

THE INTERNATIONAL COURT OF JUSTICE

The Peace Palace, The Hague, The Netherlands

THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

2013

The Case Concerning the Alfurnan Migrants

ALFURNA

(Applicant)

v.

THE STATE OF RUTASIA

(Respondent)

Memorial for Applicant

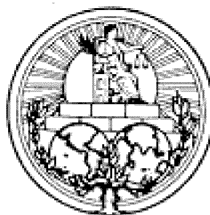


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STATEMENT OF JURISDICTION

Alfurna and the State of Rutasia have agreed to submit the present dispute to the International Court of Justice by virtue of a Special Agreement (*Compromis*), done in The Hague, The Netherlands, on the fourteenth day of September 2012, pursuant to Article 36(1) and Article 40(1) of the Statute of the Court. According to Article 2 of the *Compromis*, Alfurna acts as Applicant and the State of Rutasia as Respondent, without prejudice to any question of the burden of proof. This agreement is without prejudice to Respondent's contention that Alfurna is no longer a state. In addition, as per Article 5 of the *Compromis*, each party shall accept the Judgment of this Court as final and binding and shall execute it in good faith in its entirety.

QUESTIONS PRESENTED

- I. Whether Alfurna is still a state, and whether the Court has jurisdiction over its claims.

- II. Whether Alfurna is entitled to make claims with respect to its migrants, and whether Rutasia has processed the migrants according to international law.

- III. Whether the Alfurnan migrants held in the Woeroma Centre are being treated according to international law, and whether their proposed transfer to Saydee is legal.

- IV. Whether Rutasia can seek relief from the Court with regard to its claims over Alfurna's assets, and whether Rutasia's conduct in respect of those assets is consistent with international law.

STATEMENT OF FACTS

The islands of Batri and Engili gained independence from Finutafu in 1904, becoming the republic of Alfurna (“Alfurna”), a state based on agriculture and fishing, as well as an attractive tourist destination. On the coast of Engili lay Nullatree Cove, a village which rejected technology and lived in isolation from the rest of the country.

The State of Rutasia (“Rutasia”) is a developed state, heavily reliant on fossil fuels.

The Bay of Singri, where both states are located, experiences extreme environmental phenomena, such as strong cyclones, heavy and unpredictable winds, undersea earthquakes, and devastating tsunamis. Furthermore, the water level has risen during the last two centuries.

As Alfurna’s low-lying regions were in danger, seawalls were erected around the two islands; however, the costs of maintaining them have been high. Eventually, parts of the seawalls became submerged as the weather conditions worsened.

Alfurna sought help for financing the reparation of the seawalls and designing new measures; in 1992, it concluded with Rutasia an arrangement consisting of a “climate change loan”. Alfurna contracted with Mainline Constructions Limited (“MCL”), a Rutasian company, in order to have the seawalls repaired and improved.

The funds were deposited into an account maintained by the Alfurna Reserve Bank in the Rutasian Provincial Bank of Lando, being used for activities including research that concluded one of the main causes for the rising sea levels was global warming. Accordingly, Alfurna kept drawing attention upon the danger which threatened low-lying island states. Rutasia, on the other

hand, committed to a massive program of rebuilding and expanding its infrastructure, which accelerated carbon emissions.

As Alfurna experienced financial difficulties, it approached its lenders (including Rutasia) in order to negotiate and secure relief regarding its debts.

Alfurna had to address the damage caused by Hurricane Caryl in October 2001, which required extensive budgetary commitments. Additionally, it discovered the substandard quality of a large amount of the repairs carried out by MCL on the seawalls, and the two parties submitted their dispute to arbitration; at the same time, Alfurna withheld USD 20 million of the climate loan, in expectation of the arbitral award.

Alfurnan Prime Minister Fatu sought further negotiations with the country's lenders, anticipating a severe debt crisis. Meanwhile, the arbitrators issued their award, in favor of Alfurna, concluding MCL had improperly selected their construction materials and methods, which contributed greatly to the collapse of Alfurna's seawalls.

The Climate Emergency Committee ("CEC") established by PM Fatu reported the seawalls would soon be destroyed due to the earthquakes and extreme weather conditions, the matter being impossible to address given Alfurna's difficult financial situation. It recommended the Alfurnan government started making evacuation plans. Accordingly, PM Fatu issued a televised address encouraging cooperation in order to preserve the country, people and culture.

Because of the unprecedented nature of the events, the Alfurnan Parliament declared a moratorium on servicing all foreign debts, in order to fund the CEC researching initiatives. The CEC was also tasked with identifying a suitable new homeland and entering negotiations for the purpose of acquiring territory. At PM Fatu's request before the UN General Assembly, the Secretary-General pledged to "do whatever he can".

A major earthquake in mid-2006 rendered much of Batri Island uninhabitable. As a result, key Alfurnan agencies and governmental officers relocated to Finutafu, as did numerous residents – with the rest fleeing to Engili. A few months later, the seawalls around Batri Island were completely washed away, and the island became permanently submerged.

The CEC managed to identify possible options for obtaining territory; the negotiations, however, stalled, and PM Fatu addressed the nations of the world, calling upon them to help the Alfurnan people and their survival.

The second quarter of 2007 brought severe storms to Engili Island, greatly damaging the remaining parts of the seawall around it. Meanwhile, the UN General Assembly deferred discussion regarding Alfurna's UN membership dues given the current circumstances, and Finutafu was persuaded by the CEC to cede Nasatima Island (a national park, inhabited only by park rangers), initialing a proposed treaty in that sense.

In early 2009, Engili Island was essentially uninhabitable. The majority of Alfurnans relocated to Finutafu; most of the remaining ones were Nullatree Cove residents, refusing to leave their ancestral land. Eventually, Engili Island became completely and permanently submerged in December 2011.

A number of boats containing Alfurnans were found drifting by the Rutasian Navy. These almost 3,000 Alfurnan citizens were taken to the Woeroma Centre in Rutasia. Three persons held there committed suicide and five more died from dysentery.

An independent Rutasian review authority, the Immigration Ombudsman, concluded the conditions in one of the Woeroma Centre blocks were significantly below standard: the block in question, Block B, resembled a prison having hygiene problems and improper access to food,

water, and medical assistance. These conditions had a severe impact on the sanity of the Alfunans detainees.

Woeroma Centre was affected by an earthquake in November 2011, which revealed asbestos in the walls of Block A, therefore presenting serious health risks. Rutasia suggested transferring those held in the Centre to the Republic of Saydee, where they would be processed. Saydee has been severely criticized by the UN Human Rights Committee for its policy on disrespecting human rights.

Various NGOs protested the proposed transfer, noting with concern Rutasia was not improving the treatment of the detainees, taking into account Saydee's unacceptable detention conditions and complete disrespect for basic human rights. PM Fatu protested as well, demanding Rutasia provide the Alfunans adequate treatment or, at least, transfer custody over them to a proper state. In doing so, he did not criticize Saydee's domestic policies, merely expressing his concern over the fate of its co-nationals.

The International Legal Support Association ("ILSA") filed suit in Rutasia's Supreme Court in the name of the Alfunan detainees, seeking an emergency stay of the proposed transfer to Saydee, as well as damages for the treatment received. The case was dismissed by the Court.

The Nasatima Island negotiations failed in January 2012, but, subsequently, Finutafu agreed to lease the island to Alfurna for 99 years, stating "Alfurna will have complete control over the Island".

In March 2012, Rutasian President Millard ordered the government to seize Alfurnan property in Rutasia and close the Alfurnan account in the Provincial Bank of Lando, transferring the balance of that account to the Rutasian government's general consolidated fund.

PM Fatu considered these actions to be violations of international law, demanding the reversal of these measures. Rutasia never offered a reply. Moreover, the Alfurnan government sought negotiations with its Rutasian counterparts, which declined them. The Alfurnan officials called for the repatriation of the detainees, showing how essential it was for them to be treated with dignity and respect. The improper treatment of the Alfurnan detainees, as well as Rutasia's actions regarding Alfurnan funds, was supported by Finutafu before the UN General Assembly.

The parties submitted their dispute to the International Court of Justice by way of special agreement. The UN Secretary-General announced the matter of the Alfurnan UN membership dues would not be considered before the Court delivers its judgment. The Rutasian Supreme Court, at ILSA's application, revisited its decision and granted a temporary stay until the ICJ issues its judgment.

SUMMARY OF PLEADINGS

A. Alfurna is still a state, because territory does not represent a necessary condition for maintaining statehood. The Montevideo Convention criteria cannot be appreciated as international custom and, in any event, they can be considered at most as being criteria for acquiring statehood, not for maintaining it. The matter is built upon the notion of effectiveness and there is a very strong presumption in international law against the loss of statehood. International recognition is essential and the only country denying Alfurna's statehood is Rutasia.

Alternatively, as international law is flexible and dynamic, it must be adapted to reflect the current evolution of climate change, which is becoming a more and more visible problem. Alfurna was but the first state to lose its territory because of rising sea levels, but more countries are facing the same danger. The international community has already addressed the matter and it has been suggested it can respond positively to a reconsideration of the concepts of state and statehood.

In any event, it cannot be affirmed Alfurna lost its territory, as it exercises effective sovereignty and authority over Nasatima Island and it remains a fully sovereign state. The idea of a state acquiring territory from another state has also already been accepted.

B. Alfurna is entitled to make claims regarding the migrants now in Rutasia due to the exercise of diplomatic protection over its own citizens. Moreover, there is no obligation under public international law that requires Alfurna to take "affirmative steps". According to the *Draft*

Articles on the Protection of Persons in Case of Disasters, there is a duty to seek assistance for the affected State, if protection would exceed its national capacity. But even this obligation is doubtful, considering the controversial reactions of States.

Furthermore, even if this obligation existed, Alfurna has not failed to take “affirmative steps” since it managed to protect the majority of its people by relocation to safe territories and, in any case, there is no authority that Alfurna would lose the right to make claims regarding its citizens if it did not take “affirmative steps”.

Rutasia has failed to process the Alfurnans and accord them status consistent with international law. The Alfurnan national should be granted “environmental refugees” status which is grounded on the customary value of the principle of non-refoulement, the protection of human life and fundamental human rights but also on the moral obligation that heavily industrialized States such as Rutasia have towards the victims of environmental disasters. Domestic laws and regional instruments support this status and acknowledge it as appropriate for the protection of their vulnerabilities.

C. Rutasia’s treatment of the Alfurnans detained in Woeroma Centre violates international law firstly because they are being unlawfully detained and secondly because the treatment during detention is in breach of the general prohibition of torture.

Furthermore, the proposed transfer to Saydee violates international law since the expulsion was not made in accordance with the procedural requirements established by international conventions.

Moreover, the expulsion to Saydee would put the Alfurnans at risk of suffering from degrading and inhuman treatment which would breach the general prohibition of torture.

D. Rutasia’s conduct regarding the procedural aspect of its behavior in respect to Alfurna’s situation disentitles it from any actual relief from this Court.

Firstly, in regards to international law obligations, The Climate Change Loan (“CCL”) contained abusive clauses and reflected Rutasian behavior on the international scene.

Secondly, the Respondents’ authorities failed to come up with an equitable solution to the former’s default.

Thirdly, international law rules preclude Alfurna from being responsible for not fulfilling of its obligation under the CCL.

Alfurna brings forth arguments that, in the alternative, the seized property of the aforementioned state could not have been the subject of execution by the Rutasian government, in light of them being closely linked to sovereign purposes.

PLEADINGS

I. ALFURNA IS STILL A STATE, AND THE COURT MAY EXERCISE JURISDICTION OVER ITS CLAIMS

1. Loss of territory does not imply loss of statehood

a. Territory is not a required condition for maintaining statehood

Statehood is essentially built upon the principle of effectiveness¹. As Professor Shaw concludes, statehood associated with sovereignty² requires a certain foundation of effectiveness³. Statehood is a question of fact⁴ as reaffirmed by Sir Hersch Lauterpacht⁵.

The criteria set out by the 1933 *Convention on the Rights and Duties of States* [“Montevideo Convention”]⁶ are of interest only when discussing the creation of States⁷. Once statehood is achieved, the above-mentioned criteria must be applied less stringently⁸. Those

¹ James Crawford, “State”, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008-, online edition, [www.mpepil.com], visited on December 1, 2012, paras. 14, 46 [“Crawford MPEPIL”].

² Thomas D. Grant, “Defining Statehood: The Montevideo Convention and its Discontents”, *Columbia Journal of Transnational Law*, vol. 37, 1999, 432 [“Grant”].

³ Malcolm N. Shaw, *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, 201 [“Shaw”].

⁴ Hélène Ruiz-Fabri, “Genèse et disparition de l’État à l’époque contemporaine”, *Annuaire français de droit international*, vol. 38, 1992, 154.

⁵ Hersch Lauterpacht, “The Subjects of the Law of Nations”, *Law Quarterly Review*, vol. 63, 1947, 444.

⁶ *Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19.

⁷ James Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2006, 97 [“Crawford 2ed”].

⁸ Crawford 2ed, 59.

conditions must be met in order for an entity to qualify as a State, but, following that, international law assures certain permanence⁹.

Nowhere in modern international law is it stated the conditions affirmed by the Montevideo Convention must continue to be fulfilled once statehood has been achieved¹⁰. This idea was supported by the International Law Commission¹¹ [“ILC”]. Professor Crawford queries whether these criteria provide any standard¹² as the Montevideo Convention can be appreciated as not being international custom¹³.

An existing State losing one or more of these elements does not entail loss of statehood¹⁴. As stated by former International Court of Justice [“ICJ”] President Rosalyn Higgins¹⁵, “once in the club” the rules of achieving statehood become less important. A State is not automatically extinguished through the loss of the criteria¹⁶.

According to Professor Thomas D. Grant, once statehood has been established it is not lost with the loss of territory¹⁷. There is a very strong presumption of continuity against any loss

⁹ Shaw, 162.

¹⁰ Chiara Giorgetti, *A Principled Approach to State Failure: International Community Actions in Emergency Situations*, Martinus Nijhoff Publishers, Leiden, 2010, 65–66.

¹¹ *Yearbook of the International Law Commission 1949*, A/CN.4/2, 62, para. 70.

¹² Crawford 2ed, 45.

¹³ Grant, 456.

¹⁴ Ruth Lapidoth, “When Is an Entity Entitled to Statehood?”, *Israel Journal of Foreign Affairs* VI:3, 2012, 79.

¹⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, 41.

¹⁶ James Crawford, *The Creation of States in International Law*, 1st edition, Oxford University Press, Oxford, 1979, 417 [“Crawford 1ed”].

¹⁷ Grant, 435.

of statehood¹⁸. The international community determines whether an entity can (still) be considered a State¹⁹. According to Hugo Grotius, nothing is lost – not even personality²⁰.

As Professor Crawford notes, statehood ceases to exist not just through isolated acts of non-recognition (the example of Rutasia), but through a cumulative effect from the whole international community²¹ as was SFR Yugoslavia's case, whose extinction was formally acknowledged²². In Jean Charpentier's terms, recognition may provide opposability to an otherwise inopposable situation²³.

There are examples of entities having stopped fulfilling the Montevideo criteria (the Baltic States; Austria; Poland and Czechoslovakia²⁴), which continued to be regarded as States. The same was the case with Guinea-Bissau before Portuguese recognition²⁵. If other countries choose to continue recognizing a submerged island State, that State continues to exist²⁶.

Considering the UN Charter²⁷ and that the only UN member state to express its opposition to Alfurna's claims of statehood is Rutasia²⁸, it is concluded the international

¹⁸ Crawford MPEPIL, para. 38; Crawford 1ed, 48.

¹⁹ Michael Ross Fowler, Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, The Pennsylvania State University Press, University Park, PA, 1995, 62.

²⁰ Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter IX.

²¹ Crawford 2ed, 704–705.

²² UN Security Council Resolution 777 (1992); UN Security Council Resolution 1022 (1995).

²³ Jean Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*, Paris, 1956, 217–225.

²⁴ Alexandre-Charles Kiss, *Répertoire de la Pratique Française en Matière de Droit International Public*, tome III, Editions du Centre national de la Recherche Scientifique, Paris, 1965, 26–31.

²⁵ Crawford 2ed, 97.

²⁶ David Freestone, John Pethick, "Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses", in Gerald H. Blake (ed.), *World Boundaries vol. 5: Maritime Boundaries*, Routledge, London, 1994, 80.

²⁷ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 4(1) ["UN Charter"].

²⁸ *Compromis*, paras. 49–50.

community accepts Alfurna's continuing statehood. As Professor Dixon shows, UN membership entails "an almost irrebuttable presumption" of continuing statehood²⁹.

Rutasia being the only State contesting Alfurna's statehood does not prevent this Court from accepting Applicant's claims, applying the principle affirmed in the *Tinoco Claims* award³⁰.

In November 2012, 138 UN member states voted to upgrade the status of Palestine to non-member observer state³¹, creating a stronger presumption of statehood.

There have been cases (*e.g.* Somalia)³² where the statehood of entities without an effective government continued to be recognized and not challenged. The Alfurnan government is functioning normally³³, being gradually relocated to Nasatima Island³⁴.

b. Alternatively, climate change leads to an adaptation of international law

International law is created through the practice of States³⁵. New situations can be recognized by the international community as valid and lawful³⁶.

Professor Crawford considers³⁷ the notion of 'statehood' flexible, dynamic, open to manipulation and/or interpretation, depending on factual circumstances. In "unusual situations",

²⁹ Martin Dixon, *Textbook on International Law*, Sixth Edition, Oxford University Press, Oxford, 2007, 114.

³⁰ *Tinoco Claims* case (1923), 1 R.I.A.A. 369.

³¹ UN General Assembly Resolution 67/19, A/RES/67/19.

³² *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA*, High Court, Queen's Bench Division, 13 March 1993:[1993] QB 54.

³³ *Compromis*, paras. 48, 51.

³⁴ *Clarifications to the Compromis*, para. 7.

³⁵ Shaw, 6.

³⁶ Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, 13.

³⁷ Crawford MPEPIL, para. 12.

creative interpretations of law are possible and plausible³⁸. An entity not qualifying as a State under the ‘traditional’ criteria may nonetheless be recognized as such by the international community³⁹.

Climate change represents such a circumstance. The territories of numerous ‘small island States’ are threatened with complete disappearance due to the rising sea levels⁴⁰.

Alfurna was the first State in this situation⁴¹. According to researchers⁴², States such as the Maldives, Kiribati, Tuvalu will follow⁴³. The international community has been encouraged to address this matter⁴⁴, which is becoming more and more current.

Climate change has a significant effect on international relations⁴⁵. Numerous States have taken initiative in the matter⁴⁶.

The UNCHR considers the international community must agree States affected by climate change will continue existing, their statehood untouched⁴⁷.

³⁸ Crawford 2ed, 701.

³⁹ Crawford MPEPIL, para. 44.

⁴⁰ Nobuo Mimura *et al.*, “Small islands”, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, 2007, 687 *et seq.*

⁴¹ Rosemary Rayfuse, “W(h)ither Tuvalu? International Law and Disappearing States”, University of New South Wales Faculty of Law Research Series, Paper 9, Berkeley Electronic Press, 2009, 2.

⁴² James G. Titus, “Rising Sea Levels: The Impact They Pose”, *Environmental Protection Agency Journal*, vol. 12, 18 (1986); Shaina Stahl, “Unprotected Ground: The Plight of Vanishing Island Nations”, *New York International Law Review*, vol. 23, 29–30 (2010).

⁴³ Lilian Yamamoto, Miguel Esteban, “Vanishing Island States and Sovereignty”, *Ocean and Coastal Management*, OCMA 2686 (2009) [“Yamamoto”].

⁴⁴ UN General Assembly, *Follow-up to and implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, A/RES/63/213; UN General Assembly, *Climate change and its possible security implications*, A/RES/63/281.

⁴⁵ Alec Crawford, Arthur Hanson, David Runnalls, “Arctic Sovereignty and Security in a Climate-changing World”, International Institute for Sustainable Development, 2008, 12.

⁴⁶ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Article 2 [“UNFCCC”].

Statehood must be reconsidered acknowledging the transient character of territory. As Judge Dillard affirmed, “it is for the people to determine the destiny of the territory and not the territory the destiny of the people.”⁴⁸

The law of statehood must be re-conceptualized to accommodate climate change’s adverse effects and its implications on “traditional” statehood. Professor Österdahl noted international law must reconsider the concepts of State and statehood⁴⁹. Professor McKinley admits international law can completely abandon territory as a requirement of statehood⁵⁰.

A sovereign entity without territory is already recognized⁵¹ and acknowledged⁵². The Holy See was recognized as a State even after being annexed by Italy, despite possessing no territory until the 1929 Lateran Treaties⁵³.

In the case of States disappearing due to climate change, the continuity presumption applies until the international community no longer recognizes the situation⁵⁴. Professor Kälin considers the notion of statehood will still be embraced internationally⁵⁵. States are willing to

⁴⁷ UN High Commissioner for Refugees, *Climate Change and Statelessness: An Overview*, 15 May 2009, 2.

⁴⁸ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, 12, 122.

⁴⁹ Inger Österdahl, “Relatively Failed: Troubled Statehood and International Law”, *Finnish Yearbook of International Law*, vol. 14, 49 (2003).

⁵⁰ Michelle A. McKinley, “Conviviality, Cosmopolitan Citizenship, and Hospitality”, *Unbound Harvard Journal of the Legal Left*, vol. 5, 81 (2009).

⁵¹ Jason J. Kovacs, “The Country Above the Hermes Boutique: The International Status of the Sovereign Military Order of Malta”, *The Digest National Italian American Bar Association Law Journal*, vol. 11, 28 (2003).

⁵² Noel Cox, “The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta”, *Mountbatten Journal of Legal Studies*, forthcoming, 5.

⁵³ Kurt Martens, “The Position of the Holy See and Vatican City in International Relations”, *University of Detroit Mercy Law Review*, vol. 83, 755 (2006).

⁵⁴ Crawford 2ed, 668.

⁵⁵ Walter Kälin, *Climate Change Induced Displacement – A Challenge for International Law*, Mahanirban Calcutta Research Group, Salt Lake City, 2011, 20.

accept maintaining the *status quo* prior to the submersion. The presumption of continuity must logically extend to cover such situations⁵⁶.

International law is based on sovereign equality⁵⁷. Alfurna's situation should not be treated superficially, since other States will soon find themselves confronting the same issue; the international community must respond positively, accepting continued statehood⁵⁸.

2. In any event, Alfurna still has a territory

Alfurna currently possesses Nasatima Island as its territory, having complete control over it⁵⁹. Alfurnan state agencies are being relocated and the government is functioning effectively⁶⁰.

Rosalyn Higgins considered this idea as early as 1963, showing a lease is possible with continuing statehood⁶¹. Territorial leases offer enough sovereignty for the purpose of statehood, as discussed by Professors Oppenheim⁶² and Shaw⁶³.

UN Secretary-General Ban Ki-moon expressed a positive opinion towards this⁶⁴, mentioning the possibility of island States to acquire land within another State.

⁵⁶ Jane McAdam, "Disappearing States', Statelessness and the Boundaries of International Law", in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Publishing, Oxford, 2010, 115–116.

⁵⁷ UN Charter, Article 2(1).

⁵⁸ Yamamoto, 2.

⁵⁹ *Compromis*, para. 45.

⁶⁰ *Clarifications to the Compromis*, para. 7.

⁶¹ Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford University Press, London, 1963, 24.

⁶² Robert Jennings, Arthur Watts (ed.), *Oppenheim's International Law*, 9th edition, Pearson Education Ltd, London, 1992, vol. I, 670.

⁶³ Shaw, 538.

⁶⁴ UN General Assembly, *Climate change and its possible security implications – Report of the Secretary-General*, A/64/350, 11 September 2009, 21.

Finutafu and Alfurna agreed to transfer sovereignty over Nasatima Island⁶⁵, having concluded a *gentlemen's agreement*, considered by the ICJ as imposing duties upon the States⁶⁶. Even though they concluded a lease agreement⁶⁷, they did so having taken into consideration the idea of Alfurna possessing “some territory” of its own⁶⁸.

Some matters remaining subject to Finutafuan control does not prevent Alfurna from continuing to be recognized as a State. Similarly, through the 1912 Treaty of Fez, France agreed to exercise some sovereign powers and manage all Moroccan international relations. The ICJ considered Morocco remained a fully sovereign State⁶⁹. *A fortiori*, since Finutafu does not conduct Alfurna's complete international relations, Alfurna remains a sovereign State.

II. ALFURNA IS ENTITLED TO MAKE CLAIMS IN RELATION TO THE MIGRANTS NOW IN RUTASIA, AND RUTASIA HAS FAILED TO PROCESS THEM AND ACCORD THEM STATUS CONSISTENT WITH INTERNATIONAL LAW

1. Alfurna is entitled to make claims in relation to the migrants now in Rutasia

a. Alfurna can make claims in relation to the migrants due to diplomatic protection

Alfurna is entitled to make claims based on diplomatic protection⁷⁰.

As the ICJ noted in the *Barcelona Traction* case, “within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is asserting.”⁷¹

⁶⁵ *Compromis*, para. 31.

⁶⁶ *Legal Status of Eastern Greenland* (1933), PCIJ, Series A/B, No. 53, 70–71.

⁶⁷ *Compromis*, para. 45.

⁶⁸ *Compromis*, para. 31.

⁶⁹ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, *I.C.J. Reports 1952*, 188.

⁷⁰ ILC, *Draft Articles on Diplomatic Protection*, A/CN.4/SR.2793, Article 1.

The State's right to protect its subjects who are abroad was expressed by Emmerich de Vattel: "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen"⁷² and although "the scope *ratione materiae* of diplomatic protection was originally limited to alleged violations of the minimum standard of treatment of aliens, it has subsequently widened to include, *inter alia*, internationally guaranteed human rights"⁷³.

Customary international law recognizes two requirements: exhaustion of local remedies⁷⁴ and continuous nationality⁷⁵.

The existence of the "clean hands" doctrine is, according to Professor Salmon, "fairly long-standing and divided"⁷⁶. In all cases where the claim for diplomatic protection was held inadmissible, the cause-effect relation between the damage and the victim's breach of international law was pure and it involved no wrongful act by the respondent State⁷⁷. If the respondent State had replied by violating international law, there is no case where the claim for granting diplomatic protection was declared inadmissible⁷⁸.

⁷¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 3, 32, paras. 33-34 ["Barcelona Traction"].

⁷² Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, 1758.

⁷³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 39 ["Diallo"].

⁷⁴ *Interhandel Case (Switzerland v. USA)*, Judgment of March 21st, 1959: I.C.J. Reports 1959, 6, para. 27; *Diallo*, paras. 42, 44; *European Convention on Human Rights*, 4 November 1950, ETS 5, Article 35 ["ECHR"]; *American Convention on Human Rights*, 21 November 1969, 1144 UNTS 123, Article 46; *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Article 5;

⁷⁵ Shaw, 814.

⁷⁶ J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10, 225 (1964), 249 ["Salmon"].

⁷⁷ *Ibid.*, 261.

⁷⁸ L. Garcia Arias, "La doctrine des 'clean hands' en droit international public", *Annuaire de l'Association des Auditeurs et des Anciens Auditeurs de l'Académie de droit international*, vol. 30 (1960), 18.

Thus, the only conditions that must be fulfilled to grant citizens diplomatic protection are exhaustion of local remedies and continuous nationality. Alfurna can make claims regarding its citizens detained in Rutasia firstly because they have exhausted local Rutasian remedies and the Supreme Court “denied the motion and dismissed the case on the grounds that adjudication would intrude into the exclusive constitutional role of the political branches of government in determining foreign policy.”⁷⁹ Secondly, the citizens detained in Woeroma Centre are still Alfurnan nationals⁸⁰, giving the Alfurnan authorities the right to exercise diplomatic protection.

b. There is no international obligation requiring a State to take affirmative steps

The ILC has elaborated the *Draft Articles on Protection of Persons in the Event of Disasters* in order to facilitate an adequate, effective response to disasters, with full respect to the rights of the persons concerned⁸¹. Article 5 establishes the duty of States to cooperate in order to pursue the purpose of these Articles⁸². As the Preamble of the UN Charter and the *Declaration on Friendly Relations*⁸³ state, the duty to cooperate is fundamental to international law.

Secondly, Article 9 establishes the affected State has the primary duty to ensure the protection of persons and provision of disaster relief and assistance on its territory⁸⁴.

The duty to cooperate should not affect the respect of sovereignty and non-intervention. International assistance is a supplement, not a substitute, to the action of the affected State⁸⁵.

⁷⁹ *Compromis*, para. 43.

⁸⁰ See above, I.1.a.

⁸¹ International Law Commission, *Protection of Persons in the Event of Disasters*, A/CN.4/L.758, A/CN.4/L.776, A/CN.4/L.794, A/CN.4/L.812, Article 2 [“Protection of Persons”].

⁸² *Protection of Persons*, Article 5.

⁸³ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN*, adopted by the General Assembly on 24 October 1970 (resolution 2625 (XXV)) [“Resolution 2625”].

⁸⁴ *Protection of Persons*, Article 9.

However, there is no obligation “to take affirmative steps”. Such an expression must be expressly framed⁸⁶. The *Draft Articles* do not establish an obligation to “take affirmative steps”. They establish the duty of the affected State to seek assistance, if its national capacity is exceeded⁸⁷ and that there is a right to offer assistance from non-affected States⁸⁸ as a form of solidarity⁸⁹.

The concept of “taking affirmative steps” is unclear as to what are the exact obligations it requires. The obligation to seek assistance does not imply an obligation to accept it. According to the ILC, “whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States”⁹⁰ meaning the term “seek” implies a broader, negotiated approach to the provision of international aid⁹¹. The Governments of the affected States will be in the best position to determine the severity of a disaster situation⁹² and will have the discretionary power to choose from various States, the UN, or other organizations the most appropriate assistance⁹³.

⁸⁵ Second Report of the Special Rapporteur on the protection of persons in the event of disasters (S.CN.4/615 and Corr.1), 334, para 173-174.

⁸⁶ *Declaration on Rights of Persons belonging to National or Ethnic Minorities*, A/RES/47/135/18 December 1992, Article 1(2); *UN Convention against Transnational Organized Crime*, 8 January 2001, A/RES/55/25, Article 5(1).

⁸⁷ Protection of Persons, Article 10.

⁸⁸ Protection of Persons, texts and titles of Draft Articles 5bis, 12, 13, 14 and 15.

⁸⁹ Fourth Report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/643 and Corr.1.), 251, para 277 [“Fourth Report”].

⁹⁰ Institute of International Law, Bruges Session – 2003, Sixteenth Commission, “Humanitarian Assistance” [“Bruges resolution”], Article III, para. 3.

⁹¹ Salmon, 266.

⁹² Fourth Report, commentary on (previous) Article 10, 266, para. (8).

⁹³ *Ibid.*, para (10).

c. Alternatively, Alfurna has not failed to take affirmative steps to protect its people

A party asserting a fact must prove it⁹⁴. The Eritrea–Ethiopia Claims Commission stated ‘clear and convincing evidence’ would be required in order to support findings as to state responsibility⁹⁵, while the ICJ held claims against a State involving ‘charges of exceptional gravity’ must be proved by evidence that is ‘fully conclusive’⁹⁶. Rutasia has so far failed to bring proof Alfurna failed to take affirmative steps.

If one considered the obligation to seek assistance is equivalent to the obligation to “take affirmative steps” and this had customary value, Alfurna respected it.

Prime Minister Fatu ordered CEC to identify suitable options for a new homeland and to approach other nations to acquire the necessary territory in order to relocate the Alfurnans in time.⁹⁷ When the 2006 earthquake struck, Alfurna managed to protect its people by relocating them to Engili or Finutafu⁹⁸ and eventually relocated all its inhabitants to Finutafu⁹⁹, with the exception of 3000 Nullatree Cove inhabitants who refused leaving¹⁰⁰. These were the ones who later were found drifting towards the coast of Rutasia, admitted to Rutasian territory and detained¹⁰¹.

⁹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, para. 204 [“Genocide case”].

⁹⁵ Partial Award, Prisoners of War, Eritrea’s Claim 17, 1 July 2003, paras. 46 and 49, and Partial Award, Civilian Claims, Ethiopia’s Claim 5, 17 December 2004, para. 35.

⁹⁶ *Genocide case*, para. 209.

⁹⁷ *Compromis*, para. 24.

⁹⁸ *Compromis*, para. 25.

⁹⁹ *Compromis*, para. 32.

¹⁰⁰ *Ibid.*.

¹⁰¹ *Compromis*, para. 33.

d. Alternatively, no authority supports a State's failure to protect its people implies loss of its right to make claims concerning them in the future

According to international custom, there are only few situations that can occur in order for a State to lose the exercise of a right; Alfurna would lose the right to offer its citizens diplomatic protection: if it violated substantial law¹⁰², if it undertook countermeasures¹⁰³ or, although not generally accepted, applying the “clean hands” doctrine.

2. Rutasia has failed to process those migrants and accord them status consistent with international law

a. The concept of “environmental refugees” is supported

The notion of “environmental refugees” was defined as “people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”¹⁰⁴.

These people are collectively marked by several factors: an inability to return to their homes, collective migration, a predictable need for migration and a unique and compelling moral element to their situation¹⁰⁵.

¹⁰² *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [“VCLT”], Article 60.

¹⁰³ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, [“Responsibility of States”], Article 22.

¹⁰⁴ Essam El-Hinnawi, “Environmental Refugees”, Nairobi: United Nations Environment Programme, 1985 [“El-Hinnawi 1985”]; “Discussion Note: Migration and the Environment”, MC/INF/288, International Organization for Migration, 2007.

¹⁰⁵ Frank Biermann, Ingrid Boas, “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees” Global Governance Working Paper, No. 33, November 2007, 15 [“Biermann”]

Even though the term “refugee” has been highly opposed by some¹⁰⁶, there is no reason to reserve the stronger term “refugee” for a category of people that stood at the centre of attention after 1945, and invent less appropriate terms, such as “climate-induced environmentally displaced persons” – for people who are forced to leave their homes now, with similar grim consequences¹⁰⁷.

As Frank Biermann explains, the reason for using the term “refugee” is the strong moral connotation of societal protection in most cultures¹⁰⁸. “Denying them the moral status of a refugee is disrespectful, denigrating and unjust.”¹⁰⁹ Finding an appropriate term is vital, to clearly delimit the rights of individuals and the correlative obligation that bind states¹¹⁰.

However, regardless of the term, climate change fundamentally affects the lives of millions of people who will be forced to leave their homes to seek refuge¹¹¹. Today, these individuals and communities exist in a legal *no-man’s land*, with no juridical protection¹¹².

The number of people at risk because of sea-level rise by 2050 is likely to be 162 million¹¹³. Small-island nations are at high risk. If sea-level rises by 1 meter, storm surges could make nations such as the Maldives, Kiribati, or Tuvalu uninhabitable; a sea-level rise of 2 meters

¹⁰⁶ Biermann, 6-7 (e.g. UNHCR, UNFCCC, IOM).

¹⁰⁷ Biermann, 8.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Norman Myers, “Environmental refugees: A growing phenomenon of the 21st century”, The Royal Society 2001 [“Myers”].

¹¹² Maxine Burkett “The Nation Ex-situ: on climate change, deterritorialized nationhood and the post-climate era”, *Climate Law* 2 (2011), 350 [“Burkett”]

¹¹³ Myers.

would flood many of them¹¹⁴. It is a social reality with which States must learn to deal with according to law¹¹⁵.

As currently organized, the law is ill-equipped to deal with an inherently cross-cutting event like climate change¹¹⁶. Law requires a re-envisioning accommodating the unique circumstances of climate-induced human migration in the twenty-first century and finding a legal basis for creating a protection system appropriate to the needs of environmental refugees.

b. There is legal basis for granting an environmental refugee status

i. *The principle of non-refoulement and the general obligation to protect human rights*

Climate-induced displacement was not considered when formulating the definition of a refugee in the 1951 Convention. There are regional instruments with definitions including additional grounds for recognition of refugees¹¹⁷. Most internationally displaced persons in the context of disasters do not qualify for a refugee status, but they are protected by the *non-refoulement* principle¹¹⁸, which is considered *jus cogens* norm¹¹⁹, inherent to the absolute

¹¹⁴ German Advisory Council on Global Change 2006, 46, para. 50

¹¹⁵ Guy S. Goodwin-Gill, "The right to seek asylum: interception at sea and the principle of non-refoulement", *International Journal of Refugee Law*, Vol. 23, No. 3 (2011), 445 ["Goodwin-Gill"].

¹¹⁶ Burkett, 373.

¹¹⁷ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45, Article 1(2); *Cartagena Declaration on Refugees*, Inter-American Commission on Human Rights, OAS/Ser.L/V/II.66, doc. 10, rev. 190–193.

¹¹⁸ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Article 33(1).

¹¹⁹ "The Principle of Non-Refoulement as a Norm of Customary International Law", Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93.

prohibition of torture, universally applying for all aliens¹²⁰, and additional human rights law provisions applicable¹²¹.

The principle of humanity is the cornerstone of the protection of persons¹²². The ICJ affirmed in the *Corfu Channel case* elementary considerations of humanity are general and well-recognized principles of the international legal order, “even more exacting in peace than in war.”¹²³

The international community must support States in protecting their own citizens considering the duty to cooperate and the principle of humanity. This does not contradict, rather underpins States’ obligations to provide international protection to persons displaced across borders where the State of origin, due to a natural disaster, is unable to protect the fundamental rights of its citizens¹²⁴.

ii. The moral obligation of heavily industrialized States that have contributed to the damage of the environment

A wrongful act creates liability, including the compensation of victims¹²⁵. Climate refugees may be entitled to demand compensation payments or other assistance from industrialized countries¹²⁶.

¹²⁰ Goodwin-Gill, 444.

¹²¹ “Forced displacement in the context of climate change: challenges for States under international law”, paper submitted by the Office of the UNHCR in cooperation with the Norwegian Refugee Council, the Representative of the Secretary General on the Human Rights of Internally Displaced Persons and the United Nations University”, 20 May 2009, 10, para. 3ii [“Forced displacement”].

¹²² Protection of Persons, Article 6, Commentary, 256, para. (3).

¹²³ *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, 22.

¹²⁴ Forced displacement, 10-11.

¹²⁵ Responsibility of States, Article 1.

¹²⁶ German Advisory Council on Global Change 2007, 174;

Almost all climate refugees are likely to come from countries least responsible for climate change and least able to finance and implement adaptation programs. This situation creates a moral link between impoverished climate refugees and the richer countries that can provide funds and refuge for climate change victims¹²⁷. Refusing climate refugees to enter would be “particularly for developed countries, morally difficult to sustain since it is their emissions that will have caused the problem”¹²⁸.

Bodies such as the UNHCR are taking a stand regarding this problem: “States Parties should acknowledge in the agreed outcome that there is a clear link between the effect of climate change and displacement. They should acknowledge their obligations to address displacement in the context of climate change”¹²⁹.

As the UNHCR recommends “States should consider establishing alternative forms of protection for those persons who do not qualify as refugees but whose return is not feasible or not reasonable due to the circumstances in the place of origin and/or personal conditions, including particular vulnerabilities”¹³⁰.

Presently, governments of industrialized countries reject any claims of liability towards possible climate change victims¹³¹. A common argument is that it is difficult to relate past emissions of developed states to current or future impacts of climate change¹³².

¹²⁷ UNFCCC, *Principles*.

¹²⁸ Jon Barnett, “Security and Climate Change”, Tyndall Centre Working Paper 7, Norwich: Tyndall Centre for Climate Change Research, 2001, 9.

¹²⁹ Forced displacement, 2, para. 1 d).

¹³⁰ *Ibid.*

¹³¹ News release by Reuters in the Pacific Islands Forum in Fiji on 24-25 October 2006 (“Tuvalu is upset that regional heavyweight Australia, a major aid donor but also one of the biggest per capita emitters of the greenhouse gases responsible for global warming, has so far spurned advances to help resettle their people”).

¹³² Jouni Paavola, W. Neil Adger, “Justice and adaptation to climate change”, Tyndall Centre for Climate Change Research, October 2002, 1.

c. A special status of protection for environmental refugees is customary law

Although the *non-refoulement* principle and the general obligation to respect human rights do not entitle these people to a right to stay on a State's territory, State practice shows otherwise.

In 1990, the U.S. enacted the Temporary Protected Status as the statutory embodiment of safe haven in the USA for those who do not meet the legal definition of a refugee but are nonetheless reluctant to return to potentially dangerous situations, under certain conditions¹³³.

Finland extends complementary protection to foreign nationals who cannot return safely to their home because of environmental disasters if there is no alternative of relocation to a safe area within the home State¹³⁴.

Although many of those granted this status are presumed to be in temporary need of protection by domestic laws, Sweden determined some persons are in need of permanent solutions "if they cannot return because of an armed conflict or environmental disaster"¹³⁵. Canada, Switzerland, and the UK suspended deportations of those from countries and regions such as India, Indonesia, Maldives, Sri Lanka and Thailand after the 2004 tsunami¹³⁶.

International law adapts to protect fundamental human rights. "Refugees and asylum seekers may not fit easily within the established framework of practice regarding disembarkation, care and consular assistance, but the principles of protection are there to provide

¹³³ Forced displacement, 12.

¹³⁴ *Ibid.*

¹³⁵ Swedish *Aliens Act*, 2005:716.

¹³⁶ Susan Martin, Background paper WMR 2010: "Climate change and international migration", IOM, 10 ["Martin"].

guidance”¹³⁷, as was the case in Asia in the 1970s and 1980s: solutions had to be found to the asylum seeker at sea when an international response was organized based on fundamental principles that drew from long-established rules of rescue “with the addition of protection and solutions: non-refoulement, disembarkation, minimum standards of treatment”¹³⁸.

These elements point to the formation of a new customary rule, according to which the Alfurnan migrants in Rutasia should be granted a special status of “environmental refugees”, governed by appropriate, specific principles: the principle of planned re-location and settlement, resettlement instead of temporary asylum, collective rights for local populations, international assistance for domestic measures and international burden-sharing¹³⁹.

III. RUTASIA’S TREATMENT OF THE DETAINED ALFURNAN MIGRANTS IN THE WOEROMA CENTRE, AS WELL AS THEIR PROPOSED TRANSFER TO SAYDEE, VIOLATE INTERNATIONAL LAW

1. Rutasia’s treatment of the detained Alfurnan migrants held in Woeroma Centre violates international law

a. The Alfurnan migrants are unlawfully detained in Woeroma Centre

The general obligation to respect human rights, recognized by the ICJ in the *Barcelona Traction* and the *Nicaragua*¹⁴⁰ cases, is all the more imperative when applied to persons whose legal situation made them vulnerable, as is the case with expelled aliens.¹⁴¹

¹³⁷ Goodwin-Gill, 447.

¹³⁸ Guy S. Goodwin-Gill, Jane McAdam, *The Refugee in International Law*, Oxford University Press, Oxford, 2006, 277-284 [“Goodwin-Gill, McAdam”].

¹³⁹ Biermann, 25.

¹⁴⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 14.

¹⁴¹ ILC Fifth report of the Special Rapporteur on expulsion of aliens (A/CN.4/611 and Corr.1), 214 [“Fifth report”].

Every person has the right to liberty and security¹⁴², of which it can be deprived in few situations. One of these is arrest or detention with a view to deportation or extradition¹⁴³. Even so, there are certain conditions which may render detention incompatible with this.

Firstly, the detention must be in accordance “with such procedure as are established by law”¹⁴⁴ and not arbitrary¹⁴⁵.

According to the UN Human Rights Committee [“UNHRC”], the notion of “arbitrariness” must not be equated with “against the law”, rather interpreted more broadly to include such elements as inappropriateness and injustice. The unlawful means of entering a State’s territory will not always justify indefinite and prolonged detention¹⁴⁶.

Secondly, detention needs to be justified¹⁴⁷. “Every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.”¹⁴⁸ Detention should not continue beyond the period for which the State can provide appropriate justification. For example, illegal entry may indicate a need for investigation and there may be other particular factors, such as the likelihood of absconding and lack of cooperation, which may justify temporary detention. Without such factors, detention may be considered arbitrary, even if the entry was illegal¹⁴⁹.

¹⁴² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 3, Article 9 [“ICCPR”]; ECHR, Article 5.

¹⁴³ ICCPR, Article 13; ECHR, Article 5 para. 1(f).

¹⁴⁴ ICCPR, Article 9; ECHR, Article 5 para. 1.

¹⁴⁵ *S.D. v. Greece* (Appl. No. 5341/07), ECHR, 11 June 2009 [“S.D.”] (holding there was no provision under domestic law to detain an asylum seeker before his asylum claim was heard since until then he could not be expelled).

¹⁴⁶ *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997; para. 9.3 [“*A. v. Australia*”].

¹⁴⁷ *A. v. Australia*, para. 9.4.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

If for legal, practical or administrative reasons a person held for the purposes of extradition or expulsion cannot be removed, issues may arise whether the detention can be considered justified for the purpose it was taken “with a view to extradition”¹⁵⁰.

The Alfurman migrants are not detained in “accordance with a procedure prescribed by law” and were not granted any procedural rights, as the right to appeal the detention decision, according to Article 9(4) ICCPR¹⁵¹.

b. The treatment of the Alfurmans during detention breaches the prohibition of inhuman and/or degrading treatment

Some discomfort is normal during detention and will not raise issues under the general prohibition of torture¹⁵². When asylum seekers are detained, those facilities are often makeshift places not geared because the purpose and conditions have been found to be degrading where there is serious overcrowding, appalling hygiene, insufficient sanitary and sleeping facilities¹⁵³, pest infestation linked with recurring diseases and infections¹⁵⁴, air¹⁵⁵ or bedding¹⁵⁶.

Lack of resources or economic problems cannot in principle justify degrading detaining conditions.¹⁵⁷

¹⁵⁰ *Ali v. Switzerland*, 69/1997/853/1060, ECHR, 5 August 1998; *A and others v. UK*, February 19, 2009, ECHR, paras 167-172.

¹⁵¹ *Compromis*, paras. 33 *et seq.*

¹⁵² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

¹⁵³ *Dougoz v. Greece*, 40907/98, ECHR, 6 March 2001, para. 46.

¹⁵⁴ *Melnik v Ukraine*, 72286/01, ECHR, 28 March 2006 (where the applicant contracted TB in prison).

¹⁵⁵ *M.S.S. v Greece and Belgium*, 30696/09, ECHR, 21 January 2011 [“*M.S.S.*”]

¹⁵⁶ *S.D.*, paras. 49-54.

¹⁵⁷ Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, Thomson Reuters, London, 2011, 806 [“Reid”].

Proof of the detention conditions was made with the help of the Immigration Ombudsman, which stated Block B in Woeroma Centre “resembles a medium security prison with high fences and cages inappropriate for non-criminal detainees”, “is severely overcrowded, which has led to hygiene problems, inadequate food and water, and limited access to medical services”¹⁵⁸.

An effective official investigation is required if an individual alleges they have been ill-treated by the authorities¹⁵⁹ and inferences may well be drawn where the Government fails to submit such information¹⁶⁰. Rutasia dismissed the concerns raised by the Ombudsman as “factually inaccurate”¹⁶¹ without further investigation.

2. Rutasia’s proposed transfer to Saydee violates international law

a. The proposed transfer to Saydee does not respect public international law

Although a State has a right to expel an alien, the expulsion reasons could vary and are not all permissible under international law.

Expulsion of aliens brings forth fundamental human rights, whose violation is prohibited by international law¹⁶². Article 13 ICCPR, provides “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law”¹⁶³.

¹⁵⁸ *Compromis*, para. 36.

¹⁵⁹ *Stepuleac v. Moldova*, 8207/06, ECHR, 6 November 2007.

¹⁶⁰ *Ogica v. Romania*, 24708/03, ECHR, 27 May 2010, para. 45 [“*Ogica*”] (the Government having failed to provide documents on occupancy, hygiene and conditions in cells).

¹⁶¹ *Compromis*, para. 36.

¹⁶² ILC Preliminary report of the Special Rapporteur on the expulsion of aliens (A/CN.4/554).

¹⁶³ ICCPR, Article 13.

International law recognizes the rights of individuals to just and fair procedures for expulsion and requires States to ensure them¹⁶⁴. The expulsion must be formal in order for the person concerned to have an opportunity to appeal¹⁶⁵.

According to the reports of the Special Rapporteur, the unlawful nature of an alien's presence within the territory of a State was sufficient ground for expulsion under the legislation of many States, as long as the procedural guarantees envisaged under international and domestic law were observed¹⁶⁶.

The UNHRC considered the rights accorded under Article 13 ICCPR to aliens lawfully within the territory of the expelling State also applied if the legality of an alien's presence was disputed¹⁶⁷.

Also, the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live* states persons who were or were being expelled have certain procedural guarantees, in particular the right to remedy allowing them to contest the legality of their expulsion, the right to be heard and the right to be assisted by a lawyer¹⁶⁸.

b. Alternatively, the proposed transfer breaches the general prohibition of inhuman and/or degrading treatment

¹⁶⁴ *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984; UN General Assembly, A/RES/40/144, *Declaration on the human rights of individuals who are not nationals of the country in which they live*, 13 December 1985, Article 7 ["A/RES/40/144"]; ICCPR, Article 13.

¹⁶⁵ ICCPR, Articles 9(4), 13.

¹⁶⁶ ILC *Draft articles on protection of the human rights of persons who have been or are being expelled*, A/CN.4/617, para 158.

¹⁶⁷ Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, 11 April 1986, para. 9.

¹⁶⁸ A/RES/40/144, Article 5(c).

Although immigration and expulsion fall within a State's domestic law, where an applicant faces a real risk of torture or ill-treatment on expulsion to a particular country, issues arise under Article 3 of the *Convention regarding the general prohibition of inhuman or degrading treatment*. The obligation of the State extends in respect of everyone in their jurisdiction to a duty not to expose them to danger even outside their jurisdiction.¹⁶⁹

In *Soering v. UK*, the UK Government argument that a State should not be held accountable for acts committed outside its jurisdiction was rejected by the ECHR and stated a State cannot deport a person disregarding their fate once they have left its territory, especially if one would risk torture¹⁷⁰. This has been extended to general expulsion measures and Article 3 is potentially breached if there are substantial grounds to believe an applicant faces a real risk of torture or inhuman and degrading treatment or punishment if expelled.

In *M.S.S v. Greece and Belgium*, the ECHR held a State has a duty to verify an asylum seeker would be properly treated in the intermediate country, both regarding the examination of claims before and interim treatment¹⁷¹.

According to the Committee Against Torture, the burden of proof falls upon the complainant, who must present an arguable case that he runs a "foreseeable, real and personal risk", the Committee being entitled to freely assess the facts of each case, taking into account specific circumstances. The Committee found there was such a risk in cases where the complainant had submitted contradictory information concerning his detention and ill-treatment in the receiving State¹⁷².

¹⁶⁹ Reid, 551.

¹⁷⁰ *Soering v. The United Kingdom*, 1/1989/161/217, ECHR, 7 July 1989.

¹⁷¹ *M.S.S.*, paras 365-368.

¹⁷² Decision of the Committee against Torture, Communication No. 343/2008.

In order to prove that detaining conditions and treatment during detention are degrading, the general standard is “beyond a reasonable doubt.”¹⁷³ But, there have been cases where the authorities will be required to rebut arguable complaints¹⁷⁴ in particular where the Government may be regarded as being the sole party with access to the information capable of proving the facts¹⁷⁵.

Regarding the risk of torture or ill-treatment in the receiving State, some ILC members considered the notion of “serious risk” set too high a standard and it should be replaced with the notion of “real risk”, as embodied in the ECHR case law¹⁷⁶. A reference was also made to UNHRC General Comment No. 20 (1992), according to which States Parties to the ICCPR “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”¹⁷⁷.

Existence of real risk may be supported by previous incidences of ill-treatment. The Court will also refer to Amnesty International Reports and the UNHCR, as well as to reports by the UN Committee against Torture. These sources may be regarded as highly relevant and persuasive, particularly when mutually consistent¹⁷⁸.

While the assessment of the existence of a real risk must necessarily be rigorous, it has been stated that due to the special situation in which asylum seekers often find themselves, it is

¹⁷³ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

¹⁷⁴ *Ogica*.

¹⁷⁵ *Dimakos v. Romania*, 10675/03, ECHR, 6 July 2010.

¹⁷⁶ Fifth report, para 124.

¹⁷⁷ *Ibid.*

¹⁷⁸ Reid, 560

frequently necessary to give them the benefit of doubt when assessing the credibility of their statement and the documents submitted¹⁷⁹.

Saydee’s history of ignoring human rights¹⁸⁰ and the processing conditions in which migrants are kept – unacceptable conditions of hygiene, insufficient food, abuse, forced labor¹⁸¹ – represent a real risk of degrading treatment and determine the proposed transfer to Saydee as violating the general prohibition of torture. Moreover, “numerous reports from universally-respected human rights NGO’s are unanimous on this”¹⁸².

IV. 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 VIOLATE INTERNATIONAL LAW

The Climate Change Loan [“CCL”]¹⁸³ is a commercial contract because of its nature, purpose and chosen applicable law. As the ILC argued, it is a Financial Loan¹⁸⁴.

“Commercial transactions” are defined as covering a wide range of contracts and transactions, including contracts for a loan or other transaction of a financial nature, any obligation of guarantee or of indemnity in respect of such loan or transaction.¹⁸⁵

¹⁷⁹ *Saadi v. Italy*, 37201/06, ECHR, 28 February 2008.

¹⁸⁰ *Compromis*, para. 40.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Compromis*, Annex A.

¹⁸⁴ *Draft Articles on Jurisdictional Immunities of States and Their Property*, with commentaries, *Yearbook of the International Law Commission, 1991, vol. II, Part Two, Article 2* [“ILC Immunities”].

¹⁸⁵ *The State Immunity Act 1978 (UK SIA); State Immunity Act (1982) (Canada SIA); Foreign State Immunities Act 1985 (Australia FSIA); Immunities and Privileges Act 1984 (Malaysia); State Immunity Ordinance 1981 (Pakistan); State Immunity Act 1979 (Singapore); Foreign State Immunities Act 1981 (South Africa).*

1. Rutasia has breached the general *bona fide* obligation by executing Alfurna’s bank account

Under the general principles of the UN Charter¹⁸⁶ and in international law doctrine¹⁸⁷, States have an obligation to cooperate¹⁸⁸.

a. The CCL contains abusive clauses, violating international law

The 30-day term was unreasonable and unachievable for Alfurna’s government, violating the obligation to cooperate¹⁸⁹. Article 7 of the UNCTAD *Draft Principles on Promoting Responsible Sovereign Lending and Borrowing*¹⁹⁰ states that lenders have to “behave in good faith and with cooperative spirit to reach a consensual rearrangement of those obligations”. It was unreasonable because remediating a default under normal circumstances could not (and should not) be done rapidly, and it was unachievable because of Alfurna’s situation.

Also, the IMF’s Sovereign Debt Restructuring Mechanism set out the principles and techniques to remediate a sovereign default in an effective, not necessarily rapid, way¹⁹¹.

¹⁸⁶ UN Charter, Article 2(2).

¹⁸⁷ Oppenheim’s *International Law* notes that this is ‘of overriding importance’, 38; Élisabeth Zoller, *Bonne Foi en Droit International Public*, Pedonne, Paris, 1977; Robert Kolb, *La Bonne Foi en Droit International Public*, Presses Universitaires de France, Paris, 2000; Hugh Thirlway, “The Law and Procedure of the International Court of Justice 1960–1989 (Part One)”, *British Yearbook of International Law*, vol. 60(1), 3, 7 ff.; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. I, Cambridge University Press, Cambridge, 1986, 183; vol. II, 609.

¹⁸⁸ Resolution 2625.

¹⁸⁹ *Draft Principles on Promoting Responsible Sovereign Lending and Borrowing*, UNCTAD, [“Responsible Lending”], Article 15.

¹⁹⁰ *Ibid.*, Article 7.

¹⁹¹ Anne O. Kruege, *Sovereign Debt Restructuring Mechanism-One Year Later*, Presented at the European Commission, Brussels, Belgium, December 10, 2002.

b. Rutasia violated the international obligation to cooperate through noticing Alfurna

The 30-day notice for remediation breached Rutasia's general obligation to cooperate towards a resolution of the situation¹⁹². The CCL was due in 2027¹⁹³.

Rutasia failed to seek a favorable solution¹⁹⁴ for both parties in order to fulfill the obligations in the ACCR Project by setting a remediation term of 30 days for Alfurna. Rutasia ignored the financial challenges that affected the world in 2008¹⁹⁵, and the grave situation Alfurna's economy faced in the aftermath of the flooding.

A further violation is the fact that Rutasia executed Alfurna's account, ignoring and denying cooperation between the two States.

c. Even if the CCL clauses would not be abusive, Alfurna cannot be held responsible

Alfurna submits that the events regarding the global financial markets¹⁹⁶ constitute "*état de nécessité*"¹⁹⁷, enunciated in the ILC *Draft Articles on Responsibility of States for Wrongful International Acts*. Alfurna will argue there is substantial authority supporting the existence of necessity as a circumstance precluding wrongfulness. It was invoked¹⁹⁸ and dealt with by international tribunals. The plea was accepted in principle, or at least not rejected.

¹⁹² Responsible Lending, Article 7.

¹⁹³ *Compromis*, para. 15.

¹⁹⁴ Responsible Lending, Article 15; *Barcelona Traction*.

¹⁹⁵ *Compromis*, para. 30.

¹⁹⁶ *Ibid.*

¹⁹⁷ Responsibility of States, Article 25; *Rainbow Warrior (New Zealand v. France)*(Arbitration Tribunal)(1990), 82 ILR 499.

¹⁹⁸ *Russian Claim for Interest on Indemnities (Russia v. Turkey)*, UNRIAA, vol. XI, 431 (1912) ["Russian Claim"]; *Forests of Central Rhodope (Merits)*, UNRIAA, vol. III (1933); *Case Concerning the Société Commerciale de Belgique* P.C.I.J. Series A/B, No.78 (1939); *Fur Seal Fisheries off the Russian Coast* (1893); *Company General of the Orinoco* case, UNRIAA, vol. X, 184, 280 (1905).

As was argued in the *Russian indemnities case*¹⁹⁹, where the Ottoman Empire Government, justifying its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which met the conditions of *necessity*, that the obligation of a State to execute treaties may be weakened “*if the very existence of the State is endangered, if observation of the international duty is (...) self-destructive*”.

Landmark judgments concerning the application of private law concepts (necessity) were passed in the *Serbian Loans*²⁰⁰ and *Norwegian Loans*²⁰¹ cases, where the Court applied certain unanimously accepted private law principles.

In order for a State to invoke the state of necessity, it has to comply to the following conditions: (i) to be the only way the State can overcome an imminent peril to an essential interest; (ii) to not impair an essential State interest; (iii) to not be excluded within the obligation itself; (iv) to not have contributed to the situation.

Analyzing the economic crisis, the last condition(iv) is fulfilled, because the financial situation is not proved to be causally-linked to Alfurna’s behavior. Also, the CCL does not specifically exclude *necessity*(iii).

In the current state of Alfurna, which lost its homeland in the flooding, and suffers, like other states, from the same economic difficulties, this is an obligation that would endanger Alfurna’s existence, or, at least, the safeguarding of Alfurnan citizens’ core interests.

The ICJ also considered an argument based on Article 25 of “Responsibility of States” when passing judgment in the *Gabčíkovo-Nagymaros Project case*²⁰²: “[t]he Court considers ...

¹⁹⁹ *Russian Claim*.

²⁰⁰ *Case Concerning the Payment of Various Serbian Loans Issued in France*, P.C.I.J., Series A, Nos. 20/21, 12 July 1929.

²⁰¹ *Case of Certain Norwegian Loans*, Judgment of 6 July 1957: I.C.J. Reports 1957, 9.

that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation”.

Alfurna submits non-payment on schedule is, essentially, not a violation of international law because of the state of necessity that precluded its responsibility.

2. Rutasia’s constraint measures were unlawful, considering they regarded property excepted from enforcement

Although Alfurna has expressly enounced its consent toward the applicable law in the Climate Change Loan dispute being Rutasian law, that does not imply Alfurna has expressed its waiver of immunity²⁰³. Alfurna sees that the CCL²⁰⁴ bullet point regarding default procedures is not a valid waiver of immunity as affirmed in international law²⁰⁵, given the definition in Article 45 of ILC *Draft Articles on Responsibility of States for Wrongful International Acts*²⁰⁶, stating: “*The responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.*” Thus, the CCL provisions stating “*the creditor may (...) seize (...) any property subject to its control*”²⁰⁷ reaffirm Alfurna’s sovereign immunity²⁰⁸, because it is to be understood that Alfurna’s monetary reserve is in no way subject to Rutasian control.

²⁰² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Judgment, I.C.J. Reports 1997, 7, para. 51.

²⁰³ Article 45.

²⁰⁴ *Compromis*, Annex A.

²⁰⁵ Responsibility of States, Article 45; VCLT, Article 45.

²⁰⁶ Responsibility of States, Article 19.

²⁰⁷ *Compromis*, Annex A.

²⁰⁸ UN Charter, Article 2(1).

As affirmed by Professor Van Alebeek, state immunity has its distinct foundation in the sovereign equality of states²⁰⁹.

Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that Nauruan authorities had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry, as well as by statements made at the time of independence. As to the former, the record of negotiations showed that waiving the rehabilitation claim was raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question “*did not at any time effect a clear and unequivocal waiver of their claims*”²¹⁰.

In particular, the statements relied on “[n]otwithstanding some ambiguity in the wording ... did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”²¹¹. Concluding, based on “Responsibility of States”, Alfurna’s conduct cannot be interpreted as a waiver of immunity on either subparagraphs of Article 45.

Property serving sovereign purposes comprises any assets the foreign State uses in order to exercise its sovereignty, *e.g.* military equipment or assets used for diplomatic purposes as well as for consular functions—such as embassy bank accounts, State ships and State airplanes used

²⁰⁹ Roseanne Van Alebeek, *The Immunities of States and their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2008, 45.

²¹⁰ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 240, 247, para. 13.

²¹¹ *Ibid.*, para 20.

by diplomats. In contrast, property solely used for commercial or cultural purposes is not covered by sovereign immunity and can be subject to execution.²¹²

Alfurna's Bank of Lando account is serving a sovereign purpose²¹³ and is excepted from execution.²¹⁴

As this Court previously stated in *Germany v Italy: Greece Intervening*²¹⁵,

*“Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory”*²¹⁶

The monetary sovereignty principle was affirmed in *Emperor of Austria v Day and Kossuth*²¹⁷ and, in a broader way, in *Juillard v Greenman*²¹⁸. Rutasia has violated this principle when executing Alfurna's account.

State practice has shown that in the case of the Argentinian Debt Crisis, the US Court of Appeal has considered that immunity from execution of a central bank's assets depends solely on “whether the assets are used for central banking functions”²¹⁹.

²¹² ILC Immunities, Article 21.

²¹³ *Compromis*, para. 11.

²¹⁴ Resolution 2625.

²¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Judgment, February 3rd 2012.

²¹⁶ *Ibid.*, 16.

²¹⁷ *Emperor of Austria v. Day and Kossuth (1861)*, *English Court of Appeal in Chancery*, 2 Giff 628 (1861) [“Kossuth”].

²¹⁸ *Juillard v. Greenman*, 110 U.S. 421 (1884) [“Juilliard”]; Michael Waibel, *Sovereign Defaults before International Courts and Tribunals*, Lauterpacht Centre for International Law, Cambridge, 2011, 58-60.

National bank accounts are classified as State property²²⁰ (under Article 21, eloquently titled “Specific categories of property”), reaffirming that Alfurna’s bank account should not have been executed by the Rutasian government. Moreover, paragraph 1 of the same Article, states “the following shall not be considered as property specifically in use or intended for use by the State”.

Article 21 is an exception to the general rule stated in Article 19, covering the situation in which a State has consented to the enforceability (‘attachment, arrest or execution’) of another State’s decision. Alfurna never consented to this, and it is clear that Rutasia failed to respect its international obligations in the matter.

Article 19 of the same Convention states in paragraph c:

”the method in which one should determine whether or not a property is in use specifically for state purposes. It has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.”²²¹

Undoubtedly, Alfurna’s monetary reserve is property specifically intended for state purposes, as stated in article 21’s classification.

By denying access to Alfurna’s own bank account, the Rutasian government denied any possibility for Alfurna to remediate the situation and to safeguard its citizens’ interests.

²¹⁹ *NML Capital, Ltd. v. Banco Central de la República Argentina*, No. 10-1487-cv(L), 2011 WL 2611269 (2d Cir. July 5, 2011).

²²⁰ ILC Immunities.

²²¹ ILC Immunities, Article 21.

PRAYER FOR RELIEF

Alfurna respectfully requests this Court to adjudge and declare that:

1. Alfurna is still a state, and accordingly, the Court has jurisdiction over its claims.
2. Alfurna is entitled to make claims regarding the migrants now in Rutasia, and Rutasia has failed to process them and accord them status consistent with international law.
3. Rutasia's treatment of the detained Alfurnan migrants held in the Woeroma Centre and their proposed transfer to Saydee violate international law.
4. 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 violate international law.

Respectfully submitted,

AGENTS FOR APPLICANT