In the International Court of Justice

The Case concerning the Alfurnan migrants

State of Alfurna
(Applicant)
v

State of Rutasia
(Respondent)

Memorial for the Applicant

2013 Philip C Jessup

International Law Moot Court Competition

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Statement of Jurisdiction

The State of Alfurna, as Applicant, and the State of Rutasia, as Respondent, submit the present dispute concerning the Alfurnan migrants to the International Court of Justice by Joint Notification addressed to the Registrar of the Court, dated 14 September 2012, pursuant to Art 40(1) of the Statute of the International Court of Justice. The parties have agreed to the contents of the *Compromis* annexed to the Joint Notification. Both the State of Alfurna and the State of Rutasia have accepted the compulsory jurisdiction of the Court in accordance with Art 36(2) of the Statute of the International Court of Justice. It is agreed that this acceptance is without prejudice to any question of the burden of proof or the Respondent's contention that the State of Alfurna is no longer a state. The State of Alfurna undertakes to accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.

Questions Presented

The State of Alfurna respectfully asks the Honourable Court:

1. Whether Alfurna is still a state and whether the Court, in any event, may exercise jurisdictions over its claims;
2. Whether Alfurna may exercise protection on behalf of the migrants detained in Rutasia and whether Rutasia violated international law by omitting to process those migrants and accord them a status consistent with international law;
3. Whether Rutasia's treatment of the Alfurnan migrants detained in the Woeroma Centre violates the International Covenant on Civil and Political Rights and whether their proposed transfer to Saydee violates Rutasia's obligation not to conduct *refoulement* or collective expulsion;
4. Whether Rutasia is disentitled to any relief from this Court and whether Rutasia violated international law on immunity by seizing the assets from the Alfurnan Central Bank.

Statement of Facts

The dispute before this Court concerns the adverse effects of anthropogenic climate change with regard to the forced migration of Alfurnan nationals and their treatment in Rutasia, as well as the seizure of Alfurnan assets by Rutasia.

As early as January 2005, when the danger of submergence of the Alfurnan islands had become clear, Alfurna engaged in negotiations with other states aiming at ensuring a regulated transition of the Alfurnan nationals and government agencies to new locations. Around 2006, with the help of the international community, Alfurna reached successful emergency migration arrangements which resulted in the relocation of the majority of the Alfurnan citizens to other countries.

In early 2009, after extreme weather conditions had rendered the Alfurnan island of Engili uninhabitable, the remaining Alfurnans were forced to flee the island in overcrowded boats. Rutasia, a developed state and signatory to the Refugee Convention, encountered these migrants in its territorial waters and, without further identification proceedings, brought them to Woeroma Centre. Upon arrival to the Centre, the Alfurnan nationals were immediately detained without any form of processing.

The Alfurnans were accommodated in Blocks A and B of the Centre. The conditions in Block B have been found to resemble a medium security prison in a report by the Rutasian Immigration Ombudsman. This report also concluded that Block B is severely overcrowded leading to hygiene problems, inadequate food and water, and limited access to medical services. The report has further stated that the indefinite detention adversely affects the mental health of all Alfurnan detainees. In the first half of 2011, after two years of detention, three detainees in Block B committed suicide and five died from dysentery.

In October 2011, it was discovered that the walls in Block A contained asbestos. Arguing that this makes it impossible to detain Alfurnan migrants in Rutasia, an agreement was concluded with Saydee to transfer all Alfurnan detainees previously imprisoned in Block A to Saydee. The migrants have in the meantime been relocated to asbestos-free vacant barracks at a Rutasian military base.

In a World Immigration Watch report, Saydee's prisons have been found to lack hygiene, adequate nutrition, and to expose detainees to abuse by guards. Detainees are forced to perform manual labour, protests are not allowed and religious practices that differ from those in Saydee are not accepted. Furthermore, in the detention facility designated to house the Block A Alfurnans in Saydee, fifty women reported having been sexually abused by guards. This was reproduced in a report drafted and signed by the entirety of an official delegation consisting of UN officials and delegates of Rutasia, Alfurna and Saydee. Saydee issued a statement not denying the charges.

The International Legal Support Association filed a suit before Rutasia's Supreme Court, on behalf of the Alfurnan detainees requesting an emergency stay for the Alfurnans in Block A and seeking damages for the mistreatment of all Alfurnan detainees. The court, however, denied the motion. The case was dismissed referring to lack of competence and the exclusive constitutional role of the political branches of government in determining foreign policy.

In early 2012, Finutafu's ambassador to the UN stated before the General Assembly that Rutasia violates international law by its treatment of the Alfurnan refugees. This was supported by sixty-seven other member states.

Due to the subsequent rising sea levels in the Bay of Singri, by 26 December 2011 both of the Alfurnan islands of Batri and Engili became permanently submerged. Scientific studies concluded that the sea level rise was caused by anthropogenic climate change.

The second step of Alfurna's efforts to ensure a regulated transition consisted in finding a permanent location for its nationals and its government.

In early 2012, a lease agreement between Alfurna and Finutafu over Nasatima Island was concluded. The agreement covers a period of 99 years with an annual fee of USD 1 million to be paid by Alfurna. Only Alfurna is permitted to cancel the lease within a five year's notice. The terms of the lease further provide that Alfurna will have complete control over the island and enable it to enact laws as it deems appropriate. Laws in the fields of immigration, customs and defence shall be subject to Finutafuan control. Alfurnan nationals will have no claim to Finutafuan citizenship nor be submitted to that country's laws.

The agreement went into effect on 9 March 2012. Subsequently, all of the Alfurnan government ministries have been at least partially relocated to Nasatima Island with a definite relocation envisaged by the end of 2013.

In 1992, the Rutasian and Alfurnan governments agreed on a 'climate change loan' of USD 125 million to Alfurna, after the rise of sea levels had washed away parts of its previously constructed seawalls.. The funds of the loan were to be used for repairing the seawalls and related damage, designing and implementing other remedies and preventative measures to combat inundation and associated research. Alfurna contracted with Rutasian private-sector company, Mainline Constructions Limited (MCL) which was the only company with the necessary qualifications.

Although an Annex I country to the UNFCCC and a signatory state of the Kyoto Protocol, Rutasia was a major contributor to the worsening effects of climate change and was slow in implementing reforms on its emissions according to a 1992 report by the Tom Good Institute (TGI), a respected research institution.

The funds were kept in an account of Alfurna's central bank, the Alfurna Reserve Bank (ARB) which was maintained at one of Rutasia's provincial reserve banks. Alfurna's debt to GDP ratio had reached 120% by January 1999, in the same year Alfurna did not pay interest nor principle to Rutasia and other Paris Club members. Alfurna approached the lenders to negotiate relief because of financial pressures. Rutasia subsequently cancelled 25% of the principle, reduced the annual interest rate to 1.5% and rescheduled repayment over an additional 15 years. After a Hurricane caused considerable damage to Alfurna, the financial situation worsened. After Alfurna had stated that it would soon face severe debt servicing problems, the two states agreed to cancel further 25% of the loan and Alfurna was granted a grace period on payment of principle and interest until 15 September 2010 and the period of repayment was extended until 2047. To fund an initiative of Alfurnan President Fatu to transplant the Alfurnan nationals to a new land, a moratorium on servicing all debt to foreign lenders was passed by the Alfurnan Parliament. On 10 February 2012, Rutasian government agency RICA informed Alfurna that it was in default under the loan agreement. Five days later, Rutasia declared that the entire loan balance was due and that Rutasia would seize the assets. The Provincial Reserve Bank of Lando then closed the ARB account and transferred the entire USD 25 million to the Rutasian government's fund.

Summary of Pleadings

A. Alfurna still is a state, and accordingly, the Court may exercise jurisdiction over its claims.

Firstly, according to the principle of effectiveness interpreted in light of the presumption of continuity of established states Alfurna is still a state. This is because the principle of effectiveness does not determine Alfurna's statehood conclusively but is modified by the presumption of continuity. This is proven by state practice which is very reluctant to assert the extinction of established states and favours their preservation when effectiveness is lacking and statehood potentially threatened. Applied to Alfurna's case, the effectiveness criteria interpreted in light of the presumption favour its continued statehood. This assertion is not compromised by the terms of the lease agreement since they do not lead to a critical loss of independence.

Secondly, the presumption in favour of Alfurna's continuance is reinforced because its extinction would stem from a breach of international law.

Thirdly, even if the Court should come to the conclusion that Alfurna can no longer be qualified as state, the principle of proper administration of justice allows for the granting of jurisdiction in this case.

B. Alfurna is entitled to make claims in relation to the migrants now in Rutasia, and Rutasia has failed to process those migrants and accord them a status consistent with international law.

Firstly, since the Alfurnans detained in Rutasia have exhausted the local Rutasian remedies, Alfurna is entitled to exercise protection on their behalf. Even if the Court should declare that Alfurna is no longer a state, it is a recognised subject of international law entitled to bring forth an international claim for protection on behalf of the detainees.

Secondly, Rutasia's failure to conduct any kind of legal process regarding the detainees violates its obligations deriving from the Refugee Convention.

Thirdly, the migrants are refugees and Rutasia failed to grant the Alfurnan detainees refugee status. In the event the Court should decide that the Refugee Convention is not applicable, Rutasia failed to grant the Alfurnan detainees complimentary protection out of an obligation deriving from customary international law.

C. Rutasia's treatment of the detained Alfurnan migrants held in the Woeroma Centre, and the proposed transfer to Saydee, violate international law.

Firstly, the detention of the Alfurnan migrants is arbitrary as there is no legal ground for the detention, it is not necessary, there is no effective remedy to review the lawfulness of their detention and it is indefinite; the detention thus violates Art 9 ICCPR. Also, Rutasia violates its obligation to treat the detainees with humanity and dignity deriving from Art 10 ICCPR because the prison is overcrowded, prisoners get inadequate food and water, there are hygiene problems, only limited access to medical services and prisoners are held in cages. Furthermore, Rutasia violates the prohibition of torture and cruel, inhuman or degrading treatment stipulated in Art 7 ICCPR as well as the right to life (Art 6 ICCPR) because five Alfurnans died from dysentery and three committed suicide in Rutasian custody.

Secondly, the proposed transfer of the detained Alfurnan migrants to Saydee violates Rutasias *non-refoulement* obligation not to expel persons where there are substantial grounds for believing they would face torture or inhuman and degrading treatment because there are reports of sexual abuse by guards in Saydee. Also, the transfer would violate Rutasias obligation to not exersise collective expulsion.

D. Rutasia's conduct disentitles it to any relief from this Court in respect of its claims over Alfurna's assets, and in any event Rutasia's actions regarding those assets are in violation of international law.

Firstly, Rutasia did not negotiate the loan agreement in good faith and also did not engage in good faith negotiations before seizing the account. Also, Rutasia was estopped from seizing the account and came to the court with 'unclean hands'. This disentitles Rutasia to any relief from this Court.

Secondly, Rutasia violated international law by taking the assets because the Alfurnan Central Bank had immunity since the default clause in the loan agreement does not constitute an explicit waiver of enforcement immunity concerning central bank assets and there was no exception based on a commercial purpose.

PLEADINGS

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

Alfurna has existed as a state since its independence in 1904. In this unprecedented situation in history, Alfurna will continue to exist as a state in the future.

I. According to the principle of effectiveness interpreted in light of the presumption of continuity of established states Alfurna is still a state.

1. The principle of effectiveness as embodied in the Montevideo Convention does not determine Alfurna's statehood conclusively.

The principle of effectiveness postulates in relation to statehood that such can only be established where a governmental authority controls a defined territory and its inhabitants effectively and independently from other states.[1] It underlies the widely acknowledged formulation for the basic criteria for statehood in Art 1 Montevideo Convention on the Rights and Duties of States.[2] In determining statehood, however, state practice distinguishes between the coming into existence of new states and already established ones. Only the first situation is conclusively governed by the principle of effectiveness.[3] The statehood of established states like Alfurna, on the other hand, is governed by the presumption of state continuity.

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[1] cf Taki H, 'Effectiveness', Max Planck Encyclopedia of Public International Law (2012) para 5.

[2] [1933] 165 LNTS 19 (Montevideo Convention).

[3] cf Yusuf AA, 'Government Collapse and State Continuity: The Case of Somalia' (2003) 13 Italian Yearbook of International Law 11, 19.

2. Alfurna's statehood continues because the presumption of continuity of established states modifies the principle of effectiveness.

State practice constituting this presumption aims at maintaining peace through preserving the certainty of legal relations[4] on the international level. As states continue to be the most important actors in international law, the abrupt discontinuity of states' rights and obligations by state extinction must be avoided.[5]

a. Alfurna's extinction would diametrically oppose the previous state practice which is very reluctant to assert the extinction of established states.

In the Charter period, there have been only eight cases of state extinction in contrast to the emergence of 128 new states.

Five of these cases consist of voluntary extinctions where there was a correspondent consensus among the parties concerned. This is true for Somaliland and its voluntary union with the Somali Republic (1960), for Tanganyika and Zanzibar voluntarily merging into Tanzania (1964), the Yemen Arab Republic and the People's Democratic Republic of Yemen merging into the Republic of Yemen (1990), the German Democratic Republic voluntarily uniting with the Federal Republic of Germany (1990), and the voluntary dissolution of the Czech and Slovak Federal Republic (1993).

The three remaining cases can be subsumed under the term 'involuntary'. Among those, however, one case, Hyderabad, concerned an entity of ephemeral nature[6] and the other concerned

[4] cf Charter of the United Nations (1945), 1 UNTS 16, Arts 1, 2 (UN Charter).

[5] cf Marek K, *Identity and Continuity of States in Public International Law* (Librairie Droz 1968) 548.

[6] Invaded and annexed by India shortly after independence (1948).

the Republic of Vietnam, whose independence was never clearly established.[7] Only one case concerned the 'involuntary extinction'[8] of a clearly established state, namely the Socialist Federal Republic of Yugoslavia (SFRY). At the end of a process of consecutive secessions the international community agreed 'that the SFRY no longer exists'[9]. In sum, state practice has shown that extinction was only determined when there either was a consensual agreement among the parties concerned or great consensus within the international community. Isolated acts of non-recognition by individual states cannot lead to a loss of statehood.[10]

Alfurna's extinction, if asserted, would not resemble any of the situations above. It would be 'involuntary' as there is no consent of Alfurna regarding its extinction. In the only case of an involuntary extinction, however, the extinction was brought about by an international consensus. Regarding Alfurna, an international consensus does not exist as only one state explicitly doubts its statehood. The sceptical state is Rutasia which expects advantages from this concerning Alfurna's assets and potential human rights violations against Alfurnans in Rutasia. Nothing in the Compromis suggests that another state has explicit doubts concerning Alfurna's statehood. Therefore, Alfurna's extinction would contradict all relevant state practice in this regard.

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[7] Always lacking formal and effective independence from French Union, merger into Socialist Republic of Vietnam, 1975.

[8] Crawford J, *The Creation of States in International Law* (2nd edn, OUP 2006) 707.

[9] Arbitration Commission of the International Conference on Yugoslavia, 'Opinion No. 8' (4 July 1992) printed in (1993) 4 EJIL 87, 88; cf UNSC Res 777 (19 September 1992) UN Doc S/Res/777, preamble.

[10] cf Crawford (n8) 704f.

b. Alfurna's statehood prevails because where effectiveness is lacking and statehood potentially threatened, state practice favours the preservation of established states.

Regarding the states occupied and annexed in the course of the Second World War,[11] their legal existence was preserved from extinction and they were all reconstituted by the Allies.[12] Kuwait is a more recent example: Despite the government's exile, the complete occupation of Kuwait's territory and the fact that half of the population had fled the country during the 1990-91 Iraqi invasion,[13] Kuwait's statehood was never questioned by the international community.[14] Alfurna resembles this case insofar as governmental control over territory is (temporarily) lost and the population has left the country.

In the so-called 'failed states' cases like Somalia and Mali, the international community continues to recognise their legal personality as states despite the absence of effective governmental control over the totality of state territory. This conviction is reinforced through international measures taken in order to restore effective governmental control, and thus to help the state in distress to return to 'normal' conditions.[15] Comparable measures are also taken in Alfurna's case (Comp. 45).

To conclude, the presumption of continuity has materialised itself in the case of Alfurna as its situation is comparable to those of relevant precedents.

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[11] Ethiopia, Austria, Czechoslovakia, Albania and Poland.

[12] Crawford (n8) 702f.

[13] Duke Anthony J, Ochsenwald WL and Crystal JA, 'Kuwait', Encyclopedia Britannica (online edn) <http://www.britannica.com/EBchecked/topic/325644/Kuwait/93658/Iran-Iraq-War> accessed 16 November 2012.

[14] UNSC Res 662 (1990) (9 August 1990) UN Doc S/Res/662(1990).

[15] Mali: UNSC Res 2071 (2012) (12 October 2012) UN Doc S/Res/2071(2012); Somalia: UNSC Res 1772 (2007) (20 August 2007) UN Doc S/Res/1772(2007); UNSC Res 2073 (2012) (7 November 2012) UN Doc S/Res/2073(2012).

c. The effectiveness criteria interpreted in light of the presumption of continuity favour Alfurna's continued statehood.

Among the criteria postulated by the principle of effectiveness the government criterion is of most importance, as it alone ensures effective control over people and territory.[16]

However, as shown by the widely acknowledged concept of government in exile, the element of territory is not indispensable in order to exercise effective control. This is true provided that a government still exercises effective control over its nationals 'abroad' as well as in the areas of treaty-making and diplomatic relations.[17] A departure from effectiveness in favour of continuity is thus accepted in state practice.

Alfurna's government is located in Finutafu since 2006 (Comp. 25). Since December 2011 both of the Alfurnan Islands have been submerged (Comp. 44). Nevertheless, the Alfurnan government in exile has uninterruptedly exercised effective control. Nothing in the Compromis suggests that any of the Alfurnans living in other countries have acquired the citizenship of their respective host states which means that the Alfurnan government continues to exercise jurisdiction over them. This is supported by the fact that sixty-seven states agreed to the statement that the migrants in Rutasia are 'Alfurnan' (Comp. 49). Alfurna has further exercised effective governmental functions in the area of treaty making by concluding the lease agreement with Finutafu (Comp. 45,48), and in the area of diplomatic relations as proven by the exchange of diplomatic notes with Saydee (Comp. 42) and with Rutasia (Comp. 46,47).

The period in which the Alfurnan government was confined to the functions of a government in exile has ended with the entry into effect of the lease agreement regarding

[16] Crawford (n8) 56.

[17] McAdam J, '"Disappearing States", Statelessness and the Boundaries of International Law' (2010) UNSW Working Paper 11.

Nasatima Island on 9 March 2012 (Clar. 7). All Alfurnan government ministries and their employees have been relocated – at least partially – to the Island (Clar. 4) thereby enabling the Alfurnan government to exercise *territorial* jurisdiction again. Accordingly, from this point on the requirements of the principle of effectiveness are fulfilled by Alfurna without deviation.

To conclude, Alfurna's statehood was never interrupted. In the period where it was not able to exercise effective control over a territory, the modification of the principle of effectiveness through the presumption of continuance regards effective control by Alfurna's exile government as sufficient for state continuance. Furthermore, this period ended with the lease of Nasatima Island.

d. The terms of the lease agreement do not lead to a critical loss of independence.

Under the principle of effectiveness of statehood, effective governmental control implies the independence of the entity concerned. Independence 'is the right to exercise [...], to the exclusion of any other State, the functions of a State.'[18] In the *Austro-German Custom Union* case, Judge Anzilotti confirmed in an individual opinion that 'the restrictions upon a State's liberty, [...] arising out of [...] contractual engagements, do not as such in the least affect its independence.'[19] Rather, formal independence once acquired compensates even for a significant lack of actual independence.[20] Numerous precedents of states ceding competences to another state without their independence and effectiveness – hence statehood – being questioned support this assertion. This is true for Liechtenstein and its arrangement with Switzerland delegating the

[18] *Island of Palmas Case (United States v the Netherlands)* (1928) 2 RIAA 829, 838.

[19] (Advisory Opinion) (Individual Opinion Anzilotti) PCIJ Rep Ser A/B No 41, 57f.

[20] Crawford (n8) 288.

conduct of its foreign affairs on an *ad hoc* basis.[21] The same counts for the partial delegation of San Marino's diplomatic affairs to Italy,[22] for Bhutan in its relation to India,[23] and for the relationship between Monaco and France.[24] In *Nationality Decrees* this Court ruled that the status of entities ceding competences to another state is to be determined by reference to the specific circumstances and the constituent instruments, not by reference to any overall concept.[25]

The fact that Nasatima Island is leased and not purchased does not lead to a critical loss of independence of Alfurna in relation to Finutafu. The arrangement does not necessarily imply the automatic return of territory – rather, additional procedures are required. This is proven by the precedent of Hong Kong where the parties deemed it necessary to conclude another international treaty as an *actus contrarius* to the original lease in order to return the territory.[26] Furthermore, this treaty explicitly stated that China 'has decided to resume the exercise of sovereignty over all of Hong Kong'[27] thereby proving that even sovereignty – and hence independence – can be transferred through leasement.

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[21] Exchange of Notes on the Preservation of the Interests of Liechtenstein in Third States by Switzerland (1919) Publikation Botschaft BBL (f/d) 1919 V 463/439.

[22] Convention of Friendship and Good Neighbourhood between San Marino and Italy (1939) Gazzetta Ufficiale della Repubblica Italiana del 16.06.1939, n 217.

[23] Treaty of Friendship Between India and Bhutan [1949] 157 BSP 214; Friendship Treaty between India and Bhutan (2007).

[24] Treaty of Paris (2002) (6 January 2006) Journal Officiel de la République Française 309, Arts 1-4 granting France the power to introduce military forces without approval or request from Monaco in case of danger.

[25] (Advisory Opinion) PCIJ Rep Ser B No 4, 27.

[26] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (1984) 23 ILM 1366.

[27] ibid Art 1.

The Nasatima lease provides that 'Alfurna will have complete control over the Island' (Comp. 45) and that it 'is entitled to apply its own laws' and 'to enact new laws as appropriate' (Clar. 4). Only Alfurna is permitted to cancel the lease with five years' notice (Comp. 45). In line with the precedent of Hong Kong, these provisions indicate that Alfurna retains independence sufficient for the exercise of effective governmental functions.

The agreement further provides that laws in the areas of defence, customs, and immigration are 'subject to Finutafuan control' (Clar. 4). The interpretation of this arrangement shows that Alfurna's *formal* independence is ensured. Nothing in the agreement suggests a merger. Rather, the states' equal coexistence is envisioned: '[Alfurna's] residents will have no claim to Finutafuan citizenship or to the protection of that country's laws' (Comp. 45). Finutafu is not granted the right to intervene in Alfurna's internal matters. Further, the competences ceded by Alfurna only cover very specific areas and do not amount to a full delegation of external affairs. Because of the priority of formal over actual independence, even if the competences granted to Finutafu might be regarded as significantly restricting Alfurna's actual independence, this is still consistent with its status as an independent state.

Neither its arrangement as a lease, nor the specific terms of the Nasatima agreement compromise Alfurna's independence in way that hinders it to exercise effective governmental control.

To conclude, Alfurna is a state as is proven by state practice constituting a presumption of continuance of established states which modifies the principle of effectiveness in favour of Alfurna. The application of the modified principle of effectiveness to Alfurna's case proves unequivocally its continued statehood.

II. The presumption in favour of Alfurna's continuity is reinforced because its extinction would stem from a breach of international law.

The presumption for state continuity is reinforced by the existence of a breach of international law.[28] The submergence of Alfurna's islands essentially caused by sea level rise through anthropogenic climate change[29] (Comp. 12) proves that relevant legal obligations were breached.

Both the United Nations Framework Convention on Climate Change (UNFCCC)[30] and customary international law create the obligation on states to minimize the adverse effects of climate change. The UNFCCC entails the *duty*[31] of prevention of anthropogenic climate change (Art 2 UNFCCC) which is reinforced by Art 4.2 UNFCCC obliging Annex I parties (i.e. developed countries) to adopt measures limiting greenhouse gas emissions.[32] The no-harm-rule in environmental law obliges all states to not inflict damage on or to violate the rights of other States. It was established in the *Trail Smelter Arbitration*[33] and forms part of international

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[28] cf Crawford (n8) 703.

[29] IPCC, 'Climate Change 2007: Synthesis Report' <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf> accessed 10 January 2013, 30: 'Increases in sea level are consistent with warming'.

[30] (1992), 1771 UNTS 107.

[31] Voigt C, 'State Responsibility for Climate Change Damages' 77 Nordic Journal of International Law 1, 5.

[32] ibid.

[33] *(United States v Canada)* (1938/1941) 3 RIAA 1905, 1965.

customary law as has been found by the ICJ in its *Nuclear Weapons*[34] advisory opinion and *Gabcikovo-Nagymaros*[35] case.

Alfurna was severely damaged by the behaviour of other states which were under a legal obligation to not cause damage to it by contributing to climate change. The presumption in favour of its continuance is thus reinforced.

III. Even if the Court should come to the conclusion that Alfurna in any case can no longer be qualified as state, the Court may still exercise jurisdiction in this case.

The principle of proper administration of justice grants 'the Court [...] the ultimate power and responsibility to ensure that the justice it renders is keeping up with the highest standards of judicial procedure and that at the same time it takes duly into account the legitimate concerns of all the parties to the proceedings.'[36] In its *Kosovo*[37] and *Wall*[38] advisory proceedings the Court chose to grant non-state entities standing on the basis of this principle because these entities were directly concerned or their status was a major object of the question.[39] Furthermore, the Court has already exercised considerable discretion regarding admission to contentious cases as is proven by the *Genocide* and *NATO* cases.[40]

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[34] (Advisory Opinion) [1996] ICJ Rep 241, para 29.

[35] (Judgment) [1997] ICJ Rep 7, 41.

[36] Kolb R, 'General Principles of Procedural Law' in Zimmermann A and others (eds), *The Statute of the ICJ. A Commentary* (2nd edn, OUP 2012) para 28.

[37] (Advisory Opinion) [2010] ICJ Rep 403.

[38] (Advisory Opinion) [2004] ICJ Rep 136.

[39] Paulus A, 'Article 66' in Zimmermann, *The Statute of the ICJ* (n36) MN 15.

[40] *Application for Revision of the Judgment of 11 July 1996 in the* Bosnian Genocide Case *(Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [2003] ICJ Rep 7; *Croatian*

Alfurna is not an entity claiming to be a *new* state, but has existed as a state for a period of over a hundred years (Comp. 1). It is a member state of the United Nations – nothing in the Compromis suggests that this status is restricted by the fact that Alfurna has not paid its membership dues since 2006. Furthermore, its continued UN membership means that Alfurna is still a party to the Statute of the International Court of Justice.[41] These factors together with the discretion provided to this Court by the principle of proper administration of justice allow for the granting of jurisdiction *ratione personae*[42] to Alfurna.

Genocide Case (Croatia v Serbia) (Preliminary Objections) [2010] ICJ Rep 412; the *Legality of the Use of Force* cases filed by Serbia and Montenegro against the NATO member states.

[41] cf UN Charter Art 93(1).

[42] Statute of the International Court of Justice (1945), 1 UNTS 993, Art 34.

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

I. Alfurna is still a state and is therefore entitled to exercise protection regarding its nationals currently detained in Rutasia.

1. The detainees possess Alfurnan nationality and have exhausted the local Rutasian remedies.

It is an established rule of customary international law that a state is entitled to protect its nationals from violations of their rights committed by another state.[43]

The Alfurnan nationals currently detained in Rutasia possess Alfurnan nationality. As the Court has stated in the *Nottebohm Case*, genuine nationality is a 'legal bond' which has 'the social fact of attachment' at its basis.[44] The Alfurnans detained in Rutasia were born on the Alfurnan islands of Batri and Engili and habitually resided therein. They hence possess Alfurnan nationality.

Customary international law requires that the state in which the violation occurred should have the opportunity 'to redress it by its own means, within the framework of its own legal system'[45] before the state of nationality may exercise protection. This requirement was met. Christopher Keve, representing all Alfurnan detainees, filed a suit in Rutasia's Supreme Court, which has jurisdiction in immigration matters and requested the end of the continuous violations

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[43] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* PCIJ Rep Ser A No 2 (*Mavrommatis*), 12; *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* PCIJ Rep Ser A/B No 75, 16; *Nottebohm (Liechstenstein v Guatemala)* [1955] ICJ Rep 4 (*Nottebohm*) 23f; ILC, 'Draft Articles on Diplomatic Protection' (58th session, 2006) UN Doc A/61/10, Art 3(1).

[44] *Nottebohm* (n43) 23.

[45] *Interhandel (Switzerland v United States of America)* [1959] ICJ Rep 6, 27.

of their rights by the Rutasian authorities. This motion was denied by the court (Comp. 43). Since there is no possibility to appeal (Clar. 6), 'the whole system of legal protection, as provided by municipal law'[46] has been put to the test and the local Rutasian remedies have therefore been exhausted. Since states in the region denied entry to the remaining Alfurnans, Alfurna is not foreclosed of making claims on their behalf. Hence, Alfurna is entitled to exercise protection regarding its nationals detained in Rutasia.

2. In case the Court finds that Alfurna is no longer a State, it may declare that Alfurna is a subject of international law, entitled to exercise protection for the detainees.

    a. Alfurna possesses international legal personality.

Alfurna is a recognised subject of international law possessing functionally equivalent rights to those of a state. This is proven by the fact that Alfurna conducted negotiations with Finutafu (Comp. 45,48), concluded an international treaty (Comp. 46) and exchanged diplomatic notes with other states (Comp. 46,41,42).

    b. Alfurna is entitled to bring forth international claims for protection in relation to the detainees.

The rationale underlying the fiction of diplomatic protection[47] is to determine the subject of international law with the strongest bond to the victims of an internationally wrongful act of another state. This subject is entitled to exercise protection. The Court recognised in its advisory opinion concerning the *Reparations for Injuries suffered in Service of the United Nations* the possibility for a subject of international law other than a state to bring forth an international

[46] *Ambatielos Claim Arbitration (Greece v United Kingdom)* (1956) 12 RIAA 83, 120.

[47] Vermeer-Künzli A, 'As If: The Legal Fiction in Diplomatic Protection', (2007) 18 EJIL 37f.

claim for functional protection on behalf of persons attached to them.[48] Alfurna, as the subject of international law with the strongest ties to the detainees[49] is therefore entitled to exercise functional protection on their behalf.

II. Rutasia's failure to process the detainees violates its obligations deriving from the Refugee Convention.

1. Rutasia failed to give the detainees access to effective status determination procedures.

Signatories of the Convention and Protocol relating to the Status of Refugees (Refugee Convention), are obligated to grant any refugee within their jurisdiction protection from persecution and *refoulement*.[50] Without an obligation to process, the intended protection of the Refugee Convention would be void. Rutasia, having signed and ratified the Refugee Convention is thus obliged to give persons arriving at its borders access to effective procedures in order to determine if they might be entitled to protection.[51] Rutasia neither granted the Alfurnans rescued at sea access to determination procedures at the moment of interception, nor was there access to

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[48] *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 181f, 184f; on functional protection of the European Union cf Storost C, *Diplomatischer Schutz durch EG und EU?* (Duncker & Humblot 2005) 159f.

[49] Above section B(I)(2).

[50] Convention Relating to the Status of Refugees (1951), 189 UNTS 137, Arts 1(A)(2) 33(1); Protocol Relating to the Status of Refugees (1967), 606 UNTS 267.

[51] Obligation stipulated in eg UNHCR, 'Addendum to the Report of the UN High Commissioner for Refugees' (1998) UN Doc A/53/12/Add.1, para 21(q); Hofmann R and Löhr T, 'Introduction to Chapter V' in Zimmermann A (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) MN 46; *Hirsi Jamaa and others v Italy* App No 27765/09 (ECtHR) (Concurring Opinion Judge De Albuquerque) found a duty for states to investigate on their own motion situations of need for international protection and therefore 'no automatic negative conclusion can be drawn from a lack of an asylum application'.

a status determination procedure during detention in the Woeroma Centre. Therefore Rutasia failed to fulfill its obligation to grant the detainees access to effective status determination procedures deriving from the Refugee Convention.

2. Rutasia failed to conduct a process required by Art 31(2) Refugee Convention.

Art 31(2) Refugee Convention obligates Rutasia to conduct status regularisation procedures if it restricts the movement of the Alfurnan nationals. Status regularisation refers to 'any step by the territorial state addressing the unlawful presence'[52] of the detainees. The time period in which the status determination to address the unlawful presence may take place is shorter than the period to determine refugee status.[53] To date, Rutasia failed to engage in a procedure to regularise the status of the detainees while restricting their movement and thus failed to comply with Art 31(2) Refugee Convention.

III. Rutasia failed to grant the Alfurnans detained in Rutasia a status in consistency with international law.

1. The Refugee Convention obligates Rutasia to accord the Alfurnan detainees refugee status.

The Alfurnan nationals detained in Rutasia are refugees in the sense of Art 1(A)(2) Refugee Convention. And Rutasia's failure to grant the Alfurnan nationals refugee status, violates Rutasia's obligations deriving from the Refugee Convention.

The relevant criteria of the convention are met. Firstly, there has been persecution. Persecution refers to an intense violation of human rights with an additional failure of the state to

[52] Noll G, 'Article 31' in Zimmermann, *Refugee Convention* (n36) MN 115.

[53] ibid.

protect the individual.[54] It does not have to stem from the state of nationality itself.[55] Rutasia increased their carbon emissions, knowing that this effects climate and sea level and threatens the very basic human right, the right to life, of the nationals of only 350 miles away low-lying island state Alfurna. Also, as a state with a comparatively low GDP (Comp. 2), Alfurna is practically unable to protect its nationals from the life threatening effects of climate change, although protection through the construction of seawalls was attempted (Comp. 7,9). Extreme weather conditions then rendered the remaining Alfurnan island of Engili uninhabitable (Comp. 32), which made an internal flight alternative impossible and forced the Alfurnans to cross international borders. The persecution therefore concerned all remaining Alfurnans and consequently the Alfurnan detainees.

Secondly, the required link between the persecution and nationality exists. It is necessary for the individuals to be persecuted for 'who they are'[56]. A subjective intention to harm the individuals needs not to be proven.[57] Rutasia was well aware of the threat and harm their emissions cause to the life of the nationals of this low lying island but yet increased them. Therefore, there is a link between the persecution and a convention ground, which is nationality.

Moreover, the detainees are currently unable to return to their country of nationality. The detainees left the island of Engili in 2009/2010 and are since detained on Rutasian territory and are furthermore unable to avail themselves to the protection of the Alfurnan state, as it is Finutafu who is in control of immigration on Nasatima Island (Clar. 4). Hence, the Alfurnan

[54] cf Hathaway J, *The Law of Refugee Status* (CUP 2005) 101; Zimmermann A and Mahler C, 'Article 1 A, para. 2' in Zimmermann, *Refugee Convention* (n36) MN 216.

[55] Zimmermann/Mahler (n54) MN 283.

[56] Hathaway J and Foster M, 'The Causal Connection ("Nexus") to a Convention Ground' 15(3) International Journal of Refugee Law 461, 462.

[57] Zimmermann/Mahler (n54) MN 330f; Hathaway/Foster (n56) 469.

nationals detained in Rutasia are refugees as defined in Art 1A(2) Refugee Convention and Rutasia is obligated to accord them that status.

2. In the event the Court should declare that the Refugee Convention is not applicable, Rutasia failed to grant the Alfurnan nationals complimentary international protection.

The reasons for the Alfurnan nationals to leave their ancestral lands and seek refuge elsewhere were not of economic nature. It was an immediate endangerment of their very lives and the will to save it which coerced them to leave their island. It is therefore apt to speak of forced migration due to environmental disasters.

It is a rule of customary international law to grant people fleeing from environmental disaster international protection. The United States of America for example have, with the US Immigration Act of 1990, created the 'Temporary Protected Status' for nationals of designated countries which have been, *inter alia*, victims of environmental disaster.[58] The African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (African Union Refugee Convention) expands the protection to people who seek refuge outside their country of origin due to 'events seriously disrupting public order'[59]. A similar formulation is found in the Cartagena Declaration on Refugees,[60] which was adopted by a number of governments in the Americas. Also, the Council of the European Union issued a directive aiming at granting

[58] Sec 244 of the Immigration and Nationality Act, 8 USC § 1254a, (b) 1, (B) (i).

[59] Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), 1001 UNTS 45, Art 1(2).

[60] Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 'Cartagena Declaration on Refugees' (1984) Sec III No 3. <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> accessed 14 January 2013.

temporary protection on humanitarian grounds.[61] Additionally, the conduct of states in the region of the Bay of Singri and outside reflect the *opinio iuris* to the existence of such an obligation, as they agreed to temporary emergency protection arrangements (Comp. 26).

Furthermore, the obligation not to return individuals to countries where they may face a severe violation of their human rights is overwhelmingly recognised as a rule of customary international law.[62] Rutasia failed to explicitly express its commitment to fulfill this obligation towards the Alfurnan detainees. Therefore Rutasia failed to grant the Alfurnan nationals detained in Rutasia complimentary international protection.

[61] Council Directive 2001/55/EC [2001] OJ L212/12, Art 2(c).

[62] Goodwin-Gill G and McAdam J, *The Refugee in International Law* (3rd edn, OUP 2007) 248; Kälin W, Caroni M, and Heim L, 'Article 33 para. 1' in Zimmermann, *Refugee Convention* (n36) MN 31.

C. RUTASIA'S TREATMENT OF THE DETAINED ALFURNAN MIGRANTS HELD IN THE WOEROMA CENTRE, AND THE PROPOSED TRANSFER TO SAYDEE, VIOLATE INTERNATIONAL LAW.

I. Rutasia's treatment of the detained Alfurnans held in the Woeroma Centre violates its human rights obligations.

1. The detention of the Alfurnan migrants is arbitrary and thus violates Art 9 of the ICCPR.

According to the International Covenant on Civil and Political Rights (ICCPR),[63] to which both states are a party, 'no one shall be subjected to arbitrary arrest or detention'.[64] The concept of 'arbitrariness' as clarified by the Human Rights Council (HRC) includes elements of inappropriateness, injustice, and undue process of law.[65] The HRC has been cited by this Court in establishing that a state has violated its obligations under the ICCPR.[66] Clarifications by the HRC thus also bear authority in this case.

The detention is arbitrary because there is no legal ground for it. Art 9 ICCPR provides that 'no one shall be deprived of his liberty except on such grounds […] as are established by law'. Nothing in the Compromis suggests that Rutasia intends to submit any evidence for an authorisation to detain the Alfurnan nationals under domestic law. As argued above, no status determination procedure that could serve as a legal ground for a temporary detention of the Alfurnans has taken place.[67] The lack of legal grounds thus renders the detention arbitrary. As

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[63] (1966), 999 UNTS 171.

[64] ICCPR Art 9(1).

[65] *Mukong v Cameroon* Comm No 458/1991 (HRC) para 9.8.

[66] *Wall* (n38) para 109; also *Case Concerning Armed Activities On The Territory Of The Congo (Congo v Rwanda)* (Jurisdiction) (Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma) [2006] ICJ Rep 65, paras 16, 21; *Legality of Use of Force (Yugoslavia v United Kingdom)* (Provisional Measures) (Separate opinion by Judge Higgins) [2004] ICJ Rep 866, para 5.

[67] Above claim B(II).

the detention forms part of Rutasia's investigations concerning possible contraventions of its domestic criminal law by the detainees (Comp. 50), it therefore constitutes an arrest in the sense of Art 9(2) ICCPR.[68] By not informing the detainees at the time of the arrest of any charges against them, Rutasia violated its obligations under this article. Even if Rutasia's conduct was in accordance with its domestic law, the detention is still arbitrary under international law[69].

The detention is also not necessary – a purported illegality of entry is insufficient. In *A v Australia*, the HRC found that a detention may be considered arbitrary in the absence of factors such as a likelihood of absconding or lack of cooperation,[70] even if the entry of an alien was illegal.[71] Rather, a state party must demonstrate that 'there were no less invasive means of achieving the same ends', for instance 'the imposition of reporting obligations'[72].

Moreover, the detainees have no effective remedy or possibility to review the lawfulness of their detention. Art 2(3) provides that any person whose rights under the ICCPR are violated 'shall have an effective remedy'. Under Art 9(4) ICCPR, the individual Alfurnan migrants are further 'entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of [their] detention and order [their] release if the detention is not lawful'[73]. All such applications need to be processed on an individual basis.[74] In *A v Australia*, the HRC has further decided that court review must include the possibility of ordering release,

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[68] *Kelly v Jamaica* Comm No 253/1987 (HRC) para 5.8.

[69] cf *Mukong* (n65) para 9.8.

[70] *A v Australia* Comm No 560/1993 (HRC) paras 9.2, 9.4.

[71] ibid para 9.4.

[72] ibid para 8.2.

[73] ICCPR Art 9(4).

[74] *C v Australia* Comm No 900/1999 (HRC) para 6.4.

i.e. that it is 'in its effects, real and not merely formal'[75]. In the case filed by the detainee Christopher Keve, the Rutasian Supreme Court denied its competence (Comp. 43) and thus prevented the review from being authoritative and 'real'. As the second decision is related only to the transfer, there is no competent authority to judge on the unlawfulness of the detention of the Alfurnans.

Additionally, the fact that the detention is indefinite renders it arbitrary. Indefinite detention without justification or effective remedy clearly violates the prohibition of arbitrary detention under Art 9(1) ICCPR. The HRC has ruled that 'in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a state party can provide appropriate justification'[76]. A detention of over two years in immigration facilities is not justifiable.[77] The 'indefinite' (Comp. 36) detention of 2,978 Alfurnan migrants without individual justification for a period of two to three years in Rutasia therefore must be classified as arbitrary.

2. Rutasia violates its obligation to treat the detainees with humanity and dignity (Art 10 ICCPR).

If lawfully deprived of their liberty, aliens shall be treated with humanity and with respect for the inherent dignity of their person.[78] The conditions in the Woeroma Centre, as described by the Rutasian Ombudsman for Immigration, violate this right of the Alfurnan detainees, as prisoners in Block B were provided with 'inadequate food and water', only had

[75] *A v Australia* (n70) para 9.4.

[76] *Bakhtiyari v Australia* Comm No 1069/2002 (HRC) para 9.2.

[77] ibid.

[78] HRC, 'General Comment 15' (2003) UN Doc HRI/GEN/1/Rev6(2003) para 7.

'limited access to medical services', there were 'hygiene problems' and Block B was 'severely overcrowded' (Comp. 36).

Under the ICCPR, Rutasia is obliged to ensure minimum standards concerning detention conditions.[79] The UN Standard Minimum Rules for the Treatment of Prisoners, which the HRC considers as a reference point in determining the adequacy of the detention conditions,[80] provide that 'certain minimum standards regarding the conditions of detention must be observed'[81]. These include 'minimum floor space', 'adequate sanitary facilities' and the 'provision of food of nutritional value adequate for health and strength'[82].

Providing prisoners inadequate food thus amounts to a violation of Art 10 ICCPR.[83] In *Kelly v Jamaica*, the HRC provided that 'the provision of inadequate food to detained individuals' does not meet the requirement to treat them with humanity and with respect for the inherent dignity of the human person.[84] This obligation also 'encompasses the provision of adequate medical care during detention.'[85] Accordingly, limited access to medical services has

[79] cf *Mukong* (n65) para 9.3.

[80] ibid.

[81] UNESC, 'Standard Minimum Rules for the Treatment of Prisoners' (1977) UN Doc E/5988(1977) Rules 10, 12, 17, 19, 20.

[82] *Mukong* (n65) para 9.3.

[83] *Kelly* (n68) para 5.7; *Mukong* (n65) para 2.2; *Lantsova v Russia* Comm No 763/1997 (HRC) para 9.1.

[84] *Kelly* (n68) para 5.7.

[85] *Pinto v Trinidad and Tobago* Comm No 232/1987 (HRC) para 12.7.

also been found to violate Art 10 ICCPR.[86] Moreover, breaches were established because of inadequate hygiene[87] and detention in severely overcrowded prisons.[88]

That prisoners in Woeroma Centre are held in cages (Comp. 36) amounts to a further violation of the obligation to respect prisoners' dignity. The humiliating aspect of cages in which persons are – animal-like – denied any privacy amounts to inhuman treatment, as was decided by the HRC.[89]

Finally, the lack of financial means cannot release a state of its responsibilities under the ICCPR.[90]

3. Rutasia violates the prohibition of torture and cruel, inhuman or degrading treatment (Art 7 ICCPR).

Limited access to medical care and insufficient food further amount to cruel and inhumane treatment as stipulated in Art 7 ICCPR.[91] The HRC provided that Art 7 is violated where a person is 'detained under conditions seriously detrimental to his health'.[92] The situation in Block B can be classified as seriously detrimental to the health of the detainees as evidenced by the death of five Alfurnans due to dysentery (Comp. 35).

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[86] ibid; cf also *Massera et al v Uruguay* Comm No R.1/5 (HRC) para 10.

[87] *Lantsova* (n83) para 9.1.

[88] ibid.

[89] cf *Estrella v Uruguay* Comm No 74/1980 (HRC) para 8.4.

[90] *Lantsova* (n83) 9.2.

[91] *Deidrick v Jamaica* Comm No 619/1995 (HRC) para 9.3.

[92] *Massera* (n86) Comm No R.1/5 (HRC) para 10.

Moreover, Art 7 of the ICCPR includes the protection of the mental integrity of individuals, aiming at prohibiting acts which cause mental suffering.[93] The indefinite detention had a severe impact on the mental health of the detainees and even caused three of them to commit suicide (Comp. 35). Art 7 ICCPR has therefore been breached.

4. Rutasia violates the right to life (Art 6 ICCPR).

Rutasia has a positive obligation to avoid conditions in its detention facilities that would endanger the lives of the detainees. This is implied by the HRC when it holds that '[i]t is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected.'[94]

Inadequate hygiene, food and water have led five Alfurnans to die from dysentery and three committed suicide. Accordingly, the treatment also amounts to a violation of Art 6 ICCPR.

II. The proposed transfer of the detained Alfurnan migrants held in the Woeroma Centre to Saydee violates international law.

1. This Court may decide on the legality of the transfer to Saydee.

The transfer of Alfurnan migrants to Saydee may be addressed by this Court although Saydee is not a party to the proceedings. Firstly, the rule that the Court may not exercise jurisdiction over states which did not give their consent[95] is not relevant because the judgment would not have any binding effects for Saydee. Secondly, it will not be decided whether Saydee

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[93] HRC, 'General Comment 20' (1994) UN Doc HRI/GEN/1/Rev1, paras 2, 5.

[94] *Lantsova* (n83) para 9.2.

[95] *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States)* (Preliminary Question) [1954] ICJ Rep 19, 32.

violates international law but purely whether there is a substantial fear that Alfurnan migrants would face torture or inhuman and degrading treatment. Thirdly, if the *Monetary Gold Doctrine* would bar this claim, *non-refoulement* could *de facto* not be invoked in international courts. However, courts have decided in several instances on *non-refoulement*.[96]

2. Rutasia violates its obligation of *non-refoulement* under customary international law as there is a real risk that Alfurnans would face *torture* in Saydee.

Rutasia has an obligation of *non-refoulement* under customary international law.[97] Art 3(1) United Nations Convention Against Torture (CAT) stipulates the prohibition to 'expel […] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Art 1(1) CAT stipulates that torture includes 'severe pain or suffering, whether physical or mental' which is 'intentionally inflicted on a person'.

The acts of detention facility guards in Saydee amount to torture. The report by the independent body inquiring into the conditions in Camp Sontag attests that female detainees are being sexually abused by the guards (Clar. 10). Sexual abuse violates the essence of human dignity, producing fear, degradation, pain and terror at the time and long lasting effects like psychological trauma. It therefore constitutes torture.[98]

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) define rape 'as a physical invasion of a

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[96] cf *Soering v United Kingdom* App No 14038/1988 (ECtHR); *El-Masri v Macedonia* App No 39630/09 (ECtHR).

[97] UNHCR 'The Principle of *Non-Refoulement* as a Norm of Customary International Law' (31 January 1994) <http://www.unhcr.org/refworld/docid/437b6db64.html> accessed 11 January 2013, para 1; Goodwin-Gill/McAdam (n63) 248; Kälin/Caroni/Heim (n99) MN 31.

[98] cf *Martí de Mejía v Perú* Case No 10.970 (IACtHR) para B(2)(a).

sexual nature, committed on a person under circumstances which are coercive',[99] expressly stating that 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'[100] and that 'like torture rape is a violation of personal dignity'[101].

The Committee Against Torture found sexual abuses to constitute torture because it involves 'infliction of severe pain and suffering perpetrated for a number of impermissible purposes'[102], including intimidation, humiliation and discrimination based on gender.[103] In *L v Switzerland*, it was decided that a removal of a migrant to a country in which there is a risk to be sexually abused by police officials suffices to violate the prohibition of torture.[104] Also the Inter-American Court of Human Rights and the ECtHR have decided that sexual abuse constitute torture.[105]

3. Rutasia violates its obligation of *non-refoulement* under ICCPR as there is a real risk that Alfurnans would face *inhuman and degrading treatment* in Saydee.

This obligation results from the prohibition of torture and inhuman and degrading treatment, codified, *inter alia*, in Art 7 ICCPR. The HRC has clarified that states are prohibited

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[99] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I, 241; *Prosecutor v Delalic and others* (Judgement) ICTY-96-21-T, 173.

[100] *Prosecutor v Akayesu* (n99) 241.

[101] ibid 597.

[102] *L v Switzerland* Comm No 262/2005 (CAT) para 8.10.

[103] ibid.

[104] ibid, para 8.11.

[105] *Martí de Mejía* (n98) para B(2)(a); *Aydin v Turkey*, App No 23178/94 (ECtHR) para 83.

from exposing individuals to 'the danger of torture or cruel, inhuman or degrading treatment or punishment' by way of expulsion.[106]

Even if sexual abuse would not qualify as torture, it clearly is inhuman and degrading treatment. Further, as argued above, unacceptable hygiene conditions and insufficient food in detention centres, present also in Saydee (Comp. 40), amount to cruel and inhumane treatment as stipulated in Art 7 ICCPR.

Saydee is notorious for its human rights violations (Comp. 39,40). In order to determine whether there are substantial grounds for the fear of being subjected to torture, 'patterns of gross, flagrant or mass violations of human rights'[107], should be taken into account.

To conclude, there are substantial grounds for believing that the Alfurnan migrants will be subjected to torture or inhuman and degrading treatment in Saydee, which triggers Rutasia's obligation of *non-refoulement*.

4. The transfer to Saydee would violate Rutasia's obligation not to exercise collective expulsion.

The principle of *non-refoulement* as, *inter alia*, embodied in Arts 7 and 13 ICCPR and Art 3 CAT, necessarily implies the prohibition of mass expulsion, as it requires an individual assessment of each case. The Committee Against Torture, for example, has expressed concern in cases where expulsion took place 'without any examination of the merits of each individual case'.[108] Mass expulsion has been defined as 'any measure of the competent authority

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[106] HRC, 'General Comment 20' (n93) para 9.

[107] CAT [1984] 1465 UNTS 85, Art 3(2).

[108] UN Committee Against Torture 'Consideration of Reports Submitted by States Parties under Art 19 of the Convention (China)' (2008) UN Doc CAT/C/CHN/CO/4, para 26; also UN

compelling aliens as a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien in the group'[109]. The decision to expel migrants to a third state needs to be taken in consideration of the individual situation of each migrant,[110] this has not happened in the case of Alfurnans in Rutasia.

Numerous human rights conventions provide for an explicit prohibition of collective expulsion.[111] Evidence that the principle of collective or mass expulsion constitutes customary international law is provided by the ILC Draft Arts on the Expulsion of Aliens, whose Art 10 prohibits collective expulsion.[112]

Rutasia violates the prohibition of collective expulsion because the proposed transfer concerns a 'large number of persons of the same origin'[113] and 'the asylum procedure had not been completed'[114]. In fact, it has not even commenced.

Committee on the Elimination of Racial Discrimination, 'General Rec. 30, Discrimination against Non-citizens' (2004) UN Doc CERD/C/64/Misc.11/Rev.3, para 26.

[109] *Conka v Belgium* App No 51564/99 (ECtHR) para 59.

[110] cf *Conka* (n109) para 62; also *Institute for Human Rights and Development in Africa v Guinea* Comm No 249/02 (ACHPR) para 44; *Union interafricaine des droits de l'Homme and others v Angola* Comm No 159/96 (ACHPR) para 14; *Rencontre africaine pour la défence des droits de l'Homme (RADDHO) v Zambia* Comm No 71/92 (ACHPR) para 28.

[111] European Convention on Human Rights (1950) (as amended) Protocol No. 4, Art 4; American Convention on Human Rights (1969) Art 22(9); African Charter of Human and Peoples' Rights (1986) Art 12(5); Migrant Workers' Convention (1990), 2220 UNTS 3, Art 22(1); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), Art 25(4); Arab Charter on Human Rights (2004), Art 26(b).

[112] ILC, 'Report of the International Law Commission on the work of its 64th Session' (7 May–1 June and 2 July–3 August 2012) UN Doc A/67/10.

[113] *Conka* (n109) para 61; also *Institute for Human Rights and Development in Africa* (n110) para 69.

[114] ibid.

Further, Rutasia's justification for the transfer – the asbestos in Block B of the Woeroma Centre – ceased to apply. The Nullatree Cove villagers are now housed in an asbestos-free facility. This is not to suggest that a military base is an appropriate housing option for the Alfurnan migrants in the long term – Rutasia is obliged to find less invasive means of housing and tracing the Alfurnan migrants.

The transfer to Saydee would thus violate international law by exposing Alfurnans to torture, human and degrading treatment and would constitute mass expulsion although the official reason for the transfer has disappeared.

D. RUTASIA'S CONDUCT DISENTITLES IT TO ANY RELIEF FROM THIS COURT IN RESPECT OF ITS CLAIMS OVER ALFURNA'S ASSETS, AND IN ANY EVENT RUTASIA'S ACTIONS REGARDING THOSE ASSETS ARE IN VIOLATION OF INTERNATIONAL LAW.

I. Rutasia's conduct disentitles it to any relief from this Court in respect of its claims over Alfurna's assets.

1. Rutasia has not acted in good faith with respect to the loan agreement.

Rutasia did not negotiate the loan agreement in good faith. Good faith is recognised as a general principle of law, requiring that states 'fulfil in good faith the obligations assumed by them'[115], and has been applied in numerous rulings of the ICJ.[116] When negotiating the loan agreement and dealing with any dispute arising thereunder, Alfurna and Rutasia were thus under an obligation 'to do so in good faith, with a genuine intention to achieve a positive result'[117].

Customary international law recognises that sovereign lenders have certain responsibilities, including the prevention of unsustainable debt situations: multiple UN General Assembly resolutions on external debt have stressed the responsibility of creditors to prevent unsustainable debt situations[118] and the importance of efforts of creditors 'to provide flexibility to developing countries affected by natural disasters'[119]. Further, the *UNCTAD Principles on*

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[115] UN Charter, Art 2.

[116] cf *Nuclear Tests Cases (Australia v France)* (Judgment) [1974] ICJ Rep 253, para 46; *Gulf of Maine Case (Canada v United States)* [1984] ICJ Rep 246, para 87.

[117] *Gulf of Maine Case* (n116) para 87; see also Art 31(1) Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331.

[118] UNGA Res 64/191 (12 February 2009) UN Doc A/Res/64/191; 65/144 (4 February 2011) UN Doc A/Res/65/144; 66/189 (14 February 2012) UN Doc A/Res/66/189 para 3.

[119] ibid paras 3, 22.

Promoting Responsible Sovereign Lending and Borrowing[120] are a reflection of this rule of customary international law - this is supported by the fact that more than 60 governments took part in the creation of these principles.[121]

The exceptional scope of the Climate Change Loan, totalling at least 62 % of Alfurna's GDP,[122] shows that Rutasia has not realistically assessed Alfurna's capacity to repay the loan, thereby violating the good faith requirement.

Further, Rutasia acted in bad faith by providing the loan to build seawalls in Alfurna while at the same time contributing to a situation in which these seawalls became obsolete. This is because Rutasia contributed to climate change and thus the submergence of Batri and Engili. Also Rutasia was under an obligation not to inflict damage on other states[123] and adopt measures limiting greenhouse gas emissions.[124]

Rutasia did furthermore not engage in good faith negotiations before seizing the account. Rutasia has not acted in good faith when it seized Alfurna's assets from its central bank account without judicial proceedings, negotiations or a 'cooperative spirit'[125].

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[120] UNCTAD, 'Principles on Promoting Responsible Sovereign Lending and Borrowing (Consolidated Version)' (10 January 2012) <http://unctad.org/meetings/en/Miscellaneous Documents/Principles_Sovereign.pdf> accessed 13 January 2013.

[121] UNCTAD, 'UNCTAD XIII' (Conference Information Site) <http://www.unctad.info/en/Debt-Portal/Events/Our-events/UNCTAD-XIII/> accessed 14 January 2013.

[122] Based on Alfurna's GDP in 2001 (USD 200 million); in 1992, the GDP would have been even less(Comp. 2).

[123] *Trail Smelter* (n33).

[124] UNFCCC Annex I.

[125] UNCTAD (n120) Principle 7.

2. Rutasia was estopped from seizing the assets.

The doctrine of estoppel bars one state from successfully adopting different subsequent conduct on the same issue, thereby leading to the detriment of another.[126] Rutasia could technically have notified the default 16 months earlier (15 October 2010), thus creating a reasonable expectation in Alfurna that in times of the extraordinary emergency Rutasia would continue to delay seizing the assets as long as Alfurna finds itself in a situation of distress. Rutasia was therefore estopped from seizing the assets.

3. Rutasia comes to the Court with unclean hands.

The 'unclean hands doctrine' maintains that a states' involvement in an illegal activity may 'bar the claim'.[127] As shown above, Rutasia committed grave human rights violations of Alfurnan migrants.

Further, when a state is guilty of illegal conduct, it may be deprived of the *locus standi in judicio* for complaining of illegalities on the part of other states which are connected to its own illegal conduct.[128] Because Rutasia itself contributed to the facts that are at the origin of this case, i.e. the submergence of Alfurna,[129] Rutasia is coming to the Court with unclean hands.

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[126] *Temple of Preah Vihear* (Cambodia v Thailand) (Merits) (Dissenting Opinion Judge Spender) [1962] ICJ Rep 101, 143f.; *Argentine-Chile Frontier Case* (1966) 16 RIAA 109, 164; Shaw MN, *International Law* (6th edn, CUP 2008) 102; Cottier T and Müller JP, 'Estoppel', Max Planck Encyclopedia of Public International Law (2012) para 1.

[127] Brownlie I, *Principles of Public International Law*, (7th edn, OUP 2008) 503; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) (Dissenting Opinion Judge Schwebel) [1986] ICJ Rep 259, para 14.

[128] Schwebel S, 'Clean Hands, Principle', Max Planck Encyclopedia of Public International Law (2012) para 4.

[129] Above, claim A(II).

II. Rutasia violated international law by taking the assets because Alfurna's central bank enjoyed immunity.

Sovereign immunity is a general principle of international law and Rutasia is bound to abide by it.[130] A distinction needs to be made between jurisdictional immunity and immunity from enforcement.[131] At least enforcement immunity has not undergone a shift from absolute to restrictive immunity.[132] Even if there was an exception to jurisdictional immunity, such does thus not mean that there is also an exception to enforcement immunity.[133] The seizure of Alfurnan assets violated international law because the central bank was immune.

1. Central banks enjoy immunity.

Central banks enjoy immunity and their assets are not considered as property specifically in use or intended for use by the state for other than government non-commercial purposes.[134]

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[130] *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] <http://www.icj-cij.org/docket/files/143/16883.pdf> accessed 10 January 2013.

[131] cf *Foreign States Immunities Act 1985* [Australia] (AFSIA); *State Immunity Act 1985* [Canada] (CSIA); *State Immunities Ordinance 1981* [Pakistan]; *Foreign Sovereign Immunities Act 1976* [United States] (US FSIA); *State Immunity Act 1978* [United Kingdom] (UK SIA); UNGA, 'Convention on Jurisdictional Immunities of States and their Properties' (2004) UN Doc A/59/508; BVerfGE 46, 342 (1977) (German Federal Constitutional Court).

[132] Stoll PT, 'State Immunity', Max Planck Encyclopedia of Public International Law (2012) para 51.

[133] See proceedings to execute the award in *Sedelmayer v Russia*, *ad hoc*, SCC (Germany-USSR BIT) (Award, 7 July 1998) 316 and *Creighton Limited v Government of the State of Qatar* (1999) 181 F 3d 118 (DCC); cf Blane A, 'Sovereign Immunity As A Bar To The Execution Of International Arbitral Awards' 41 International Law and Politics 469.

[134] Stoll (n132) para 67; Convention on Jurisdictional Immunities Art 21; cf Waibel M, *Sovereign Defaults before International Courts and Tribunals* (CUP 2011) 122.

Although the UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention) is not yet in force, it can serve as a useful framework. It states in Art 21 that 'property of the central bank […] shall not be considered as property specifically in use or intended for use by the state for other than government non-commercial purposes', thus being immune from enforcement. The UK, US and other countries' foreign sovereign immunity acts also expressly provide for immunity of central bank accounts.[135] The US and the UK are especially relevant, because they are frequently the site of enforcement proceedings.

Further evidence on the strength of immunity of central banks is the fact that a suggestion of the Special Rapporteur to change Art 21(1)(c) 'property of the central bank or other monetary authority of the State' by adding 'and used for monetary purposes' was not incorporated in the final text, due to lack of consensus.[136]

2. The default clause in the loan agreement does not constitute an explicit waiver of enforcement immunity concerning central bank assets.

A waiver of enforcement immunity concerning central bank assets needs to be explicit.[137] No such explicit waiver has been made. Moreover, this waiver would only be applicable 'in connection with a proceeding before a court of another State'[138]. Accordingly, the commentary to the ILC draft articles on Jurisdictional Immunities states that 'Article 18 concerns immunity

[135] US FSIA §1611(b)(1); UK SIA 14(4); Fox H, *The Law of State Immunity* (2nd edn, OUP 2008) 469.

[136] Stoll (n132) para 67.

[137] Convention on Jurisdictional Immunities (n134) Art 18.

[138] ibid.

from measures of constraint only to the extent that they are linked to a judicial proceeding'[139]. No such proceeding has taken place in this case. Consequently, immunity cannot be challenged in this regard.

The waiver of enforcement immunity in the loan agreement does not mean that Rutasia can directly take enforcement measures against Alfurnan central bank assets. In the *Noga Arbitration,* a contract between a French company and the Russian Government had contained 'a waiver by the Russian Government of "all right to immunity relative to the execution of the arbitral award rendered against it in connection with the present contract" and "any immunity from suit, from execution or attachment"'.[140] The French court still decided that funds of the Russian central bank were exempt from enforcement.[141]

3. There is no exception based on a commercial purpose.

The UN Convention stipulates that 'in determining whether a contract or transaction is a "commercial transaction" […] reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account'. The money in the ARB account was not used for commercial purposes, as the building of seawalls clearly had national security as its aim, i.e. to protect Batri and Engili from submergence. Next to this past use, the present use matters even more – the money is currently urgently needed to pay, *inter alia*, for the leasing agreement.

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[139] ILC, 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (43rd session, 1991) UN Doc A/46/10, 56.

[140] Blane (n133) 470.

[141] ibid.

In *Borri v Argentina*, the Italian Supreme Court has ruled that sovereign defaults on bonds amount to sovereign acts and is covered by immunity.[142]

A commercial exception is not applicable to the assets taken by Rutasia because they form part of a mixed account, containing funds for commercial as well as for sovereign purposes.[143] In the *LECTO* arbitration, the tribunal decided that if only parts of the funds were used for commercial purposes, the entire account was nevertheless immune from enforcement.[144]

[142] *Borri v Argentina* (Request for a Ruling on Jurisdiction) No 11225 (IT 2005) ILDC 296.

[143] cf Bundesverfassungsgericht [1977] E 46, 342, 364ff; *Leasing West* v *Democratic Republic of Algeria* (1986) 116 ILR 526, 529 (Austrian Supreme Court); *I GmbH v A* (1998) Case No 1 Ob 100/98g (Austrian Supreme Court); *Liberian Eastern Timber Corporation v Liberia* (1987) 26 ILM 647 (ICSID) *(LETCO)*.

[144] *LETCO* (n143); *Blane* (n133) 468.

Prayer for Relief

For the foregoing reasons, Alfurna respectfully asks the Court to adjudge and declare that:

(a) Alfurna is still a state, and accordingly, the Court may exercise jurisdiction over its claims;

(b) Alfurna is entitled to make claims in relation to the migrants now in Rutasia, and Rutasia has failed to process those migrants and accord them status consistent with international law;

(c) Rutasia's treatment of the detained Alfurnan migrants held in the Woeroma Centre, and the proposed transfer to Saydee, violate international law; and

(d) Rutasia's conduct disentitles it to any relief from this Court in respect of its claims over Alfurna's assets, and in any event Rutasia's actions regarding those assets are in violation of international law.

The 2013 Philip C. Jessup International Law Moot Court Competition

Alfurna

vs.

The State of Rutasia

The Case Concerning The Alfurnan Migrants

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