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In the International Court of Justice

At the Peace Palace

The Hague

The Case concerning the Alfurnan migrants

Alfurna
(Applicant)
v

State of Rutasia
(Respondent)

Memorial for the Respondent

2013 Philip C Jessup

International Law Moot Court Competition

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Statement of Jurisdiction

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

Questions Presented

The State of Rutasia respectfully asks the Honourable Court:

A. whether Alfurna is no longer a state under the customary international law standard on statehood, and whether, accordingly, the Court lacks jurisdiction over Alfurna's claims;

and in any event:

B. whether Rutasia has violated international law in its treatment of the migrants from (former) Alfurna and, in any event, whether Alfurna is foreclosed from making claims with respect to those individuals since it is not a state and because those individuals were not continuously Alfurnan nationals and, in any event, because of its failure to take available affirmative steps to protect them;

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

D. whether Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.

Statement of Facts

The submergence of Alfurna's territory

Alfurna's territory had originally consisted of the islands Batri and Engili, which, like Rutasia, are located in the Bay of Singri.

That the islands were at risk of being frequently flooded had become clear within the first decade of Alfurna's settlement. Owing to local factors such as rainfall, riverine input, and evaporation, the Bay has exhibited a net water gain over the past two centuries. However, the erection and maintenance of seawalls that could have protected Alfurna from these vulnerabilities was hampered by budgetary difficulties from the very beginning.

By 1990, many parts of the islands were underwater even at low tide. The erosion of seawalls and routine monsoon activity further accelerated the part-by-part submersion of Alfurna's islands. The situation was aggravated by a major earthquake in mid-2006 and severe storms in 2007, causing damage to the entire Bay of Singri. In 2004, the Alfurnan Climate Emergency Committee (CEC) acknowledged that Alfurna would soon be completely submerged and that it was unable to address this threat. The Alfurnan government sought new territory for relocation – unsuccessfully, as it deemed some territories climatically or topographically inadequate and other territories were too costly.

Batri was rendered uninhabitable and subsequently submerged in 2006. In early 2009, natural disasters also made the remaining Island of Engili uninhabitable, and on 26 December 2011 it was permanently submerged as well.

The humanitarian crisis concerning the migrants left behind by Alfurna

When Batri was rendered uninhabitable, approximately 15,000 residents relocated to Finutafu, the remainder moved to Engili.

When Engili, too, was made uninhabitable, many Alfurnans could be evacuated, but about 3,000 Alfurnans were left behind; roughly half of these were residents of the Nullatree Cove area. As they could not survive on Engili, the remaining 3,000 had to flee the island on overcrowded boats, leaving the entire former territory of Alfurna without any population.

Alfurna's lease of Nasatima Island

Initially, the CEC tried to persuade Finutafu to cede Nasatima Island, a national reserve, to Alfurna. The parties indicated in a draft agreement that, in order to acquire territory as a homeland, Alfurna had to possess Nasatima Island in perpetuity, and have full legislative autonomy.

However, the negotiations eventually collapsed due to Alfurna's insufficient funds. Finutafu only agreed to lease Nasatima Island to Alfurna for 99 years. While Finutafu generally accepted Alfurnan legislative autonomy on Nasatima Island, it retained control over matters of defence, immigration and customs.

The interception and emergency housing of the migrants by Rutasia

In 2009-2010, 2,978 Alfurnans were intercepted by Rutasia's navy and subsequently housed in the Woeroma Immigration and Processing Centre. Rutasia's Ambassador to the UN stressed that the migrants entered Rutasian sovereign waters illegally and that some may have criminal records or may have previously been involved in financing illegal activities; Rutasia is currently reviewing these issues. Nonetheless, Rutasia agreed to separately house the Nullatree Cove villagers in Block A according to their wishes; the other Alfurnans were accommodated in Block B.

Rutasia's Ombudsman issued a report on the Woeroma Centre after three migrants in Block B committed suicide and five died from dysentery in 2011. It concluded that conditions

at Block A were within acceptable standards, but alleged that conditions in Block B relating to space, hygiene, food and water were inadequate; Rutasia denied this.

As soon as an earthquake revealed asbestos-related health risks to the migrants housed in Block A, Rutasia relocated them to vacant barracks at a military base.

The proposed transfer to Saydee

On 10 January 2012, Rutasia declared that it could no longer provide separate facilities for the Nullatree Cove villagers at the Woeroma Centre, and that in light of its financial difficulties, it cannot commit to construct new facilities. Therefore, Rutasia concluded an agreement with the Republic of Saydee to transfer all of the migrants previously housed in Block A to Saydee, where they would be processed and housed in existing facilities.

An observation team reported that several of the 600 people currently at Saydee's camp designated for the migrants showed signs of malnutrition, and some women reported sexual abuse by guards. Two days after the report was issued, Saydee publicly committed to rectifying the situation.

Representing the Alfurnan detainees, ILSA filed a suit in Rutasia's Supreme Court, requesting damages for alleged mistreatment and an emergency stay of the proposed transfer, which was later granted as a temporary measure.

The Climate Change Loan

On 5 June 1992, Alfurna and Rutasia agreed on a loan of USD 125 million, to be applied in the construction and maintenance of seawalls in order to protect Alfurna's territory.

The loan agreement contains a default procedure providing that Rutasia may seize for its own account any collateral or other property of Alfurna subject to its control, without further notice or judicial authorisation, up to the amount of the then-current indebtedness. The 'arbitration clause' was waived to allow for the Court's adjudication of issues arising under

the loan agreement. A 'choice of law clause' provides that disputes are to be resolved according to the applicable laws of Rutasia.

The ARB account

Between 1992 and 1997, the full amount of the loan was disbursed by RICA, a Rutasian government agency, into an account of Alfurna's central bank ARB, held at a Rutasian reserve bank called the Provincial Bank of Lando.

Damages paid regarding a contractual dispute involving repair work completed by the Rutasian private-sector company MCL under the loan agreement, were later transferred into the same account, their use restricted to the original purposes and governed by the procedures of the loan, in agreement with Alfurna. It is unclear whether the account contains any funds other than the monies advanced and damages paid.

Alfurna's debt crisis and the loan restructurings

In January 1999, the International Monetary Fund reported that Alfurna's debt had reached 120% of GDP, and it failed to meet repayment obligations under the loan as well as other agreements.

As it did not qualify for restructuring under Paris Club rules, Alfurna engaged in bilateral negotiations with the lender governments, including Rutasia. Even after these debt restructurings, Alfurna encountered severe debt-servicing problems. Rutasia agreed to renegotiate the loan again. Solely to Alfurna's benefit, the interest rates were lowered twice and two partial debt cancellations reduced the principal to be repaid by 50%, as well as granting an additional grace period to 15 September 2010.

Rutasia's seizure of Alfurna's assets in accordance with the 'default clause' of the loan agreement

In 2005, Alfurna declared a moratorium on all debts to foreign lenders. Accordingly, it did not resume payments under the loan when the renegotiated grace period ended.

On 10 February 2012, RICA issued a default notice, granting Alfurna an additional period of 30 days to remedy the default. When Alfurna did not respond, Rutasia's government declared that the entire loan balance (approximately USD 50 million) was due and payable, and that the government was proceeding to seize Alfurnan property in Rutasia to offset its losses. Consequently, the ARB account was closed and the balance, then approximately USD 25 million, transferred to Rutasia's general consolidated fund.

During a General Assembly meeting, none of the states present commented on the taking of the funds.

Summary of Pleadings

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

Firstly, due to its lack of territory and permanent population, Alfurna does not fulfil the customary international law criteria for statehood as codified in Art 1 Montevideo Convention. Alfurna did not regain its territory by leasing Nasatima Island, and did not regain its permanent population.

Secondly, as Alfurna is no longer sovereign, it does not fulfil the customary requirement of independence.

B. Rutasia has not violated international law in its treatment of the migrants.

Firstly, Alfurna may not exercise diplomatic protection on the migrants' behalf since this is an exclusive right of a person's state of nationality. Even if Alfurna regained its statehood in 2012 and considered the migrants its citizens, it could not invoke diplomatic protection due to the migrants' lack of continuous Alfurnan nationality. In any event, Alfurna is foreclosed from making claims in respect of the migrants because it failed to take affirmative steps to protect them.

Secondly, the migrants are not entitled to refugee protection, because they cannot argue having a well-founded fear of persecution under the Convention relating to the Status of Refugees.

Thirdly, there is no 'duty to process' under international law and, in any event, such duty would have been fulfilled.

C. Rutasia's treatment of the migrants held in the Woeroma Centre does not violate international law, and their proposed transfer to Saydee is legal.

Firstly, Rutasia has not breached its obligations under the International Covenant on Civil and Political Rights: Rutasia has not actively deprived the migrants of their lives and was not responsible for the deaths occurring due to illness and suicide (Art 6); Rutasia did not torture the migrants or employ cruel, inhuman or degrading treatment (Art 7); Rutasia did not breach its obligation to treat the migrants with humanity and dignity (Art 10); Rutasia is not obliged to guarantee the migrants freedom of movement because they are not aliens 'lawfully within the territory' (Art 12); and Rutasia's accommodation of the migrants does not constitute arbitrary detention (Art 9).

Secondly, the proposed transfer of the migrants to Saydee is legal. Under the *Monetary Gold* doctrine, the Court cannot assess the legality of the transfer because it does not have jurisdiction to determine potential violations of international law by Saydee. In any event, Alfurna has failed to establish that the proposed transfer amounts to a violation of Rutasia's obligations under international law: there is no prohibition of mass expulsion of illegal aliens under international law. Moreover, Rutasia does not have an obligation of *non-refoulement* pursuant to the customary prohibition of torture because the migrants are not personally at risk of being tortured in Saydee. Lastly, Rutasia does not have an obligation of *non-refoulement* under Art 7 because Alfurna cannot establish a 'real risk' that the migrants will suffer cruel, inhuman or degrading treatment in Saydee.

D. Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.

Firstly, nothing in Rutasia's conduct disentitles it to relief for its claims over the assets. The Court has jurisdiction to rule upon issues arising under the loan agreement, even

though the latter is governed by Rutasian law. There is no rule of international law governing inter-state lending which would invalidate the loan agreement as negotiated by Alfurna and Rutasia. Rutasia also has not acted in bad faith when concluding and performing the loan agreement. Further, there is no rule of 'unclean hands' in international law, which could disentitle Rutasia from relief. In any event, Rutasia is not responsible for Alfurna's submergence. Lastly, neither the doctrine of estoppel nor the 'arbitration clause' prevented Rutasia's seizure of the assets.

Secondly, not being a state anymore, Alfurna does not enjoy sovereign immunity – the same is true should jurisdiction be assumed on the basis that Alfurna had legal personality *sui generis*. Alternatively, Alfurna has waived immunity from execution, which is indicated by its express consent to enforcement measures and its consent to the 'arbitration clause'. Moreover, the specific Alfurnan assets were not immune because they were for other than government non-commercial purposes and the central bank exception does not apply.

PLEADINGS

A. ALFURNA IS NO LONGER A STATE, AND ACCORDINGLY, THE COURT LACKS JURISDICTION OVER ALFURNA'S CLAIMS.

I. Only states can be parties to cases before the Court

Art 34 of the Court's Statute (Statute)[1] prescribes that only states can be parties to contentious cases before the Court. This provision has always been adhered to.

Only in two proceedings, the Court involved non-state entities. Both proceedings were mere advisory proceedings, governed by Art 66 Statute which may allow the Court more discretion. In both cases, the Court distinguished between established states and non-states by addressing them in different paragraphs.[2] Moreover, the Court linguistically separated 'statements' from 'contributions' as it called the non-state's submissions.[3] Thus, there is no precedent for the equalisation of non-states with states before the Court.

The present case is brought under Art 40(1) Statute.[4] Therefore, Alfurna must be a state for its claim to be admissible.

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[1] Statute [1945] 1 UNTS 993.

[2] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order) [2003] ICJ Rep 428, paras 1, 2, 4; *Accordance with International Law of the Unilateral Declaration of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Order) [2008] ICJ Rep 409, paras 1, 4.

[3] See ibid, paras 3, 6, 8-11, 13.

[4] Joint Notification addressed to the Registrar of the Court [14 September 2012].

II. Alfurna is not a state.

1. The criteria set out in Art 1 Montevideo Convention on the Rights and Duties of States (MC) constitute customary international law (CIL).

Art 1 MC[5] is generally accepted as the catalogue of legal criteria of statehood by both the overwhelming majority of scholars and the international community.[6] Due to its virtually unanimous support, Art 1 MC is a codification of CIL.[7] If its criteria are fulfilled, a state is a 'community which consists of a territory and a population subject to an organized political authority'[8]. This means that the criteria of Art 1 MC are interwoven[9]: for example, a territory must be populated to be territory, and a population must inhabit a territory to be a population.

'[A] state's existence *or non-existence* ha[s] to be established on the basis of universally acknowledged principles of law concerning the constitutive elements of a state'(emphasis added)[10]. Therefore, the criteria of CIL originating from the MC equally apply to a state's birth and extinction.

The temporary separation of government from territory and population has sometimes been regarded by the international community as not endangering statehood. However, this

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[5] MC [1933] 165 LNTS 19.

[6] Passim Crawford J, *The Creation of States in International Law* (2nd edn, OUP 2006) 45f; Shaw MN, *International Law* (6th edn, CUP 2008) 198; Brownlie I, *Principles of Public International Law* (7th edn, OUP 2008) 70; Cox N, 'The acquisition of sovereignty by quasi-states: the case of the Order of Malta' (2002) 6 Mountbatten Journal of Legal Studies 26, 27.

[7] See its employment by the Arbitration Commission of the European Conference on Yugoslavia, Opinion No 1 [11 January 1992] Consideration No 1) a)-b).

[8] ibid.

[9] Brownlie (n 6) 70f.

[10] Arbitration Commission of the European Conference on Yugoslavia, Opinion No 8 [11 January 1992] sec. 1 para 1, endorsing its Opinion No 1.

exception from the general rule is limited to cases of 'government in exile'[11] or 'failed states'[12]. In these cases, the territory was always both inhabit*able* and inhabit*ed* by a population; the reunion of the government with its populated territory always was a possibility,[13] and states were preserved following the principle of *ex injuria non jus oritur*[14] in order not to let unlawfulness (mostly illegitimate armed force)[15] assert itself.[16] A state whose territory is uninhabitable and hence detached from its 'permanent population', or which cannot hope to reunite territory, population and government, or whose loss of territory and/or population is not due to a serious violation of public international law (PIL), therefore does not exist as it does not benefit from the exception. This conclusion is supported by the consensus of states,[17] especially present among those endangered by a rise of sea-level.[18]

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[11] Examples are Belgium, Serbia and Montenegro in World War I; Belgium, Greece, Luxembourg, the Netherlands, Norway, Poland and Yugoslavia in World War II; Haiti, Sierra Leone and Kuwait in the 1990s.

[12] The most widely recognised example is Somalia.

[13] See e.g. the positive estimations of the UN Secretary-General in recent Reports on Somalia (30 August 2011) UN Doc S/2011/549; (31 January 2012) UN Doc S/2012/74; (22 August 2012) UN Doc S/2012/643 as compared to earlier reports on the Situation in Somalia (11 March 1992) UN Doc S/23693; (17 February 1997) S/1997/135, paras 5-15; (19 December 2000) UN Doc S/2000/1211, paras 34-39; (11 October 2001) UN Doc S/2001/963, paras 25f; (27 June 2002) UN Doc S/2002/709, especially paras 9-13.

[14] Endorsed by this Court in another context: *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) (Judgment) [1997] ICJ Rep 7, para 133.

[15] See passim the UN Security Council's resolutions concerning Kuwait (UN Docs S/RES/660-662, 644, 666-667, 669, 670, 677-678 (1990)), Sierra Leone (UN Docs S/RES/1132 (1997); S/RES/1156, 1162, 1171, 1181 (1998); S/RES/1220, 1231, 1245, 1260, 1270 (1999)) and Somalia (UN Docs S/RES/733, 746, 767 (1992)); and the Reports of the Secretary-General on the Situation in Somalia (n 13) and on Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations (22 September 1998) UN Doc S/1998/883, especially paras 11-14.

[16] See Crawford (n 6) 63.

[17] UNHCR, 'Climate Change and Statelessness: An Overview', submission to the 6th session of

That the Order of Malta despite a lack of territory is treated as a sovereign entity by some states[19] does not contradict this finding because the Order is not treated as a state[20] but as a sovereign entity *sui generis*.[21] Moreover, nothing considered *sui generis* can be applied to other cases because it is an anomaly. The same arguments apply *mutatis mutandis* to the International Committee of the Red Cross and the Holy See[22]. Even if the Court came to the conclusion that Alfurna could claim such sub-state sovereignty, it could not adjudicate this issue due to the restriction under Art 34 Statue.

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the Ad Hoc Working Group on Long-Term Cooperative Action under the UN Framework Convention on Climate Change 1-12 June 2009 in Bonn, Germany (15 May 2009).

[18] See these states' submissions to the UNGA's 64th session: 'Liliendaal Declaration on Climate Change and Development', adopted at the 30th Meeting of the Conference of the Caribbean Community (4 July 2009) in Liliendaal, Guyana, (by the Caribbean Community, consisting of fourteen states), preamble para 3; 'Security Implications of Climate Change in Kiribati', 8; 'Tuvalu's Views on the Possible Security Implications of Climate Change', para III; 'Views on the Possible Security Implications of Climate Change' (statement of the Federated States of Micronesia), 8; 'Nauru Country Report. Views on the Possible Security Implications of Climate Change', 5.

[19] Lindblom A, *Non-Governmental Organisations in International Law* (CUP 2005) 71.

[20] Cox (n 6) 42.

[21] Lindblom (n 19) 63.

[22] Which is intertwined with a state, Vatican City, to support its claim to sovereignty; Treaty between the Holy See and Italy [1929] 24 ILM 1589, Art 2; *Fundamental law of Vatican City 2000*, Art 2.

2. Alfurna does not fulfil the joint criteria of Art 1 MC due to its lack of territory and permanent population.

a) Alfurna lost its territory.

In early 2009, natural disasters rendered Engili uninhabitable, Batri already being uninhabitable since 2006 (Compromis 26, 32). Since then, it was impossible for a population to be permanently attached to the islands. Even the most rooted residents of Engili had to flee (Compromis 33). Hence, no Alfurnan territory existed anymore.

If one regarded Engili as territory even after becoming uninhabitable, Alfurna definitively lost its territory when the island was submerged on 26 December 2011 (Compromis 44) and hence not even constituted *terra*, let alone territory.

That states were still recognised in cases of 'failed states' or 'government in exile' has no bearing on the present case. The Alfurnan territory is no longer populated and a return of population and government to it is impossible. Furthermore, Alfurna's loss of territory and population did not result from a breach of PIL, let alone unlawful violence. The commitments listed in Art 4(1), (2) UN Framework Convention on Climate Change (UNFCCC)[23] are dependent on each party's 'specific' and 'individual' circumstances respectively, allowing the states wide discretion. There is no indication that Rutasia acted beyond its discretion and thus violated the UNFCCC. No evidence has been brought forth to establish a breach of the Kyoto Protocol to the UNFCCC[24] by Rutasia or any other state.

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[23] UNFCCC [1992] 1771 UNTS 107.

[24] Kyoto Protocol to the United Nations Framework Convention on Climate Change [1997] 2303 UNTS 148.

Even if the Court found a breach of the UNFCCC or the Kyoto Protocol, this breach is not the cause of Alfurna's loss of territory and population: due to lack of evidence, it is completely unclear to which extent unlawful anthropogenic carbon emissions, rather than earthquakes or the primordial climatic conditions in the Bay of Singri, caused the demise of Batri and Engili.

b) Alfurna lost its permanent population.

The Alfurnans are dispersed (Compromis 25, 26, 32, 33). Nobody inhabits Alfurnan territory anymore because it does not exist. Consequently, Alfurna lost its permanent population.

c) Alfurna did not regain its territory through the lease of 9 March 2012 concerning Nasatima Island.

By leasing Nasatima Island, Alfurna did not regain territory.

Firstly, a lease could not have provided Alfurna with sovereign control over Nasatima Island. A lease does not provide the lessee state with sovereignty over the leased territory, but only with limited autonomy – ultimate sovereignty is retained by the lessor state.[25] This means e.g. that the lessee has to consult with the lessor before transferring the rights of the lease to another state, like the Russian Empire consulted the People's Republic of China (China) before

[25] See Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations [1903] <http://avalon.law.yale.edu/20th_century/dip_cuba002.asp> accessed 13 January 2013, Art III; On Basic Principles and Terms of the Utilization of the *Baikonur* Cosmodrome. Agreement between the Russian Federation and the Republic of Kazakhstan [1994], 30 Journal of Space Law 2004, 26, Art 3.

transferring the lease of Chinese territories to the Empire of Japan in 1905.[26] Moreover, upon the termination of such leases, territories have always been reverted to the ultimate sovereigns,[27] indicating the temporary nature of leases. Of further significance is the wording used when such agreements were explicitly terminated (in contrast to 'simple' expiry): e.g., the United Kingdom and China jointly declared that the latter had 'decided to resume'[28] control over Hong Kong – so it was the lessor's decision when the lease ended. That Alfurna was conscious of its inability to acquire sovereignty over Nasatima Island through a lease is demonstrated by its preference of cession over lease: only if 'possessed in perpetuity' (Compromis 31), the draft cession treaty suggested, the island could be considered a new homeland.

Secondly, even if sovereign control could be transferred via lease, the present lease did not as it is not valid under PIL. Not being a state due to lack of territory and permanent population after early 2009 (26 December 2011 at the latest), Alfurna was not a subject of PIL and could therefore not conclude a valid international treaty with Finutafu. Finutafu is consequently not bound by the agreement. Therefore, Alfurna cannot exercise sovereign, i.e. exclusive, control over the leased territory.

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[26] See Treaty and Additional Agreement between Japan and China relating to Manchuria [1905] 1 The American Journal of International Law 1910, Supplement: Official Documents, 307-312, Art I; Treaty of Peace between Japan and Russia [1905] 199 Parry's Consolidated TS 144, Arts V (2), VI.

[27] Examples are the 1999 restoration of the Panama Canal Zone following the Panama Canal Treaty [1977] 1161 UNTS 177 which terminated the perpetual lease concluded in 1903, and the recuperation by China of its leased territories following the 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] United Kingdom Treaty Series No 26 (1985): Cmnd 95 43.

[28] ibid, para 1.

Thirdly, even if the present lease was valid and if leases could provide sovereign control over territory, this specific lease still did not. While allowing the Alfurnan government to generally regulate matters on Nasatima Island autonomously, Finutafu retains legislative authority with regard to matters of defence, customs and immigration (Clarification 4) – very core matters of sovereignty. Alfurna is therefore unable to control how the alleged new territory shall be defended or which goods and people may enter it under which conditions. This makes it impossible to regard Alfurna's hold on Nasatima Island as sovereign control.

d) Alfurna did not regain a permanent population.

Nasatima Island, prior to the lease a natural reserve (Compromis 29), is not sufficiently populated to act as substrate for a state. That governmental structures were *partly* relocated to the island (Clarification 4) only suggests that somebody *works* on the island, but leaves it unclear whether these workers indeed *populate* Nasatima Island or are possibly commuters. Moreover, since an exchange of staff would automatically mean a change of population, one cannot consider this alleged population 'permanent'.[29]

[29] Similarly, the Permanent Court of International Justice (PCIJ) decided that periodical commercial operations on a territory are insufficient for a territorial claim, *Legal Status of Eastern Greenland* (*Denmark v Norway*) PCIJ Rep Series A/B No 53, 35.

3. CIL further requires that states be internationally sovereign, i.e. independent from other states.

Sovereignty is already required by the Montevideo criteria as far as it pertains to a state's territory and population[30]. Beyond this, PIL requires sovereignty in the relation with other states, i.e. independence.[31] This is made clear by Art 2(1) Charter on the United Nations (UNC)[32], which provides that the international community is based on the principle of sovereign equality.

States have at times delegated competences to other states or *supra*-state entities without their independence being questioned. However, this only pertains to entities that *had achieved* independence and were *then* able to transfer competences.[33] A proto-state, on the other hand, cannot transfer competences because this *Kompetenz-Kompetenz* is a feature of statehood.

CIL further requires that a non-state entity must show more than complete internal control to be recognised as independent: the Cook Islands, although granted 'full internal self-government'[34], were not independent.[35] Examples abound as regards Overseas territories.[36]

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[30] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 14, para 202.

[31] Shaw (n 6) 202; Crawford (n 6) 62; *Island of Palmas case* (*Netherlands, USA*) 2 RIAA 829, 838.

[32] UNC [1945] 1 UNTS XVI.

[33] See, e.g., member states of the European Union.

[34] UNGA Res 2064 (XX), UN Doc A/RES/2064(XX) para 5.

[35] See ibid, para 6. This took almost thirty years of developing international practice and New Zealand's consent, Repertory of Practice of United Nations Organs Supplement No 8, Volume VI, Art 102 paras 10f.

[36] Tokelau (see Joint Statement of the Principles of Partnership between Tokelau and New Zealand [2003] PITS 7); The Turks and Caicos Islands (see UNGA Res 64/104, para X – UN Doc A/RES/104 A-B), Anguilla (ibid, II), Bermuda (ibid, III No 1), British Virgin Islands (ibid, IV para 4), Guam (ibid, VI paras 2ff, No 1), Montserrat (ibid, VII No 2) all are to various degrees internally autonomous, but not independent; The Isle of Man and the Channel Islands have their

Similarly, many agreements between states and indigenous 'nations' provided these entities with autonomy but not with independence.[37]

4. Alfurna does not fulfil the criterion of independence

The relationship between Alfurna and Finutafu cannot be conceived as one between independent states but rather resembles that between states and indigenous 'nations' or Overseas territories. Like the latter, Alfurna is a non-state which was granted a certain degree of autonomy. This does not suffice for independence. As explained above, Finutafu did not grant Alfurna full sovereign control and, in any event, is not bound to respect any autonomy granted to Alfurna.

That consolidated states may transfer some of their competences has no bearing on the present case: Alfurna could not transfer any of its competences since it lost them together with its statehood in 2009. Alfurna could not transfer competences because it was not a state and it did not become a state because it did not receive a comprehensive set of competences. This is underscored by the lack of any transfer agreement.

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own 'national identity' without being 'full subjects of international law'(Anderson DH, 'Isle of Man and Channel Islands' The Max Planck Encyclopaedia of Public International Law (onl edn) <http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1266> accessed 8 January 2013 MN 13).

[37] See the description by the United States Supreme Court, *Cherokee Nation v Georgia* 30 U.S. (5 Peters) 1 (1831); *Johnson & Graham's Lessee v M'Intosh* 21 U.S. (8 Wheaton) 543 (1823); *Samuel A. Worcester v Georgia* 31 U.S. (6 Peters) 515 (1832); see also the Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada [1993] <http://www.tunngavik.com/documents/publications/1993-00-00-Nunavut-Land-Claims-Agreement-English.pdf>, the Inuvialuit Final Agreement [1984] <http://www.eco.gov.yk.ca/pdf/wesar_e.pdf> and the James Bay and Northern Quebec Agreement [1975] <http://www.gcc.ca/pdf/LEG000000006.pdf> all accessed 13 January 2013.

B. RUTASIA HAS NOT VIOLATED INTERNATIONAL LAW IN ITS TREATMENT OF THE MIGRANTS FROM (FORMER) ALFURNA AND, IN ANY EVENT, ALFURNA IS FORECLOSED FROM MAKING CLAIMS WITH RESPECT TO THOSE INDIVIDUALS BECAUSE OF ITS FAILURE TO TAKE AVAILABLE AFFIRMATIVE STEPS TO PROTECT THEM.

I. Even if there had been a violation of the migrants' rights, Alfurna would not have the right to make claims on the migrants' behalf.

1. Alfurna may not exercise diplomatic protection since this is the exclusive right of a person's state of nationality and Alfurna is not a state nor are the migrants Alfurnan nationals.

'[D]iplomatic protection consists of the invocation *by a State* […] of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a […] person *that is a national of the former State*'(emphases added)[38]. This standard is embodied in the Draft Articles on Diplomatic Protection (DADP) by the International Law Commission (ILC),[39] signifying its nature as a rule of CIL.

Therefore, even if the Court found that Alfurna is a sovereign entity upon whose claims it can adjudicate, this entity would have no right to exercise diplomatic protection on the migrants' behalf. This is because CIL reserves this right for states, and saying that an entity 'is an international person […] is not the same thing as saying that it is a State […] or that its legal personality and rights and duties are the same as those of a state'[40].

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[38] *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*) (Preliminary Objections) [2007] ICJ Rep 582, para 39, quoting ILC, 'Draft Articles on Diplomatic Protection' (2006) UN Doc A/61/10, Art 1; see also *The Panevezys-Saldutiskis Railway Case* (*Estonia v Lithuania*) PCIJ Rep Series A/B No 76, para 65.

[39] ILC (n 38) Arts 1, 2, 3(1).

[40] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion)

As explained above, Alfurna has not been a state since 2009. Therefore, the migrants are no longer Alfurnan nationals. Consequently, Alfurna is not allowed to invoke the migrants' rights.

The migrants are not 'considered as a national by any State'[41], i.e. they are stateless. Art 8 DADP is inapplicable since it does not represent CIL.[42] Even if it were applicable, it only allows states to exercise diplomatic protection for persons on their territory, Art 8(1). Alfurna, however, tries to exercise diplomatic protection for stateless persons on the territory of another state, Rutasia, and thus fails to meet the requirements.

2. Even if Alfurna regained its statehood in 2012 and considered the migrants its citizens, it would still be barred from invoking diplomatic protection due to the lack of continuous nationality.

CIL, embodied in DADP Art 5(1), requires that persons must continuously be nationals of the protecting state from the date of injury to the date of the official presentation of the claim.[43] If Alfurna lost and then regained its statehood, the migrants were not continuously

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[1949] ICJ Rep 174, para 9.

[41] Convention Relating to the Status of Stateless Persons [1954] 360 UNTS 117, (CRSSP) Art 1(1).

[42] ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) UN Doc A/61/10, Art 8 commentary (2); ILC (ed) and Special Rapporteur Dugard J, 'Seventh report on diplomatic protection' (7 March 2006) UN Doc A/CN.4/567, para 50.

[43] See *Kren Claim*, United States, International Claims Commission 1951-1954, 20 ILR 233; *Stevenson* (1903) IX RIAA 385; see further examples set forth by the Dugard J, Special Rapporteur, on the ILC's 2680th Meeting [25 May 2001] UN Doc A/CN.4/506 and Add.1, A/CN.4/513 sec. B, A/CN.4/514, para 3.

nationals of Alfurna. Therefore, Alfurna could not invoke diplomatic protection on the migrants' behalf.

3. Even if Alfurna was a state and the migrants still Alfurnan nationals, Alfurna is foreclosed from invoking diplomatic protection on their behalf because it abandoned them in 2009.

PIL prohibits a state from successfully adopting contradictory behaviour.[44]

Alfurna must have known that its situation was untenable since 1990, when much of its territory was submerged even at low tide and seawalls eroded (Compromis 7). Alfurna's own Climate Emergency Committee (CEC), the establishment of which alone signifies Alfurna's knowledge of its critical situation, found in 2004 that Alfurna could not address the threat of the approaching total submergence, and recommended relocation of its inhabitants (Compromis 21). However, the Alfurnan government did not take adequate action. Many territories available for relocation were rejected due to superficial reasons like uncomfortable climatic or topological conditions (Compromis 26). No full relocation was made possible prior to the submergence, which would have allowed the Alfurnans to save much of their property. When Engili was eventually submerged, about 3,000 Alfurnans were left behind (Compromis 32). They had to rescue themselves onto overcrowded boats before Rutasia rescued them. This irresponsible behaviour by Alfurna may have cost an unknown number of lives[45] and has placed a considerable burden on Rutasia that now provides for the migrants' livelihoods.

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[44] *Case Concerning the Tem*ple *of Preah Vihear* (*Cambodia v Thailand*) (Merits) [1962] ICJ Rep 6, 30; *Argentine-Chile Frontier Case* [1966] 16 RIAA 109, 164.

[45] The amount of casualties remains unclear, as one only knows that 2,978 migrants arrived in Rutasia, and not how many started from Alfurna – only 'approximately 3,000' (Compromis 32).

Since Alfurna has so forsaken these people, it contradicts itself by claiming to protect them from the state that came to their rescue.

II. The migrants are not refugees and therefore not entitled to refugee protection.

1. The standard embodied in the Convention Relating to the Status of Refugees (CRSR) is the only available and reliable standard concerning refugee status in the scope of Art 38 Statute of the Court.

Both Rutasia and Alfurna have ratified the CRSR[46] and the Protocol to it[47] (Compromis 54), which are therefore binding law between them to be considered by the Court according to Art 38(1)(a) Statute. Furthermore, Arts 1A(2), 33 CRSR represent CIL in the sense of Art 38(1)b Statute.[48]

2. The migrants cannot argue having a well-founded fear of persecution due to the reasons stipulated in Art 1A(2) CRSR.

a) Natural disasters do not constitute persecution.

Art 1A(2) CRSR requires that persecution occurs 'for reasons of' the enumerated factors, meaning that a person has to be directly targeted for belonging to a particular 'race, religion, nationality, […] social group or political opinion'.[49]

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[46] CRSR [1951] 189 UNTS 137.

[47] Protocol to the CRSR [1967] 606 UNTS 267.

[48] Goodwin-Gill GS, McAdam J, *The Refugee in International Law* (OUP 2007) 354.

[49] Zimmermann A, Mahler C, 'Article 1 A, para 2' in Zimmermann A (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) MN 322.

The natural disasters that displaced the Alfurnans do not operate discriminatorily. From the time of the first Alfurnan settlements onwards, monsoons, earthquakes and tsunamis hit the whole Bay of Singri (Compromis 5). And even if only Alfurnans had been affected, this was not 'for [reason] of' being Alfurnan – it would have made no difference had they been foreigners.

Moreover, 'universally understood is that persecution embraces […] serious violations of human rights'[50]. Human rights are rights which people enjoy *vis-à-vis* states[51] and other people, which is why 'persecution is always conducted by one or more individuals'[52]. Nature, however, is neither a state nor an individual and thus not an agent of persecution. Consequently, the effects of natural disasters are not persecution.

This conclusion is overwhelmingly supported by scholarly opinion[53] and state practice – courts and authorities from all over the world, especially of those countries most affected, have denied refugee protection to persons who migrated for environmental reasons.[54]

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[50] UNHCR, 'Agents of Persecution – UNHCR Position' (14 March 1995) para 3.

[51] Cf International Covenant on Civil and Political Rights [1966] 999 UNTS 171, preamble para 5.

[52] Zimmermann, Mahler (n 49) 265.

[53] McAdam J, *Climate Change, Forced Migration and International Law* (OUP 2012) 43; Zimmermann, Mahler (n 49) 560ff; DeWitte C, 'At the Water's Edge: Legal Protections and Funding for a new Generation of Climate Change Refugees' (2010) 16 Ocean & Coastal L. J. 211, 219; Kibreab G, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) 20 Fordham Envtl. L. Rev. 357, 385; Atapattu S, 'Climate Change, Human Rights, and Forced Migration: Implications for International Law (2009-2010) 27 Wis. Int'l L.J. 607, 617.

[54] See passim in Canada: *Attorney General v Ward* [1993] 2 SCR 689, 732; in the United Kingdom *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 499-500 (Lord Hope); New Zealand: Refugee Appeal No 72719/2001, RSAA (17 September 2001); Refugee Appeal No 72313/2000, RSAA (19 October 2000); Australia: *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4.

b) Rutasia did not persecute the Alfurnans.

Rutasia has never engaged in persecution of Alfurnans. The climate phenomena *per se* cannot be regarded as persecution. In any event, Alfurna cannot establish any legal responsibility by Rutasia for climate change, as there is no sufficient causal link between Rutasia's conduct and the sea-level rise contributing to Alfurna's submergence.

Multiple factors unrelated to both climate change and Rutasia have contributed to the net water gain in the Bay of Singri, and thus led to the submersion of Engili. The climatic events cannot be attributed to Rutasia either, since only the accumulated effects of all carbon-emitters have aggravated the situation. Individual state responsibility therefore cannot be established.[55] Further, Alfurna itself ignored early warning signs and failed to allocate sufficient funds for the erection and maintenance of seawalls (Compromis 6), thereby contributing to its inundation.

Without a causal chain, the assumption of persecution by Rutasia is without any support.

3. There is no 'duty to process' under the CRSR and even if there was, it was not violated in the present case.

The CRSR has no provision containing a duty to process. Considering the reluctance of states to admit refugees and the tendency to interpret CRSR-provisions restrictively, it cannot be assumed that states implicitly introduced a duty to process.

Even if there was such a duty, it could only come into effect once asylum has been applied for, of which there is no evidence. Moreover, a duty to process even persons that are

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[55] Cf Tomuschat C, 'Global Warming and State Responsibility' in Hestermeyer H and others, *Law of the Sea in Dialogue* (Springer 2011), 3, 17, 19f, 26; Tol RSJ and Verheyen R, 'State responsibility and compensation for climate change damages – a legal and economic assessment' 32 Energy Policy 1109, 1113.

obviously not refugees – like the migrants in this case – would be an inappropriate burden on states.

In any event, the processing of the Alfurnan migrants is on-going, which is why the migrants were housed in an 'Immigration *Processing* […] Centre' (Compromis 33, emphasis added). Any outstanding processing will be performed by Saydee (Compromis 38).

C. 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.

I. Rutasia's treatment of the migrants does not violate international law.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[56] does not contain binding obligations, but State Parties enjoy discretion in 'achieving progressively the full realization of the rights recognised'[57].

Rutasia's obligations under the International Covenant on Civil and Political Rights (ICCPR) are determined by giving the provisions their 'ordinary meaning'[58].

1. Rutasia has not breached Art 6 ICCPR because it has not actively deprived the migrants of their lives and was not responsible for the deaths occurring due to illness and suicide.

Under Art 6 ICCPR, states have a negative duty not to kill and a positive duty to ensure that people do not die in state custody.[59]

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[56] ICESCR [1966] 993 UNTS 3.

[57] ICESCR 56) Art 2(1); Shaw (n 6) 308; Riedel E, 'International Covenant on Economic, Social and Cultural Rights (1966)' Max Planck Encyclopedia of Public International Law (2012), para 8.

[58] Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331, Art 31(1).

[59] Cf *Barbato v Uruguay*, Human Rights Committee (HRC), Comm No 84/1981, para 9.2; *Lantsova v Russian Federation*, HRC, Comm No 763/1997, para 9.2; Joseph S, Schultz J and Castan M, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (2nd edn, OUP 2004) 182, para 8.41.

Alfurna does not claim that Rutasian authorities actively killed any migrants. Neither can it establish Rutasia's liability for an omission leading to a deprivation of their lives. The description of the conditions in Woeroma Centre is inaccurate (Compromis 36). In any event, Alfurna cannot prove a causal link between the alleged conditions and the instances of dysentery; and the suicides were unforeseeable.

Rutasia has therefore not breached Art 6 ICCPR.

2. Rutasia has not violated Art 7 ICCPR because it did not torture the migrants or employ cruel, inhuman or degrading treatment.

Even the 'weakest' possible violation, degrading treatment,[60] requires some infliction of physical or mental suffering by an official.[61] Accordingly, insufficient medical access was only found to violate Art 7 ICCPR where prison personnel itself had inflicted the injuries demanding treatment. [62]

Since there is no evidence of any maltreatment by Rutasian authorities, Art 7 ICCPR was not breached.

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[60] Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel 1993) 133.

[61] Cf *Voulanne v Finland*, HRC, Comm No 265/1987, para 9.2; HRC, 'General Comment 20', UN Doc HRI/GEN/1/Rev.1 (1994) para 2.

[62] *Bailey v Jamaica*, HRC, Comm No 334/1988, para 9.3.

3. Rutasia has not breached its obligation under Art 10 ICCPR to treat the migrants with humanity and dignity.

Art 10 ICCPR requires states to guarantee detention standards respecting the humanity and dignity of detainees.[63] No additional obligations arise out of the non-binding UN Standard Minimum Rules for the Treatment of Prisoners (Standard Rules).[64]

Even if conditions at the Woeroma Centre were as reported, they are not comparable to circumstances found in violation of Art 10 ICCPR: the *prison* in *Griffin v Spain*, for example, had '30 persons per cell', was 'infested with rats, lice, cockroaches and diseases' and had 'human faeces all over the floor […] sea water for showers and often for drink as well; urinesoaked blankets and mattresses to sleep on'[65]. In addition to malnutrition, the author in *Schweizer v Uruguay* was subjected to solitary confinement, constant harassment and persecution by guards and arbitrary punishment.[66]

In contrast, Rutasia has voluntarily housed the migrants – respecting the Nullatree Cove villagers' request for separate accommodation – and acted swiftly in preventing any harm to them when asbestos-related health risks became apparent (Compromis 33f; Clarification 5).

Rutasia has thus not breached Art 10 ICCPR.

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[63] Joseph and others (n 59), 275, para 9.132.

[64] Standard Rules, UN Doc E/5988 (1977) para 1.

[65] HRC, Comm No 493/1992, para 3.1.

[66] HRC, Comm No 66/1980, paras 11, 19; see also *Larrosa Bequio v Uruguay*, HRC, Comm No 88/1981, para 12; *Lluberas v Uruguay*, HRC, Comm No 123/1982, para 10.

4. Because the migrants are not aliens 'lawfully within the territory', Rutasia is not obligated to guarantee them freedom of movement under Art 12 ICCPR.

States may freely decide which aliens to allow entry[67] and set their domestic conditions of 'lawfulness' accordingly.[68] Rutasia did not grant its consent prior to the entering of the migrants' boats into its territorial waters (Compromis 33) and has not done so retrospectively. The migrants are therefore unlawfully on Rutasia's territory, which renders Art 12 ICCPR inapplicable.

5. Rutasia's accommodation of the migrants does not constitute arbitrary detention under Art 9 ICCPR.

Art 9(1) ICCPR provides that any detention must be based on law and must not be arbitrary. The housing of the migrants complies with these requirements.

Firstly, the fact that the migrants are brought to an 'Immigration Processing and Detention Centre' indicates that their accommodation follows a procedure under Rutasian domestic law in accordance with the legality requirement.

Secondly, the migrants are not detained arbitrarily. State practice supports the detention of non-citizens due to illegal entry[69] or for reasons of national security,[70] and even the Human

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[67] Nowak (n 60) 202.

[68] HRC, 'General Comment 15', UN Doc HRI/GEN/1/Rev.6 (2003), para 9.

[69] Cf *Migration Act 1958* (as amended 2012) [Australia] (Cth) (AMA) Section 178(1); *Aliens Act 1980* [Belgium] (BAA) Art. 74(6); *Law for Foreigners in the Republic of Bulgaria 1998* (as amended 2007) [Bulgaria] Art 41(1); *Aliens and Immigration Law 1959* (as amended 2001) [Cyprus] Art 13(1)(d); *Immigration Act 1999* [Ireland] Section 5; *Consolidated Immigration Act 286/1998* (as amended 2011) [Italy] Art 14(1); *Aliens Law 2003* [Poland] Art 102(1)(3); *Immigration Control and Refugee Recognition Act 1951* [Japan] Arts 39(1), 24(i), 3(1)(i); *Organic Law 4/2000* [Spain] Art 61(1)(d); *Law on the Legal Status of Foreigners and*

Rights Committee (HRC) could not 'find any support for the contention that there is a rule of CIL which would render all such detention arbitrary'[71].

Moreover, factors justifying the detention[72] exist: the mass influx of *illegal* migrants – some of whom may have had criminal records or been involved in financing illegal activities (Compromis 50) – compelled Rutasia to confine them and prevent them from absconding, while reviewing potential risks to its national security, public order, health and morals.

The length of the migrants' stay does not make it arbitrary. Rutasia has no interest in housing the migrants, at its own cost, for longer than necessary. The Court may also take into account that classifying the migrants' emergency housing as 'arbitrary detention' could discourage states from rescuing migrants in distress at sea.

Art 9(4) ICCPR does not stipulate an *ex officio* duty to review every detention.[73] As evidenced by the Rutasian Supreme Court's judgment and temporary measures issued (Compromis 43, 53), the migrants could challenge the lawfulness of their 'detention'.

Rutasia has therefore complied with Art 9 ICCPR.

Stateless Persons 1994 (as amended 2007) [Ukraine] Art 30(4); *Illegal Immigration Reform & Immigrant Responsibility Act 1996* [United States] Sections 301-303.

[70] Cf AMA, Section 176; BAA, Art 74(6); Law 3386/2005 on the Entry, Residence and Social Integration of third-country Nationals on Greek Territory [Greece] Art 76.

[71] *A v Australia*, HRC, Comm No 560/1993, para 9.4.

[72] ibid.

[73] *Stephens v Jamaica*, HRC, Comm No 373/1989, para 11.46.

II. The proposed transfer of the migrants to Saydee is legal.

1. Under the *Monetary Gold* doctrine, the Court cannot assess the legality of the transfer because it does not have jurisdiction to determine potential violations of international law by Saydee.

The *Monetary Gold* doctrine negates jurisdiction where this would violate the 'well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent'[74].

Saydee is not party to the proceedings. It has not accepted the Court's jurisdiction over potential violations of PIL resulting from conditions in its detention facilities, which the adjudication of Alfurna's claim would necessarily involve. Without Saydee's consent, the Court therefore cannot assess the legality of the transfer.

2. In any event, Alfurna has failed to establish that the transfer would amount to a violation of Rutasia's obligations under international law.

a) There is no prohibition of mass expulsion of *illegal* aliens under international law.

Art 13 ICCPR is not applicable to the migrants who *illegally* entered Rutasia. Because the illegality is not in dispute, the protection of Art 13 ICCPR cannot be extended under the HRC's General Comment 15.[75] Further, the migrants cannot invoke the so-called Migrant Workers' Convention[76] because Alfurna and Rutasia are not parties to it.

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

[75] HRC (n 70).

[76] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [1990] 2220 UNTS 3, Art 83.

Rutasia is also not party to the *regional* human rights conventions prohibiting collective transfers of *illegal* aliens, e.g. the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR)[77] or the African Charter on Human and Peoples' Rights (AChHPR)[78]. Furthermore, given that the recent ASEAN 'Human Rights Declaration' contains no prohibition of mass expulsion,[79] Alfurna cannot establish CIL to that effect.

b) Rutasia does not have an obligation of *non-refoulement* under the customary prohibition of torture because the migrants are not personally at risk of being tortured in Saydee.

Alfurna and Rutasia are not parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[80]; however, its central provisions reflect CIL[81], which Rutasia acknowledges. Under Art 1 CAT, torture requires the presence of four elements: (1) severity of the pain or suffering inflicted; (2) intentional infliction; (3) particular purpose of the infliction; and (4) infliction by or with consent of an official person. The conditions described by the observation team (Clarification 10) do not meet these criteria.

Firstly, the alleged instances of malnutrition and sexual abuse by guards, even if true, are not of the 'exceptional severity' required in previous findings of torture: applicants being

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[77] ECHR [1953] 213 UNTS 222, Art 4 Protocol No 4.

[78] AChHPR [1981] 21 ILM 58, Art 12(5).

[79] Association of Southeast Asian Nations (2012) <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration> accessed 7 January 2013.

[80] CAT [1984] 1465 UNTS 85.

[81] *Prosecutor v Furundzija*, International Criminal Tribunal for former Yugoslavia (ICTY), Case No IT-95-17/1-T (10 December 1998) para 153; Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law: Volume I Rules* (CUP 2005) 315.

stripped and hanged,[82] severely beaten and urinated on,[83] beaten, kicked and repeatedly assaulted with highly pressurized freezing cold water[84] or beaten and raped[85]. Cases involving rape must further be distinguished because the report alleges sexual abuse, not rape.

Secondly, there is no evidence that the alleged maltreatment was *intentionally* inflicted for a *contemptible* purpose. Rather, it presumably resulted from individual criminal behaviour. A specific intention was, however, essential where torture was found on the basis of sexual violence. In *V.L. v Switzerland*, for example, prison officers *raped* the author 'for a number of impermissible purposes, including interrogation'[86] concerning the whereabouts of her husband[87]. In *Prosecutor v Akayesu*, *rape* was committed as part of 'a widespread and systematic attack against the civilian ethnic population'[88] in times of war.

In any event, 'grounds must exist to show that the individual concerned would be personally at risk'[89] – being a member of a group generally persecuted is insufficient.[90] The

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[82] *Aksoy v Turkey*, European Court of Human Rights (ECtHR), App No 21987/93, paras 40, 61, 64.

[83] *Selmouni v France*, ECtHR, App No 25803/94, paras 92, 102-105.

[84] *Elci and others v Turkey*, ECtHR, App Nos 23145/93, 25091/94, paras 640f, 646.

[85] *Aydin v Turkey*, ECtHR, App No 23178/94, paras 73, 80-86, 88.

[86] Committee against Torture (CAT), Comm No 262/2005, para 8.10.

[87] ibid, para 2.3.

[88] ICTR, Case No ICTR-96-4-T, Ch I (2 September 1998).

[89] *Tala v Sweden,* CAT, Comm No 43/1996, para 10.1; *Agiza v Sweden,* CAT, Comm No 233/2003, para 13.3; Lambert H, 'Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue' (1999) 48 International and Comparative Law Quarterly 515, 541.

[90] CAT, 'General Comment 1', UN Doc HRI/GEN/1/Rev.6 (2003) para 7; *Z.Z. v Canada,* CAT, Comm No 123/1998, para 8.5.

individual migrants are not particularly at risk. Saydee has also immediately committed to rectify any deficiencies in its facilities (Clarification 10).

If the criteria for torture are not met, as in the present case, the customary obligation of *non-refoulement* does not apply.[91]

c) Rutasia does not have an obligation of *non-refoulement* under Art 7 ICCPR because Alfurna cannot establish a 'real risk' that the migrants would suffer cruel, inhuman or degrading treatment in Saydee.

To establish a violation of Art 7 ICCPR, Alfurna must show 'substantial grounds' for a threat of cruel, inhuman or degrading treatment upon expulsion to Saydee, and a 'real risk' that the migrants would personally suffer such violation,[92] i.e. that it is a 'necessary or foreseeable consequence'[93]. This high threshold[94] is not satisfied on the facts.

To date, no violation of *non-refoulement* under Art 7 ICCPR has been found where a person challenged an *expulsion* and feared mistreatment short of torture.[95] The only case establishing a prohibition of *refoulement* due to a fear of 'only' cruel, inhuman or degrading treatment concerned an extradition case.[96]

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[91] *B.S. v Canada*, CAT, Comm No 166/2000, para 7.4; *I.A.O. v Sweden*, CAT, Comm No 65/1997, para 14.5; *V.X.N. and H.N. v Sweden*, CAT, Comm Nos 130&131/1999, para 13.7.

[92] Lambert (n 89) 535.

[93] *A.R.J. v Australia*, HRC, Comm No 692/1996, para 6.8.

[94] Lambert (n 89) 536.

[95] ibid, 541; Joseph and others (n 63) 240; Cf *M.F. v Netherlands*, HRC, Comm No 173/1984.

[96] *Ng v Canada*, HRC, Comm No 469/1991.

The risk of personal mistreatment in extradition cases is, however, not comparable to that in expulsion cases. A person *extradited* for prosecution and punishment in the receiving state will definitely suffer the expected sanction, e.g. death penalty[97]. In contrast, an *expelled* person only faces a general and impersonalised risk of mistreatment.

Because Alfurna therefore cannot establish a 'real risk' that the migrants will personally suffer cruel, inhuman or degrading treatment, the proposed transfer is not prohibited under Art 7 ICCPR.

[97] ibid, para. 16.4; *Soering v United Kingdom*, ECtHR, App No 14038/1988, para 99.

D. Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.

I. Nothing in Rutasia's conduct disentitles it to relief for its claims over Alfurna's assets.

1. Under the principle established in the *Serbian Loans Case*, the Court may take into account provisions of the loan agreement although the latter is governed by Rutasian law.

In the *Serbian Loans Case,* the PCIJ held that, owing to the broad scope of its Statute,[98] the 'duty to exercise its jurisdiction cannot be affected […] by the circumstance that the dispute relates to a question of municipal law'[99]. In line with this reasoning, the 'choice of law clause' (Correction 3) cannot affect the Court's jurisdiction over issues arising under the loan agreement.

This is reinforced by the need for an effective remedy and respect for the autonomy of the parties, who agreed on the Court's jurisdiction under Art 36(1) Statute and waived the arbitration provision, thereby expressly allowing adjudication of issues regarding the loan agreement (Compromis Art 1; Clarification 9).

2. There is no rule of international law governing inter-state lending which could invalidate the loan agreement.

The UNCTAD Principles on Promoting Responsible Sovereign Lending (UNCTAD Principles)[100] are not legally binding.[101] Moreover, there is no CIL or general principle of law

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[98] *Serbian Loans Case (France v Serbia)* (Merits) PCIJ Rep Series A No 20/21, 18f.

[99] ibid, 19.

[100] UNCTAD Principles (10 January 2012) <http://unctad.org/meetings/en/MiscellaneousDocuments/Principles_Sovereign.pdf> accessed 13 January 2013.

[101] Waibel M, 'Out of Thin Air? Tracing the Origins of the UNCTAD Principles in Customary International Law' in Bohoslavsky JP, Esposito C and Li Y (eds) *Sovereign Financing and*

governing inter-state lending. This is particularly true of the 'odious debt' doctrine, which lacks general support,[102] and whose conditions[103] cannot be established. Further, the present case is factually not comparable to the *Tinoco Arbitration*, which permitted Costa Rica to nullify its obligations under contracts entered into by the insurgent ruler for his own *personal benefit*.[104]

Under the *Lotus* principle, which stipulates that states may do anything not prohibited by international law,[105] it must be concluded that nothing in PIL prohibits the loan agreement as negotiated by Alfurna and Rutasia pursuant to their freedom of contract.

3. Rutasia has not acted in bad faith when concluding and performing the loan agreement.

'Good faith' is a general principle of law under Art 38(1)(c) Statute.[106] However, it 'is not in itself a source of obligation where none would otherwise exist'[107]. Rather, it sets out

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International Law: The UNCTAD Principles On Responsible Sovereign Lending and Borrowing (OUP 2013) 1, 3ff.

[102] Schier H, *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective* (Martinus Nijhoff Publishers 2007) 64f.

[103] Sack AN, Politis N, *Les Effets des transformations des États sur leurs dettes publiques et autres obligations financières* (Recueil Sirey 1927) 157.

[104] *Tinoco Arbitration (GB v Costa Rica)* (1923) 1 RIAA 369, 399; Hagedorn C, 'Tinoco Concessions Arbitration' Max Planck Encyclopedia of Public International Law (2012) para 2.

[105] *The Case of the S.S. "Lotus" (France v Turkey)* (Merits) PCIJ Rep Series A No 10, 19; Bogdandy AV and Rau M, 'The Lotus' Max Planck Encyclopedia of Public International Law (2010) para 15.

[106] Kotzur M, 'Good Faith (Bona fides)' Max Planck Encyclopedia of Public International Law (2012) para 22.

[107] *Case Concerning Border and Transborder Armed Actions Case (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, para 94.

certain requirements for the performance of existing obligations.[108] Rutasia has not exhibited bad faith in its conclusion and performance of the loan agreement.

Given that the loan was unsecured, the agreement to deposit any funds advanced into the Alfurnan Reserve Bank account (the account), coupled with Alfurna's voluntary submission to execution measures, represents a fair and reasonable bargain. Moreover, Alfurna cannot show that such terms are uncommon, especially in commercial debtor-creditor relationships.

Neither was it apparent that the loan would overburden Alfurna, as the scale of its indebtedness was not evident until the International Monetary Fund report – seven years after the loan agreement was concluded – and it did not qualify for restructuring under the Paris Club rules after its first default (Compromis 9, 15). Moreover, one must weigh the size of the loan against the urgent need for investment to protect Alfurna's territory. In any event, Rutasia agreed to renegotiate the loan twice – solely to Alfurna's benefit.

4. There is no rule of 'unclean hands' in international law that could disentitle Rutasia from relief and, in any event, Rutasia is not responsible for Alfurna's submergence.

The Court has never recognised an 'unclean hands' defence, despite various submissions to this effect.[109] Moreover, the ILC questions its status in PIL[110] and has not

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[108] *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 253, 268; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* (Judgment) [1984] ICJ Rep 246, 292.

[109] See Written Statement of the Government of Israel (30 January 2004) in the *Israeli Wall Opinion* (n 2) paras 0.7, 9.3.; arguments by the USA as recited in the *Case Concerning the Oil Platform* (*Islamic Republic of Iran v United States of America*) (Judgment) [2003] ICJ Rep, paras 27ff and the *LaGrand Case* (*Germany v United States*) (Judgment) [2001] ICJ Rep 466, para 61f.

[110] ILC (ed) and Dugard J, 'Sixth report on diplomatic protection' (11 August 2004) UN Doc.

included ‘unclean hands’ among the ‘circumstances precluding wrongfulness’ in its Draft Articles on State Responsibility.[111]

In any event and irrespective of its potential legal basis, e.g. the UNFCCC, the ‘no harm’ rule[112] or the ‘polluter pays’ principle,[113] state responsibility of Rutasia for the harmful environmental effects on Alfurna cannot be established (see above section B.II.2.b.).

5. Neither the doctrine of estoppel nor the ‘arbitration clause’ prohibit Rutasia’s seizure of the assets.

The doctrine of estoppel bars states from successfully adopting different subsequent statements on the same issue where another state has relied to its detriment on such statements.[114] Rutasia has never acted inconsistently with its rights under the loan agreement, or made any conflicting statements. Any delay in the issuance of the default notice cannot be interpreted as a waiver by Rutasia of its right to repayment, and Alfurna cannot show detrimental reliance upon such.

The application of the default provision is also not prevented by the ‘arbitration clause’, i.e. Rutasia does not have to initiate proceedings under the Rules of the International Chamber of Commerce (ICC Rules) before seizing the assets. Alfurna’s submission to execution measures *without judicial authority*, including arbitration tribunals, represents the substance

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A/CN.4/546, para 18.

[111] Crawford J, Second Report on State responsibility (1999) UN Doc A/CN.4/498/Add.2, 49f.

[112] Cf *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 29; *Gabčikovo-Nagymaros* (n 14) 41.

[113] Cf Rio Declaration on Environment and Development (1992) UN Doc. A/CONF.151/26(vol. I)/31ILM874, Principle 16; Boyle A, ‘Polluter Pays’ Max Planck Encyclopedia of Public International Law (2012) paras 1f, 4.

[114] *The Temple of Preah Vihear* (*Cambodia v Thailand*) (Merits) (Dissenting Opinion Judge Spender) [1962] ICJ Rep 101, 143f; *Argentine-Chile Frontier Case* (n 44); Shaw (n 6) 101f; Cottier T/Müller JP, ‘Estoppel’ Max Planck Encyclopedia of Public International Law (2012) para 1.

of the default procedure. Thus, to require prior arbitral proceedings would constitute a *reductio ad absurdum* of the default mechanism.

Rutasia was therefore not disentitled from relief in respect of the assets.

II. Rutasia's seizure of the assets was consistent with international law.

1. Not being a state anymore, Alfurna does not enjoy sovereign immunity – the same applies if jurisdiction was accepted on the basis that Alfurna had legal personality *sui generis*.

The CIL of state immunity 'derives from the principle of sovereign equality of States'[115]. Accordingly, immunity from proceedings or execution measures is premised on statehood.[116] The only other subjects of PIL enjoying immunities are Heads of States, Diplomatic Missions, Armed Forces and International Organisations.[117] Alfurna does not belong to these categories. Even if Alfurna was considered a legal personality *sui generis*, state practice suggesting that, as such, it is entitled to invoke sovereign immunity logically cannot exist.

Therefore, nothing in PIL prevented Rutasia from seizing the contents of the ownerless account.

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[115] *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*) (Judgment) [2012] < http://www.icj-cij.org/docket/files/143/16883.pdf> accessed 12 January 2013, para 57.

[116] ILC, Reports of the ILC on its thirty-second session, YB Int'l L Comm'n (1980), UN Doc A/CN.4/SER.A/1980/Add.1(Part 1) 205; Stoll P-T, 'State Immunity' Max Planck Encyclopedia of Public International Law (2012) para 1.

[117] Fox H, *The Law of State Immunity* (2nd edn, OUP 2008) 665.

2. Alternatively, Alfurna has waived immunity from execution, as indicated by its express consent to enforcement measures and its agreement to the 'arbitration clause'.

State practice distinguishes between immunity from jurisdiction and execution.[118] As the present case only concerns execution measures, issues particular to jurisdictional immunity are irrelevant.

Although the UN Convention on Jurisdictional Immunities of States and their Properties (UN Convention) has not entered into force, it provides a useful framework for the present assessment. Art 19(a)(i) UN Convention codifies state practice regarding the possibility of a state to waive its immunity from execution by express consent.[119] By agreeing to the seizure of 'any collateral or other property […] without further notice and without the need for any judicial authorization' in case of default (Compromis Annex A), Alfurna has specifically waived its immunity from *enforcement*.

This is reinforced by the arbitration provision (Compromis Annex A). According to Art 19(a)(ii) UN Convention, arbitration clauses indicate express consent to measures of enforcement. Such interpretation is supported by Article 34(6) ICC Rules, which states that 'By submitting the dispute to arbitration under the Rules, the parties […] shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made'.

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[118] 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); UN Convention [2004] UN Doc A/59/508; BVerfGE 46, 342 [1977] (German Federal Constitutional Court) 364f.

[119] AFSIA, Section 31(1); CSIA, Section 12(a); UK SIA Section 13(3); US FSIA, Section 1619(a)(1); European Convention on State Immunity [1972] ETS No 74 (ECSI), Art 2; BVerfG (n 118) 364; Fox (n 117) 630.

3. Moreover, the specific assets were not immune because they were for other than government non-commercial purposes and the central bank exception does not apply.

a) The assets were used for commercial purposes.

Art 19(c) UN Convention sets out the 'commercial exception' from enforcement immunity as recognised by state practice.[120]

Concerning the assets seized, a significant amount presumably consisted of the monies advanced by Rutasia under the loan agreement. Loans are generally considered to be purely commercial in nature.[121] Moreover, the monies' use was contractually limited to commercial purposes, namely to pay for the construction of seawalls: Alfurna instructed Rutasia's largest *private-sector* construction company and submitted their dispute to *commercial* arbitration under the ICC Rules (Compromis 17, emphasis added; Annex A).

The damages paid by Rutasian private-sector company MCL are equally commercial: it was explicitly agreed that, should Alfurna prevail in the MCL arbitration, the withheld funds would remain in the account, their use being restricted to the original loan purposes (Compromis 19).

Even if the account contained funds unrelated to these two purposes, Alfurna has failed to establish that such were for sovereign use.[122] To prevent execution in case of mixed funds

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[120] Cf AFSIA, Section 32(1); CSIA, Section 12(b); UK SIA, Section 13(4); US FSIA, Section 1610; BVerfG (n 118) 388f; *Stato di Rumania c Trutta* (Court of Cassation of Italy) AJIL 26 [1932] 711f; *K.k. Österreichisches Finanzministerium v Dreyfus* (Federal Supreme Court Switzerland) [1918] BGE 44 I, 49ff; *Socobelge c Etat hellenique* (Civil Court Brussels) [1952], 79 Journal du Droit International 244; *Societé Europeenne d'Etudes et d'Entreprises en liqu. vol. (SEEE) c Yugoslavia* (Supreme Court of the Netherlands) [1973] Netherlands Yearbook, 290ff.

[121] Cf UK SIA, Section 3(3)(b); Legislative history US FSIA, 1976 U.S. Code Cong.&Ad.News 6614-6618.

[122] Fox (n 117) 628.

would also be manifestly wrong, as it would enable states to vaccinate all their funds by adding a homeopathic dose of unequivocally sovereign monies.[123]

b) CIL does not recognise a general immunity of central banks.

Art 21(1)(c) UN Convention provides central bank property with blanket immunity from enforcement. This provision, however, does not represent CIL. In line with the general tendency to limit immunity for *acta jure gestionis*,[124] many states do not support any special immunity for central banks, e.g. Singapore, Australia, and civil law countries, such as Germany[125]. The sovereign immunity statutes of the United States and Canada limit the exception to central bank property 'held for its own account';[126] and despite the UK *legislation's* extensive protection of central banks, immunity was denied by its Court of Appeal in the *Trendtex Trading Corporation v Central Bank of Nigeria* case[127]. Forceful policy considerations, e.g. preventing states from 'hiding' assets from legitimate creditors, also demand equal application of the commercial exception to central banks.

The greater protection under the statutes of the United Kingdom[128] and – to a lesser extent – the United States and Canada stems from a policy decision to avoid that foreign central banks 'withdraw their dollar assets from th[e] country, thereby destabilizing the dollar

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[123] Cf *Birch Shipping Corp. v Embassy of the United Republic of Tanzania*, 507 F.Supp.311, 1981 AMC 2666, 313.

[124] *Jurisdictional Immunities Case* (n 115) 25; see also ECSI (n 119) Art 4ff; BVerfG (n 118) 364.

[125] AFSIA, Section 35(1); Fox (n 117) 472.

[126] FSIA, Section 1611(b)(1); CSIA, Section 12(4).

[127] CA [1977] 2 WLR 356, 64 ILR 111.

[128] UK SIA, Section 14.

and the international monetary system',[129] rather than from compliance with an international legal obligation;[130] they therefore lack *opinio juris*.

The funds were thus not immune and, accordingly, their seizure by Rutasia was consistent with PIL.

[129] *Banque Compafina v Banco de Guatemala*, 583 F.Supp. 320 (1984), para 231.
[130] Fox (n 117) 472.

Prayer for Relief

For the foregoing reasons, the State of Rutasia respectfully requests this Court to adjudge and declare that:

A. Alfurna is no longer a state, and accordingly the Court lacks jurisdiction over Alfurna's claims;

and in any event:

B. Rutasia has not violated international law in its treatment of the migrants from (former) Alfurna and, in any event, Alfurna is foreclosed from making claims with respect to those individuals because of its failure to take available affirmative steps to protect them;

C. 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; and

D. Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.