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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 Respondent

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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 Rutasia has treated the migrants according to international law, and whether Alfurna is entitled to make claims with respect to them because of its failure to take available affirmative steps to protect those persons.

III. Whether the Alfurnan migrants held in the Woeroma Centre are being treated in accordance with Rutasia's obligations under international law, and whether their proposed transfer to Saydee is legal.

IV. Whether Rutasia's conduct in respect of Alfurna's assets is consistent with international law.

STATEMENT OF FACTS

After gaining independence from Finutafu in 1904, the islands of Batri and Engili became the republic of Alfurna ("Alfurna"). The State of Rutasia ("Rutasia") is a developed state, having a diverse economy and being involved in numerous development and assistance programs, including being a permanent member of the Paris Club. In addition, it has worked for years to reduce its greenhouse gases emission, encountering considerable success.

As the Bay of Singri, where both states are located, experiences heavy weather conditions – earthquakes, tsunamis, storms –, seawalls were erected around the two Alfurnan islands.

In 1992, Rutasia concluded an agreement with Alfurna consisting of a "climate change loan" to help finance repairs and improvement works on Alfurna's seawalls. The loan was made through the Rutasian International Cooperation Administration ("RICA"). As Alfurna was required to use the service of Rutasian companies, it contracted with Mainline Constructions Limited ("MCL") to perform the work.

The funds were deposited into an account maintained by the Alfurna Reserve Bank in the Rutasian Provincial Bank of Lando, being withdrawn for the uses stipulated in the agreement. The full amount of the loan was disbursed between 1992 and 1997.

As Alfurna experienced financial difficulties, it approached its lenders (including Rutasia) in order to negotiate its debts status. Rutasia awarded Alfurna debt relief, cancelling 25% of the loan principal, reducing the annual interest rate, and rescheduling payment over an additiona; 15 years.

Alfurna alleged a large amount of the repairs carried out by MCL on the seawalls was substandard, 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. Rutasian President Millard cancelled a further 25% of the loan principal, reduced once again the annual interest rate, granted a grace period, and extended the repayment period. Meanwhile, the arbitrators issued their award, considering MCL had improperly selected their construction materials and methods. President Millard immediately ordered an emergency enquiry into MCL's work.

The Climate Emergency Committee ("CEC") established by PM Fatu reported the seawalls would soon be destroyed due to the earthquakes and extreme weather conditions. PM Fatu issued a televised address encouraging cooperation in order to preserve the country, people and culture.

The Alfurnan Parliament declared a moratorium on servicing all foreign debts, Alfurna ceasing the repayment of its loans. The CEC was also tasked with identifying a suitable new homeland and entering negotiations for the purpose of acquiring territory.

A major earthquake in mid-2006 rendered much of Batri Island uninhabitable, also causing extensive damage to Rutasia. 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 negotiations carried out by CEC, however, stalled, and PM Fatu addressed the nations of the world, calling upon them to help the Alfurnan people.

The second quarter of 2007 brought severe storms to Engili Island, greatly damaging the remaining parts of the seawall around it. Meanwhile, the UN Committee on Contributions observed Alfurna had not paid its UN membership dues. The UN General Assembly, however, deferred the matter. 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.

As world credit markets tightened in 2008, Rutasia experienced serious financial difficulties. It had to fulfill its own loan payment obligations, as well as attend the damage caused by the 2007 storms. Rutasia had, therefore, to find alternative options for funding its immediate investments. It further ordered RICA to improve its debt recovery activity.

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. Some of them had criminal records, not meeting the good moral character requirements imposed by numerous states. Eventually, Engili Island became completely and permanently submerged in December 2011.

The Rutasian Navy came upon boats overfilled with Alfurnans in Rutasia's territorial waters. These almost 3,000 Alfurnan citizens were taken to the Woeroma Centre in Rutasia, the only immigration facility available. Rutasian authorities listened to the wishes of the Nullatree Cove villagers and housed them together in Block A of the Centre.

An independent Rutasian review authority, the Immigration Ombudsman, criticized the conditions in Block B of the Woeroma Centre. However, these allegations were dismissed as factually inaccurate.

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, not wanting

to endanger the life of the detainees and being unable to design and build new facilities in the near future, suggested transferring them the Republic of Saydee, which would be able to offer them adequate conditions. They would be processed there and housed in existing detention facilities. All costs regarding the transfer, detention, health, and welfare were going to be supported by Rutasia.

Various NGOs, as well as PM Fatu, protested the proposed transfer. However, Saydee had voluntarily agreed to assist in the interim protection of the Alfurnans in whatever way it could.

The International Legal Support Association ("ILSA") filed suit in Rutasia's Supreme Court in the name of the Alfurnan 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, as adjudication would violate the constitutional role of the government in determining foreign policy.

The Nasatima Island negotiations failed in January 2012 as Alfurna could not prove it had enough funds. Subsequently, Finutafu agreed to lease the island to Alfurna for 99 years.

In February 2012, Alfurna was put on notice for having been in default under the loan agreement for more than one year, demanding a remedy of the problem within 30 days. As Alfurna did not respond to this notice in any way, Alfurnan property in Rutasia was seized and the Alfurnan account in the Provincial Bank of Lando was closed, in order to cover Alfurna's obligation.

Rutasia did not respond to PM Fatu's comments about the alleged illegality of these actions. Rutasia's ambassador to the UN addressed these matters, however, before the General Assembly. The ambassador argued that Alfurna, having lost all of its territory, was not a state

anymore and, as a consequence, it could not be a member of the UN anymore. In addition, Rutasia considered the migrants had arrived illegally in the Rutasian territorial waters, reserving its right to deal with them according to its domestic laws. Furthermore, the ambassador showed that despite Rutasia's continued intent of cooperation with Alfurna, the latter failed to meet its obligations under the loan agreement and Rutasia proceeded accordingly.

The parties submitted their dispute to the International Court of Justice by way of special agreement, without prejudice to Rutasia's contention Alfurna is no longer a state. The Rutasian Supreme Court, at ILSA's application, revisited its decision, granting a temporary stay until the ICJ issues its judgment.

SUMMARY OF PLEADINGS

A. The criteria set out by the Montevideo Convention are part of international customary law, being widely considered by legal authorities. In addition, they are still applicable today, despite the current effects of climate change. Numerous sources still refer to and apply these conditions in contemporary contexts.

Territory is, therefore, a necessary condition for acquiring and maintaining statehood. An entity must have *some* area of land, *some* effective territory belonging to it on which it can exercise its sovereignty. States are territorial entities, acting as such at an international level. Moreover, researchers have shown that the permanent loss of territory does indeed imply a loss of statehood. The UN General Assembly has concluded the permanent and complete disappearance of territory means an extinction of statehood.

Alfurna lost its entire territory. It is unable to exercise full authority upon Nasatima Island, as it is only a leased land and, in any event, there are some domains still subject to Finutafuan regulations. Finutafu retains residual sovereignty over the Island, limiting Alfurna's rights over it. Accordingly, Alfurna cannot be considered a state anymore.

B. The Alfurnan migrants are not refugees, as international law does not consider environmentally displaced persons should benefit from this status. The 1951 Refugee Convention cannot be interpreted to include such situations, nor can it be reasonably amended.

States have no obligation to provide asylum to such individuals. The Alfurnan migrants are not internally displaced persons. Not even the *Draft Articles on Protection of Persons in the Event of Disasters* provide any real protection.

No human rights provisions are applicable in the present case. There is no *erga omnes* obligation for states to treat environmentally displaced persons in any specific way. This matter falls under domestic Rutasian law.

In any event, Alfurna cannot make claims regarding those individuals. Alfurna had the essential duty of taking any effective steps in order to protect them. Even though it had long been aware of the situation, Alfurna took no affirmative action.

Alfurna has "unclean hands" regarding its citizens, having effectively failed to meet its duties, and it is therefore foreclosed from making any claims in the matter.

C. The Alfurnan migrants are illegal émigrés. They are entitled to the minimum of protection every human being deserves.

A State has the right to control aliens' entry and residence. Detention pending extradition is justifiable under international law. In the case-law, the emphasis is set on the detention being in good faith. The threshold for treatment amounting to torture, inhuman and degrading treatment is very high.

A question arises as to the jurisdiction of the Court to rule on the legality of the migrants' transfer, in the absence of Saydee's consent.

There has been no wrongful act on the part of Rutasia, for international responsibility to be engaged. The transfer has never occurred and the agreement with Saydee has only been negotiated.

The real risk of the migrants being subjected to bad treatment in Saydee had not been established at the moment negotiations commenced.

A State has the right to expel an alien from its territory. Restrictions on expulsion contained in all relevant global and regional treaties are limited only to aliens lawfully present in the territory of the expelling State.

D. The Climate Change Loan signed between Alfurna and Rutasia represents a commercial transaction and not an exercise of sovereignty from the Alfurnan side. Under the doctrine of "restrictive immunity" Alfurna could not benefit of immunity form jurisdiction, even if the Agreement would allow for judicial proceedings resulting from its default in payment of the Loan. What is more, Alfurna has expressly and voluntarily waived its immunity from execution in order to guarantee that it would meet the payment calendar.

Alfurna cannot raise pretentions with regards to the ARB account and its other assets that were seized by Rutasia, as it had, of its own determination, allocated the said assets as compensation in case it defaulted in payment.

Rutasia has been extremely diligent throughout its contractual links with Alfurna, observing its specific role and duties as a developed state crediting a small island-nation and therefore it is entitled to assert its role as creditor of a defaulting debtor.

PLEADINGS

I. ALFURNA IS NO LONGER A STATE, AND THE COURT LACKS JURISDICTION OVER ITS CLAIMS

1. Loss of territory implies loss of statehood

a. Territory is a required condition for statehood

As Professor Crawford argues, statehood is not merely a matter of fact "in the sense that a chair is a fact"; rather, statehood is to be seen as a mix of facts and law, a certain legal regime characterizing a certain state of facts[1].

Article 1 of the 1933 *Convention on the Rights and Duties of States* ["Montevideo Convention"][2] lists four criteria for statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into international relations. These conditions represent "the most widely accepted formulation"[3] of the statehood criteria, being nowadays regarded by various scholars, such as Professors Brownlie, Shaw, Crawford, or Thomas D. Grant, as reflecting customary international law[4]. The Convention is viewed as declaratory of international custom[5].

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[1] James Crawford, "The Criteria for Statehood in International Law", *British Yearbook of International Law*, vol. 48, 1976–1977, Oxford University Press, Oxford, 95.
[2] *Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19.
[3] Malcolm N. Shaw, *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, 198 ["Shaw"].
[4] *Conference on Yugoslavia Arbitration Commission*, opinion no. 1, in 31 I.L.M. 1488 ["Yugoslavia Opinion 1"]; Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized* De Facto *Regimes in International Law: The Case of 'Somaliland'*, Martinus Nijhoff Publishers, Leiden, 2004, 12; Thomas D. Grant, "Defining Statehood: The Montevideo

The criteria specified in the Montevideo Convention are considered as an efficient starting point towards a generally applicable definition[6]. In any event, as Professor Oppenheim stated, a legal entity cannot be seen as a State without territory[7].

A State must have "a consistent band of territory"[8], a defined, specific, firm area. In order for an entity to be considered a State, it must possess *some* coherent territory[9]. In fact, the essence of a State is its territorial foundation[10], from which it can assert itself, from and on which it can act, with which the State and its citizens may identify. States are, after all, territorial entities[11].

As Philip C. Jessup stated in 1948, there has to be "some portion" of territory over which a government exercises its authority[12]. In order to exist, a country must possess, at least, a core territory[13]. Without territory, "there can be no stable and effective government", there can be no actual statehood[14].

Convention and its Discontents", *Columbia Journal of Transnational Law*, vol. 37, 1999, 408 ["Grant"].

[5] Noel Cox, "The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta", *Mountbatten Journal of Legal Studies*, forthcoming, 2 ["Cox"].

[6] Ian Brownlie, *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, 2003, 70 ["Brownlie"].

[7] Robert Jennings, Arthur Watts (ed.), *Oppenheim's International Law*, 9th edition, Pearson Education Ltd, London, 1992, vol. I, 563.

[8] Shaw, 199.

[9] 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.

[10] Justus Reid Weiner, Diane Morrison, "Legal Implications of 'Safe Passage': Reconciling a Viable Palestinian State with Israel's Security Requirements", *Connecticut Journal of International Law* vol. 22, 2007, 246.

[11] James Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2006, 46 ["Crawford"].

[12] U.N. SCOR, 3rd Session, 383rd meeting, U.N. DOC S/PV.383 (2 December 1948), 11.

[13] *Deutsche Continental Gas-Gesselschaft v. Polish State* (1929), 5. A.D. 11, 15.

[14] Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947, 30.

A State's control over some territory of its own represents the basis for its sovereign status among other States, acting at an international level[15]. Alfurna, having lost its territory, is unable to act on the international scene anymore, therefore its status as a State should be considered as terminated.

Territory may appear not to be a necessary condition for maintaining statehood: as Thomas D. Grant shows, once statehood has been established by an entity, it is not lost through loss of territory[16]. However, the author refers to situations involving a *temporary* loss of territory (*e.g.* boundary disputes, occupation), and not to a *permanent* one[17].

If an island State becomes permanently submerged (as is the case with Alfurna[18]), all territorial sovereignty is lost[19]. Researchers have concluded the permanent loss of a State's entire territory means the absolute extinction of statehood[20].

b. <u>The rules are still applicable today</u>

The four 'classical' criteria set out in the Montevideo Convention are still valid, as shown by recent UN works[21]. Professor Warbrick argues the Convention remains a proper source for defining statehood in the contemporary international context[22].

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[15] Peter Thomas Muchlinski, "Globalization and Legal Research", *International Lawyer*, vol. 37, 2003, 225.
[16] Grant, 435.
[17] Rosemary Rayfuse, Emily Crawford, "Climate Change, Sovereignty and Statehood", University of Sydney Law School Legal Studies Research Paper No. 11/59, 2011, 9–10.
[18] *Compromis*, paras. 25, 44.
[19] Lilian Yamamoto, Miguel Esteban, "Vanishing Island States and Sovereignty", *Ocean and Coastal Management*, *Ocean and Costal Management* 2686 (2009).
[20] Cox, 16; 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, 79–80; David D. Caron, "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Level", *Ecology Law Quarterly*, vol. 17, 1990, 634.

Former International Court of Justice ["ICJ"] President Rosalyn Higgins refers to the Montevideo Convention criteria as the accepted conditions of statehood[23]. The relevant provisions in US law recognize the same criteria as necessary for an entity to be qualified as a State[24], as do the relevant legal texts of Canada[25].

The notion of territory remains an absolutely vital element of statehood[26]. The UN General Assembly has considered the matter, concluding[27] the very existence of States is threatened in case of a permanent disappearance of territory.

The Order of Malta is not considered a State by the international community and its legal capacity must be limited because it lacks the essential territorial characteristic of States[28].

This was argued by the commission appointed by Pope Pius XII and presided over by Eugene Cardinal Tisserant, with the purpose of precisely determining the nature of the Order[29]. The same view was adopted by the Office of the Legal Adviser of the US Government in 1959[30].

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[21] Yugoslavia Opinion 1; UN Security Council, *Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations*, 11 November 2011, S/2011/705.
[22] Colin Warbrick, "States and Recognition in International Law", in Malcolm D. Evans (ed.), *International Law*, Oxford University Press, Oxford, 2003, 221.
[23] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, 39.
[24] American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, §201.
[25] Hugh M. Kindred, Phillip M. Saunders (eds.), *International Law Chiefly as Interpreted and Applied in Canada*, Seventh edition, Emond Montgomery Publications Limited, Toronto, 2006, 14.
[26] UN High Commissioner for Refugees, *Climate Change and Statelessnes: An Overview*, 15 May 2009, 1 ["UNHCR Climate Change"].
[27] 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 ["UNGA Follow-up"].
[28] Brownlie, 64.
[29] *Acta Apostolicae Saedis* (1953) vol. 20, 765–767.
[30] Hyginus Eugene Cardinale, *Order of Knighthood Awards and the Holy See – A historical, juridical and practical Compendium*, Van Duren: Gerrards Cross, Buckinghamshire, 1983, 26.

Similarly, the Holy See is considered by Professor Brownlie a "*sui generis* entity" because it fails to fulfill the statehood criteria[31].

Should one accept the existence of a presumption in favor of the continuity of an established State and against its extinction, such a presumption would have to be sustained by actual international reactions to that State's claims. This was the case with the UN expressly accepting the Russian Federation as a continuing Sate at the request of the Russian Ambassador[32]. By contrast, Alfurna never declared its continuing statehood, although having been offered the opportunity[33].

States have become extinct even through involuntary ways, such as Hyderabad or the Republic of Vietnam[34]. Even in the situation of the permanent submergence of an island State (as is the case with Alfurna), the international community believes that entity loses its territory and, as a consequence, ceases to be a State[35].

Although climate change represents a unique issue, it is difficult to consider forming international consensus around a possible exception to the long-understood, essential condition of statehood – possessing a territory[36]. Climate change cannot modify the rules of international law, and, in any event, a hypothetic change would be slow; no mandatory rules have formed so

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[31] Brownlie, 63.
[32] *Letter to the Secretary-General of the United Nations from the President of the Russian Federation*, Moscow, 24 December 1991, INFCIRC/397.
[33] *Compromis*, paras. 49–50.
[34] Crawford, 716.
[35] UNHCR Climate Change, 1–2; UNGA Follow-up.
[36] Roy Smith, "Place and Chips: Virtual Communities, Governance and the Environment", *Environmental Politics*, vol. 3, 2003, 88–90.

far[37]. A State without territory can no longer be accepted and recognized by the international community and is not a State anymore[38].

The issue of Palestine having its status upgraded, in November 2012, to UN non-member state, on the one hand, and the issue of Alfurna's disappearing statehood, on the other hand, are two different matters altogether. According to Security Council Resolutions 248[39] and 256[40], Palestine *has* a territory (which is considered under foreign occupation), whereas Alfurna lost its entire territory.

The same view was expressed by UN Secretary General Ban Ki-moon in a 2009 report on climate change and security, considering territory a fundamental aspect of statehood[41].

2. Alfurna's leased island does not represent an effective territory

Statehood requires effective *possession* of territory – the territory must belong to the State in question[42]. Only through a formal cession of land – and not simply through a lease – one State acquires lawful international title to the respective territory, being able to effectively exercise sovereignty over it[43].

Exercising such supreme, independent sovereignty over a determined piece of territory represents the essence of modern statehood – it is a necessary legal condition for discussing

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[37] UNHCR Climate Change, 1.
[38] Crawford, 46.
[39] UN Security Council Resolution 248 (1968), S/RES/248.
[40] UN Security Council Resolution 256 (1968), S/RES/256.
[41] UN General Assembly, *Climate change and its possible security implications – Report of the Secretary-General*, A/64/350, 11 September 2009, 21.
[42] Crawford, 30.
[43] John Campbell, "Climate-induced community relocation in the Pacific: The meaning and importance of land", in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary perspectives*, Hart Publishing, Oxford, 2010, 57–79.

statehood, which must have concrete manifestations, as arbitrator Max Huber showed in the *Island of Palmas* case[44].

Professor Crawford argues[45] a State must exercise full governmental powers over its territory. He notes[46] the misguided character of an analogy between the territorial sovereignty of a State and private ownership of real property – a State cannot simply "lease"[47] territory and affirm it exercises complete and effective sovereignty over it. A treaty of cession is in order (as was the case with the cession of Alaska to the US)[48].

According to Professor Brownlie, in the case of an international lease, the grantor State retains residual sovereignty, the grantee's rights over the territory being limited. For example, in 1898 China leased territory to Germany for 99 years and, though committing to abstain from exercising sovereign rights over that territory, it retained the above-mentioned residual sovereignty[49].

Professor Lowe argues the concept of statehood is linked with ensuring the activities within the respective borders are not regulated by any other State[50]. For this reason, territorial dependence cannot be viewed as compatible with an effective government and the capacity for international relations[51] – for example, Northern Cyprus depends on Turkey, while South Ossetia

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[44] *Island of Palmas* case (1928), 2 R.I.A.A. 829, 838–839.
[45] Crawford, 46.
[46] Crawford, 717.
[47] *Compromis*, para. 45.
[48] Alfred H. A. Soons, "The Effects of a Rising Sea Level on Maritime Limits and Boundaries", *Netherlands International Law Review*, vol. 37(2), 1990, 230.
[49] Brownlie, 111.
[50] Vaughan Lowe, *International Law*, Oxford University Press, Oxford, 2007, 138.
[51] *Customs Régime between Germany and Austria* (1931), PCIJ, Series A/B, No. 41, 57 – 58 (Individual Opinion of Judge Anzilotti).

depends on Russia. The territory has to be effectively governed by an entity in order for that entity to be able to be considered a sovereign State[52].

Lacking a territory, Alfurna depends on Finutafu, as Nasatima Island continues to belong to the latter[53] and, in any event, there are some domains (defense, customs, immigration) which continue to be governed by Finutafuan – not Alfurnan – legislation[54].

Hence, Alfurna does not have the required effective and exclusive power over the land in question, a principle affirmed by the ICJ[55], as well as by Professor Cassese as being the core of all international relations[56], and should not be considered a State anymore.

II. RUTASIA HAS NOT VIOLATED INTERNATIONAL LAW IN ITS TREATMENT OF THE ALFURNAN MIGRANTS AND, IN ANY EVENT, ALFURNA CANNOT MAKE ANY CLAIMS IN RESPECT TO THOSE INDIVIDUALS BECAUSE OF ITS FAILURE TO TAKE AVAILABLE AFFIRMATIVE STEPS TO PROTECT THEM

1. Rutasia has not violated international law in its treatment of the migrants from (former) Alfurna

The notions of 'environmental refugees' and 'environmental displacement' have no support in international law, suggestions to that purpose having been rejected both by the UN

[52] Jianming Shen, "Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan", *American University International Law Review*, vol. 15, 2000, p. 1129.
[53] *Compromis*, para. 45.
[54] *Clarifications to the Compromis*, para. 4.
[55] *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, 12, 49.
[56] Antonio Cassesse, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, 12–13.

High Commissioner for Refugees ["UNHCR"] and the International Organization for Migration[57].

a. The Alfurnan migrants are not refugees

The UNHCR considers climate-induced migrants are not qualified for refugee status, offering a specific definition: "people who are displaced from or feel obliged to feel their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events"[58].

Article 1A of the 1951 *Convention Relating to the Status of Refugees*[59] ["Refugee Convention"], amended by the 1967 Protocol[60], provides the accepted definition for "refugees", expressly limiting the scope of the notion to politically, not environmentally, ill-treated[61] persons, regardless of those persons crossing international borders. It does not appear environmental degradation can be seen in any way as a form of persecution[62].

The UNHCR drafted a *Handbook on Procedures and Criteria for Determining Refugee Status*, ruling out victims of natural and environmental disasters from qualifying as refugees[63].

Furthermore, the Refugee Convention cannot be interpreted to include modern situations, such as environmental displacement[64]. An extension of the current protections would devaluate

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[57] David Keane, "The Environmental Causes and Consequences of Migration: A Search for the Meaning of *Environmental Refugees*", *Georgetown International Environmental Law Review*, vol. 16, 2004, 214–215 ["Keane"].
[58] Brian Gorlick, *Environmentally Displaced Persons: A UNHCR Perspective*, 16 May 2007.
[59] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.
[60] *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267.
[61] Ilka Fedor, *Cultural and National Identity in the Face of Climate Change: A Case Study of I-Kiribati Migrants in New Zealand*, Dunedin, New Zealand, 2012, 52.
[62] Jane McAdam, *Climate Change 'Refugees' and International Law*, New South Wales Bar Association, 24 October 2007, 5 ["McAdam"].
[63] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/Eng/REV.1, 1979, para. 39.

them, which the international community does not permit[65]. Amending the Convention in order to cover environmental displacement would be unfeasible, as Professor Piguet affirmed[66].

Environmental conditions do not represent the legal basis for any international protection[67], binding or not[68]. The Refugee Convention has been regionally expanded by the Organization for African Unity[69] in 1969 and through the 1984 Cartagena Declaration[70]. However, from neither of these expanded definitions can it be deduced environmentally-displaced persons benefit from actual protection under international law[71].

b. The Alfurnan migrants have no special status

States have no obligation in international law to provide asylum or protection to the persons forced to leave their homes because of environmental conditions[72].

Those individuals are not stateless persons and therefore States have no obligation regarding them, according to the *Convention Relating to the Status of Stateless Persons*[73].

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[64] Keane, 215.
[65] *Ibid.*, 215–216.
[66] Etienne Piguet, "Climate change and forced migration", *New Issues in Refugee Research*, Research Paper No. 153, UNHCR Policy Development and Evaluation Service, Neuchâtel, 2008, 8.
[67] UNCHR Executive Committee, *Refugees and Environment*, EC/1992/SC.2/CRP.20, 22 September 1992.
[68] Kara K. Moberg, "Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection", *Iowa Law Review*, vol. 94, 2009, 1117 ["Moberg"].
[69] *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.
[70] *Cartagena Declaration on Refugees*, Inter-American Commission on Human Rights, OAS/Ser.L/V/II.66, doc. 10, rev. 190–193.
[71] Roberta Cohen, Megan Bradley, "Disasters and Displacement: Gaps in Protection", *Journal of International Humanitarian Legal Studies*, vol. 1, 2010, 95 ["Cohen"].
[72] Gaim Kibreab, "Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate", *Disasters, the Journal of Disaster Studies, Policy and Management*, vol. 21(1), Blackwell Publishers, London, 1997, 21 ["Kibreab"].
[73] *Convention Relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117.

However, as Professor Kälin, notes, "statelessness means to be without nationality, not without state"[74].

Other displaced people are the so-called 'internally displaced persons'[75]. However, they benefit from no actual recognition in international law and, in any event, they do not include individuals relocating because of environmental reasons[76]. This does not cover the situation where they cross an international border[77], as the Alfurnan migrants crossed into Rutasian territory[78].

Alfurnan migrants are not protected in any way by the provisions of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*[79], whose role is subsidiary to national legislation or other international instruments[80]; in any case, it has not been ratified by any developed country and its relevance at the international level is reduced[81].

State practice (*e.g.* the USA, Finland) shows it may be possible to receive displaced foreigners not fulfilling the legal definitions of refugees, but only provided the disruption of their living conditions is temporary in nature[82].

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[74] Walter Kälin, *Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Frameworks for Their Protection?*, The Brookings Institution, 10 October 2008 ["Kälin"].
[75] UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (1998).
[76] Keane, 217.
[77] Cohen, 95,
[78] *Compromis*, para. 33.
[79] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1 July 2003, 2220 UNTS 3.
[80] Article 3(d).
[81] Kibreab, 21.
[82] *Immigration and Nationality Act*, Sec. 244.1/8 U.S.C. 1254; Finnish *Aliens Act*, 301/2004.

States whose legislations include provisions regarding the protection of individuals even in case of environmental disasters (such as Sweden[83]) have adopted those provisions out of political reasons, and not out of a sense of an international duty[84].

Alfurna cannot invoke the *Draft Articles on Protection of Persons in the Event of Disasters*[85], which do not provide any real protection or, in any event, a very limited one that cannot be relied upon[86]. The *Draft Articles* would be void of any effect in the absence of actual State practice, which is reluctant to manifest itself in this domain[87].

No human rights provisions applicable to aliens provide a right for those individuals to enter into or stay in another State[88]. The *International Covenant on Civil and Political Rights* ["ICCPR"][89] and the *International Covenant on Economic, Social and Cultural Rights*[90] cannot be relied on, as there are no possibilities for individuals to make complaints to the monitoring body, and in any event the States' reservations have made their ratification essentially ineffective[91].

Individuals such as the Alfurnan migrants benefit from no protection at an international level from any human rights provisions[92]. There is no *erga omnes* obligation to protect those

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[83] Swedish *Aliens Act*, 2005:716.
[84] UN High Commissioner for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States under International Law*, 20 May 2009, pp. 12–13 ["UNHCR Displacement"].
[85] 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.
[86] Cohen, 95.
[87] Kälin, 2.
[88] UNHCR Displacement, 10.
[89] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 3.
[90] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 999 UNTS 171.
[91] Moberg, 1116–1117.
[92] Keane, 216.

forced to relocate due to climate change, not even through consideration of protecting human dignity[93].

People affected by environmental conditions and forced to relocate do not represent any specific juridical category. States have no international obligations regarding them[94]. It is up to their domestic laws to resolve the arising issues[95].

Consequently, the Alfurnan migrants benefit of no special status under international law differentiating them from illegal migrants[96]. As the Alfurnan migrants were found in the Rutasian territorial sea[97], the issues of reviewing their previous conduct and establishing the legality of their presence there[98] fall under the provisions of domestic Rutasian law[99].

2. <u>In any event, Alfurna cannot make any claims with respect to those individuals because of its failure to take affirmative steps to protect them</u>

a. <u>Alfurna had the duty to protect its citizens</u>

States have an international duty to take all possible steps to protect the lives of their people[100]. Accordingly, they must take affirmative measures to mitigate and reduce the risks of disasters, as well the consequences thereof – this view being consistent with the *Hyogo Framework for Action*, adopted by 168 UN member states in 2005[101].

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[93] McAdam, 9.
[94] Keane, 217.
[95] Moberg, 1117.
[96] Council of Europe, Parliamentary Assembly, Doc. 11084, 23 October 2006.
[97] *Compromis*, para. 33.
[98] *Compromis*, para. 50.
[99] Shaw, 571.
[100] UNHCR Displacement, 6.
[101] United Nations, *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters*, 22 January 2005, A/CONF.206/6.

The displacement had to be properly addressed by Alfurna,which had the duty of continuing to exercise its responsible and affirmative sovereignty over its citizens even in the midst of a catastrophe[102]. The European Court of Human Rights ["ECHR"] has defined the obligation of States to take appropriate action regarding its citizens if a disaster is foreseeable.[103]

The State affected by an environmental disaster is the one having the primary duty of protecting its population and ensuring them effective safety mechanisms[104]. In the event it cannot do so, the affected State must effectively seek to initiate, coordinate, and implement all assistance towards its individuals[105].

b. Alfurna failed to protect its citizens

From early years of Alfurnan settlement, "it became clear" the islands were threatened with submersion given the environmental conditions in the area of the Bay of Singri[106], and by 1990 many territories were underwater even at low tide[107]. Despite all these factors, it was only in 2005 the Alfurnan government actually started planning the evacuation[108].

Even after this, the Alfurnan authorities failed to find an effective solution in order to protect its population, all negotiations stalling in 2006[109]. Almost 3,000 Alfurnan migrants were practically abandoned by their country and left to drift away in overcrowded boats[110].

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[102] UNHCR Displacement, 10.
[103] *Budayeva and others v. Russian Federation*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR, Judgment of 20 March 2008.
[104] United Nations General Assembly, *Report of the International Law Commission*, 62nd session, 2010, Supplement No. 10 (A/65/10), 329.
[105] United Nations General Assembly Resolution A/RES/46/182, 19 December 1991.
[106] *Compromis*, para. 6.
[107] *Compromis*, para. 7.
[108] *Compromis*, paras. 21–22.
[109] *Compromis*, para. 26.
[110] *Compromis*, para. 33.

c. Alfurna cannot make any claims regarding its citizens as it has "unclean hands"

Having thus failed to fulfill its essential duty towards its citizens, Alfurna cannot make any claims regarding the migrants found drifting in Rutasian territory, because it does not have effective and admissible *locus standi* based on the "clean hands" doctrine.

Early examples of the doctrine being applied include the *Clark Claim* of 1862 (stating a party seeking relief must present itself with clean hands)[111] and the *Ben Tillett* arbitration[112]. The doctrine was also addressed by Judge Schwebel in the *Nicaragua* case[113], where it was showed a State guilty of illegal conduct (even towards its citizens, as is the case with Alfurna) cannot seek reparation before this Court.

The view was shared by the Permanent Court of International Justice ["PCIJ"] in the *Diversion of Water from the Meuse*[114] and the *Legal Status of Eastern Greenland*[115] cases, as well as by judges of the ICJ in cases such as *United States Diplomatic and Consular Staff in Tehran*[116], or *Arrest Warrant*[117].

This was also considered a principle of international law by the International Law Commission ["ILC"]; Special Rapporteur García Amador stated a party must have clean hands

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[111] Bin Cheng, *General Principles of International Law as Applied by International Courts and Tribunals*, London, Stevens, 1953, 155.
[112] *Revue générale de droit international public*, vol. 6, No. 46 (1899).
[113] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, 14, 392–394 ["*Nicaragua*"].
[114] *The Diversion of Water from the Meuse* (1937), PCIJ, Series A/B, No. 70, 77.
[115] *Legal Status of Eastern Greenland* (1933), PCIJ, Series A/B, No. 53, 95.
[116] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, 3, 53–55, 62–63.
[117] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, 3, 160–161.

before seeking any kind of reparation[118]. As Professor Pellet affirmed, the concept of "clean hands" becomes fully functional in such a context, and the responsible State is foreclosed from making any claims regarding the individuals concerned[119].

Alfurna has repeatedly failed to meet its duties of protecting its population from adverse effects of climate change, effects which had long been foreseen by their authorities. However, its failure to act with enough diligence to that purpose leads to the conclusion it has "unclean hands" and, as a consequence, cannot make any claims regarding its citizens, being unable to obtain any form of reparation in this matter before the Court.

III. 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

1. The Alfurnan migrants held in the Woeroma Centre are being treated in accordance with Rutasia's international obligations

a. The standard of protection

All displaced persons are entitled to fundamental human rights[120]. These include the right to life, health, food, shelter and movement[121]. The Human Rights Committee ["HRC"] has

[118] *Yearbook of the International Law Commission 1958*, vol. II, 53–54.
[119] International Law Commission, *Diplomatic protection*, A/CN.4/SR.2793, 4.
[120] Roger Zetter, "Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks", Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2011, 16 ["Zetter"].
[121] Zetter, 16.

interpreted the right to life as embodied in Article 6 ICCPR to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right[122].

Rutasia has acted in accordance with its international obligations. When Alfurna's evacuation plan was executed, approximately 3000 Alfurnan citizens were abandoned[123]. The Rutasian authorities intercepted the migrants abandoned by the Alfurnan authorities and secured them accommodation[124].

According to Professor Shaw, the protection of foreign nationals has received two interpretations: the 'international minimum standard' and the 'national treatment standard'[125]. The international standard concept has received extensive support in case-law[126]. In the *Neer* claim[127], the Commission stated the treatment of aliens, in order to constitute an international delinquency, "should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency". García Amador, in an ILC report on international responsibility, suggested international responsibility would only be engaged if internationally recognized fundamental human rights were affected[128].

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[122] Human Rights Committee, *General Comment No. 6 (The Right to Life)*, 30 April 1982, para. 5 (stating that the expression 'inherent right to life' cannot be understood in a restrictive manner, and that the protection of this right requires States to adopt positive measures).
[123] *Compromis*, para. 32.
[124] *Compromis*, paras. 33-34.
[125] Shaw, 824
[126] *Ibid.*
[127] *Neer Claim (United States v. Mexico),* 4 RIAA 60, pp. 61-2 (1926).
[128] *Yearbook of the International Law Commission*, 1957, vol. II, pp. 173, 199-203.

The Alfurnan migrants are illegal *émigrés* and are entitled to the minimum protection every human being deserves. Rutasia reserves the right to deal with them in accordance with its national laws[129].

b. Treatment in both blocks

Articles 9 and 10 ICCPR establish the general standard of treatment for persons deprived of their liberty. The *European Convention on Human Rights* ensures a higher standard of protection. However, the treatment of the Alfurnan migrants is consistent even with the strict requirements of the latter convention.

A State has the right to control aliens' entry and residence. In *Saadi v. UK*, the ECHR stated a person allowed temporary admission to a country, pending decision on his status, may be regarded as someone against whom measures can be taken to prevent "unauthorized" entry[130]. The emphasis is on the detention being in good faith and closely connected to the purpose of preventing unauthorized entry[131] or with a view to expulsion.

The detention does not cease to be justifiable because the migrants were held in the Centre for approximately two years[132]. In *Kolompar v. Belgium*[133], the ECHR found two years and eight months to be reasonable.

The threshold for torture, inhuman and degrading treatment has been set very high by Convention organs[134]. As the Court stated in *Ireland v. UK*: "…ill-treatment must attain a

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[129] *Compromis*, para. 50.
[130] Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, London, Sweet & Maxwell, 2012, 357 ["Reid"]; *Saadi v. UK* [GC], no. 13229/03, ECHR 2008-I, January 29, 2008, paras. 61-66.
[131] Reid, 359.
[132] *Compromis*, paras. 33 and 37; *Clarifications to the Compromis*, para. 5.
[133] *Kolompar v. Belgium,* no. 11613/85, ECHR, 16 EHRR 197, September, 24, 1992; see also *Chahal v. UK*, no. 22414/93, ECHR, 23 EHRR 413, November 15, 1996 [*"Chahal"*].

minimum level of severity if it is to fall within the scope of Article 3. The assessment of the minimum is, in the nature of things, relative; it depends on all the circumstances of the case"[135] .

A 2011 report by the Immigration Ombudsman in Rutasia on conditions at the Woeroma Centre[136] criticized the living conditions in Block B. However, the conclusions of this report are not specific enough because it does not provide sufficient evidence in order for the Court to establish the existence of torture, inhuman or degrading treatment in the Centre "beyond reasonable doubt"[137]. Furthermore, no other authority or international organization has ever corroborated the findings of the Ombudsman. The Rutasian Immigration Department, the competent authority, has deemed the report inconclusive[138].

Considering that more than 1500 people were housed in Block B[139], the fact that three of the Alfurnan migrants committed suicide and five died from dysentery[140] is only an isolated incident, insufficient to prove a pattern of the alleged bad treatment of the migrants.

Minor unpleasantness will not raise any issues of torture, inhuman or degrading treatment[141]. The ECHR emphasizes the distress or hardship complained of must be shown to go beyond the unavoidable level of suffering inherent in detention[142].

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[134] Reid, 790.
[135] *Ireland v. UK* (5310/71), Commission, Decision of January 18, 1978, Series A, No. 25, 2 EHRR 25, para. 162 ["*Ireland v. UK*"]; see also *the Greek Case* (3321-3/67) and (3344/67), *11th Yearbook of the ECHR*, (Rep.) November 5, 1969, 501 ["*The Greek Case*"].
[136] *Compromis*, para. 36.
[137] *The Greek Case*; *Ireland v. UK; Ribitsch v. Austria,* no. 18896/91, December 4, 1995, Series A, No. 336, 21 EHRR 573, para. 104.
[138] *Compromis*, para. 36.
[139] *Compromis*, para. 34.
[140] *Compromis*, para. 35.
[141] Reid, 632.
[142] e.g. *Kalashnikov v. Russia*, no. 47095/99, July 15, 2002, ECHR 2002-VI, para. 95; *Kudla v. Poland* [GC], no. 30210/96, October 26, 2000, ECHR 2000-XI, paras. 93-94; *Valasinas v. Lithuania*, no. 44558/98, July 24, 2001, ECHR 2001-VIII, para. 102.

Expulsion and extradition *per se*, while possibly entailing significant personal distress, cannot be regarded as inhuman treatment, particularly where the distress is a collateral effect of measures primarily aimed at achieving other legitimate aim[143]. The focus is on the maintenance of proper and humane standards of conduct by the authorities rather than the actual impact on the applicant or any concrete indications of significant harm or suffering[144].

The Rutasian authorities have acted in good faith. Although Rutasia had no obligation under international law to receive the migrants, the Immigration Department ensured the abandoned Alfurnan migrants accommodation in the Centre. The Rutasian authorities have given course to the special request of the Nullatree Cove villagers to be housed together[145].

As soon as the cracking in Block A revealed the walls contained asbestos, the competent authority conducted an assessment of resulting health risk[146]. Consequently, the migrants residing in the affected block were immediately relocated to vacant barracks at a Rutasian military base, made available especially for this purpose[147].

2. **The Alfurnan migrants' proposed transfer to Saydee is legal**

a. The jurisdiction of the Court

To decide whether the transfer of the Alfurnan migrants to Saydee is legal, as a prerequisite, the Court would rule upon the lawfulness of Saydee's treatment of aliens. Saydee's

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[143] e.g. *V v. UK*, no. 24888/94, December 16, 1999, ECHR 1999-IX, para. 71; *D vs UK*, no. 38000/05, ECHR, March 4, 2008.
[144] Reid, 790.
[145] *Compromis,* para. 34.
[146] *Compromis*, para. 37.
[147] *Clarifications to the Compromis*, para. 5.

rights and obligations would thus constitute the very subject matter of such a judgment made in the absence of that State's consent.

Such a judgment would run directly contrary to the "principle … that the Court can only exercise jurisdiction over a State with its consent"[148].

Article 62 of the Statute gives to a third State, which considers it has a legal interest which may be affected by the decision in the case, the right to intervene. Nonetheless, in *The Monetary Gold* case, the Court stated the Statute cannot be regarded, by implication, as authorizing proceedings to be continued without the consent of the State whose legal interest would not only be affected by a decision, but would form the very subject-matter of the decision[149].

b. The wrongful act

In order for a wrongful act to entail the responsibility of a State, such an act must firstly exist. The definition of the wrongful act in Article 2 of the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts* is set on the premise of a conduct of a State, which can consist of an action or an omission. Future conducts are not within the scope of the Articles. This conclusion can also be drawn from Article 13 of the Draft Articles, according to which the

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[148] *Case of the Monetary Gold removed from Rome in 1943 (Preliminary Question),* Judgment of June 15th, 1954: ICJ Reports 1954, p.19 [*"Monetary Gold"*]; this principle was also confirmed in: *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, ICJ Reports* 1984, p. 25, para. 40; *Nicaragua*, p. 431, para. 88; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, ICJ Reports* 1986, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, ICJ Reports* 1990, pp. 114-116, paras. 54-56, and p. 112, para. 73; and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, pp. 259-262, paras. 50-55).

[149] *Monetary Gold.*

wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed[150].

The transfer of the Alfurnan migrants to Saydee never occurred; the *émigrés* never left Alfurnan territory. Article 3 of *the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ["Convention against Torture"] sets an obligation for States Party not to extradite a person when there are substantial grounds for believing they would be in danger of being tortured. The agreement to transfer the migrants to Saydee has only been negotiated by the parties[151]; consent to be bound to the treaty has never been given[152].

Therefore, Rutasia's responsibility cannot be engaged for not having obtained sufficient guarantees for the treatment of the Alfurnan migrants in Saydee until a specific moment in the negotiation process. As a result of the concerns expressed regarding the transfer, Rutasia took part in an observation team which issued a report on the conditions of Camp Sontag[153]. The Supreme Court of Rutasia eventually agreed to stay the proposed transfer of Alfurnan migrants to Saydee[154].

c. <u>The real risk</u>

In *Soering v. UK*, the ECHR established a potential breach of Article 3 of the *European Convention on Human Rights* will be found where there are "substantial grounds" for believing

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[150] *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (A/56/10), *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, 58.
[151] *Compromis*, para. 38.
[152] *Vienna Convention on the Law of Treaties*, 23 May 1999, 1155 UNTS 331, Article 11.
[153] *Clarifications to the Compromis*, para. 10.
[154] *Compromis*, para. 53.

an applicant faces "a real risk" of being subjected to torture or to inhuman and degrading treatment or punishment if expelled[155].

When Rutasia opened negotiations with Saydee, the only information against the transfer was the fact that Saydee was not a party to the Convention against Torture and the fact that its human rights record had been subjected to criticism by the HRC[156]. As the ECHR stated, the mere possibility of ill-treatment is not enough[157]. It is not sufficient for the applicant to point to a general unsettled situation in a country[158]. According to the UN Committee against Torture, the applicant has to establish he runs a foreseeable, real and personal risk[159].

An applicant must bring evidence he faces a real risk of torture or ill-treatment[160]. Where such evidence is produced, it is for the Government to dispel any doubts about the risk the applicant might face[161].

d. The right to expel

A State has the right to expel aliens from its territory, this being uncontested in practice[162] and legal writings[163].

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[155] *Soering v. United Kingdom,* no. 14038/88, ECHR, Judgment of 7 July 1989, para. 91.
[156] *Compromis*, para. 39.
[157] *Vilvarajah and others v. UK*, October 30, 1991, Series A, No. 215, 14 EHRR 248, para. 111 [*"Vilvarajah"*]; *Salah Sheekh v. The Netherlands*, no. 1948/04, ECHR, Judgment of January 11, 2007, para. 148.
[158] *Aoulmi v. France*, no. 50278/99, ECHR, Judgment of January 17, 2006, para. 66; *Sultani v. France*, no. 45223/05, ECHR, Judgment of September 20, 2007, para. 67; *NA. v. UK*, no. 25904/07, ECHR, Judgment of July 17, 2008, para. 114 [*"NA."*].
[159] *Committee against Torture*, CAT/C/48/D/343/3008, 13, para. 9.3.
[160] *Vilvarajah*, paras. 103 and 111; *NA.*, para. 111.
[161] Reid, 555.
[162] *Vilvarajah*, para. 102; *Chahal*, para. 73.
[163] ILC *Draft Articles on Expulsion of Aliens*, A/67/10, 22, para. (1) ["Expulsion of Aliens"].

The ILC considers the unlawfulness of the presence of an alien within the territory of a State can in itself constitute a sufficient ground for expulsion[164].

Article 13 ICCPR sets the condition to which a State's exercise of its right to expel aliens from its territory is subject, that being the adoption of an expulsion decision by the expelling State in accordance with the law. However, this requirement appears only with respect to aliens lawfully present on the territory of the expelling State.

Alternatively, although the requirement for conformity with law is a condition for the lawfulness of any expulsion measure under international law, the question might arise as to the extent of an international body's power of review of compliance with internal law rules in a context like that of expulsion[165]. The HRC, the ICJ, and the ECHR have shown themselves reticent to their own power to assess whether a State had complied with its internal law in a case of expulsion[166].

Expulsion of Aliens provides certain procedural rights of aliens subject to expulsion, both lawfully and unlawfully present in the territory of the expelling State[167]. However, these Draft Articles are non-binding; there is not enough State practice for this document to be considered customary law.

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[164] *Expulsion of Aliens,* 27, para. (3).
[165] *Expulsion of Aliens,* 25, para. (7).
[166] Human Rights Committee, communication no. 58/1979 *Anna Maroufidou v. Sweden*, Views adopted on 9 April 1981, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), 165, para. 10.1; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010; *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, para.58.
[167] *Expulsion of Aliens,* 63, para. (1).

IV. RUTASIA'S CONDUCT IN RESPECT OF ALFURNA'S ASSETS IS CONSISTENT WITH INTERNATIONAL LAW

1. Alfurna cannot issue any claims with regards to the closing and liquidation of the ARB account and the seizure of its other assets because it cannot invoke immunity from jurisdiction or execution

a. Alfurna's actions would not be subject to immunity from jurisdiction even if judicial proceedings were allowed by the Climate Change Loan

The Climate Change Loan[168] ["the Loan Agreement"] is a "commercial transaction" between States, as defined in the *United Nations Convention on Jurisdictional Immunities of States and Their Property 2004* ["UNCJISTP"][169], having the same qualification in a significant number of national documents[170].

According to the "restrictive immunity approach"[171], based on the rationale for which States enter into international relations, only acts *de jure imperii* allow for immunity of jurisdiction, whereas acts of *jure gestionis* do not. This theory has become predominant in international documents[172], judicial decisions[173], state policies[174] and doctrine[175].

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[168] *Compromis*, para. 8; Annex A.
[169] UNCJISTP, Article 2 (c) (ii).
[170] *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).
[171] Sir Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", *British Year Book of International Law*, 1951, vol. 28, 220-272.
[172] *Ibid.* notes 173 and 174.
[173] Supreme Court of Austria, *Dralle v. Republic of Czechoslovakia* 17I LR, p. 155; West German Supreme Constitutional Court, *The Empire of Iran* 45 ILR; US Court of Appeals in *Victory Transport Inc. v. Comisaria General de Abasteciementos y Transportes* 35 ILR, p. 110 and others.
[174] *The Tate Letter*, 26 Department of State Bulletin, 984 (1952).
[175] Shaw, 701; David Gaukrodger, *"Foreign State Immunity and Foreign Government Controlled Investors"*, 2010/2, OECD Publishing.

i. Under the Terms of the Loan Agreement, judicial proceedings to enforce execution of debt are not called for in case of Alfurna's default in payment.

The clause through which Alfurna renounces judicial authorization for execution of its liquidities and assets[176] is valid and binding, due to its behavior towards it throughout executing the contract. As Alfurna has had two decades to reconsider its consent towards being bound by the provisions of the Loan Agreement, it would be inequitable that the Court would consider this clause as abusive.

Under the Terms of the Loan Agreement, if the debtor fails to cure the default in payment after due notification from the creditor, the latter can execute the debt without need for judicial authorization[177]. By accepting this clause, Alfurna became bound by the basic principle of customary law *pacta sunt servanda*[178]; hitherto, it voluntarily assumed liability for default in payment.

At no point did Alfurna repudiate the Loan Agreement or raise any kind of objections to its content; the Applicant understood and accepted that the clauses of the Loan Agreement were binding to both Parties, actually making use of them directly – resolving its dispute with the MCL[179] and renegotiating of clauses[180] to its direct benefit.

In conclusion, Alfurna's consent to being bound by the complete provisions the Loan Agreement is unaltered and has remained so for the entire duration the said document was in force between the Parties.

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[176] *Compromis*, Annex A, 6th bullet point
[177] *Ibid.*
[178] Shaw, 94.
[179] *Compromis*, para. 17.
[180] *Compromis*, paras. 15, 19.

ii. In the alternative, Alfurna would not benefit from immunity of jurisdiction due to the commercial (de jure gestionis) character of its actions.

As "international lending takes place almost exclusively under municipal law", respectively "treaty and customary law on sovereign debt is sparse"[181] in this domain, Courts have relied mostly on municipal law and general principles of international law[182] in order to determine when and how a State is held liable for the obligations it assumes[183].

Both customary law[184] and doctrine[185] underline that "the predominant approach has been to focus upon the nature of the transaction rather than its purpose"[186] in deciding whether the activity undertaken is of itself sovereign (*de jure imperii*) or non-sovereign (*de jure gestionis*), and that "the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the initially commercial nature of an activity or transaction that is critical"[187].

The purpose of the Loan Agreement was safeguarding Alfurna's territory in the midst of climate-change related damage; however, judging by the State's positions when signing the

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[181] Michael Waibel, *Sovereign Defaults before International Courts and Tribunals,* Lauterpacht Centre for International Law, Cambridge, 2011, 20.
[182] *Ibid.*, 22.
[183] *Case Concerning the Payment of Various Serbian Loans Issued in France,* P.C.I.J., Series A, Nos. 20/21, 12 July 1929, pp. 41–2 (where the ICJ primarily applies national law and then relies on practice of States and principles of international law); see also the *Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, P.C.I.J., Series A, Nos. 20/21, 12 July 1929.
[184] UNCJISTP, Article 2 point 2.
[185] Shaw, 709.
[186] *Ibid.*
[187] s. 1603(d) of the US Foreign Sovereign Immunities Act of 1976, reproduced in *UN, Materials*, 103, 107.

Agreement, it was engaging in a purely commercial activity[188], procuring financial resources for an objective that the World Bank describes as "risk mitigation project"[189], namely, an investment in long-term infrastructure.

To construe that it was not the intent of Alfurna to engage in a commercial transaction with Rutasia would contradict the Terms of the Loan Agreement[190]. Through the provisions of the said document, Alfurna expressly and voluntarily adopts the quality of debtor towards Rutasia for the Loan principal and the interest accrued; therefore, it is the contention of the Respondent that Alfurna engaged in *acta de jure gestionis*.

Even if judicial proceedings would be necessary to enforce the debt that Alfurna has contracted, it could still not invoke immunity from Rutasian jurisdiction. As it has carried out a commercial transaction, it is not exempt of judicial proceedings in the Forum of the Parties' choice, as jurisprudence[191] underlines.

b. Alfurna has expressly waived its right to immunity from execution and therefore, the closing and liquidation of the ARB account and the seizure of other Alfurnan assets is allowed both under the provisions of the Loan Agreement, and under international law

According to relevant international documents[192], doctrine[193] and jurisprudence[194], a state can waive its immunity from execution, by making an express declaration in this sense; under

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[188] *Clarifications to the Compromis*, para. 11 (noting the *Compromis* does not mention any issuing of Alfurnan State Bonds in order to contract debt, the accent being put on the fact that Alfurna's creditors are States).
[189] Michelle V. Remo, *DBP gets World Bank loan worth $50M for relending*, Philippine Daily Inquirer Magazine online, 2011.
[190] *Compromis*, Annex A.
[191] [US Court of Appeal] *Svenska Petroleum v. Lithuania* [2006] EWCA Civ 1529, para. 137; *Maclaine Watson v. Department of Trade and Industry* [1988] 3 WLR 1033; 80 ILR, p. 49; *Alfred Dunhill v. Republic of Cuba* 425 US 682 (1976); 66 ILR, p. 212 and others.
[192] UNCJISTP, Article 19(a)(ii); *European Convention on State Immunity*, Article 23; ILA *Draft Articles on a Convention on State Immunity*, Article VIII(A); *Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States*, Article 5.

the Loan Agreement's provisions, Alfurna has made such a declaration by its own free will, and thusly it is not exempt from enforceability of liabilities occurring under the said document.

i. Alfurna has indicated as collateral the ARB account and its other assets in case of its default in payment of the Loan Agreement

Alfurna has, by its own will, earmarked[195] the ARB account in the Provincial Reserve Bank of Lando and its other property on Rutasian territory; in this way, it has indicated that these assets should be considered collateral and attachable[196] in case of a default in payment under the Loan Agreement.

Alfurna must be held to its obligations, given there was no repudiation of the Loan Agreement in the course of the two decades that it operated.

ii. Alternatively, Rutasia would still be allowed to execute the ARB account and the other Alfurnan assets

a) The particular case of the ARB account

As underlined in doctrine[197] and jurisprudence[198], the Alfurnan Reserve Bank, in the quality of a branch of the Alfurnan government, is an *alter ego*[199] of the latter; therefore, when the State is held liable for its commercial obligations, the Bank should be as well.

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[193] Eva Wiesinger, *State Immunity from Enforcement Measures*, University of Vienna, 2006 ["Wiesinger"], 6; Shaw, 744.
[194] Paris Court of Appeal, *Embassy of the Russian Federation in France v. Compagne NOGA d'Importation et d'Exportation* 127 ILR, 156, 160.
[195] Wiesinger, 6 (the author states: "Even property serving sovereign purposes can be attached if the State either waived immunity from enforcement measures or the property was especially earmarked or allocated").
[196] *Compromis*, Annex A, bullet point 6.
[197] Harvard Law Review on *Immunity of Central Banks in Times of Crisis* 2012, 558 ["HLR Immunity"].

In the current context, the ARB account in the Provincial Bank of Lando cannot be used to perform traditional currency reserve and balancing operations[200], therefore, it is evident that it cannot be given the same guarantees as a functional National Bank. What is more, given that the nature of the loan was that of sponsoring infrastructure relating to the Alfurnan Islands, given their demise[201], the Loan Agreement is without cause and the money would be due and payable even without any waiver of immunity from execution.

b) The particular case of the other Alfurnan assets seized as collateral by Rutasia

As underlined in customary international law[202], jurisprudence[203] and doctrine[204], the assets that a State possesses in another State's Forum are exempted from execution if they meet the requirements underlined by said sources – *e.g.* property used in performance functions of diplomatic missions or military functions; cultural heritage; exhibition of objects of scientific, cultural or historical interest and so on.

Alfurna has willingly submitted to earmarking these assets under the Terms of the Loan Agreement, thusly recognizing their non-essential character.

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[198] US Supreme Court, *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983).
[199] HLR Immunity, 558.
[200] *Ibid.*
[201] *Compromis*, para 32.
[202] UNCJISTP, Article 19
[203] See example of Federal Constitutional Court of the Federal Republic of Germany *in X v. Republic of the Philippines* 1976, UN Materials on Jurisdictional Immunities, 297); HL *Alcom Ltd. v. Republic of Colombia* 1984, The All England Law Reports, 6
[204] Seema Bono and collective, "Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries", Mayer-Brown Pub., 2012, 15.

2. Rutasia has been consistent in respecting its international obligations as a creditor towards Alfurna and therefore the Applicant cannot claim that Rutasia is not entitled to make claims with regards to the Climate Change Agreement

a. The Climate Change Loan terms and provisions are consistent with international law

Observing the UN Millennium Declaration[205], UN Millennium Project Goals and Targets[206] and the provisions of the UN Framework Convention on Climate Change[207], Rutasia has acted both responsibly and in good faith when contracting with Alfurna.

The UN Conference on Trade and Development amended *Principles on Responsible Sovereign Lending and Borrowing* ["UNCTAD"] state that the lender is responsible to make a realistic assessment of the sovereign borrower's capacity to service a loan, based on the best available information and following objective and agreed technical rules on due diligence and national accounts[208].

At the time the mentioned Loan was given (5 June 1992), the effects of climate change in Alfurna had not manifested themselves in such a way that, at that point, would represent an obstacle in the repayment of sovereign debt by the borrower; it is also noted Alfurna had manifested a constant increase in its tourist sector for the past three decades, based on loans and grants given by the international community to this end[209], in this sense being considered a traditional trading partner with Rutasia.

Moreover, given that the nature of the Climate Change Loan was the preservation of Alfurna's territorial integrity in the given natural conditions, the Party States established a

[205] UN General Assembly Resolution 55/2, 8 September 2000, IV.
[206] Goal VIII, Targets 12, 13.
[207] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Article 4(1)(f).
[208] Responsibilities of Lenders, Point 4.
[209] *Compromis*, para. 2.

transparent process of obtaining financing and assuming sovereign debt obligations and liabilities[210], by clearly conditioning the disbursement of loan proceeds by using the funds to initiate construction and maintenance of seawalls, respectively, funding research into sustainable solutions for the problems underlined.

Given Rutasia's position as lender and the massive economic effort that it voluntarily undertook with the sponsoring of (former) Alfurnan remedies to the effects of changing of natural conditions, The Terms of the Climate Change Loan clearly stipulated the obligations of the Alfurnan side; more so, the Terms of the Agreement were made universally available and were freely accessible in a timely manner to all stakeholders, including other creditors of the borrower.

b. Restructuring of (former) Alfurnan sovereign debt was undertaken promptly, efficiently and fairly

The Rutasian side swiftly responded to the Alfurnan invitation to renegotiate the Terms of the Climate Change Loan on two separate occasions, following the IMF report on Alfurnan national debt of January 1999[211], respectively, in September 2002, following the financial estimates of debt servicing of the (former) Alfurnan side.

On the first of these occasions, in 1999, Rutasia agreed on cancelling 25% of the loan principal, reducing the annual interest rate and rescheduling repayment[212]. Rutasia met the requirements of international law concerning the cancellation of national sovereign debt towards

[210] *Compromis*, Annex A.
[211] *Compromis* para. 15.
[212] *Ibid.*

impoverished middle-income countries[213]; furthermore, it is a sign of good faith that Rutasia agreed on more advantageous conditions for the repayment of the loan principal.

Rutasia manifested diligence in managing the Alfurnan debt crisis, agreeing on restructuring of debt in advantageous conditions and partial cancellation of debt principal, despite the fact that Alfurna did not qualify for restructuring of debt under the Paris Club Rules[214]. This implies that, at the moment of the first half of 1999, Alfurna could not invoke *force majeure* to put off repayment of national debt, whereas Rutasia manifested good will in this aspect.

In 2002, Rutasia canceled a further 25% of the loan principal, again reduced the annual interest rate and rescheduled repayment and imposed a grace period on repayment of loan principal and interest of 8 years. This is further evidence of the Rutasian fair administration of the (former) Alfurnan debt crisis.

[213] UNCTAD, Principle 15.
[214] *Compromis*, para. 15.

PRAYER FOR RELIEF

The State of Rutasia respectfully requests this Court to adjudge and declare that:

1. Alfurna is no longer a state, and accordingly the Court lacks jurisdiction over its claims;

in any event:

2. Rutasia has not violated international law in its treatment of the Alfurnan migrants and, in any event, Alfurna cannot make claims in this respect because of its failure to take available affirmative steps to protect them.

3. The Alfurnan migrants held in the Woeroma Centre are being treated in accordance with international law, and their proposed transfer to Saydee is legal.

4. Rutasia's conduct regarding Alfurna's assets is consistent with international law.

Respectfully submitted,

AGENTS FOR RESPONDENT