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**THE 2003 ASIA CUP  
INTERNATIONAL LAW MOOT COURT COMPETITION**

**IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE  
PALACE, THE HAGUE, THE NETHERLANDS**

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**CASE CONCERNING THE TREATMENT OF A PHYSICIST**

**THE STATE OF SELENE  
APPLICANT**

**v.**

**THE STATE OF LARCEAN  
RESPONDENT**

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**2003**

**On Submission to the International Court of Justice**

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**MEMORIAL FOR THE APPLICANT,  
THE STATE OF SELENE\***

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\* This is the winning memorial of the 2003 Asia Cup International Law Moot Court Competition, prepared by Arnell Uychoco, Neil Silva, Ruben Acebedo, and Karina Balajadia.

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Table of Contents

SUMMARY OF PLEADINGS.....	582
PLEADINGS AND AUTHORITIES.....	583
I. Larcean breached its duty under Conventional and Customary Law to respect and protect Mardof's basic human rights.....	583
A. Larcean violated Mardof's right to freely choose employment and right to just and favorable conditions of work.....	585
B. By forcing Mardof to indefinitely stay in its territory, Larcean is violating his right to leave any country and to return to his own .....	586
C. In tapping into Mardof's phone conversations, and putting him under the surveillance of the Secret Service, Larcean violated Mardof's right to privacy and right against unlawful attacks against honor.....	587
D. Larcean violated Mardof's right against discrimination by imposing an unreasonably different application of its military secrets law on Mardof.....	587
E. Larcean violated Mardof's rights under customary international law on the treatment of aliens.....	589
II. In preventing Mardof from being employed by Selene, Larcean has violated the right of the people of Selene to the benefits of scientific progress .....	590
III. There are no circumstances that exist to justify Larcean's violation of Mardof's internationally protected human rights.....	591
A. Larcean's actions cannot be excused on the ground that there exists a public emergency that permits a lawful derogation of human rights.....	591
B. Larcean may not validly invoke a state of necessity that would preclude the wrongfulness of Larcean's acts.....	593
IV. Larcean has the obligation under international law to make reparations and cease and refrain from violating Mardof's human rights.....	594
CONCLUSION AND PRAYER FOR RELIEF.....	595

### SUMMARY OF PLEADINGS

Larcean is in breach of its duty under Conventional and Customary International Law to respect and protect Mardof's basic human rights. The right of Mardof to leave any country and to return to his own was unjustifiably violated when he was prevented from leaving Larcean to work in Selene, and by forcing him to stay within Larcean after he had expressed his desire to return to Authentica, his state of nationality. This is in breach of customary and treaty law providing that a person's liberty is not to be infringed absent the presence of grounds and the conduct of procedures established by law. Mardof was detained without specifying the charge on which such detention was premised and without even a pretense of following established legal procedures.

Mardof's right to equal protection of the law was likewise violated, a right recognized under international law which proscribes discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this case, other scientists in the employ of Larcean were allowed to leave their employment when they chose, whereas Mardof was subjected to harsh sanctions when he did the same. This amounts to palpable discrimination against Mardof, since Larcean presented no evidence that would justify the difference in treatment that proved prejudicial to him.

In preventing Mardof from being employed by Selene, Larcean has violated the right of the people of Selene to the benefits of Scientific progress and its applications. The right of every individual to education and to enjoy the benefits of scientific progress and its applications is recognized under the ICESCR. For the realization of the right to benefit from scientific progress, States undertake to respect the freedom indispensable for scientific research and creative activity, and shall take steps necessary for the diffusion of scientific knowledge.

Furthermore, by undertaking to prevent Mardof from traveling to Selene, Larcean has deprived the people of Selene of the opportunity to learn from Mardof the expertise necessary for the peaceful exercise of nuclear power, imperiling the freedom necessary for scientific research and preventing the diffusion of science, all in violation of its obligations under the Covenant.

There are no circumstances that exist to justify Larcean's violation of Mardof's internationally protected human rights. The acts of Larcean infringing on the rights of Mardof and of the people of Selene cannot be justified on the basis of public emergency and the claim that terrorists might obtain nuclear weaponry through Mardof because it was backed by nothing but mere suspicion. A state

which commits an act that violates its obligations under international law cannot invoke necessity to justify its act unless that act is strictly necessary to safeguard an essential interest of that state from a grave and imminent peril, which must be duly established, and not a mere apprehension of a possible peril. The means employed must not impair an essential interest of the international community as a whole, and the obligation violated must not exclude the possibility of excluding necessity.

Larcean invokes the supposed danger of nuclear terrorism that, it claims, would arise from allowing Mardof to leave for Selene with his technical knowledge. But the existence of this alleged risk has not been sufficiently established rendering it a bare and baseless suspicion of a nuclear terrorist risk. Worse, the obligations that Larcean has breached, particularly those arising from its treaty commitments under the International Covenant on Civil and Political Rights, do not admit of derogation even on the basis of necessity.

## PLEADINGS AND AUTHORITIES

### **I. Larcean breached its duty under Conventional and Customary Law to respect and protect Mardof's basic human rights.**

The function of international law in the field of human rights is to set minimum standards against which municipal legal systems can be measured appropriately.<sup>1</sup> The Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of this inspiration and has been the basis of the United Nations setting the standards set in the existing international human rights instruments, particularly the International Covenant on Civil and Political Rights<sup>2</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>3</sup> (ICESCR).<sup>4</sup> Such human rights treaties are not made for the mere mutual benefit of the contracting states, but for the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting

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<sup>1</sup> Chaloka Beyani, *The Legal Premise for the Protection of Human Rights*, THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOR OF IAN BROWNLIE 23 (Guy S. Goodwin-Gill & Stefan Talmon, ed. 1999) [hereinafter Beyani]; *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14 at 113, para. 218 (June 27) [hereinafter *Nicar. v. U.S.*]

<sup>2</sup> *Opened for signature* December 16, 1966, *entry into force* 23 March 23; 1976 GA Res. 2200A (XXI) [hereinafter ICCPR].

<sup>3</sup> *Opened for signature* December 16, 1966, *entry into force* January 3, 1976, GA Res. 2200A (XXI) [hereinafter ICESCR].

<sup>4</sup> Vienna Declaration on Human Rights, 12 July 1993, U.N. Doc. A/CONF.157/23 (1993).

states.<sup>5</sup> States parties thus submit to a legal order in which they assume various obligations towards all individuals within their jurisdiction.<sup>6</sup>

Customary international law mandates that all nations have the duty to promote and protect human rights, as evidenced by the acceptance of numerous international conventions<sup>7</sup> and instruments stating this hallowed principle.<sup>8</sup> Likewise, the conventions to which both Larcean and Selene are both signatories, the United Nations Charter-- as interpreted by the subsequent practice of State parties<sup>9</sup>-- the ICCPR, and the ICESCR, impose the obligation to promote and protect human rights<sup>10</sup>, particularly the rights of Mardof that are being violated by Larcean.<sup>11</sup> This duty under custom and convention is an obligation *erga omnes* since it involves the interest of all nations in the protection of human rights and fundamental freedoms<sup>12</sup>: When a state breaches an obligation, *erga omnes*, it injures

<sup>5</sup> A. D. MCNAIR, LAW OF TREATIES 255-256 (1961)

<sup>6</sup> THEODOR MERON, HUMANITARIAN NORMS AS CUSTOMARY LAW 18 (1989) [hereinafter Meron on Humanitarian Norms].

<sup>7</sup> ICCPR, *supra* note 2; ICESCR, *supra* note 3; Charter of the United Nations, preamble, para. 2, and arts. 1 (1), 55, 56, [hereinafter UN Charter], in MERLIN MAGALLONA, AN INTRODUCTION TO INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 109 (2<sup>nd</sup> ed. 1999). See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter EuCHR]; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970) [hereinafter AmCHR]; African Charter on Human and People's Rights, June 27, 1981, 21 L.L.M. 59 (1981) [hereinafter AfCHR]. See Beyani, *supra* note 1, at 33, citing Theodor Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 198 (1986).

<sup>8</sup> Universal Declaration of Human Rights, art. 7, G.A. Res. 217A (III), 10 December 1948; Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. Res. 40/144, Preamble, U.N. Doc. A/RES/40/144, 13 December 1985; G.A. Res. 54/109, arts. 9(3-4) 17, 21, U.N. Doc. A/RES/54/109, 25 February 2000; G.A. Res. 54/164, and Preamble, paras. 1, 10, 15, 16, U.N. Doc. A/RES/54/164, 24 February 2000; G.A. Res. 50/186, no. 3, Preamble, paras. 9, 13, U.N. Doc. A/RES/50/186, 6 March 1996; G.A. Res. 52/133, no. 4, Preamble, paras. 9, 14, U.N. Doc. A/RES/52/133, 27 February 1998.

<sup>9</sup> ICCPR, *supra* note 2; Universal Declaration of Human Rights, article 7, GA Res. 217A (III), 10 December 1948; General Assembly Resolution 40/144, A/RES/40/144, 13 December 1985, ANNEX, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Preamble; General Assembly Resolution 54/109, A/RES/54/109, 25 February 2000, article 9, nos. 3-4, articles 17, 21; General Assembly Resolution 54/164, A/RES/54/164, 24 February 2000, no. 4, Preamble, 1<sup>st</sup> par., 10<sup>th</sup> par., 15<sup>th</sup> par., 16<sup>th</sup> par.; General Assembly Resolution 50/186, A/RES/50/186, 6 March 1996, no. 3, Preamble, paras. 9, 13; General Assembly Resolution 52/133, A/RES/52/133, 27 February 1998, no. 4, Preamble, paras. 9, 14. See Vienna Convention on the Law of Treaties, signed 23 May 1969, entered into force 27 January 1980, art. 31(3); Interpretation of the Air Transport Services Agreement between the United States and Italy, 16 REP. INT'L ARB. AWARDS 75, 99 (1965); MERLIN MAGALLONA, *The Legal Character of United Nations General Assembly Resolutions*, INTERNATIONAL LAW ISSUES IN PERSPECTIVE 93, 96-104 (1996); Beyani *supra* note 1, at 24, citing B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN YRBK. INT'L L 82, 83 (1988-89).

<sup>10</sup> UN Charter, *supra* note 7, preamble, para. 2, articles 1 (1), 55, 56; ICCPR, *supra* note 2, arts. 2, 8, 9. See Beyani, *supra* note 1, at 24.

<sup>11</sup> ICCPR, *supra* note 2, arts. 2, 8, 9.

<sup>12</sup> See McNair, *supra* at 255, 256; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 4 at 23; Beyani *supra* at 23.

every state, including those not directly affected. As a victim of a violation of the international legal order, every state is therefore competent to bring actions against the breaching state.<sup>13</sup> Thus, Larcean's violation of this duty entitles all nations to invoke its breach.<sup>14</sup>

**A. Larcean violated Mardof's right to freely choose employment and right to just and favorable conditions of work.**

Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the recognition of a person's right to work, which includes the right to the opportunity to gain his living by work which he freely chooses or accepts.<sup>15</sup> State parties are consequently required to take appropriate steps to safeguard this right<sup>16</sup>, which includes the entitlement to full and productive employment conditions that safeguard the fundamental political and economic freedoms of the individual.<sup>17</sup> Article 7 of the ICESCR provides for the enjoyment of just and favorable conditions of work that ensure safe and healthy working conditions.<sup>18</sup> As a party to the ICESCR, Larcean has the duty to faithfully carry out the aforementioned obligations in order not to defeat the purpose of the Covenant.<sup>19</sup> Instead, Larcean is forcing Mardof to endure a bad research environment in a desert facility and is compelling him to work in Larcean against his will, with the possibility of arrest and imprisonment should he attempt to leave.<sup>20</sup> This runs afoul of the international norm against forced labor,<sup>21</sup> a form of slavery<sup>22</sup> that involves the exaction of work from any person who neither offered

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<sup>13</sup> Meron on Humanitarian Norms, *supra* at 191.

<sup>14</sup> *Barcelona Traction, Light, and Power Company, Ltd. Case* (Second Phase) 1970 ICJ Reports 3, 32, para. 33. See Hugh Thirlway, *The Law and Practice of the International Court of Justice, 1960-1989*, 60 Brit. Yrbk. Int'l L. 1, 98 (1989), citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Reports, at 56, para. 126. See also OPPENHEIM'S INTERNATIONAL LAW 937-939 (R. Jennings, A. Watts, 9<sup>th</sup> ed., 1994) [hereinafter Oppenheim], citing Ireland vs. United Kingdom, 58 ILR 188, 291-292 (1978), and H. LAUTERPACHT, 1 COLLECTED PAPERS 145 (1970).

<sup>15</sup> ICESCR, *supra* note 3, art. 6(1).

<sup>16</sup> *Id.*, *supra* note 3, art. 6(1).

<sup>17</sup> *Id.*, *supra* note 3, art. 6(2).

<sup>18</sup> *Id.*, *supra* note 3, art. 8(b).

<sup>19</sup> North Sea Continental Shelf (Germ. v. Den./ Germ. v. Neth.), 1969 ICJ Rep. 39 (Feb. 20); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 13 (1989).

<sup>20</sup> Statement of Facts.

<sup>21</sup> See Lyal Sunga, INDIVIDUAL REponsibility in International Law for Serious Human Rights Violations 87-92 (1992) [hereinafter SUNGA]; Convention Concerning Forced or Compulsory Labor (I.L.O. No. 105), June 25, 1957, art. 1-2, 320 U.N.T.S. 291; ICCPR, *supra* note 2, art. 8(3)(a).

<sup>22</sup> See A.Y. Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition on Slavery and the Slave trade under Customary International Law*, 39 VA. J. INT'L L. 303, 310-311, 331 [hereinafter RASSAM]. See also Convention to Suppress the Slave Trade and Slavery, September 25, 1926, 46 Stat. 2173, 60 L.N.T.S. 253, art. 1, par 1 [hereinafter 1926 SLAVERY CONVENTION]; ICCPR, *supra* note 2, Art. 8; European

nor agreed to render such service but is compelled to work under menace of penalty.<sup>23</sup> Larcean miserably failed to follow by the mandate of the ICESCR and has consequently breached its international obligations towards Mardof and Selene.

**B. By forcing Mardof to indefinitely stay in its territory, Larcean is violating his right to leave any country and to return to his own.**

The right of any individual to leave any country and to return to his own is recognized in the ICCPR<sup>24</sup>, as well in customary international law, as manifested by the widespread acceptance of international instruments that guarantee the right.<sup>25</sup> This right can only be restricted when provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and consistent with the other rights recognized in the ICCPR.<sup>26</sup>

Larcean violated this right by preventing Mardof from going to the nation of Selene, and then forcing him to stay within Larcean after he had expressed his desire to return to Authentica, his state of nationality. This restriction on his freedom of movement was not provided by the law on nuclear secrets,<sup>27</sup> and Larcean has given no evidence of any fact beyond bare suspicion that would make the restriction necessary to national security.<sup>28</sup> Moreover, the restriction infringes on other rights assured in the ICCPR. He was deprived of his freedom of movement without being convicted by an impartial tribunal of an offense that would justify such deprivation of liberty,<sup>29</sup> and worse, Mardof kept him from leaving by arbitrarily detaining him without trial and without specifying the charge for which he was detained, with nary a pretense of following established legal

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Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 4, par. 2, 312 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights, Nov. 22, 1969, art. 6, 9 I.L.M. 673 (1970) [hereinafter AmCHR]; African Charter on Human and People's Rights, June 27, 1981, art. 5, 21 L.L.M. 59 (1981) [hereinafter AfCHR]; *Barcelona Traction, Light, and Power Company, Ltd. Case* (Second Phase) 1970 ICJ Reports 3, 32, para. 33.

<sup>23</sup> Forced Labour Convention (1930).

<sup>24</sup> ICCPR, *supra* note 2, art. 9.

<sup>25</sup> Universal Declaration of Human Rights, article 13, par. 2, UN General Assembly Resolution 217A (III), 10 December 1948. General Assembly Resolution 40/144, A/RES/40/144, 13 December 1985, ANNEX, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Art 5(2)(a). See *Brogan and Ors v. UK*, 11 Eur. H.R. Rep. 117 (1989). See M. Akehurst, *Custom as a Source of International Law*, 47 BRITISH YRBK OF INTL LAW 1, 53 (1974-75).

<sup>26</sup> ICCPR, *supra* note 2, art. 12(3).

<sup>27</sup> Statement of Facts.

<sup>28</sup> Statement of Facts.

<sup>29</sup> See ICCPR, *supra* note 2, art. 9; Universal Declaration of Human Rights, art. 10, UN General Assembly Resolution 217A (III), 10 December 1948. See also Meron on Humanitarian Norms, *supra* note at 80.

procedures,<sup>30</sup> in stark violation of the ICCPR and general international law on due process of law.<sup>31</sup>

**C. In tapping into Mardof's phone conversations, putting him under the surveillance of the Secret Service, Larcean violated Mardof's right to privacy and right against unlawful attacks against honor.**

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with privacy, correspondence, nor to unlawful attacks on honour and reputation.<sup>32</sup> This provision is also found in Article 12 of the UDHR. Larcean breached this obligations when it tapped Mardof's telephone conversation with the Selene National Research Institute of Nuclear Physics; when it directed its Secret Service to keep "an eye on his behavior" (Problem, para. 14); and when it concluded that Mardof had an "impure motivation to go to Selene by way of Authentica" (Problem, para. 13), despite his pronouncements to the contrary. By its own admission, Mardof is a private citizen (Problem, para. 17) working in a private university with a private institution at the time of the wire-tapping (Problem, para. 4). Larcean therefore had not authority to interfere with his private correspondence with anyone. Furthermore, the surveillance conducted by the Secret Service against Mardof is an unlawful interference with his right to privacy guaranteed under the ICESCR. Finally, in imputing bad faith on Mardof, a respected scientist whose ability is highly appraised, Larcean breached its positive duty not to intrigue upon the honor of Mardof.

**D. Larcean violated Mardof's right against discrimination by imposing an unreasonably different application of its military secrets law on Mardof.**

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<sup>30</sup> Statement of Facts, para.

<sup>31</sup> ICCPR, *supra* note 2, art. 9. See Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, preamble, and art. 5 (1)(a), General Assembly Resolution 40/144, U.N. Doc. A/RES/40/144, 13 December 1985; IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 76 (1983) [hereinafter Brownlie on State Responsibility]. Universal Declaration of Human Rights, article 10-11, UN General Assembly Resolution 217A (III), 10 December 1948. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ Rep. 3, 42 (May 24); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Rep. 16 at 57 (June 21). See also O. Y. Elagab, *The Place of Non-Forcible Counter-measures in Contemporary International Law*, THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOR OF IAN BROWNLIE 125, 144 (1999) [hereinafter Elagab], citing United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

<sup>32</sup> ICCPR, *supra* 2, art. 17(1).



The right to equal protection of the law is recognized under international law, which prohibits discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>33</sup> States have the obligation to afford equal protection to all persons within its territory regardless of nationality,<sup>34</sup> and have the duty to exercise due diligence in the protection of their rights.<sup>35</sup>

The right to equal protection requires equality in fact as well as formal equality in law.<sup>36</sup> There is unlawful discrimination when there is a difference in treatment or in the application of the law without "objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and aim sought to be realized."<sup>37</sup>

Other scientists in the employ of Larcean were allowed to leave their employment when they chose to. In contrast, when Mardof sought to do likewise, he was subjected to harsh sanctions. Larcean presented no evidence that would justify the manifest difference in treatment that proved prejudicial to Mardof. It did not prove, nor even seek to prove, that Mardof's field of expertise was so different from those of other scientific workers that it legitimately required more draconian measures. Such discrimination in fact was not shown to have been just<sup>38</sup> or reasonably justified by objective circumstances<sup>39</sup> and therefore constitutes a violation under international law of Mardof's right to equal protection.

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<sup>33</sup> Universal Declaration of Human Rights, art. 7, UN General Assembly Resolution 217A (III), 10 December 1948. See ICCPR, *supra* note 2, art. 2, par. 1. MALCOLM SHAW, INTERNATIONAL LAW 214 (4<sup>th</sup> ed., 1997) [hereinafter Shaw]; General Comment 18 on Non-Discrimination, Adopted on 9 November 1989, U.N. Doc. CCPR/C/Rev.1/Add.1 (1989).

<sup>34</sup> F.V. GARCIA-AMADOR, L.B. SOHN, & R.R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY TO ALIENS 206-207 (1974) [Garcia-Amador]. See also The Convention on the Rights and Duties of States, Dec. 26, 1933, art IX, 165 L.N.T.S. 19; Report of the Human Rights Committee to the General Assembly, 41 UN GAOR Suppl. No. 40 at p. 117, UN Doc/41/40 (1986).

<sup>35</sup> U.S. v Mexico, 4 REP. INT'L ARB. AWARDS 82 (1926); Brownlie, *supra* at 527.

<sup>36</sup> Shaw 214. See Minority Schools in Albania, PCIJ Series A/B. No. 64, p. 19 (1935) 8 ILR 386, 389-90.

<sup>37</sup> Oppenheim 932. See James Case (ECHR, 1986), 75 ILR 396, 429-430; Belgian Linguistics case, ECHR, Series A, No. 6, 1986, para. 10, 45 ILR 114, 164-165; Rasmussen Case (ECHR, 1984), 81 ILR 59, 69-71; Lithgow case (ECHR, 1986), 75 ILR 438, 500-501; Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (IACHR, 1984), 79 ILR 282, 299-304.

<sup>38</sup> See Shaw, *supra* at 214. See also South West Africa case, ICJ Reports (1966), p. 3, 306 (J. Tanaka, dissenting), 37 ILR 243, 464.

<sup>39</sup> See Shaw, *supra* at 214. See also Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. 1984, para. 56, 5 H.R.L.J. 172 (1984).

**E. Larcean violated Mardof's rights under customary international law on the treatment of aliens.**

All persons are under the direct protection of international law. This principle is consistent with the universal respect for, and observance of, human rights and fundamental freedoms referred to in the United Nations Charter, and the principle of equality of nationals and aliens.<sup>40</sup> States have the corresponding duty to afford equal treatment to all persons within their territory, regardless of nationality<sup>41</sup>, and the duty to exercise due diligence in the protection of their rights.<sup>42</sup> A state may be held responsible for the ill-treatment of non-nationals in its territory if the ill-treatment is such as may "amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."<sup>43</sup> Verily, when a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them.<sup>44</sup>

Larcean's violations of Mardof's human rights is a breach of its positive duty under customary law to protect aliens and respect their rights. Larcean may thus be held accountable for these acts, even if these were to be characterized by it as exercise pursuant to sovereign rights.<sup>45</sup> It is acknowledged that states have the sovereign right to enact legislation and carry out measures within their borders<sup>46</sup>, and that in particular, they have the right to impose their laws on the aliens in their territory, who are in turn bound to observe those laws.<sup>47</sup> However, Larcean's acts, though confined within its borders, unjustifiably violated the right of Mardof and of Selene, rights guaranteed by the express *fiat* of international law on the protection of aliens within a State.

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<sup>40</sup> Garcia-Amador, *supra* at 206-207.

<sup>41</sup> Garcia-Amador, *id.*; See also The Convention on the Rights and Duties of States, Dec. 26, 1933, art. IX, 165 L.N.T.S. 19.

<sup>42</sup> U.S. v. G.B., in Moore, 1 INTERNATIONAL ARBITRATIONS 495 (1872); (US v. Mexico), 4 REP. INT'L ARB. AWARDS 82 (1926).

<sup>43</sup> US v. Mexic, 4 REP. INT'L ARB. AWARDS 82 (1926); Brownlie at 527

<sup>44</sup> Barcelona Traction Case, 2<sup>nd</sup> Phase, para 33

<sup>45</sup> BIN CHENG, THE GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 130 *et seq* (1987); The Free Zones Case P.C.I.J. (ser. A/B), No. 46, p. 167 (1936); North Atlantic Coast Fisheries Case, , 1 HCR 141, 169, 171 (Perm. Ct. of Arb. 1910). See also Brownlie on State Responsibility, *supra* at 81; Shaw, *supra* at 574; AMCO v. Indonesia (Merits), 89 ILR 405, 466; World Bank Guidelines on the Treatment of Foreign Direct Investment, 31 I.L.M. 1363 (1992).

<sup>46</sup> Oppenheim *supra* at 905. UN Charter, *supra* arts. 2(1-7).

<sup>47</sup> Oppenheim *supra* at 905.

## II. In preventing Mardof from being employed by Selene, Larcean has violated the right of the people of Selene to the benefits of scientific progress.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), to which both Larcean and Selene are parties, recognizes the right of everyone to education<sup>48</sup> and to enjoy the benefits of scientific progress and its applications<sup>49</sup>. States signatories to the ICESCR have a legal obligation-- subject to international interpretation and scrutiny<sup>50</sup>--to take steps, to the *maximum* of their available resources, to achieve the full realization of these rights recognized in the Covenant by all appropriate means.<sup>51</sup> In order that the right to benefit from scientific progress may be realized, States undertake to respect the freedom indispensable for scientific research and creative activity,<sup>52</sup> and to take steps necessary for the diffusion of scientific knowledge and all its applications.<sup>53</sup>

Larcean deliberately prevented Mardof from travelling to Selene, thus depriving them of the opportunity to learn from Mardof his expertise in the peaceful uses of nuclear power, one the benefits of which Selene is entitled under the Non-Proliferation Treaty and international law.<sup>54</sup> Through its actions, Larcean impaired the free exchange of scientific research and prevented the diffusion of science, willfully taking steps to prevent the realization of the right of the people of Selene to education and to benefit from scientific progress. Consequently, Larcean is in violation of its obligations under the Covenant.

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<sup>48</sup> ICESCR, *supra* note 3, art. 13.

<sup>49</sup> *Id.*, art. 15, para. 1(b). See also Vienna Declaration and Programme of Action, Report on the World Conference on Human Rights, U.N. GAOR, 48<sup>th</sup> Sess., 22<sup>nd</sup> mtg., pt. 1, at 24, U.N. Doc. A/ Conf. 157/24 (1993), reprinted in 32 I.L.M. 1661, 1667 (1993).

<sup>50</sup> L. HENKIN, *THE AGE OF RIGHTS* 20 (1991).

<sup>51</sup> ICESCR, *supra* note 3, art. 2, par. 1. See Vienna Convention on the Law of Treaties, 23 May 1969, art. 26, 1155 U.N.T.S. 331, 8 ILM 679 [hereinafter VCLOT],. See also North Atlantic Coast Fisheries Arbitration, 9 Rep. Int'l Arb. Awards 188 (1910). See also Rights of Nationals of the United States in Morocco, 1952 I.C.J. 212 (August 27).

<sup>52</sup> ICESCR, *supra* note 3, art. 15, par. 3.

<sup>53</sup> *Id.*, art. 15, par 2.

<sup>54</sup> Convention on the Physical Protection of Nuclear Material, T.I.A.S. 11080, *entered into force* Feb. 8, 1997, preamble, 1<sup>st</sup> para., available at <http://www1.umn.edu/humanrts/peace/docs/materialnuc.html> (last visited 28 June 2003); See G.A. Res. 41/12 (October 29, 1986), preamble, last par. and no. 4, available at [http://www.us-israel.org/jsource/UN/unga41\\_12.html](http://www.us-israel.org/jsource/UN/unga41_12.html) (last visited 28 June 2003); G.A. Res. 39/74, U.N. Doc.A/RES/39/74, 13 December 1984, available at <http://www.un.org/documents/ga/res/39/a39r074.htm> (last visited 28 June 2003); General Assembly resolution 37/167, U.N.Doc. A/RES/37/167, 17 December 1982, available at <http://www.un.org/documents/ga/res/37/a37r167.htm> (last visited 28 June 2003); Resolution GC(45)/RES/18 adopted by the General Conference of the International Atomic Energy Agency at its 10th plenary meeting, 21 September 2001, available at <http://projects.sipri.se/expcon/res4636l.htm> (last visited 28 Jun 2003). See MERLIN MAGALLONA, *The Legal Character of United Nations General Assembly Resolutions*, INTERNATIONAL LAW ISSUES IN PERSPECTIVE 93, 104-107 (1996).

**III. There are no circumstances that exist to justify Larcean's violation of Mardof's internationally protected human rights.**

No single state is permitted to derogate from any rule of international law, peremptory or not, unless the state can establish a justification precluding wrongfulness, such as the legal regimes of *force majeure*, state of necessity, or self-defense.<sup>55</sup> Significantly, the existence of any of the aforementioned conditions to justify or preclude the wrongfulness of an act must be in accordance with well-established norms under international law on the non-derogability of fundamental rights, the existence of exceptional threat, the formal proclamation of such threat, notification, the proportionality of the measures adopted to the exigencies of the situation, the adoption of non-discriminatory measures, and consistency of the measures with the state's other obligations under international law. What is clear is that the notion that the state has absolute discretion to decide on the existence of the aforementioned conditions to justify or preclude the wrongfulness of an act has been rejected universally.<sup>56</sup>

**A. Larcean's actions cannot be excused on the ground that there exists a public emergency that permits a lawful derogation of human rights.**

It is recognized under international law that rights may be derogated in time of public emergencies.<sup>57</sup> Such derogation, however, is strictly circumscribed as to the conditions that would justify it and the infringement of rights that would be allowable as a consequence.<sup>58</sup> Under the standards set in the International Covenant on Civil and Political Rights, the public emergency must be one that threatens the very life of the nation<sup>59</sup> and its existence must be officially proclaimed. The derogation must only be to the extent strictly required by the circumstances, and they must not be with a State's other obligations under international law nor "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."<sup>60</sup> In any case, the Convention provides that the state making the

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<sup>55</sup> THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 15 (1989). Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1, 20 1986.

<sup>56</sup> Rene Provost, *International Human Rights and Humanitarian Law*, 2002; *Lawless case* (Merits), Eur. Ct Hum Rts, Ser.A 1960-1, at 56 para28; *Ireland v Uk* (1978) ECHR, ser. A vol.25, at 78-82; *Brannigan and McBride v UK* (A/d53-B), (1993) 17 Eur. HR Rep 539, 569 para.43 (ECHR); *Askoy v turkey*, (1996) 23 EHRR 553, 586-7 (ECHR)

<sup>57</sup> Art. 1, par 3(c), EuCHR.

<sup>58</sup> See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.) (Merits), 1997 I.C.J. 7, at para. 51 (Sept. 25).

<sup>59</sup> Elagab *supra* at 143, quoting G. Fitzmaurice, *The General Principles of Law Considered from the Standpoint of the Rule of Law*, 92 RdC 1, 120 (1957, II). See *Russian Indemnity Case* (1912), 11 REP INT'L ARB. AWARDS 443.

<sup>60</sup> ICCPR, *supra* note 2, art. 4, par. 1.

derogation must inform other States parties of the rights derogated and the reasons for it.<sup>61</sup>

The acts of Larcean infringing the rights of Mardof and of the people of Selene cannot be justified on the basis of public emergency. No public emergency was officially proclaimed, and the claim that terrorists might obtain nuclear weaponry through Mardof was backed by nothing but mere suspicion, which cannot justify the infringement of fundamental rights. Verily, Larcean's manner of characterization of the factual situations obtaining in the case constitutes abuse of its rights, and was made with manifest bad faith.<sup>62</sup> Moreover, the measures undertaken by Larcean involved the imposition of unlawful servitude on Mardof, and were not accompanied by an explanation of the derogation to other States parties. Ordre public must be measured against human rights standards and not solely by state interests.<sup>63</sup>

Furthermore, not even the presence of a terrorist threat can justify the wholesale denigration of human rights, particularly the right to due process of law<sup>64</sup> and the right against arbitrary detention,<sup>65</sup> or the execution of measures that are not proportionate to the alleged threat.<sup>66</sup> Thus, the plethora of international instruments that condemn terrorism likewise affirm the need for anti-terrorist measures to be in accordance with international human rights standards and with the norms of international law.<sup>67</sup>

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<sup>61</sup> ICCPR, *supra* note 2, art. 4, par. 3.

<sup>62</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR,' (1985) 7 HUM RTS QUART 3, 10; 'Final Report on Monitoring States of Emergency: Guidelines for Bodies Monitoring Respect for HR during States of Emergency', in Intl Law Assoc, Report of the 64<sup>th</sup> conference, Queensland, 20-25 August 1990 (London: ILA, 1991) 228, 233; Greek Case (1969) 12 YB Eur. Conv. Hum Rts 71-6 and 100.

<sup>63</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 523 (5<sup>th</sup> ed. 1998).

<sup>64</sup> Convention to Prevent and Punish Acts of Terrorism, February 9, 1971, article 4, 8(c), 1438 U.N.T.S. 194; Brogan and Ors v. UK 11 Eur. H.R. Rep. 117, (ECHR, 1989).

<sup>65</sup> Brogan and Ors v. UK 11 Eur. H.R. Rep. 117, (ECHR, 1989); Lawless Case (1961) Vols 1-3 ECHR Series A.

<sup>66</sup> See McCann v. United Kingdom, Case 17/545, Judgment of 27 Sept 1995, (ECHR, 1975). See also Sunday Times Case, 30 ECHR (Ser. A) (1979).

<sup>67</sup> International Convention for the Suppression of Terrorist Bombing, 12 January 1998, art. 7 (3-4, 14) available at [http://www.unodc.org/unodc/terrorism\\_convention\\_terrorist\\_bombing.html](http://www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html) (last visited June 29, 2003); Convention to Prevent and Punish Acts of Terrorism, 9 February 1971, art. 4, 8(c), 1438 U.N.T.S. 194; G.A. Res. 54/109, art. 9 (3-4), 17, 21, U.N. Doc. A/RES/54/109 (25 February 2000); G.A. Res. 54/164, no. 4, and preamble, paras.1, 10, 15, 16, U.N. Doc. A/RES/54/164 (24 February 2000); G.A. Res. 50/186, no. 3, and Preamble, paras. 1, 9, 13, 14 U.N. Doc. A/RES/50/186, (6 March 1996); G.A. Res. 52/133, no. 4, and preamble, paras.1, 9, 13, 14, U.N. Doc. A/RES/52/133, (27 February 1998); G.A. Res. 44/29, preamble, para. 14; S.C. Res. 1373, no. 3(f) (2001); S.C. Res. 1377 (2001). See Report of the Secretary-General, 17 July 2001, U.N. Doc. A/56/190.

**B. Larcean may not validly invoke a state of necessity that would preclude the wrongfulness of Larcean's acts.**

A state that violates its obligations under international law cannot invoke the existence of a state of necessity to justify its act, unless certain strictly defined conditions, drawn from customary international law, concur.<sup>68</sup> The state concerned is not the sole judge of the existence of these conditions.<sup>69</sup>

These conditions demand, first, that the otherwise illegal act must be must be strictly necessary to safeguard an essential interest of that state from a grave and imminent peril.<sup>70</sup> The existence and imminence<sup>71</sup> of such a peril must be duly established, for "mere apprehension of a possible 'peril' could not suffice"<sup>72</sup> – its existence must not be clouded by uncertainty.<sup>73</sup> With regard to its treatment of Mardof, Larcean invokes the supposed danger of nuclear terrorism which it claims would arise from allowing Mardof to leave for Selene with his scientific knowledge. However, the existence of this alleged risk has not been sufficiently established. Larcean has not given evidence to conclusively establish Selene's alleged breach, which is the necessary quantum of evidence accepted and recognized in international law,<sup>74</sup> and has not offered even a shred of proof to buttress this suspicion of terrorist risk. Indeed, Mardof had already decided to return to his home country of Authentica and conveyed such a decision to the authorities to cure whatever violation of Larcean domestic laws on military employment and immigration he may have previously committed (Problem, para 12).

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<sup>68</sup> Articles of State Responsibility, supra note art. 25(1). Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7, at para. 54 (Sept. 25).

<sup>69</sup> Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) (Merits), 1997 ICJ Rep. 7, at p. 40-41, paras. 51-52, (Sept. 25).

<sup>70</sup> Articles of State Responsibility, supra art. 25(1). See *Societe Commerciale de Belgique*, 1939, PCIJ Series A/B, No. 78, p. 160; *Russian Indemnity Case* (1912), 11 REP INT'L ARB. AWARDS 443; *Oscar Chinn Case*, 1934 P.C.I.J. (ser. A/B), No. 63, at 65, 112-114 (separate opinion of Judge Anzilotti,) in International Law Commission, *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, Report of the International Law Commission on the work of its Fifty-third session, chp.IV.E.2, GAOR Sess. 56, Supp. No. 10, p. 194-206, U.N. Doc. A/56/10 (2001); and citing Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7, at para. 54 (Sept. 25). See also *The Observer and the Guardian v. United Kingdom*, 14 Eur. H.R. Rep. 153, (ECHR, 1992); *Soering v. UK*, 11 Eur. H.R. Rep.439 (1989); International Law Commission, *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, Report of the International Law Commission on the work of its Fifty-third session, chp.IV.E.2, GAOR Sess. 56, Supp. No. 10, p. 194-206, U.N. Doc. A/56/10 (2001), citing *Societe Commerciale de Belgique*, 1939, PCIJ Series A/B, No. 78, p. 160; *Russian Indemnity Case* (1912), 11 REP INT'L ARB. AWARDS 443; *Oscar Chinn Case*, 1934 P.C.I.J. (ser. A/B), No. 63, at 65, 112-114 (separate opinion of Judge Anzilotti).

<sup>71</sup> A. D. McNAIR, ed., 2 INTERNATIONAL LAW OPINIONS 232 (1956) [McNair Opinions].

<sup>72</sup> Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7, para. 54 (Sept. 25).

<sup>73</sup> Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7, para. 55. (Sept. 25).

<sup>74</sup> *Corfu Channel Case* (U.K. v. Albania) 1948 I.C.J. 4, at 18.

Moreover, the means employed to avert the purported peril must be such as are absolutely necessary to avert the alleged danger; Indeed, they must have been the only means of safeguarding that interest to be protected<sup>75</sup> In this case, Larcean cannot claim that these measures are necessary, when all it has is the unfounded suspicion that Selene is seeking to develop nuclear weapons and the baseless speculation that terrorists may obtain these arms. Even if it had basis for its paranoia, Larcean could have reported the matter to the International Atomic Enforcement Agency, which under Article 3 of the Nuclear Non-Proliferation Treaty (NNPT) monitors state parties' fulfillment of treaty obligations, or the Security Council under Articles 24 and 39 of the UN Charter, or it could have request Authentica to hold Mardof when he returned to his state of nationality.

Furthermore, the measures undertaken must not impair an essential interest of the international community as a whole;<sup>76</sup> and the obligation violated must not exclude the possibility of excluding necessity.<sup>77</sup> Here, Larcean violated its erga omnes obligation to protect human rights, besides impairing that right of Selene to the benefits of peaceful use of nuclear technology under the NNPT.<sup>78</sup> Finally, the State which is the author of that act must not have contributed to the occurrence of the state of necessity. In this case, Larcean already knew that Mardof was being invited by Selene and yet it still transferred him to its military base thereby acquiring more military secrets which is the purported reason for his continued detention (Problem, para. 8).

#### **IV. Larcean has the obligation under international law to make reparations and cease and refrain from violating Mardof's human rights.**

Under international law, when a State is shown to be committing an act in violation of its international obligations, it must immediately cease the act and guarantee that the act would not be repeated.<sup>79</sup> As Larcean's restriction of Mardof's freedoms is contrary to its treaty obligations and to international law in general, then its must lift these restrictions immediately. As a consequence, Mardof and his family should be allowed to leave Larcean.

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<sup>75</sup> W.R. Manning (ed.), 3 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES: CANADIAN RELATIONS 1784-1860, p. 422 (1943). A.D. McNair (ed.), 2 INTERNATIONAL LAW OPINIONS 22 (1956).

<sup>76</sup> Articles of State Responsibility, *supra* art. 25(1)(b). See Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. at para. 58 (Sept. 25).

<sup>77</sup> Articles of State Responsibility, *supra* art. 25(2)(a).

<sup>78</sup> Art. 4, NNPT.

<sup>79</sup> Articles of State Responsibility, *supra*, article 30. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 at 149, para. 292 (June 27).

Furthermore, A state that has breached its international obligation is liable to give appropriate reparations for its offense.<sup>80</sup> Given Larcean's responsibility for its acts, Selene is entitled to a declaratory judgment that it has violated international human rights law with regard to the treatment of Mardof since July 2002.

#### CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the State of Selene requests this Honourable Court to declare that Larcean violated international human rights law with respect to its treatment of Mardof since July 2002.

Respectfully submitted,  
AGENTS FOR THE  
STATE OF SELENE

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<sup>80</sup> BIN CHENG, *supra* at 169; ILC COMMENTARIES, *supra* at 223-231; ARTICLES ON STATE RESPONSIBILITY, *supra* at 31.



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**THE 2003 ASIA CUP  
INTERNATIONAL LAW MOOT COURT COMPETITION**

**IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE  
PALACE, THE HAGUE, THE NETHERLANDS**

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**CASE CONCERNING THE TREATMENT OF A PHYSICIST**

**THE STATE OF SELENE  
APPLICANT**

**v.**

**THE STATE OF LARCEAN  
RESPONDENT**

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**2003**

**On Submission to the International Court of Justice**

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**MEMORIAL FOR THE RESPONDENT,  
THE STATE OF LARCEAN**

## Table of Contents

SUMMARY OF PLEADINGS.....	598
PLEADINGS AND AUTHORITIES.....	599
I. The decision to prevent Mardof from leaving Larcean territory was a valid exercise of sovereignty.....	599
II. Under customary international law, Larcean is justified in restricting Mardof's rights.....	600
A. Mardof's Rights are not absolute.....	601
1. Larcean's restriction of Mardof's right to leave, and to return to his State of nationality was lawful, pursuant to treaty provisions and customary law.....	601
2. Mardof's temporary detention is not a violation of his right against arbitrary detention and to due process.....	602
3. Mardof's right to privacy of communication was not violated by Larcean.....	603
4. Larcean's treatment of Mardof's did not constitute a violation of his right against discrimination .....	604
B. There exists a state of necessity that justifies Larcean's temporary suspension of Mardof's rights.....	605
1. There exists a grave and imminent danger of nuclear terrorism, which threatens the national security interests of Larcean.....	606
2. Mardof's continued, but temporary, stay within the territory of Larcean is the only way for Larcean to safeguard national security against the grave and imminent peril of nuclear terrori.....	608
III. Selene is not entitled to a declaratory judgment in its favor.....	610
PRAYER FOR RELIEF.....	610

### SUMMARY OF PLEADINGS

Larcean's enactment of a law that effectively prevents Mardof from leaving Larcean on the basis of national security interests and a grave and imminent peril is an exercise of sovereignty, consistent with customary international law.

Under customary law, Larcean's actions directed at protecting its national security interests are valid. They are within bounds defined by its domestic law, and established norms on the non-use of force under international law. This includes the right to protect grave national security concerns. Larcean's finding of the existence of a national security problem, by virtue of the grave and imminent threat of nuclear terrorism and the probability that Mardof will facilitate it, gives rise to a state of necessity.

The doctrine of state of necessity is well-established under customary law. Necessity may be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international law provided that it is occasioned by an essential interest of the State; that interest must be threatened by a grave and imminent peril; the act being challenged must have been the only means of safeguarding that interest; that act must not seriously impair an essential interest of the State towards which the obligation exists; and the State which is the author of the act must not contribute to the occurrence of the state of necessity. Larcean passes this cumulative test.

There exists a grave and imminent danger of nuclear terrorism, which threatens the national security interests of Larcean as found by the UN Security Council in numerous resolutions, giving rise to a state of necessity in Larcean.

The wrongfulness of Larcean's actions is thus precluded under customary law, notwithstanding the restrictions on internationally protected human rights of Mardof. These rights are evidently not absolute and may be validly derogated.

Under Article 4 and 12 of the International Covenant on Civil and Political Rights, and Article 8 of the International Convention on the Protection of the rights of All Migrant Workers and Members of their Families, Mardof's right to leave Larcean may be subjected to restrictions which are provided by law, and are necessary to protect national security, and public order.

Mardof's consequent detention pursuant to laws relating to immigration does not violate his right against arbitrary detention or right to due process. The fact that he was not charged or brought before a court does not amount to a

violation of human rights norms. Mardof's arrest was done under the authority of an existing Larcean law; he was not detained longer than was needed for investigation; he was not treated as if he were already convicted of an offense; he was not treated in an inhuman manner; and he was not, at any point, deprived of the right to seek judicial recourse for the alleged violation of his rights.

There was no infringement of Mardof's right to privacy because there was no interference on the part of the Larcean government to speak of in the first place. It is natural that Mardof, an employee of the Larcean Military, like all persons in the military service, have limited access to freedom of communication, transportation and employment, and that such restriction is tolerated in the practice of international society.

Larcean's treatment of Mardof was not discriminatory and did not constitute an illegal treatment of an alien under customary international law under either the international minimum standard of human rights or the national treatment standard. As provided by the principle of non-discrimination and equality of the ICESCR and the UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Mardof did not suffer any discrimination in the enjoyment of his right to work nor in the application of this right while in the employ of the Larcean government.

## PLEADINGS AND AUTHORITIES

### **I. The decision to prevent Mardof from leaving Larcean territory was a valid exercise of sovereignty.**

Under the principle of reserve domain jurisdiction, States have absolute competence within their respective spheres of concern<sup>1</sup>, and the absolute and exclusive jurisdiction to legislate upon all matters within their territory.<sup>2</sup> Corollary to this, States have the power to enforce its laws within its territory and to penalize the violators therein.<sup>3</sup> Other States may not interfere with the exercise of this

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<sup>1</sup> *Schooner Exchange v. McFaddon* 11 US (7 Cranch) 116 (1812); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 301 (1999) [hereinafter Brownlie]; DJURA NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 132 (1970) [hereinafter Nincic]

<sup>2</sup> Article 2, Draft Declaration of State Duties & Responsibilities, ILC Report, A/925 (A/4/10), 1949, part II, para. 53, Yearbook, 1949; *Schooner Exchange v. McFaddon* 11 US (7 Cranch) 116 (1812); Brownlie, *supra* note 1 at 301 (1999); *Island of Palmas Case*, (Neth. v. U.S.) 2 Rep. Int'l Arb. A. 829 (1928); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 16 (1989) [hereinafter Meron].

<sup>3</sup> Brownlie *supra* note 1 at 301.

jurisdictional competence<sup>4</sup>, which includes the determination of the existence of a national security problem, and the consequent balancing of rights and State interest.<sup>5</sup> Larcean's enactment of a law that effectively prevents Mardof from leaving Larcean on the basis of national security interests and a grave and imminent peril is an exercise of sovereignty, consistent with customary international law.

## II. Under customary international law, Larcean is justified in restricting Mardof's rights.

Under customary law, Larcean may engage in independent acts in order to protect its national security interests, provided that these acts are within bounds defined by its domestic law,<sup>6</sup> and established norms on the non-use of force under international law.<sup>7</sup> Preventing Mardof from leaving Larcean territory is one such act. Although the norm is *premised* on an instant and overwhelming threat, and the absence of time for deliberation and a plausible and timely international institutional alternative<sup>8</sup>, the right to protect state interest by reason of grave national security concerns is not limited to instances of actual attacks against Larcean, but extends to anticipatory measures as well.<sup>9</sup> As such, the act had to be constrained by a state of necessity.<sup>10</sup>

Larcean's finding of the existence of a national security problem, by virtue of the grave and imminent threat of nuclear terrorism and the probability that Mardof will facilitate it, to the detriment of Larcean's national security, gives rise to a state of necessity. This gives rise to Larcean's right to prevent Mardof from leaving Larcean, in protection of its national security interests, the wrongfulness of which is precluded under customary law.<sup>11</sup> This norm applies to any internationally

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<sup>4</sup> Charter of the United Nations, June 26, 1945, art. 1(2), 1 U.N.T.S. xvi [hereinafter UN Charter].

<sup>5</sup> *Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A, No. 24, p. 753, para. 48, 1 EHRR 737 (1979-1980); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 29-31 (1987).

<sup>6</sup> International Covenant on Civil and Political Rights, opened for signature December 6, 1966, art. 12, 993 UNTS 3 [hereinafter ICCPR]; Articles of State Responsibility, art. 25; International Convention on the Protection of the rights of All Migrant Workers and Members of their Families, art. 8(1),

<sup>7</sup> UN Charter, *supra* note 4, art. 2(4); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (Jun 25); Declaration on Measures to Eliminate International Terrorism, GA Res. 49/60, UN GAOR 6<sup>th</sup> Comm., 49<sup>th</sup> Session, 84<sup>th</sup> plen. Mtg., UN Doc A/49/743 (1994); Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, GA Res. 51/210, UN GAOR 6<sup>th</sup> Comm., 51<sup>st</sup> Sess., 88<sup>th</sup> plen. Mtg., UN Doc. A/51/631 (1996).

<sup>8</sup> W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 19 (1999); Richard G. Maxon, *Nature's Eldest Law: A Survey of a Nation's Right To Act in Self-Defense*, PARAMETERS, US ARMY WAR COLLEGE QUARTERLY 56-68 (1995).

<sup>9</sup> John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L. J., 1034 (1999). [hereinafter Romano].

<sup>10</sup> Romano, *id.*

<sup>11</sup> Articles of State Responsibility, art 25 (1)(b).

wrongful act, whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source.<sup>12</sup>

**A. Mardof's Rights are not absolute.**

Under customary law, there is a positive obligation on the part of states to protect human rights.<sup>13</sup> However, under customary and treaty law, human rights, except those incapable of derogation, such as war crimes, slavery, torture, and genocide<sup>14</sup>, are not absolute and may be restricted under international law for reasons of protecting national security, public order, or public health and morals.<sup>15</sup>

There is a general expectation that derogation on conventional provisions which are declaratory of general or customary law will not be admitted because such rules must have equal force for all members of the international community.<sup>16</sup>

**1. Larcean's restriction of Mardof's right to leave any country, and to return to his State of nationality was lawful, pursuant to treaty provisions and customary law.**

The International Covenant on Civil and Political Rights (ICCPR) itself, to which both Larcean and Selene are parties, provides for the derogation of the right to return to one's state of origin, as provided by law, and as necessary to protect national security, and public order.<sup>17</sup> Likewise, Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families states that migrant workers and members of their families shall be free to leave any State, including their State of origin, as necessary to protect

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<sup>12</sup> ILC Commentary on the Articles of State Responsibility, at 112; *Gabcikovo-Nagymaros Project* (Hung. v. Slov.) 1997 I.C.J. 63, para. 101.

<sup>13</sup> UN Charter, *supra* note 4, art. 55; ICCPR, *supra* note 6, Art. 12(3); European Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 10(2) 213 U.N.T.S. 221 (1953) [hereinafter ECHR]; American Convention on Human Rights, Art. 13, 9 I.L.M. 673 (1978) [hereinafter ACHR]; African Charter on Human and Peoples' Rights, Art. 27, 21 I.L.M. 59 (1986). [hereinafter AfCHR].

<sup>14</sup> *Barcelona Traction, Light and Power* (Belg. v. Spain) 1970 I.C.J. para. 32-34

<sup>15</sup> ICCPR, *supra* note 6, art. 12, 19(3); ASR, Art. 25; International Convention on the Protection of the rights of All Migrant Workers and Members of their Families, Art. 8(1); Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, Dick J of Int'l L 314 (2001), c.f. Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-undVorratsstelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125; 1125 CMLR 255; Jaime Oraa, *The Protection of Human Rights in Emergency Situations Under Customary International Law*, Essays in Honor of Ian Brownlie (1999).

<sup>16</sup> *North Sea Continental Shelf cases* (FRG/Den.; FRG/Neth.), 1969 ICJ 39 (Feb. 20); Meron, *supra* at 13.

<sup>17</sup> Art. 4 and 12, ICCPR

national security, public order, public health or morals or the rights and freedoms of others.<sup>18</sup>

This norm is echoed in Article 25 (1)(a) of the Articles of State Responsibility of the International Law Commission, which states that necessity may be invoked by a State if it is the only way for the State to safeguard an essential interest against a grave and imminent peril.<sup>19</sup>

**2. Mardof's temporary detention is not a violation of his right against arbitrary detention and to due process.**

Mardof's consequent detention pursuant to laws relating to immigration does not violate his right against arbitrary detention or right to due process. The mere fact that he was not charged or brought before a court does not itself amount to a violation of human rights norms.<sup>20</sup> Neither may a violation of customary human rights law arise, *ipso facto*, given that the arrested person is not released promptly.<sup>21</sup> This element of promptness must be assessed in accordance with the special features and attendant circumstances of each case.<sup>22</sup> First, Mardof's arrest was done under the authority of an existing Larcean law<sup>23</sup> of which he was previously alerted by his superior (Problem, para. 9). Second, he was not detained longer than was needed for investigation. In fact, he was released only a day after he was detained for purposes of investigation (Problem, para. 11).<sup>24</sup> Third, he was not treated as if he were already convicted of an offense.<sup>25</sup> Fourth, he was not treated in an inhuman manner.<sup>26</sup> Fifth, he was not, at any point, deprived of the right to seek judicial recourse for the alleged violation of his rights.<sup>27</sup>

Furthermore, there is likewise no denial of justice to Mardof because he failed to exhaust available local remedies in Larcean. Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Mardof was prevented

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<sup>18</sup> Art. 8(1), International Convention on the Protection of the rights of All Migrant Workers and Members of their Families.

<sup>19</sup> ASR, Art. 25 (1)(a)

<sup>20</sup> *Brogan and Ors v. United Kingdom* (1989) 11 EHRR 117; Art. 9, 10, & 11, ICCPR.

<sup>21</sup> *Brogan and Ors v. United Kingdom* (1989) 11 EHRR 117; Art. 9, 10, & 11, ICCPR.

<sup>22</sup> *Brogan and Ors v. United Kingdom* (1989) 11 EHRR 117; Art. 9, 10, & 11, ICCPR.

<sup>23</sup> Art. 9(1), ICCPR

<sup>24</sup> Art. 9(3), ICCPR

<sup>25</sup> Art. 10(2)(a), ICCPR

<sup>26</sup> Art. 10(1), ICCPR

<sup>27</sup> Art. 9(4), ICCPR

from leaving the territory of Larcean by virtue of an existing law (Problem, para. 9), which may be reasonably presumed to contain remedies that may be invoked by any injured party. The rule on exhaustion of local remedies is an important and well-settled principle under customary international law.<sup>28</sup>

The International Court of Justice held in the *Interhandel Case* that "the rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual."<sup>29</sup> Furthermore, it may be submitted that another policy ground for the application of the rule is that the alien, by conducting activities within the territory of the host state, both enjoys protection and is correspondingly accountable under the laws and before the courts of that state; thus, it may be fair to hold that he should first seek redress under those laws and before those courts.

**3. Mardof's right to privacy of communication was not violated by Larcean.**

Under Article 17(1) of the ICCPR, the right to privacy can only be violated only if there was actual interference with an individual's privacy and such interference was either arbitrary or unlawful.<sup>30</sup> Thus, there was no infringement of Mardof's right to privacy because there was no interference on the part of the Larcean government to speak of in the first place. Even if it were to be assumed, as per Selene's allegations, that Mardof was being monitored by the Larcean secret service, such monitoring would be reasonable given the nature of his occupation and his recent intention to work for the Selene government. It is natural that Mardof, an employee of the Larcean Military, like all persons in the military service, have limited access to freedom of communication, transportation and employment, and that such restriction is tolerated in the practice of international society. Moreover, he is a leading nuclear physicist who intends to work for Selene which not only clandestinely manufactures nuclear weapons in violation of the Non-Proliferation Treaty but is also suspected of harboring terrorists. Thus, the monitoring of Mardof is not only expected but necessary as a matter of genuine security concern for the Larcean government. Such act of interference therefore cannot be considered as arbitrary as to violate Dr. Mardof's right to privacy.

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<sup>28</sup> *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. (July 20).

<sup>29</sup> ICJ Reports (1959), 27

<sup>30</sup> Art. 17(1), ICCPR



**4. Larcean's treatment of Mardof's did not constitute a violation of his right against discrimination**

Larcean's treatment of Mardof was not discriminatory and did not constitute an illegal treatment of an alien under customary international law under either the international minimum standard of human rights or the national treatment standard.

In full accord with the principle of non-discrimination and equality of Article 2(2) of the ICESCR and the UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live Article 8<sup>31</sup>, Mardof did not suffer any discrimination in the enjoyment of his right to work nor in the application of this right while in the employ of the Larcean government. Indeed, Larcean has respected his rights to work in just, favorable conditions of work.<sup>32</sup> Larcean afforded him the opportunity to gain his living by work which he freely accepted when it approved Mardof's application for prolonging his stay as he wished after his allowed length of stay expired. He was provided employment at the Larcean Military Research Institute when he needed a job to pay back ANRI to support his family, satisfying his needs both in terms of salary and type of work.

Furthermore, transfer is a common practice of personnel management in any work place. Any employee, especially those who were engaged in military service, must be prepared to be transferred at any time and place. He conducted research under better conditions than in any other countries including his own. Moreover, should he need to take a job during his continued stay, Larcean assured its assistance, even in assuming his former work, if chooses to. Mardof is even fortunate because many people in Larcean are working under a less favorable condition.

His detention was in accordance with Larcean immigration law which allow immigration officers to detain for violation of any law. He violated the law protecting Larcean's military secrets when he did not ask permission upon his acceptance of new employment. Others of the same occupation who did not have any problem were not similarly situated as Mardof.

Assuming there was differential treatment of Mardof for being an alien, such distinction is still accepted under international human rights law. Following the national treatment standard, Larcean does not bring any discrimination or disadvantage to Mardof, but at the same time he, as a private citizen, is not in a

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<sup>31</sup> G.A. Res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985).

<sup>32</sup> Articles 6 & 7, ICESCR.

position to be endowed with any privilege. Article 2 of the UN Declaration On The Human Rights Of Individuals Who Are Not Nationals Of The Country In Which They Live recognizes the state's right to promulgate laws and regulations concerning the terms and conditions of the stay of aliens or to establish differences between nationals and aliens. Aliens are required to observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State (Article 4).

All major human rights instruments prohibit discrimination on the basis of, *inter alia*, race, birth, and national, ethnic or social origins.<sup>33</sup> However, none of these instruments contain a prohibition of discrimination on grounds of nationality or citizenship. The *travaux préparatoires* of the UDHR and the ICCPR reveal unambiguously that the reference to 'national origins' in those instruments was meant to prescribe distinctions between citizens born in the country and citizens who had been naturalized, and not between nationals and aliens.<sup>34</sup>

**B. There exists a state of necessity that justifies Larcean's temporary suspension of Mardof's rights.**

The doctrine of state of necessity is well-established under customary law. As stated under Article 25 (1)(b) of the International Law Commission's Articles on State Responsibility, necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Under customary international law, the doctrine of state of necessity can be invoked under certain strictly defined conditions which must be cumulatively satisfied – it must have been occasioned by an essential interest of the State which is the author of the act conflicting with one of its international obligations; that interest must be threatened by a grave and imminent peril; the act being challenged must have been the only means of safeguarding that interest; that act must not seriously impair an essential interest of the State towards which the obligation exists; and the State which is the author of the act must not contribute to the occurrence of the state of necessity.<sup>35</sup>

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<sup>33</sup> Art. 2(1), UDHR; Art. 2(2) ICESCR; Art. 2(1) ICCPR; Art 1(1) International Convention on the Elimination of All Forms of Racial Discrimination; Art 14, EuCHR; Art 1(1), ACHR; Art. 2, African Charter on Human and People's Rights.

<sup>34</sup> See UN Doc. E/CN.4/Sub.2/SR.5 at 2-12; UN Doc A/2929 (1952), ch. 4, paras 180-2.

<sup>35</sup> Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, p.40-41, para. 51-52.

Though the doctrine of the state of necessity is intimately related to the doctrine of self-defense, both are independent and distinct.<sup>36</sup> While self-defense requires that the injured State be the source of the peril, the doctrine of state of necessity does not require the State invoking the doctrine to prove that the injured State is the source of the grave and imminent peril.<sup>37</sup> What is required of States to validly invoke the doctrine is (1) the existence of the right to act; and (2) the necessity and proportionality of the action.<sup>38</sup> The doctrine does not annul or terminate the obligation involved, rather, it provides a justification or excuse for non-performance while the circumstance in question subsists.<sup>39</sup>

Evidently, Larcean passes the aforementioned tests. Larcean's act of preventing Mardof from leaving Larcean is based on his possession of nuclear weapons control technology which may probably come into the possession of terrorists harbored by Selene, the State in which Mardof intends to work, an essential national security interest on the part of Larcean; as set out in none other than the findings of the U.N. Security Council, there exists a grave and imminent peril of terrorist attacks motivated by extremism and intolerance; given these circumstances, the only means of safeguarding that Larcean's national security interest is to prevent Mardof from leaving Larcean within the duration of the period provided under Larcean domestic law; more significantly, the prevention of Mardof from leaving Larcean's territory does not seriously impair the essential interest of Selene since, first, Mardof is not a Selene national, and, second, the act is not directed principally against the right to travel and to return to one's State of nationality, the restriction being primarily directed against the movement and transfer of nuclear weapons technology; and, finally, Larcean did not contribute to the occurrence of the state of necessity.

**1. There exists a grave and imminent danger of nuclear terrorism, which threatens the national security interests of Larcean.**

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<sup>36</sup> Romano *supra* at 1046

<sup>37</sup> *Id.*

<sup>38</sup> Reisman *supra* at 19; Maxon *supra* at 56-68; Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, DICK. J. INT'L L. vol. 19, no. 2, 2001, p. 314, c.f. Case 265/87 Schrader v. Hauptzollamt, Gronau, 1989 E.C.R. 2237 (1989); Art 25 (1)(b), ASR.

<sup>39</sup> ILC Commentary, ASR, p. 112;

Terrorism has been defined as the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet the political objectives of the perpetrators.<sup>40</sup>

The United Nations Security Council has made numerous pronouncements on its deep concern about the imminent threat of terrorism and terrorist attacks.<sup>41</sup> It has recognized that terrorism constitutes a threat to international peace and security<sup>42</sup> and that terrorist attacks have been increasing and have been directed primarily against the interest of first world states<sup>43</sup> motivated simply by extremism and intolerance.<sup>44</sup>

The threat of terrorists using Weapons of Mass Destruction springs from the fact that: (1) the lethality of nuclear weapons would advance a terrorist group's goal of wreaking havoc on a society; (2) the material and information necessary to construct nuclear weapons have become accessible to fringe groups and are difficult to monitor; and (3) the persistence of state sponsorship of terrorism by rogue states.<sup>45</sup>

As a consequence, the Security Council has urged states to employ all the necessary means to prevent and suppress terrorism.<sup>46</sup> It has exhorted states to refrain from providing any form of support, active or passive, to entities within their territories from making resources available for the benefit of persons who commit or participate in terrorist acts.<sup>47</sup>

Though there is no specified and definite point of time for the terrorist attack to happen against Larcean, the realization of such a threat, however far off it might be, is not thereby less certain or less inevitable.<sup>48</sup> Given the covert nature of terrorism, and the swift and destructive methods of terrorists, there is no other conclusion but that the threat of nuclear terrorism is imminent, and that States, including Larcean, are justified in taking measures to guard against the threat pursuant to national security interests.

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<sup>40</sup> John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, *The Georgetown Law Journal*, vol. 87, No. 4, (April 1999), p. 1026

<sup>41</sup> SC Res. 1373, S/RES/1373.

<sup>42</sup> SC Res. 1455, S/RES/1455; SC Res. 1456, S/RES/1456; John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO L J 1023 (1999).

<sup>43</sup> See <<http://www.usis.usemb.se/terror/rpt1999/appb.html>> 6 July 2003

<sup>44</sup> SC Reso 1373

<sup>45</sup> John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO L. J. 1024 (1999).

<sup>46</sup> SC Res 1465, S/RES/1465 (2003)

<sup>47</sup> SC Res 1373, S/RES/1373 (2003); SC Res. 1438, S/RES/1438 ()

<sup>48</sup> Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, p. 42, para. 54.

Selene is intent on employing Mardof in its illegal manufacture of weapons, which are likely to fall in to terrorists' hands. It pirated Mardof from the Larcean Military Research Institute. Moreover, it is invoking Larcean's responsibility by circumventing the nationality of claims principle<sup>49</sup> of diplomatic protection and without Authentica. Mardof's state of nationality, Authentica, is not the party instituting the action for alleged violations Mardof's rights and was not impleaded as a party to the case it has instituted.

Since Authentica is the state of nationality of Mardof, Authentics legal interests would not only be affected by a decision, they would constitute the very subject-matter of the decision.<sup>50</sup>

It is, once again, worth noting that Mardof was a military employee prior to his resignation from the Larcean Military Research Institute (Explanatory Supplementation, para. 5 and 6). Part of his experience belongs to military secrets (Problem, para 11). He is a nuclear scientist in possession of vital military and scientific information, regarding the control and development of nuclear weapons (Problem, para 8); and he intends to work for Selene, a state continually building up armaments (Problem, para 1), suspected by Larcean of harboring terrorists (Explanatory Supplementation, para. 8) and from whom terrorists may acquire nuclear weapons (Problem, para. 3). Clearly, his intention to work for Selene is a grave national security concern for Larcean.

**2. Mardof's continued, but temporary, stay within the territory of Larcean is the only way for Larcean to safeguard national security against the grave and imminent peril of nuclear terrorism.**

It has become increasingly easy to plan and implement highly destructive terrorist actions in the territory of another state, whether the technique of destruction is by electronic or kinetic intervention, or by conventional explosive, nuclear, chemical, or biological weapons.<sup>51</sup> Although it is widely known that only a few nuclear secrets are left, and the barriers to nuclear weapons development by a determined country have steadily eroded<sup>52</sup>, the key hurdle remains the acquisition of fissile material, whose atoms can be split in an explosive chain releasing huge

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<sup>49</sup> Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States) 1954 I.C.J. (June 15).

<sup>50</sup> Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States) 1954 I.C.J. (June 15).

<sup>51</sup> Reisman, *supra* at 4.

<sup>52</sup> Clausen, NON-PROLIFERATION AND THE NATIONAL INTEREST, 205.

amounts of nuclear energy.<sup>53</sup> This is a technology that Mardof can provide Selene, and the same technology that could be used by terrorists to engage in terrorist attacks. The use – forcible or otherwise – of nuclear scientists for the production of nuclear weapons is not unknown.<sup>54</sup> It was made evident in the Afghanistan and the Gulf Wars.<sup>55</sup> Likewise, the transfer of sensitive nuclear technology necessary for the production of nuclear weapons is not inexistent.<sup>56</sup> This is the eventuality that threatens the national security interests of Larcean, and the same eventuality that it seeks to protect itself from.

All of this is compounded by the inherent difficulties in catching terrorists or preventing terrorist acts. There is also an inherent difficulty in the intelligence gathering process, especially in light of state-supported terrorist activities.<sup>57</sup>

What is noteworthy is that the Security Council has expressed its concern about the ease by which terrorists could exploit sophisticated technology, and resources for their criminal objectives.<sup>58</sup> It has also noted with concern the close connection between international terrorism and the illegal movement of nuclear materials<sup>59</sup> and has consequently encouraged UN member States to adopt an international convention for the suppression of acts of nuclear terrorism.<sup>60</sup>

There is an inherent overlap between the technologies and materials used to produce nuclear weapons and those used in peaceful nuclear research and electric-power programs.<sup>61</sup> Clearly, the concerns of Larcean are not unfounded. In the face of these facts, and the possibility that nuclear military technology possessed by Mardof could come in the possession of terrorists, Larcean cannot simply stand by and do nothing. Given this possibility of terrorists employing weapons of mass destruction, the most urgent international sanctioning goals available to Larcean are arresting, deterring, and preventing<sup>62</sup> Mardof from leaving Larcean.

The law restricting Mardof's right to travel is not directed against the right to leave any country, and to return to his own country, per se, but on the transfer of

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<sup>53</sup> Clausen, NON-PROLIFERATION AND THE NATIONAL INTEREST, 205.

<sup>54</sup> <[http://news.bbc.co.uk/1/hi/world/south\\_asia/1619252.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1619252.stm)> 5 July 2003.

<sup>55</sup> See <http://www.guardian.co.uk/pakistan/Story/0,2763,591916,00.html> and <<http://www.yellowtimes.org/article.php?sid=874>> 3 July 2003.

<sup>56</sup> See <<http://www.nci.org/nci-nt.htm#develop2>> 5 July 2003.

<sup>57</sup> Clausen, NON-PROLIFERATION AND THE NATIONAL INTEREST

<sup>58</sup> SC Res. 1465, S/RES/1465 (2003).

<sup>59</sup> SC Res. 1373, S/RES/1465 (2003).

<sup>60</sup> SC Res. 1465, S/RES/1465 (2003).

<sup>61</sup> Clausen, NON-PROLIFERATION AND THE NATIONAL INTEREST, 206.

<sup>62</sup> W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON JOURNAL OF INTERNATIONAL LAW, 8 (1999).

nuclear weapons control technology possessed by Mardof. Customary law enables states to regulate the transfer of materials with a high terrorist potential, through the use of nonforcible measures<sup>63</sup>, and gives States the right to protect such information from disclosure<sup>64</sup>, and, conversely, does not require States to provide any information which they are not permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material.<sup>65</sup>

### III. Selene is not entitled to a declaratory judgment in its favor.

Larcean's invocation of the state of necessity is premised on the existence of a national security problem attended by a grave and imminent peril of nuclear terrorism, consequently, Larcean's act of preventing Mardof from leaving Larcean is precluded from being wrongful under customary law.<sup>66</sup> Larcean therefore does not violate international human rights law with respect to treatment of Mardof and there is no basis for a judicial declaration of such. Since Larcean's international responsibility is not engaged, Selene is not entitled to its claim of reparations in the form of a declaratory judgment.<sup>67</sup>

### PRAYER FOR RELIEF

For the foregoing reasons, the State of Larcean requests this Honourable Court to declare that Larcean has not breached its international obligations under International Human Rights Law with respect to its treatment of Mardof since July 2002.

Respectfully submitted,  
AGENTS FOR THE STATE OF LARCEAN

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<sup>63</sup> Convention on the Physical Protection of Nuclear Materials of 1980; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1993 (32 ILM 804); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons of 1972 (26 UST 583).

<sup>64</sup> Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Article 36.

<sup>65</sup> Convention on the Physical Protection of Nuclear Materials, Article 6.

<sup>66</sup> Art 1 & 25, ASR.

<sup>67</sup> Art. 3, ASR.

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