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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

ALFURNA

(APPLICANT)

V.

THE STATE OF RUTASIA

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Republic of Alfurna (‘Alfurna’) and the State of Rutasia (‘Rutasia’) hereby agreed to submit the present dispute to the International Court of Justice (‘ICJ’) in accordance with Articles 36 (1) and 40 (1) of the Statute of the Court. As per Article 36, the jurisdiction of the Court comprises all cases that the Parties refer to it. Applicant submits to the jurisdiction of the Court.

QUESTIONS PRESENTED

I. Whether Alfurna is still a State and accordingly whether the ICJ has jurisdiction to deal with all claims in the present dispute.

II. Whether Alfurna is entitled to make claims in relation to its migrants, and whether Rutasia has failed to accord them a status consistent with international law.

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

IV. Whether Rutasia's seizure of Alfurna's assets is a violation of international law and whether this conduct disentitles Rutasia to any relief from this Court.

STATEMENT OF FACTS

Alfurna's preventive measures in response to climate change

The initial territory of Alfurna was located in the Bay of Singri, formed of two low-lying islands: Batri and Engili. Rutasia is a State located 350 miles east of Alfurna. Since its settlement, Alfurna faced difficulties caused by the harsh climate of the bay. Natural disasters, such as earthquakes, cyclones and tsunamis, encountered the bay annually. As a consequence, the low-lying regions of both Alfurnan islands were endangered by the rising tides. Over the years, due to the climate change and its worsening effects, the inundated areas extended. To avoid inundations Alfurna constructed seawalls that required considerable financial outlays.

Already in 1992, the Tom Good Institute, a world-renowned research center, reported that 'Rutasia has been a major contributor to the worsening effects of climate change'. Nevertheless, Rutasia committed to a massive public works program, incontestably accelerating the generation of carbon emissions.

In early 2003, Prime Minister Fatu established the 'Climate Emergency Committee' ('CEC') to examine the future prospects of Alfurna. In August 2004, the CEC reported, based on scientific evidence, that sea levels even at low tide would overwhelm the islands. The report recommended the government to start making plans to evacuate the Alfurnan migrants and to identify a new 'homeland'. By 2005, the Fatu government decided to implement all of the CEC's recommendations.

In mid-2006, a major earthquake rendered Batri Island essentially uninhabitable. Key agencies and the executive officers of Alfurna's government relocated to Finutafu, a State on the western side of the Bay of Singri. Approximately 15,000 of Alfurnans were relocated to

Finutafu, while the remainder fled to Engili. A few months later, Batri Island became permanently submerged.

The CEC negotiated with several countries on the cession of territory for Alfurna. In November 2007, official negotiations with Finutafu on the cession of the Nasatima Island started. Meanwhile, severe storms damaged Engili which became permanently submerged on 26th December 2011. Alfurna and Finutafu failed to agree on the cession of Nasatima Island, but in the end, Finutafu agreed to lease the island for 99 years. According to this agreement, Alfurna is entitled to apply and enact its own laws on the island. However, in regard to defense, customs, and immigration Finutafu retains full sovereignty.

The lease agreement went into effect on 9 March 2012. Three government ministries already relocated to Nasatima Island and the remaining 11 have representatives and functionaries on the island. The definite relocation is planned for the end of 2013.

Rutasia's treatment of the detained Alfurnan migrants

Alfurna's population consists of approximately 53,000 citizens, including 1,500 habitants of the Nullatree Cove village. The latter villagers rejected urbanization and lived isolated on the coast of Engili. By 2009, the evacuation plans undertaken by Alfurna's government enabled all but 3000 Alfurnans to resettle elsewhere. Roughly half of the remaining Alfurnans were Nullatree Cove villagers who refused to be evacuated.

During 2009 and 2010, the Rutasian Navy intercepted 2,978 Alfurnan migrants in Rutasia's territorial waters. All migrants were detained in the Woeroma Immigration Processing and Detention Centre ('the Woeroma Centre'). The 1,492 Nulatree Cove villagers were located in Block A, while the other Alfurnan migrants were housed in Block B.

The Rutasian Immigration Ombudsman expressed his concerns about the human rights violations in the Woeroma Centre. According to his report, the facility resembled 'a medium security prison with high fences'. The Alfurnan migrants were housed in overcrowded rooms and exposed to hygiene problems. Inappropriate food and water was provided and the medical service was limited. Three Alfurnans committed suicide and another five died from dysentery. Rutasia's Immigration Department did not take any measures to overcome these concerns.

By the end of November 2011, an earthquake damaged the Woeroma Centre, revealing asbestos in Block A. Since it became uninhabitable, the Rutasian government decided to transfer the migrants to Republic of Saydee ('Saydee'), a State with objectionable human rights records. Several NGO's protested the proposed transfer, underlining that Saydee's detention centers resemble prisons where conditions are degrading and human rights are not respected. Alfurna's Prime Minister publicly opposed the transfer.

Meanwhile, the International Legal Support Association ('ILSA'), representing the Alfurnan detainees, filed a suit in Rutasia's Supreme Court. They requested an emergency stay of the proposed transfer. However, the case was dismissed because the Court could not interfere with the Rutasia's foreign policy.

The Alfurnan government and Finutafu's ambassador plead on international fora to stop the transfer. They were supported by 67 UN Member States. After ILSA filed an urgent application, the Rutasian Supreme Court approved the motion and permitted a temporary stay until the judgment of the ICJ would be issued.

Rutasia's seizure of Alfurna's assets

In 1992, in response to increased inundations, Alfurna's government sought loans to finance the reparation of the seawalls. The Rutasian and Alfurnan governments launched the 'Alfurna Climate Change Remediation Project' ('ACCR Project'') and signed a 'Climate Change Loan' ('CCL') of USD 125 million. The agreement was executed on 5 June 1992 by the Rutasian International Cooperation Administration ('RICA'). Between 1992 and 1997, all funds were disbursed into the Alfurna Reserve Bank's ('ARB') account in the Provincial Bank of Lando.

In 1999, Alfurna failed to repay its obligations under the CCL and other loans taken under the Paris Club arrangements. The Alfurnan government started negotiations with several creditor countries resulting in debt reliefs. Rutasia cancelled 25% of the CCL principal, reduced the annual interest rate from 2.0% to 1.5%, and rescheduled repayment to 2027. In September 2002, further 25% of the CCL were cancelled, the interest rate was reduced to 1.1%, and the period for repayment was extended for further 20 years.

Under the provisions of the CCL, Alfurna was obliged to use the services of Rutasian companies. Accordingly, it contracted the Mainline Constructions Limited Company ('MCL'). However, already in 2001, a dispute arose. The Alfurnan Government claimed that repairs on the seawalls were partly substandard. In November 2002, the Arbitration Tribunal judged in favor of Alfurna and awarded damages of USD 35 million. Furthermore, USD 20 million, earlier held in deposit, were released.

In January 2005, the Alfurnan Parliament passed legislation declaring a moratorium on its foreign debts. As a result, Alfurna ceased repaying any of its loans. Facing financial problems, Rutasia started to collect its debts. On10 February 2012, RICA put Alfurna on notice that it had been in default under the loan agreement for more than one year. Alfurna

did not respond. After one month, president Millard declared the entire loan balance due and payable and ordered the closure of the ARB account. The total amount of USD 25 million was seized. On 20 March 2012, Prime Minister Fatu responded with a diplomatic note, stating that the seizure violated international law. Rutasia did not respond.

Unable to resolve the dispute by negotiation, Alfurna as Applicant and Rutasia as Respondent brought their dispute to the ICJ on 14 September 2012. Since Rutasia challenges the jurisdiction of the ICJ, the parties drafted the Compromis which is now before this Court.

SUMMARY OF PLEADINGS

I. Only States can be parties to cases before the Court. This Court may exercise jurisdiction over all present claims since Alfurna is still a State. Therefore, Rutasia is foreclosed from claiming that the Court lacks jurisdiction.

Once a State has been rightfully established, international law provides no criteria to determine the continued existence of a State. Rutasia cannot invoke the Montevideo criteria to challenge Alfurna's existence as a State since Alfurna is neither a State party to the Montevideo Convention nor reflect the Montevideo criteria customary international law. In any event, Alfurna would meet the Montevideo criteria because it is in possession of territory, has a permanent population, an effective government and the capacity to enter into relations with other States. Alternatively, even if it does not fulfill those criteria, Alfurna bases the Court's jurisdiction on the customary principle of continuity of statehood.

II. Alfurna is entitled to make claims in respect to the Alfurnan migrants and Rutasia violated international law by failing to process the migrants and accord them a status consistent with international law.

Firstly, Alfurna's claims are admissible due to its right to exercise diplomatic protection over the Alfurnan migrants. Furthermore, Alfurna's claims cannot be rejected through the 'clean hands' doctrine since the doctrine cannot be invoked to preclude a State from exercising diplomatic protection when its own conduct led to the violation of its nationals' rights. In any event, Alfurna cannot be attributed such a conduct. Even if the Court is minded to consider that the 'clean hands' doctrine applies, Rutasia is estopped from invoking Alfurna's failure to protect the migrants due to its own inconsistent behavior.

Secondly, customary international law grants a status of subsidiary protection. By not according this status to the Alfurnan migrants, Rutasia has deprived them of their status rights. Rutasia further violated its non-refoulement obligation pursuant to Article 6 and 7 ICCPR by failing to process the Alfurnan migrants in due time.

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

Rutasia violates its human rights obligations by its conduct towards the Alfurnan migrants detained in the Woeroma Center. Rutasia violated the Alfurnan migrants' right to liberty and security. Rutasia further violated the Alfurnan migrants' right to be treated with humanity and respect for the inherent dignity and exposed them to degrading treatment. Finally, Rutasia violated the Alfurnan migrants' right to an adequate standard of living and the highest attainable standard of health.

Rutasia further violates its non-refoulement obligation pursuant to Article 6 and 7 ICCPR with the proposed transfer of the Alfurnan migrants to Saydee. In compliance with the more extensive non-refoulement obligation pursuant to article 6 and 7 ICCPR, Rutasia can only transfer the Alfurnan migrants to a third country if this is a safe country. Saydee cannot fulfill the requirements put upon a 'safe third country'. Thus, by transferring the migrants, Rutasia violated its non-refoulement obligation pursuant to Article 6 and 7 ICCPR.

IV. Rutasia's conduct disentitles it from any relief from this Court in respect to its claims over Alfurna's assets, and in any event, Rutasia's seizure of Alfurna's assets violated international law.

Rutasia is estopped from claiming that the seizure of Alfurna's assets was lawful. Rutasia did not act in 'good faith' when it seized Alfurna's assets and set itself in contradiction to its prior behavior. Rutasia's behavior is therefore inconsistent and amounts to an estoppel.

In any event, Rutasia violated Alfurna's sovereign immunity from enforcement under the restrictive approach of the Court: Alfurna's assets were in use for an *acta iure imperii* and thus immune from enforcement measures. Furthermore, Alfurna has neither given its consent to the carrying out of an enforcement measure, nor has Alfurna earmarked the assets for the satisfaction of Rutasia's claims arising from the Climate Change Loan. Finally, Alfurna has not waived its immunity from enforcement by subjugating the Climate Change Loan to Rutasia's laws. Hence, Rutasia violated Alfurna's sovereign immunity from enforcement.

I. THIS COURT HAS JURISDICTION OVER ALL OF ALFURNA'S CLAIMS SINCE ALFURNA IS STILL A STATE

Only States can be parties to cases before the International Court of Justice ('ICJ').[1] Once a State has been rightfully established, international law provides no criteria to determine its continued existence [A]. In any event, Alfurna still satisfies the customary criteria for the creation of statehood as reflected in Article 1 of the Convention on the Rights and Duties of States[2] ('Montevideo Convention') [B]. Alternatively, even when these criteria were not satisfied, Alfurna bases its statehood on the customary principle of continuity of statehood [C].

A. International law provides no criteria to determine Alfurna's statehood

The total loss of State territory caused by the effects of climate change is unique in the experience of international law.[3] No rules exist yet to deal with such a situation. In particular, neither the rules that govern the creation of states nor those that govern the extinction of states for other reasons can be applied to Alfurna's situation.

[1] Statute of the International Court of Justice, 59 STAT 1055 (1945) (Statute ICJ) art 34 (1).

[2] Convention of the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention).

[3] UN Doc A/63/PV.9.

Firstly, international law only contemplates a State's extinction within the context of State succession.[4] However, all State succession scenarios require that a successor State begins to exist on, or assumes control over, the territory of the previous State.[5] Since the situation is entirely different if a State's territory has become permanently extinct,[6] these rules cannot be applied to Alfurna.

Beyond that, it may be argued that a State can also become extinct if it does no longer satisfy the cumulative criteria for the creation of statehood as set out in Article 1 Montevideo Convention. This view, however, fails to recognize that Article 1 Montevideo Convention is not ratified by Alfurna and has not yet become customary international law [1]. In any event, these criteria do not apply to a once rightfully established State [2].

1. Article 1 Montevideo Convention cannot be applied since it has neither been ratified by Alfurna nor has Article 1 become customary international law

In accordance with Article 11 of the Vienna Convention on the law of treaties ('VCLT')[7], a State has to express its consent to be bound by a treaty. Since Alfurna is not a State party to the Montevideo Convention its rules are not binding upon it.

Accordingly, the ICJ could only apply the Montevideo criteria, if they had become customary international law.[8] Although scholars have argued that these criteria for the

[4] Jane McAdam, *Climate Change, Forced Immigration and International Law* (OUP 2012) 128.

[5] ibid.

[6] ibid.

[7] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

creation of statehood may have gained the status of customary international law,[9] this custom has yet to be proven.[10] Moreover, the tentative formulations of the scholars show that the customary character of these criteria is far from established.[11] Accordingly, there are no customary criteria recognized by the international community.[12]

2. In any event, Article 1 of the Montevideo Convention does not provide criteria to determine the extinction of once rightfully established States

Article 1 of the Montevideo Convention provides cumulative criteria for the creation of statehood: A permanent population, a defined territory, an effective government and the capacity to enter into relations with other States.[13]

International law, however, only discusses these criteria with regard to the creation of a State, not when a State's ongoing existence is in doubt.[14] This is backed up by the international community's conduct vis-à-vis States that temporarily did not fulfill some of the

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[8] Statute ICJ, art 38(1)(b).

[9] Michael Schoiswohl, *Status and Human Rights Obligations of Nonrecognized de facto Regimes in International Law: The Case of 'Somaliland'* (Martinus Nijhoff Publishers 2004) 11.

[10] Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 COLUM. J. TRANSNAT'L L. 416.

[11] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 37ff.

[12] Crawford (n 11) 45; Schoiswohl (n 10) 11.

[13] Montevideo Convention, art 1.

[14] Chiara Giorgetti, *A Principled Approach to State Failure: International Community Actions in Emergency Situations* (Martinus Nijhoff Publishers 2010) 65-66.

Montevideo criteria.[15] Somalia which has not been in possession of an effective government since 1991,[16] may serve as a recent example. It is still acknowledged as a State.

This shows that the international community does not rely upon the Montevideo criteria to determine statehood of a once rightfully established State. Hence, even if the criteria set forth in Article 1 of the Montevideo Convention have become part of customary international law, they only apply in context to the creation of statehood and not once a State has already been established. Hence, these criteria cannot be applied to determine whether Alfurna is still a State.

B. In any event, Alfurna still satisfies the cumulative criteria of Article 1 of the Montevideo Convention

Alfurna still satisfies the cumulative criteria of the Montevideo Convention to determine statehood since it is in possession of territory [1], has a permanent population [2], an effective government [3] and the capacity to enter into relations with other States [4].

1. Alfurna is in possession of territory

The core criterion to establish statehood is territory.[17] Although it is not mandatory to have the borders of the territory itself settled, a State has to be in possession of at least some land territory.[18] Hence, without territory a legal person cannot be a State.[19]

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[15] Crawford (n 11) 694; Ian Brownlie, *Principles of Public International Law* (5th edn OUP 1998) 71.

[16] See <http://www.bbc.co.uk/news/world-africa-14094503> accessed 09 January 2013.

[17] *Island of Palmas Case (The Netherlands v United States)* (1928) Scott Hague Court Reports 2d 83.

Alfurna lost its erstwhile territory, Batri and Engili Island, on 26th December 2011.[20] Nevertheless, Alfurna is now in possession of the Nasatima Island territory due to the Nasatima Island lease which has been in effect since 9th March 2012[21] and therefore fulfills the criterion of territory.

2. Alfurna has a permanent population

There is no legal definition of 'permanent population' in international law; yet scholars define it as 'stable community'.[22] There is no minimum requirement of people to establish a population.[23] As the Court indicated, thinly populated countries can also be subject to territorial sovereignty.[24]

To date, three of Alfurna's fourteen government agencies as well as the representatives and functionaries of the other eleven agencies have already relocated to

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[18] *Deutsche Continental Gas Gesellschaft v Polish State* (1929) 5 AD 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.

[19] Robert Jennings, Arthur Watts, *Oppenheim's International Law* (9th edn, OUP 1992) 563.

[20] 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]).

[21] C[31]; Clarifications para 4,7 (Cl[para]).

[22] Brownlie (n 15) 70.

[23] Crawford (n 11) 52.

[24] *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 Reports 659,712, para 173.

Nasatima Island. [25] The latter government agencies will permanently relocate to Nasatima Island by the end of 2013.[26] By now, Nasatima Island is thinly populated by Alfurnans. The main objective of the Nasatima Island lease, to unite again in a new homeland,[27] makes clear that the relocation is permanent. For this purpose, the government agencies have permanently relocated to Nasatima Island. Thus, a small but stable community has been formed on Nasatima Island. Accordingly, Alfurna has established a permanent population on Nasatima Island.

3. Alfurna possesses an effective government.

An effective government is established through the exercise of authority and the right or title to exercise that authority.[28] Since 'territorial sovereignty is not ownership of, but governing power with respect to territory',[29] the ICJ accepts this definition by confirming that territorial sovereignty is established by proving 'the intention and will to act as sovereign, and some actual exercise or display of such authority'.[30] According to the ICJ, a claim to territorial sovereignty can be 'based […] upon some particular act or title such as a treaty of cession'.[31]

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[25] Cl[7].

[26] ibid.

[27] C[26].

[28] James Crawford, 'The Criteria for Statehood in International Law' (1976) 48 BRIT. Y.B. INT'L L. 93, 117.

[29] ibid, 116.

[30] *Legal Status of Eastern Greenland* (n 24) 45-46, cited in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 24) 712, para 172.

[31] ibid.

Alfurna bases its territorial sovereignty upon the Nasatima Island lease which grants it jurisdiction over the island and its people.[32] Furthermore, Alfurna's territorial sovereignty is not impeded by the control that Finutafu retains over Nasatima Island. Regarding the proof of territorial sovereignty, this Court found that legal significance has to be attached to evidence provided on legislative or administrative acts.[33] However, it also maintained that in cases of competing claims on sovereignty, 'very little [is required] in the way of the exercise of sovereign rights, provided that the other State [cannot] make out a superior claim'.[34]

The Nasatima Island lease shows Alfurna's willingness to act as sovereign, and grants it the right to exercise full authority over the territory except for matters of defense, customs and immigration. Furthermore, three of Alfurna's fourteen government agencies have already relocated to Nasatima Island.[35] The other eleven agencies have representatives and functionaries on the island and will permanently relocate by the end of 2013.[36] Accordingly, Nasatima Island is now populated by Alfurnans and its government has already taken up control over Nasatima Island.

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[32] C[31]; Cl[4];Cl[7].

[33] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 24) 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 04 January 2012.

[34] *Legal Status of Eastern Greenland* (n 24) 45-46, cited in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 24) 712, para 173.

[35] Cl[7].

[36] ibid.

Since the Court is satisfied with very little in respect to the exercise of sovereign powers,[37] the set-up of Alfurna's government together with the Alfurnans on Nasatima Island is sufficient to display its sovereign power over the territory and its people. Furthermore, Alfurna is granted effective control by the Nasatima Island lease over most of the matters that the Court considers significant to prove a State's territorial sovereignty.[38] Thus, Alfurna has a superior claim to the territory of Nasatima Island. Hence, Alfurna has established territorial sovereignty over Nasatima Island. Hence, Alfurna is in possession of an effective government.

4. Alfurna enters into relations with other States

Despite its present situation, Alfurna managed to maintain its independence, a condition to be able to conduct relations with other States. Independence entails the right of a State to exercise its own functions, excluding the participation of any other State.[39] Any political or economic dependence that may in reality exist does not affect the legal independence of the State.[40]

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[37] *Legal Status of Eastern Greenland* (n 24) 45-46, cited in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 24) 712, para 172.

[38] ibid.

[39] *Island of Palmas Case* (n 17), para 839.

[40] Malcolm N. Shaw, *International Law* (5th edn, Cambridge University Press 2003) 189.

Alfurna is independent as it is able to conduct commercial business with other entities[41], to conclude treaties[42] and present its matters before international fora.[43] Thus, Alfurna is able to enter into relations with other States.

Consequently, even assumed that the Montevideo criteria have become customary international law, Alfurna still fulfills them and thus is still a State.

C. In any event, Alfurna bases its statehood on the principle of continuity of statehood

According to the generally acknowledged principle of continuity of an existing State,[44] statehood continues unless the changes in territory, population or government remain over an extended period of time or have become permanent.[45] Several cases show that the fact that one of the criteria of statehood was not satisfied for several years did not impair statehood. *S*tates which had no effective government for a certain period of time were Afghanistan (1989-1996), Bosnia and Herzegovina (1991-1994) and Zaire/Congo (1997-2004), for example. Somalia, without effective government since 1991, may serve as another recent example. Furthermore, the territory of Ethiopia (1935-1945), Poland (1939-1945) and Kuwait (1990-1991) was completely occupied.

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[41] C[9].

[42] C[9]; C[31].

[43] C[26]; C[41].

[44] Crawford (n 11), 667, 700ff.

[47] United Nations High Commissioner for Refugees (UNHCR), 'Climate Change and the Risk of Statelessness: the Situation of Low-Lying Islands' (2011) PPLA/2011/04, 1-2 <http://www.unhcr.org/refworld/docid/4e09a4ba2.html> accessed 4 January 2013.

Since a State's total loss of territory is unique in the experience of international law, no precedent exists of how States deal with it.[46] Nonetheless, the rationale that underlies the principle of continuity mandates its application to cases in which territory has become extinct. Firstly, the principle prevents the undermining of international stability.[47] In State succession scenarios, States generally want to avoid the premature recognition of another State on the territory of the original State.[48] This is because it could be seen as an unlawful interference in the domestic affairs of the original State.[49] The same holds true for the disappearing Island State scenario. [50] Rutasia's seizure of the Alfurnan assets evidences that an unlawful interference can also occur when territory has become extinct.

Secondly, without continuity of statehood there would be a hiatus in international relations and States will 'find it difficult or impossible to continue many mutually advantageous economic, administrative and technical relations with other nations'.[51] The strength of this rationale explains why there have been virtually no cases of involuntary extinction of States since the establishment of the UN Charter in 1945.[52] Thus, the customary principle of continuity of statehood also applies when territory is lost.

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[46] UN Doc A/63/PV.9.

[47] Oscar Schachter, 'State Succession:The Once and Future Law', (1993) 33 VA. J. INT'L L. 253, 259.

[48] ibid,

[49] ibid.

[50] Cf. McAdam **(**n 4),134.

[51] See Roda Mushkat, 'Hong Kong and Succession of Treaties' (1997) 46 INT'L & COMP. L.Q. 181, 183; Matthew CR Craven, 'The Problem of State Succession and the Identity of States under International Law', (1998) 9 EUR. J. INT'L L.142, 159.

[52] McAdam (n 4), 134.

Alfurna lost its territory formed by Batri and Engili Island finally on 26th December 2011[53] while the Nasatima Island lease came into effect on 9th March 2012. This creates a void where no territory existed. Although Alfurna irrevocably lost its former territory, it has gained a new territory with the Nasatima Island. Since the loss of territory did not become permanent, Alfurna can rely upon the principle of continuity of statehood to bridge the gap between 26th December 2011 and 9th March 2012.

In the event that the Court is minded to consider that Alfurna does not satisfy the Montevideo criteria through the lease of the Nasatima Island, Alfurna can still establish its statehood through the principle of continuity of statehood. The rationale of the principle, the maintenance of international stability and avoidance of gaps in international relations still applies since Alfurna is still trying to procure a new permanent homeland.[54] Thus, Alfurna's claim on statehood can, in any event, be based on the principle of continuity. Accordingly, Alfurna is still a State and the Court has jurisdiction to deal with all claims in the present dispute.

[53] C[44].

[54] C[45].

II. ALFURNA IS ENTITLED TO MAKE CLAIMS IN RESPECT TO THE ALFURNAN MIGRANTS AND RUTASIA VIOLATED INTERNATIONAL LAW BY NOT GRANTING THEM A STATUS CONSISTENT WITH INTERNATIONAL LAW

Alfurna is entitled to make claims in respect to the Alfurnan migrants [A] and Rutasia violated international law by failing to process the migrants and accord them a status consistent with international law [B].

A. Alfurna is entitled to make claims in respect to the Alfurnan migrants

Alfurna's claims are admissible due to its right to exercise diplomatic protection over the Alfurnan migrants [1]. Furthermore, there are no grounds for rejecting Alfurna's claims [2].

1. Alfurna can exercise diplomatic protection over the Alfurnan migrants

Customary international law allows a State to exercise diplomatic protection over its nationals to invoke another State's responsibility for a violation of those nationals' rights.[55] By exercising diplomatic protection over a national, the rights the State asserts in respect to its nationals are its own rights.[56] However, two requirements must be fulfilled:[57] Firstly,

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[55] *Republic of Guinea v. Democratic Republic of the Congo* (Preliminary Objections, Judgment) [2007] ICJ Rep 582, 599, para 39.

[56] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain), Second Phase* (Judgment) [1970] ICJ Rep 4, 44.

[57] *Interhandel (Switzerland v United States of America)* (Preliminary Objections) [1959] ICJ Rep 6, 27; *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15, 43-44, para 53.

nationality of the claimant, determined by each State according to its domestic law,[58] and, secondly, the exhaustion of all available local remedies.[59]

Both conditions are met in the present case: The Alfurnan migrants kept in the Woeroma Immigration Processing and Detention Centre ('the Woeroma Centre') have the Alfurnan nationality.[60] Moreover, they submitted their case to the Supreme Court of Rutasia[61] which rejected their case.[62] Since the Supreme Court is the highest court in Rutasia[63] no other effective legal remedies exist to relieve the Alfurnan migrants. Hence, the local remedies condition is fulfilled. Both conditions being fulfilled, as a result, Alfurna can exercise diplomatic protection on behalf of its migrants.

2. Alfurna's exercise of diplomatic protection cannot be rejected through the 'clean hands' doctrine

The 'clean hands' doctrine is generally invoked 'to preclude a State from exercising diplomatic protection if the national it seeks to protect has suffered an injury in consequence

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[58] International Law Commission (ILC), Draft Articles on Diplomatic Protection (2006), Official Records of the General Assembly, Sixty-first Session, Supplement No 10 (A/61/10) (Draft Articles on Diplomatic Protection), art 4.

[59] Draft Articles on Diplomatic Protection, art 14.

[60] C[33]; C[34].

[61] C[43].

[62] ibid.

[63] Cl[6]

of his or her own wrongful conduct.'[64] However, the 'clean hands' doctrine cannot be invoked to preclude a State from exercising diplomatic protection when its own conduct led to the violation of its nationals' rights [a]. Moreover, Alfurna did take all available affirmative steps to protect its people [b]. In any event, Rutasia is estopped from claiming Alfurna's failure to protect since its conduct amounts to an inconsistent behavior [c].

a. The 'clean hands' doctrine cannot be invoked to prevent the exercise of diplomatic protection vis-à-vis Alfurna's nationals

The 'clean hands' doctrine has never been upheld by this Court, even though it had various opportunities to do so.[65] Moreover, the International Law Commission ('ILC') concluded that the 'clean hands' doctrine cannot be invoked to preclude a State from exercising diplomatic protection when its own conduct led to the violation of its nationals' rights.[66] The ILC held that no conclusive evidence in favor of the 'clean hands' doctrine was forwarded and no clear authority supported the applicability.[67] Hence, Rutasia cannot invoke the 'clean hands' doctrine to bar Alfurna from exercising diplomatic protection over its nationals due to its failure to take all available affirmative steps to protect them.

b. Alternatively, Alfurna cannot be attributed a wrongful conduct since it took all available affirmative steps to protect its people

[64] UN Doc A/CN.4/546, 2, para 2.

[65] ibid, 9, para 18.

[66] UN Doc. A/60/10, para 231.

[67] UN Doc A/CN.4/546, 8, para 18.

Even if the clean hands doctrine could be applied, Alfurna's claim can still not be rejected with regard to the merits since no wrongful conduct can be attributed to Alfurna.

In situations where environmental degradation endangers people's lives, the State in which these people live must take appropriate measures.[68] 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.[69] However, particularly in cases of global warming, a State cannot be expected to prevent environmental deterioration.[70] Another restriction is imposed by the 'due diligence' standard.[71] Accordingly, a State is only obliged to fulfill obligations that are within its ability to fulfill.[72] A State is not held responsible for its omission if it lacks the resources to take the preventive or adaptive measures required.[73]

Alfurna signed and ratified the UN Framework Convention on Climate Change ('UNFCCC') in 1997 and the Kyoto Protocol in 1998.[74] Alfurna promoted the combat against global warming pursuant to its obligation under Article 3(1) UNFCCC.[75] It negotiated the

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[68] Astrid Epiney 'Environmental Refugees' in Etienne Piguet, Antoine Pécoud, Paul de Guchteneire (eds), *Migration and Climate Change* (CUP 2011) 397.

[69] ibid.

[70] ibid.

[71] ibid.

[72] ibid.

[73] ibid.

[74] C[13].

[75] ibid.

Climate Change Loan ('CCL') to get the funds needed for repairing the seawalls and related damage, taking preventative measures and doing associated research.[76] After being informed of the pending submergence of its territory, Alfurna's government started negotiations for a new homeland.[77] Alfurna further made evacuation plans and individual arrangements allowing all but 3000 Alfurnans -out of a population of 53000-[78] to relocate to a host State.[79] Half of these 3000 persons were Nullatree Cove Villagers who refused to relocate and for the other half the respective host States denied their admission due to their Alfurnan criminal records,[80] not because of a lack of effort on Alfurna's side. Hence the 'due diligence' standard prevents a failure of Alfurna's obligation to take preventive measures to protect its people from the effects of climate change. Thus, Alfurna cannot be attributed a wrongful conduct. Therefore, the 'clean hands' doctrine does not mandate the rejection of Alfurna's claims in regard to its nationals.

c. In any event, Rutasia is estopped from claiming Alfurna's failure to protect the migrants due to its own inconsistent behavior

A State is estopped from making any claims that would set the State in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable

[76] C[9].

[77] C[24].

[78] C[2].

[79] C[32].

[80] ibid.

reliance on such conduct.[81] Inconsistent behavior is established when a State complains about an action or omission that it does not perform itself.[82]

Rutasia is a State party to the UNFCCC. [83] It has signed the Kyoto Protocol in 1998 but not yet ratified it.[84] Thus, it is not obliged to reduce its greenhouse gases and carbon dioxide emissions in compliance with the Kyoto Protocol. Already in 1992, the Tom Good Institute declared Rutasia as one of the mayor contributors to the worsening effects of climate change.[85] Nonetheless, Rutasia produced even more gases from the mid-90's onwards.[86]

Thus, Rutasia itself did not take steps to prevent and mitigate the effects of the climate change but on the contrary rather, contributed to the climate-change induced sinking of Alfurna's territory. Consequently, it cannot claim any failure on behalf of Alfurna since it did not itself perform any measures to prevent the effects of climate change. Hence, Rutasia is estopped from claiming that Alfurna's claims have to be rejected. Thus, Alfurna is entitled to make claims in regard to the Alfurnan migrants.

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[81] ibid.

[82] *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 80; *Military and Paramilitary Activities in und against Nicaragua (Nicaragua* v *United States of America)* (Merits, Judgment) [1986] ICJ Rep 14; Karl Doehring, *Völkerrecht* (2nd edn, C.F. Müller Verlag 2004) 137, para 310.

[83] C[8].

[84] C[14].

[85] C[10].

[86] C[10]; C[14].

B. Rutasia failed to process the migrants and accord them a status consistent with international law

Under customary international law 'environmental refugees' are granted a status of subsidiary protection and are essentially provided with the rights as set forth in the 1951 Convention Relating to the Status of Refugees[87] (Refugee Convention). By not according this status to the Alfurnan migrants, Rutasia has deprived them of their status rights under customary international law [1]. Rutasia further violated its non-refoulement obligation by failing to process the Alfurnan migrants in due time [2].

1. Rutasia has deprived the Alfurnan migrants of their status rights under customary international law

The Alfurnan migrants cannot claim the status of refugees under Article 1A(2) of the Refugee Convention, since the necessary element of persecution is missing.[88] Nevertheless, customary international law provides subsidiary protection for those who do not satisfy this formal criterion of 'refugee'. Under subsidiary protection, these persons enjoy the same level of protection as contained in the Refugee Convention.

[87] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[88] Refugee Convention, art 1A(2)

According to this Court, State practice as an element of customary law can be established when many States engage in the same practice.[89] Moreover, the practice of 'specially affected States' is the most significant one.[90]

Since particularly African and Central American States are affected by the impacts of climate change,[91] they can be considered as 'specially affected States'. Most African States ratified the OAU Convention[92], which includes 'environmental refugees' into its refugee definition[93] and grants them the right to protection under the Refugee Convention.[94] The same refugee definition is contained in the Cartagena Declaration[95] which is considered to be

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[89] *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131, 138.

[90] *North Sea Continental Shelf Cases* (n 18), para 74.

[91] African Development Fund, 'The Cost of Adaptation to Climate Change in Africa' (paper) (October 2011) 2ff <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Cost%20of%20Adaptation%20in%20Africa.pdf> accessed 04.01.2012; Comisión Centroamericana de Ambiente y Desarrollo and Sistema de la Integración Centroamericana 'Regional Strategy on Climate Change' (executive document) (November 2010) 12ff <http://www.uncsd2012.org/content/documents/regionalstrategyelsalvador.pdf> accessed 04.01.2012.

[92] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention).

[93] OAU Convention, art 8(2).

[94] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007), 213.

[95] Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commisssion on Human Rights OAS Doc OEA/Ser.L/II.66/doc.10, rev. 1, 190-93 (1984-1985).

regional customary law in Central America.[96] Several other States provide for subsidiary protection in their municipal law.[97] Hence, the State practice of specially affected States as well as other States suggests that 'environmental refugees' benefit from protection under the Refugee Convention.[98]

The Alfurnan migrants were forced to leave their country due to a climate change induced natural disaster. Therefore, they qualify as 'environmental refugees' and must be accorded a status of subsidiary protection. Consequently, Rutasia failed to grant the migrants the status of subsidiary protection and deprived them of their status rights.

2. Rutasia further violated its non-refoulement obligation by failing to process the Alfurnan migrants in due time

The non-refoulement obligation is firmly anchored in Article 33(1) Refugee Convention.[99] Accordingly, a State shall not expel or return a refugee to a place where 'his life or freedom would be threatened on account of his race, religion, nationality or membership of a particular social group or political opinion.'[100] Beyond that, Article 6 and 7

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[96] Guy S Goodwyn-Gill, Jane McAdam, *The Refugee in International Law* (3rd edn OUP 2007) 38; Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The lessons of Pragmatism', (1991) 3 INT'L J. REF. L. 185, 187.

[97] See William Thomas Worster, 'The Evolving Definition of the Refugee In Contemporary International Law' (2009) 30 BERKELEY INT'L L. J. 146, 136f for all relevant national laws providing for subsidiary protection.

[98] J Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279, 283.

[99] Refugee Convention, art 33(1).

[100] Refugee Convention, art 33(1).

of the International Covenant on Civil and Political Rights[101] ('ICCPR') implicitly entail a more extensive non-refoulement obligation.[102] Persecution is here substituted by the threat of 'cruel, inhuman or degrading treatment.' [103]

To give effect to either non-refoulement obligation, States cannot return intercepted migrants without prior assessment of their individual protection claims.[104] For this purpose, the State has to grant the migrants 'access to fair and effective procedures for determining status and protection needs'.[105] At the minimum, the host State must advise the migrants on their rights and evaluate their claims on an individual basis.[106] An overlong delay of the initial determination procedure is unacceptable.[107]

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[101] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[102] HRC General Comment No 20 (1992) UN Doc HRI/GEN/1/Rev.6, 151, para 9.

[103] ibid.

[104] Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes', (2002) 14 INT'L J. REF. L. 329, 347.

[105] UNHCR Executive Committee (EXCOM), General Conclusion on International Protection No 99 (2004) l < 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.

[106] ibid.

[107] UN Doc CCPR/CO/79/RUS, para 25.

The requirements introduced by the non-refoulement obligation are further heightened for migrants intercepted at sea,[108] since these people are particularly unlikely to be familiar with the local law.[109]

Since the Alfurnan migrants enjoy subsidiary protection, they benefit under customray international law from protection under the non-refoulement obligation as set forth in Article 33(1) Refugee Convention. Whereas the Alfurnan migrants reside on Rutasia's State territory[110] and Rutasia is a State party to the ICCPR[111], they also benefit from protection under the more extensive scope of the non-refoulement obligation pursuant to Article 6 and 7 ICCPR. Therefore, Rutasia is obliged to observe the non-refoulement obligation under customary international law as well as under Article 6 and 7 ICCPR.

Rutasia intercepted the migrants at sea.[112] Until present, Rutasia has not afforded the migrants any means to apply for a status; neither has it acknowledged the status of the Alfurnan migrants.[113] Hence, Rutasia failed to recognize the Alfurnan migrants' protection needs from non-refoulement.

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[108] UN General Assembly (UNGA) Resolution 54/166 Protection of Migrants Un Doc A/RES/54/166 (2000); Inter-American Court of Human Rights, 'Juridical Condition and Rights of the Undocumented Migrants' (Advisory Opinion) OC-18/3, (17 September 2003) 112 <http://www.unhcr.org/refworld/docid/425cd8eb4.html> accessed 04 January 2013.

[109] ibid.

[110] C[52].

[111] ICCPR, art 2.

[112] C[33].

[113] C[33]ff.

If Rutasia claims that the rapid arrival of the Alfurnan migrants leads to a temporary release from its non-refoulement obligation, it fails to consider that the term 'temporary' cannot be stretched so far as to last for more than two years. Furthermore, the non-refoulement obligation under the ICCPR is absolute and continues to apply even under exceptional circumstances.[114]

By its failure to recognize their status rights and to process the Alfurnan migrants in due time, Rutasia violated its non-refoulement obligation pursuant under customary international law and Article 6 and 7 ICCPR.

[114] *Chahal v The United Kingdom* Appl No 70/1995/576/662 (ECtHR 16 November 1996), 79-80; UN Commission Against Torture (UNCAT), Communication No 39/1996: Sweden. 1997-04-28 (*Tapia Paez v Sweden*) CAT/C/18/D/39/1996, 14.5; UNCAT, Communication No 104/1998 (*M.B.B. v Sweden)* CAT/C/22/D/104/1998 6.4; UNHRC General Comment No 20 (1994) HRI/HEN/1/Rev.1 3, 9.

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

Rutasia violates its human rights obligations by its conduct towards the Alfurnan migrants detained in the Woeroma Center [A]. Rutasia further violates its non-refoulement obligation pursuant to Article 6 and 7 ICCPR with the proposed transfer of the Alfurnan migrants to Saydee [B].

A. Rutasia violates its human rights obligations by its conduct towards the Alfurnan migrants detained in the Woeroma Center

Governments are particularly obliged to respect, protect and fulfill the human rights of individuals being held in detention.[115] Rutasia violated the Alfurnan migrants' right to liberty and security [1]. Rutasia further violated the Alfurnan migrants' right to be treated with humanity and respect for the inherent dignity and exposed them to degrading treatment [2]. Finally, Rutasia violated the Alfurnan migrants' right to an adequate standard of living and the highest attainable standard of health [3].

[115] 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_4.pdf> accessed 04 January 2013.

1.Rutasia violated the Alfurnan migrants' right to liberty and security

Arbitrary detention as a deprivation of liberty falls within the scope of Article 9 ICCPR.[116] In this context, detention is defined as a 'restriction on freedom of movement through confinement ordered by an administrative or judicial authority'.[117] Arbitrariness on the other hand, is understood in a broad sense by referring to the concepts of justice and predictability.[118] According to these concepts, only legislation which is just and predictable applies to the deprivation of liberty.[119] Moreover, such a deprivation must be lawful, reasonable and necessary in all specific circumstances.[120] Hence, every deprivation of liberty must have a legitimate aim,[121] be proportionate to the aim pursued and have a fair balance struck between the conflicting interests.[122] Thus, a State can only use detention as a last

[116] HRC Communication No 155/1983, views 3 April 1987 *(Hammel v Madagascar)* (1990) UN Doc CCPR/C/OP/2, para 179; HRC Communication No 236/1987(*V.M.R.B. v Canada),* paras 4.4. and 6.3, decision on admissibility 18 July 1988 (1988) UN Doc Supp No 40 (A/43/40) para 258.

[117] International Organization for Migration (IOM), *Glossary on Migration* (2nd edn, International Migration Law Series 2011) 25, 27.

[118] Ryszard Cholewinski, *International migration law: developing paradigms and key challenges* (TMC Asser Institut 2007) 54.

[119] ibid.

[120] ibid.

[121] *Velez Loor v Panama* (Judgment) Inter-American Court of Human Rights Series C No 218 (10 December 2010), para 162.

[122] Working Group on Arbitrary Detention, 'Report on the visit to Australia' (24 October 2002) UN Doc E/CN.4/2003/8/Add.2, para 12.

necessity measure in the control of its migration policy.[123] The necessity to have recourse to a detention measure must be evaluated in each individual case.[124] Accordingly, mandatory or automatic detention is arbitrary.[125]

Furthermore, a maximum duration of the detention must be established by law and the detention may in no case be of excessive or infinitive length.[126] For instance, according to European State practice, detention of asylum seekers must not exceed a period of six months.[127]

The migrants were detained in the Woeroma Center for approximately two years.[128] After the discovery of asbestos in Block A, the Nullatree Cove villagers were relocated to vacant barracks.[129]The other Alfurnan migrants remained in barracks at the Woeroma Centre as of the date of the Compromis[130] without having been processed so far. According to

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[123] HRC 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development'(2009) UN Doc A/HRC/10/21, paras 67, 82.

[124] HRC 'Annual report' (1 December 2004) UN Doc E/CN.4/2005/6, para 54; See also Case C-61/11 PPU *M. El Dridi* [2011] ECR 2011, 00000, para 39.

[125] Working Group on Arbitrary Detention, 'Report of the Working Group on Arbitrary Detention' UN Doc A/HRC/7/4, para 62; 'Report on the visit to Australia' (n 123), para 12.

[126] Working Group on Arbitrary Detention, Report (n 126), para 84.

[127] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348, 24.12.2008/98.

[128] C[33].

[129] Cl[5].

[130] ibid.

psychologists visiting the Alfurnan migrants, this indefinite detention already affected the mental health of the Alfurnan migrants.[131] This fact further underlines the need for certainty in respect to the duration of the detention.

The fact that a few of the Alfurnan migrants had criminal records[132] and that some of them are suspected to have taken part in illegal activities[133] is no reason to detain all Alfurnan migrants. Since detention measures must be evaluated individually[134] the legitimate aim to detain those suspects does not extend to the other Alfurnan migrants. Accordingly, the mandatory detention of all Alfurnan migrants is arbitrary.

Ultimately, Rutasia violated the Alfurnan migrants' right to liberty and security pursuant to Article 9 ICCPR.

2. In addition, Rutasia violated the Alfurnan migrants' right to be treated with humanity and respect for the inherent dignity and exposed them to degrading treatment

The fundamental principle applicable to standards of detention is enshrined in Article 10 of the ICCPR providing that 'all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person'.[135] Article 10 ICCPR not only provides to treat a person humanely, but also imposes an obligation on the States to take

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[131] C[36].

[132] C[32].

[133] C[50].

[134] *M. El Dridi* (n 128) para 39; UNCHR 'Civil and Political Rights, Including The Questions of Torture And Detention Torture and other cruel, inhuman or degrading treatment', UN Doc E/CN.4/2005/6 (2004), para 54.

[135] HRC General Comment No 21 (1992) UN Doc A/47/40.

positive measures to ensure a minimum standard for humane conditions of detention, regardless of economic or budgetary difficulties.[136] This positive obligation also covers the prohibition of any hardship or constraint other than that resulting from the deprivation of liberty.[137] Furthermore, 'migration-related detention centers should not bear similarities to prison-like conditions'.[138]

The protection under Article 10 ICCPR is complemented by Article 7 ICCPR, comprising that no one shall be subjected to a degrading treatment.[139] The aim of this provision is to protect both the dignity and the physical and mental integrity of the individual.[140] 'The scope of protection required goes far beyond the prohibition on torture as normally understood.'[141] Accordingly, the prohibition in Article 7 ICCPR covers acts which cause physical and mental suffering to the individual.[142] States parties are not allowed to derogate from this Article, even in situations of public emergency.[143]

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[136] HRC Communication No 458/1991 (1994) UN Doc CCPR/C/51/D/458/1991, para 9.3; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary* (Engel 2nd edn 2005) 188.

[137] HRC General Comment No 21 (1992) UN Doc A/47/40.

[138] 'Report of the Special Rapporteur on the human rights of migrants', UN Doc A/65/222 (2010), para 87 (a), (c) and (d).

[139] ICCPR, art 7.

[140] HRC General Comment No 20 UN Doc HRI/GEN/1/Rev.6, 151.

[141] HRC General Comment No 07 UN Doc HRI/GEN/1/Rev.6, 129.

[142] HRC General Comment No 20 (n 146), 151.

[143] ibid.

The Alfurnan migrants in Block B were detained in a severely overcrowded place resembling a 'medium security prison'.[144]They were exposed to inadequate food and water as well as sanitary problems.[145]Accordingly, Rutasia did not provide the Alfurnan migrants with a minimum standard of humane conditions in detention. Moreover, the accommodation in the prison-like Block B is not appropriate for detainees since it resembles a prison. Hence, Rutasia violated the Alfurnan migrants' right to be treated with humanity and respect for their inherent dignity.

On top of that, the Alfurnan migrants were not provided with adequate food and water.[146] Furthermore, the indefinite detention had an impact on their mental health.[147] Since mental and physical suffering qualify as degrading treatment, Rutasia also exposed them to a degrading treatment. Consequently, Rutasia violated Article 10 and 7 ICCPR.

3. Rutasia violated the Alfurnan migrants' right to an adequate standard of living and the highest attainable standard of health

Article 11 of the International Covenant on Economic, Social and Cultural Rights[148] ('ICESPR') provides 'the right of everyone to an adequate standard of living for himself and

[144] C[36].

[145] ibid.

[146] ibid.

[147] C[35].

[148] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

his family'.[149]A State party must provide minimum standards in respect to the conditions of detention regardless of a State party's level of development.[150] Furthermore, a State cannot exonerate itself because of a lack of economic or budgetary means.[151] The right to the highest attainable standard of living comprises the provision of adequate food and water[152], clothing, shelter with adequate sanitary facilities[153], medical treatment[154], etc.[155] A general situation of deplorable conditions of detention, such as overcrowded prisons, poor sanitary and hygienic standards, lack of adequate food and medical treatment leads to a violation of the rights of detainees under Article 10(1) ICESCR.[156]

Furthermore, poor sanitary and hygienic standards and a lack of medical treatment also fall within the scope of Article 12(1) ICESCR.[157] This Article recognizes 'the right of

[149] HRC General comment No 4 (1991) UN Doc E/1992/23, para 1.

[150] Nowak (n 137) 159.

[151] ibid, 182.

[152] ibid.

[153] ibid.

[154] ibid.

[155] ibid.

[156] ibid, 172, 247.

[157] UN Committee on Economic, Social and Cultural Rights, General Comment No 14 (2000), UN Doc E/C.12/2000/4.

everyone to the enjoyment of the highest attainable standard of physical and mental health'.[158]

Rutasia as a State party to the ICESCR is bound by the obligations arising hereunder.[159] Since Block B resembles a medium security prison and the severe overcrowding leads to hygiene problems, Rutasia does not provide the Alfurnan migrants with an adequate shelter. Further, the Alfurnan migrants were not supplied with adequate food and water and had only limited access to medical services.[160] In consequence to the indefinite detention, the detained Alfurnans suffered mental health problems.[161] Some Alfurnans also committed suicide.[162] Accordingly, Rutasia did not grant the Alfurnan migrants an adequate standard of living and also failed to grant them the highest attainable standard of health. Hence, Rutasia violated Article 10(1) and 12(1) ICESCR.

In conclusion, Rutasia violated its human rights obligations under international law by the unlawful treatment of the Alfurnan migrants.

B. Rutasia violates its non-refoulement obligation pursuant to Article 6 and 7 ICCPR by transferring the Alfurnan migrants to Saydee

In compliance with the more extensive non-refoulement obligation pursuant to Article 6 and 7 ICCPR, Rutasia can only transfer the Alfurnan migrants to a third country if this is a

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[158] HRC General Comment No 14 (2000) UN Doc E/C.12/2000/4, para 2.

[159] C[54].

[160] C[36].

[161] ibid.

[162] C[35].

safe country.[163] 'Safety' of the third country means not only being free from the risk of being returned in accordance with the non-refoulement obligation, but 'effective protection' has to be available as well.[164] 'The concept of 'effective protection' must encompass at least physical and material security, access to humanitarian assistance, access to secondary education and livelihood opportunities, timely access to durable solutions, a functioning judicial system, the rule of law, and respect for migrants' rights, including protection from refoulement and respect for their fundamental (including socio-economic) rights.'[165]

Where a State has actual or constructive knowledge of violations of international human rights obligations by the third country, it can no longer, in good faith, ensure that transfers are made in accordance with international law.[166] In such a case, the transferring State is disentitled from prompting any transfers to that State unless and until there is clear evidence that the breach has ceased.[167]

Saydee has not ratified the relevant human rights instruments, such as the ICESCR, the Refugee Convention and the Convention against Torture and Other Cruel, Inhuman or

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[163] 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.

[164] Goodwyn-Gill, McAdam (n 97), 393, 395.

[165] ibid.

[166] Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', (2008) 28 MICH. J. INT'L L. 223, 284.

[167] Michelle Foster, 'Colloquium, The Michigan Guidelines on Protection Elsewhere' (2007) 28 MICH. J. INT'L L. 207, para 15.

Degrading Treatment or Punishment.[168] Thus, Saydee is not obliged to grant any of the rights arising from these conventions. Consequently, no presumption can reasonably be made that Saydee grants minimum human rights protection. This is further supported by its deplorable human rights record.[169] Furthermore, the conditions at Camp Sontag, a converted prison to where Rutasia would transfer the Alfurnan migrants, are even more deplorable than those in the Woeroma Centre.[170] The conditions of living are intolerable and 50 women reported sexual abuse by the guards.[171] Further, people housed in Camp Sontag are required to perform manual labor, regardless of their fitness or suitability to engage in such tasks.[172] Protests are not tolerated and religious practices differing from those commonly observed in Saydee are prohibited.[173]

Accordingly, Saydee cannot fulfill the requirements put upon a 'safe third country'. Hence, Rutasia cannot transfer the migrants to Saydee because in doing so, Rutasia would violate its non-refoulement obligation pursuant to Article 6 and 7 ICCPR.

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[168] C[39].

[169] C[40].

[170] Cl[10].

[171] ibid.

[172] C[40]; Cl.[10].

[173] ibid.

IV. RUTASIA'S CONDUCT DISENTITLES IT FROM ANY RELIEF FROM THIS COURT IN RESPECT TO ITS CLAIMS OVER ALFURNA'S ASSETS, AND IN ANY EVENT, RUTASIA'S SEIZURE OF ALFURNA'S ASSETS VIOLATED INTERNATIONAL LAW

Rutasia cannot seek relief from the Court due to its own unlawful conduct [A]. In any event, Rutasia violated international law by seizing Alfurna's assets [B].

A. Rutasia is estopped from seeking relief the Court

To bring a claim before the Court, a State must 'be consistent in its attitude to a given factual or legal situation'.[174] In various judgments, the Court acknowledged that 'one should not benefit from his or her own inconsistency'.[175] This principle is identified as estoppel[176] and rests upon reflections of good faith.[177]

Estoppel consists of three fundamental elements: First, a State must make a representation vis-à-vis another State; secondly, this representation must be made

[174] Iain MacGibbon, 'Estoppel in International Law', (1958) 7 INT'L COM. L. Q. 468, 487.

[175] *Legal Status of Eastern Greenland* (n 24), 71, 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 18) 120 (Separate Opinion of Judge Ammoun).

[176] ibid.

[177] Derek Bowett, 'Estoppel Before International Tribunals and Its Relation to Acquiescence', (1957) 33 BRIT. Y.B. INT'L L. 153, 176 ; MacGibbon (n 175); Alfred P. Rubin, 'The International Legal Effects of Unilateral Declarations', (1977) 71 AM. J. INT'L L.1, 2.

unconditional and with proper authority; and finally, the State invoking estoppel must rely on this representation.[178]

A representation can arise from a declaration or from silence.[179] In the *Serbian* Loans[180] case, the Court observed that a declaration must be "clear and unequivocal".[181] 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."[182]

Already in 2005, the Alfurnan Parliament passed legislation declaring a moratorium on servicing all debt to foreign lenders.[183] Consequently, Alfurna ceased repaying any of its loans.[184] Rutasia did not protest this moratorium or the fact that Alfurna had ceased paying its loan installments. This silence entails a clear and unambiguous statement upon which Alfurna can rely.

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[178] *North Sea Continental Shelf Cases* (n 18) 26; Bowett, (n 178), 201; Megan Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 Cal L Rev 1777.

[179] *Temple of Preah Vihear* (n 176) 62 (Separate Opinion of Judge Fitzmaurice); *Elettronica Sicula SpA* (n 58), 44.

[180] *Case Concerning the Payment of Various Serbian Loans Issued in France* (n 83).

[181] ibid, 38.

[182] *Military and Paramilitary Activities in und against Nicaragua* (n 83) 415; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1998] ICJ Rep 275, 303.

[183] C[23].

[184] ibid.

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.'[185] 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.[186] Alfurna subsequently relied upon Rutasia's assistance and trusted that Rutasia will not make use of its right pursuant to the *default clause*.

Rutasia's eventual seizure of the assets held in the account of Alfurna's Reserve Bank ('ARB') deprived Alfurna of the funds it desperately needs to chart the future of its nation .[187] Accordingly, Rutasia did not act in 'good faith' when it seized Alfurna's assets and set itself in contradiction to its prior behavior. Rutasia's behavior is inconsistent and therefore, Rutasia is estopped to seek relief from the Court.

B. In any event, Rutasia violated Alfurna's sovereign immunity from enforcement under the restrictive approach of the Court

Rutasia violated international law by violating Alfurna's sovereign immunity from enforcement. In its judgment regarding the case concerning *Jurisdictional Immunities of the State*[188], the ICJ adopted the restrictive approach in respect to immunity from enforcement, hereby rejecting an absolute immunity. Accordingly, prior to the exercise of any enforcement

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[185] C[23].

[186] See the *default clause* in C[Annex A].

[187] C[49].

[188] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ 3 February 2012, 43-44, paras 116-118 <http://www.icj-cij.org/docket/files/143/16883.pdf> accessed 04 January 2013.

measure against property belonging to a foreign State, certain conditions must be fulfilled.[189] First, the property has to be in use for an *acta iure gestionis*, in contrast to an *acta iure imperii.*[190] Secondly, the State owning the property must have expressly given its consent to the exercise of a measure of constraint,[191] or the State must have earmarked the property particularly for the satisfaction of a judicial claim.[192]

Alfurna's assets were used for *acta iure imperii* and are thus immune from enforcement measures [1]. Furthermore, Alfurna has neither given its consent to the carrying out of an enforcement measure [2], nor has Alfurna earmarked the assets for the satisfaction of Rutasia's claims arising from the Climate Change Loan ('CCL') [3]. Finally, Alfurna has not waived its immunity from enforcement by subjugating the CCL to Rutasia's laws [4].

1. Alfurna's assets are in use for acta iure imperii and thus immune from enforcement measures

To determine whether property is in use for *acta iure imperii* or *acta iure gestionis*, two tests have to be applied.[193] First, the nature of the contract has to be examined.[194] If the nature of the contract is commercial, the defendant State can still prove that the purpose of

[189] ibid.

[190] ibid.

[191] ibid.

[192] ibid.

[193] UN Doc A/46/10, art 10, 25, para 20.

[194] ibid.

the contract serves a non-commercial purpose.[195] Accordingly, even though a loan is generally considered to be of a commercial nature, a public character can also derive from the purpose of the loan.[196] If the purpose is of a public nature, *i.e.* procuring money for a public purchase, the loan contract qualifies as *acta iure imperii*. [197]

The purpose of a loan contract is 'clearly public and thus supported by *raison d'Etat*, [if it serves] the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area'.[198]

The CCL was tied to the use of Rutasian expertise and resources[199] and disbursement was conditioned on the funds being applied, *i.e.* repairing the seawalls and related damage, combat inundation, and associated research.[200] Accordingly, the CCL was concluded to enable Alfurna to effectively combat the effects of climate change on its territory. Hence, the purpose of the CCL was public and thus *acta iure imperii*.

At the direction of Rutasia's president, on 15 March 2012 the Provincial Reserve Bank of Lando, a government agency,[201] closed the ARB's account and transferred the

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[195] ibid, 26 para 20.

[196] ibid, 28 para 20.

[197] ibid.

[198] ibid, 26 para 20.

[199] C[8].

[200] C[9].

[201] Cl[2].

balance to Rutasia's general consolidated fund.[202] Since the original loan balance was fully disbursed between 1992 and 1997,[203] the assets of USD 25 million held in the ARB account on March 2012 derive from the amount of USD 20 million. Alfurna withheld that sum prior to the Mainline Constructions Limited ('MCL') arbitration and the awarded damages in the amount of USD 35 million in the MCL arbitration.[204]

With regards to the withheld amount, Rutasia and Alfurna agreed that the amount would remain in the ARB account and that its use would be restricted to the original purposes governed by the procedures of the CCL.[205] Accordingly, these funds serve a public purpose.

As for the amount of the awarded damages, Alfurna prevailed in the MCL arbitration, since MCL failed to observe industry standards in the construction of the seawalls leading to an accelerated collapse.[206] Alfurna contracted MCL in compliance with the terms of the CCL to repair the seawalls,[207] hence, for a public purpose. Accordingly, MCL's defective performance correlates to this public purpose. Consequently, Alfurna's assets are in use for *acta iure imperii* and thus immune from enforcement measures.

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[202] C[46].

[203] C[12].

[204] C[17]; C[19]; C[20].

[205] C[19].

[206] C[20].

[207] C[9].

2. Furthermore, Alfurna has not given its consent to carry out an enforcement measure

According to this Court, consent to an enforcement measure must be expressly given to effectively waive immunity from enforcement. [208] In this respect, consent to the taking of an enforcement measure can be given in a written contract.[209]

In the *default clause* of the CCL, Alfurna and Rutasia agreed that Rutasia as 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-current indebtedness.[210] The assets in the ARB account may count as property subject to Rutasia's control, since it is held in the name of ARB, Alfurna's central bank. But it must be underlined that the agreement does not display an expressly given consent of Alfurna waiving its immunity from enforcement. Since express consent is required by this Court,[211] the *default clause* does not waive Alfurna's immunity from enforcement measures.

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[208] *Jurisdictional Immunities of the State* (n 189), 43, para 118.

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

[210] *Default clause*, C[Annex A].

[211] *Jurisdictional Immunities of the State* (n 189), 43, para 118.

3. Alfurna has not earmarked the assets for Rutasia's satisfaction

As the ICJ held in *Jurisdictional Immunities of the State*, if consent to an enforcement measure was not expressly given, a State must have earmarked property for the express purpose of satisfying the claim which is the object before the Court.[212]

Alfurna did not expressly earmark the assets in the ARB account for the satisfaction of a judicial claim of Rutasia. Hence, Rutasia violated Alfurna's immunity from execution and thus international law.

4. Finally, Alfurna has not waived its immunity from enforcement by subjugating the Climate Change Loan to Rutasian law

According to Article 7(2) Immunities Convention the 'agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State'.[213] Furthermore, the ICJ recently stated that 'immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts'.[214] Accordingly, 'any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory'.[215]

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[212] Immunities Convention, arts 18, 19; *Jurisdictional Immunities of the State* (n 189), 43, 44, paras 116-118.

[213] Immunities Convention, art 7.

[214] *Jurisdictional Immunities of the State* (n 189) 43, para 113.

[215] ibid.

Alfurna and Rutasia agreed in the CCL on the application of Rutasia's laws.[216] According to Article 7 Immunities Convention, the choice of law is not equivalent to the assignment of jurisdiction.[217] Hence, Alfurna has not waived its immunity from jurisdiction. Furthermore, even if Alfurna had waived its immunity from jurisdiction, nonetheless, it would still be granted immunity from execution since, according to the Court, immunity from jurisdiction goes further than immunity from jurisdiction and has to be treated separately.[218] Thus, Alfurna has not waived its immunity from enforcement by subjugating the CCL to Rutasia's laws.

Finally, by seizing Alfurna's assets, Rutasia violated Alfurna's sovereign immunity from enforcement.

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[216] C[Annex A].

[217] Immunities Convention, art 7.

[218] *Jurisdictional Immunities of the State* (n 189) 43 para 113.

PRAYER FOR RELIEF

Alfurna respectfully requests the Court to adjudge and declare that:

I. Since Alfurna is still a State, the Court may exercise jurisdiction over all claims in this case;

II. Alfurna is entitled to make claims in respect to the Alfurnan migrants and further Rutasia failed to process the Alfurnan migrants and grant them a status consistent with international law;

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

IV. Rutasia's conduct disentitles it from any relief from this Court, and in any event, Rutasia's seizure of Alfurna's assets violated international law.