

INTERNATIONAL LAW STUDENTS ASSOCIATION

2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008-2864 U.S.A.

1-202-939-6030
CABLE "AMINTLAW"
FAX 1-202-265-0386
or
1-202-797-7133



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CASE CONCERNING THE GRANTING OF REFUGEE STATUS

Fredonia

v.

Balboa

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MEMORANDUM OF LAW AND AUTHORITY FOR JUDGES

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The 1994 Jessup Competition Problem and supporting materials were written by Dr. Rebecca M.M. Wallace, Reader in Law, University of Strathclyde, Glasgow, Scotland. Review and comments by Tony Aust, Legal Counsellor, Foreign and Commonwealth Office, London; George C. Summerfield, Pennie & Edmonds, Washington, D.C.; and Brett J. Lorenzen, Executive Director, International Law Students Association.

1994 Philip C Jessup International Law Moot Court Competition

Case Concerning the Granting of Refugee Status

Freedonia v. Balboa

This problem focuses on main stream traditional international law issues, and in particular: preliminary objections to the jurisdiction of the International Court of Justice; and the application of the various sources of international law and their relationship to each other. The problem has been designed specifically to encourage participation by those at an early stage in their study of international law and those whose library resources may be relatively limited.

The following is intended only as a guideline to judges as to the main arguments which should be raised by the agents for the applicant and respondent. It is not intended to be comprehensive or exhaustive.

The International Court must decide the issues presented in the way prescribed in Article 38(1) of its Statute. Article 38 (1) provides :

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law as recognized by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law."

Before the International Court of Justice can hear a dispute, the parties must submit to the Court's jurisdiction. The International Court of Justice may hear cases pursuant to a form of compulsory jurisdiction under Article 36(2) which provides:

"The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (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."

A State accepts compulsory jurisdiction by unilateral declaration. Upon its declaration, the declarant state is bound to accept jurisdiction vis-a-vis any other declarant so far as the acceptances coincide.

Both Freedonia and Balboa have made such declarations under Article 36(2) of the ICJ Statute. Freedonia's declaration contains a reservation (see problem, para 12). Balboa's declaration contains no such reservation (not explicitly stated in the Problem, but inferred).

The first issue which both the applicant and the respondent are required to address is whether the Court possesses jurisdiction over the subject matter of this dispute.

Principal issues relevant to the applicant's (Freedonia) argument.

1. The reservation contained in her Declaration accepting the Court's jurisdiction under Article 36(2) is of no relevance in this instance as the issues raised - viz. the protection of human rights - is a matter not only of domestic jurisdiction but is of international concern. To this end Freedonia will invoke the International Court's judgment in the *Barcelona Traction Light and Power Company*, ICJ Reps. 1970 at 3, and in particular the statement re obligations *erga omnes* (at 32), rights which because of their nature and their importance all States have a legal interest affording protection. On this basis, Freedonia will argue that she has a right to intervene on behalf of individuals who are not her nationals and hence the departure from the nationality of claims rule.

2. In anticipation of Balboa's argument re reciprocity, Freedonia will cite the individual opinion of Judges Lauterpacht and Guerrero in the *Norwegian Loans Case*, ICJ Reps 1957 at 9, both of whom questioned the validity of reservations of this type - viz. automatic/self-judging reservations (Connally Amendment, see US Declaration of 1946 exempting from the Court's jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America").

The principal objection voiced by the judges was that such reservations are contrary to Article 36(6) of the Statute of ICJ whereby "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court," and in the words of Judge Guerrero such a reservation is "contrary to the spirit and to the letter of the Statute and which, . . ., is for that reason, null and void." (at 70).

3. In anticipation of Balboa's argument as to when the dispute arose and the effect of the Freedonian *Ratione Temporis*, Freedonia will argue that the dispute between herself and Balboa did not arise until July, when she intervened in the case (see para 11), and that the dispute is on-going. Freedonia could cite the International Court's statement in the *Interhandel Case*, ICJ Reps. 1959, at 6) that "the facts and situation which have led to a dispute must not be confused with the dispute itself." (Judgment at 22).

4. Re exhaustion of local remedies. It is implied from the facts provided that a final decision has been given by the Balboa Ministry of Immigration and Freedonia will argue that her offer of assistance has been refused by Balboa and consequently there is no further obligation incumbent on Freedonia to pursue negotiations.

5. Some participants for Freedonia may advance the argument that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol represent customary international law (see below) and that, accordingly, Balboa is obliged to refer to the Court on the basis of Article 38 and Article IV (of the Convention and Protocol respectively). The essence of such an argument is that the procedural provisions of the Convention and Protocol have evolved as customary international law in the same way as the substantive provisions. This is a novel argument and although it may be advanced persuasively, it is without judicial support. But judges should acknowledge the argument if raised as it demonstrates imagination, creativity and initiative on the part of the participants.

Substantive issues:

1. The 1951 Convention on the Status of Refugees and the 1967 Protocol constitute customary international law. To do this successfully Freedonia must bring before the Court instances of state practice and prove the existence of *opinio juris sive necessitatis* (the belief that those who engage in conduct in question do so because the conduct is mandatory and not discretionary). Freedonia is obliged to prove the existence of the custom as she is the party seeking to rely upon it.

1.a. Freedonia will submit that the number of Contracting Parties to the Convention and Protocol are sufficient to warrant the provisions of these instruments being deemed customary international law. (As of 1993, 113 States are parties to the Convention and 114 to the 1967 Protocol—those party to the Convention + the United States.) Freedonia will argue that this number constitutes sufficient evidence of a universal state practice. (There are currently 183 members of the United Nations.)

1.b. The existence of *opinio juris* must be proved as failure to do this will be fatal to the claim that an international custom exists - see *Lotus Case*, PCIJ Rep. Series A No. 10 (1927) and *North Sea Continental Shelf Cases*, 1969 ICJ Reps, at 3. *Opinio juris* may be deduced *inter alia* from state practice at a domestic level, from the attitude of States to UN General Assembly Resolution (see *Military and Paramilitary Activities In and Against Nicaragua (Merits)*, ICJ Rep. 1986, at 14, paras 99-100.

2. Freedonia will seek to apply the Refugee Convention and the terminology contained therein to Hilary, her family and the Laborians. The term refugee as defined in the Convention applies to anyone who "owing to 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 to 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 to, or owing to such fear, is unwilling to return to it."

a. Hilary

Freedonia will seek to demonstrate that Hilary falls within the above definition as she fears persecution on grounds of her political opinion and that such fear is genuine and that it is irrelevant that she is a refugee *sur place*. Each term should be examined to determine under which Hilary's claim would be satisfied. The conditions prevailing within Draconia should also be considered.

Freedonia must demonstrate *inter alia* that:

- i. Hilary fears persecution for holding political opinions not tolerated by the authorities as they are critical of Draconian policies and methods;
- ii. Such opinions have come to the notice of the Draconian authorities and are attributed by them to Hilary;
- iii. Hilary's position as a prominent international minority rights lawyer places her in a more vulnerable position. (*see* UNHCR Handbook on Procedures and Criteria for Determining Refugee Status).

b. Rousseau and Emily

Freedonia will allege a violation of Article 31 of the 1951 Convention - *viz.* that:

"Contracting Parties shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorization, provided that they present themselves without delay to the authorities and should show good cause for their illegal entry or presence."

Freedonia will argue that it was because Rousseau and Emily were prevented from presenting themselves to the appropriate authorities, having been apprehended by the Balboan authorities themselves, the requirement should be ignored.

Rousseau's position should be dealt with in relation to the country of "former habitual residence" *viz.* Draconia.

As far as Emily is concerned, Freedonia will argue that Balboa's treatment of Emily is contrary to the 1989 Convention on the Rights of the Child, 28 I.L.M. 1448, both general provisions such as Articles 8, 9(1), 20(3), and the provisions relating specifically to refugee children (Article 22) and contrary to Article 18(a) of the

Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969) — viz. that a state (such as Balboa) once it has signed a treaty shall refrain from acts which would defeat the purpose of the agreement.

c. *The Laborians*

The Laborians fall within the Convention definition in that they are "unable or, owing to such fear, unwilling to avail (themselves) of the protection of that country."

Freedonia will maintain that even if the Refugee Convention does not apply, customary international law has developed to take account of new situations and will invoke the measures adopted within Regional Organizations, the extended mandate of the UNHCR, state practice and the attempt to produce a Convention on Territorial Asylum to endorse its argument. Regional instruments purporting to extend the definition of refugees beyond that contained in the 1951 Convention include those produced by the Organization of African Unity (OAU), the Organization of American States (OAS), and the Council of Europe.

The OAU extended the definition in the Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974):

"The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

The OAS defines the term as:

"Persons who have fled their country because their lives, safety, or freedom have been threatened by general violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."

Parliamentary recommendation 773 (1976) of the Council of Europe expressed concern re the position of "*de facto* refugees," that is, persons who either have not been formally recognised as Convention refugees (although they meet the Convention's criteria), or who are "unable or unwilling for . . . other valid reasons to return to their countries of origin." The Council of Europe called upon Member States to give a liberal interpretation to the term "refugees" in the Convention and "not to expel *de facto* refugees unless they will be admitted by another country where they do not run the risk of persecution."

The Freedonian argument may also include reference to Article 14 of the Universal Declaration on Human Rights: "everyone has the right to seek and to enjoy in countries asylum from persecution."

In the efforts to produce an international convention on Territorial Asylum in the 1970s, an affirmative vote was taken in favour of extending the scope of the term refugee so as to include *inter alia* those who faced a definite possibility of persecution.

State practice may also be invoked by Freedonia to advance her argument that a definition other than the traditional one should be applied. Freedonia may also cite the writings of certain specialists in the field to support an expanded concept of refugees in customary international law (*e.g.*, Goodwin-Gill).

3. To return any of the claimants to Draconia/Laboria would be contrary to Article 33 of the Refugee Convention *viz.* the principle of *non-refoulement*:

"No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

4. The conditions in which Hilary et al were held constitute a violation of general human rights and in particular the international minimum standard—a nebulous concept difficult to define but Freedonia could cite the Tribunal in the *Roberts Claim* (US v. Mexico, 4 R.I.A.A. (1926)):

"Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization."

Principal Issues Relevant to the Respondent's (Balboa) Argument

1. Balboa would seek to rely on the reservation contained in Freedonia's declaration. Balboa will seek to rely on the argument advanced by Norway and accepted by the International Court of Justice in the *Norwegian Loans Case* (*France v Norway*), ICJ Reps 1957, at 9. In that case Norway, whose declaration contained no reservation, was allowed to invoke the reservation contained in the French Declaration *viz.* that the declaration did not apply to "differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic" and to interpret it as bringing the

dispute within its domestic jurisdiction as understood by the Norwegian Government. The Court in that case held that since two unilateral declarations were involved the Court's jurisdiction was conferred only to the extent to which the two Declarations coincided and that a comparison between the two declarations demonstrated that the French declaration accepted the Court's jurisdiction within narrower limits than the Norwegian declaration and that consequently the common will of the Parties, the basis of the Court's jurisdiction, existed within the narrower limits indicated by the French reservation. The Court held (twelve to three) that Norway, equally with France, was entitled to exemption from the compulsory jurisdiction of the Court as regarded disputes understood by Norway to be essentially within its national jurisdiction. Balboa will seek to demonstrate on the basis of reciprocity that the common will in the instant case existed within the limits of the Freedonian Declaration.

2. Balboa may also raise the issue of the reservation *ratione temporis* contained in Freedonia's Declaration whereby disputes arising before June 4th are excluded from the Court's jurisdiction. Balboa will argue that the salient events giving rise to the dispute arose in April and in May.

3. Regarding the exhaustion of domestic remedies, Balboa may argue that there is still the possibility of negotiation available through diplomatic channels or action in the Balboa courts.

Substantive Issues:

1. Balboa will seek to demonstrate that the Convention and Protocol are not binding on her. Balboa will argue that neither the 1951 Convention nor the Protocol constitute customary international law as far as Balboa is concerned and that applying the Convention as a guide is a practice Balboa finds politically expedient (and only that). Balboa may maintain that the number of Contracting parties to the Convention constitutes less than two thirds of the current international community and does not constitute sufficient evidence of international custom.

2. However, if it were to be held that the instruments represent customary international law, Balboa has applied the principles contained therein as required. Balboa will seek to demonstrate that Balboa has applied the Convention definition in the correct manner and that Hilary, her family and the Laborians do not fall within the ambit of this definition.

2.a. Hilary: Balboa will maintain that the holding of political opinions different from those of the government is not in itself a ground for claiming refugee status; that Hilary has never personally suffered any repressive measures at the hands of the Draconian authorities; she was allowed to maintain a high international profile; she was granted permission to leave Draconia for the specific purpose of presenting a paper at an international conference on the protection of minority rights.

b. Rousseau and Emily: Balboa will deny any violations of Article 31 of the 1951 Convention on the grounds that Rousseau failed to present himself and Emily "without delay to the authorities" and has failed to "show good cause for their illegal entry or presence." Balboa will also maintain that entry visas are required under Balboan domestic law and that Balboa is within her sovereign rights in demanding compliance with this requirement.

c. The Laborians: Balboa will maintain that the Laborians do not fall within the Convention definition as they are fleeing civil strife rather than persecution. With respect to the expanded definitions produced by the regional bodies Balboa will argue that these definitions are the work of regional organisations and as such they do not constitute customary international law.

The Universal Declaration is only a General Assembly Resolution which was never intended to be a legally binding document and that, in addition, the right articulated in Article 14 has not been defined further in other international instrument, e.g. The Covenant on Civil and Political Rights 1966. The attempt to secure a Convention on Territorial Asylum was abortive.

Balboa may also invoke writings against the development of such definition under customary international law, e.g. Hailbronner.

3. As to a possible violation of Article 33 Balboa will maintain her argument that "the domestic policies and living standards in Draconia were not such that they were likely to give rise to any legitimate claims of asylum by Draconian citizens." No violation is incurred with respect to the Laborians as they do not meet the standards for refugee status within the Convention.

4. Treatment of Hilary, Family and the Laborians: Balboa will argue that the detainees have been held in conditions that are no different from those in which nationals are held.