

THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE 2013 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION



**CASE CONCERNING THE ALFURNAN MIGRANTS**

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ALFURNA

(APPLICANT)

V.

THE STATE OF RUTASIA

(RESPONDENT)

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**MEMORIAL FOR THE RESPONDENT**

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## STATEMENT OF JURISDICTION

Alfurna ('Alfurna') and the State of Rutasia ('Rutasia') hereby agreed to submit the present dispute to the International Court of Justice ('ICJ') pursuant to Article 40(1) of the Court's Statute, in accordance with the Compromis for submission to the ICJ, on their differences concerning the Alfurnan migrants, signed in The Hague, the Netherlands on the fourteenth day of September in the year two thousand and twelve.

However, jurisdiction is contested in this dispute. Rutasia objects to the Court's jurisdiction on the ground that Alfurna is no longer a State and consequently, according to Article 34(1) of the Court's Statute, it cannot be a party to present dispute. Therefore the Court is hereby respectfully requested to decline jurisdiction.

## QUESTIONS PRESENTED

- A. Whether Alfurna is still a State and consequently, whether the Court has jurisdiction over Alfurna's claims.
- B. Whether Alfurna is estopped from making claims on behalf of its migrants and whether Rutasia failed to process and accord them a status consistent with international law.
- C. Whether the Alfurnan migrants held in 'the Woeroma Centre' were treated in accordance with international law, and whether their proposed transfer to Saydee is legal.
- D. Whether Rutasia is estopped from seeking relief from this Court and whether Rutasia's seizure of Alfurna's assets is consistent with international law.

## STATEMENT OF FACTS

### **Environmental impacts on Alfurna's territory**

The present dispute between Alfurna ('Applicant') and the State of Rutasia ('Respondent') concerns the Alfurnan Migrants who were detained in the Woeroma Immigration Processing and Detention Centre ('the Woeroma Centre') during 2009 and 2010.

Rutasia developed good relations with Alfurna – its western neighbor. Both states were located in the Bay of Singri, an area vulnerable to earthquakes and tsunamis. Alfurna, composed of two low-lying islands, Batri and Engili, was endangered of being inundated due to the effects of climate change. Although seawalls were constructed, it did not prevent the islands from being swamped. This happened on 26th December 2006.

### **Alfurna's insolvency**

Rutasia participated in the Paris Club debt restructuring arrangements including the Heavily Indebted Poor Countries Initiative ('HIPCI'). Accordingly, in the region of the Bay of Singri, it joined the 'Alfurna Climate Change Remediation Project' ('ACCR Project') under which Rutasia offered Alfurna a loan of USD 125 million. The loan, executed on 5 June 1992, was performed through the Rutasian International Cooperation Administration ('RICA'). Alfurna agreed to use the services of Rutasian companies to perform work on its seawalls. It contracted with the Mainline Constructions Limited Company ('MCL').

The central bank of Alfurna, the Alfurna Reserve Bank ('ARB') opened an account in the Provincial Bank of Lando, an agency of the Rutasian government. Between 1992 and 1997, RICA disbursed all funds into Alfurna's account which were allocated for the ACCR project.

By 1999, Alfurna's debt reached 120% of its GDP. It failed to pay back interest and principals required under the loan agreement. As a consequence, Alfurna negotiated a debt relief. Rutasia was willing to cancel 25% of the loan principal, reduce the annual interest rate from 2.0% to 1.5% and extend the repayment for 15 years. In light of Alfurna's deteriorating situation, Rutasia cancelled further 25% of the loan. Moreover, the annual interest rate was reduced to 1.1% and the payment of the loan was extended for another 20 years. Nevertheless, in 2005 Alfurna stopped repaying its loans.

In the meantime, a dispute between Alfurna and the MCL aroused concerning the reparation of the seawalls. Alfurna claimed that the MCL's repairs were substandard. In November 2006, the dispute was resolved in arbitration in favor of Alfurna. The tribunal awarded USD 35 million of damages and the release of USD 20 million held in deposit in the ARB.

Relying on the recommendations of the 'Climate Emergence Committee' ('CEC'), Alfurna's government started to negotiate emergency migration arrangements. In September 2008, Finutafu agreed to cede Nasatima Island to Alfurna, but, ultimately, a lease agreement was concluded on 9 March 2012.

### **The detention of the Alfurnan migrants**

A major earthquake in 2006 made the Alfurnan government decide to relocate its citizens and its government agencies to Finutafu. By 2009, Engili Island was inhabited by approximately 3000 Alfurnans. Roughly half of them refused to take part in the evacuation.

Since Engili Island became practically uninhabitable, the Alfurnan citizens left the island and headed in overcrowded boats to Rutasia's coast. During 2009 and 2010, the Rutasian Navy intercepted 2,978 irregular Alfurnan migrants in its territorial waters.

The migrants were detained in Block A and B of the Woeroma Centre, the only facility governed by the Rutasian Immigration Department. Nevertheless, the Rutasian authorities took into account the request of the Nullatree Cove villagers and housed them together in Block A. Rutasia provided the migrants with basic housing and supplied them with essential food and medical care. Despite all the measures taken, three Alfurnan citizens committed suicide while five died from dysentery.

In October 2011, the Immigration Ombudsman, an independent review authority within the Rutasian government, issued a report on the conditions at the Woeroma Centre. It concluded that while ‘the conditions in Block A are within acceptable standards for such facilities, the conditions in Block B, however, need to be improved significantly. Block B allegedly resembles a medium security prison with high fences and cages inappropriate for non-criminal detainees. It was also claimed that Block B was overcrowded which has purportedly led to hygiene problems, inadequate food and water, and limited access to medical services. The Ombudsman further maintained that, according to psychologists who have visited the detainees, the indefinite detention of the detainees was having a severe impact on their mental health. Rutasia’ s Immigration Department dismissed the concerns raised by the Ombudsman as factually inaccurate.

Later on, a major earthquake revealed asbestos in Block B, thus rendering it uninhabitable. Therefore, the Alfurnan migrants were relocated to vacant barracks at a Rutasian military base. Subsequently, Rutasia was involved in negotiations on an agreement to transfer the detainees to Saydee. Rutasia agreed to cover all costs of the transfer and the upkeep of the migrants. This provoked major criticisms by Alfurna's authorities and international human rights non-governmental organizations. Indeed, an independent group of

experts stated certain irregularities in Saydee's treatment of detainees. Nevertheless, Saydee's authorities committed to endeavor to rectify the situation.

In the meantime, a suit was filed at Rutasia's Supreme Court by the International Legal Support Association (ILSA), on behalf of the Alfurnan detainees who sought damages for their ill-treatment. In February 2012, however, the case was dismissed because the Supreme Court did not want to intervene with exclusive political competences of the Rutasian government.

### **The seizure of Alfurna's assets**

On 10 February 2012, RICA notified Alfurna of its default under the renegotiated loan agreement and imposed 30 days to remedy it. Due to the lack of reaction from Alfurna, the Provincial Bank of Lando closed Alfurna's account and transferred the balance (USD 25 millions) to the Rutasian government's general consolidated fund. Rutasia's action was interpreted as a violation of international law by Prime Minister Fatu and Finutafu's ambassador.

Alfurna and Rutasia tried to resolve their dispute by negotiation, however without success. Therefore, they brought their differences concerning the Alfurnan migrants to the ICJ by signing the Compromis on 14 September 2012, which is without prejudice to any question of burden of proof and to Rutasia's contention that Alfurna is no longer a State.

## **SUMMARY OF PLEADINGS**

**I.** This Court lacks jurisdiction to deal with Alfurna’s claims since Alfurna is no longer a State and only States can be parties before this Court.

Customary international law provides cumulative criteria for statehood as reflected in Article 1 of the Convention on the Rights and Duties of States (‘Montevideo Convention’): a defined territory, a permanent population, an effective government and the capacity to enter into relations with other States. Due to the environmental impact of climate change, Alfurna lost its territory, formed of Batri and Engili Island. Moreover, the Nasatima Island lease is not sufficient to establish Alfurna’s territorial sovereignty over Nasatima Island. Thus, Alfurna is not in possession of any territory. Without territory, Alfurna can neither establish a permanent population nor an effective government. Hence, Alfurna does not satisfy the cumulative criteria required by customary international law. Therefore, it lacks statehood. Finally, the customary principle of continuity of statehood cannot establish Alfurna’s statehood since it does not apply when a State’s territory is permanently lost. However, if this Court considers that Alfurna is still a State, Rutasia did not violate international law.

**II.** Rutasia has not violated international law in regard to the treatment of the Alfurnan migrants, and in any event, Alfurna is foreclosed from making claims due to its failure to take affirmative steps to protect them.

Rutasia was not obliged to process the Alfurnan migrants. Rutasia further did not deprive the Alfurnan migrants of their status rights as refugees since the Alfurnan migrants do not enjoy the refugee status in accordance with the definition under the Convention

Relating to the Status of Refugees ('Refugee Convention'). Moreover, the Alfurnan migrants do not benefit from subsidiary protection, since no custom can be established.

In any event, Alfurna is foreclosed from making claims with respect to its migrants since it cannot exercise diplomatic protection over them due to its lack of 'clean hands'. In context of diplomatic protection, the 'clean hands' doctrine is applicable in State-to-State claims when the wrongful conduct is attributable to the State. Since Alfurna violated its obligation to take preventive measures to protect the Alfurnan migrants, the 'clean hands' doctrine mandates the rejection of its claims.

**III.** Rutasia's treatment of the Alfurnan migrants held in the Woeroma Centre is consistent with international law and their proposed transfer to Saydee is legal.

Rutasia respected the Alfurnan migrants' human rights. The deprivation of the Alfurnan migrants' right to liberty and security was lawful. Moreover, Rutasia treated the detained Alfurnan migrants with humanity and respect for their inherent dignity and did not at any stage expose them to a degrading treatment. Rutasia further granted the Alfurnan migrants an adequate standard of living and the highest attainable standard of health.

Furthermore, the proposed transfer to Saydee is lawful. The customary non-refoulement obligation permits the transfer of migrants to a third country when no risk of torture can be established in the third country. In Saydee, no risk of torture exists. Hence, Rutasia does not put the migrants at risk of direct refoulement. Since there is no indication that Saydee would transfer the migrants to a country where they are at risk of being tortured, no subsequent risk of refoulement is present in Saydee. Thus, the proposed transfer is lawful.

**IV.** Rutasia's conduct in respect of Alfurna's assets is consistent with international law, since it did not violate Alfurna's sovereign immunity.

Rutasia is not estopped from making claims since no inconsistent conduct can be attributed to it. Rutasia's prolonged leniency in calling in the loan must be considered an act of 'good faith'. Hence, Rutasia is entitled to seek relief from this Court.

Moreover, Rutasia did not violate Alfurna's sovereign immunity from enforcement under the restrictive approach of the Court. Alfurna's assets are in use for an *acta iure gestionis*. Therefore, Alfurna's assets are not protected by the immunity from enforcement. In any event, Alfurna gave its express consent to carry out of the enforcement measure and thus waived its immunity from enforcement. Hence, by seizing Alfurna's assets, Rutasia did not violate Alfurna's sovereign immunity from enforcement under the restrictive approach of the Court and thus, did not violate international law.



## PLEADINGS

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### I. THIS COURT LACKS JURISDICTION OVER ALFURNA'S CLAIMS SINCE ALFURNA IS NO LONGER A STATE

Only States can be parties to cases before the International Court of Justice ('ICJ').<sup>1</sup> Alfurna is no longer a State and thus cannot be a party to the present case. First, it lacks statehood according to the criteria required under customary international law [A]. Furthermore, the customary principle of continuity of statehood cannot re-establish Alfurna's statehood since it does not apply when State territory is permanently lost [B]. Therefore, this Court lacks jurisdiction.

#### **A. Alfurna does not satisfy the cumulative customary law criteria to establish statehood**

Customary international law knows four criteria to determine statehood.<sup>2</sup> These criteria, which are reflected in Article 1 of the Convention on the Rights and Duties of States<sup>3</sup> ('Montevideo Convention'), are a permanent population, a defined territory, an effective

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<sup>1</sup> Statute of the International Court of Justice (1945) 59 STAT 1055 (Statute of the Court) art 34 (1).

<sup>2</sup> Arbitration Commission of the European Conference of Yugoslavia, Opinion No 1 (1992) 3 EJIL 182-183; Martin Dixon, Robert McCorquodale, *Cases and Materials on International Law* (4th edn, OUP 2003) 137; Colin Warbrick, 'States and Recognition in International Law' in Malcolm D Evans (ed) *International Law* (2nd edn, OUP 2006) 231; Jane McAdam, *Climate Change, Forced Immigration and International Law* (OUP 2012) 128.

<sup>3</sup> Convention of the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 1.

government and the capacity to enter into relations with other States.<sup>4</sup> These criteria must be applied cumulatively.<sup>5</sup> Since Alfurna does not have a defined territory [1], it can neither establish a permanent population nor an effective government [2]. Hence, its statehood cannot be established.

### **1. Alfurna is not in possession of a defined territory**

Alfurna has lost its former territory [a] and the Nasatima Island lease is not sufficient to establish Alfurna's territorial sovereignty over Nasatima Island [b]. Thus, Alfurna is not in possession of territory.

#### **a. Alfurna has lost its former territory formed of Batri and Engili Island**

The core criterion to determine statehood is territory.<sup>6</sup> Although it is not mandatory that the borders of a State's territory itself are settled, a State has to be in possession of at least some land territory.<sup>7</sup> Without territory a legal person cannot be a State.<sup>8</sup>

Alfurna's former territory formed of Batri and Engili Island<sup>9</sup> became permanently submerged by the sea on 26th December 2011 even at low tide.<sup>10</sup> An island is defined as a

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<sup>4</sup> Montevideo Convention, art 1.

<sup>5</sup> Jane McAdam, 'Disappearing States' in Jane McAdam (ed) *Climate Change and Displacement-Multidisciplinary Perspectives* (Hart Publishing 2010) 110.

<sup>6</sup> *Island of Palmas Case (The Netherlands v United States)* (1928) Scott Hague Court Reports 2d 83, paras 103, 108, 110, 111, 113, 114, 418, 479, 492.

<sup>7</sup> *Deutsche Continental Gas Gesellschaft v Polish State* (1929) 5 AD PUBLIC INT'L L 11, 14-15; *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 32; *Re Duchy of Sealand* (1978) ILR 80, 683; *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, 22, 26.

<sup>8</sup> Robert Jennings, Arthur Watts, *Oppenheim's International Law* (9th edn, OUP 1992) 563.

‘naturally formed area of land, surrounded by water, which is above water at high tide’.<sup>11</sup> Being permanently under water, Batri and Engili Island no longer qualify as islands and hence as State territory. Furthermore, the air space and the territorial sea of Alfurna, which accompanied the submerged land territory, legally vanish together with the land territory.<sup>12</sup>

Accordingly, Alfurna has no longer a defined territory and hence, does not satisfy the cumulative criteria required to define statehood under customary international law.

*b. Alfurna has not established new territory by leasing the Nasatima Island*

International law defines ‘territory’ by reference to the extent of the governmental power exercised, or capable of being exercised, with respect to some area and population.<sup>13</sup> Accordingly, the cumulative criteria of statehood are interlinked.<sup>14</sup> Hence, to acquire territory sufficient to establish statehood, a State must establish territorial sovereignty over some land territory.<sup>15</sup> ‘Territorial sovereignty is not ownership of, but governing power with respect to,

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<sup>9</sup> Compromis for submission to the International Court of Justice of the differences between the Applicant and the Respondent concerning the Alfurnan Migrants, Jointly Notified 14 September 2012 para 1 (C[para]).

<sup>10</sup> C[25], C[44].

<sup>11</sup> Convention of the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) UNTS 3 (UNCLOS) art 121(1). See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits, Judgment) [2001] ICJ Reports 40, para 185.

<sup>12</sup> Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 105, 117-118.

<sup>13</sup> James Crawford, ‘The Criteria for Statehood in International Law’ (1976) 48 BRIT. Y.B. INT’L L. 93, 116.

<sup>14</sup> United Nations High Commissioner for Refugees (UNHCR), ‘Climate Change and the Risk of Statelessness: the Situation of Low-Lying Islands’ (2011) PPLA/2011/04, 5, <<http://www.unhcr.org/refworld/docid/4e09a4ba2.html>> accessed 4 January 2013.

<sup>15</sup> UNHCR, ‘Climate Change and the Risk of Statelessness: the Situation of Low-Lying Islands’ (n 14) 5.

territory’.<sup>16</sup> The ICJ considers territorial sovereignty only established when a State proves its ‘intention and will to act as sovereign, and [proves] some actual exercise or display of such authority’<sup>17</sup> which must ‘cover a considerable period of time’.<sup>18</sup> However, territorial sovereignty can only be established as long as no other State [can] make out a superior claim’ on the territory.<sup>19</sup>

Full territorial sovereignty over land territory might be established if another State formally cedes territory.<sup>20</sup> However, although bilateral agreements may permit a State to exercise some jurisdiction over a territory, full territorial sovereignty is not established as long as the granting State still exercises some jurisdiction over the territory.<sup>21</sup> The case concerning the *Lighthouses in Crete and Samos*<sup>22</sup> and several national cases before the United States Courts,<sup>23</sup> confirm that notwithstanding the autonomy of the grantee of the

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<sup>16</sup> *ibid.*

<sup>17</sup> *Legal Status of Eastern Greenland* (Judgment) (1933) PCIJ Series A/B No 53, 45-46, cited in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, 712, para 172.

<sup>18</sup> *Legal Status of Eastern Greenland* (n 17) 46, cited in *Territorial and Maritime Dispute* (n 17) 712, para 173.

<sup>19</sup> *ibid.*

<sup>20</sup> *McAdam* (n 3) 150.

<sup>21</sup> *ibid.*, 149.

<sup>22</sup> *Lighthouses in Crete and Samos (France v Greece)* (1937) PCIJ Series A/B No 62.

<sup>23</sup> *Brewer v United States* (2010) 130 S Ct 1161 175 L Ed 2d 988 2010 US; *Cobb v United States* (1951) ILR 18 No 173; *United States v Ushi Shiroma* (1954) ILR 21 No 82; *Burma v United States* (1957) ILR 24 No 89, 160.

territory, the territory still belonged to the grantor even though the grantor had to accept restrictions on its exercise of rights of sovereignty in the leased territory.<sup>24</sup>

Alfurna and Finutafu concluded the Nasatima Island lease, which is in effect since 9th March 2012.<sup>25</sup> This lease grants Alfurna legislative, administrative and executive powers.<sup>26</sup> Nonetheless, Finutafu remains the single State competent to regulate defence, custom and immigration matters.<sup>27</sup> The ICJ bestows particular importance to a State's competence to regulate immigration matters as evidence of territorial sovereignty.<sup>28</sup> Under the Nasatima Island lease, immigration regulation remains subject to Finutafu's control.<sup>29</sup> Hence, Alfurna depends upon Finutafu to allow the Alfurnan migrants to enter the territory of the Nasatima Island. The importance of this particular competence must be highlighted in the present immigration context. The territory is not inhabited by Alfurnans and Finutafu can restrict their entrance.

The circumstances in the present case are similar to those of the case of *Lighthouses in Crete and Samos*<sup>30</sup>. Alfurna as a grantee, has in part gained autonomy on the Nasatima

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<sup>24</sup> *Lighthouses in Crete and Samos* (n 22), para 38.

<sup>25</sup> Clarifications para 4 (CI[para]).

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *Territorial and Maritime Dispute* (n 17) 713–722, paras 176-208, cited in *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ 19 November 2012 32, para 80 <<http://www.icj-cij.org/docket/files/124/17164.pdf>> accessed 02 December 2012.

<sup>29</sup> CI[4].

<sup>30</sup> *Lighthouses in Crete and Samos* (n 22), para 38.

Island due to the Nasatima Island lease, while Finutafu as a grantor, consequently has to accept restrictions on the exercise of its powers on the Nasatima Island. According to the Permanent Court of International Justice ('PCIJ'), in such a case the territory still belongs to the grantor.<sup>31</sup> Therefore, the Nasatima Island is still Finutafuan State territory. Pursuant to the criterion of territorial sovereignty as set out by the ICJ, Finutafu's title bars Alfurna from establishing territorial sovereignty over the Nasatima Island.

Hence, Alfurna has not established territorial sovereignty over the Nasatima Island, in particular not by the lease.

**2. Without territory, Alfurna can neither establish a permanent population nor an effective government**

The customary international law criteria as reflected in the Montevideo Convention are interlinked.<sup>32</sup> Hence, the criteria of a permanent population and an effective government cannot be established when a State lacks territory since they vanish at the same time as territory does.<sup>33</sup>

Batri and Engili Island became permanently submerged and thus uninhabitable.<sup>34</sup> Consequently, Alfurna does not possess territory any longer. Therefore, it can neither establish a permanent population nor an effective government since both criteria are linked to

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<sup>31</sup> *ibid.*

<sup>32</sup> UNHCR 'Climate Change and the Risk of Statelessness: the Situation of Low-Lying Islands' (n 14).

<sup>33</sup> Brownlie (n 12) 70; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1998) 75.

<sup>34</sup> C[25], C[44].

the one of territory. Accordingly, Alfurna does neither possess a permanent population nor an effective government.

Ultimately, Alfurna no longer satisfies the cumulative criteria to establish statehood as put forward by the Montevideo Convention.

**B. In any event, the principle of continuity of statehood cannot be applied to re-establish Alfurna's statehood**

Even if the Court is minded to consider that Alfurna has established territorial sovereignty over the Nasatima Island after 9th March 2012, Alfurna has still lost its statehood. The principle of continuity of statehood cannot remedy missing territory. Hence, Alfurna cannot rely upon it to bridge the gap between the loss of its territory on 26th December 2011 and the re-establishment of territorial sovereignty on 9th March 2012.

The principle of continuity contains the presumption of the continuity of a once established State.<sup>35</sup> Accordingly, substantial changes in territory, population and government, or in some cases all three of them, do not automatically lead to the extinction of a once established State.<sup>36</sup> Nevertheless, its customary nature has only ever been established in cases where territory was still existent, e.g. when no effective government was in residence<sup>37</sup> or

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<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> China 1930-1935, Russia 1917-1921, Afghanistan 1989-1996, Bosnia and Herzegovina 1991-1994, Zaire/Congo 1997-2004; James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 694.

when the territory was occupied<sup>38</sup> respectively the borders of the territory were not finally settled<sup>39</sup>. To apply the customary principle of continuity of statehood to cases where territory has become extinct, two elements have to be proven: a conclusive state practice and *opinio juris sive necessitatis*.<sup>40</sup>

Since a State's total loss of territory is unique in the experience of international law, no precedent yet exists of how States deal with the total loss of territory.<sup>41</sup> However, the Sovereign Military Order of Malta constitutes a particularly relevant indication that the loss of territory cannot be overcome. It has lost its territory in 1798 and despite its attempts did not regain any territory.<sup>42</sup> Although the Order exhibits some aspects of a sovereign State, States generally do not consider it to be a State.<sup>43</sup> This supports the claim that 'without territory, a legal person cannot be a State'.<sup>44</sup>

Further indication is given by actors in the international community who have held that the sea level rise is a threat to the status of small island States.<sup>45</sup> Even specially affected

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<sup>38</sup> Ethiopia 1935-1945, Poland 1939-1945, Kuwait 1990-1991; Crawford (n 37) 694.

<sup>39</sup> Crawford (n 37) 700ff.

<sup>40</sup> Statute of the Court, Article 38; see also *Military & Paramilitary Activities in & against Nicaragua (Nicaragua. v United States)* (Merits) [1986] ICJ Rep 14, 97, paras 183ff.

<sup>41</sup> UN Doc A/63/PV.9.

<sup>42</sup> A. Visconti, *La sovranità dell'Ordine di Malta nel diritto italiano* (1936) vol 2, 195, 205 cited in N. Cox, 'The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta', (2002) 6 MJLS 26, 32.

<sup>43</sup> N. Cox (n 42) 33; UN Doc. A/48/PV.103; UN Doc. A/BUR/48/SR.13.

<sup>44</sup> Crawford (n 37), 30.

<sup>45</sup> UNHCR 'Climate Change and Statelessness: An Overview' (15 May 2009) 1-2 <<http://www.unhcr.org/refworld/docid/4a2d189d3.html>> accessed 04 January 2013; UN GA Res 63/213 UN Doc A/RES/63/213; Permanent Mission of the Republic of Nauru to the UN, 'Views on the possible Security

island States as Nauru and Tuvalu have expressed their concerns.<sup>46</sup> They see their existence as a State endangered once the islands become submerged by the sea.<sup>47</sup> Accordingly, neither a conclusive State practice nor an *opinio juris sive necessitatis* can be proven. Thus, the total loss of territory falls outside the scope of the customary principle of continuity of statehood.

Alfurna lost its territory on 26th December 2011<sup>48</sup> while the Nasatima Island lease only came into effect on 9th March 2012. Between those dates, a void exists where Alfurna was not in possession of any territory. Since the principle of continuity of statehood cannot be applied when a State is not in possession of any territory, Alfurna has ceased to exist as a State on 26th December 2011. Hence, this Court lacks jurisdiction to deal with Alfurna's claims.

However, if this Court is minded to consider that Alfurna is still a State, Rutasia did not violate international law.

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Implications of Climate Change to be included in the Report of the Secretary General to the 64th Session of the UN General Assembly' (2009) 16 <[http://www.un.org/esa/dsd/resources/res\\_pdfs/ga-64/cc-inputs/PSIDS\\_CCIS.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/PSIDS_CCIS.pdf)> accessed 04 January 2013; UNGA Res 63/213 UN Doc A/RES/63/213.

<sup>46</sup> 'Views on the possible Security Implications of Climate Change' (n 43); 'Tuvalu's views on the possible Security Implications of Climate Change to be included in the Report of the Secretary General to the 64th Session of the UN General Assembly' (2009) 3 <[http://www.un.org/esa/dsd/resources/res\\_pdfs/ga-64/cc-inputs/Tuvalu\\_CCIS.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/Tuvalu_CCIS.pdf)> accessed 08 January 2013.

<sup>47</sup> *ibid.*

<sup>48</sup> C[44].

**II. RUTASIA HAS NOT VIOLATED INTERNATIONAL LAW IN REGARD TO THE  
TREATMENT OF THE ALFURNAN MIGRANTS, AND IN ANY EVENT, ALFURNA IS  
FORECLOSED FROM MAKING CLAIMS DUE TO ITS FAILURE TO TAKE AFFIRMATIVE  
STEPS TO PROTECT THEM**

Rutasia has not violated international law in regard to the treatment of the Alfurnan migrants [A]. In any event, Alfurna is foreclosed from making claims due to its failure to take affirmative steps to protect them [B].

**A. Rutasia did not violate international law by not processing the Alfurnan migrants  
and further did not deprive them of their status rights**

The UN High Commissioner for Refugees ('UNHCR') has recommended that a State should grant the migrants 'access to fair and effective procedures for determining status and protection needs' of refugees.<sup>49</sup> Since this is only a recommendation, it creates no obligation to install a procedure.<sup>50</sup> Hence, Rutasia was not obliged to process the Alfurnan migrants. Rutasia further did not deprive the Alfurnan migrants of their status rights as refugees since the Alfurnan migrants do not enjoy the refugee status in accordance with the definition under

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<sup>49</sup> UNHCR Executive Committee (EXCOM), General Conclusion on International Protection No 99 (2004) I <<http://www.unhcr.org/41750ef74.html>> accessed 04 January 2013; UNHCR General Conclusion on International Protection No 85 (1998) (q) <<http://www.unhcr.org/refworld/docid/3ae68c6e30.html>> accessed 09 January 2013; UNHCR EXCOM General Conclusion No 71 (1993) (i) <<http://www.unhcr.org/3ae68c6814.html>> accessed 09 January 2013; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, 37ff. <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>> accessed 13 January 2013.

<sup>50</sup> *ibid.*

the 1951 Convention Relating to the Status of Refugees<sup>51</sup> ('Refugee Convention') [1]. Moreover, the Alfurnan migrants do not benefit from subsidiary protection under the Refugee Convention since no custom can be established [2].

**1. Rutasia has not deprived the Alfurnan migrants of their status rights since they cannot claim upon the refugee status**

The Alfurnan migrants might claim upon the refugee status to benefit from the status rights therein included. Article 1A(2) Refugee Convention defines a 'refugee' as a person who 'owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, resides outside the country of his nationality and is unable, or owing to such fear unwilling to avail himself of the protection of that country'.<sup>52</sup>

Rutasia is a State party to the Refugee Convention.<sup>53</sup> The Alfurnan migrants, however, were forced to leave Alfurna due to the climate change induced disasters permanently rendering their State territory uninhabitable.<sup>54</sup> They did not leave their country due to a fear of political persecution pursuant to Article 1A(2) Refugee Convention. Accordingly, the Alfurnan migrants cannot be considered as refugees since the necessary element of persecution is missing.

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<sup>51</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>52</sup> Refugee Convention, art 1A(2).

<sup>53</sup> C[54].

<sup>54</sup> C[25], C[44].

Although it was discussed among the scholars to extend the definition for the purpose of including people displaced by climate change, this approach was mostly rejected.<sup>55</sup> Within the context of the preparatory work for the Refugee Convention it was stated that ‘it is difficult to envisage that fires, floods, earthquakes or volcanic disruptions, for instance, differentiate between their victims on the grounds of race, religion or political opinion’.<sup>56</sup> This shows clearly that a possible inclusion of so called ‘environmental refugees’ was seen, but not wanted by the Contracting Parties.<sup>57</sup> Thus, the aim of the Refugee Convention is to provide for the protection of political refugees and not ‘environmental refugees’.

The Alfurman migrants qualify as ‘environmental refugees’ and as such have no claim on ‘refugee’ status under the Refugee Convention. Thus, Rutasia could not have deprived them of their status rights.

**2. Furthermore, the scope of the refugee definition has not been extended under customary international law to include persons seeking subsidiary protection**

The Alfurman migrants cannot enjoy subsidiary protection since no custom can be established.<sup>58</sup> It is discussed among scholars whether persons seeking subsidiary protection can, under certain circumstances, be beneficiaries of protection under the Refugee

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<sup>55</sup> Guy S Goodwyn-Gill, Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 79-80; Walter Kälin, ‘Conceptualising Climate-Induced Displacement’ in Jane McAdam, (n 5) 96ff.

<sup>56</sup> UN Doc A/Conf.2/Sr.22, 6.

<sup>57</sup> See for the interpretation of treaties: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), article 31(1).

<sup>58</sup> Cf. William Thomas Worster, ‘The Evolving Definition of the Refugee in Contemporary International Law’ (2009) 30:1 BERKELEY J. INT’L L.101, 146.

Convention.<sup>59</sup> This view is supported by the claim that the scope of the Convention has been extended and the refugee definition has evolved under customary international law.<sup>60</sup> However, this approach fails to establish custom in accordance with Article 38 of the Statute of the Court,<sup>61</sup> since neither State practice nor *opinio juris sive necessitatis* can be established.

Admittedly, the States of Africa<sup>62</sup> and Central America<sup>63</sup> grant subsidiary protection to ‘environmental refugees’. Under this subsidiary protection, they benefit from protection under the Refugee Convention.<sup>64</sup> Nevertheless, State practice in the EU differs.<sup>65</sup> Although the EU grants subsidiary protection to persons falling outside the scope of the refugee definition in the Refugee Convention,<sup>66</sup> ‘environmental refugees’ cannot rely upon this

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<sup>59</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 209.

<sup>60</sup> María-Teresa Gil-Bazo, ‘Refugee status, subsidiary protection, and the right to be granted asylum under EC law’ (2006), UNHCR Research Paper No 136, Oxford Legal Studies Research Paper No 54/2006; McAdam (n 59) 209; See also UNHCR EXCOM ‘Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime’ (2000) UN Doc EC/50/SC/CRP.18;

<sup>61</sup> Statute of the Court, art 38.

<sup>62</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art 8(2).

<sup>63</sup> Cartagena Declaration on Refugees (adopted 22 November 1984) in Annual Report of the Inter-American Commission on Human Rights (1984-1985) OAS Doc OEA/Ser.L/II.66/doc.10 rev 1, 190-93, art 8.

<sup>64</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (n 62), art 8(2); Cartagena Declaration on Refugees (n 63), art 8.

<sup>65</sup> Directive 2004/83/EC of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12 (Qualification Directive), art 2(c).

<sup>66</sup> Qualification Directive (n 65), art 2 (e).

protection.<sup>67</sup> To benefit from this subsidiary protection under the EU Qualification Directive, there must exist a danger of serious harm which can include: the death penalty or execution; torture or inhuman or degrading treatment or punishment in the country of origin and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>68</sup> Hence, 'environmental refugees' are precluded from the scope of subsidiary protection in the EU. Consequently, no common State practice can be proven granting subsidiary protection to 'environmental refugees' and therefore, the scope of the Refugee Convention cannot be extended. Hence, the Alfurnan migrants do not benefit from subsidiary protection and thus cannot claim upon the refugee status.

Ultimately, Rutasia did not violate international law by not processing the Alfurnan migrants and further did not deprive them of their status rights.

**B. In any event, Alfurna is foreclosed from making claims due to its failure to take affirmative steps to protect the migrants**

Under customary international law, a State can invoke another State's responsibility for its violation of the former State's nationals rights.<sup>69</sup> The State exercises diplomatic protection over its nationals and by doing so, the rights a State asserts in respect to its

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<sup>67</sup> Catherine Brouers, 'Der Schutz der Umwelt- und Klimaflüchtlinge im Völkerrecht: Regelungslücken und Lösungsansätze', (2012) ZUR 81, 84.

<sup>68</sup> Qualification Directive (n 65), art 15.

<sup>69</sup> *Republic of Guinea v Democratic Republic of the Congo* (Preliminary Objections, Judgment) [2007] ICJ Rep 599, para 39.

nationals become its own rights.<sup>70</sup> Accordingly, a State can bring a State-to-State claim before the Court invoking the violation of the rights of its nationals.<sup>71</sup>

However, the ‘clean hands’ doctrine precludes a State from exercising diplomatic protection when the national it seeks to protect has suffered an injury in consequence of his or her own wrongful conduct.<sup>72</sup> In this context, Rutasia submits that the ‘clean hands’ doctrine is applicable in State-to-State claims when the wrongful conduct is attributable to the State and not to the national [1]. Since Alfurna violated its obligation to take preventive measures to protect the Alfurnan migrants, the ‘clean hands’ doctrine mandates the rejection of its claims [2].

**1. The ‘clean hands’ doctrine is applicable in State-to-State claims**

The ‘clean hands’ doctrine derives from the general principle of ‘good faith’.<sup>73</sup> In the context of diplomatic protection, the ‘clean hands’ doctrine is generally invoked to preclude a State from exercising diplomatic protection when the national it seeks to protect has suffered an injury in consequence of his or her own wrongful conduct.<sup>74</sup> The ‘clean hands’ doctrine is further interpreted to preclude diplomatic protection when a State acted unlawfully and gave

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<sup>70</sup> *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 4, 44.

<sup>71</sup> *ibid.*

<sup>72</sup> UN Doc A/CN.4/546, 2, para 2.

<sup>73</sup> UN Doc A/CN.4/SR.2793, 4.

<sup>74</sup> UN Doc A/CN.4/546, 2, para 2

rise to a violation of its national's rights of which it now complains.<sup>75</sup> States have frequently invoked the 'clean hands' doctrine as well as similar objections before the Court<sup>76</sup> which underlines its relevance in State-to-State disputes. In the *Oil Platforms Case*<sup>77</sup>, this Court also acknowledged that the 'clean hands' doctrine could mandate a rejection of the claims with regard to the merits.<sup>78</sup>

Accordingly, the 'clean hands' doctrine is applicable in inter-State disputes. Rutasia can invoke the 'clean hands' doctrine with regard to the merits.

**2. The 'clean hands' doctrine mandates the rejection of Alfurna's claims since it failed to take preventive measures to protect its migrants**

Since Alfurna's failure to protect the migrants gave rise to the measures of which it now complains, its claims regarding these measures must be rejected. In situations where environmental degradation endangers people's lives, the State in which these people live

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<sup>75</sup> Aleksandr Shapovalov, 'Should a Requirement of 'Clean Hands' Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate' (2005) 20 no 4 AM. U. INT'L L. REV. 839.

<sup>76</sup> UN Doc A/CN.4/546, 5, para 6. See e.g. *Certain Phosphate Lands in Nauru (Nauru v. Australia) Preliminary Objections* (Judgment) [1992] ICJ Rep 240, 255, paras. 37-38; *Case concerning Avena and Other Mexican Nationals* (Judgment) [2004] ICJ Rep, paras. 45-47; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 63; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (n 40), 392, para 268 (dissenting opinion Schwebel) – Schwebel acknowledged that 'Nicaragua has not come to Court with clean hands'.

<sup>77</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161.

<sup>78</sup> *ibid*, 177, para 29.

must take appropriate preventive measures.<sup>79</sup> This obligation derives from positive human rights obligations according to which States are required to intervene if it becomes probable that a human right, such as the right to life, may be infringed.<sup>80</sup> The ICJ also acknowledged that the realization of human rights is largely dependent on whether the physical environment is capable of sustaining these people's rights.<sup>81</sup> The protection of the environment is 'a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself'.<sup>82</sup> Appropriate measures in this context are, for instance, the warning against natural disasters, minimizing of environmental degradation or enabling affected populations to resettle elsewhere within the State.<sup>83</sup>

As early as August 2004, it became known to Alfurna's government that in time sea levels would overwhelm the islands even at low tide.<sup>84</sup> Accordingly, it was recommended that the government should start making plans to evacuate the Alfurnan islands.<sup>85</sup> In early

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<sup>79</sup> Astrid Epiney, 'Environmental Refugees' in Etienne Piguet, Antoine Pécoud, Paul de Guchteneire (ed), *Migration and Climate Change* (CUP 2011) 397.

<sup>80</sup> *Öneryıldic v Turkey* App No 48939/99 (ECtHR, 30 November 2004).

<sup>81</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Weeramantry) [1997] ICJ Rep 7, 91; Dinah Shelton, 'Environmental Rights' and Philip Alston, 'Peoples' Rights: Their Rise and Fall' in Philip Alston (ed) *Peoples' Rights* (OUP 2001); Meeting of Experts on Human Rights and the Environment, Final Text (16 January 2002) < <http://www2.ohchr.org/english/issues/environment/enviro/conclusions.htm>> accessed 04 January 2013.

<sup>82</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (n 81), 91.

<sup>83</sup> Epiney (n 79) 397.

<sup>84</sup> C[21].

<sup>85</sup> *ibid.*

2009, Alfurna had still not made any evacuation plans or negotiated individual arrangements for 3000 Alfurnans.<sup>86</sup> While 1500 Nullatree Cove Villagers refused to relocate,<sup>87</sup> the other 1500 Alfurnans were left behind on an uninhabitable territory, thereby endangered in their very existence.

Furthermore, Alfurna cannot exonerate itself from its obligation to take preventive measures to protect the Alfurnan migrants. Alfurna had over seven years' time to negotiate individual arrangements for all its citizens. Particularly for the Alfurnans with a criminal record not fitting the required moral standards of most host States;<sup>88</sup> early arrangements should have been made. Accordingly, Alfurna cannot claim an inability to secure a situation for these 1500 Alfurnans.

Hence, Alfurna violated its obligation to take affirmative steps to protect the Alfurnan migrants. Since Alfurna's conduct gave rise to the measures of which it now complains, the 'clean hands' doctrine mandates the rejection of its claims.

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<sup>86</sup> C[32].

<sup>87</sup> *ibid.*

<sup>88</sup> C[32].

**III. RUTASIA’S TREATMENT OF THE ALFURNAN MIGRANTS HELD IN THE  
WOEROMA CENTRE IS CONSISTENT WITH INTERNATIONAL LAW AND THEIR  
PROPOSED TRANSFER TO SAYDEE IS LEGAL**

Rutasia’s detention of the Alfurnan migrants is lawful [A] as well as their proposed transfer to Saydee [B].

**A. Rutasia’s detention of the Alfurnan migrants is lawful**

Governments are obliged to respect, protect and fulfill the human rights of individuals held in detention.<sup>89</sup> Rutasia’s treatment of the detained Alfurnan migrants complied with this obligation since it observed the Alfurnan migrants’ right to freedom of movement, liberty and security [1]. Furthermore, Rutasia treated the detained migrants with humanity and respect for their inherent dignity and did not expose them to a degrading treatment [2]. Lastly, Rutasia granted them an adequate standard of living and the highest attainable standard of health [3].

**1. Rutasia observed the Alfurnan migrants’ right to freedom of movement, liberty and  
security**

Article 12(1) International Covenant on Civil and Political Rights<sup>90</sup> (‘ICCPR’) provides the right to freedom of movement to individuals **lawfully** residing within the

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<sup>89</sup> Office of the High Commissioner for Human Rights (OHCHR), ‘Dignity and Justice for Detainees Week’, Information Note No 1 (2007) <[http://www.ohchr.org/EN/UDHR/Documents/60UDHR/detention\\_infonote\\_1.pdf](http://www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_1.pdf)> accessed 09 January 2013.

<sup>90</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

territory of a State.<sup>91</sup> Whether or not an alien is lawfully residing within the territory of a State is determined by internal national law.<sup>92</sup> Furthermore, the right to freedom of movement is not an absolute right. Article 12(3) provides possible restrictions hereto.<sup>93</sup> For instance, a State is entitled to control its borders and regulate the entry of migrants within its territory.<sup>94</sup>

Furthermore, the right to liberty pursuant to Article 9 ICCPR is not an absolute right, the deprivation or restriction of liberty is only lawful when it is in compliance with national law.<sup>95</sup> Thus, a State has the discretion to order a detention to protect its national security and public order<sup>96</sup> and/or to prevent individuals from committing crimes.<sup>97</sup>

During 2009 and 2010, Rutasia encountered a mass influx of 2,978 Alfurnans.<sup>98</sup> All those individuals entered Rutasian territorial waters illegally.<sup>99</sup> Therefore, their right to freedom of movement is restricted by Rutasia's national laws. By detaining the Alfurnan

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<sup>91</sup> ICCPR, art 12.

<sup>92</sup> UN Human Rights Committee (HRC), CCPR General Comment No 27: Article 12 (Freedom of Movement) (1999) UN Doc CCPR/C/21/Rev.1/Add.9.

<sup>93</sup> ICCPR, art 4.

<sup>94</sup> Ryszard Cholewinski, *International migration law: developing paradigms and key challenges* (TMC Asser Institut 2007) 50.

<sup>95</sup> Galina Cornelisse, *Immigration detention, territoriality and human rights: towards destabilization of sovereignty's territorial frame?* (European University Institute 2007) 255.

<sup>96</sup> Cholewinski (n 95) 51.

<sup>97</sup> Kay Hailbronner, 'Detention of Asylum Seekers' (2007) EUR. J. MIGRAT. L. 9, 160.

<sup>98</sup> C[33].

<sup>99</sup> C[33]; C[50].

migrants, Rutasia dealt with them according to its national laws.<sup>100</sup> Since the detention occurred in compliance with Rutasian national law, the deprivation of the Alfurnan migrants' right to liberty and security was lawful.

Besides, some of the intercepted Alfurnan migrants have criminal records.<sup>101</sup> Moreover, there exists further evidence that some of the Alfurnan migrants have been financing illegal activities from Rutasia's shores in the past.<sup>102</sup> Rutasia is still determining whether Rutasia's criminal laws have been violated by any of the intercepted Alfurnan migrants.<sup>103</sup> Hence, the detention must be regarded as lawful in light of Rutasia's valid interest to solve these residual crimes. Thus, Rutasia did not violate the Alfurnan migrants' right to liberty and security. Consequently, Rutasia did not violate the Alfurnan migrants' right to freedom of movement, liberty and security pursuant to Article 9 and 12 ICCPR.

**2. Rutasia treated the detained Alfurnan migrants with humanity and respect for their inherent dignity and they were not exposed to a degrading treatment**

Article 10(1) ICCPR states that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.<sup>104</sup> The UN's interpretation of Article 10 ICCPR establishes certain standards and safeguards for the

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<sup>100</sup> C[50].

<sup>101</sup> C[32].

<sup>102</sup> C[50].

<sup>103</sup> *ibid.*

<sup>104</sup> UNHCR CCPR General Comment No 21: Article 10 (Human Treatment of Persons Deprived of Liberty) (1992) UN Doc HRI/GEN/1/Rev.6, 153.

detention of migrants. However, these interpretations are non-binding.<sup>105</sup> Therefore, no standards or safeguards are recognized at the international level.<sup>106</sup>

The protection under Article 10 ICCPR is complemented by Article 7 ICCPR, comprising that no one shall be subjected to torture, inhuman or degrading treatment.<sup>107</sup> Accordingly, State organs should refrain from any action resulting in a mistreatment.<sup>108</sup> However, ‘a general situation of deplorable conditions of detention, such as overcrowded prisons or poor sanitary hygienic standard does not necessarily reach the threshold of a violation of Article 7 ICCPR’.<sup>109</sup>

Rutasia granted the migrants temporary protection in the Woeroma Centre and later on in the barracks.<sup>110</sup> Furthermore, it provided them with an independent supervision of the detention conditions<sup>111</sup> as well as a legal counsel.<sup>112</sup> The concerns raised by the Ombudsman in respect to the conditions in the Woeroma Center were contested by Rutasia’s Immigration

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<sup>105</sup> Shyla Vohra ‘Detention of Irregular migrants and Asylum Seekers’ citing UN GAOR 13th Session, Third Committee (16 September to 8 December 1958) in Ryszard Cholewinski, Richard Perruchoud and Euan MacDonald (eds), *International Migration Law* (Asser Press 2007), 160-173, 227-241.

<sup>106</sup> Vohra, (n 105), 61.

<sup>107</sup> ICCPR, art 7.

<sup>108</sup> Vohra (n 105), 61.

<sup>109</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary* (Kehl 2005), art 7 (Prohibition of torture) 172.

<sup>110</sup> *ibid.*

<sup>111</sup> C[36].

<sup>112</sup> C[43].

Department as factually inaccurate.<sup>113</sup> Even if the facts were accurate, the conditions in Block B would nevertheless not amount to a degrading treatment in the sense of Article 7 ICCPR.<sup>114</sup> Socio-economic conditions like the general living conditions in detention centres cannot establish a degrading treatment.<sup>115</sup>

Degrading treatment constitutes the weakest level of violation of Article 7 ICCPR and does not amount to an inhuman treatment.<sup>116</sup> Accordingly, if no degrading treatment can be established, inhuman treatment cannot be assumed either. Hence, Rutasia treated the Alfurnan migrants with humanity and respected their inherent dignity in conformity with Article 10 ICCPR.

Thus, Rutasia treated the Alfurnan migrants with humanity and respect for their inherent dignity and did not expose them to degrading treatment. Therefore, Rutasia did neither violate Article 10 nor 7 ICCPR.

**3. Lastly, Rutasia granted the Alfurnan migrants an adequate standard of living and the highest attainable standard of health**

According to Article 11 of the International Covenant of Economic, Social and Cultural Rights ('ICESCR'), every State party has to recognize 'the right of everyone to an

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<sup>113</sup> C[36].

<sup>114</sup> Nowak (n 109), 172.

<sup>115</sup> UN Doc A/2929 31, para 13.

<sup>116</sup> Nowak (n 109), 165.

adequate standard of living for himself and his family'.<sup>117</sup> This includes 'adequate food, clothing and housing'.<sup>118</sup> Pursuant to the Human Rights Committee, each State party has the 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights it is incumbent upon'.<sup>119</sup> Thus, a State party only discharges its obligations under the Covenant if it deprives a significant number of individuals of essential food, essential primary health care, basic shelter and housing.<sup>120</sup> Hence, to respect human dignity, a State has to afford irregular migrants a minimum level of housing assistance.<sup>121</sup> Furthermore, the right of everyone to enjoy the highest attainable standard of physical and mental health pursuant to Article 12(1) ICESCR<sup>122</sup> provides the right to essential primary health care.<sup>123</sup>

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<sup>117</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11.

<sup>118</sup> Asbjørn Eide, 'Adequate Standard of Living' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2010) 235.

<sup>119</sup> UNHCR General Comment No 3: The nature of States parties' obligations (art 2, para 1 of the Covenant) UN Doc E/1991/23, para 10.

<sup>120</sup> *ibid.*

<sup>121</sup> Ryszard Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights*, (Council of Europe Publishing 2005) 35.

<sup>122</sup> ICESCR, art 12(1).

<sup>123</sup> UNHCR General comment No 3: The nature of States parties' obligations (art 2, para 1 of the Covenant) UN Doc E/1991/23, para 10.

Rutasia, being a State party to the ICESCR<sup>124</sup>, is obliged to grant a minimum standard of those human rights to the Alfurnan migrants. Notwithstanding, since the report of the Ombudsman is deemed to be factually inaccurate,<sup>125</sup> it does not establish facts which the ICJ might consider. In any event, Rutasia provided the Alfurnan migrants with basic housing in the Woeroma Centre. It supplied them with essential food as well as a limited access to medical care.<sup>126</sup> This suffices by itself to satisfy the minimum core obligation of the right to essential primary healthcare.

Accordingly, Rutasia complied with its minimum core obligation to ensure the enjoyment of an essential level of each right<sup>127</sup> and granted the Alfurnan migrants an adequate standard of living and the highest attainable standard of health.

### **B. The proposed transfer to Saydee is legal**

The prohibition on direct or indirect refoulement<sup>128</sup> does not generally preclude a transfer of migrants to a third country.<sup>129</sup> Nevertheless, since Rutasia is obliged to respect the

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<sup>124</sup> C[54].

<sup>125</sup> C[36].

<sup>126</sup> C[33].

<sup>127</sup> UNHCR General comment No 3: The nature of States parties' obligations (art 2, para 1 of the Covenant) UN Doc E/1991/23, para 10.

<sup>128</sup> *Salah Sheekh v the Netherlands* App No 1948/04 (ECtHR, 11 January 2007), para 141; *M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011), para 342; UNHRC CCPR General Comment No 31 UN Doc CCPR/C/21/Rev.1/Add.13, para 12; UNCAT General Comment No 1: Implementation of article 3 of the Convention in the context of article 22 (1997) UN Doc A/53/44 annex IX, para. 2; UNCAT '*Hamayak Korban v Sweden* Communication No 88/1997, Views of 16 November 1998, para 7.

core obligation of non-refoulement according to customary international law, it can only transfer the Alfurnan migrants to a third country where no reasonable danger of torture exists.<sup>130</sup> In this respect, Rutasia submits that it does not put the migrants at risk of direct refoulement, since no risk of torture can be established in Saydee [1] and further, that no subsequent risk of refoulement is present in Saydee [2].

**1. Rutasia does not put the migrants at risk of direct refoulement, since no risk of torture, inhuman, cruel or degrading treatment can be established in Saydee**

Alongside Article 33(1) Refugee Convention, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>131</sup> ('CAT') also **expressly** provides a non-refoulement obligation. Article 3(1) CAT comprises that 'no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'<sup>132</sup>

Beyond that, the Human Rights Committee ('HRC') takes the view that a more extensive non-refoulement obligation is implicitly entailed in Article 6 and 7 ICCPR.<sup>133</sup> It

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<sup>129</sup> Elihu Lauterpacht, Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (CUP & UNHCR 2003) 122, para 116.

<sup>130</sup> UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007), para 21 <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> accessed 10 January 2013.

<sup>131</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

<sup>132</sup> CAT, art 3(1).

<sup>133</sup> HRC, General Comment No 20 (1992) UN Doc HRI/GEN/1/Rev.6 at 151, para 9.

further holds that persecution under Article 7 ICCPR includes the threat of ‘cruel, inhuman or degrading treatment.’<sup>134</sup> However, the interpretations of the UN create no binding obligations for the States.<sup>135</sup>

It has also been discussed that the non-refoulement obligation has become customary international law.<sup>136</sup> Yet, State practice has shown that there is no general acceptance among States of an extended scope of the non-refoulement obligation.<sup>137</sup> This is, for instance, evidenced by the United States’ written statement to the UN where it declared that it does not agree with the UN’s interpretation of Article 6 and 7 ICCPR, comprising a extensive non-refoulement obligation.<sup>138</sup> The US’s different understanding of the non-refoulement obligation is further illustrated by its still practiced interception and repatriation of Haitians in international waters.<sup>139</sup> The *Suresh* as well as the *Chahal* case provide further proof that States do not accept an absolute non-refoulement obligation as suggested by the HRC but

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<sup>134</sup> HRC, General Comment No20 (1992) (n 133), para 9.

<sup>135</sup> Vohra (n 105) 160-173, 227-241.

<sup>136</sup> UNHCR, ‘The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’ (31 January 1994) <<http://www.unhcr.org/refworld/docid/437b6db64.html>> accessed 10 January 2013; Rodger Haines, ‘International Law and Refugees in New Zealand’, (1999) N.Z.L. REV. 119, 124.

<sup>137</sup> UN Doc CCPR/C/USA/CO/3/Rev.1.

<sup>138</sup> *ibid.*

<sup>139</sup> i.e. 125 Haitians were intercepted by the US coast guard and repatriated to Haiti in January 2012 <<http://www.defend.ht/news/articles/community/2390-haiti-125-migrants-intercepted-and-repatriated-by-us-coast-guard>> accessed 10 January 2013.

reserve the right to deviate in exceptional cases.<sup>140</sup> Although custom cannot be denied on the grounds that States do not always act according to its obligation,<sup>141</sup> States seem only to adhere to a minimum core obligation of non-refoulement under customary international law. This minimum standard entails that no one can be returned to a place where a risk of torture awaits.<sup>142</sup> Thus, no conclusive State practice exists to prove that the non-refoulement obligation has the extended scope as suggested by the HCR.

Rutasia is not a State party to the CAT and thus not bound by its provisions.<sup>143</sup> Although Rutasia is a State party to both the Refugee Convention<sup>144</sup> as well as the ICCPR<sup>145</sup>, it is not bound by a non-refoulement obligation under either of these conventions with regard to the Alfurnan migrants. Firstly, the Alfurnan migrants cannot claim upon the refugee status and thus, fall outside the scope of the Refugee Convention.<sup>146</sup> Secondly, the ICCPR does not entail a non-refoulement obligation. Rutasia is only bound by the obligation to not return someone to a place where a risk of torture exists.

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<sup>140</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 2002 SCC 1; *Chahal v The United Kingdom* Appl No 70/1995/576/662 (ECtHR, 16 November 1996).

<sup>141</sup> *Military & Paramilitary Activities in & against Nicaragua* (n 40).

<sup>142</sup> UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007), para 21 <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> accessed 10 January 2013.

<sup>143</sup> C[54].

<sup>144</sup> C[54].

<sup>145</sup> ICCPR, art 2.

<sup>146</sup> Refugee Convention, art 1A(2).

Torture is defined as ‘any act by which severe pain or suffering, whether physical or mental, is **intentionally** inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him [...] or intimidating or coercing him [...] based on discrimination of any kind [...] when such pain or suffering is inflicted [...] by a public official [...]’<sup>147</sup>. The threshold of when a risk of torture is reached can be summarized as ‘circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture’.<sup>148</sup> In the words of the UK Court of Appeal, ‘a “real risk” is more than a mere possibility but something less than a balance of probabilities or more likely than not’.<sup>149</sup>

However, the major criticisms of Saydee’s Camp Sontag are unacceptable hygiene, insufficient food and the alleged sexual abuse by the guards.<sup>150</sup> The conditions regarding hygiene and food do not amount to torture in the sense of the definition. Firstly, they do not constitute a severe mental or physical suffering. Secondly, they were not inflicted for gaining any information or based on any kind of discrimination. Although the alleged sexual abuse by the guards amounts to mental and physical suffering, it is also not intentionally inflicted based on any kind of discrimination. Furthermore, the threshold of when a risk is established is not reached since a mere possibility of torture is not sufficient.

Therefore, Rutasia does not violate its direct non-refoulement obligation since no risk of mistreatment is present in Saydee.

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<sup>147</sup> CAT, art 1(1).

<sup>148</sup> Lauterpacht, Bethlehem (n 129), para 249.

<sup>149</sup> *AS & DD (Lybia) v Secretary of State for the Home Department* (2008) EWCA Civ 289, para 60.

<sup>150</sup> C[40].

**2. Further, no subsequent risk of refoulement is present in Saydee**

For a legal transfer to a third country, it must be ensured that there is no reasonable risk of refoulement in this country.<sup>151</sup> Hence, to comply with international law, the third countries must be assessed as ‘safe’ in the sense that migrants are not subject to a risk of subsequent refoulement.<sup>152</sup> If there is a reasonable risk that individuals could be refouled, the transfer would constitute a violation of the non-refoulement obligation.<sup>153</sup>

There is no indication that Saydee would transfer the migrants to a country where a risk of torture is imminent. Since the mere possibility does not suffice<sup>154</sup>, the threshold of a risk of torture is not reached.

Consequently, the proposed transfer to Saydee is consistent with Rutasia’s non-refoulement obligation. Ultimately, the transfer of the Alfurnan migrants to Saydee is legal.

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<sup>151</sup> Rachel Mansted, ‘The Pacific Solution - Assessing Australia’s Compliance with International Law’, (2007) 3:1 BOND UNIV. ST. L. REV. 1, 5, para 11.

<sup>152</sup> *T.I. v United Kingdom* [2000] INLR 211, 228; Lauterpacht, Bethlehem (n 129), 122.

<sup>153</sup> *ibid.*

<sup>154</sup> Lauterpacht, Bethlehem (n 129), para 249; *AS & DD (Lybia) v Secretary of State for the Home Department* (2008) EWCA Civ 289, para 60.

#### **IV. RUTASIA IS ENTITLED TO SEEK RELIEF FROM THE COURT AND DID NOT VIOLATE ALFURNA'S SOVEREIGN IMMUNITY FROM ENFORCEMENT**

Rutasia is entitled to seek relief from the Court [A] and did not violate Alfurna's sovereign immunity from enforcement [B].

##### **A. Rutasia is entitled to seek relief from this Court**

Rutasia is not estopped from making claims since no inconsistent conduct can be attributed to it. The obligation to act in good faith is a general principle of international law.<sup>155</sup> Good faith is also the basis underlying the international estoppel principle.<sup>156</sup> In various judgments, the ICJ acknowledged the estoppel principle according to which 'one should not benefit from his or her own inconsistency'.<sup>157</sup> Hence, estoppel demands that a State should 'be consistent in its attitude to a given factual or legal situation' for its claim to be heard by the ICJ.<sup>158</sup> If a State brings a claim that is inconsistent with its prior conduct, this claim has to be rejected.<sup>159</sup>

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<sup>155</sup> *Certain Norwegian Loans (France v Norway)* [1957] ICJ 9, 53 (Separate Opinion of Judge Lauterpacht).

<sup>156</sup> Derek Bowett, 'Estoppel Before International Tribunals and Its Relation to Acquiescence', (1957) 33 BRIT. Y.B. INT'L L. 176, 176; Ian MacGibbon, 'Estoppel in International Law', (1958) 7 INT'L AND COMP. L. Q. 468, 487; Michael Rubin, 'The International Legal Effects of Unilateral Declarations', (1977) 71 AM. J. INT'L L. 1, 2.

<sup>157</sup> *Legal Status of Eastern Greenland* (n 17) 73; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 39 (Separate Opinion of Judge Alfaro); *North Sea Continental Shelf Cases* (n 7) (Separate Opinion of Judge Ammoun).

<sup>158</sup> Ian MacGibbon, 'The Scope of Acquiescence in International Law', (1954) 31 BRIT. Y.B. INT'L L. 153, 176.

<sup>159</sup> *ibid.*

Estoppel consists of three fundamental elements: first, a State must make a representation vis-à-vis another State; secondly, this representation must be unconditional and made with proper authority; and finally, the State invoking estoppel must rely on this representation.<sup>160</sup>

A representation can arise from a declaration or from silence.<sup>161</sup> In the *Serbian Loans* case<sup>162</sup>, the Court observed that a declaration must be ‘clear and unequivocal’. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court stated more precisely that an ‘estoppel may be inferred from the conduct, declarations and the like made by a State which ... [has] caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice.’<sup>163</sup> In contrast, an estoppel arising from silence was considered for the first time in the *Fisheries Case*.<sup>164</sup> Nevertheless, the first element of an estoppel, the requirement of a clear and unambiguous statement, creates an obstacle to the establishment of estoppel by silence.<sup>165</sup> A clear and unambiguous demonstration of the State's

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<sup>160</sup> *North Sea Continental Shelf Cases* (n 7) 26; Bowett (n 156), 201; Megan Wagner, ‘Jurisdiction by Estoppel in the International Court of Justice’, (1986) 74 CAL. L. REV. 1777, 1779-1780.

<sup>161</sup> *Temple of Preah Vihear* (n 164) 62 (Separate Opinion of Judge Fitzmaurice); *Elettronica Sicula SpA (United States of America v Italy)* [1989] ICJ Rep 15, 44.

<sup>162</sup> *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes)* (Judgment) (1929) PCIJ Rep Series A No 20. para 38.

<sup>163</sup> (*Nicaragua v United States of America*) (*Jurisdiction*) [1984] ICJ Rep 392, 415; see further *Land and Maritime Boundary between Cameroon and Nigeria, (Cameroon v Nigeria) (Jurisdiction)* [1998] ICJ Rep 275, 303.

<sup>164</sup> *Fisheries Case (United Kingdom v. Norway)* [1951] ICJ Rep 116.

<sup>165</sup> Wagner (n 160), 1783.

position is needed.<sup>166</sup> If a State does not intend its silence to serve as a policy statement, later actions cannot be called inconsistent and thus, lacking good faith.<sup>167</sup>

First of all, Rutasia ‘did what it could over the years to help Alfurna cope with its debt burden’.<sup>168</sup> Rutasia agreed to cancel, to renegotiate and to extend Alfurna’s obligations to repay its loans.<sup>169</sup> In 2005, the Alfurnan Parliament passed legislation declaring a moratorium on servicing all debt to foreign lenders.<sup>170</sup> Consequently, Alfurna ceased repaying any of its loans.<sup>171</sup> Although Rutasia did not protest this moratorium or the fact that Alfurna has ceased paying its loan installments, this silence does not entail a clear and unambiguous statement upon which Alfurna can rely. After declaring the moratorium, Prime Minister Fatu also called upon all States to assist Alfurna at what he termed ‘a time of unique tragedy and unique challenge.’<sup>172</sup> In silent response, Rutasia did not inform Alfurna of its default and did not make use of its right to call the whole loan balance due.<sup>173</sup> In this respect, Rutasia’s prolonged leniency in calling in the loan must be considered an act of ‘good faith’, especially since Rutasia itself already experienced severe financial pressure since 2008.<sup>174</sup>

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<sup>166</sup> *ibid.*

<sup>167</sup> MacGibbon (n 158) 168-169.

<sup>168</sup> C[50].

<sup>169</sup> C[50].

<sup>170</sup> C[23].

<sup>171</sup> C[23].

<sup>172</sup> C[23].

<sup>173</sup> See the *default clause* in C[Annex A].

<sup>174</sup> C[30].

Notwithstanding its financial situation, Rutasia waited until 2012 before it finally notified Alfurna of the default.<sup>175</sup> After Alfurna did not respond to this notice,<sup>176</sup> Rutasia seized the money to finally protect its own interests by using the funds to pay down at least a portion of the loans that it had extended in good faith.<sup>177</sup> Accordingly, Rutasia acted in ‘good faith’ and cannot be attributed an inconsistent behavior amounting to estoppel.

Therefore, Rutasia is entitled to seek relief from the Court.

**B. Rutasia did not violate Alfurna’s sovereign immunity from enforcement under the restrictive approach of this Court**

In its judgment regarding the case concerning *Jurisdictional Immunities of the State*, this Court adopted the restrictive approach in respect to immunity from enforcement, hereby rejecting the absolute immunity approach.<sup>178</sup> Accordingly, prior to the exercise of any enforcement measure against property belonging to a foreign State, certain conditions must be satisfied.<sup>179</sup>

For one thing, the property has to be in use for an *acta iure gestionis*, in contrast to an *acta iure imperii*.<sup>180</sup> For another thing, the State owning the property must have expressly

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<sup>175</sup> C[46].

<sup>176</sup> *ibid.*

<sup>177</sup> C[50].

<sup>178</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ, 43, 44, paras 116-118 <<http://www.icj-cij.org/docket/files/143/16883.pdf>> accessed 04 January 2013.

<sup>179</sup> *ibid.*

<sup>180</sup> *Jurisdictional Immunities of the State* (n 178), paras 116-118.

given its consent to exercise a measure of constraint,<sup>181</sup> or the State must have earmarked the property particularly for the satisfaction of a judicial claim.<sup>182</sup> Accurately, Alfurna's assets are in use for an *acta iure gestionis* and thus, Alfurna's assets cannot be protected by immunity from enforcement [1]. In any event, Alfurna has given its express consent to the carrying out of the enforcement measure [2].

**1. Alfurna's assets are in use for an acta iure gestionis and thus do not enjoy  
immunity from enforcement**

To determine whether property should be regarded as an *acta iure imperii* or an *acta iure gestionis*, two aspects have to be taken into consideration: Firstly, the nature of the contract, secondly its purpose.<sup>183</sup> When the nature of the contract is commercial, the defendant State can still prove that the purpose of the contract serves a non-commercial purpose.<sup>184</sup> Accordingly, even though a loan is generally considered to be of a commercial nature, if its purpose is procuring money for a public purchase, the loan contract can be regarded as having a public character<sup>185</sup> and hence qualifying as an *acta iure imperii*. For instance, the purpose of a loan contract is 'clearly public and thus supported by *raison d'Etat*,

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<sup>181</sup> *ibid.*

<sup>182</sup> *ibid.*

<sup>183</sup> UN Doc A/46/10, art 10, para 25, 20.

<sup>184</sup> *ibid.*, art 10, para 26, 20.

<sup>185</sup> *ibid.*, art 10, para 28, 20.

[if it serves] the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area.’<sup>186</sup>

Since loans qualify as commercial contracts,<sup>187</sup> the Climate Change loan is according to its nature a commercial contract. In any case, Alfurna has the burden of proof that the purpose of the Climate Change loan was an *acta iure imperii*. In this context, Alfurna could claim that the purpose of the Climate Change loan was non-commercial due to its purpose. The disbursement was conditioned on the funds being used to repair the seawalls and related damage, designing and implementing other remedies and preventative measures to combat inundation, and associated research.<sup>188</sup> Hereby, Alfurna fails to recognize, however, that Rutasia did not seize the disbursed money and hence, did not seize money serving a non-commercial purpose.

On 15 March 2012 when Rutasia seized the ARB’s account, the original loan balance had already been fully disbursed between 1992 and 1997.<sup>189</sup> The seized assets of USD 25 million derive from the amount of USD 20 million that Alfurna withheld prior to the Mainline Constructions Limited (‘MCL’) arbitration and the damages in the amount of USD 35 million awarded in the MCL arbitration.<sup>190</sup> Alfurna and Rutasia agreed that the withheld amount of USD 20 remains in the ARB account, its use restricted to the original purposes and

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<sup>186</sup> UN Doc A/46/10, art 10, para 26, 20.

<sup>187</sup> *ibid*, art 10, para 28, 20.

<sup>188</sup> C[9].

<sup>189</sup> C[12].

<sup>190</sup> C[17];[19];[20].

governed by the procedures of the climate change loan.<sup>191</sup> This agreement however does not encompass the awarded damages in the amount of USD 35 million. These funds are no longer tied to the original purpose of the Climate Change loan. Accordingly, to support its claim, Alfurna would have to prove the assets of USD 25 million were still governed by the original purpose of the Climate Change loan.

Consequently, Alfurna's assets are in use for an *acta iure gestionis* and thus, not protected by immunity from enforcement.

**2. In any event, Alfurna gave its express consent to carry out the enforcement measure and thus waived its immunity from enforcement**

As held by the Court, the consent to an enforcement measure must be expressly given to effectively waive the immunity from enforcement.<sup>192</sup> In this respect, consent to the taking of an enforcement measure can be given in a written contract.<sup>193</sup>

The ARB account was held in the name of ARB, Alfurna's central bank.<sup>194</sup> Hence, the assets in the ARB account were property subject to Rutasia's control. According to the wording of the default clause, 'the creditor may, at its election, seize for its own account any collateral or other property of the debtor subject to its control, without further notice and without the need for any judicial authorization, up to the amount of the then incurred

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<sup>191</sup> C[19].

<sup>192</sup> *Jurisdictional Immunities of the State* (n 178) 43, para 118.

<sup>193</sup> Convention on Jurisdictional Immunities of States and Their Property (2004, not yet in force) UN Doc A/59/49, (Immunities Convention), arts 18, 19; UN Doc A/46/10, art 10, paras 25, 20.

<sup>194</sup> C[11].

indebtedness”.<sup>195</sup> Therefore, Alfurna expressly consented, that Rutasia may seize its property without the need for a judicial authorization. Hence, Alfurna agreed to the carrying-out of such an enforcement measure.

Therefore, by closing Alfurna’s bank account and seizing the USD 25 million of Alfurna’s assets, Rutasia did not violate Alfurna’s sovereign immunity from enforcement under the restrictive approach of the Court and thus did not violate international law.

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<sup>195</sup> C[Annex A].

## **PRAYER FOR RELIEF**

Rutasia respectfully requests the Court to adjudge and declare that:

**I.** Since Alfurna is no longer a State, the Court cannot exercise jurisdiction over all its claims in the present dispute;

**II.** Rutasia complied with its obligations under international law, and in any event, Alfurna is foreclosed from making claims in respect to the Alfurnan migrants;

**III.** Rutasia's treatment of the Alfurnan migrants in 'the Woeroma Centre', and the proposed transfer to Saydee, are lawful; and

**IV.** Rutasia is entitled to seek relief from this Court and did not violate Alfurna's sovereign immunity from enforcement.

