
**THE 2013 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION**

CASE CONCERNING THE ALFURNAN MIGRANTS

ALFURNA

(APPLICANT)

v.

STATE OF RUTASIA

(RESPONDENT)

SPRING TERM 2013

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE, THE HAGUE, THE NETHERLANDS

MEMORIAL FOR THE RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF RUTASIA

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STATEMENT OF JURISDICTION

Alfurna and the State of Rutasia have agreed to submit this dispute ‘Concerning the Alfurnan Migrants’ to the International Court of Justice pursuant to Article 40, paragraph 1 of the Statute of this Court and by virtue of a Special Agreement (*Compromis*) signed in The Hague, The Netherlands, on September 14, 2011 and jointly notified to the Court on the same date. Both parties have agreed that the *Compromis* is without prejudice to the State of Rutasia’s contention that Alfurna is no longer a state. In accordance with Article 36, paragraph 1 of the Statute, the Court has jurisdiction to decide all matters referred to it for decision. Both parties shall accept the Court’s decision as final and binding and execute it in good faith.

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QUESTIONS PRESENTED

- I. Whether Alfurna is still a state, and accordingly, the lacks jurisdiction over Alfurna's claims.
- II. Whether Rutasia has violated international law in its treatment of the migrants from (former) Alfurna, and whether, in any event, Alfurna is foreclosed from making claims with respect to those individuals because of its failure to take available affirmative steps to protect them.
- III. Whether the Alfurnan migrants held in the Woeroma Centre are being treated in accordance with Rutasia's obligations under international law, and whether their proposed transfer to Saydee is legal.
- IV. Whether Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.

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STATEMENT OF FACTS

BACKGROUND

Rutasia is a large developed state on the Bay of Singri, its coast lying approximately 350 miles east of Alfurna. Rutasia's head of state is President Eileen Millard. Rutasia lends and provides development assistance to other governments, particularly those in the neighbouring region, and is a permanent member of the Paris Club, having participated in a number of sovereign debt restructuring arrangements, including under the Heavily Indebted Poor Countries Initiative. Relations between Rutasia and Alfurna have always been friendly, and for decades, many Rutasians travelled to Alfurna for tourism and business each year. Alfurna is a developing state that comprised of two low-lying islands – Batri and Engili – located in the Bay of Singri. The hydrology of the Bay is such that, in addition to water-level changes resulting from waves and tide, the average sea level varies throughout the year, and owing to such local factors as salinity, rainfall, riverine input, and evaporation, the Bay has exhibited a net water gain over the past two centuries

CLIMATE CHANGE LOAN

The low-lying regions of the two islands were in frequent danger of being swamped owing to the Bay of Singri's extreme weather and hydrology. By 1990, rise in sea level had submerged parts of the island. Seawalls that had been constructed in response to these vulnerabilities were inadequate and could not be maintained owing to budgetary difficulties. Alfurna sought grants and loans to finance a repair and remedial programme in 1992. Rutasia provided a loan of USD 125 million tied to the use of Rutasian expertise and resources. Alfurna contracted with MCL – the only Rutasian company capable of performing the contract – for construction and

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maintenance work on the seawalls. The loan amount was deposited in Alfurna's Reserve Bank account in Rutasia.

DEBT-CRISIS

The IMF reported in 1999 that Alfurna's debt had reached 120% of its GDP. Alfurna did not meet its debt repayment obligations to various states, including Rutasia. Alfurna approached the various lenders to negotiate debt relief. Rutasia cancelled 25% of the climate change loan principal, reduced the annual interest rate from 2% to 1.5% and rescheduled repayment that was originally due by 2012 until 2027. In 2001, Hurricane Caryl caused considerable damage to Alfurna thereby exposing the substandard quality of work performed by MCL. Alfurna took MCL to arbitration, which Alfurna ultimately prevailed in. In 2002, Alfurna again sought renegotiation of its loan with Rutasia. Rutasia cancelled a further 25% of the loan and granted Alfurna a grace period on repayments until September 2010. Also the interest rate was reduced to 1.1% and the payments rescheduled until 2047. In January 2005, Alfurna declared a moratorium on servicing all debts to foreign lenders.

NEW HOMELAND

Considering the rapid rise in sea-level, Alfurna started looking for territory to relocate to and countries willing to take in Alfurnans temporarily. In mid-2006, a major earthquake rendered much of Batri Island inhabitable. The Alfurnan government relocated to leased offices in Finutafu. 15,000 Alfurnans also moved to Finutafu. A few months later Batri Island submerged permanently. In late-2007 Alfurna was able to persuade Finutafu to cede Nasatima Island. However, the negotiations were stalled owing to Alfurna's financial condition. By early 2009, Alfurna's administrative agencies had all relocated to Finutafu. In 2011, Engili Island submerged

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completely. Finally, Finutafu agreed to lease Nasatima Island to Alfurna for a period of 99 years, terminable at Alfurna's option and inflation-adjusted rent of USD 1 million per year. As per the terms of the lease, Alfurna may apply its own laws on Nasatima Island and enact new laws, except for laws relating to defense, customs, and immigration, which are subject to Finutafuan control. This lease went into effect on 9 March 2012. As on the date of the Compromis, three of Alfurna's 14 government ministries have relocated to Nasatima Island, using temporary and modular offices. The remaining 11 have representatives and functionaries on the Island, and plan for definitive relocation by the end of 2013.

ALFURNAN MIGRANTS

The Alfurnan Government's evacuation plans and individual arrangements enabled all but 3000 Alfurnans to resettle elsewhere. About half of these were residents of Nullatree Cove who refused to leave ancestral lands. Some of the individuals had Alfurnan criminal records. In 2009 and 2010, the Rutasian Navy intercepted these people in Rutasian territorial waters. They were detained and taken to Woeroma Immigration Processing and Detention Centre.

WOEROMA CENTRE

Of the 2978 people brought to Woeroma Centre, 1492 were Nullatree Cove villagers. The Rutasian authorities housed the Nullatree Cove villagers in Block A. The others were housed in Block B. In the first half of 2011, three Alfurnan migrants in Block B committed suicide and five died of dysentery. In October 2011, the Immigration Ombudsman of Rutasia issued a report on the conditions in Woeroma Centre.

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SHARING OF BURDEN

After a small earthquake caused cracks in the walls of Woeroma Centre, it was found that Block A's walls contained asbestos. Rutasia declared that it could not accommodate housing requests for the Nullatree Cove villagers and entered into an agreement with Saydee whereby Rutasia would transfer the migrants to Saydee for processing. Rutasia would provide finance for transfer, detention, health and welfare of the transferees. The international community protested against this transfer as Saydee's human rights record had been the subject of criticism. Saydee responded to this criticism by stating lack of funds as the cause of the poor detention conditions. Pending the transfer, the migrants were housed in vacant military barracks.

SEIZURE OF ALFURNAN ASSETS

RICA put Alfurna on notice of default on February 10, 2012. On March 15, 2012 Rutasia officially declared that the entire loan balance was due and payable and that Rutasia was proceeding to seize Alfurnan property in Rutasia. Alfurna's account in Rutasia was closed and the balance transferred to Rutasia's consolidated fund. Rutasia did not respond to Alfurna's diplomatic protests.

UNITED NATIONS

During the 2012 General Assembly Session, Finutafu's ambassador raised the issue of treatment of Alfurnan migrants and the seizure of Alfurnan assets by Rutasia. Finutafu was supported by 67 other states with respect to the 'Alfurnan refugees'. Rutasia responded by asserting that Alfurna was no longer a state and that the Alfurnan migrants were not refugees. Also that some of the migrants were suspected of criminal activity and Rutasia would deal with them as it deemed fit. Further, Rutasia declared that it had seized the assets to protect its own interests. The

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Secretary-General encouraged both parties to take the matter to ICJ. The Secretary-General also put on hold the issue of Alfurna's membership dues. Further, seeing that the matter of the detainees was to be taken up by the ICJ, the Rutasian Supreme Court granted a temporary stay on the transfer of the migrants.

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SUMMARY OF PLEADINGS

I. The right to appear before the International Court of Justice is limited only to states. Alfurna no longer fulfills the objective criteria of statehood as it has permanently lost its territory. The lease arrangement between Alfurna and Finutafu does not transfer title. It does not establish the de jure sovereignty of Alfurna, which is required for land to qualify as ‘territory’ for the purpose of statehood. The Alfurnan entity existing on the leased territory is not a continuator of the former Alfurna as there has been a complete change in territory. The presumption of continuity of statehood would not apply in such a case.

Additionally, Alfurna does not have a territorially effective government on the Nasatima Island as there are only three ministries fully functional as on the date of the Compromis. Alfurna, further, does not enjoy legal autonomy from Finutafu and, thereby, does not meet the criterion of independence.

II. Alfurna is foreclosed from bring a claim on behalf of the migrants under the doctrine of clean hands. Alfurna has failed to provide adequate evacuation plans for the migrants and has denied their right to return. It has, thus, breached the obligation in customary in international law to not create large flows of refugees.

The procedure followed with regard to the migrants is a domestic decision and not in violation of the 1951 Refugee Convention. The migrants were provided temporary protection, given that it was a situation of mass influx. They were placed in administrative detention on account of their irregular status, which is not considered a penalty under Article 31 of the Refugee Convention.

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The detention was not arbitrary as the detention continued for as long as necessary and procedural safeguards were present.

III. Rutasia has not violated its human rights obligations in the treatment of Alfurnan migrants at Woeroma Centre, as subsequent state practice exists for standards of treatment similar to those provided by Rutasia, which apply the rule under ICCPR differently. Rutasia's obligations are minimized in a situation of mass-influx which causes a burden on a State's resources. A state's limitations permissible under refugee law, applies as *lex specialis*, over the positive obligations under the ICCPR.

Rutasia's proposed transfer of the Alfurnan migrants does not violate its *non-refoulement* obligations as Saydee does not pose a specific threat to the Alfurnan migrants, and its core obligations form a part of customary international law. In any event, Rutasia has sufficient guarantees from Saydee to ensure the protection of the Alfurnan migrants, through a written agreement. In any event, Saydee is bound by its legally binding unilateral promise.

IV. Rutasia's actions prior to the seizure do not disentitle it from seeking declaratory relief from this Court, as the principle of clean hands or *exceptio* is not triggered by Rutasia's success in combating climate change. In any event, applying the *Monetary Gold* principle, Rutasia cannot be held severally liable. Further, Rutasia's economic activity is was not the *sine qua non* for Alfurna's failure to repay the debt. The negligence of MCL does not trigger Rutasia's responsibility in the absence of any territorial or jurisdictional control.

Rutasia's seizure was pursuant to the CCL agreement, which was not suspended either by external circumstances or by Alfurna's Acts. *Rebus sic stantibus* is not triggered due to foreseeability of the rise in sea levels. Rutasia has no obligation to recognize the moratorium,

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and in any event, it does not amount to sufficient notice for *force majeure* event. Defaulting was not the only way to protect Alfurna's interest, and therefore, it may not invoke necessity as a defense.

Rutasia's acts of seizure did not violate the immunity of ARB, as Alfurna has waived ARB's immunity by pledging it as a security and by submitting to arbitration. In any event, ARB was performing a non-sovereign function while being a holding account for developmental loans.

In any event, Rutasia's seizure was a valid countermeasure to Alfurna's moratorium which amounts to a repudiation of debt. The moratorium was indefinite, arbitrary and was not for the purpose of restructuring and therefore an international wrongful act. The seizure was proportionate to Alfurna's debt obligations.

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PLEADINGS

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

The right to appear before the International Court of Justice is limited to states.¹ Rutasia will establish that Alfurna ceased being a state upon [1] complete and permanent loss of territory; [2] loss of effective governance; and [3] loss of independence. The criteria for statehood has evolved from state practice² and the judgments of this Court³, thus, confirming their customary nature.

A. ALFURNA HAS CEASED TO BE A STATE UPON SUBMERGENCE OF THE ISLAND AND FAILURE TO ACQUIRE NEW TERRITORY.

1. The submergence of the islands leads to extinction of statehood.

A state without territory does not meet the objective criteria of statehood.⁴ States must have exclusive control over some core territory.⁵ The international community⁶ and, in

¹ Statute of the International Court of Justice, art. 34, June 26, 1945, 33 U.N.T.S. 993.

² Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19[hereinafter *Montevideo Convention*]; Arbitration Commission of the Peace Conference on Yugoslavia, 92 I.L.R. 165 (Nov. 29, 1991) (Opinion No. 1 Disintegration of the SFRY); *Duff Development v. Government of Kelantan*, [1924] A.C. 747, 814 (H.L.) (UK); *Harris v. Minister of the Interior*, 1952 (2) SA 428 (A), 478 (S. Afr.); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (2nd ed. 2006) [hereinafter *CRAWFORD, CREATION*].

³ *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, 2004 I.C.J. 279, ¶26 (Dec. 15) (Separate Opinion of Judge Kreca).

⁴ *CRAWFORD, CREATION*, 30; U.N. SCOR, 3rd Sess., 383rd mtg., 10, U.N. Doc. S/PV.383 (Dec. 2, 1948) (Statement of Ambassador Jessup).

⁵ *Deutsche Continental Gas-Gesellschaft v. Polish State*, 5 A.D. 11, 14 (AUG. 1, 1929).

⁶ See U.N.H.C.R., *Climate Change and Statelessness: An Overview*, available at <<http://www.unhcr.org/refworld/docid/4a2d189d3.html>> (May 15, 2009); G.A. Res. 63/213, U.N. Doc. A/RES/63/213 (Feb. 10, 2009); Rep. of the Secretary General, *Climate Change and its Possible Security Implications*, 20, U.N.Doc. A/64/350 (Sept. 11, 2009).

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particular, low lying island nations⁷ have agreed that the permanent submergence of territory would lead to extinction of the state, reflecting instant custom⁸. In fact, Alfurna itself has acknowledged that such submergence was a threat to its survival as a nation.⁹

2. Nasatima Island cannot be ‘territory’ for the purposes of statehood.

For the purpose of statehood, there must be *de jure* sovereignty over territory¹⁰, which Alfurna lacks over the leased land from Finutafu.¹¹ The essence of territorial sovereignty lies in the title,¹² which continues to rest with Finutafu. The ability of Finutafu to cede territory¹³ is

⁷ U.N.GAOR, 63rd Sess., 9th plen. mtg., *Address by Elia Chin, Vice President of Palau*, U.N.Doc. A/RES/63/117 (2008); U.N.GAOR, 64th Sess., 5th& 6th plen. mtg., *Address by Mr. Litokwa Tomeing, President of the Republic of the Marshall Islands* and *Address by Mr. Anote Tong, President of the Republic of Kiribati*, U.N. Doc. A/63/PV.9 (Sept. 25, 2008); U.N.GAOR, 64th Sess., 10th plen. mtg., *Address by Mr. Emanuel Mori, President of the Federated States of Micronesia*, U.N. Doc. A/63/PV.10 (Sept. 25, 2008); U.N.GAOR, 64th Sess., 11th plen. mtg., *Address by The Honourable Tuilaepa Lupesoliai Sialele Malielegaoi, Prime Minister of the Independent State of Samoa*, U.N. Doc. A/63/PV.11 (Sept. 26, 2008); U.N.GAOR, 64th Sess., *Tuvalu’s Views On The Possible Security Implications of Climate Change to be Included in the Report of the UN Secretary General*, available at <http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/Tuvalu_CCIS.pdf> (2009).

⁸ North Sea Continental Shelf (Federal Republic of Germany/Denmark), 1969 I.C.J. 3, ¶¶73-74 (Feb. 20).

⁹ *Compromis*, ¶22.

¹⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 1996 I.C.J. 595, 662-663 (July 11) (Dissenting Opinion of Judge Kreca)[hereinafter *Judge Kreca in Bosnia*]; Island of Palmas Case (USA v. Netherlands), 2 U.N.Rep. Int’l Arbitral Awards 829, 838 (Apr. 4, 1928) (PCA)[hereinafter *Island of Palmas*].

¹¹ *Compromis*, ¶45.

¹² Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), 1986 I.C.J. 554, 566 (Dec. 22)[hereinafter *Frontier Dispute*]; M.N. SHAW, INTERNATIONAL LAW 490 (6th ed. 2008)[hereinafter *Shaw*].

¹³ *Compromis*, ¶31.

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indicative of its title. In holding that Alfurna is a state on Nasatima Island, the court would be giving effect to a unilateral act of secession,¹⁴ as there is absence of Finutafu's consent. The UNSC has repeatedly condemned such acts.¹⁵

a. The lease agreement does not amount to a transfer of title.

In state practice, leases do not transfer title as residual sovereignty remains with the lessor state.¹⁶ The Panama Canal, despite being leased 'in perpetuity'¹⁷, was returned to Panama in 2000. A lease is not a mode of acquisition of territory; it is classified as a temporary transfer of a minor right over territory.¹⁸ The grant and protection of minor rights over territory is seen, in practice¹⁹, to be an exercise of sovereignty.

¹⁴ CRAWFORD, *CREATION*, 388-389.

¹⁵ S.C. Res. 146, U.N.Doc. S/4426 (Aug. 9, 1960); S.C. Res. 216, U.N.Doc. S/RES/216 (Nov. 12, 1965); S.C. Res. 787, U.N.Doc. S/RES/787 (Nov. 16, 1992); Secretary-General's Press Conference in Dakar, 7 U.N. Monthly Chronicle 36 (Feb. 1970).

¹⁶ Convention Respecting an Extension of Hong Kong Territory, June 9, 1898, 186 Cons.T.S. 310; National Legislative Bodies, *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, available at <<http://www.unhcr.org/refworld/docid/3ae6b525c.html>> (Dec. 19, 1984); National Legislative Bodies, *Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau*, available at <<http://www.unhcr.org/refworld/docid/3ae6b51fc.html>> (1987); Wen-Sze King, *The Lease Conventions between China and the Foreign Powers*, 1 Chinese Soc.& Pol.Sci.Rev.24 (1916).

¹⁷ Panama Canal Treaty, September 7, 1977, 16 I.L.M. 1022.

¹⁸ PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 158 (1997); 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 507-9 (Bernhardt ed., 1987); *Shaw*, 490; J.L.BRIERLY, *LAW OF NATIONS* 162 (6th edn., OUP, 1963).

¹⁹ Legal Status of Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J.(ser.A/B) No.53, 53 (Apr. 5)[hereinafter *Eastern Greenland*]; Government of the Republic of Cuba, *Statement from the Ministry of Foreign Affairs*, available at <<http://europa.cubaminrex.cu/CDH/60cdh/Guantana mo/English/Official%20Statements%20and%20Editorials.htm>> (Jan. 19, 2005); *See* Territorial

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Further, the fact that Alfurna may have jurisdiction over the Nasatima Island does not amount to a transfer of sovereignty, as is evidenced in state practice.²⁰ The Raja of Cochin transferred full jurisdiction to the British government over part of Cochin.²¹ The British, however, regarded this as foreign territory.²²

b. Any control by Alfurna over the leased land is considered not relevant.

Effective control cannot displace conventional title²³ and preference will be given to the holder of legal title, if any.²⁴ In any case, effective control over the Nasatima Island will be determined as per the critical date – date of the Compromis. Any effective control, exercised by Alfurna has only been for a period of three months²⁵, which is insufficient to conclude title. In any event, administrative activities do not conclusively establish sovereignty.²⁶

Sovereignty and Scope of the Dispute (Eritrea and Yemen), 3 U.N.Rep. Int'l Arbitral Awards 209, ¶58 (Oct. 9, 1998) (Contention of Yemen).

²⁰ Protocol between the Government of the United Kingdom and Northern Island and the Government of French Republic, Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link, November 25, 1991, Treaty Series No. 70 (1993); Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Annex I(b) and I(c), October 26, 1994, 34 I.L.M. 43.

²¹ C U AITCHISON, A COLLECTION OF TREATIES, ENGAGEMENTS AND SANADS RELATING TO INDIA AND NEIGHBORING COUNTRIES 267 (vol X, 1930).

²² Foreign Jurisdiction Act, 1890 (53 & 54 VICT. CH. 37) (British).

²³ *Eastern Greenland*, 46; Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), 2002 I.C.J. 303, 353[hereinafter *Cameroon and Nigeria*].

²⁴ *Frontier Dispute*, ¶63.

²⁵ *Clarification*, No.7.

²⁶ *Cameroon and Nigeria*, ¶67; *Minquiers and Ecrehos (France/United Kingdom)*, 1953 I.C.J. 47, 70 (Nov. 17); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 107 (7th ed. 2008)[hereinafter *Brownlie*].

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c. In any event, the lease arrangement is a temporary arrangement.

There is a requirement for territory to be permanent,²⁷ which is not being fulfilled by the lease agreement. The lease only extends for a period of 99 years.²⁸ It can come to an end earlier upon identification of a ‘permanent homeland’²⁹, clearly indicating the parties’ intention for it to be a temporary arrangement. As with any agreement, the lease could be rescinded – as done in the lease of the Lado Enclave in 1906.³⁰

3. The Alfurnan entity is not a continuator of former Alfurna.

The identity of a state continues if essential portions of territory and population remain³¹. The new Alfurnan entity, existing on completely different territory, is not a continuator of the former Alfurna³² – such discontinuity being in line with the practice of the U.N.³³ Further,

²⁷ *Brownlie*, 111; American Law Institute, Restatement of the Law Second, The Foreign Relations (1965).

²⁸ *Compromis*, ¶45.

²⁹ *Id.*

³⁰ OPPENHEIM’S INTERNATIONAL LAW 569 (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Michael J. Strauss, *Guantanamo Bay and the Evolution of International Leases and Servitudes*, 10 N.Y. City L. Rev. 479, 492 (2006-2007).

³¹ Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 Cornell Int’l L.J. 29, 41 (1995)[hereinafter *Musical Chairs*]; Rein Mullerson, *The Continuity and Succession of States, By Reference to the Former USSR and Yugoslavia*, 42 Int’l & Comp. L.Q. 473, 475 (1993)[hereinafter *Mullerson*].

³² See Chairman of the Sixth Committee, *Letter dated Oct. 8, 1947 from the Chairman addressed to the Chairman of the First Committee*, U.N. Doc. A.C.1/212 (Oct. 11, 1947); Dr Ivan Kerno, *Legal Opinion*, U.N.GAOR, 15th Sess., 2-4, UN. Doc. A/CN.4/149 (1962).

³³ See Konrad Buhler, *State Succession, Identity/Continuity and Membership in the United Nations*, in STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 192 (Pierre Michel

continuity of land is central to the identity of small island states.³⁴

B. ALFURNA HAS NO EFFECTIVE GOVERNMENT.

1. The Alfurnan government is not effective on Nasatima Island.

Effective governance refers to territorial effectiveness of the government,³⁵ in absence of contest from another government.³⁶ Assuming Nasatima Island to constitute defined territory, the notion of effective control requires the exercise of ‘all the functions of a sovereign government’.³⁷ It is submitted that, at the time of the critical date, there are only three Alfurnan ministries functioning on the Nasatima Island. There is no legislative body present, which is essential for government.³⁸

2. The presumption of continuity of statehood does not apply.

Alfurna may contend that a territorially ineffective government would not signify extinction of the state. This presumption of continuity allows for governments-in-exile to continue representing an existing state.³⁹ However, continuity is presumed only when there was

Eisemann, Martri Koskeniemi eds., 2000)[hereinafter *Michel Eisemann*]; *Musical Chairs*, 43-66.

³⁴ Certain Phosphate Lands in Nauru (Nauru v. Australia), Memorial of the Republic of Nauru (Vol. 1) 90 (April, 1990).

³⁵ Great Britain v. Costa Rica, 1 U.N.Rep. Int’l Arbitral Awards 369 (1923).

³⁶ Republic of Somalia v. Woodhouse Drake Carey Suisse S.A, [1993] 1 All ER 371 (Mar. 13) (UK)[hereinafter *Republic of Somalia*].

³⁷ Arantzazu Mendi, (1939) A.C. 256, 264-265 (Lord Atkin).

³⁸ Aaland Islands Case, (1920) L.N.O.J. Spec. Supp. 4, 8-9; *Brownlie*, 73.

³⁹ Stefan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, in THE REALITY OF INTERNATIONAL LAW. ESSAYS IN HONOR OF IAN BROWNLIE 501(Guy Goodwin-Gill/Stefan Talmon eds., OUP, 1999).

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prior territorial effectiveness, which can be regained⁴⁰ — for example, cases of illegal occupation⁴¹ or temporary submergence of the territory⁴².

This presumption does not apply when either territory or the government has changed completely.⁴³ State practice⁴⁴ and *opinio juris*⁴⁵ shows new government to be recognized upon establishment of effective control. State practice to the contrary only occurs in situations of contests between two governments – when the presumption of legitimacy created by effective control is rebutted.⁴⁶ This exception would not derogate from the validity of the rule.⁴⁷ The government had lost territorial effectiveness in 2009⁴⁸ and cannot be presumed to be able to regain effectiveness on entirely different terrain.

⁴⁰ H. Lauterpacht, *Recognition of Governments: I*, 45(6) Colum. L. Rev. 815, 822 (Nov. 1945)[hereinafter *Lauterpacht*].

⁴¹ CRAWFORD, *CREATION*, 702.

⁴² Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, 9, available at <<http://www.unhcr.org/4df9cb0c9.pdf>> (May 2011).

⁴³ *Brownlie 75; Mullerson, 475; Michel Eisemann, 192.*

⁴⁴ *Republic of Somalia*; U.N. GAOR, 56th Sess., 45th plen. mtg, U.N.Doc.A/56/PV.45 (Nov. 10, 2001); G.A.Res. 2758, U.N.Doc.A/RES/2758 (Oct. 7, 1971).

⁴⁵ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Written proceedings of Federal Republic of Yugoslavia, 127-128 (June 1995) (Preliminary Objections).

⁴⁶ BRAD ROTH, *GOVERNMENT ILLEGITIMACY IN INTERNATIONAL LAW* 253-320 (2001).

⁴⁷ *Cyprus v. Turkey*, App.No.6780 & 6950/75, E.C.H.R., ¶4 (May 26, 1975).

⁴⁸ *Clarification*, No.4.

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C. ALFURNA IS NOT INDEPENDENT.

The ICJ⁴⁹, state practice⁵⁰ and jurists⁵¹ have acknowledged independence as a criterion for statehood. Substantial interference of one state in another's internal affairs results in loss of statehood of the latter.⁵² The PCIJ⁵³ considered independence to be lost when restrictions on the state's liberties, regardless of their source, placed the state under the legal authority of another⁵⁴.

It has been confirmed in practice⁵⁵ that legal autonomy is necessary for statehood. The legislations made by Alfurna's legislative body are subject to the legal authority of Finutafu, who exercises 'control' over the laws of defense, immigration and customs.⁵⁶ The restrictions upon Alfurna's independence are necessarily co-terminus with the allowance to use Finutafu's territory. The degree of independence enjoyed by Alfurna is, thus, same as that of an internally self-determined unit⁵⁷ and not of a state.

⁴⁹ *Judge Kreca in Bosnia*, 78.

⁵⁰ *Island of Palmas*, 838; *Efrat Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 288 (Mar. 31, 2005).

⁵¹ *Lauterpacht*, 26.

⁵² *CRAWFORD, CREATION*, 71.

⁵³ *Customs Regime between Germany and Austria*, 1931 P.C.I.J.(ser.A/B) No.41, 58 (Sept.5) (Judge Anzilloti) (Advisory Opinion); *Yrissari v. Clement*, (1825) 2 C & P 223, 225.

⁵⁴ *Draft Declaration on Rights and Duties of State*, art.14, G.A.Res. 375(IV), U.N.Doc. A/1196 (Dec. 1949); *Montevideo Convention*, art. 8.

⁵⁵ *Statute of Westminster*, 1931(UK); Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48(3) Colum. L. Rev. 341, 349, 352; Thomas Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 Colum. J. Transnat'l L. 403, 438 (1999).

⁵⁶ *Clarification*, No.6.

⁵⁷ U.N. 7 GAOR, 3rd Committee, 447th mtg, ¶5, U.N.Doc. A/C.3/SR 447 (1952) (Netherlands); *Reference Re Secession of Québec*, (1998) 2 S.C.R. 217, ¶126 (Aug. 20).

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

A. ALFURNA IS FORECLOSED FROM MAKING CLAIMS WITH RESPECT TO THOSE INDIVIDUALS BECAUSE OF ITS FAILURE TO TAKE AVAILABLE AFFIRMATIVE STEPS TO PROTECT THEM.

Alfurna is foreclosed from making such claims as it has come to the Court with unclean hands.⁵⁸ The PCIJ⁵⁹, the ICJ⁶⁰, jurists⁶¹ and state practice⁶² have held that the principle of clean hands precludes a State guilty of illegal conduct from making claims with regard to illegalities by another States which have resulted as a consequence.

There exists a duty to prevent creation of large refugee flows in customary international law. The UNGA has confirmed such a duty, in light of comments prepared by a Group of Governmental Experts.⁶³ These flows result from lack of effective protection⁶⁴ or control over

⁵⁸ Int'l Law Comm'n, Summary Record of 2793rd Meeting, *Diplomatic Protection*, [2004] I Y.B. Int'l L. Comm'n 11, ¶4, U.N.Doc. A/CN.4/SR.2793.

⁵⁹ *The Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J.(ser.A/B) No.70 (June 28)[hereinafter *River Meuse*]; *Eastern Greenland*, 95.

⁶⁰ *Case Concerning the Military and Parliamentary Activities In and Around Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, ¶272 (June 27) (Dissenting Opinion of Judge Schwebel)[hereinafter *Nicaragua*]; *Case Concerning the Arrest Warrant of 11 April of 2000 (Congo v. Belgium)*, 2002 I.C.J. 3, ¶35 (Feb. 14) (Dissenting Opinion of Judge Van den Wyngaert).

⁶¹ G Fitzmaurice, *The General Principles of International Law, Considered from the Standpoint of the Rule of Law*, 92(2) RdC 1, 119 (1957).

⁶² *Legality of Use of Force (Yugoslavia v. United States of America)*, Doc. CR.99/24, ¶3.17 (May 12, 1999) (Oral submissions of Agent of the United States).

⁶³ U.N. General Assembly, *International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General*, ¶66(b), U.N.Doc. A/41/324 (May 13, 1986)[hereinafter *Refugee Flows*]; G.A.Res.36/148, U.N.Doc. A/RES/36/148 (Dec. 16, 1981); S.C. Res. 688, ¶¶ 3, 9–14, U.N. Doc. S/RES/688 (Apr. 5, 1991).

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territory⁶⁵. States of origin are considered to have lost the right to protect refugees fleeing from them.⁶⁶

Alfurna had not taken affirmative steps in providing adequate evacuation facilities to the migrants⁶⁷. Further, Alfurna expressly barred the right to return of the migrants⁶⁸ and has not discussed voluntary repatriation with Rutasia. The right to return is present as treaty obligation⁶⁹ and customary international law⁷⁰. Any exercise of protection would have removed the need to process by Rutasia, which resulted in the alleged illegality.⁷¹

⁶⁴ U.N.H.C.R., *Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶65, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1979).

⁶⁵ Guy Goodwin Gill, *The Language of Protection*, 1 Int'l J. Refugee L. 6, 13 (1989).

⁶⁶ Rep. of the Int'l Law Comm'n, 58th Sess., Draft Articles on Diplomatic Protection, art. 8, U.N. Doc. A/61/10 (2006); Grahl Madsen, *Protection of Refugees by their Country of Origin*, 11 Y.J.I.L. 392 (1985-1986); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 68, Dec.18 1990, U.N.Doc. A/RES/45/158 [hereinafter *Convention on Migrant Workers*].

⁶⁷ *Compromis*, ¶32.

⁶⁸ *Compromis*, ¶41.

⁶⁹ International Covenant on Civil and Political Rights, art. 12(4), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter *ICCPR*].

⁷⁰ See also Universal Declaration of Human Rights, art. 13(2), G.A. Res. 217A(III), U.N. Doc A/810 (Dec. 10, 1948); Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii), G.A.Res. 2106(XX), U.N.Doc. A/6181 (Dec. 21, 1965); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3(2), May 2, 1968, E.T.S. No.46.

⁷¹ R. Y. Jennings, *Some International Law Aspects of the Refugee Question*, 20 Brit Y.B. Int'l L. 98, 111 (1939).

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B. RUTASIA HAS NOT VIOLATED INTERNATIONAL LAW IN ITS TREATMENT OF THE MIGRANTS.

1. Rutasia has not violated international law by failing to accord refugee status.

The interception of irregular migrants by States in territorial waters does not violate the doctrine of innocent passage.⁷² The 1951 Convention Relating to the Status of Refugees [“Refugee Convention”] does not stipulate any procedure for processing. The contracting parties may determine procedure- including the time period for refugee status determination.⁷³ States may accord prima facie refugee status to a group if it readily appears to fall within the definition.⁷⁴ In the absence of persecution on the convention grounds by an identifiable agent of persecution⁷⁵, the migrants do not appear to be refugees. There lies no duty to grant asylum outside the Refugee Convention.⁷⁶

⁷² United Nations Convention on Laws of Seas, arts. 2, 19(1)(g), 21(1)(h) & 25, Dec. 10, 1982, 1983 U.N.T.S. 397.

⁷³ U.N.H.C.R., *Reception Standards for Asylum Seekers in the European Union*, ¶189, available at < <http://www.unhcr.org/refworld/docid/3ae6b3440.html>> (July 2000)[hereinafter *Reception Standards*]; Minister for Immigration and Ethnic Affairs v. Mayer, [1985] HCA 70 (Nov. 5) (Australia); INS v. Aguirre-Aguirre, 119 S.Ct.1439, 1446-47 (1999).

⁷⁴ U.N.H.C.R., *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, ¶6, U.N.Doc. EC/GC/01/4 (Feb. 19, 2001)[hereinafter *Mass Influx Protection*].

⁷⁵ JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW 45 (OUP, 2012).

⁷⁶ G.A. Res. 2312 (XXII), *Declaration on Territorial Asylum*, art. 1(3), U.N.Doc. A/6716 (Dec. 14, 1967); Drafting Committee to the Commission on Human Rights, 2nd Sess., U.N. Doc. E/CN.4/95 (May 21, 1948).

2. There is no violation of Article 31 of the Refugee Convention.

There is no violation of Article 31 of the Refugee Convention as [a] temporary protection is being offered, [b] the administrative detention falls within Article 31(2) and [c] the migrants are potentially excludable.

In situations of mass influx, there is a deviation from usual procedure. The determination of a mass influx situation is a subjective determination⁷⁷ — there is no minimum number of people⁷⁸ and other determinants are considered.⁷⁹ The flow of Alfurnan migrants to Rutasia constitutes a mass influx, impairing efficient asylum determination.

a. There has been no penalization of the Alfurnan migrants due to temporary protection.

The Alfurnan migrants have received temporary protection, which may continue till a durable solution is reached.⁸⁰ State practice of temporary protection is extensive⁸¹ in situations of mass influx. The government of Papua New Guinea justified its hospitality to Irian Jayans under

⁷⁷ G.A. Res. 36/148, U.N.Doc. A/RES/36/148 (Dec. 16, 1981); *Mass Influx Protection* ¶14.

⁷⁸ *Refugee Flows*, ¶27; European Union: Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, art. 2(d), OJ L. 212-223, 2001/55/EC (Aug. 7, 2001)[hereinafter *Council Directive 2001/55/EC*].

⁷⁹ U.N.H.C.R. ExCom, *Conclusion 100(LV), International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, ¶(a), U.N.Doc. A/59/12/Add.1 (Oct. 8, 2004).

⁸⁰ U.N.H.C.R. ExCom, *Conclusion 22(XXXII), Protection of Asylum-Seekers in Situations of Large-Scale Influx*, U.N.Doc. A/AC.96/601 (Oct. 21, 1981)[hereinafter *Conclusion 22(XXXII)*]; UN GAOR, *Addendum to the Report of the United Nations High Commissioner for Refugees*, 36th Sess., Supp.No.12A, 18, U.N. Doc. A/36/12/Add.1 (1981).

⁸¹ U.N.H.C.R., *Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx*, U.N. Doc. EC/SCP/16/Add.1 (July 17, 1981); See Deborah Perluss et al., *Temporary Refuge: Emergence of a Customary Norm*, 26 *Virg .J. Int'l L.* 551(1985-86)[hereinafter *Temporary Refuge*].

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the right to provide temporary protection.⁸² The UNHCR has accepted this practice⁸³, considering this an extension of the rule of *non-refoulement*.⁸⁴

Refugee status determination is suspended during this period,⁸⁵ as was done by Australia to asylum seekers from Afghanistan and Sri Lanka.⁸⁶ Restrictions, such as those placed on the Alfurnan migrants, are placed on persons under such protection as done in Israel⁸⁷ and the UK⁸⁸.

b. In any event, administrative detention falls within the exception in Article 31(2).

According to subsequent state practice⁸⁹, administrative detention of irregular migrants is not penalization under Article 31⁹⁰. There is an implicit recognition of this practice in the

⁸² *Temporary Refuge*, 578.

⁸³ U.N.H.C.R. ExCom, *Conclusion 15(XXX), Refugees without an Asylum Country*, ¶72, U.N. Doc. A/AC.96/572 (1979).

⁸⁴ U.N.H.R.C., *Report of the United Nations Commissioner for Refugees to the Economic and Social Council*, ¶22, U.N.Doc. E/1985/62 (1985).

⁸⁵ *Protection of Refugees*, ¶4; *Council Directive 2001/55/EC*, art.3(1).

⁸⁶ Minister for Immigration and Citizenship, *Changes to Australia's Immigration Processing System*, available at < <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm> > (Apr. 9, 2010).

⁸⁷ Tally Kritzman-Amir, *Refugees and Asylum Seekers in the State of Israel*, 102, available at < <http://www.clb.ac.il/AsylumSystem/Intro4.pdf> > (2012).

⁸⁸ Immigration and Asylum Act 1999, ¶ 21(1), Schedule 2 (UK).

⁸⁹ GALINA CORNELISSE, *IMMIGRATION DETENTION AND HUMAN RIGHTS 12* (Martinus Nijhoff Publishers, 2010); Department of Immigration and Citizenship, *Refugee and Humanitarian Issues Australia's Response*, 32, available at <<http://www.immi.gov.au/media/publications/refugee/ref-hum-issues/pdf/refugee-humanitarian-issues-june09.pdf>> (2009); Aliens Act, 1980, art.74/5 (Belgium); Aliens Act, 2000, art. 7(a) (Netherlands); Law No. 9/94, 1994 art. 4.1 (Spain); Official Journal of the European Union, *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*, art. 15(1), OJ L. 348/98 (Dec. 24, 2008).

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Convention on Migrant Workers.⁹¹ The UK stated that restrictions on the ability to detain asylum seekers in exceptional circumstances were unjustified.⁹² In fact, the UNHCR submitted, in *Saadi v. United Kingdom*⁹³, that states could impose restrictions on movement in order to investigate irregular migrants.

c. The migrants are potentially excludable and, therefore, subject to provisional detention.

Provisional detention can be provided while identifying excludable persons without violating Article 31. This is not penalization due to illegal entry—detention pertains to the claim of being a refugee⁹⁴. The evidence indicating the involvement of migrants in financing illegal activities⁹⁵ can attract criminal responsibility.⁹⁶ Further, some migrants have Alfurnan criminal

⁹⁰ *Lim v. MILGEA*, 176 CLR 1 FC 92/051 (1992); Council of Europe, Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, available at <<https://wcd.coe.int/ViewDoc.jsp?id=2121>>(April 16, 2003); Inter American Commission on Human Rights, *The United States: Detention and Due Process*, 14, OEA/Ser.L/V/II. Doc. 78/10 (Dec. 30, 2010)[hereinafter *IACHR*]; *Al-Kateb v. Godwin* [2004] HCA 37, ¶1 (Australia).

⁹¹ *Convention on Migrant Workers*, art. 17(3).

⁹² Cabinet Office, *Written Ministerial Statements*, Home Department, available at <<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111013/wmstext/111013m001.htm#11101330000005>> (Oct. 13, 2011).

⁹³ E.C.H.R. App. No. 13299/03, ¶26, (Mar. 30, 2007) (Written Submissions on behalf of the U.N.H.C.R.).

⁹⁴ Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, 9 <<http://www.unhcr.org/refworld/pdfid/470a33b10.pdf>> (Oct. 2001); U.N.H.C.R., *UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶¶53-54, available at <<http://www.unhcr.org/refworld/docid/43f48c0b4.html>> (Feb. 7, 2006)[hereinafter *Guidelines on Mass Influx*].

⁹⁵ *Compromis*, ¶50.

⁹⁶ Rome Statute of the International Criminal Court, art. 25(3), July 1, 2002, 2187 U.N.T.S. 90; BVerwG 10 C 48.07, Tenth Division of the Federal Administrative Court (Oct. 14, 2008).

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records.⁹⁷ Article 1F of the Refugee Convention requires the crime to be committed outside the territory of the state of refuge. However, state practice has allowed for exclusion when a crime is committed in both the state of refuge and another state⁹⁸ — as is the case with the Alfurnan migrants.

3. The detention is not indefinite and procedural safeguards have been provided.

The state practice⁹⁹ of detention of irregular migrants indicates that there is no need to have a limit on the duration of detention. *Opinio juris*¹⁰⁰ recognizes that administrative detention may continue for as long as necessary — the investigation of individuals results in this necessity.¹⁰¹ Procedural safeguards¹⁰² have been provided – the migrants had access to court and

⁹⁷ *Compromis*, ¶32.

⁹⁸ *Tenzin Dhayakpa v. The Minister for Immigration and Ethnic Affairs*, FED No. 942/95 (Oct. 25, 1995) (Australia Federal Court); *See CRR, 62749, Ghulam Azam, 62749 Commission des Recours des Réfugiés* (Jan. 30, 1987).

⁹⁹ *Al-Kateb v. Godwin* [2004] HCA 37, ¶31 (Australia); *The Nationality, Immigration and Asylum Act, 2002* (United Kingdom); *Alien Act, 2004* (Finland); *Aliens Act, 2000* (Netherlands); *Alien Act, 1983* (Denmark); *Aliens Act, 1993* (Estonia); *Law to Legal Status to Foreigners, 2004* (Lithuania); *Immigration Act, 1970* (Malta); *Alien Act, 2005* (Sweden); *Passport Law (Law No 5683 of 1950) and Movement of Aliens (Law No 5687 of 1950)* (Turkey); *See generally Daniel Wilsher, The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives*, 53 I.C.L.Q. No.4, 897 (Oct. 2004).

¹⁰⁰ Department of Immigration & Multicultural & Indigenous Affairs, *Article 31- Refugees Unlawfully in the Country of Refuge: An Australian Perspective*, 153, available at <http://www.immi.gov.au/media/publications/refugee/convention2002/10_illegal.pdf>; *A v. Australia*, Communication No. 560/1993, ¶9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997).

¹⁰¹ H.R.C., *Communication No.560/1993*, ¶9.4, 49th Sess., U.N.Doc. CCPR/C/D/59/560/1993 (1997).

¹⁰² *ICCPR*, art. 9.

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legal services.¹⁰³ The Rutasian Supreme Court, however, has a limited power of review in matters of national security.¹⁰⁴

III. THE ALFURNAN MIGRANTS HELD IN THE WOEROMA CENTRE ARE BEING TREATED IN ACCORDANCE WITH RUTASIA'S OBLIGATIONS UNDER INTERNATIONAL LAW AND THEIR PROPOSED TRANSFER TO SAYDEE IS LEGAL.

A. RUTASIA HAS NOT VIOLATED ITS HUMAN RIGHTS OBLIGATIONS IN THE TREATMENT OF ALFURNAN MIGRANTS AT WOEROMA CENTRE.

With respect to the conditions of detention, Rutasia submits that the obligations of a state in its treatment of persons deprived of liberty is minimized in cases of mass-influx, as evidenced by subsequent state practice.¹⁰⁵

1. Subsequent state practice exists for standards of treatment similar to those provided by Rutasia.

There is uniform state practice that states house migrants in converted prisons. In the European Union¹⁰⁶, Australia¹⁰⁷ and the United States¹⁰⁸, this practice is followed prior to

¹⁰³ *Compromis*, ¶43.

¹⁰⁴ *Chahal v. UK*, App No. 22414/93, E.C.H.R., ¶¶121-123; *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 402 (Nov. 22, 1984).

¹⁰⁵ Vienna Convention on the Law of Treaties, art. 31(3), Jan. 27, 1980, 1155 U.N.T.S. 331[hereinafter *VCLT*]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South- West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, ¶53 (June 21) (Advisory Opinion).

¹⁰⁶ See *Reception Standards*; CPT, *Report to Ireland*, Doc. CPT/Inf (2011) 3 (Jan.25.-Feb.5, 2010); CPT, *Report to France*, Doc. CPT/Inf(2012) 13 (Nov.20-Dec.10, 2012); CPT, *Report to Austria*, Doc. CPT/Inf (2010) 5 (Feb.15-Feb.25, 2009); CPT, *Report to Germany*, Doc. CPT/Inf (2012) 6 (Nov.25-Dec.7, 2010); CPT, *Report to Portugal*, Doc. CPT/Inf(2009) 13 (Jan. 14-Jan. 28, 2008); CPT, *Report to Greece*, CPT/Inf (2012) 1 (Jan.19-Jan.27, 2011); CPT, *Report to Netherlands*, CPT/Inf (2012) 21 (Oct.10-Oct. 21, 2011).

¹⁰⁷ Department of Immigration and Citizenship, *Onshore Processing Arrangements for Irregular Maritime Arrivals*, Fact sheet no. 65, available at < <http://www.immi.gov.au/media/fact-sheets/65onshore-processing-irregular-maritime-arrivals.htm>> (June 2012).

¹⁰⁸ *IACHR*, 85-108.

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determination of refugee purposes, particularly when there is a lack of available space. State practice shows that hygiene issues due to overcrowding are unavoidable, when there is an overburdening of infrastructure.¹⁰⁹

After similar incidents of suicide by migrants in Australia, the Australian government justified its failure to act by citing "overburdening of detention and processing infrastructure due to the rapid arrivals and varying risk profile of detainees".¹¹⁰ A similar response was tendered by the US to the Inter-American Court of Human Rights, with regard to migrant deaths.¹¹¹ The Woeroma Centre is the only processing facility in Rutasia¹¹² and the Alfurman migrants would have been accommodated in an acceptable housing facility, i.e. Block A¹¹³, but for a situation of mass-influx.

2. Rutasia's obligations are minimized in a situation of mass-influx, under the principle of burden-sharing.

The limitation of a state's treatment obligations in a situation of mass-influx has been recognized by the UNHRC¹¹⁴ and international jurists¹¹⁵. While any treatment principles are non-

¹⁰⁹ C.A.T., *Conclusions and Recommendations of the Committee against Torture: Spain*, 28th Sess., U.N. Doc. CAT/C/CR/29/3, ¶11(d) (Dec.23, 2002); U.N. GAOR, *Report of the Committee against Torture*, U.N. Doc. A/56/44, ¶¶115-120 (Brazil), ¶95(f) (Bolivia).

¹¹⁰ A Hawke et al., *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, available at, <<http://www.immi.gov.au/media/publications/pdf/2011/independent-review-incidents-christmas-island-villawoodfull.pdf>> (Aug. 31, 2011).

¹¹¹ *IACHR*, ¶26 (Response of the United States to the *IACHR* Draft).

¹¹² *Compromis*, ¶33.

¹¹³ *Compromis*, ¶36.

¹¹⁴ *Guidelines on Mass Influx*, ¶97.

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binding¹¹⁶ in the period of temporary refuge, basic minimum standards for the protection¹¹⁷ are to be provided — unless States can demonstrate a lack of resources to fulfill even such a minimum obligation.¹¹⁸ While obligations arising out of ICCPR and CAT may not be derogated from by citing lack of resources¹¹⁹, the conflicting norms under refugee law and human rights law can be harmonized, under the principle of *lex specialis*.¹²⁰ Therefore, under the principle of harmonization¹²¹, Rutasia's positive obligations shall be minimized as per its margin of appreciation.¹²²

Wherever possible, particularly with regard to family unity¹²³ and medical care¹²⁴, Rutasia fulfilled its protection obligations. However, Rutasia, while implementing its obligations

¹¹⁵ Jean Francois Dureiux et al., *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16(1) Int'l J Refugee Law 4 (2004).

¹¹⁶ G.A. Res 43/173, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

¹¹⁷ U.N.H.C.R., *Rep. of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx*, U.N. Doc. EC/SCP/16 (June 3, 1981); *Conclusion 22(XXXII)*, ¶57(2).

¹¹⁸ C.E.S.C.R., *General Comment No.3, The Nature of State Parties' Obligation (art. 2, para.1, of the Covenant)*, ¶10, U.N. Doc. E/1991/23 (Dec. 14, 1990).

¹¹⁹ High Commissioner for Human Rights, *General Comment No.21, Replaces General Comment 9 concerning Humane Treatment of Persons Deprived of Liberty (Art.10)*, ¶4, available at < <http://www2.ohchr.org/english/bodies/hrc/comments.htm> > (Oct.4, 1992).

¹²⁰ 2001 Articles on Responsibility of States for Internationally Wrongful Acts, art. 55, U.N. Doc. A/56/83 (Aug. 3, 2001) [hereinafter *ASR*].

¹²¹ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶25 (July 8) (Advisory Opinion).

¹²² Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, App. No. 1474/62, 1677/62, 1692/62, 1769/63, 1994/63, 2126/64, E.C.H.R., ¶3 (July 23, 1968).

¹²³ *Compromis*, ¶34.

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to provide the basic minimum standard to the Alfurnan migrants, was faced with several austerity measures, due to disaster management and credit crisis.¹²⁵ Rutasia's obligations are further limited by equitable concerns as the international community failed to respond to the principle of burden sharing.¹²⁶

B. RUTASIA'S PROPOSED TRANSFER OF THE ALFURNAN MIGRANTS DOES NOT VIOLATE ITS *NON-REFOULEMENT* OBLIGATIONS.

The transfer of the Alfurnan migrants to Saydee will not violate the principle of *non-refoulement*, as it [1] the transfer falls within the exception of provided in the 'Protection Elsewhere Doctrine' [2] Rutasia has sufficient guarantees for the protection and welfare of the Alfurnan migrants in Saydee.

Relevant state practice in Australia¹²⁷, United States¹²⁸, and *opinio juris*¹²⁹ affirm the existence of the 'Protection Elsewhere Doctrine', which refers to a situation in which a state or

¹²⁴ *Compromis*, ¶36.

¹²⁵ *Compromis*, ¶¶30, 25.

¹²⁶ U.N.H.C.R. ExCom, *Conclusion 19 (XXXI), Temporary Refuge*, ¶48(4), U.N.Doc. A/AC.96/588 (1981).

¹²⁷ Migration Legislation Amendment (Regional Processing and Other Measures) Act, 2012; Guy Goodwin-Gill, *The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibility of States and International Organizations*, 9 UTS L. Rev. 26 (2007).

¹²⁸ MOU, *United Kingdom-Turks and Caicos Islands- United States to establish in the Turks and Caicos Islands a processing facility to determine the refugee status of boat people from Haiti*, June 18, 1994, Doc. KAV 3906, Temp. State Dept. No. 94-158; MOU, *United States-Jamaica, for the establishment within the Jamaican territorial sea and internal waters of a facility to process nationals of Haiti seeking refuge within or entry to the United States of America*, June 2, 1994, Doc. KAV 3901, Temp. State Dept. No. 94-153; Angus Francis, *Bringing protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing*, 20 Int'l J. Refugee L. 273 (2008).

¹²⁹ Official Journal of EU, *Council Regulation (EC) No. 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for*

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agency acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the state of refuge.¹³⁰

1. Saydee does not pose a specific threat to the Alfurnan migrants.

State practice¹³¹ and *opinio juris*¹³² affirm that *de jure* compliance to the Refugee Convention is not a pre-requisite, as the principle of *non-refoulement* has attained the status of customary international law¹³³. Saydee has ratified the ICCPR, which is inclusive of the obligation of *non-refoulement*,¹³⁴ as well as the provision against inhumane treatment and torture¹³⁵.

Further, state practice¹³⁶ consistently shows that for a violation of *non-refoulement*, the

Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 OJ (L 50) 1, 10 (Feb. 25, 2003); Council of Europe: *Parliamentary Assembly, Resolution 1569 (2007): Assessment of Transit and Processing Centers as a Response to Mixed Flows of Migrants and Asylum Seekers*, ¶2, Doc. Res. 1569 (2007) (Oct. 1, 2007).

¹³⁰ Colloquium, *The Michigan Guidelines on Protection Elsewhere*, 28 Mich J. Int'l L. 207 (2007).

¹³¹ *NAFG v. Minister for Immigration & Multicultural & Indigenous Affairs*, (2003) 131 F.C.R. 57 (Australia); *Kola v. MIMA*, (2002) 120 F.C.R. 170 (Australia); *Patto v. MIMA*, (2000) 106 F.C.R. 119 (Australia).

¹³² Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 Int'l J. Refugee L. 567, 573 (2003).

¹³³ U.N.H.C.R., *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 7, available at <<http://www.unhcr.org/home/RSDLEGAI.45fi7al a4.pdf>> (Jan. 26, 2007).

¹³⁴ High Commissioner for Human Rights, *General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment*, U.N. Doc HRI/GEN/1/Rev 1 (July 28, 1994).

¹³⁵ *ICCPR*, art. 7.

¹³⁶ *Immigration and Naturalization Service v. Stevic*, 467 U.S. 407, 429. (SCOTUS); *R v. Secy of State for the Home Dept, ex parte Sivakumaran and Ors.* [1988] 1 All ER 193.

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individual's in question must be specifically threatened, due to past persecution,¹³⁷ as opposed to a general perception of fear of persecution, due to a bad human rights situation.¹³⁸ While Saydee may have a poor human rights record¹³⁹, there is not specific threat to the Alfurnan migrants.

2. In any event, Rutasia has sufficient guarantees from Saydee to ensure the protection of the Alfurnan migrants.

Rutasia has an interest in ensuring Saydee's compliance with its protection obligations, as it will be held liable for aiding or assisting a violation of an international wrongful act,¹⁴⁰ having financed Saydee's operations.¹⁴¹ Rutasia's continuous protection exists even if protection obligations are delegated, assigned or transferred by bilateral agreements.¹⁴²

Rutasia has entered into a written agreement with Saydee, which amounts to diplomatic assurances, as evidenced state practice.¹⁴³ Diplomatic assurances have been recognized by the

¹³⁷ Soering v. United Kingdom, App. No. 14038/88, E.C.H.R., ¶88 (July 7, 1989); Chahal v. United Kingdom, App. No. 22414/93, E.C.H.R., ¶¶17-24 (Nov. 15, 1996); G.T v. Australia, Communication No. 706/1996, ¶2.1, U.N. Doc. CCPR/C/61/D/706/1996 (Nov. 4, 1997); Tapia Paez v. Sweden, Communication No. 39/1996, ¶2.1, U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997); Alzery v. Sweden, Communication No 1416/2005, ¶3.12, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006)[hereinafter *Alzery*].

¹³⁸ K v. Refugee Status Appeals Authority, No. 2, NZAR 441, ¶26 (2005) (New Zealand).

¹³⁹ *Clarification*, No.10.

¹⁴⁰ ASR, art. 16; Michelle Foster, *Protection Elsewhere: The legal Implications of requiring Refugees to Seek Protection in Another State*, 28 Mich. J. Int'l L. 223, 263 (2007).

¹⁴¹ *Compromis*, ¶38.

¹⁴² U.N.H.C.R., *Considerations on the "Safe Third Country" Concept*, 2, available at <<http://www.unhcr.org/refworld/pdfid/3ae6b3268.pdf>> (July 1996); U.N.H.C.R., *UNHCR Position on Readmission Agreements, "Protection Elsewhere" and Asylum Policy*, 3 Euro. Ser. 2, 465, ¶3 (Aug. 1, 1994).

¹⁴³ Othman (aka Ab Qatada) v. Secretary for the State of Home Department, Appeal No. SC/15/2005, ¶¶171-174 (Feb. 16, 2007) (Special Immigration Appeals Commission, UK).

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UNHCR¹⁴⁴, and have been considered sufficient even when there is a highly probable risk of ill-treatment in state practice¹⁴⁵ and *opinio juris*¹⁴⁶. Diplomatic assurances have been held to be irrevocable,¹⁴⁷ and legally binding,¹⁴⁸ given by organ of the government having responsibility to ensure compliance with the assurance.

3. In any event, Saydee is bound by its legally binding unilateral promise.

A unilateral act of a State means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to the international community.¹⁴⁹ The legally binding nature of unilateral statements has been recognized in the *Nuclear Tests* case.¹⁵⁰ Saydee has issued a public statement promising to remedy its poor human rights situation subject to sufficient funds.¹⁵¹

¹⁴⁴ U.N.H.C.R., *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, 15, available at <<http://www.unhcr.org/refworld/docid/44dc81164.html>> (Aug. 2006).

¹⁴⁵ *Hilal v. United Kingdom*, App. No. 45276/99, E.C.H.R., ¶¶60-69 (June 6, 2001); *R. (Bagdanavicius) v. Secretary for the State of Home Department*, [2005] 2 W.L.R. 1359, ¶¶7-10 (H.L.); *Svazas v. Secretary for the State of Home Department*, [2002] 1 W.L.R. 1891, ¶50.

¹⁴⁶ William Thomas Worster, *Between a Treaty and Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases*, 21 *Minnesota J. Int'l L.* No.2 (Oct. 10, 2011).

¹⁴⁷ *Alzery*, ¶3.2.

¹⁴⁸ *Yin Fong v. Australia*, Communication No. 1442/2005, ¶¶7.4, 9.7 U.N.Doc. CCPR/C/97/D/1442/2005 (Nov. 23, 2009).

¹⁴⁹ Special Rapporteur, *Fifth Report on Unilateral Acts of States*, Int'l Law Comm'n, ¶51, U.N. Doc. A/CN.4/525 (Apr. 4, 2002).

¹⁵⁰ *Nuclear Tests (France v. New Zealand)*, 1974 I.C.J. 457 (Dec. 20).

¹⁵¹ *Clarification*, No.5.

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

A. RUTASIA'S ACTIONS PRIOR TO THE SEIZURE DO NOT DISENTITLE IT FROM SEEKING DECLARATORY RELIEF FROM THIS COURT.

Rutasia has come to this Court in good faith. It submits that Rutasia's [1] efforts towards combating climate change, or [2] the acts of a Rutasian private company, Mainline Construction Limited ["MCL"], do not constitute unlawful conduct under the principle of clean hands or *exceptio non adimpliti contractus* ["*exceptio*"].

1. Rutasia has not violated its climate change obligations or caused trans-boundary harm.

Rutasia's obligations under the United Nations Framework Convention for Climate Change¹⁵², are not legally-binding, in the absence of ratification of the Kyoto Protocol.¹⁵³ In any event, the harm suffered by Alfurna cannot be attributed to Rutasia, due to lack of causation.

Under the *sine qua non* test¹⁵⁴, Rutasia may not be held independently liable as it is not the sole contributor to climate change.¹⁵⁵ Alfurna would have still suffered the same harm even if Rutasia had ceased its economic activities.¹⁵⁶ While cases of joint liability under domestic law

¹⁵² United Nations Framework on Convention for Climate Change , art. 4, May 9, 1992, 1771 U.N.T.S. 107.

¹⁵³ *Compromis*, ¶14.

¹⁵⁴ R. VERHEYEN, CLIMATE CHANGE, DAMAGE AND INTERNATIONAL LAW 235, 248-249 (2005).

¹⁵⁵ German Watch, *The Climate Change Performance Index Results 2012*, available at <<http://germanwatch.org/klima/ccpi.pdf>>(Dec. 2011).

¹⁵⁶ Honoré, *Causation and Remoteness of Damage*, in ANDRE TUNC ET AL., INTERNATIONAL ENCYCLOPEDIA OF COMPARITIVE LAW, 7-58 (Martunus Nijhoff Publishers).

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allow for several liability¹⁵⁷, this will not apply to attribution under international law — due to the *Monetary Gold* principle of 'indispensible third party'.¹⁵⁸

Further, there is no proof for specific causation¹⁵⁹ as the rise in sea level and natural disasters are likely to be caused due to the local hydrology of the bay.¹⁶⁰ The precautionary principle, which normally operates in the absence of scientific certainty¹⁶¹, has not attained the status of *lex lata*¹⁶² and is, therefore, non-applicable.

In any event, to have failed to act with due diligence, the state must have failed to take all appropriate measures to reduce the risk or prevent the harm.¹⁶³ Rutasia took all reasonable efforts to minimize the risk to Alfurna under the Alfurna Climate Change Remediation Project¹⁶⁴.

¹⁵⁷ German Civil Code (BGB), 1896, ss. 840, 421, 426; Civil Liability (Contribution) Act, 1978 (UK); American Law Institute, Restatement (Third) of Torts, § 17: Joint And Several Or Several Liability For Independent Tortfeasors (2002).

¹⁵⁸ Monetary Gold Removed from Rome in 1943 (Italy v. France, Great Britain and Northern Ireland and United States of America), 1954 I.C.J. 19, ¶ 32 (June 15); Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240, 326-330 (June 26) (Dissenting Opinion of Judge Schwebel) (Dissenting Opinion of Judge Ago); Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J. 90, 102 (June 30).

¹⁵⁹ Trail Smelter Case (US, Canada), 3 U.N.Rep. Int'l Arbitral Awards 1905, 1911 (Apr.16, 1938) (PCA)[hereinafter *Trail Smelter*].

¹⁶⁰ *Compromis*, ¶5.

¹⁶¹ Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), ITLOS Cases No 3/4, 117 I.L.R. 148, ¶179 (Aug. 27, 1999) (Separate opinion of Judge Treves, ¶9).

¹⁶² Gerhard Hafner et al., *Obligations of Prevention and the Precautionary Principle*, in LAW OF INTERNATIONAL RESPONSIBILITY 530 (James Crawford et al. eds., OUP).

¹⁶³ Corfu Channel (UK v Albania), 1949 I.C.J. 4, 22 (Apr. 9)[hereinafter *Corfu Channel*]; *Trail Smelter*, 1911; Certain Phosphate Lands in Nauru (Nauru v Australia), 1992 I.C.J. 240, 281 (June 26).

¹⁶⁴ *Compromis*, ¶¶8,10.

2. In any event, Rutasia's climate change obligations are not synallgamic to Alfurna's obligation to repay the debt.

Rutasia's climate change obligations are not triggered by the Climate Change Loan ["CCL"] agreement, being limited to disbursement of funds on request¹⁶⁵ and not extending, as Alfurna may argue, to prevent climate change. Therefore, Rutasia has not breached a reciprocal nor a similar obligation under the principle of *exceptio*.¹⁶⁶ Rutasia has neither hindered Alfurna's performance nor contributed to its loan default, in further compliance with its good faith obligation¹⁶⁷.

The policy implication of Alfurna's disentitlement argument is that no creditor, which is an Annex-I nation, can bring a claim against a debtor nation affected by climate change for the recovery of loans to combat climate change.

3. The negligence of MCL does not trigger Rutasia's responsibility in the absence of any control.

Rutasia lacks both territorial and jurisdictional control over MCL, which are required to prove a due diligence obligation¹⁶⁸. MCL's negligence took place on Alfurnan territory pursuant to a separate contract, to which Rutasia was not a party.¹⁶⁹ Rutasia did not have prior

¹⁶⁵ *Compromis*, Annex-A "Disbursement".

¹⁶⁶ *River Meuse*, ¶323 (Dissention Opinion of Judge Hudson).

¹⁶⁷ Convention on International Sale of Goods, art. 80, April 11, 1980, 1489 U.N.T.S. 3[hereinafter *CISG*]; *Factory at Chorzów (Germany v. Poland)*, 1927 P.C.I.J.(ser.A) No.9, ¶21 (July 26).

¹⁶⁸ *Corfu Channel*, 22 ; U.N.G.A., *Rio Declaration on Environment and Development*, Annex I, Principle 2, U.N.Doc. A/CONF.151/26(Vol.I) (June 13-14, 1992); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 14, ¶205 (Apr. 20).

¹⁶⁹ *Compromis*, ¶9.

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knowledge¹⁷⁰ of MCL's negligence. Further, it cannot be presumed to have jurisdictional control, as the UNCTAD principles which require post disbursement monitoring¹⁷¹ are non-binding. Rutasia fulfilled its obligation to duly investigate MCL's acts after such knowledge.¹⁷² In furtherance of its *bonafide* intention¹⁷³, Rutasia, has restructured Alfurna's debts on two separate occasions.¹⁷⁴

B. RUTASIA'S SEIZURE WAS PURSUANT TO THE CCL AGREEMENT, WHICH WAS NOT SUSPENDED EITHER BY EXTERNAL CIRCUMSTANCES OR BY ALFURNA'S ACTS.

State practice¹⁷⁵ reflects that Alfurna's status as a state does not affect its obligations as a contractual entity, i.e. under *lex contractus*. Further, jurisdiction may be exercised over agreements governed by municipal law, as demonstrated in the *Serbian Loans* case¹⁷⁶ and *Brazilian loans* case¹⁷⁷.

¹⁷⁰ *Corfu Channel*, 18-22.

¹⁷¹ United Nations Conference on Trade And Development, *Draft Principles on promoting Reasonable Sovereign Lending and Borrowing*, Principle 5, available at <http://unctad.org/en/docs/gdsddf2011misc1_en.pdf> (Apr. 26, 2011)[hereinafter *UNCTAD*].

¹⁷² *Compromis*, ¶20.

¹⁷³ *UNCTAD*, Principle 15.

¹⁷⁴ *Compromis*, ¶¶15,19.

¹⁷⁵ Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, art. 153, 29 LL.M. 1511, 1520 (1990); WTO, *Trade Policy Review: Macau, China 2001*, 12, 18, Doc. WT/TPR/S/82 (July 2001); International Monetary Fund, *IMF Offers Membership to Republic of Kosovo*, IMF Press Release No. 09/158 (May 8, 2009); Tai-Heng Cheng, *Why New States Accept Old Obligations*, 2011 U. Ill. L. Rev. 1 (2011).

¹⁷⁶ *Payment of Various Serbian Loans issued in France* (France v. Yugoslavia), 1929 P.C.I.J.(ser.A) No.20, ¶42 (July 12).

¹⁷⁷ *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (France v. Brazil), 1929 P.C.I.J.(ser.A) No.21, ¶¶79-82, 242 (July 12).

1. Alfurna may not invoke any defense to avoid its repayment obligations under the CCL agreement.

The principle of *rebus sic stantibus*, requires that the change must not be anticipated¹⁷⁸. Alfurna had anticipation the rise in sea level as early as 1992¹⁷⁹. In order to plead necessity, it must be impossible to proceed by any legitimate means.¹⁸⁰ Alfurna had several legitimate methods before availing the option of defaulting.¹⁸¹

Under general principles of law, or *lex mercatoria*, the defense of a *force majeure* event¹⁸² or the defense of hardships¹⁸³, often cited as reason for rendering performance impossible, must be notified¹⁸⁴ and must not be foreseeable¹⁸⁵, respectively. Alfurna, however,

¹⁷⁸ *VCLT*, art. 62(1); Fisheries Jurisdiction Case (United Kingdom v. Norway), 1951 I.C.J. 116, ¶41 (Dec. 18).

¹⁷⁹ *Compromis*, ¶8.

¹⁸⁰ ASR, art. 25(1) (a); CMS Gas Transmission Company v. The Argentine Republic, Case No. ARB/01/8, ¶¶323-324 (May 12, 2005) (ICSID); Sempra Energy International v. Argentina Republic, Case No. ARB/02/16, ¶350 (Sept. 28, 2007) (ICSID); [hereinafter *Sempra*]; Gabčíkovo-Nagymaros (Hungary/Slovakia), 1997 I.C.J. 7, ¶102 (Sep. 25). [hereinafter *Gabčíkovo*]; Societe Commerciale De Belgique (Belgium v. Greece), 1939 P.C.I.J.(ser. A/B) No.78, ¶103 (June15).

¹⁸¹ *Compromis*, ¶¶4, 15, 19.

¹⁸² *CISG*, art. 79; International Institute for the Unification of the Private Law, *UNIDROIT Principles of International Commercial Contract*, art. 7.1.7, available at <<http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf>>(2010)[hereinafter *UNPICC*].

¹⁸³ *UNPICC*, art. 6.2; ICC Commission on Commercial law and Practice, *ICC Hardship Clause 2003*, ICC Publishing No. 650 (Feb. 2003).

¹⁸⁴ *CISG*, art. 26,49, 64; *UPICC*, art. 7.3.2.

¹⁸⁵ *UPICC*, art. 6.2.2. (a)-(b).

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was aware of local factors like hurricanes and earthquakes¹⁸⁶. In any event, the Alfurnan moratorium does not amount to a notice of suspension to Rutasia.

2. The CCL agreement is not suspended by the Alfurnan moratorium.

Domestic legislations cannot limit the scope of obligations governed by international law¹⁸⁷. When the applicable law is domestic law, national courts¹⁸⁸ only give recognition to the laws applicable to the contract.¹⁸⁹ Creditors have in the past uniformly refused to recognize moratoriums by debtor nations, except when followed by a request of restructuring¹⁹⁰, which was absent in this case¹⁹¹.

C. RUTASIA'S ACTS OF SEIZURE DID NOT VIOLATE THE IMMUNITY OF THE ALFURNAN RESERVE BANK ("ARB").

Central banks and their property do not enjoy absolute immunity¹⁹² and the presumption of immunity is rebuttable in two cases: [1] the immunity is waived by the state or, [2] the central

¹⁸⁶ *Compromis*, ¶21.

¹⁸⁷ *VCLT*, art. 27; *German Interests in Polish Upper Silesia (Germany v. Poland)*, 1926 P.C.I.J. (ser. A) No.7, Annex 1, 17 (Feb 5); *LaGrande Case (Germany v. USA)*, 2001 I.C.J. 466, ¶125 (June 27); *Brownlie*, 25.

¹⁸⁸ *See generally* *United State v. National City Bank of New York*, 90 F.Supp. 448 (S.D.N.Y. 1950); *National Bank of Greece and Athens SA v. Metliss*, 1958 A.C. 509 (PC).

¹⁸⁹ IMF, *Legal Aspects of Standstills and Moratoria on Sovereign Debt Payments and their Effect on Actions by Creditors*, 14, Doc. EBS/96/26 (Feb. 22, 1996).

¹⁹⁰ Udaibir S. Das, et al., *IMF Working Paper*, *Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts*, Doc. WP/12/203 (Aug. 2012).

¹⁹¹ *Compromis*, ¶22.

¹⁹² HAZEL FOX, *THE LAW OF STATE IMMUNITY* 464-473 (2nd ed. 2008) [hereinafter *Hazel Fox*]; *STATE PRACTICE REGARDING STATE IMMUNITIES* 18, 59-68 (Gerhard Hafner, 2006)[hereinafter *Gerhard Hafner*]; Rep. of Special Rapportuer, *Seventh Report on Jurisdictional Immunities of States and their Property*, 42-44, U.N. Doc. A/CN.4/388 and Corr.1 (E only) & Corr.2 (F only) (Mr. Sompong Sucharitkul).

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bank is performing a non-sovereign function or *acta jure gestinios*¹⁹³.

1. Alfurna has waived ARB's immunity by pledging it as a security and by submitting to arbitration.

In the CCL agreement, parties have agreed upon a waiver of judicial authorization for enforcement, thereby constituting an express waiver.¹⁹⁴ The validity of waiver of immunity from enforcement measures has been recognized both in international conventions¹⁹⁵ and national legislations¹⁹⁶. This also includes the recognition of an implied waiver by agreeing to arbitration.¹⁹⁷

Pledging of overseas property as security for developmental loans is reflected in state practice¹⁹⁸ and *opinio juris*¹⁹⁹. The notice for enforcement of Rutasia's security interest was

¹⁹³ *Weston Compagnie de Finance et D'Investissement, S.A. v. Ecuador*, 823 F.Supp.1106 (1993); *Alcom Ltd v. Republic of Colombia, United Kingdom*, 127 I.L.R. 170, 187 (Apr. 12, 1984); *Leasing West v. Democratic Republic of Algeria*, 116 I.L.R. 526, 529 (Apr. 30, 1986); *Leica AG v. Central Bank of Iraq and State of Iraq*, [2001] J.T. 6 (Feb. 15, 2000) (Brussels Court of Appeal).

¹⁹⁴ *Compromis*, Annex A 'Default Clause'.

¹⁹⁵ Convention of United Nations on Jurisdictional Immunities of States and Their Property, art. 19(1), December 16, 2004, U.N. Doc. A/RES/59/38[hereinafter *Jurisdictional Immunities Convention*]; European Convention on State Immunity, art. 31, May 16, 1972, 1495 U.N.T.S. 182.

¹⁹⁶ United States Foreign Sovereign Immunities Act, 1976, s 1610(a)(1); United Kingdom State Immunity Act, 1978, s 13(3); Australia Foreign States Immunities Act, 1985, s 31; Canada State Immunity Act, 1982, art.12(1)(a); Pakistan State Immunity Ordinance, 1981, s 14(3); Singapore State Immunity Act, 1985, s 15(3); South Africa Foreign States Immunities Act, 1981, s 14(2).

¹⁹⁷ *Creighton Ltd v. Minister of Finance of Qatar and Others*, 127 I.L.R 154,155 (July 6, 2000); *Libyan American Oil Company v. Libya*, Case No. Ö 261/79, 20 I.L.M 893, 895 (June 18, 1980); *Gerard Hafner*, 138-150.

¹⁹⁸ A.O. Adede, *Approaches to Bilateral Loan Agreements between Developed and Developing States: Some Lessons from the Practice of Denmark, the United Kingdom and the United States*, 5 Dalhousie L.J. 121 (1979).

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served to Alfurna who failed to respond within 30 days.²⁰⁰ Alfurna, thereby, waived its claim over the ARB account in the Rutasian bank, which was pledged as security for the CCL as “other property under Rutasian control”.²⁰¹ After exercising diplomatic protection on ARB's behalf in this case, Alfurna may not seek the defense of separate legal personality of ARB.²⁰² There is no *pari passu* charge on the ARB bank account as was in the Argentinean default²⁰³, and in any case, the same has been waived by Alfurnan creditors.²⁰⁴

2. In any event, ARB was performing a non-sovereign function.

In determining whether a transaction is commercial²⁰⁵, reference should be made primarily to its nature and not its purpose.²⁰⁶ The Belgian Government attached the assets of the Greek National Bank,²⁰⁷ since the nature of the transaction was one which could be undertaken

¹⁹⁹ See Generally PHILIP R. WOOD, *COMPARATIVE LAW OF SECURITY INTERESTS AND TITLE FINANCE* (Sweet & Maxwell, 2007).

²⁰⁰ *Compromis*, Annex A ‘Default Clause’.

²⁰¹ *Id.*

²⁰² *Certain Norwegian Loans (France v. Norway)*, 1957 I.C.J. 9, ¶¶90-91 (July 6).

²⁰³ *NML Capital Ltd v. the Republic Argentina*, [2011] UKSC 31; *NML Ltd et al. v. Republic Argentina*, Doc. No. 12-105(L) (Oct. 26, 2012) (United States Court of Appeals).

²⁰⁴ *Clarification*, No.11.

²⁰⁵ *Jurisdictional Immunities Convention*, art. 19(c).

²⁰⁶ United States Foreign Sovereign Immunities Act, 1976, s 1603(d); Canada State Immunity Act, 1982, s 2; *Hazel Fox*, 604, 608.

²⁰⁷ See PHILIP R. WOOD *PROJECT FINANCE, SUBORDINATED DEBT AND STATE LOANS* (Sweet & Maxwell, 2007) 546 (1995).

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by a private entity.²⁰⁸ Major financial jurisdictions like Germany²⁰⁹, Switzerland²¹⁰, United States²¹¹, and Germany²¹² affirm this test. ARB's bank account has been used for purposes normally performed by commercial banks.²¹³

D. IN ANY EVENT, RUTASIA'S SEIZURE WAS A VALID COUNTERMEASURE TO ALFURNA'S REPUDIATION.

Counter-measures have been recognize by international tribunals²¹⁴, to be a part of customary international law, as a proportional measure by an aggrieved state in response to an international wrongful act²¹⁵ by another state. Rutasia seized only 50% of the amount Alfurna owed²¹⁶ and after the acquisition of territory by Alfurna²¹⁷.

²⁰⁸ *Socobelge v. The Hellenic State*, 8 I.L.R 3, 7-8 (Apr. 30, 1951) (Belgian Civil Tribunal of Brussels).

²⁰⁹ *Central Bank of Nigeria, Landsgericht Frankfurt*, 65 I.L.R 131, 137 (Dec. 2, 1975); *Empire of Iran Case*, 45 I.L.R. 57 (Apr. 30, 1963) (German Federal Constitutional Court).

²¹⁰ *See generally* *Kuwait v. X*, 5 Rev. Suisse D. int. eur., 593 (Jan. 24, 1994); *Libya v. Actimon SA*, 82 I.L.R. 30 (Apr. 24, 1985) (Swiss Federal Tribunal).

²¹¹ *Republic of Argentina v. Weltover*, 54 U.S. 607 (1992).

²¹² *National Iranian Oil Company Revenues from Oil Sales Case*, 65 I.L.R. 215, 243 (Apr. 12, 1983).

²¹³ *Compromis*, ¶¶11, 17, 19.

²¹⁴ *Air Service Agreement of 27 March 1946 between the United States of America and France*, 18 U.N.Rep. Int'l Arbitral Awards 417, ¶81 (Dec. 9, 1978); *Nicaragua*, 127; *Gabcikovo*, ¶¶ 7, 55.

²¹⁵ *ASR*, art. 22.

²¹⁶ *Compromis*, ¶46.

²¹⁷ *Clarification*, No.7.

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The moratorium amounts to a repudiation of its debt obligations, which is an international wrongful act,²¹⁸ as opposed to a mere contractual breach.²¹⁹ The moratorium by Alfurna was discriminatory²²⁰, as it did not suspended debt servicing obligations to domestic lenders²²¹. In the absence of a time limit, as is with similar declarations²²², the moratorium was not temporary in nature. Alfurna's claim in the ICJ, disentitling Rutasia, clarifies that Alfurna believes that it no longer has any debt repayment obligations.

²¹⁸ Waste Management (Inc.) v. Mexico, Case No. ARB(AF)/00/3, 174, 177 (Arr. 30, 2004) (ICSID); SGS v. Republic of Philippines, Case No. ARB/02/6, ¶161 (ICSID); *Sempra* ¶311; Russian Indemnity Case (Russia v. Turkey), 11 U.N.Rep. Int'l Arbitral Awards (Sales No. 61.V.4), 421.

²¹⁹ E. BORCHARD, STATE INSOLVENCY AND FOREIGN BONDHOLDERS: GENERAL PRINCIPLES 118-120 (Bread Books, 2000); MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 237-239 (2011).

²²⁰ S. Schwebel, *On Whether Breach by a State of a Contract with an Alien is a Breach of International Law*, in JUSTICE IN INTERNATIONAL LAW, SELECTED WRITINGS OF STEPHEN SCHWEBEL 434 (Cambridge University Press, 2011).

²²¹ *Compromis*, ¶23.

²²² Wenqiang Yin, *Moratorium in International Law*, 11(2) Chinese J. Int'l L. 321 (2012).

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PRAYER FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests this Honourable Court to find, adjudge and declare that:

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

and in any event:

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

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

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

Respectfully Submitted on behalf of the Respondent,

Agents for the Respondent.