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No. 1994

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

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FREEDONIA,  
Applicant

v.

BALBOA,  
Respondent.

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Spring Term

1994

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ON SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE

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MEMORIAL FOR THE RESPONDENT

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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.

Balboa contests the validity of Freedonia's Declaration of acceptance of the Court's jurisdiction under 36(2).

Alternatively, Balboa relies upon the reservations made by the Freedonian Government in its Declaration. By virtue of the principle of reciprocity, which is embodied in Article 36(2), the Balboan Government cannot be bound, vis-a-vis the Freedonian Government, by undertakings which are either broader or stricter than those given by the latter Government. Since the Balboan Government has the right to rely upon the restrictions placed by Freedonia upon her own undertakings, Balboa is convinced that the dispute which has been brought before the Court by the Application of Freedonia, arose before June 4, 1993 and is within the domestic jurisdiction of Balboa, as determined by Balboa. Accordingly, Balboa requests the Court to decline to reach the merits, on grounds that it lacks jurisdiction.

## STATEMENT OF THE FACTS

In May 1993 Balboa hosted the International Conference on the Protection of Minority Rights. (C. 1). Hilary Pankhurst, an international lawyer and citizen of the neighboring state of Draconia, attended the Conference and presented a paper to the conference of delegates. (C. 1). Although Hilary was critical of Draconia's domestic policies, her views had been widely disseminated in the past, both domestically and internationally, and she had never personally suffered any repressive measures from the Draconian authorities. (C. 1).

The night before her scheduled departure from Balboa, Hilary heard that her apartment had been searched by police. (C. 2). On the day of her departure, Hilary requested permission to live in Balboa indefinitely. (C. 2). The Balboan Ministry of Immigration promptly reviewed her request. (C. 2). Although Balboa was not a party to the 1951 Geneva Convention on Refugees, or the 1967 Protocol to that Convention, Balboan officials used their provisions as guidelines. (C. 2).

After considering the reasonableness of Hilary's request, Balboa determined in early June that Hilary did not qualify for refugee status because she did not have a well-founded fear of persecution. (C. 2). Balboa offered to negotiate Hilary's return and repatriation to Draconia. (C. 2). Several days later Hilary's husband, Rousseau, and daughter, Emily, absconded Draconian law and slipped illegally into Balboa. (C. 3). Upon learning of their illegal entry, Balboa apprehended them. (C. 3).

Hilary was held so that the Balboan government could ensure that she would not leave the country illegally pending her return to Draconia. (C. 3). Rousseau and Emily were held for having entered Balboa without the necessary travel documents. (C. 3). Rousseau and Emily requested to remain in Balboa. Balboa considered their applications on the same basis as Hilary's. (C. 3). For the same reasons, their applications were denied. (C. 3). Although not a Draconian national, Rousseau has a right of residence in Draconia because of

his marriage to Hilary. (C. 3). He and Emily were informed that Balboa could not properly consider their requests until they followed the proper procedural requirements. (C. 3).

Although they were arrested for unlawful presence in Balboa, Hilary and Rousseau were not imprisoned. (C. 3). Instead they were sheltered in a refugee hotel, pending their repatriation to Draconia. (C. 3). Emily Pankhurst was safely placed in a Balboan foster home. (C. 4).

Also living in the refugee hotel were several hundred persons who were receiving temporary shelter from Balboa while they waited out a civil war transpiring across Balboa's border in their native country of Laboria. (C. 4). Although not considered refugees under customary international standards, the Laborians were extended Balboan protection until the Laborian government could ensure their safe return. (C. 3). The Pankhursts and the Laborians were provided adequate shelter and food. (C. 3-4). Children were placed in foster homes to ensure their best interests. (C. 4).

Due to Hilary's prominence as an international attorney, Balboa's attempts to shelter the Pankhursts and the Laborians came under public scrutiny. (C. 4). Taking advantage of the pressure on Balboa, a third state, Freedonia attempted to assume control of the Pankhursts and the Laborians. (C. 4). Balboa initially refused Freedonia's interference, maintaining that Balboan policy accorded international standards. (C. 4). Freedonia immediately initiated proceedings before this Court. (C. 4). Only in power three years, Freedonia had not agreed to this Court's jurisdiction until the previous January. (C. 4). In addition, Freedonia's acceptance to this Court's compulsory jurisdiction was conditioned by two reservations which limited this Court's capacity to adjudicate international disputes. (C. 5). Balboa agreed to submit the dispute to this Court. (C. 5). In early August Balboa filed a preliminary objection to this Court's jurisdiction. (C. 5). In September the Court joined the actions. (C. 5).

QUESTIONS PRESENTED

- I. WHETHER THIS COURT'S JURISDICTION IS PRECLUDED WHERE THE CONSENT OF THE PARTIES WAS NEGATED BY FREEDONIA'S INVALID RESERVATION?
- II. WHETHER THE ABSENCE OF A BREACH OF AN OBLIGATION OWED BY BALBOA TO FREEDONIA PREVENTS FREEDONIA'S STANDING IN THIS DISPUTE?
- III. WHETHER THE DETERMINATION OF REFUGEE STATUS AND THE PROPER TREATMENT OF HUMANITARIAN REFUGEES IS NOT SUBJECT TO AN INTERNATIONAL OBLIGATION?
- IV. WHETHER BALBOA'S CONFERRAL OF TEMPORARY REFUGE TO THE PANKHURSTS AND THE LABORIANS CONFORMS WITH STANDARDS OF INTERNATIONAL LAW?

## SUMMARY OF THE PLEADINGS

### I.

The customary international principle respecting the sovereignty of states demands the consent of all interested parties before a dispute may be adjudicated by an international tribunal. Parties may consent to the authority of the International Court of Justice either through a treaty, convention, special agreement or by a declaration of acceptance of the Court's compulsory jurisdiction. No treaty, convention or special agreement between the parties exist which invoke this Court's jurisdiction for this dispute. Freedonia's declaration of acceptance of this Court's compulsory jurisdiction is invalid. It has not properly consented to this Court's authority. Further, this dispute could not be adjudicated until Draconia and Laboria consented.

Even if Freedonia's declaration of acceptance of this Court's jurisdiction were valid, reciprocity of this declaration would prevent this Court's adjudication of this dispute. The issues of this dispute are essentially within Balboa's domestic jurisdiction. The determination of refugee status is in the domain of the receiving state. To abrogate Balboa's right to administrate its domestic issues by allowing Freedonia to intervene would violate the customary international principles of state sovereignty and non-intervention.

Before an international dispute can be placed before an international tribunal, the parties must seek to resolve the dispute by other means. First, local remedies must be exhausted in the state where the alleged breach of an international obligation occurred. Second, the parties must meaningfully attempt to negotiate the dispute. Freedonia did not seek resolution of this dispute through any local remedy. In addition, Freedonia made no attempts to negotiate with Balboa. Instead, Freedonia's first resort was to initiate proceedings before this Court.

## II.

No conventional or customary rules of international law provide Freedonia standing to bring this dispute. Freedonia is not a party to a treaty or convention which grants it an interest in the Pankhursts or the Laborians. Neither the Pankhursts nor the Laborians are nationals of Freedonia. A state may seek diplomatic protection only on behalf of its nationals. Further, Balboa has breached no obligations *erga omnes*. Thus, Freedonia may not seek redress for this dispute on that basis.

## III.

In the event that this Court determines that it has jurisdiction, there is no conventional or customary rule of international law which obligates Balboa to grant refugee status to the Pankhursts and the Laborians, or to accord them treatment as refugees. Balboa is not a party to any of the treaties which could arguably impose such a duty. Articles 34 and 35 of the Vienna Convention on the Law of Treaties prevent treaties from creating obligations for third parties without their express consent.

Although Balboa has accepted the definition of "refugee" contained in the 1951 Convention as customary, the treatment provisions of the 1951 Convention are not recognized as customary international law. Rousseau and Emily Pankhurst do not qualify for refugee status as they cannot satisfy its requirement of a "well-founded fear of persecution." Likewise, the Laborians are humanitarian refugees, and thus do not qualify for treatment under the 1951 Convention.

Balboa's status as a signatory to the 1989 Convention on the Rights of the Child does not prejudice its position since a signature does not convey the necessary consent of a state to be bound by a treaty if the treaty is subject to ratification. Furthermore, the Convention of the Child and the other human rights treaties upon which Freedonia relies have not attained the widespread level of acceptance necessary to impose an obligation upon a non-party. Should this Court decide to give them effect binding *erga omnes*, Balboa's actions regarding the Pankhursts and the Laborians did not violate

the terms of the treaties at issue.

#### IV.

Assuming *arguendo*, that Balboa was under an obligation, Balboa accorded treatment to the Pankhursts and the Laborians which fully complies with that demanded by international law. Even if the Pankhursts are refugees under the 1951 Convention, they were nevertheless in Balboa unlawfully. Thus, Balboa was entitled to impose necessary restrictions on their movements prior to deportation. In addition, Balboa's detention of the Laborian refugees was consistent with international law regarding temporary refuge of humanitarian refugees. Furthermore, Balboa's treatment of the Pankhursts and Laborians is warranted due to significant concerns of national security and public order.

Balboa willingly accepted its humanitarian duty to provide temporary refuge to the Laborians. Balboa's intention to repatriate these persons at the conclusion of the civil war occurring within Laboria is consistent with international law. Finally, Balboa's decision to deport the Pankhursts in a view to repatriate them with their country of origin clearly comports with international standards.

Finally, Balboa's denial of Freedonia's proposal to transfer the refugees to its control was also done in their best interests. Indeed, resettlement in a third country is considered the least satisfactory solution for refugees due to the potential difficulties of assimilation into an unknown society.

## PLEADINGS AND AUTHORITIES

### I. THIS COURT'S JURISDICTION IS PRECLUDED WHERE THE CONSENT OF THE PARTIES WAS NEGATED BY FREEDONIA'S INVALID RESERVATION.

An overriding concern for the propriety of its own jurisdiction has marked this Court's history.<sup>1</sup> Tempering the utility of its jurisdiction with a persistent restraint, this Court has carefully charted its own authority within the boundaries set by the consent of the parties appearing before it.<sup>2</sup> Where its consideration would exceed these boundaries, this Court has consistently refused to adjudicate.<sup>3</sup>

#### A. This Court does not have the consent of the interested parties necessary to adjudicate this dispute.

Though Article 59 of this Court's creating statute excludes the use of precedential authority in adjudicating disputes,<sup>4</sup> in fact, this Court has developed through its decisions customary principles of international law.<sup>5</sup> This Court has treated the breadth of its jurisdiction as stretching only as far as it is conferred by the will of the parties,<sup>6</sup> a practice that reflects the powerful sanctity of state sovereignty.

Parties may confer consent to this Court's jurisdiction through Article 36, paragraphs (1) or (2), of this Court's statute. The former allows consent through the provision of a treaty or convention, a special agreement, or a matter referred by the Charter of the United Nations (Charter); the latter through a declaration of acceptance of this Court's compulsory jurisdiction.

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<sup>1</sup> See Ram Prakash Anand, *International Courts and Contemporary Conflicts* 198-199 (1974).

<sup>2</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court* 91 (2d ed. 1958).

<sup>3</sup> See e.g., *Status of Eastern Carelia*, 1923 P.C.I.J. (ser. B) No. 9, 27-28; *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, 16; *Monetary Gold Removed from Rome in 1943 (Italy. v. Fr.)*, 1954 I.C.J. 19; *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93 (Jurisdiction July 22).

<sup>4</sup> Statute of the International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993 [hereinafter Statute].

<sup>5</sup> See Rebecca M.M. Wallace, *International Law: A Student Introduction* 251 (1986). See generally Lauterpacht, *supra* note 2.

<sup>6</sup> Ian Brownlie, *Principles of Public International Law* 719 (4th ed. 1990).

There is neither a treaty between Freedonia and Balboa nor a convention to which they are both parties which provides this Court's consultation with regard to this dispute. The parties have made no special agreement to appear. No provisions of the Charter invoke this Court's authority for this dispute. Articles 55 and 56 only speak broadly and ideally to international economic and social cooperation. This dispute suggests issues too narrow for resolution under these broad constructs. Thus, this Court's jurisdiction could be based only through declarations pursuant to Article 36(2) of the Court's statute filed by the parties. Though both parties purport such a declaration, only Balboa's provides this Court legitimate consent.

1. Freedonia's declaration of acceptance of this Court's jurisdiction under Article 36(2) of the Court's statute is invalid.

Parties are permitted to express reservations against this Court's authority in their declarations under Article 36(2), also known as the Optional Clause.<sup>7</sup> However, these reservations must agree with the "object and purpose" of Article 36.<sup>8</sup> Article 36(6) endows this Court with the power to determine its own jurisdiction regarding a dispute. A reservation which attempts to eviscerate Article 36(6) is, therefore, invalid.<sup>9</sup> Since a reservation is inseverable from the declaration it qualifies,<sup>10</sup> an invalid reservation invalidates the entire declaration.<sup>11</sup> An "automatic" reservation attempts to give the reserving state the capacity to determine which

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<sup>7</sup> See 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, 1150 (1986).

<sup>8</sup> Vienna Convention on the Law of Treaties, opened for signature May 2, 1969, art. 19, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>9</sup> See *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9, 48 (July 6) (separate opinion of Judge Lauterpacht); See also *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 101 (Preliminary Objections Mar. 21) (dissenting opinion of Judge Lauterpacht); Ende, *supra* note 7, at 1155.

<sup>10</sup> *Norwegian Loans*, 1957 I.C.J. at 43-44. For discussion of close connection between the reservation and the declaration, see *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 1, 33 (Judgment of Dec. 19).

<sup>11</sup> See James Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 1979 Brit. Y.B. Int'l L. 63, 65. See also Ende, *supra* note 7, at 1155.

international disputes are within its own domestic jurisdiction.<sup>12</sup>

Conversely, this type of reservation purports to determine which disputes are within this Court's jurisdiction, a breach of the object and purpose of Article 36(6).

Freedonia's Optional Clause declaration contains an automatic reservation. Broaching the letter of Article 36(6), this invalid reservation invalidates Freedonia's entire declaration. Without a valid Article 36(2) declaration, Freedonia cannot invoke the Court's Article 36(2) authority.

2. Even were the declaration valid, Freedonia's *ratione temporis* would preclude the jurisdiction of this Court.

Freedonia's declaration includes a *ratione temporis* which limits the Court's jurisdiction to disputes arising after June 4, 1993. The subject of this dispute is whether the Pankhursts and the Laborians should have been granted refugee status. The source of this dispute arose before June 4, 1993.

In *Electricity Company*, Judge Erich wrote, "[a]ny dispute caused by facts or measures of a legal character prior to a ... critical date are excluded from the application of the [*ratione temporis*]."<sup>13</sup> *Phosphates in Morocco* held the "source of the dispute" to be determinative.<sup>14</sup> Thus, the source of the dispute is the real cause of the dispute.<sup>15</sup> Though this Court found in *Right of Passage* that the dispute occurred when the elements comprising it were complete,<sup>16</sup> there is a primary distinction between that case and the case at bar. In *Right of Passage*, the parties could not agree what was the legal issue of the dispute,<sup>17</sup> contributing to the confusion over

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<sup>12</sup> See generally Crawford, *supra* note 11.

<sup>13</sup> *Electricity Company of Sofia and Bulgaria*, 1939 P.C.I.J. (ser. A/B) No. 77, 64, 142 (separate opinion of Judge Erich).

<sup>14</sup> *Phosphates in Morocco*, 1938 P.C.I.J. (ser. A/B) No. 74, 23.

<sup>15</sup> See Shabtai Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* 42 (1960).

<sup>16</sup> *Right of Passage Over Indian Territory (Port. v. India)*, 1960 I.C.J. 6, 34 (Jurisdiction Apr. 12).

<sup>17</sup> *Right of Passage*, 1960 I.C.J. at 31-32.

when the dispute arose. However, Judge Badawi noted that the situation giving rise to the dispute existed long before the critical date.<sup>18</sup> This realization strengthened the principles concerning the source of the dispute, first established in *Electricity Company and Phosphates in Morocco*.

There is no confusion over the legal issue in this dispute. The issue in this case concerns the refugee status of the Laborians and the Pankhursts. The source of this dispute is the treatment due these individuals. Assuming Freedonia could properly bring this dispute before this Court, their interest would depend entirely on the interests of the Laborians and Pankhursts. The interests of these individuals were vested before June 4, 1993.

The Laborians have been receiving shelter in Balboa since the summer of 1992. The alleged violations concerning the Laborians which give rise in part to Freedonia's claim would have occurred the moment the Laborians were placed in the temporary shelters. Similarly, the events leading up to the Pankhursts' applications for asylum arose when Hilary first sought asylum in Balboa in May 1993. Thus, the source of the dispute arose before Freedonia's declaration of acceptance could have taken effect. Again, Freedonia has not provided the consent necessary to invoke the Court's authority.

3. Not all interested parties are present before this Court.

Central to the requirement of the parties' consent is the bar against this Court's judgment where the interests of a non-party may be affected. In *Monetary Gold* this Court refused to consider the merits due to the absence of Albania from the proceedings.<sup>19</sup> Referring to Albania, the jurists stated:

Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third state, the Court cannot without the consent of that third state, give a decision on that issue binding upon any state, either the third state, or any one of the parties before it.<sup>20</sup>

Not all of the states possessing an interest in this dispute are present

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<sup>18</sup> *Right of Passage*, 1960 I.C.J. at 69. See Rosenne, *supra* note 15, at 43.

<sup>19</sup> *Monetary Gold*, 1954 I.C.J. at 32.

<sup>20</sup> *Monetary Gold*, 1954 I.C.J. at 33.

at these proceedings. Draconia has a fundamental interest in the Pankhursts because Hilary and Rousseau are bona fide fugitives. Hilary has substantially violated the terms of her lawful exit visa. As a Draconian citizen, Hilary is bound by Draconian laws. Draconia commits no *prima facie* violations of international law by requiring its citizens to obtain and respect the terms of an exit visa when traveling abroad. Any Draconian who disobeys the terms of an exit visa has broken Draconian law. In this regard, her speculative status as a refugee is irrelevant.

Though Rousseau is not a Draconian national, he is the husband and father of Draconian citizens and he has broken Draconian law on Draconian soil. It would be unfairly presumptuous to consider his earlier detainment in Draconia a violation of his human rights. Hilary was a nationally and internationally known critic of Draconian policy long before her trip to Balboa, yet had previously suffered no repercussions. To relate his detainment in Draconia with Hilary's situation would presume a causal connection that cannot not be presumed. Draconia also has a substantial interest in Emily. She is a national of Draconia. To adjudicate this dispute without Draconia would abrogate these sovereign interests.

Similarly, Laboria has a fundamental interest in those Laborians receiving temporary shelter in Balboa. The existence of a civil war should not deprive Laboria of its right to avoid the adjudication of its interests without its consent. Action by this Court in this dispute would violate the established doctrine of consent and divest Draconian and Laborian rights.

- B. The issues of this dispute do not fall within this Court's jurisdiction.
- 1. Reciprocity of Freedonia's *ratione materiae* places this dispute within Balboan domestic jurisdiction.

Freedonia's automatic reservation precludes from this Court's jurisdiction any dispute which is essentially within Freedonian jurisdiction as determined by the Freedonian government. If the validity of this reservation were upheld, it would be available to Balboa through reciprocity.

The principle of reciprocity is well-established.<sup>21</sup> It is based on the language found in Article 36(2) which employs a state's declaration only "in relation to any other State accepting the same obligation." Reciprocity protects a state whose declaration subjects it to broader degrees of global scrutiny than that accepted by the declaration of the opposing party.

The Balboa Optional Clause declaration contains no reservations. Balboa respects and accepts without reservation international adjudication over Balboa disputes. Yet, to hold Balboa to a greater threat of judicial scrutiny than Freedonia would subvert the principle of sovereign equality. In *Norwegian Loans*, Norway was allowed to rely on a French automatic reservation that was identical to the one claimed by Freedonia.<sup>22</sup> Analogously, fairness demands reciprocal use by Balboa of Freedonia's reservations.

- a. The issues giving rise to the proceedings are domestic in nature.

The determination of refugee status is within the dominion of domestic jurisdiction.<sup>23</sup> The decision to appoint refugee status to an individual is left to the receiving state.<sup>24</sup> Each state must set its own procedures for defining a refugee according to its particular government structure.<sup>25</sup>

This dispute concerns the refugee status of persons who sought refuge in Balboa. Stripping from Balboa hands the right to control this determination would preempt its customary right to set its own refugee status procedures.

- b. International adjudication of this dispute would violate customary international principles of sovereignty and non-intervention.

The sovereign right of every nation is one of the strongest principles

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<sup>21</sup> See also *Ende*, *supra* note 7, at 1153, n.45; Leo Gross, *Bulgaria Invokes the Connally Amendment*, 56 *Amer. J. Int'l Law* 357 (1962).

<sup>22</sup> *Norwegian Loans*, 1957 I.C.J. at 23-24.

<sup>23</sup> Office of the United Nations High Commissioner, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 189, HCR/1P/4 Eng. rev. 1 (1988) [hereinafter *Handbook*].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

governing customary international law.<sup>26</sup> The Charter is conditioned by this rule.<sup>27</sup> Thus, human rights issues that arise within the domestic jurisdiction of a state are protected by the sovereign principle. Accordingly, the right of non-intervention in domestic affairs from external forces is widely accepted.<sup>28</sup> Intervention by this Court into Balboa's treatment of those seeking refuge would violate the sovereign principle.

Humanitarian exceptions to sovereign rights focus on cases of extreme and massive violations.<sup>29</sup> These situations have no resemblance to the treatment afforded the Pankhursts and the Laborians.

2. The dispute does not fall within the jurisdictional categories enumerated in Article 36(2).

This dispute appears before the Court pursuant to its jurisdiction created under Article 36(2). Article 36(2) enumerates four types of disputes which the Court may hear: "(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation."<sup>30</sup> This Court may only consider under guise of Article 36(2) authority, a matter or case which agrees with the description given in at least one of these four categories.

No treaty between Freedonia and Balboa exists nor are the facts of this

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<sup>26</sup> See generally Brownlie, *supra* note 6, at 287-297.

<sup>27</sup> U.N. Charter, art. 2, para. 7 (stating, "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.").

<sup>28</sup> See, e.g. *Conference on Security and Co-operation in Europe*, (Helsinki Accords) August 1, 1975, reprinted in 14 I.L.M. 1292. See also Virginia Leary, *When Does the Implementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State? - the interactions of Articles 2(7), 55 and 56 of the U.N. Charter 16 18 in International Human Rights Law and Practice* (James C. Tuttle ed. 1978).

<sup>29</sup> See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32, (Feb. 5), see *infra* notes 50, 56 and accompanying text.

<sup>30</sup> Statute, *supra* note 4, at art. 36, para. 2.

case in dispute. Since the issues giving rise to this dispute are domestic in nature, there is no question of international law. Further, this dispute does not concern the nature or extent of a reparation for the breach of an international obligation. Consequently, this dispute does not involve any of the issues this Court is empowered to consider under Article 36(2).

C. Freedonia has not attempted to settle this dispute by other means.

The invocation of this Court's attention should be a last resort. Alternative methods of dispute resolution facilitate communication between states and encourage respect for state sovereignty. This ideal is reflected in many of the international instruments that describe customary international law.<sup>31</sup> The 1951 Convention reflects a concern that parties cannot invoke this Court's attention unless the dispute "cannot be settled by other means."<sup>32</sup>

1. Local remedies have not been exhausted.

Before a state may be brought to the Court for alleged violations which would have occurred on its soil, attempts for redress should be made by the applicant state in the domestic courts of the respondent. This is an established rule of customary international law.<sup>33</sup> Respect for this rule affords the state concerned the chance to address the problem within its own system, limits the frequency of international claims, and encourages the sovereignty of nations.<sup>34</sup> This requires reference not just to a nation's courts but also to any procedure available to a litigants in that nation.<sup>35</sup>

The need to exhaust local remedies before international adjudication was

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<sup>31</sup> See e.g., U.N. Charter, art. 33, para. 1; Convention Relating to the Status of Refugees, opened for signature July 28, 1951, art. 38, 189 U.N.T.S. 137 [hereinafter 1951 Convention], amended by Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

<sup>32</sup> 1951 Convention, *supra* note 31, at art. 38.

<sup>33</sup> See Wallace, *supra* note 5, at 172-173.

<sup>34</sup> *Id.* at 173.

<sup>35</sup> *Ambatielos Arbitration (Greece v. U.K.)*, 12 R.I.A.A. 83 (1956).

addressed in *Interhandel*,<sup>36</sup> and is also reflected in numerous international conventions, as well.<sup>37</sup> Special Rapporteur of the International Law Commission labeled this principle as the "best guarantee of further substantial progress in the acceptance of new obligations with regard to human rights."<sup>38</sup> He further warned against tampering with the existing interpretation of this principle.<sup>39</sup> Logically, reference to this Court must not proceed until the highest Balboa court has ruled on the matter.<sup>40</sup> Freedonia has not sought a remedy in Balboa courts. Within days of Balboa's initial refusal, Freedonia brought suit before this Court.

The insistence on the exhaustion of local remedies is generally excepted in only two situations: where such exhaustion would be unreasonably prolonged or where local remedies would be ineffective or unavailable.<sup>41</sup> Neither of these situations apply.

First, Balboa has given prompt attention to both the Laborians and the Pankhursts. Balboa officials responded to Hilary's situation in a few weeks, even submitting their review to public scrutiny. Balboa also responded to Rousseau and Emily's cases quickly. The Laborians were sheltered upon arrival to Balboa. The length of their stay is due both to Balboa's patience with the strife in their homeland and reticence to subject them to more violence, a

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<sup>36</sup> See *Interhandel*, 1959 I.C.J. at 27.

<sup>37</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 171 (1989). See e.g. International Covenant on Civil and Political Rights, opened for signature, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Covenant on Political Rights]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 222 [hereinafter European Convention]; American Convention of Human Rights, Nov. 22, 1969, 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, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 [hereinafter African Charter].

<sup>38</sup> Robert Ago, *Sixth Report on State Responsibility*, [1977] 2 Y.B. Int'l L. Comm'n (pt.1) at 43, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Part 1) (1978).

<sup>39</sup> *Id.*

<sup>40</sup> Louis Henkin et al., *International Law: Cases and Materials* 558 (2d ed. 1987).

<sup>41</sup> Meron, *supra* note 37, at 173.

violence that exists just over Balboa's border.

Second, there is no indication that Balboan courts would not give full regard to customary international principles when reviewing the needs of the Pankhursts and Laborians. To the contrary, Balboa's demonstrated respect for these principles and quick response to the situation indicate its concern for the best interests of all. If anything, this concern suggests Balboa's local remedies would not only be available but effective and adequate, as well.

2. Freedonia has not adequately attempted to negotiate this dispute.

Most international agreements also insist that parties attempt to settle their dispute through negotiation or diplomacy before seeking resolution in a tribunal.<sup>42</sup> Many tribunals have considered negotiation as an implied prerequisite to their adjudication.<sup>43</sup> This Court in *Chorzow* said that the prerequisite of negotiation confirms to a subsequent tribunal that a "difference of views is in question which has not been capable of being otherwise overcome."<sup>44</sup> *North Sea Continental Shelf* added that negotiation must be entered with an intention to reach agreement.<sup>45</sup> The parties must engage themselves "meaningfully" rather than insisting obstinately on positions without considering modification.<sup>46</sup>

Freedonia has not adequately attempted to negotiate with Balboa. Freedonia offered no alternatives to its complete resettlement of the Pankhursts and Laborians nor did it suggest better methods of treatment within Balboa. Had Freedonia been willing to cooperate with Balboa the two states may have been able to create even better resources for shelter and comfort than that which either state could provide alone. Instead, Freedonia chose

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<sup>42</sup> Henkin, *supra* note 40, at 557.

<sup>43</sup> *Id.*

<sup>44</sup> *Factory at Chorzow (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Judgment of Sept. 13).

<sup>45</sup> *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)* 1969 I.C.J. 4, 47-48 (Feb. 20).

<sup>46</sup> *North Sea*, 1969 I.C.J. at 47-48.

immediate recourse to this Court after only an initial demure from Balboa, an action that may do more to improve Freedonia's public stature than the current livelihoods of the Pankhursts and Laborians.

II. THE ABSENCE OF A BREACH OF AN OBLIGATION OWED BY BALBOA TO FREEDONIA PREVENTS FREEDONIA'S STANDING IN THIS DISPUTE.

A state must possess *jus standii* in order to present a dispute before this Court, in accordance with Article 37 of the Court's statute. Generally, this requires a state to have a legal interest in the dispute.<sup>47</sup> There is no floating right of every state to vindicate every possible act by another state.<sup>48</sup> This right must derive from either a treaty obligation, an interest capable of diplomatic protection, or an obligation *erga omnes*. None of these situations are applicable to the present dispute.

A. No international instruments exist which grant Freedonia standing in this dispute.

Article 36(1) of this Court's statute allows a state to bring another state before the Court for the violation of a treaty to which both. However, no such treaty between Balboa and Freedonia exists. Though both are members of the United Nations, Balboa has breached no obligation found in the Charter. Without a mutual instrument defining Freedonia's legal interest in this dispute, Freedonia has no standing under to Article 36(1).

B. No principles of customary international law exist which grant Freedonia standing in this dispute.

As a state which has no redress through conventions or treaties, Freedonia must find *jus standii* in more general customary international principles. Only an individual's state of nationality may diplomatic protection that individual's interests.<sup>49</sup> The only exception which allows a state to sue another state on behalf of persons who are nationals of neither

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<sup>47</sup> See Henkin, *supra* note 40, at 526-530. See also Oscar Schachter, *International Law in Theory and Practice* 205-208 (1991).

<sup>48</sup> Schachter, *supra* note 47, at 206.

<sup>49</sup> Wallace, *supra* note 5, at 168-169. See *North American Dredging Company Case (U.S./Mex.)*, 4 R.I.A.A. 26, 29 (1926).

requires the breach of an obligation *erga omnes*.<sup>50</sup> Yet, this type of obligation implies conduct far different from the facts of this dispute. Importantly, this Court has never based the standing of an otherwise disinterested state on the enforcement of an obligation *erga omnes*.<sup>51</sup>

Standing based on obligations owed to a entire community was denied to Ethiopia and Liberia in *South West Africa*.<sup>52</sup> This Court held that its creating statute did signify this communal interest.<sup>53</sup> *Nuclear Tests* held that a party must possess "rights of its own distinct from a general community interest."<sup>54</sup> *Barcelona Traction* ruled that a state may only "claim a subjective right on the basis of a personal and direct interest."<sup>55</sup> Following the principles elucidated in these cases, Freedonia lacks the necessary standing. Freedonia has no rights or interests of its own in this dispute. The facts of this dispute indicate no association between Freedonia and the other parties from which rights independent of this dispute could have stemmed.

Even if standing for an otherwise disinterested state was routinely based on an obligation *erga omnes*, its reach would not stretch to this dispute. *Barcelona Traction* described violations of an obligation *erga omnes* as acts of aggression, genocide, slavery, and racial discrimination.<sup>56</sup> The facts of this dispute indicate nothing approaching these extreme standards or resembling these descriptions.

Freedonia may attempt to argue that the current list of obligations *erga*

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<sup>50</sup> See *Barcelona Traction*, 1970 I.C.J. at 32.

<sup>51</sup> See Schachter, *supra* note 47, at 208.

<sup>52</sup> *South West Africa (Eth. v. S.Afr., Lib. v. S.Afr.)*, 1966 I.C.J. 4 (Second Phase July 18).

<sup>53</sup> *South West Africa*, 1966 I.C.J. at 22.

<sup>54</sup> *Nuclear Tests (Austl. v. Fr., N.Z. v. Fr.)*, 1974 I.C.J. 253, 424.

<sup>55</sup> *Barcelona Traction*, 1970 I.C.J. at 327.

<sup>56</sup> *Barcelona Traction*, 1970 I.C.J. at 32.

*omnes* should be expanded. Yet, an expanded description would be vulnerable to abuse by states capriciously seeking political advantage and would discourage many states from accepting this Court's compulsory jurisdiction.<sup>57</sup>

In the absence of an obligation *erga omnes*, there must be a close link connecting the allegedly injured individual and the state attempting redress for the injury. *Nottebohm* measured nationality as a "legal bond having as its basis a social fact of attachment, a genuine connection of existence."<sup>58</sup> Nationality expresses that "the individual upon whom it is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State."<sup>59</sup> Further, this nationality link should exist when the alleged injury occurs and when the claim is brought before the Court.<sup>60</sup> Freedonia had no connection with any of the interested persons until Freedonia's offer of admission, much less, one so great that either the Pankhursts or Laborians could be said to have a connection with Freedonians greater than that with Draconians or Laborians.

*Nottebohm* resolved an issue of standing so as to limit the breadth of diplomatic protection, which lessened the chance of its abuse and strengthened state sovereignty.<sup>61</sup> The principles of customary international law have defined strong boundaries of consent, sovereignty, and standing. To encroach these principles, an obligation of some sort owed by Balboa must be found.

### III. THE DETERMINATION OF REFUGEE STATUS AND THE PROPER TREATMENT OF HUMANITARIAN REFUGEES IS NOT SUBJECT TO AN INTERNATIONAL OBLIGATION.

#### A. There are no conventional international obligations binding on Balboa pertaining to the Pankhursts or the Laborians.

The Vienna Convention provides that "[a] treaty does not create

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<sup>57</sup> *Id.*

<sup>58</sup> *Nottebohm, (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

<sup>59</sup> *Nottebohm*, 1955 I.C.J. at 23.

<sup>60</sup> Wallace, *supra* note 5, at 170.

<sup>61</sup> Schachter, *supra* note 52, at 208.

obligations or rights for a third state without its consent."<sup>62</sup> Since there is no indication that Balboa consented to be bound by any conventions other than the Vienna Convention, no obligation can be forced upon Balboa with respect to the terms of any other conventions.<sup>63</sup>

1. The provisions of the 1951 Convention and the 1967 Protocol are not binding on Balboa.

Balboa is not a party to the 1951 Convention; therefore, Balboa is not bound by its terms. Although the guidelines for determining refugee status in the 1951 Convention are "generally accepted international law," its provisions concerning treatment are not applicable to this dispute since the Pankhursts and the Laborians do not meet its definition of refugee.<sup>64</sup> As it is the prerogative of the receiving state to determine refugee status,<sup>65</sup> Balboa has determined that the Pankhursts and Laborians do not qualify as refugees.<sup>66</sup> The procedure Balboa followed fully complies with the model guidelines suggested by the United Nations High Commissioner for Refugees.<sup>67</sup>

Hilary Pankhurst does not qualify for treatment as a refugee because she does not have a well-founded fear of persecution. Although Hilary may be able to establish a subjective fear of apprehension and prosecution for violating

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<sup>62</sup> Vienna Convention, *supra* note 8, at art. 34.

<sup>63</sup> Atle Grahl-Madsen, 1 *The Status of the Refugee in International Law* (1966).

<sup>64</sup> See Nirmila Chandrahasan, *A Precarious Refuge: A Study of the Reception of Tamil Asylum Seekers into Europe, North America and India*, 2 *Harv. Hum. Rts. Y.B.* 55, 62 (1989).

<sup>65</sup> See *Handbook, supra* note 23, at para. 189; see also L. Holburn, *Refugees: A Problem of Our Time* 164 (1975).

<sup>66</sup> 1951 Convention, *supra* note 31, at art. 1, para.A(2) (defining a refugee as:

"any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.").

<sup>67</sup> See *Handbook, supra* note 23, at para. 192.

the terms of her exit visa, an objective evaluation of the conditions in Draconia precludes satisfaction of the requirement that such fear be well-founded.<sup>68</sup> Hilary's views have been widely disseminated in the past and she has never suffered any repressive measures from Draconian authorities.

Likewise, neither Rousseau nor Emily Pankhurst can fulfill the criteria for refugee status under the 1951 Convention. Although Rousseau is stateless, he does not qualify for refugee status since there is no evidence to establish that Rousseau has any reason to fear persecution. The fact that the Pankhursts' apartment was searched, even if unlawfully, does not give rise to a well-founded fear of persecution. Although Rousseau and Emily Pankhurst were placed under house arrest in Draconia, it is clear that they left Draconia simply to be reunited with Hilary, rather than because of any fear of persecution.

As for the Laborians, they do not qualify for refugee status under the 1951 Convention because their flight was prompted by a civil war occurring within Laboria.<sup>69</sup> They are "humanitarian refugees" and as such do not qualify for treatment as 1951 Convention refugees.<sup>70</sup> Although there were human rights violations occurring within Laboria, there is no evidence that these particular Laborians were themselves victims of persecution. Thus, they cannot satisfy the requirement of an individualized determination of a well-founded fear of persecution.

2. Balboa is not bound by treaties to which it is not a party.

The international law of treaties precludes binding Balboa to treaties to which Balboa is not a party.<sup>71</sup> According to Article 35 of the Vienna Convention, such an obligation can only arise "if the parties to the treaty

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<sup>68</sup> See *Id.* at paras. 37-43.

<sup>69</sup> See Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Thinking?* 26 Va. J. Int'l L. 857, 859 (1986).

<sup>70</sup> See generally Hailbronner, *supra* note 69.

<sup>71</sup> Vienna Convention, *supra* note 8, at art. 34.

intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing."<sup>72</sup> These Vienna Convention provisions prevent parties to a treaty from imposing their will on third states.

Balboa's signature on the 1989 Convention on the Rights of the Child only obligates Balboa to "refrain from acts calculated to frustrate the objects of the treaty."<sup>73</sup> The Rights of the Child explicitly requires ratification for binding effect.<sup>74</sup> Thus, Balboa's signature to it does not establish Balboa's consent to be bound to it.<sup>75</sup>

- B. There are no customary rules of international law binding on Balboa with regard to this dispute.
  - 1. There is no consistent state practice pertaining to the treatment of refugees.

Since there is no conventional obligation binding on Balboa with respect to these "refugees," this Court must look to customary international law to determine the existence of any international obligation. Pursuant to Article 38 of the Statute of the International Court of Justice,<sup>76</sup> states may become bound by customary international law if there is evidence of both a common practice among states as well as the state's conviction that this practice is rendered obligatory by the existence of law requiring it, *opinio juris vel necessitatis*.<sup>77</sup> According to the actual practice of states regarding the treatment of refugees, Freedonia cannot bear its burden of demonstrating

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<sup>72</sup> Vienna Convention, *supra* note 8, at art. 35.

<sup>73</sup> Ian Brownlie, *Principles of Public International Law*, 606-607 (3d ed. 1979); *See also* Vienna Convention, *supra* note 6, at art. 18.

<sup>74</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, art. 47, U.N.G.A. Res. 44/25 [hereinafter Rights of the Child].

<sup>75</sup> Vienna Convention, *supra* note 8, at art. 18; Brownlie, *supra* note 6, at 606.

<sup>76</sup> Statute, *supra* note 4, art. 38 para. 1 (b).

<sup>77</sup> *North Sea Continental Shelf*, 1969 I.C.J. at 41 (Feb.20); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27); *see also* Patricia Hyndman, *Asylum and Non-Refoulement: Are these Obligations Owed to Refugees under International Law?* 57 Phil. L. J. 43, 46 (1982) [hereinafter Hyndman, *Asylum*].

consistent state practice along with the requisite *opinio juris* necessary to establish customary law in this area.<sup>78</sup>

a. State practice does not impose a duty upon states to grant asylum.

Balboa has not violated any customary rule of international law by denying the applications for asylum presented by the Pankhursts and the Laborians. Balboa is under no obligation to grant asylum to these displaced persons, because there is no right to asylum under international law.<sup>79</sup> Although the Universal Declaration of Human Rights<sup>80</sup> gives refugees the right to seek and enjoy asylum, this "right" merely confers on the state the discretion of whether to provide asylum. There are other international instruments which contain provisions relating to asylum; however, such provisions do not "impose upon contracting states any duty to grant asylum to persons who are not their nationals."<sup>81</sup> Indeed, state practice reflects that the decision to grant asylum is within the sovereignty of each state.<sup>82</sup>

b. Although Balboa concedes that the doctrine of nonrefoulement of refugees has risen to the level of customary law, it is inapplicable to this matter because the Pankhursts and Laborians are not refugees.

The principle of *nonrefoulement*, codified in Article 33 of the 1951 Convention, prohibits states from returning a refugee to a country where he may face persecution.<sup>83</sup> However, actual state practice indicates that

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<sup>78</sup> Brownlie, *supra* note 73, at 6-10.

<sup>79</sup> See James Z. Pugash, *The Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 Harv. Int'l L.J. 577, 586 (1977); See also Patricia Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 Australian J. L. 148, 153 (1986); Hailbronner, *supra* note 69, at 865.

<sup>80</sup> Universal Declaration of Human Rights, opened for signature Dec. 10, 1948, art. 14, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>81</sup> United Nations High Commissioner for Refugees, *The State of the World's Refugees: The Challenge for Protection* (1993) [hereinafter *The State of the World's Report*].

<sup>82</sup> See Hyndman, *Asylum*, *supra* note 77, at 68; Brownlie, *supra* note 73, at 519; Lassa Oppenheim, *International Law* 675-676 (8th ed. 1955). See *The State of the World's Refugees*, *supra* note 81, at 32.

<sup>83</sup> 1951 Convention, *supra* note 31, at art. 33.

refoulement occurs in many instances.<sup>84</sup> Regardless of the customary nature of this principle, the Pankhursts and the Laborians are not entitled to invoke *nonrefoulement* because they are not Convention refugees. Furthermore, even were the Pankhursts or the Laborians entitled to *nonrefoulement*, Balboa has not violated *nonrefoulement*. Balboa has not evidenced an intent to repatriate the Laborians until the Laborian government is stabilized. Additionally, Balboa insisted on negotiations prior to returning the Pankhursts to Draconia.

2. There are no provisions in the various human rights instruments pertaining to refugees which have risen to the level of customary international law.

Since Article 38 of the Vienna Convention provides that a treaty may only become "binding upon a third State as a customary rule of international law,"<sup>85</sup> the provisions of any treaties to which Balboa is not a party may only become binding as customary law if there is evidence of "a constant and uniform usage."<sup>86</sup> Freedonia bears the burden of proving whether the treaties at issue have crystallized into rules of customary international law.<sup>87</sup>

The Rights of the Child only recently entered into force.<sup>88</sup> Although time is not a bar to the absorption of a treaty into customary international law, three years hardly allows time for extensive and virtually uniform state practice to develop.<sup>89</sup> Thus, the provisions contained within the Rights of the Child are not binding customary international law.

Furthermore, the Universal Declaration is a General Assembly resolution,

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<sup>84</sup> 1991 U.N.Y.B. 719, U.N. Sales No. E. 92.1.1; see also, Hyndman, *Asylum*, *supra* note 77, at 70.

<sup>85</sup> Vienna Convention, *supra* note 8, at art. 38.

<sup>86</sup> *Asylum (Colum. v. Peru)* 1950 I.C.J. 266, 276 (Nov. 20); see also, *North Sea Continental Shelf*, 1969 I.C.J. at 42.

<sup>87</sup> *Asylum*, 1950 I.C.J. at 277-278.

<sup>88</sup> Maria Jean-Bernard, *International Instruments Relating to Human Rights: Classification and Status of Ratifications as of January 1, 1993*, 14 Hum. Rts. L. J. 57, 65 (1993).

<sup>89</sup> *North Sea Continental Shelf*, 1969 I.C.J. at 43.

and as such, is not legally binding.<sup>90</sup> Rather, the Universal Declaration was intended to be only a "common standard of achievement for all peoples of all nations."<sup>91</sup> Consequently, its provisions cannot be considered binding as rules of customary international law. Although some of the principles contained in the leading human rights documents<sup>92</sup> have "passed into the general *corpus* of international law,"<sup>93</sup> none of these principles impose an obligation on Balboa that is relevant to the dispute *sub judice*. Thus, Balboa has no customary obligation compelling it to treat these "refugees" in a certain manner.

3. Freedonia has not stated a claim binding *erga omnes*.

Neither customary law nor general principles of international law will support an *erga omnes* claim pertaining to the treatment of these individuals. Although Balboa recognizes the existence of certain human rights norms of international law, the applications of those rules must be limited to special and precisely defined categories of "international crimes."<sup>94</sup> *Barcelona Traction* recognized only acts of aggression, genocide, slavery and apartheid as examples of obligations *erga omnes*.<sup>95</sup> None of the claims made by Freedonia suggest acts which rise to this level.

IV. **BALBOA'S CONFERRAL OF TEMPORARY REFUGE TO THE PANKHURSTS AND THE LABORIANIS CONFORMS WITH STANDARDS OF INTERNATIONAL LAW.**

Freedonia has alleged that Balboa is not properly ensuring the

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<sup>90</sup> Wallace, *supra* note 5, at 186; see also Henkin, *supra* note 40, at 115; see also Schachter, *supra* note 47, at 337.

<sup>91</sup> Universal Declaration, *supra* note 80, at pmb.; see also Wallace, *supra* note 5, at 186; see also Henkin, *supra* note 40, at 115.

<sup>92</sup> See generally Universal Declaration, *supra* note 80; Covenant on Political Rights, *supra* note 37; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter Covenant on Cultural Rights]; European Convention, *supra* note 37; American Convention, *supra* note 37; African Charter, *supra* note 37.

<sup>93</sup> *North Sea Continental Shelf*, 1969 I.C.J. at 41.

<sup>94</sup> See *Draft Articles on State Responsibility*, [1980] 2 Y.B. Int'l L. Comm'n, art. 19, para. 3, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Pt. 1).

<sup>95</sup> *Barcelona Traction*, 1970 I.C.J. at 32.

protection of the internationally guaranteed rights of Hilary, her family, and the Laborian refugees. Since a sovereign state has jurisdiction over its inhabitants, both national and foreign,<sup>96</sup> Freedonia must establish that Balboa has in some way violated the international minimum standard of treatment. To incur such a violation, "a state's treatment of foreign nationals must fall so short of established civilised behaviour that 'every man would readily recognise its insufficiency.'"<sup>97</sup>

A. Balboa has accorded treatment to the Pankhursts and the Laborians which complies with international law.

There is no precise standard of treatment for refugees.<sup>98</sup> The proper standard depends "on whether the refugee . . . is lawfully or unlawfully in the territory of the state, or has been formally recognized as a refugee."<sup>99</sup>

1. The Pankhursts are not lawfully in Balboa.

Even if the Pankhursts and Laborians are 1951 Convention refugees, Article 31(2) of the 1951 Convention empowers a state to impose necessary restrictions on refugees unlawfully present in its territory, including restrictions on the refugee's movements until his status in the country is regularized.<sup>100</sup> Several of the provisions refer only to "refugees lawfully staying in their territory."<sup>101</sup> Thus, in order to benefit under the 1951 Convention, a refugee must be lawfully admitted into the host country.<sup>102</sup>

Although the question of what constitutes legal presence is subject to

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<sup>96</sup> Marjorie M. Whiteman, 5 *Digest of International Law* 217 (1963).

<sup>97</sup> Wallace, *supra* note 5, at 162, citing *Neer Claim*, 4 R.I.A.A. 60, 62 (1926).

<sup>98</sup> Guy Goodwin-Gill, *The Refugee in International Law* 31-33 (1983).

<sup>99</sup> *Id.*

<sup>100</sup> 1951 Convention, *supra* note 31, at art. 31, para. 2.

<sup>101</sup> See 1951 Convention, *supra* note 31, at arts. 17, 21, 23, 24, 26, 28, 32 (emphasis added).

<sup>102</sup> Brian Roberts, Comment, *Can the Boat People Assert a Right to Remain in Asylum*, 4 U. Puget Sound L. Rev. 176, 182, 197 (1980).

each state's interpretation,<sup>103</sup> the Pankhursts are unlawfully present in Balboa. Since Hilary's visa expired and Rousseau and Emily Pankhurst entered Balboa without having applied for the appropriate visas, the Pankhursts are currently residing in Balboa unlawfully. Although Balboa allowed them to remain in the refugee "hotel" since their arrival in Balboa, they are now illegally present in the country and are thus not entitled to invoke the full benefits available under the 1951 Convention.

2. . Even were the Pankhursts and the Laborians lawfully in Balboa, Balboa's treatment of the Pankhursts and the Laborians complies with the requirements of the 1951 Convention.

Regardless of the lawfulness of the Pankhursts' presence in Balboa, Balboa has acted in good faith and in full compliance with the 1951 Convention in its treatment of the refugees. Article 7 of the 1951 Convention states that "a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally."<sup>104</sup> The Laborians and the Pankhursts have been accorded treatment that comports with this standard. They have been provided with housing that meets the 1951 Convention standards.<sup>105</sup> That the facilities may be less than ideal does not mean that they are not sanitary or do not provide the fundamental necessities. The refugees have been provided shelter and an adequate supply of food while they await the final adjudication of this matter. Detention of the Pankhursts prior to deportation was undertaken consistent with Balboa's immigration laws and is clearly permissible under international law.<sup>106</sup> Since the conditions in the refugee "hotel" are better than the conditions in the prisons, placing the Pankhursts in the "hotel" prior to deportation was in their best interests. Housing the Laborians in the refugee "hotel" until their civil war subsides comports with international

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<sup>103</sup> Ved. P. Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 Hofstra L. Rev. 449, 469 (1981).

<sup>104</sup> 1951 Convention, *supra* note 31, at art. 7.

<sup>105</sup> 1951 Convention, *supra* note 31, at art. 21.

<sup>106</sup> See e.g. European Convention, *supra* note 37, at art. 5(1)(f); see also Paul Sieghart, *The International Law of Human Rights* 149 (1983).

standards regarding temporary refuge of persons fleeing civil war.<sup>107</sup>

3. Even were the Rights of the Child and the other relevant human rights treaties applicable, Balboa's treatment of the Pankhursts and the Laborians complies with their terms.

Balboa, like other countries,<sup>108</sup> governs the hotel with prudent policies which are designed to promote the health and safety of those it houses. Housing mass influxes of people in a separate facility assures the safety of women and children. Ensuring that men and women, like Hilary and Rousseau, have separate housing also promotes safety. Those in the camp are free to move about and associate within the camp community during daylight hours which provides full opportunity for interaction between husbands and wives.

Emily and the Laborian children were placed in Balboan foster homes to ensure their best interests. This practice comports with the Rights of the Child which provides that

[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. States parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include . . . foster placement.<sup>109</sup>

Thus, Balboa's placement of the children in foster homes was a temporary solution to protect the children until a more durable solution is found for the entire family, at which time they will be reunited.

4. Balboa's treatment of the Pankhursts and Laborians is warranted due to significant concerns of national security and public order.

Even if Balboa is bound to the treatment standards set out in the 1951 Convention and the related human rights documents, these instruments contain justifications for derogation in cases of national security and maintenance of

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<sup>107</sup> See Joan Fitzpatrick Hartman, *The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict*, in *The New Asylum Seekers: Refugee Law in the 1980's* 90-91 (David A. Martin ed., 1988).

<sup>108</sup> See *The State of the World's Refugees*, *supra* note 81, at 92.

<sup>109</sup> Rights of the Child, *supra* note 74, at art. 20.

public order.<sup>110</sup> Whenever the safety, security or integrity of a state is threatened, the threatened state has a sovereign right to take whatever measures in its territory necessary to ensure the safety of its community.<sup>111</sup> The inundation of hundreds of Laborian refugees to Balboa qualifies as an emergency, which if uncontrolled would threaten Balboa's national security and public order.<sup>112</sup> Furthermore, when there is such a large-scale influx of people, a country may not be able to accommodate them due to a shortage of essentials such as food and medicine.

The detention of the Pankhursts has not been prolonged considering the circumstances. The Balboan Ministry of Immigration issued a final decision on Hilary's application for asylum approximately two weeks subsequent to her application. It appears that during this period, Hilary was in no way detained and her movements were not restricted. When learning that her family had illegally entered the county, Balboan officials detained Hilary to ensure that she did not leave the country illegally prior to her return to Draconia. Balboa detained her family because they had entered the country unlawfully.

- B. Balboa has properly ensured the protection of the internationally guaranteed rights of the Draconians and the Laborians.
  - 1. The grant of temporary refuge to the Laborians has properly ensured their international rights.

The actual practice of states in granting temporary refuge to large numbers of refugees indicates that it is done on a purely humanitarian basis rather than due to a belief that it is a legal obligation.<sup>113</sup> Balboa accepted its humanitarian duty by providing temporary refuge to the Laborians.

- 2. Repatriation of the Laborians with Laboria conforms with customary

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<sup>110</sup> See Universal Declaration, *supra* note 80, at art. 29; European Convention, *supra* note 37, at arts. 15, 16, 17, 18; American Convention, *supra* note 37, at art. 27; Covenant on Political Rights, *supra* note 37, at art. 4; Covenant on Cultural Rights, *supra* note 37, at art. 4.

<sup>111</sup> Ian Brownlie, *International Law and the Use of Force by States* 298-300 (1963).

<sup>112</sup> G.J.L. Coles, *Temporary Refuge and the Large Scale Influx of Refugees*, 8 Australian Y.B. Int'l L., 189, 191 (1983).

<sup>113</sup> Hailbronner, *supra* note 69, at 869-870, 876.

international law.

Municipal laws of states indicates that *nonrefoulement* for humanitarian refugees is not supported by state law or practice.<sup>114</sup> Even were *nonrefoulement* a binding principle, Balboa has made no attempt to return the Laborians to Laboria. Rather, Balboa will not repatriate the Laborians until the appropriate government agencies are functioning, which would most likely occur when the hostilities in Laboria subside. This solution comports with international law and the ultimate objective of temporary refuge of humanitarian refugees.<sup>115</sup> Moreover, deporting the Pankhursts with the intention of repatriating them with Draconia is the most durable, and the most satisfactory solution for the parties.<sup>116</sup>

3. Balboa has not rendered the Laborians or the Pankhursts "stateless."

Stateless persons are those persons who are "not considered nationals by any state according to its law."<sup>117</sup> Hilary and Emily Pankhurst are nationals of Draconia, and the Laborians are nationals of Laboria. Rousseau is not a national under the laws of any state, thus he was stateless *de jure* prior to the circumstances at issue in this dispute. Since the other individuals may still claim the protection of their respective countries, they have not been deprived of their nationality. Thus, Balboa has committed no act which has rendered either the Laborians or the Pankhursts stateless.

4. Balboa's initial decline of Freedonia's offer was in the Pankhursts' and the Laborians' best interests.

There is no rule of international law requiring Balboa to transfer the Pankhursts and the Laborians to Freedonia. Indeed, resettlement to third countries is perceived as the last resort, only to be used when there are no

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<sup>114</sup> Hailbronner, *supra* note 69, at 876.

<sup>115</sup> See *The State of the World's Refugees*, *supra* note 81, at 3; see also Hartman, *supra* note 107, at 91.

<sup>116</sup> See *The State of the World's Refugees*, *supra* note 81, at 44.

<sup>117</sup> Hudson, *Nationality, Including Statelessness*, U.N. Doc. A/CN.4/50, reprinted in (1952) 2 Y.B. Int'l L. Comm'n 3, 17, U.N. Doc. A/CN.4/SER.A/1952/Add.

other durable solutions available.<sup>118</sup> Also, resettlement in another country is "considered the least satisfactory solution to a refugee problem because of the difficult cultural adaptations involved."<sup>119</sup> Since there is no indication of Freedonia's culture, the Pankhursts and the Laborians could enter into an unknown state, without homes, skills, or jobs and possibly with a language barrier that could impair their assimilation into Freedonian society.

In addition, Freedonia has only recently thrust itself into international view. There is no evidence of what treatment Freedonia accorded international legal principles as recently as three years ago. A state like Freedonia, whose traditional policy towards recognition of human rights principles is as mysterious as its governmental history, is not a safe repository for international refugees.

Alternatively, Balboa has already shown a willingness and a capacity to provide shelter and safety to hundreds of temporary civil war refugees. In addition, Balboa has demonstrated a respect for the sovereign and civil interests of its neighboring states while seeking to further principles that were generally accepted international law.

#### CONCLUSION

For the reasons stated above, Balboa respectfully requests this Honorable Court to:

1. DECLARE that this Court does not have jurisdiction over the subject matter of this dispute.
2. DECLARE that Freedonia does not have standing to bring this dispute.
3. DECLARE that Balboa was not obligated to accord refugee status to either the Pankhursts or the Laborians.
4. DECLARE that if Balboa was obligated to treat the Pankhursts and Laborians as refugees, Balboa did not violate this obligation.

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<sup>118</sup> See *The State of the World's Refugees*, supra note 81, at 45; see also 1991 U.N.Y.B 704, U.N. Sales No. E. 92.1.1.

<sup>119</sup> See *The State of the World's Refugees*, supra note 81, at 45.