pressure on Rutasia as world credit markets tightened
30 Sept. 2008	Finutafu agreed in principle to cede Nasatima Island to Alfurna; treaty signed
Early 2009	Engili practically uninhabitable; all but 3,000 Alfurnans able to settle elsewhere
2009-10	Approximately 3,000 Alfurnans in boats intercepted by Rutasian Navy, brought to Woeroma Immigration Processing and Detention Centre
15 Sept. 2010	Grace period on Alfurna's repayment of principal and interest under climate change loan expires
First half 2011	Three Alfurnan migrants in Block B committed suicide and five died from dysentery
Oct. 2011	Immigration ombudsman conducted review of conditions at Centre
15 Nov. 2011	Small earthquake damaged Woeroma Centre
26 Dec. 2011	Earthquake destroyed remaining seawall and Engili permanently submerged
10 Jan. 2012	Rutasia could not continue to provide separate facilities for Nullatree Cove villagers
Jan. 2012	Rutasia agreed with Saydee to transfer migrants by 28 Sept. 2012
23 Jan. 2012	Negotiations for Nasatima Island collapsed; after further pleas, Finutafu agreed to lease Island to Alfurna
8 Feb. 2012	Rutasia court dismissed lawsuit filed requesting emergency stay of transfer of Alfurnans to Saydee
Early 2012	General Assembly session, Finutafu's ambassador addresses Rutasia's treatment of migrants

10 Feb. 2012	RICA put Alfurna on notice that it was in default under loan
15 Mar. 2012	Rutasia declared entire loan balance due and payable; then closed ARB account and transferred balance to Rutasian government fund
20 Mar. 2012	Alfurna denounced closure of ARB account
30 Mar. 2012	Rutasia agreed with Saydee to transfer all detainees by this date
August 2012	Rutasian and Alfurna reach special agreement to bring dispute to ICJ
3 Sept. 2012	Rutasian Supreme Court granted temporary stay of transfer of migrants pending ICJ decision

V. Appendix C: Guide to People, Places, and Acronyms

ACCR Project

Alfurna Climate Change Remediation Project, an Alfurnan project funded by a Rutasian loan.

Alfurna

A developing island nation of 53,000 located in the Bay of Singri; the Applicant state. It became completely submerged in 2011.

ARB

The Alfurna Reserve Bank, Alfurna's central bank. It has an account in the Provincial Bank of Lando.

Batri Island

A low lying island in the Bay of Singri, part of Alfurna.

Bay of Singri

An oceanic bay; Alfurna, Rutasia, Saydee, and Finutafu are all located in or around the Bay.

Block A; Block B

Separate detainment facilities within the Woeroma Centre. Block A contains asbestos.

Camp Sontag

A converted prison in Saydee where the Alfurnan detainees in Rutasia would be transferred.

CEC

Climate Emergency Committee, a committee established by Prime Minister Fatu to examine Alfurna's prospects in light of climate change developments.

Eileen Millar

Rutasia's head of state.

Engili Island

A low lying island in the Bay of Singri, part of Alfurna.

Finutafu

A developed State on the western of the Bay of Singri. First settled the Alfurnan islands, gave shelter to the Alfurnan government, and leased Nasatima Island to Alfurna.

ICCPR

The International Covenant on Civil and Political Rights.

ICESCR

The International Covenant on Economic, Social and Cultural Rights

ILSA

The International Legal Support Association, a non-governmental organization based on Rutasia which filed suit in Rutasia on behalf of the Alfurnan detainees request immediate stay of the transfer to Saydee.

Immigration Ombudsman

An independent review authority within the Rutasian government, issued a report on the Woeroma Center saying, *inter alia*, that the conditions in Block A are acceptable and Block B is overcrowded and unhygienic.

MCL

Mainline Constructions Limited, a Rutasian company contracted to perform Alfurna's seawall maintenance.

Nasatima Island

An island national park in Finutafu. Currently leased to Alfurna.

Nullatree Cove

A costal village on Engili Island in Alfurna. The approximately 1,500 residents live in isolation and reject urbanisation and technology. The population floated on boats to Rutasian waters where they were picked up and detained.

Prime Minister Fatu

Alfurna's Prime Minister.

Provincial Bank of Lando

A reserve bank of Rutasia and agency of the Rutasian government. Alfurna's loan funds were deposited into the ARB account here.

RICA

The Rutasian International Cooperation Administration. A Rutasian agency which made the climate change loan to Alfurna.

Rutasia

A large developed State on the eastern side of the Bay of Singri; the Respondent state.

Saydee

A developing country to which Rutasia is attempting to transfer the Alfurnan detainees. Saydee has a poor human rights record.

TGI

The Tom Good Institute, a world-renowned and respected research institution. TGI issues a report about climate change and sovereign lending in 1992.

UNFCCC

United Nations Framework Convention on Climate Change.

VCLT

The Vienna Convention on the Law of Treaties.

Woeroma Centre

The Woeroma Immigration Processing and Detention Centre, an immigration processing and detention facility maintained by the Rutasian Immigration Department.

World Immigration Watch

An international human rights non-governmental organization which mentioned the below standard conditions in the Woeroma Centre and highlighted Saydee's history of human rights violations.

VI. Appendix D: Suggested Questions for the Oral Rounds

A. International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?
2. What is customary international law? What are the elements of customary international law?
3. When asserting a state's obligations under customary international law:
    a. Where can we find evidence of relevant State practice?
    b. What is *opinio juris*? How is it proven?
4. Is the ICJ bound by its prior decisions?
5. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?
6. What is the basis of standing for the party seeking relief?
7. What is the standard of proof with respect to this issue? Which party bears the burden of proof?
8. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?
9. If a state has conflicting obligations under two treaties (or a treaty on the one hand and customary international law on the other), which obligation controls? What principle does the Court use to determine which obligation controls?
10. What is the Court to do if it finds there is a lacuna in the law?

B. Statehood

1. What is the importance of being a State – what is the substantive difference between a State and another international person?
2. Is there an accepted definition of "State" in international law?
3. Are you advocating for the constitutive or declarative theory of statehood? Does it matter in this case which theory is adopted? Why?
4. If you contend that either theory is customary international law, what is the basis for that contention?
5. Are those inherently political theories? Why should the ICJ be concerned with them?
6. Is there any precedent for this Court to address the physical disappearance of a State's territory?
7. If there is a definition of a State, is it a static definition or can it be subject to change?
8. Are the criteria in the *Montevideo Convention* reflective of customary international law?
9. Does Alfurna have to meet all 4 criteria under the Convention?
10. Doesn't the Montevideo Convention provide that recognition is unconditional and irrevocable (Article 6)? What are the implications of this provision to your argument?
11. If this Court were to conclude that Alfurna does not meet the requirements necessary to qualify as a State, must we decline to address the remaining questions before the Court?
12. What are the requirements of Statehood under the declarative theory? Will you concede that one of these is the most difficult for Alfurna to satisfy?
13. Can submerged islands constitute territory?
14. Has a state ever lost statehood for lack of territory?
15. Is there a presumption against loss of Statehood? If so, what is the basis of the presumption?
16. What kind of 'territory' is required for Statehood?
17. What if Alfurna built a lighthouse or other structure on the submerged Islands, would they qualify as territory?
18. Can a "lease" give rise to exclusive jurisdiction over territory? Who retains sovereign authority in such a circumstance?
19. Is the lease with Finutafu a treaty/international agreement? Does it matter?
20. Does Finutafu retain sovereignty over Nasatima Island?
21. Is the ability to control borders a hallmark of sovereignty and statehood?
22. Does the State become extinct as soon as the last part of its territory is covered by water at high tide? Is this automatic? Isn't this incredibly unpredictable and destabilizing for the international system?

C. Protection of Migrants

1. Does Alfurna's conduct in failing to protect its citizens disentitle it from asserting claims against Rutasia?
2. What is the basis for applying the "clean hands" doctrine in international law?
3. Has this Court ever applied the "clean hands" doctrine to preclude a state from asserting a claim?
4. Did the migrants end up in Rutasia because Alfurna failed to secure them a safe outcome?
5. The migrants do not have unclean hands, do they? So should the Court refuse to decide whether they are being treated in accordance with law, because Alfurna failed to protect them? Isn't that a very harsh outcome?
6. What is the basis on which the Court can conclude that the migrants are entitled to protection under international law?
7. Is there any basis for the Court to apply refugee protection to the migrants?
8. Is there *opinio juris* that protects the migrants as environmentally displaced persons? Does this mean they are entitled to heightened protection?
9. Should laws relating to migrants be expanded to apply to environmentally displaced persons? Can the Court do so through interpretation or is something else required?

D. Treatment and Transfer of Migrants

1. What is the relevance of the detainees' migratory status in deciding whether they have been accorded proper treatment? Are they protected by the ICCPR and ICESCR regardless of their migratory status?
2. What is the justification for the prolonged detention of the migrants?
3. Is indefinite detention illegal *per se*? How does the Court draw lines in this respect?
4. Is there justification for the separation of migrants into Block A and B? Must the standards of treatment at each Block be the same in order not to violate the ICCPR?
5. What are the grounds for concluding there is a risk of irreparable harm to the migrants from the proposed transfer to Saydee?
6. Is Saydee a necessary third party with respect to this issue?
7. Doesn't the Court have to decide whether conditions in Saydee violate articles of the ICCPR in order to decide this claim?
8. Are Saydee's assurances of the migrants treatment sufficient to conclude there is no risk of harm?
9. Is an NGO report sufficient to constitute a 'real risk' of irreparable harm? What other evidence exists?
10. What is the risk of transferring the migrants to Saydee? Typically *non-refoulement* circumstances involve returning an individual to a country that persecuted him/her. Here that is not the case, Saydee has no history or relationship with the migrants – so can the transfer really run afoul of *non-refoulement*?
11. What is the significance of articles of the ICCPR being derogable? Can Respondent justify derogating from some of the protections of the ICCPR in this case based on a state of emergency?

E. The Loan Agreement

1. Is it fair to describe the loan agreement as a treaty? What is the significance for purposes of this argument if it or is not a treaty?
2. What is the state practice with respect to sovereign debt enforcement? Does it exist?
3. Is debt renegotiation a rule of customary international law? What about debt forgiveness?
4. If there is no accepted State practice, should Rutasia be precluded from enforcing the loan?
5. Is there State immunity over the assets in the account, such that Rutasia is precluded from seizing them?
6. Has Alfurna consented to waiving immunity from seizure by agreeing in the loan agreement to allow Rutasia to seize the funds in the case of default?
7. Has Alfurna really 'defaulted' on the loan in this case, when it was essentially precluded from continuing to make payments because of massive environmental catastrophe?
8. Is the loan agreement still valid, when its purpose has been defeated by the total submersion of the islands?
9. Is the bank account of another country's central bank really "subject to" Rutasia's control? (as required by the default provision in the loan agreement)
10. Doesn't the bank account include more than just loan proceeds? Does it matter is the money seized includes funds other than those lent by Rutasia?

11. What is the relevance to its enforcement efforts of Rutasia's conduct in connection with making the loan to Alfurna in the first place?
12. The default clause refers to the "debtor." If Rutasia claims Alfurna no longer exists, who is the "debtor?"
13. Can Alfurna rely on necessity or *force majeure* to justify its failure to pay?
14. Is Rutasia's record of being a long-standing producer of carbon and soot emissions relevant?
15. Can Rutasia be held responsible for the conduct of MCL? If so, should Rutasia be barred from enforcing the loan terms?
16. Is enforcement of sovereign debt a remedy recognized in State practice?