
No. 1994

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

FREEDONIA,
Applicant

v.

BALBOA,
Respondent.

Spring Term

1994

ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The government of the State of Balboa and the State of Freedonia have recognized as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court.

STATEMENT OF FACTS

In the late 1980s, world events led to increasing demands for greater political and cultural rights to be given to minority groups. (C. 1). In an effort to discourage the political activity of these groups, Draconia, an industrialized nation, adopted a series of increasingly harsh policy measures directed generally at minority groups. (C. 1). These measures were heavily criticized by Hilary Pankhurst, a prominent international minority rights lawyer and citizen of Draconia. (C. 1). Hilary's views were widely disseminated both within Draconia and, to some extent, internationally because she served on the executive board for the Committee on Rights for Women, a Draconian based organization with various regional and local groups. (C. 1).

In early May of 1993, after attaining a temporary exit visa, Hilary attended the International Conference on the Protection of Minority Rights in Balboa, a neighboring state. (C. 1). At the conference, Hilary presented a paper that was highly critical of Draconia's policy toward minority groups. (C. 1). Hilary's presentation was given significant international attention. (C. 1). Shortly before her scheduled return to Draconia, Hilary received word from her husband that the police had raided her apartment and had seized many of her papers and personal documents. (C. 2). Fearing repercussion if she returned to Draconia, Hilary applied to the Balboan immigration authorities for permission to stay in Balboa for an indefinite period. (C. 2).

Hilary's request was denied on the preliminary grounds that she did not satisfy the criteria for refugee status under the 1951 Convention or the 1967 Protocol thereto. (C. 2). Although Balboa is not a party to the 1951 Convention, the Balboan Minister of Immigration considered its guidelines to be the appropriate standard because they were "generally accepted international law." (C. 2). Additionally, the Balboan Minister of Immigration announced that the denial of Hilary's application was in Balboa's "best interest" because granting it would establish unwanted precedent and harm friendly relations with Draconia. (C. 2).

In early June, Hilary's application was ultimately denied on the basis

that the domestic policies and living situations in Draconia did not give rise to any legitimate claims for asylum by Draconian citizens. (C. 2). Despite Hilary's objections to returning her to Draconia, Balboa stated its intention to negotiate her return. (C. 2).

Meanwhile, Hilary's husband Rousseau and daughter Emily were smuggled into Balboa to be reunited with Hilary after escaping house arrest in Draconia. (C. 3). Unfortunately, upon learning of these events, the Balboan officials arrested all of the family members before they could be reunited. (C. 3). Balboa justified the arrest of Hilary on the grounds that they were obligated to ensure that she did not leave the country, and Balboa justified the arrests of Rousseau and Emily on the grounds that they had entered Balboa unlawfully. (C. 3). Although Rousseau applied on behalf of himself and Emily for leave to remain in Balboa, the application was denied on two grounds. First, they failed to apply for the appropriate exit visas from Draconia. Second, they, like Hilary, were not entitled to refugee status. (C. 3).

Balboa then placed Hilary and Rousseau in a refugee "hotel." (C. 3). In the same "hotel," Balboa detained several hundred men and women from Laboria, a less developed state neighboring Balboa which had been engaged in a violent civil war for several years. (C. 3). Hilary learned that, despite the civil strife and consequent massive human rights violations resulting from the war, Balboa had denied the Laborians their refugee status. (C. 3). However, Balboa had not returned them because the appropriate government agencies responsible for undertaking their return were apparently not functioning in war-torn Laboria. (C. 3).

In the hotel, the refugees were crowded into small, dimly lit sleeping rooms, were permitted limited freedom of movement and were provided a meager supply of very basic food. (C. 3-4). Husbands and wives were housed separately, and the children, including Emily, were placed in Balboan foster homes where most of the foster parents spoke only their native Balboan language. (C. 4).

Since Hilary was able to draw the attention of the international

community to the plight of her family and the Laborians, international human rights advocates frequently expressed concern over the effect that Balboa's actions would have, including rendering the refugees in effect stateless and depriving them of their right to "family life." (C. 4). The only response by the Balboan officials to the concerns regarding the conditions in the "hotel" was that the conditions in the "hotel" were slightly better than those generally prevailing in the Balboan prisons. (C. 4).

In the face of continued resistance by Balboa, human rights groups and governments called for action to resolve the "intolerable situation" involving the Pankhursts and the Laborians. (C. 4). In mid-July of 1993, Freedonia, a sympathetic third state and ardent protector of human rights, answered the call by declaring its willingness to provide a new home for the Pankhursts and the Laborian refugees presently in Balboa. (C. 4). Although this generous offer was praised by a number of developing countries and accepted by the Pankhursts and the Laborians, Balboa refused Freedonia's offer because Balboa was concerned that Hilary might damage their public relations if released and that granting the request would be viewed as a concession that its domestic policies were questionable. (C. 4).

The Freedonian Minister of State then initiated proceedings before this Court against Balboa demanding the release of the Pankhursts and the Laborians. (C. 4). Freedonia's acceptance of this Court's jurisdiction under Article 36(2) of the Statute of the Court, which was filed in January of 1993, stated the Freedonia would accept this Court's jurisdiction "with respect to all disputes arising after 4 June 1993, except those which related to matters which are essentially within its national jurisdiction, as determined by the government of Freedonia." (C. 4-5).

In light of the mounting international pressure, Balboa consented to appear before this Court. (C. 5). Their first action was to file a preliminary objection to this Court's jurisdiction in August of 1993. (C. 5). The following month, this Court gave notice that it joined the objection to jurisdiction and the merits. (C. 5). Neither Draconia nor Laboria has

publicly issued a statement or taken steps to intervene in the actions before this court. (C. 5).

QUESTIONS PRESENTED

- I. WHETHER THIS COURT MAY PROPERLY EXERCISE JURISDICTION UNDER ARTICLE 36(2) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE OVER BALBOA'S VIOLATION OF THE PANKHURSTS' AND THE LABORIAN'S HUMAN RIGHTS?

- II. WHETHER FREEDONIA POSSESSES *JUS STANDII* TO ENFORCE BALBOA'S VIOLATION OF THE PANKHURSTS' AND THE LABORIAN'S HUMAN RIGHTS?

- III. WHETHER BALBOA'S ACTIONS REGARDING HILARY, HER FAMILY AND THE LABORIAN REFUGEES CONSTITUTE VIOLATIONS OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW?

- IV. WHETHER REQUIRING BALBOA TO ACCEPT FREEDONIA'S OFFER TO GIVE THE PANKHURSTS AND THE LABORIAN A NEW HOME IS AN APPROPRIATE REMEDY UNDER INTERNATIONAL LAW?

SUMMARY OF THE PLEADINGS

I.

This Court may exercise jurisdiction under Article 36(2) of the Statute of the International Court of Justice, under which both Freedonia and Balboa have made declarations of compulsory jurisdiction. The case *sub judice* falls within paragraph 2(b) of Article 36 as a "question of international law." The question at issue concerns Balboa's breach of international obligations to grant the Pankhursts and the Laborians refugee status and to ensure protection of their rights to freedom of movement, expression and "family life."

Freedonia's declaration of jurisdiction accepts compulsory jurisdiction "with respect to all disputes arising after 4 June 1993, except those which relate to matters which are essentially within its national jurisdiction, as determined by the government of Freedonia." The reservations in Freedonia's declaration do not in any way preclude this Court's jurisdiction.

First, the dispute in this case did not arise until after June 4, 1993. A dispute does not arise until the last of its constituent elements comes into existence. In this case, the fourth and final element did not exist until sometime in the latter part of the summer of 1993, when Balboa refused Freedonia's offer to provide a home for the refugees.

Additionally, the automatic reservation contained in Freedonia's declaration should not prevent this Court from exercising its jurisdiction. This is so for several reasons. First, Balboa has not clearly invoked the reservation and until it does so, its presence in Freedonia's declaration remains irrelevant. Second, Balboa would be estopped from invoking the reservation now since it has not clearly invoked it before. Freedonia has relied on Balboa's silence in regard to the reservation, and Balboa's actions now constitute implied consent. Third, Balboa could not invoke the reservation in any case because the matter is clearly an international matter, and is therefore not within its domestic jurisdiction. Freedonia's claim concern issues of human rights which are indisputably issues of public international law. Finally, in light of all of these circumstances, Balboa

could not in good faith invoke the reservation, and thus the principle of reciprocity does not apply.

No other procedural matter should preclude the jurisdiction of this Court. As victims of ongoing abuses of human rights, these individuals have done everything within their power to exhaust remedies available in Balboa. Further, their nations of origin, Draconia and Laboria, have not intervened in this proceeding, and their interests do not form its subject matter. Thus, the case should be decided in their absence.

II.

Freedonia has standing to bring Balboa's violations of customary human rights law before this Court. First, Freedonia possesses standing under the *erga omnes* principle of international law, which states that some obligations flow from all members of the international community to all members of the international community. Balboa is obligated to the entire international community, including Freedonia, to ensure the human rights of the Pankhursts and the Laborians as individuals within its control. As a member of the international community, Freedonia is entitled to protect the interests of the Pankhursts and the Laborians, and may even be under a duty to do so. Freedonia need show no specific injury to bring this claim, but is presumed injured due to the type of offense.

Alternatively, if this Court finds that the obligations at issue in this dispute are not enforceable *erga omnes*, Freedonia should be allowed to exercise diplomatic protection on behalf of these individuals. The Pankhursts and the Laborians have not been allowed the opportunity to establish objective ties with Freedonia in order to establish a connection of nationality. Therefore, their manifest intent to become nationals precludes the requirement that those objective ties be demonstrated.

III.

Balboa's actions regarding the Pankhursts and the Laborians constitute violations of customary international human rights law. Since human rights law governs the relations between states and persons within their territories,

its acceptance into the body of customary international law can be evidenced by alternative forms of state practice, such as the acts of international organizations and international conventions and declarations.

Balboa's use of the 1951 Convention definition of refugee, application of the "safe country" procedure and subsequent denial of refugee status to the Pankhursts and the Laborians are contrary to customary international law. The standard for determining refugee status has evolved beyond the restrictive criteria of the 1951 Convention's definition of a refugee. Specifically, a well-founded fear of persecution for a limited number of reasons is no longer a prerequisite to refugee status. Also, the international community condemns the use of the "safe country" procedure because of the dangers inherent in failing to individually assess the validity of a refugee claim.

Both the Pankhursts and the Laborians are entitled to refugee status. Draconia's harsh measures directed at minorities generally as well as the recent attacks on the Pankhursts demonstrate more than sufficient reason for their flight from Draconia. Likewise, the massive human rights violations caused by the violent civil war in Laboria demonstrate more than sufficient reason for their flight from Laboria. Thus, Balboa violated customary international human rights law by denying refugee status to the Pankhursts and the Laborians.

Additionally, Balboa's treatment of the Pankhursts and the Laborians resulted in the violation of their internationally guaranteed rights of protection. First, Balboa's refusal to allow the Pankhursts and the Laborians to come to Freedonia violated their rights to freedom of movement. Second, Balboa's interference with the Pankhursts' and the Laborians' abilities to send and receive information violated their rights to freedom of expression. Last, Balboa's separation of husbands and wives within the "hotel" and the placement of children in foster homes violate their rights to "family life."

IV.

Allowing the Pankhursts and the Laborians to come to Freedonia is the only remedy which will prevent the continued violation of customary

international law. As refugees, the Pankhursts and the Laborians are entitled to the protection of the principle of *nonrefoulement*, which prohibits the return of a refugee whose life or freedom is threatened. The lives and freedom of both the Pankhursts and the Laborians are threatened in Draconia and Laboria respectively. Thus, neither the deportation of the Pankhursts to Draconia nor the expulsion of the Laborians to Laboria is an acceptable remedy under customary international law. Additionally, forcing them to remain in the "hotel" indefinitely threatens to deny them their right to a nationality and to render them *de facto* stateless.

PLEADINGS AND AUTHORITIES

I. THIS COURT MAY PROPERLY EXERCISE JURISDICTION UNDER ARTICLE 36(2) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE OVER BALBOA'S VIOLATION OF THE PANKHURSTS' AND THE LABORIAN'S HUMAN RIGHTS.

A. Balboa's violation of the Pankhursts' and the Laborians' human rights concerns questions of international law within the meaning of Article 36(2) of the I.C.J. Statute.

Freedonia has made a declaration of compulsory jurisdiction before this Court under Article 36(2) of the Statute of the International Court of Justice. Declarations under Article 36(2) grant jurisdiction to this Court over all legal disputes concerning several specific issues. One issue this Court may consider under 36(2) is a legal dispute concerning "any question of international law."¹ Such questions arise when, as here, the Applicant state alleges breach of an international obligation by the Respondent state.

In order to demonstrate that this Court has jurisdiction over a question of international law, Freedonia need not make a conclusory showing of international obligation and breach of that obligation.² Rather, jurisdictional issues must be decided in a way which does not prejudice the merits of the case.³

Balboa is obligated by customary human rights law to grant the Pankhursts and the Laborians refugee status. Additionally, Balboa is obligated to ensure the protection of their rights to freedom of movement, freedom of expression and "family life." Balboa's actions in regard to the Pankhursts and the Laborians constitute a breach of these obligations.

B. The reservations to Freedonia's acceptance of compulsory jurisdiction do not preclude the jurisdiction of this Court.

Freedonia's declaration of compulsory jurisdiction under Article 36(2) accepts such jurisdiction "with respect to all disputes arising after 4 June 1993, except those which relate to matters which are essentially within its

¹ Statute of the International Court of Justice art. 36 para. 2(b), 59 Stat. 1055, T.S. 993.

² See Shabtai Rosenne, *The International Court of Justice* 250 (1957).

³ *Id.*

national jurisdiction, as determined by the government of Freedonia."⁴ Nothing in this declaration nor its reservations precludes the exercise of subject matter jurisdiction by this Court.

1. The dispute in this case arose after June 4, 1993.

In *Right of Passage Over Indian Territory*, this Court held that, in order to determine when a dispute arose, it is necessary to consider the subject of the dispute.⁵ That dispute consisted of three elements which were: the alleged existence of a right of passage in favor of Portugal; the failure of India to comply with its obligations concerning the right of passage; and the redress of the illegal situation arising from that failure.⁶

This Court held that the dispute could not have arisen "until all of its constituent elements had come into existence."⁷ Even though some of the incidents occurred prior to February 5, 1930, the date contained in the *rationae temporis* reservation, they did not lead the parties to adopt "clearly defined legal positions" against one another until 1954, well after the date in question.⁸

The case *sub judice* has at least four constituent elements: (1) entry of the Laborians and the Pankhursts into Balboa; (2) inadequate treatment afforded the individuals within the refugee camp; (3) Freedonia's offer of residence to the Laborians and the Pankhursts; and (4) Balboa's refusal of Freedonia's offer.

Clearly, some of the facts and situations involved in the dispute arose prior to June 4, 1993. For example, the Laborians entered the refugee "hotel" in the summer of 1992, and Hilary entered Balboa in May of 1993. It is not clear from the facts at what time Rousseau and Emily entered Balboa, or when

⁴ *Compromis* at 5.

⁵ *Right of Passage over Indian Territory (Port. v. India)*, 1960 I.C.J. 6, 34 (Apr. 12).

⁶ *Id.* at 34-35.

⁷ *Id.* at 34.

⁸ *Id.*

the Pankhursts were placed in the "hotel," but both events apparently occurred after June 4, 1993.

However, facts and situations are not to be confused with the dispute itself.⁹ The dispute did not arise until the parties adopted clearly defined legal positions against one another.¹⁰ That did not occur until Balboa refused Freedonia's offer in the latter part of the summer of 1993. Therefore, the dispute arose after June 4, 1993, and this Court's jurisdiction is not precluded.

2. The jurisdiction of this Court is not precluded by the automatic reservation contained in Freedonia's declaration.

Reservations such as the one contained in Freedonia's declaration of jurisdiction, which grant a state the ability to withhold from this Court's consideration matters that it determines to be within its own domestic jurisdiction, are known as "automatic reservations."¹¹ Such reservations have been considered valid by this Court when they are properly exercised.¹² However, in this case, Balboa should not be allowed to rely on the reciprocal effect of Freedonia's automatic reservation in order to avoid this Court's jurisdiction. This is because of the following: First, Balboa has not clearly exercised the reservation; second, Balboa is estopped from now exercising the reservation; third, the dispute is within the jurisdiction of this Court, and not the domestic jurisdiction of Balboa; and finally, in light of all the circumstances, Balboa could not in good faith invoke the reservation.

a. Balboa has not clearly invoked the automatic reservation.

There is no indication that Balboa has made any statement that the

⁹ *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 22 (Preliminary Objections Mar. 21).

¹⁰ *Right of Passage*, 1960 I.C.J. at 34.

¹¹ Douglas J. Ende, Comment, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration*, 61 Wash. L. Rev. 1145, 1159 (1986).

¹² See *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 4, 22 (July 6).

issues in this dispute "relate to matters which are essentially within its national jurisdiction, as determined by the government of [Balboa]." ¹³ As long as the Balboan government has not exercised the automatic reservation, it is not a proper issue for the Court's adjudication. ¹⁴ It is within the province of this Court to determine whether an issue is "within the domestic jurisdiction" of Balboa, and therefore outside the jurisdiction of this Court. ¹⁵ However, no such decision by this Court is warranted until a subjective determination to this effect has been made by the Balboan government. ¹⁶

- b. Balboa would be estopped from invoking the automatic reservation now since it had not clearly invoked the reservation before.

Under the doctrine of estoppel, which is clearly recognized in international law, a state which has not brought certain jurisdictional issues to the forefront of the objections to this Court's jurisdiction by its actions may not thereafter object to the Court's jurisdiction. ¹⁷ Instead, a state's conduct may be deemed to be its implied consent to the jurisdiction of this Court. ¹⁸

In the case sub judice, jurisdictional issues have been joined to the merits. Now that the case has reached the Second Phase, the doctrine of estoppel precludes Balboa from raising an issue it has not previously raised. ¹⁹ Thus, since Balboa has not made its intent to rely on Freedonia's

¹³ See *Compromis* at 5.

¹⁴ James Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 1979 Brit. Y.B. of Int'l L. 63, 70-71 (1981).

¹⁵ See Statute of the International Court of Justice, *supra* note 1, at art. 36, para. 6.

¹⁶ Crawford, *supra* note 14, at 70.

¹⁷ Rosenne, *supra* note 2, at 267-68.

¹⁸ Sir Hersch Lauterpacht, *The Development of International Law by the International Court* 202 (1982).

¹⁹ Rosenne, *supra* note 2, at 267.

automatic reservation clear and unequivocal, Freedonia is entitled to rely upon Balboa's silence as implied consent to this Court's jurisdiction.

- c. Even were Balboa to attempt to invoke the automatic reservation, this dispute is not within Balboa's domestic jurisdiction.

The validity of automatic reservations such as Freedonia's, when clearly invoked, has been recognized by this Court.²⁰ However, Freedonia recognizes that some limitation of the application of this reservation is necessary if this Court is truly to determine its own jurisdiction.²¹

This is particularly true of Article 36(2) declarations of compulsory jurisdiction. Although these declarations are "unilateral engagements," they comprise a bilateral engagement as to one another.²² Their unilateral nature does not mean that, as the state making the declaration, Freedonia is "free to amend the scope and the contents of its solemn commitments as it pleases."²³ Rather, it is ultimately this Court alone which has the power to determine its own jurisdiction as a substantive issue.²⁴ The purpose of automatic reservations such as Freedonia's is to avoid the determination of "domestic jurisdiction" by this Court as a substantive issue.²⁵ Once the validity of the exercise of the reservation is in question, as it is here, the Court passes on its own jurisdiction and the exercise of the reservation is

²⁰ *Norwegian Loans*, 1957 I.C.J. at 27.

²¹ See Statute of the International Court of Justice, *supra* note 1, at art. 36 para. 6, stating that, "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

²² *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 418 (Jurisdiction and Admissibility Nov. 26).

²³ *Id.* at 418.

²⁴ See *Nicaragua*, 1984 I.C.J. at 608 (dissenting opinion of Judge Schweibel).

²⁵ See Fred L. Morrison, *Potential Revisions to the Acceptance of Compulsory Jurisdiction of the International Court of Justice by the United States of America*, 29, 51-52, in *The United States and the Compulsory Jurisdiction of the International Court of Justice*, (Anthony Clark Arend ed., 1986) (for an explanation of an identical reservation belonging to the United States.)

irrelevant.²⁶

In Nicaragua, this Court held that the principle of reciprocity applied only to the scope and substance of the commitments entered into by the parties.²⁷ Freedonia itself would not be entitled to rely upon its own automatic reservation in regard to a matter which was obviously not within its domestic jurisdiction.²⁸ Therefore, if the dispute *sub judice* is clearly not within Balboa's domestic jurisdiction, Balboa is not entitled to rely on Freedonia's automatic reservation.

The dispute is obviously not within Balboa's domestic jurisdiction. Both the determination of refugee status and the treatment occurring in Balboa's refugee "hotel" involve issues of human rights. Issues of human rights "cannot but be considered a subject within the theory and discipline of public international law."²⁹ The evolution of human rights law has weighed more and more heavily in the balance against state sovereignty.³⁰ Indeed, if the dispute were to be considered within the domestic jurisdiction of Balboa, there can be no enforcement of violations of the human rights of unprotected persons within Balboa's boundaries.³¹ Such a result would render the body of human rights law meaningless for those persons who need its protection the most.

- d. Even were Balboa to attempt to invoke the automatic reservation, reciprocity does not apply because Balboa lacks good faith.

Since Balboa's declaration of compulsory jurisdiction does not contain an automatic reservation, it must rely on the principle of reciprocity in

²⁶ *Id.*

²⁷ *Nicaragua*, 1984 I.C.J. at 418.

²⁸ *See id.* at 418-420.

²⁹ Theodor Meron, *Human Rights and Humanitarian Norms in Customary Law* 101 (1989).

³⁰ Jonathan I. Charney, *Third State Remedies in International Law*, Mich. J. Int'l. L. 57, 65 (1989). *See also* Office of the United Nations High Commissioner for Refugees, *The State of the World's Refugees: The Challenge of Protection* 22 (1993) [hereinafter *The State of the World's Refugees*].

³¹ Charney, *supra* note 30, at 65.

order to invoke it. However, not all reservations may be reciprocally invoked.³² This Court has refused to recognize the reciprocal effect of reservations which are in violation of the "requirements of good faith."³³

The requirements of good faith could not be met by Balboa's successful use of the automatic reservation. Balboa has not yet clearly invoked the reservation, although it has had the opportunity to publicly do so since Freedonia originally brought suit against Balboa in the summer of 1993. Additionally, Balboa is aware of the international nature of this dispute. Balboa accepted the guidelines in the 1951 Convention Relating to the Status of Refugees as "generally accepted international law," acknowledging the customary character of the Convention.³⁴ By accepting the 1951 Convention as custom, Balboa is acknowledging that, since the dispute concerns its denial of refugee status to the Pankhursts and the Laborians, it is governed by principles of international law.³⁵ In light of all of the above circumstances, Balboa could not in good faith invoke Freedonia's automatic reservation.

C. This Court is the proper forum for this dispute because the Pankhursts and the Laborians have exhausted local remedies.

In order for Freedonia to seek redress on behalf of the Pankhursts and the Laborians, local remedies must have been exhausted in Balboa, as the state where the violation occurred.³⁶ The purpose behind this rule is that states such as Balboa should have the opportunity to redress their violations within the framework of their own domestic legal system.³⁷ However, the rule is not designed to shield states from international accountability.

³² Ende, *supra* note 11, at 1154.

³³ *Nicaragua*, 1984 I.C.J. at 420.

³⁴ Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

³⁵ Meron, *supra* note 29, at 80.

³⁶ *Interhandel*, 1959 I.C.J. at 27; Oscar Schachter, *International Law in Theory and Practice* 213 (1991).

³⁷ *Interhandel*, 1959 I.C.J. at 27.

Balboa has had ample opportunity to settle this dispute to its satisfaction. It has determined that the Pankhursts and the Laborians are not "refugees" and thus not entitled to such protection by their government. It has made a final determination on Hilary Pankhurst's application, rejecting her claim for asylum. It is logical to infer from Balboa's plan to return Rousseau, Emily and the Laborians to their homelands that final determinations for asylum for them have been made as well.

Moreover, given the human rights character of this case, it is not necessary that the Pankhursts and the Laborians first resort to the local courts of Balboa. In such cases, "the interests of state sovereignty must of course be balanced with those of the effective protection of human dignity."³⁸ The balance in this case must tip in favor of the human rights of the Pankhursts and the Laborians. These individuals currently reside in a refugee "hotel" whose conditions violate their basic human rights. The Balboan government plans to deport the Pankhursts, and presumably is only holding them for the duration of this proceeding. It plans to deport the Laborians as soon as an office exists in Laboria to process their re-entry. Time is therefore indisputably of the essence. To require these individuals to pursue further remedies within Balboa would be a needless delay which would stand as an obstacle to "a more direct, quicker and more effective form of protection of human rights."³⁹ Therefore, this dispute must be settled by this Court.

D. The failure of Draconia and Laboria to intervene in these proceedings does not preclude this Court's jurisdiction.

In this Court, there is no "indispensable parties" rule in international law.⁴⁰ States which feel they may be affected by the remedy are free to intervene formally into the proceedings, or to bring a separate action.⁴¹ It

³⁸ Meron, *supra* note 29, at 176

³⁹ See Roberto Ago, Sixth Report on State Responsibility, 2 Y.B. Int'l L. Comm'n 43, A/CN.4/SER.A/1977/Add. 1 (Part 1).

⁴⁰ *Nicaragua*, 1984 I.C.J. at 431.

⁴¹ *Id*

is only if Draconia's or Laboria's legal interests would "form the very subject matter" of the decision that the Statute of the I.C.J. might not authorize proceedings to continue in their absence.⁴²

Clearly, that is not the situation here. Any legal interest Laboria may have previously possessed in decisions concerning their those who have fled its civil war has been overcome by their prolonged silence and lack of participation in these proceedings. Likewise, Draconia's interest in the enforcement of its immigration laws will not be significantly, if at all, hindered since they are already outside Draconia. Moreover, Draconia's and Laboria's failure to intervene in this proceeding further demonstrates the insignificance of any interest that they possess.

II. FREEDONIA POSSESSES JUS STANDII TO ENFORCE BALBOA'S VIOLATION OF THE PANKHURSTS' AND THE LABORIAN'S HUMAN RIGHTS.

- A. Freedonia possesses jus standii to enforce Balboa's violation of the Pankhursts' and the Laborians' human rights because the obligation to protect their rights is enforceable erga omnes. (Barcelona Traction)

In *Barcelona Traction*, this Court recognized that certain international obligations are *erga omnes*, i.e., owed to the entire international community.⁴³ The Court stated, in pertinent part:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁴⁴

In order for Freedonia to have standing to bring this suit under the *erga omnes* principle, there must be both an international obligation and a corresponding right of protection.⁴⁵

⁴² *Monetary Gold Removed from Rome in 1943 (Italy v. Fr.)*, 1954 I.C.J. 19, 33 (Preliminary Question).

⁴³ *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5).

⁴⁴ *Id.*

⁴⁵ *Id.*

1. Balboa owes an international obligation to Freedonia as a member of the international community to respect the customary human rights of the individuals within its borders.

According to the *Restatement of Foreign Relations Law*, the international obligation to respect human rights runs equally to every state, regardless of the nationality of the victim.⁴⁶ Therefore, Balboa was under an obligation to Freedonia, as a member of the international community, to respect human rights of the Draconian and Laborian individuals within its refugee "hotel."

2. Freedonia possesses an *erga omnes* right to enforce customary human rights requirements against Balboa.

Balboa's *erga omnes* obligations give rise to "rights of protection" in favor of members of the international community, including Freedonia.⁴⁷ With human rights obligations, as with any other *erga omnes* obligation, all states are under a duty not to encourage violations.⁴⁸ In fact, due to the special nature of human rights violations, all states may have a duty in international law to actively discourage violations of these obligations.⁴⁹ Thus, not only is Freedonia entitled to take action to remedy Balboa's breach, but it may also be obligated to do so.

As stated previously, both Balboa and Freedonia have agreed to the compulsory jurisdiction of this Court as a means for settling disputes between them generally. Therefore, Freedonia has standing to bring this *erga omnes* claim before this Court.⁵⁰

3. Freedonia need not show direct injury to bring this action.

Normally, violations of customary law are enforceable only by the state

⁴⁶ *Restatement (Third) of Foreign Relations Law*, § 702, Reporters' Note 3 [hereinafter *Restatement*].

⁴⁷ *Id.* (emphasis added).

⁴⁸ Meron, *supra* note 29, at 31.

⁴⁹ *Id.* at 31-32.

⁵⁰ *Restatement*, *supra* note 46, at § 703, Reporters' Note 3.

who has suffered direct injury.⁵¹ However, since the case *sub judice* involves customary human rights issues, the criteria for establishing standing to enforce customary law are broader.⁵² Freedonia does not have to demonstrate a particular, individualized injury in order to gain standing to enforce human rights violations.⁵³ Rather, due to the importance of human rights to the international community and the difficulties inherent in enforcement, all states are presumed to be "injured" by a violation of the customary law of human rights.⁵⁴

B. Even were the human rights violations at issue in this dispute not enforceable *erga omnes*, Freedonia is entitled to exercise diplomatic protection on behalf of the Pankhursts and the Laborians (Nottebohm).

This Court addressed the subject of diplomatic protection of an individual in the *Nottebohm* case.⁵⁵ In that case, this Court did not allow Liechtenstein to exercise protection on behalf of Nottebohm, although he had performed the functions necessary for naturalization by that country.⁵⁶ Instead, this Court considered several factors to determine Nottebohm's "real and effective nationality" as a Guatemalan.⁵⁷ These factors included, but were not limited to, the location of business and family ties, participation in public life, habitual residence, and allegiance shown by an individual and his family.⁵⁸

A cursory review of these factors might suggest that the Pankhursts and the Laborians should not be allowed diplomatic protection by Freedonia.

⁵¹ *Id.*

⁵² *See id.*

⁵³ William Riphagen, Draft Articles on State Responsibility, art. 5.2(e), 2(2) Y.B. Int'l L. Comm'n 25 A/CN.4/SER.A/1985/Add.1 (Part 2)

⁵⁴ *See id.* at art. 5.2(e) (iii).

⁵⁵ *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6).

⁵⁶ *Id.*

⁵⁷ *Id.* at 24-25.

⁵⁸ *Id.*

Nothing in the facts indicates that any of the individuals in question has resided in Freedonia, and they have not yet been given the opportunity to establish business and family ties in the country.

However, just as the court considered the relevant circumstances in *Nottebohm*, so should it consider them here. The intent of the Pankhursts and the Laborians is not to "use" the government of Freedonia for fraudulent purposes. The intent of these individuals is to gain a safe haven from the persecution they have faced.

The Pankhursts and the Laborians have done everything within their limited power to become nationals of Freedonia by expressing their desire to accept Freedonia's offer of residence. In this instance, the other objective factors are precluded by manifestations of intent on behalf of the Pankhursts, the Laborians and the state of Freedonia.⁵⁹

III. BALBOA'S ACTIONS REGARDING THE PANKHURSTS AND THE LABORIANIS CONSTITUTE VIOLATIONS OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW.

Because international human rights law governs relations between states and persons within their territories, "the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally"⁶⁰ This newer mode of international law making emphasizes the importance of conventions and declarations as evidence of custom and minimizes the legal effect of contrary state practice.⁶¹ The primary alternative forms of conduct include the acts of international organizations, such as the United Nations, and international conventions and declarations.⁶² In the field of refugees, the United Nations primarily acts through the United Nations High Commissioner for Refugees (UNHCR). As a body of the United Nations, the

⁵⁹ See *Kosztka's Case*, Moore, *Digest*, vol. III, pp. 820-54.

⁶⁰ *Restatement*, *supra* note 46, at § 701, note 2.

⁶¹ Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 *Harv. Int'l L.J.* 1,74 (Winter 1981).

⁶² See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

actions of the UNHCR can be viewed as collective state practice.⁶³

A. Balboa's failure to grant the Pankhursts and the Laborians refugee status violated customary international human rights law.

The welfare of refugees is no longer a matter that is left to the whim of states. States cannot arbitrarily deny refugee status and hide behind the thin veil of sovereignty. The international community has adopted a standard for evaluating refugee status and requires that all states apply the standard correctly.⁶⁴ Because Balboa applied an improper standard and used inadequate procedures, the refugee status of the Laborians and the Pankhursts was wrongfully denied.

1. The standard used by Balboa to evaluate the refugee status of the Pankhursts and the Laborians is contrary to customary international human rights law.

The starting point for an analysis of the standard for evaluating refugee status in contemporary international law is the 1951 Convention. Although Balboa is not a party to the 1951 Convention, a non-party can be bound by a rule in a convention if it becomes "a customary rule of international law."⁶⁵ As Balboa has recognized, the guidelines in the 1951 Convention are "generally accepted international law." Article 1(A)(2) of the 1951 Convention provides in that to be a refugee a person must demonstrate a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"⁶⁶ The definition was originally limited to persons who met the criteria as a result of events occurring before January 1, 1951, but the temporal limitation was removed by the 1967 Protocol Relating to the Status of

⁶³ See Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 Colum. Hum. Rts. L. Rev. 315, 366 (1991-92).

⁶⁴ Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/ Eng. Rev. 1 (1988) [hereinafter Handbook].

⁶⁵ Vienna Convention on the Law of Treaties, opened for signature May 2, 1969, art. 38, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁶⁶ 1951 Convention, *supra* note 65.

Refugees.⁶⁷ This definition was primarily created to deal with the refugees in Europe after the Second World War⁶⁸

In the twenty seven years since the 1967 Protocol, the notion of who is entitled to international protection as a refugee as a matter of customary international law has continued to evolve toward a broader definition.⁶⁹ The increased emphasis placed on humanitarian concerns and the movement toward a new world order in which state sovereignty is less dominant has driven this expansion.⁷⁰ Evidence of the acceptance into customary law of this expansion can be found in the increasing competence of the United Nations High Commissioner for Refugees (UNHCR) and regional agreements related to refugees.

First, the increasing competence of the UNHCR demonstrates international acceptance of a significantly expanded concept of refugee. The competence of the UNHCR is technically limited by the UNHCR statute which uses essentially the same definition of refugee as the 1951 Convention.⁷¹ However, in practice, the UNHCR acts to protect persons who fall outside that definition.⁷² For example, the UNHCR has been active in the protection of those persons who have been displaced by civil strife, "such as the Kurds in northern Iraq and civilians in parts of Bosnia and Herzegovina."⁷³

Second, significant regional agreements relating to refugees incorporate

⁶⁷ Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, art. 1, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

⁶⁸ Patricia Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 Australian L.J. 148,150 (1986).

⁶⁹ See James C. Hathaway, *The Law of Refugee Status* (1991).

⁷⁰ See generally, Charney, *supra* note 30.

⁷¹ Statute of the Office of the United Nations High Commissioner for Refugees, Ga. Res 428(V), U.N.GAOR, 5th Sess, Supp. No. 20, U.N. Doc. A/1775 (1950).

⁷² Hathaway, *supra* note 69, at 11-13; *Open Session Governing Rules Project: Review and Discussion on the Movement of Persons Across Borders*, Am. Soc'y Int'l L., proceeding of the 85th Annual Meeting 51 (1991).

⁷³ The State of the World's Refugees, *supra* note 30, at 10.

expanded refugee definition. The first was adopted just two years after the 1967 Protocol by the Organization of African Unity (OAU). In the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,⁷⁴ the definition of refugee includes the 1951 Convention definition and an additional provision to include persons whose flight is motivated by "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality"⁷⁵

In 1985, the General Assembly of the Organization of American States (OAS) approved the Cartagena Declaration⁷⁶ which also contains an expanded definition of refugee that does not require a fear of persecution. It provides that refugee status exists for those who flee "because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."⁷⁷

Customary international law no longer limits refugee status to persons whose flight is motivated by a well-founded fear of persecution for a few selected reasons. Customary international law now requires states to grant refugee status to persons whose flight from their country of origin is motivated by a broad range reasons. Thus, Balboa violated customary international law by requiring the Pankhursts and the Laborians to demonstrate a well-founded fear of persecution.

2. The procedure used by Balboa to evaluate the Pankhursts' refugee status is contrary to customary international human rights law.

Assessing a claim for refugee status based on the conclusion that the

⁷⁴ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, opened for signature Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention].

⁷⁵ *Id.* at art. 1, para. 2.

⁷⁶ See Annual Report of Inter-American Commission on Human Rights 1984-85, OEA/Ser.L/II.66, doc. 10, rev. 1, at 190-193 [hereinafter Cartagena Declaration].

⁷⁷ *Id.*

state of origin is "safe" rather than evaluating the motive for the flight of the claimant is contrary to customary international law. The international community through the UNHCR has condemned the use of the "safe country" analysis to deny an asylum claim.⁷⁸ The obvious danger of this method is that asylum claims will be wrongly denied because political and human rights situations change rapidly and vary widely from one social or ethnic group to another.⁷⁹ The danger of a wrongful denial is significantly elevated when, like Hilary, the claimant maintains that she has been singled out by her state of origin for persecution. Balboa denied the Pankhursts' claims for refugee statuses based on an analysis of the domestic policies and living situations in Draconia. Balboa's use of the analysis is more offensive because Balboa's determination that Draconia was a "safe" country was partially motivated by a desire to maintain friendly relations with Draconia.

3. The Laborians are entitled to refugee status under customary international human rights law.

The Laborians are clearly entitled to refugee status since the fear of persecution is no longer required. The practice of the UNHCR and the regional agreements confer refugee status to persons who demonstrate a wide range of compelling reasons for their flight. The Laborians fled massive human rights violations that resulted from the violent civil war that has raged in Laboria for several years. This is clearly a sufficiently compelling reason for flight under customary international law.

4. The Pankhursts are entitled to refugee status under customary international human rights law.

Since the Pankhursts are entitled to refugee statuses under the terms of the 1951 Convention, they are clearly entitled to refugee status under customary international law. Since Balboa's denial of their claim was based on an analysis of the domestic policies and living situations in Draconia, Balboa did not properly consider the facts which demonstrate that their fears

⁷⁸ *The State of the World's Refugees*, supra note 30, at 44-46. See also *Handbook* supra note 64.

⁷⁹ *Id.*

of persecution are well-founded.⁸⁰ Draconia's raiding of the Pankhurst family's apartment and placing Rousseau and Emily under house arrest, as well as the series of increasingly harsh policy measures directed generally at minority groups provide a very sufficient basis for their fears. Neither the absence of any prior persecution against Hilary nor the potential prosecution of the violation of her exit visa detracts in any way from the rapidly escalating attacks on Hilary and her family by Draconia

B. Balboa failed to properly ensure the protection of internationally guaranteed rights of the Pankhursts and the Laborians.

Balboa violated customary international human rights law by failing to adequately protect the Pankhursts and the Laborians. As a result of Balboa's actions, the Pankhursts' and Laborians' rights to freedom of movement, freedom of expression and "family life" have been violated. These violations stem from Balboa's insistence on detaining the Pankhursts and the Laborians in the refugee "hotel." With respect to the Pankhursts, these violations are particularly egregious because there is no justification for placing the Pankhurst family in the "hotel" with the Laborian refugees.

1. Balboa failed to properly ensure protection of the internationally guaranteed right to freedom of movement.

a. Balboa was obligated to protect the Pankhursts' and the Laborians' right to freedom of movement.

"Freedom of movement is regarded as a natural right, meaning that it takes precedence over all prerogatives asserted by the state."⁸¹ The *Restatement* noted the significance of the freedom of movement by including prolonged arbitrary detention in its list of human rights that are a part of customary international law.⁸² The viability of the right to freedom of movement as a part of customary international law has been consistently

⁸⁰ For a discussion of the standard for a "well-founded fear," see *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁸¹ Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* 12 (1987) (defining freedom of movement as "nothing less than the freedom to choose the society in which one wants to live.").

⁸² *Restatement*, *supra* note 46, at § 701.

recognized by both commentators⁸³ and case law.⁸⁴ A facet of the freedom of movement that is of particular relevance to this dispute is the right to seek asylum. The right to seek asylum is an exercise of the freedom of movement because a person must be allowed to contact the authorities of a state in order to initiate proceedings to attain asylum. The plight of the Pankursts and the Laborians demonstrates why the right to seek asylum is the "cornerstone of international protection."⁸⁵ Balboa's denial of the their right to seek asylum has obstructed their access to effective international protection. The Universal Declaration protects several forms of the freedom of movement.⁸⁶ The leading universal human rights instruments and the three most significant regional human rights conventions also embrace these rights.⁸⁷

⁸³ See Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, (1987) (citing 85 countries with constitutional provisions ensuring the right to leave and return.); Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain,"* 65 Tul. L. R. 849, 851 (1991).

⁸⁴ *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980) (arbitrary detention held to be prohibited by customary international law).

⁸⁵ See *The State of the World's Refugees*, supra note 30, at 50.

⁸⁶ Universal Declaration of Human Rights, opened for signature Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 3. (right to life, liberty and the security of person), art. 9 (right to be free from arbitrary detention), art. 12(2) (right to leave any country) [hereinafter Universal Declaration].

⁸⁷ International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 9 (right to be free from arbitrary detention), art. 13(2) (right to leave any country), 999 U.N.T.S. 171 [hereinafter Covenant on Political Rights]; European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 5 (right to liberty and security of person), 312 U.N.T.S. 222 [hereinafter European Convention]; Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those already Included in the Convention and in the Protocol Thereto, opened for signature Sept. 16, 1963, art. 2(2) (right to leave any country), Europ. T. S. no. 46; American Convention on Human Rights, Nov. 22, 1969 art. 7(1) (right to liberty and security of person) and art. 7(3) (right to be free from arbitrary arrest); art. 22(2) (right to leave any country), O.A.S.T.S. no. 36, O.A.S. off rec. OEA/Ser. L./V/II.23/doc.21, rev. 6 [hereinafter American Convention]; African Charter on Human and People's Rights, opened for signature June 27, 1981, art. 6 (right to be free from arbitrary detention); art. 12(2) (right to leave any country), OAU Doc. CAB/LEG/67/3/Rev. 5 [hereinafter African Charter].

- b. Balboa violated the Pankhursts' and the Laborians' right to freedom of movement.

The Laborians' right to freedom of movement has been violated because Balboa subjected them to a prolonged arbitrary detention. Balboa's initial decision to temporarily house the Laborian refugees may not have been an arbitrary detention. However, once the Laborians expressed their desire to come to Freedonia and Balboa refused to allow them to leave, it became an arbitrary detention and their right to freedom of movement was violated.

Similarly, the Pankhursts' right to freedom of movement was also violated. Balboa's initial arrest of the Pankhursts, although designed to prevent their reunion, was justified on the grounds that it was a detention prior to deportation⁸⁸ despite the absence of any indication that they intended to leave Balboa. However, an arrest pursuant to deportation must be both lawful and necessary to not constitute an arbitrary detention under customary law.⁸⁹ There is no indication that the arrest was necessary. Even were the initial arrest lawful and necessary, the detention became arbitrary when Balboa refused to allow the family to come to Freedonia. Balboa had no legitimate reason to detain the family after they expressed an intent to come to Freedonia. Rather, Balboa refused their request because of a concern about the public relations damage that Hilary could do if released and because Balboa did not want to concede that its domestic policies were questionable. Thus, Balboa violated their right to freedom of movement.

2. Balboa failed to properly ensure protection of the internationally guaranteed right to freedom of expression.

- a. Balboa was obligated to protect the Pankhursts' and the Laborians' right to freedom of expression.

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of

⁸⁸ See, e.g., European Convention, *supra* note 87, at art. 5(1)(F).

⁸⁹ Paul Sieghart, *The International Law of Human Rights* 149 (1983).

frontiers."⁹⁰ Further evidence of the acceptance of the freedom of expression into customary international law can be found in other influential alternative forms of state practice.⁹¹ The right to freedom of expression is universally accepted⁹² because without it "other rights cannot be fully realised."⁹³ The present international effort to promote democratic governments depends heavily on the preservation of such political rights.

- b. Balboa violated the Pankhursts' and the Laborians' right to freedom of expression.

The nature of the right to freedom of expression is such that it can be violated by an infringement, rather than an absolute denial.⁹⁴ The Pankhursts' and the Laborians' right to freedom of expression has been violated because detained them, significantly curtailing their ability to send or receive information. Balboa's violation of Hilary's right to freedom of expression is coldly calculated. Balboa's refusal to release her is partially motivated by their fears of what she might report if she were allowed to exercise her right to freedom of expression.

3. Balboa failed to properly ensure protection of the internationally guaranteed right to "family life."
 - a. Balboa was obligated to protect the Pankhursts' and the Laborians' right to "family life."

"The family is the natural and fundamental group unit of society and is

⁹⁰ Universal Declaration, *supra* note 90, at art. 19.

⁹¹ Covenant on Political Rights, *supra* note 87, at art. 19(2); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* December 16, 1966, art. 10(1), 993 U.N.T.S. 3 [hereinafter *Covenant on Cultural Rights*]; European Convention, *supra* note 87, at art. 10(1); American Convention, *supra* note 87, at art. 13(1); African Charter, *supra* note 87, at art. 9(2).

⁹² Elizabeth F. Dedeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 *Stan. J. Int'l L.* 57 (1992).

⁹³ Paris Economic Summit: Declaration on Human Rights, July 15, 1989, reprinted in 28 *I.L.M.* 1253.

⁹⁴ See, e.g., *Lingens*, 103 *Eur. Ct. H. R. (Ser. A)* (1986) (convicting for defamation based on criticism of the leader of the Austrian Socialist Party held a violation); *McIntyre et al. v. Canada*, Communication Nos. 359/1989 and 385/1989, reprinted in 14 *Hum. Rts. L. J. No. 5*, p. 171 (1993) (prohibiting advertisement in the English language in Canada held to be a violation).

entitled to protection by society and the State".⁹⁵ The alternative sources of state practice demonstrate that the right to "family life" is a part of customary international law.⁹⁶

The rights of children, a subset of the right to "family life," is a field of increasing international concern. The Convention on the Rights of the Child⁹⁷ recently codified several rights that were a part of customary law. Even though the Rights of the Child has only been in force a few years, one hundred and twenty five members of the international community had submitted instruments of ratification by January 1, 1993.⁹⁸ This rapid and wide-spread approval indicates that the rights contained within the Rights of the Child were already a part of customary international law.⁹⁹ Balboa's obligation to respect the rights within the Rights of the Child does not arise solely from the customary law status of those rights. Since Article 47 of the Rights of the Child states that it is subject to ratification,¹⁰⁰ Balboa's status as a signatory to the Rights of the Child does not bind it as a party absent an intent to be bound.¹⁰¹ However, Balboa is "obliged to refrain from acts which would defeat the object and purpose"¹⁰² of the Rights of the Child.

⁹⁵ Universal Declaration, *supra* note 86, at art. 16(3). See also *id.* at art. 12 (no arbitrary interference with family).

⁹⁶ Covenant on Political Rights, *supra* note 87, at art. 17(1); Covenant on Cultural Rights, *supra* note 87, at art. 10(1); European Convention, *supra* note 87, at art. 8(1); American Convention, *supra* note 87, at art. 17(1); African Charter, *supra* note 87, at art. 18(1).

⁹⁷ The Convention on the Rights of the Child, *opened for signature* November 20, 1989 G.A. Res. 44/25, 44 U.N. GAOR, Supp. (No. 49), U.N. Doc. A/44/49 (1989) [hereinafter Rights of the Child].

⁹⁸ Marie Jean-Bernard, *International Instruments Relating to Human Rights: Classification and Status of Ratification as of 1 January 1993*, 14 Hum. Rts. L. J. 57, 68 (1993).

⁹⁹ *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 4, 43 (Feb. 20).

¹⁰⁰ The Rights of the Child, *supra* note 97.

¹⁰¹ See Vienna Convention, *supra* note 65, at art. 12.

¹⁰² *Id.* at art. 18.

- b. Balboa violated the Pankhursts' and the Laborians' right to "family life."

In accordance with Balboa's policy of requiring the separation of husbands from wives in the "hotel," Hilary and Rousseau and the Laborian couples have been separated. Even if customary international law permits separate housing for women and men, there is no justification for only separating married couples. Although the right to "family life" is culturally relative, the separation of spouses from each other and parents from their children clearly constitutes a violation of the right to family.¹⁰³

Balboa's actions regarding Emily and the Laborian children clearly violate provisions of the Rights of the Child. By placing the children in foster homes, Balboa violated Article 9 which prohibits the separation of a child and her parent against her will unless it is in the best interests of the child. Balboa may also have violated Article 20 which provides that due regard to a child's linguistic background should be given when a child is separated from her parents and placed in a foster home. Since most of the foster parents only speak Balboan, many of the children have been placed in a home where they must confront a linguistic barrier. Thus, Balboa's separation of Emily and the Laborian children from their families and placing them in Balboan foster homes both violates the terms of Rights of the Child and defeats its object and purpose.

IV. REQUIRING BALBOA TO ACCEPT FREEDONIA'S OFFER TO GIVE THE PANKHURSTS AND THE LABORIANS A NEW HOME IS AN APPROPRIATE REMEDY UNDER INTERNATIONAL LAW.

Despite calls for action from the international community, Balboa made clear its intention to deport the Pankhursts to Draconia with haste and expel the Laborians to Laboria as soon as the appropriate agencies in Laboria were functioning. Voluntary repatriation of refugees is ordinarily the preferred solution because it recognizes that a solution must have the consent of the

¹⁰³ Ronald Thandabantu Nhlapo, *International Protection of Human Rights and the Family: African Variations on a Common Theme*, 3 Int'l J. L. Fam. 1 (1989).

refugee to be permanent.¹⁰⁴ Neither the deportation of the Pankhursts nor the expulsion of the Laborians would be a voluntary repatriation since both the Pankhursts and the Laborians wish to come to Freedonia.

A. Deportation of the Pankhursts to Draconia or expulsion of the Laborians to Laboria will violate the principle of nonrefoulement.

The principle of *nonrefoulement* was codified in the 1951 Convention and prohibits expelling or returning a refugee if "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁰⁵ Since the Pankhursts and the Laborians are refugees whose lives or freedom is threatened in Draconia and Laboria respectively, *nonrefoulement* prohibits Balboa returning them.

1. The Pankhursts and the Laborians are entitled to the protection of nonrefoulement.

Customary international law requires that the principle of *nonrefoulement* be applied to persons who satisfy the elements of the 1951 Convention definition of refugees as well as those persons who are entitled to refugee status under the evolved standard.¹⁰⁶ The Pankhursts and the Laborians are entitled to the protection of *nonrefoulement* because they are refugees under the evolving notion of refugee in customary international law.

2. The lives or freedom of the Pankhursts and the Laborians are threatened in Draconia and Laboria respectively.

Draconia's raid of the Pankhursts' apartment, house arrest of Rousseau and Emily and harsh policy measures directed generally at minority groups demonstrate that the lives or freedom of the Pankhursts is threatened in Draconia. The Laborians fled Laboria because of the massive human rights violations caused by the civil war. Neither the violence nor the human rights violations have ceased, and Laboria remains war-torn.

B. Forcing the Pankhursts and the Laborians to remain in Balboa will render them *de facto* stateless.

¹⁰⁴ *The State of the World's Refugees*, supra note 30, at 103-20.

¹⁰⁵ 1951 Convention, supra note 34, at art. 33.

¹⁰⁶ See Guy Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int'l L. 897 (1986).

International human rights advocates have frequently voiced their concern that Balboa's actions have in effect rendered the Pankhursts and the Laborians "stateless." Concern that they will become stateless is warranted because many international and domestic rights are dependent upon a person's nationality.¹⁰⁷ Nationality is the link to a state through which an individual can obtain international protection.¹⁰⁸ Thus, Balboa's refusal to give the Pankhursts and the Laborians the opportunity to become Freedonian nationals must be closely scrutinized.

1. The Pankhursts and the Laborians have the right to a nationality.

The alternative sources of state practice support the right to a nationality as a part of customary international law.¹⁰⁹ Additionally, the international community has made clear its desire to avoid any acts that will result in the creation of stateless persons.¹¹⁰ Even if Balboa does not have an obligation to grant the Pankhurst family or the Laborian refugees Balboan nationality, Balboa is obligated to not act in a way that will deprive the Pankhursts and the Laborians of their own nationalities.¹¹¹

2. Balboa is not ensuring protection of their right to a nationality.

International law requires that Balboa not be permitted to force the Pankhursts or the Laborians to remain in Balboa because they will become *de facto* stateless. In fact, Rousseau is already *de jure* stateless. Persons are *de facto* stateless if they "no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant

¹⁰⁷ Richard B. Lillich, *Civil Rights 154 in 1 Human Rights in International Law* (T. Meron ed. 1984).

¹⁰⁸ Lassa Oppenheim, *International Law* 610-11 (9th ed. 1992).

¹⁰⁹ Universal Declaration, *supra* note 86, at art. 15; Covenant on Political Rights, *supra* note 87, at art. 24(3) (right to a nationality for children); American Convention, *supra* note 87, at art. 20(1).

¹¹⁰ Convention Relating to the Status of Stateless Persons, *opened for signature* September 28, 1954, 360 U.N.T.S. 131; Convention on the Reduction of Statelessness, *opened for signature* August 30, 1961, 989 U.N.T.S. 175.

¹¹¹ Johannes M.M. Chan, *The Right to a Nationality as a Human Rights*, 12 Hum. Rts L. J. 1, 11 (1991).

them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."¹¹² Neither Laboria nor Draconia have acted to protect the Laborians or the Pankhursts. Additionally, both the Laborians and the Pankhursts have expressed their willingness to be transferred to Freedonia. Thus, by not allowing the Laborians or the Pankhursts to be transferred to Freedonia, Balboa threatens to deny them their right to a nationality and render them stateless.

CONCLUSION

For the foregoing reasons the Applicant, Freedonia, respectfully requests that this honorable Court:

1. DECLARE that the Court possesses jurisdiction over the subject matter of the dispute.
2. DECLARE that Freedonia has standing to bring this dispute.
3. DECLARE that Balboa's actions regarding the Pankhursts and the Laborians were in violation of customary international human rights law.
4. DECLARE that requiring Balboa to accept Freedonia's offer is an appropriate remedy under international law.

¹¹² *A Study of Statelessness*, at 9, U.N. Sales No. 1949. XIV. 2.