

THE 1994 PHILIP C. JESSUP

INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

APRIL 1994

CASE CONCERNING THE GRANTING OF REFUGEE STATUS

GOVERNMENT OF FREEDONIA
Applicant

v.

GOVERNMENT OF BALBOA
Respondent

MEMORIAL FOR APPLICANT

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LIST OF ABBREVIATIONS.

AD	- Annual Digest and Reports of Public International Law Cases
AJ	- American Journal of International Law
Annuaire	- Annuaire de l'Institut de Droit international
Aust YBIL	- Australian Yearbook of International Law
art.	- Article
BY	- British Yearbook of International Law
CWRJIL	- Case Western Reserve Journal of International Law
cmt.	- commentary
Col LR	- Columbia Law Review
Germ YBIL	- German Yearbook of International Law
Hag R	- Recueil des Cours de l'Academic de Droit International
Harv ILJ	- Harvard International Law Journal
HRLJ	- Human Rights Law Journal
Hum Rts Q	- Human Rights Quarterly
ICJ	- International Court of Justice
ICLQ	- International and Comparative Law Quarterly
ILM	- International Legal Materials
ILR	- International Law Reports
I R of R Cross	- International Review of Red Cross
Indian JIL	- Indian Journal of International Law
Jap AIL	- Japanese Annual International Law
LNTS	- League of Nations Treaty Series
Malaya LR	- Malaya Law Review
Mc Gill LJ	- Mc Gill Law Journal
Mich YBILS	- Michigan Yearbook of International Law Studies
Neth ILR	- Netherlands International Law Review
para.	- paragraph(s)

PCIJ	- Permanent Court of International Justice
Phil LJ	- Phillippine Law Journal
Refugees	- Refugees Magazine (published by the Public Information Section of the UNHCR)
RIAA	- United Nations Reports on International Arbitral Awards
Scand SL	- Scandinavian Studies In Law
sect.	- section
Ser.	- Series
Texas ILJ	- Texas International Law Journal
UNGAR	- United Nations General Assembly Resolution
UNGAOR	- United Nations General Assembly Ordinary Resolution
UNHCR	- United Nations High Commissioner for Refugees
UNTS	- United Nations Treaty Series
Va JIL	- Virginia Journal of International Law
YBILC	- Yearbook of the International Law Commission
ZoV	- Zeitschrift fur auslandisches offentliches Recht und Volkerrecht

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Res 1285 (XIII) of Dec. 5, 1958; 1390 (XIV) of Nov. 20, 1959; 1499 (XV) of Dec. 5, 1960; 1673 (XVI) of Dec. 18, 1961	24
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STATEMENT OF JURISDICTION

The Government of Freedonia and the Government of Balboa have submitted the following matter to the International Court of Justice pursuant to paragraph 2 of Article 36 of the Statute of the International Court of Justice. Both states have made Declarations accepting the compulsory jurisdiction of the Court.

STATEMENT OF FACTS

Freedonia is an ardent advocate of the protection of human rights [problem at 11]. The present government of Freedonia, which has been in power for three years, has human rights issues high on its list of priorities [*id.*]. In line with this, the Freedonian government has been very supportive of the world community's efforts to protect human rights [*id.*].

Hilary Pankhurst, a citizen of Draconia, is a prominent minority rights lawyer in her country and a member of the Committee on Rights for Women, a national organization which operates both on a local and regional level [*id.* at 2]. In April of 1993, Hilary was invited to deliver a paper at the International Conference on the Protection of Minority Rights [*id.* at 3]. The Draconian authorities granted her request for the necessary travel documents after which she left for Balboa to attend the Conference [*id.*].

At the Conference, she was highly critical of Draconia's policies toward minority groups [*id.* at 4]. The Conference and Hilary both received wide international media coverage [*id.* at 5]. Her intended return to Draconia after the Conference did not materialize as a result of a cable she received from her husband notifying her of the actions of the Draconian authorities against her in Draconia [*id.*]. Her apartment had been ransacked and searched and many of her papers and personal documents, including her research papers and duplicate passport, had been confiscated [*id.*]. As a consequence of this, she decided to apply to the Balboan immigration authorities for permission to remain in Balboa [*id.* at 6]. Her application was unsuccessful on the ground that she did not fulfil the necessary criteria to be considered a refugee as articulated in the 1951 CSR or 1967 Protocol [*id.*]. Instead, Balboa offered to repatriate Hilary to Draconia, an offer which Hilary claims is against the established legal principle of nonrefoulement and would put her in a position of fear and apprehension of political persecution and prosecution [*id.* at 7].

A further reaction on the part of the Draconian government against Hilary was to place Hilary's husband Rousseau and daughter Emily under house arrest [*id.*]. However, family friends helped Rousseau and Emily escape and managed to get them into Balboa with the hope of reuniting them with Hilary

[*id.*]. The Balboan authorities were quick to find out about what had happened and promptly arrested all the family members [*id.* at 8]. The Balboan authorities stated that, like Hilary, Rousseau and Emily did not fulfil the necessary criteria to be considered refugees [*id.*].

All three family members were transferred to a refugee "hotel" where several hundred men and women from Laboria had been detained since the previous summer [*id.* at 9]. Laboria is an under-developed neighbour of Balboa which had been experiencing violent civil war for several years [*id.*]. The Laborians had fled their home state due to the civil strife and massive human rights violations stemming therefrom [*id.*]. The request of the Laborians for refugee status was also turned down on the basis that they did not fulfil the necessary criteria [*id.*].

The refugees' living conditions were far from satisfactory [*id.* at 10]. The "hotel" was crowded, its inhabitants were restricted in their movements and they were poorly fed [*id.*]. Husbands were separated from wives, and children from parents; children were placed in the care of Balboan families where the Balboan language was the only language spoken [*id.*].

The Balboan government rejected Freedonia's offer of asylum to the refugees on political grounds [*id.* at 11]; it was afraid of the potential public relations damage Hilary could do if released, and was not willing to admit that its domestic policies were questionable [*id.* at 12] .

Freedonia initiated proceedings before the International Court of Justice under Article 36(2) of the Statute of the Court [*id.*]. Freedonia is applying for a declaration that the court possesses jurisdiction to hear the dispute and that the refugees should be transferred to Freedonia so that their basic rights may be safeguarded [*id.* at 14].

QUESTIONS PRESENTED

1. Whether the Court possesses jurisdiction over the subject matter of the dispute.
2. Whether Balboa is properly ensuring the protection of the internationally guaranteed rights of Hilary, her family, and the Laborian refugees.
3. Whether international law requires the transfer of the refugees to the control of Freedomian authorities.

SUMMARY OF PLEADINGS

I. The Court possesses jurisdiction over the subject matter of the dispute, the treatment of the refugees. First, the Court is invested with compulsory jurisdiction by virtue of the Declarations, made by Freedonia and Balboa, under Article 36(2) of the Statute of the International Court of Justice ("Statute"). Second, the present dispute is a legal dispute as it concerns questions of international law and breaches of International obligations. Third, the dispute arose after 4 June 1993, the commencement date of the Freedonia's acceptance of the Court's compulsory jurisdiction. Fourth, the reservation of domestic jurisdiction in the Freedonian Declaration is compatible with Article 36(6) of the Statute. The reservation does not entitle Balboa to determine, arbitrarily, that the present dispute concerns matter essentially within its national jurisdiction. The Court has jurisdiction to decide the propriety or arbitrariness of the determination. The determination by Balboa that the present dispute falls within its national jurisdiction is neither genuine nor made in good faith, as the subject matter of the dispute is manifestly international in character. Fifth, the reservation, if it is incompatible with Article 36(6) of the Statute, is merely rendered inoperative and not invalid. Sixth, the reservation, if it is regarded as invalid, can be severed; it does not render the whole declaration null and void.

II. Freedonia has standing to assert a claim on behalf of the refugees. First, Freedonia is the state which has granted asylum to the refugees, who no longer enjoy the protection of their national states. Freedonia has conferred on the refugees an effective nationality by extending protection to them, and as such it is the proper party to present a claim on their behalf. Second, Freedonia has standing to claim responsibility from Balboa for violations of the basic human rights of the refugees, which constitute obligations *erga omnes*. The observance of obligations *erga omnes* are of universal concern - any violation confers standing on all states to claim responsibility from the state in breach. Third, exhaustion of local remedies is not a prerequisite when a state

is claiming on behalf of non-nationals. This procedural bar is also inapplicable as Freedonia is only requesting a declaration and not reparation. Further, there is no proof of existence of effective local remedies in Balboa - the refugees' continuous detention indicates a denial of justice.

III. Balboa's treatment of the refugees is in violation of international law on human rights. First, Balboa has failed to adhere to the minimum standard required of it by international law in its treatment of the refugees; a failure of which incurs international responsibility. Second, Balboa by failing to adhere to this standard, has violated its human rights obligations arising from the United Nations Charter and the Universal Declaration on Human Rights. Third, since Hilary and her family fulfil the necessary criteria for characterization as a refugee as articulated in the 1951 Convention Relating to the Status of Refugees (CSR 51) and the 1967 Protocol to that Convention, and considering that Balboa affirms the guidelines in the CSR 51 to be the generally accepted international law; the treatment accorded to Hilary and her family is a denial of their rights as Convention refugees. Fourth, the treatment accorded to the refugee children is in breach of Balboa's obligations arising from the 1989 Convention on The Rights of The Child (CRC 89). Balboa as a signatory to the CRC 89 is obliged to accord the refugee children their rights guaranteed under it. The absence of ratification does not preclude Balboa's obligations under the CRC 89.

IV. Balboa is obliged to afford temporary refuge to the Laborians who have fled from civil strife and massive human rights violations in Laboria. A forced repatriation to their war-torn state, where their lives will be threatened, would be in breach of the practice of temporary refuge which has attained the status of a customary rule of international law.

V. In the event the Court decides that the guidelines under the CSR 51 or the obligations arising there from are not binding upon Balboa and or that the

practice of temporary refuge has not attained the status customary rule of international law, the intended repatriation of the refugees, would be a breach of international obligation on the second and different ground, that it breaches the customary rule of nonrefoulement. Customary international law extends the rule of nonrefoulement to the Laborians. Furthermore, Balboa is obliged to facilitate the resettlement of the refugees in Freedonia.

I. THE COURT POSSESSES JURISDICTION OVER THE SUBJECT MATTER OF THE DISPUTE

A. The Court Is Invested With Compulsory Jurisdiction Under The Optional Clause: Article 36(2) Of The Statute Of The International Court Of Justice

Freedonia requests the Court for a declaration that the Court possesses jurisdiction over the subject matter of the dispute. Freedonia invokes the Declarations under Article 36(2) of the Statute of the International Court of Justice,¹ by which Freedonia and Balboa have accepted the compulsory jurisdiction of the Court in all legal disputes.² Since the dispute involves, among other questions of international law, the scope and application of international obligations relating to state responsibility, particularly the treatment of refugees,³ this dispute falls within the categories of legal disputes in Article 36(2) of the Statute, in particular, subparagraphs (b) and (c).

B. The Condition *Ratione Temporis* Does Not Divest The Court Of Its Jurisdiction

The dispute arose in mid-July 1993 when Freedonia's offer to provide asylum for Hilary, her family and the Laborian refugees was refused by Balboa despite the refugees' willingness to accept the offer.⁴ The dispute, therefore, has arisen after 4 June 1993, the commencement date of Freedonia's acceptance of the Court's compulsory jurisdiction.⁵ The facts and situation which have led to the dispute itself, though they may have occurred prior to the commencement date, however, should not be confused with the dispute itself.⁶

C. The Reservation *Ratione Materiae* Is Compatible With Article 36(6):*La Competence De La Competence*

¹ Hereinafter Statute.

² Problem at Introduction.

³ *Infra* p. 12 ff.

⁴ Problem at 11 and 12.

⁵ Problem at 13.

⁶ Interhandel (Switz. v. US), [1959] ICJ 6, at 22 (March 21); Harris, *Cases And Materials In International Law*, at 726 (1983).

The scope and character of the reservation of domestic jurisdiction to the Freedonian Declaration, properly interpreted, is not contrary to the Court's power to settle disputes as to its jurisdiction pursuant to Article 36(6) of its Statute.

1. The Scope and Character of the Reservation Eliminates any Arbitrary Determination

The reservation of domestic jurisdiction, invocable by Balboa, reciprocally,⁷ should not be interpreted as giving Balboa, equally with Freedonia, an arbitrary power to settle any question of jurisdiction which arises by the assertion that the particular matter is essentially within the national jurisdiction, when it is evidently one of international character.⁸

Such an interpretation would run contrary to Article 36(6) of the Statute which embodies a rule consistently accepted by customary international law in the matter of international arbitration.⁹ This power established by the Statute and customary international law cannot be derogated by making the unilateral declaration pursuant to Article 36(2).¹⁰ Further, it was never the intention of Freedonia to do so. Freedonia recognises that the Statute is hierarchically superior to the will of the parties;¹¹ hence it is beyond the juridical capacity of Freedonia, equally with Balboa, to stipulate clauses in contradiction with the Statute, for instance Article 36(6).

2. The Reservation does not Deprive the Court of Its Power to Settle Disputes Concerning Its Own Jurisdiction

⁷ Phosphates in Morocco, [1938] PCIJ (Ser. A/B) No. 74, at 22 (June 14); Electricity Company of Sofia, [1939] PCIJ (Ser. A/B) No. 77, at 81 (April 14); Anglo-Iranian Oil Co. (UK v. Iran), [1952] ICJ 93, at 103 (July 22); Norwegian Loans (Fr. v. Nor.), [1957] ICJ 9, at 24 (July 6); S. Rosenne, *The Law And Practice Of The International Court*, at 386 (1985); E. Weiss, "Reciprocity And The Optional Clause", in L. Damrosch (ed.) in *The International Court Of Justice at a Crossroad*, at 83-5 (1987).

⁸ Norwegian Loans, *supra* n. 7, at 74-6 (Dis. Op. of Judge Basdevant), 92-5 (Dis. Op. of Judge Read).

⁹ Nottebohm (Liech. v. Guat.), [1953] ICJ 111 at 119 (Nov. 18); Shihata, *The Power Of The International Court To Determine Its Own Jurisdiction*, at 296-7 (1965); Briggs, "The United States And The International Court Of Justice: A Re-Examination", 53 *AJ* 301, at 310 (1959).

¹⁰ J. Crawford, "The Legal Effect Of Automatic Reservations To The Jurisdiction Of The International Court", 50 *BY* 63, at 73.

¹¹ By virtue of Article 103 of the Charter of the United Nations (entry into force on Oct. 24, 1945) [hereinafter Charter]; J. Crawford, *supra* n. 10, 50 *BY* 64, at 69.

The present application by Freedonia on the basis of the Declarations made by both parties under Article 36(2) constitutes a proper *seisin*, which empowers the Court to exercise incidental jurisdiction, and this includes the power to adjudicate upon a plea to its jurisdiction pursuant to Article 36(6) of the Statute.¹² Freedonia, equally with Balboa, accepted this incidental jurisdiction of the Court by becoming a party to the Statute,¹³ quite aside from their Declarations under Article 36(2). No unilateral attempt on the part of Balboa, equally with Freedonia, can deprive the Court of such jurisdiction already validly established.¹⁴

The Norwegian Loans Case is not an authority for the proposition that when a party to a dispute invokes such a reservation, the Court can do nothing but register this fact and declare itself incompetent.¹⁵ In fact such a proposition is clearly incompatible with Article 36(6) of the Statute which explicitly provides that " [I]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." This Court has interpreted the word " shall be " as having " an obligatory and imperative meaning."¹⁶

In addition, the Court is commanded by Article 1 of its Statute in conjunction with Article 92 of the Charter to "function in accordance with the provisions of the ... Statute".¹⁷ Hence it is legally impossible for the Court to act contrary to its Statute, particularly Article 36(6). The reason why the Court declined jurisdiction in the Norwegian Loans case is that the subject of the proceeding was essentially within the domain of municipal law

¹² Nottebohm, *supra* n. 9, at 123; Right Of Passage (Port. v. India), [1957] ICJ 125, at 142 (Nov. 26); Briggs, " Reservations To The Acceptance Of The Compulsory Jurisdiction Of The International Court Of Justice" ,93 *Hag R* 223, at 362 - 363 (1958,1); E. Weiss, *supra* n. 7, at 85-6.

¹³ By virtue of Article 93 of the Charter.

¹⁴ Briggs, " The Incidental Jurisdiction Of The International Court Of Justice As Compulsory Jurisdiction ", in Zemanak (ed) *Volkerrecht and Rechtliches Weltbild*, at 87 - 95 (1960).

¹⁵ Norwegian Loans, *supra* n. 7 at 46-8 (Sep. Op. of Judge Lauterpacht).

¹⁶ Constitution of the Maritime Safety Committee, [1960] ICJ 150, at 150 (June 8); S.Rosenne, "Sir Hersch Lauterpacht's Concept Of The Task Of The International Judge", 55 *AJ* 825, at 845 (1961).

¹⁷ I. Hussain, *Dissenting And Separate Opinions At The World Court*, at 139 (1984); J. Crawford, *supra* n. 10, at 69.

of the Respondent state.¹⁸

3. The Court has Jurisdiction to Decide whether the Determination under the Reservation is Genuine or Made in Good Faith

The determination by Balboa that the present dispute falls within its national jurisdiction is not genuine.¹⁹ Balboa has invoked the reservation in a matter which is totally foreign to the reserved domain.²⁰ Balboa has also failed to furnish any valid evidence showing that the determination was made in good faith. The determination was made to deny the jurisdiction of the Court in the present dispute which manifestly did not relate to " matters which are essentially within its national jurisdiction".²¹ This constitutes an *abus de droit* which the Court should treat as null and void.²²

This Court, by deciding whether the determination was so made, would not "be arrogating to itself a power which has been expressly denied to it".²³ In a separate opinion, Judge Lauterpacht denied the legal obligation to act in good faith on the basis that such possibility was excluded in that case.²⁴ This view which depends solely upon the attitude of the state making the reservation²⁵ cannot be considered as a conclusive factor.²⁶ In fact, there is nothing in the terminology of the reservation which excludes the

¹⁸ Serbian and Brazilian Loans, 7 AD 466 (July 12, 1929); Norwegian Loans, *supra* n. 7, at 28 (Declaration of Judge Moreno Quintana), 30 (Sep. Op. of Judge Badawi).

¹⁹ Norwegian Loans, *supra* n. 7, at 836 (Dis. Op. of Judge Read); R.Y. Jennings, "Recent Cases On 'Automatic' Reservations To The Optional Clause", 7 ICLQ 349, at 358-9 (1958).

²⁰ Tunis And Morocco Nationality Decrees, [1923] PCIJ (Ser. B) No. 4, at 23-4 (Feb. 7); H.M. Waldock, "The Plea Of Domestic Jurisdiction Before The International Legal Tribunals", 31 BY 96, at 108-9 (1954).

²¹ Norwegian Loans, *supra* n. 7, at 72 (Dis. Op. of Judge Basdevant); this contention was also adopted by Professor Guggenheim in Written Observations, Interhandel (Switz. v US), I.C.J Pleadings, at 579 (Nov. 12, 1958).

²² Norwegian Loans, *supra* n. 7, at 73 (Dis. Op. of Judge Basdevant).

²³ Norwegian Loans, *supra* n. 7, at 52-3 (Sep. Op. of Judge Lauterpacht); Greig, International Law, at 656 (1976).

²⁴ Norwegian Loans, *supra* n. 7, at 52-3 (Sep. Op. of Judge Lauterpacht).

²⁵ *Ibid*; see also L. Preuss, "The International Court Of Justice, The Senate, And Matters Of Domestic Jurisdiction" 40 AJ 720, at 727-31 (1946); cf. F. Wilcox, "The US Accepts Compulsory Jurisdiction", 40 AJ 699, at 712 (1946).

²⁶ Grieg, *supra* n. 23, at 655-6.

possibility of interpreting it in the light of the requirement of good faith.²⁷ The contrary view put forward by the US Government²⁸ does not rule out the possibility of this Court holding that a determination under a subjective reservation should be made in good faith. The withdrawal by the US Government, which was primarily influenced by the US Government's previous adverse position,²⁹ denied the Court the benefit of a judicial determination of the scope and character of the reservation.³⁰

D. Alternatively, The Incompatibility Of The Reservation Ratione Materiae With Article 36(6) Does Not Render It Invalid

Even if the reservation of domestic jurisdiction is incompatible with Article 36(6), which it is not in the present case, the Court need only declare, by invoking Article 103 of the Charter, that there existed a conflict and that the prior and superior principle of Article 36(6) shall prevail;³¹ and thereby regard it as unwritten and inoperative.³²

Judge Lauterpacht's stand, formulated in his two individual opinions,³³ which represents the most intransigent alternative, i.e. the complete invalidity of the reservation is clearly inconsistent with the Court's previous stand.³⁴ The Court had very clearly assumed the validity of the

²⁷ Greig, *supra* n. 23, at 655-6, Written Observations, Norwegian Loans (Fr. v. Nor.), ICJ Pleadings, at 131 (Apr. 20, 1956); Written Observations, Interhandel, *supra* n. 21, at 579.

²⁸ Written Observations, Aerial Incident of 27 July, 1955 (U.S v Bulgaria), ICJ Pleadings, at 308, 677 (May 13, 1960).

²⁹ Oral Proceedings, Interhandel (Switz. v. US), ICJ Distr. 57/168, at 18-20 (Oct. 12, 14).

³⁰ Greig, *supra* n. 23, at 656.

³¹ L. Gross, "Bulgaria Invokes The Connally Amendment", 56 *AJ*, 357, at 381.

³² Interhandel, *supra* n. 6, at 93 (Dis. Op. of Judge Armand-Ugon).

³³ Norwegian Loans, *supra* n. 7, at 43-66 (Sep. Op. of Judge Lauterpacht); Interhandel, *supra* n. 6, at 101-19 (Sep. Op. of Judge Lauterpacht).

³⁴ United States Nationals in Morocco (Fr. v. US), [1952] ICJ 22 at 176 (Aug 27); J. Crawford, *supra* n. 10, at 65-66; Greig, *supra* n. 23, at 655-6; S. Rosenne, *supra* n. 7, at 398-9; Shihata, *supra* n. 9, at 284-97.

reservation³⁵ and in no case has the Court regarded the plea of domestic jurisdiction as operating to deprive the Court of jurisdiction *in limine litis*.³⁶

E. Further, An Invalid Condition Or Reservation Incorporated In A Declaration Does Not Vitiare The Entire Declaration

Although the contrary view has been maintained,³⁷ an invalid reservation does not render the whole declaration null and void.³⁸ The invalid reservation can be severed, as it is not the essence of the Declaration.³⁹ The good faith of Freedonia in accepting the compulsory jurisdiction of the Court in all legal disputes under Article 36 (2) should not be questioned.⁴⁰

Since the matter, determined by Balboa to be essentially within its national jurisdiction, is in fact governed by conventions and principles of international law,⁴¹ this Court in deciding this dispute to be within its jurisdiction on the basis of Article 36(2), is vested with jurisdiction to hear the merits of the case.⁴²

³⁵ Norwegian Loans, *supra* n. 7, at 25 ff, at 29 (Sep. Op. of Judge Badawi), 71 (Dis. Op. of Judge Basdevant); Interhandel, *supra* n. 6, 125 (Dis. Op. of Judge Spiropoulos); L. Gross, *supra* n. 31, at 375.

³⁶ Briggs, *supra* n. 12, at 363; J. Crawford, *supra* n.10 at 65; Briggs, *supra* n. 9, at 307.

³⁷ Norwegian Loans, *supra* n. 7, at 55-9 (Sep.Op. of Judge Lauterpacht); Interhandel, *supra* n. 6, at 55, 57 (Sep. Op. of Judge Lauterpacht).

³⁸ Norwegian Loans, *supra* n. 7, at 68, 70 (Dis Op. of Judge Guerrero); Interhandel, *supra* n. 6, at 32 (Declaration of Judge ad. hoc. Carry), 76-8 (Dis. Op. of Judge Klaestad), 93-4 (Dis. Op. of Judge Armand-Ugon); Harris, *supra* n. 6, at 730; I. Hussain, *supra* n. 17, at 153; R.Y. Jennings, *supra* n. 19, at 357.

³⁹ Right Of Passage, *supra* n. 12, at 142; S. Rosenne, *supra* n. 7, at 399.

⁴⁰ Briggs, *supra* n. 12, at 361-3.

⁴¹ *Infra* p. 12 ff.

⁴² Anglo-Iranian Oil Co (UK v. Iran), [1951] ICJ 89, at 92-3 (July 5); Interpretation Of The Peace Treaties With Bulgaria, Hungary and Romania, [1950] ICJ 65 at 70 (July 18).

II. FREEDONIA HAS STANDING TO BRING THE PRESENT ACTION BEFORE THIS COURT

A. Freedonia Is Entitled To Offer Diplomatic Protection To The Refugees

The rule that a state may only exercise diplomatic protection in respect of its nationals is not absolute. There exist various exceptions to this principle.⁴³ It has been acknowledged that in the case of stateless persons and refugees, non-national states may bring a claim on their behalf against a state which violates their rights.⁴⁴

The refugees in the present case are *de facto* stateless persons i.e. they no longer enjoy the protection or assistance of their national states, despite retaining their nationality.⁴⁵ *De facto* stateless persons have consistently been equated in status to *de jure* stateless persons⁴⁶ (who enjoy treaty protection⁴⁷). International efforts have recognised that all persons should be given an effective nationality⁴⁸ and have stressed the need to eliminate statelessness in all its forms⁴⁹ by extending protection to the persons concerned.⁵⁰

⁴³ L. Oppenheim, *International Law*, at 935-9 (Jennings ed., 1992); G. Schwarzenberger, *International Law*, at 592-6 (1957).

⁴⁴ L. Oppenheim, *supra* n. 43, at 886-96.

⁴⁵ Study of Statelessness, UN Dept. of Soc. Affairs, at 8-9, UN Docs. E/ 1112, (Feb. 1, 1949) & E/1112/Add-1 (May 19 1949); G. V. Glahn, *Law Among Nations*, at 212 (1992); I. Brownlie, *Principles Of Public International Law*, at 556 (1990); Report on Nationality and Statelessness submitted to the 44th. Conference of the International Law Association, by J. Merryn Jones, Special Rapporteur, at 2, UN Doc. A/1785/Annex 1 (Mar. 6, 1951).

⁴⁶ A Study of Statelessness, *supra* n. 45, at 8-9; J. Hathaway, "A Reconsideration Of The Underlying Premise Of Refugee Law", 31 *Harv ILJ* 129, at 144 (1990).

⁴⁷ Convention Relating To The Status Of Stateless Persons, entered into force June 6, 1960, Sept. 23, 1954, 360 UNTS 5158 [hereinafter CSSP 54] ; Convention On The Reduction Of Statelessness, entered into force Dec. 13, 1975 [hereinafter CRS 61].

⁴⁸ Universal Declaration Of Human Rights, art.15, adopted by UNGAR 217 A (III) (Dec.10, 1948) [hereinafter UDHR]; Third Report on the Elimination or Reduction of Statelessness, by Roberto Cordova, Special Rapporteur [1954] 2 YBILC 26, at 30, UN Doc. A/CN.4/81.

⁴⁹ Brownlie, *supra* n. 45, at 557-9; Weis, *Nationality And Statelessness In International Law*, at 162-7 (1979).

⁵⁰ Van Panhuys, *The Role Of Nationality In International Law*, at 220-2 (1959).

Freedonia's claim is consonant with these objectives. By granting the refugees asylum, it is affording them the protection and assistance that they no longer enjoy from their respective national states. The refugees are, thus, able to retain the functional and effective aspect of their nationality,⁵¹ i.e. the right of protection by a state. Judicial considerations *per se* should not operate to negate the humanitarian aspect⁵² of this claim, as the proper focus should be on eliminating statelessness and giving an effective right to nationality.⁵³ Where no other state is able to extend protection, then the state of asylum should be the proper party to present a claim.

The principle of effective link⁵⁴ is not a material consideration in the present case. This principle only applies where the persons concerned have connections with both states,⁵⁵ e.g. in cases of dual nationality. Even if an effective link had to be shown, Freedonia would still qualify. Having granted the refugees asylum, it is, therefore, the state to which they are most closely connected.⁵⁶

B. Balboa Has Violated Obligations *Erqa Omnes* In Their Treatment Of The Refugees

Although the general requirement is that a state may claim only the rights of its own nationals,⁵⁷ there exist important exceptions which entitle a state to exercise protection on behalf of non-nationals.⁵⁸ International

⁵¹ L. Oppenheim, *supra* n. 43, at 857.

⁵² A.P. Mutharika, *The Regulation Of Statelessness Under International Law And National Law*, at 46 (1989).

⁵³ Secretary General's Message to the UN Conference On The Elimination Or Reduction Of Future Statelessness, UN Doc.A/CONF.9/SRI (1959).

⁵⁴ Nottebohm, *supra* n.9, at 24-6.

⁵⁵ Flegenheimer Case, 25 ILR 91, at 148-50 (Sept.20,1958).

⁵⁶ Leigh, "Nationality And Diplomatic Protection", 20 ICLQ 453, at 469-71 (1971); Van Panhuys, *supra* n.50, at 237-8.

⁵⁷ Mavrommatis Palestine Concessions (Greece v. UK), [1924] PCIJ (Ser. A) No.2, at 12(Aug. 20); Panavezys-Saldutiskis Railway (Est. v. Lith.), [1939] PCIJ (Ser. A/B) No. 76, at 16 (Feb. 28).

⁵⁸ Reparations For Injuries Suffered In The Services Of The United Nations, [1949] ICJ 174, at 181 (April 11).

law has consistently recognised legal interests in matters apart from direct, physical interests.⁵⁹ States other than the state directly injured can have a legal interest in the observance of certain obligations.⁶⁰ These are obligations *erga omnes*, which are the concern of all states by virtue of the importance of the rights involved;⁶¹ all states have a legal interest in their protection. The rules on basic human rights comprise one of these obligations.⁶²

Balboa's treatment of the refugees amounts to a flagrant violation of their basic rights which have been incorporated into the Universal Declaration of Human Rights⁶³ and subsequent international instruments in human rights.⁶⁴ The incorporation of these rights, coupled with evidence of state practice, confirms their character as rights which have entered into the body of customary international law.⁶⁵ The binding effects of these rights as customary law places the obligation squarely on Balboa to respect them.

⁵⁹ South West Africa (Eth. v. S. Africa; Lib. v. S. Africa), [1962] ICJ 319, at 425 (Sep. Op. of Judge Jessup) (Dec. 21); South West Africa (Eth. v. S. Africa; Lib. v. S. Africa), [1966] ICJ 6, at 251 (Dis. Op. of Judge Tanaka) (July 18); C.J.R. Dugard, "The South West Africa Cases, Second Phase, 1966," 83 *SALJ* 429, at 449-51 (1967).

⁶⁰ South West Africa, *supra* n. 59, at 425 (Dis. Op. of Judge Jessup), 478 (Dis. Op. of Judge Forster); Military And Paramilitary Activities In And Around Nicaragua (Nicar. v. US), [1984] ICJ 4, at 190 (Dis. Op. of Judge Schwebel) (June 27); Fifth Report on State Responsibility, by Roberto Ago, Special Rapporteur reprinted in [1976] 2 *YBILC* 3, at 50, UN Doc.A/CN.4/291; W.A. McKean, "Legal Right Or Interest In The South West Africa Cases: A Critical Comment", 1 *Aust YBIL* 135, at 139-41 (1966).

⁶¹ Barcelona Traction, Light And Power Company Limited (Belg. v. Spain), [1970] ICJ 3, at 32 (Feb. 5); H. Thirlway, "The Law and Procedure of the ICJ", 60 *BY* 1, at 92-102 (1989).

⁶² Barcelona Traction, Light And Power Company Ltd., *supra* n. 61.

⁶³ UDHR, *supra* n. 48; International Conference on Human Rights in Teheran, Res. XX, U.N. Doc. A/CONF.32/41 (1968).

⁶⁴ Convention Relating To Status of Refugees, July 28, 1951, entered into force Apr. 22, 1954 189 UNTS 13, [hereinafter CSR 51]; CSSP 54 *supra* n. 47; International Covenant on Civil and Political Rights, Dec. 16, 1966, entered into force Mar. 23, 1976, UNGAR 2200 (XXI), 21 UNGAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) [hereinafter ICCPR 66]; American Convention on Human Rights, entered into force on July 18, 1978 [hereinafter ACHR 69]; The African Charter on Human and Peoples' Rights, entered into force on Oct. 21, 1986 [hereinafter ACHPR 81].

⁶⁵ D'Amato, "The Concept of Human Rights in International Law", 82 *Col LR* 1110, at 1128 (1982); L. Oppenheim, *supra* n. 43, at 1000-1; Declaration of the Occasion of the 25th Anniversary of the UN, UNGAR 2627 (XXV) (1970).

As these rules were established for the protection of human rights,⁶⁶ their interests are not allocatable exclusively to a particular state.⁶⁷ In the event of a violation of these rules, every other state bound by these rules must necessarily be considered an injured state,⁶⁸ and Freedonia comes logically within this category.

C. The Exhaustion Of Local Remedies Is Not A Prerequisite To Adjudication By This Court

The requirement of exhaustion of local remedies before a claim against a state may be submitted to an international forum is a general rule of international law⁶⁹ applicable in cases where a state exercises diplomatic protection for its nationals whose rights have been violated by the respondent state.⁷⁰ An examination of the precedents reveals that the rule only applies in cases of diplomatic protection.⁷¹ There is no authority for applying the rule beyond its parameters.

The rule is therefore inapplicable in the present case, since Freedonia is not claiming the right of diplomatic protection of its nationals. Freedonia, which is not directly affected, is submitting a claim on behalf of the victims of an international human rights violation. Rigid insistence on

⁶⁶ Draft Articles on State Responsibility, art. 5(2)(e)(iii), in Report of the International Law Commission in the Work of its Thirty-Seventh Session, reprinted in [1985] 2 YBILC 20, UN Doc.A/CN.4/SER.A/1985/Add. 1 (Part 2).

⁶⁷ Draft Articles on State Responsibility, *supra* n. 66, cmt. to art. 5.

⁶⁸ *Ibid.*

⁶⁹ Mavrommatis Palestine Concessions, *supra* n. 57, at 12; Interhandel, *supra* n. 6, at 27; Draft Articles On State Responsibility, art. 22 in Report Of The International Law Commission On The Work Of Its 32nd. Session reprinted in [1977] 2 YBILC at 31, UN Doc. A/CN.4/SER.A/1977/Add.1 (Part 2); L. Oppenheim, *supra* n. 43, at 525; Briggs, "Interhandel, The Court's Judgement of March 21, 1959, On The Preliminary Objections Of The United States", 53 *AJ* 547 at 560-3 (1959); de Zayas, Moller, and Opsahl, "Application Of The International Covenant On Civil And Political Rights Under The Optional Protocol By The Human Rights Committee", 28 *Germ YBIL* 9, at 24 (1985).

⁷⁰ Aerial Incident of July 27, 1955 (Israel v. Bulgaria), [1959] ICJ 127, at 127 ff (May 26); Sorenson, *Manual Of Public International Law*, at 582 (1968); T. Meron, "The Incidence Of The Rule Of Exhaustion Of Local Remedies", (1959) 35 *BY* 83, at 94 (1959); L. Oppenheim, *supra* n. 43, at 523.

⁷¹ Mavrommatis Palestine Concessions Case, *supra* n. 57, at 12; Panevezys-Saldutiskis Railway, *supra* n. 57; Norwegian Loans, *supra* n. 7; Elettronica Sicula S.P.A. (US v. Italy), [1989] ICJ 15 (July 20).

the rule will be an obstacle to "a more direct, quicker and more effective form of protection of human rights".⁷²

Further, the rule is only a condition precedent to the exercise of the right of diplomatic protection⁷³ and is not a *sine qua non* upon which the very existence of the state's international responsibility hinges.⁷⁴ Consequently, since the action complained of is a breach of international law, not of domestic law, the local remedies rule does not *ex hypothesi* come into play at all, unless the domestic law provides for an extraordinary remedy by way of constitutional appeal.⁷⁵

Even if the action complained of is a breach, both of the domestic law and of international law, it is submitted that the rule which operates as a procedural bar, is inapplicable as Freedonia is only requesting a declaration, not reparation and damages.⁷⁶ The terms of the Statute do not prevent this Court from rendering a declaratory judgement⁷⁷ that there has been a breach of international law.

The rules of customary international law demand that local remedies be

⁷² T. Meron, *Human Rights And Humanitarian Norms As Customary Law*, at 175 (1991).

⁷³ Barcelona Traction, Light And Power Co. Ltd., *supra* n. 61, at 143 (Sep. Op. of Judge Tanaka).

⁷⁴ Phosphates in Morocco, *supra* n. 7, at 28; Finnish Vessels In Great Britain During The War (Fin. v. UK), 7 AD 231, at 235 (May 9); Norwegian Loans, *supra* n. 7, at 39-41 (Sep. Op. of Judge Lauterpacht); C.H.P. Law, *The Local Remedies Rule In International Law*, at 32 ff., 131 ff. (1961); T.Hoesler, *The Exhaustion Of Local Remedies In The Case Law Of International Courts And Tribunals* Eagleton, at 92 ff., 131 ff. (1968); C. Amerasinghe, "The Formal Character Of The Rule Of Local Remedies", 25 *ZoV* at 445 (1969); Eagleton, *The Responsibility of States for Denial of Justice*, at 407 (1938); Fitzmaurice, "The Denial of Justice", 13 *BY* 93, at 96 (1932).

⁷⁵ J.H.W. Verzijl, "Observations Au Sujet De L'Expore Preliminaire", 45 *Annuaire* 1, at 5 (1954,1); J. Fawcett, "The Exhaustion Of Local Remedies: Substance Or Procedure?", 31 *BY* 452, at 455 (1954).

⁷⁶ J. Fawcett, *supra* n. 75, at 457.

⁷⁷ German Interests in Polish Upper Silesia, [1926] PCIJ (Series A) No. 7, at 19 (May 25); Interpretation of Judgements Nos. 7 and 8 (The Chorzow Factory), [1927] PCIJ (Series A) No. 3, at 20-21 (Dec. 16); Simmonds, 10 *ICLQ* 537; at 545 (1961); C.Amerasinghe, *State Responsibility For Injuries To Aliens*, at 204 (1967); J. Fawcett, *supra* n. 75, at 453.

both available and effective.⁷⁸ The burden of proof falls on Balboa to show the existence of effective local remedies.⁷⁹ The non-existence of effective local remedies extinguishes the requirement for exhaustion of such remedies.

The claim by Freedonia is also justified due to the existence of exceptional circumstances which impede the recourse to local remedies.⁸⁰ The continuous detention of the victims by Balboa make recourse to local remedies almost impossible.

In addition, the continuous detention has deprived the victims any possibility of free access to the local courts. This amounts to a denial of justice, and breaches the international minimum standard, justifying non-exhaustion of local remedies.⁸¹

III. BALBOA'S TREATMENT OF THE REFUGEES IS IN VIOLATION OF INTERNATIONAL LAW ON HUMAN RIGHTS

A. Balboa Has Failed To Adhere To The International Minimum Standard Required In Its Treatment Of Aliens

All states are required to adhere to a minimum standard in their treatment of aliens. A failure to measure up to this standard incurs international responsibility.⁸² Balboa's contention that they have treated the refugees better than their own prisoners⁸³ does not absolve them of international liability. Local practice cannot be invoked to avoid

⁷⁸ Draft Articles On State Responsibility, *supra* n. 69, at 47; O. Shachter, "International Law In Theory And Practice", 178 *Hag R* 188, at 202 (1982,5).

⁷⁹ Ambatielos Claim (Gr. v. UK), 23 ILR 306, at 334-5 (Mar. 6, 1956); A.A. Cancado Trindade, "Exhaustion Of Local Remedies In Relation To Legislative Measures And Administrative Practices-The European Experience", 18 *Malaya LR* at 257 ff (1976); A.A. Cancado Trindade, "The Burden Of Proof With Regard To Exhaustion Of Local Remedies In International Law", 9 *HRLJ* at 81-121 (1976).

⁸⁰ Finnish Vessels in Great Britain during the War, *supra* n. 74, at 237.

⁸¹ F.V. Garcia-Amador, *The Changing Law of International Claim*, at 465 (1986,2); G. Schwarzenberger, *supra* n. 43, at 603.

⁸² L. Oppenheim, *supra* n. 43, at 931.

⁸³ Problem at 10.

international obligations.⁸⁴ The 'national standard' doctrine, which says that an alien should be treated equally to a state's nationals,⁸⁵ cannot be validly invoked by Balboa.

The propriety of Balboan acts must "ultimately be tested in the light of international law",⁸⁶ i.e. the test of international standards,⁸⁷ in accordance with the ordinary standards of civilisation.⁸⁸ Hence Balboa, in its actions, must still take as its lowest common denominator,⁸⁹ the international minimum standard.⁹⁰

The Charter, the UDHR and other international human rights instruments are now acknowledged as the bases which define the international standards applicable to all persons, including aliens.⁹¹ These are, therefore, the minimum standards which Balboa must adhere in its treatment of the refugees.

B. Balboa Has Violated Its Obligations Arising From The Charter And The UDHR

1. The Charter Mandates the Observance of Human Rights

⁸⁴ L. Oppenheim, *supra* n. 43, at 82.

⁸⁵ First Report on State Responsibility, by Garcia-Amador, *Special Rapporteur*, [1956] 2 *YBILC* 173 at 201-2, UN Doc.A/CN.4/96; F.Garcia-Amador, L.Sohn & R.Baxter, *Recent Codification Of The Law Of State Responsibility For Injuries To Aliens*, at 3-4 (1974); McDougal, Lasswell & Chen, "The Protection Of Aliens From Discrimination, And World Public Order: Responsibility Of States Co-joined With Human Rights", 70 *AJ* 432, at 443-5 (1976).

⁸⁶ Robert's Claim (US v. Mex.), 4 *RIAA* 77, at 80 (1926).

⁸⁷ Neer Claim (US v. Mex.), 4 *RIAA* 60, at 61 (1926).

⁸⁸ *Ibid.*

⁸⁹ R.Y. Jennings, "General Course In International Law", 121 *Hag R*, at 487 (1967,2).

⁹⁰ First Report on State Responsibility, *supra* n.85, at 199-201; F. Garcia-Amador, Sohn & Baxter, *supra* n. 85, at 429-31; McDougal, Lasswell & Chen, *supra* n. 85 at 446-7; Borchard, "The Minimum Standard Of The Treatment Of Aliens", 33 *A.S. Proceedings* 51, at 53 (1939); Roth, *The Minimum Standard Of International Law Applied To Aliens*, at 172 (1949).

⁹¹ McDougal, Lasswell & Chen, *supra* n.85 at 456,464; R. Y. Jennings, *supra* n.89 at 488; Freeman, "Human Rights And The Rights Of Aliens", 45 *A.S.Proceedings* 120 (1951); P.C. Jessup, *A Modern Law Of Nations*, at 101-2 (1948); Fenwick, "The Progress Of International Law During The Past Forty Years", 79 *Hag R* 1, at 44 (1951-2); Mosler, "The International Society As A Legal Community", 140 *Hag.R.* 1 at 72 (1974-4); Lillich, "Duties Of States Regarding The Civil Rights Of Aliens", 161 *Hag R* 333 at 390-410 (1978,3).

Article 55 of the Charter imposes a mandatory obligation to promote, respect and observe human rights and fundamental freedoms. This is evidenced by the distinct legal duty in Article 56 of the Charter in which all members pledge themselves to act, jointly and severally, to achieve the purpose set forth in Article 55⁹² as confirmed by this Court.⁹³

Article 2(2) of the Charter requires Balboa to fulfil the obligations assumed by it in accordance with the Charter in good faith. Balboa as a member of the United Nations is under a duty to observe fundamental human rights.

2. Principles Embodied in UDHR Constitute Binding Obligations for Balboa

The UDHR as an authoritative listing of human rights has achieved the tone of customary international law.⁹⁴ This Court has given obligatory force to the fundamental principles enumerated in the UDHR.⁹⁵ Moreover, declarations of the General Assembly have explicitly provided that states shall "faithfully and strictly" observe its provisions.⁹⁶

3. Treatment of the Refugees is in Violation of UDHR

The continuous detention of the refugees without any change in their

⁹² H. Lauterpacht, *International Law And Human Rights*, 147-149 (1950); see also Lauterpacht's report on Human Rights, the Charter of United Nations and the International Bill of Rights of Man in report of the 43rd Conference (Brussels) of the International Law Association pp. 80 ff. (1948); P. C. Jessup, *supra*. n. 91, at 89.

⁹³ Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa), [1971] I.C.J 16 (June 21); see also UNGAR 616 (VII) of 1952, 721 (VIII) of 1957, 1178 (XII) of 1957, 1248 (XIII) of 1958, 1375 (XIV) of 1959.

⁹⁴ L. Sohn, "The New International Law :Protection of the Rights of Individuals Rather than States", 32 *Am U LR* 1, 17 (1982); L. Sohn, "The Human Rights Law of Charter", 12 *Texas ILJ* 129, 131 (1977) ; see also M.G. Kaladharan Mayan, *Human Rights and Economic Developments:The Legal Foundation Universal Human Rights*, at 64.

⁹⁵ United States Diplomatic and Consular Staff in Teheran (US v Iran), [1980] ICJ 3, at 42 (May 27).

⁹⁶ Declaration on the Granting of Independence to Colonial countries and Territories, UNGAR 1514 (XV) of Dec. 14, 1960; J.P. Humprey, *The Universal Declaration Of Human Rights, Its History, Impact, Judicial Character In Human Rights Thirty Years The Universal Declaration*, at 37; Proclamation of Teheran, UNGAR 2442 (XXII) of Dec. 19, 1968, at para. 5, 23 UNGAOR, Supp. No. 18, at 49-50, UN Doc. A/7218 .

situation,⁹⁷ is, in itself, arbitrary. It infringes on the freedom from arbitrary detention embodied in Article 9. The refugees have not been afforded access to courts as set forth in Article 10. Article 12 further guarantees the fundamental right of family unity which is entitled to be protected by the state⁹⁸. At present husbands have been separated from their wives, while their children have been placed in foster homes.⁹⁹ Moreover, Article 13 accords the refugees the freedom to leave Balboa and seek asylum in Freedonia.¹⁰⁰

C. Balboa Has Violated Its Obligations Arising Under The CSR 51

1. The Unilateral Pronouncement of Balboa has Resulted in Binding International Obligation

The statement by the Balboan Minister for Immigration¹⁰¹ to the effect that Balboa considers the guidelines in CSR 51 and the 1967 Protocol Relating to the Status of Refugees¹⁰² as generally accepted international law is binding upon Balboa, as confirmed by the Permanent Court.¹⁰³ In addition this Court has recognized that the declaration made by way of unilateral acts concerning legal or factual situation creates legal obligations¹⁰⁴ particularly if the declaration is made publicly, with an intention to be bound.¹⁰⁵ Since Hilary falls within the definition of a refugee under CSR 51,

⁹⁷ Problem at 9.

⁹⁸ "Humane Treatment for Non Delinquent Detainees", 11 *IR of R Cross* 403, at 412 (1967).

⁹⁹ Problem at 10.

¹⁰⁰ UDHR *supra* n. 48, read in conjunction with article 14.

¹⁰¹ Problem at 6 .

¹⁰² entered into force Oct. 4, 1967, 606 UNTS 267 [hereinafter 1967 Protocol].

¹⁰³ Legal Status Of Eastern Greenland (Den. v. Nor.), [1933] PCIJ (Ser A/B) No.53, (1933).

¹⁰⁴ Nuclear Test (Aust. v Fra.; N. Z. v Fra.), [1974] ICJ 253, (Dis. Op. of Judge Anzilotti) (Dec. 20).

¹⁰⁵ *Ibid.*

Balboa is under a legal obligation to accord her the rights under the Convention.¹⁰⁶

2. Hilary Fulfils the Necessary Criteria for Characterization as a refugee as Articulated in CSR 51

a. **A Well-founded Fear of Persecution for Reason of Political Opinion is the Basis for Claiming Refugee Status**

i. **A Well-founded fear of persecution**

A refugee claimant under the CSR 51 must perceive himself to stand in fear of persecution,¹⁰⁷ which must be reasonable and not overstated.¹⁰⁸ A well-founded fear exists in cases of persons who have defied the government of their country of origin while abroad.¹⁰⁹ Further, the fear is substantiated by experiences of claimant's family in the country of origin.¹¹⁰ Moreover, international law recognizes that a genuine refugee claim may be established where the state of origin views the unauthorized stay as an implied political statement of disloyalty or defiance.¹¹¹

There is conclusive evidence of persecution at present, for the most obvious form of persecution is abuse of human rights by organs of state such as the police.¹¹² In such cases it is clear that claimant refugees can have no reasonable expectation of national protection, since the harm feared consists of acts or circumstances for which government authorities themselves

¹⁰⁶ *Infra*, p. 18 ff.

¹⁰⁷ Y. Shimada, "The Concept of Political Refugee in International Law" 19 *Jap AIL* 24, at 33 (1975).

¹⁰⁸ G. Melander, "The Protection of Refugees", 18 *Scand SL* 153, at 158 (1974).

¹⁰⁹ Grahl Madsen, *The Status of Refugee in International Law*, at 181 (1966).

¹¹⁰ J. Hathaway, *The Law of Refugee Status*, at 89 (1981); G. Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligation of States and the Protection Function of the Office of the U.N.C.H.R.", *Mich YBILS* 291 (1980); Anthony Andre Williams v. Minister Of Employment and Immigration, Federal Court of Appeal Decision A-57-81, June 16, 1981.

¹¹¹ B. Tsamenyi, "The Boat People: Are They Refugees", 5 *Hum Rts Q* 348, at 369-70 (1983).

¹¹² Grahl Madsen, *supra* n 109, at .

are responsible.¹¹³ The fact that Hilary's apartment was ransacked by the Draconian police indicates that the persecution emanates from the state or at least involves state complicity.

ii. Political opinion

The term "political opinion" in the context of Article 1A(2) covers persecution of persons on the mere ground that they are known to hold opinions contrary to or critical of the policies of the government.¹¹⁴ Further, a claimant may justly fear persecution for reasons of political opinion if he is threatened with measures of a persecutory nature because of his exercise of his rights to freedom of opinion and expression as embodied in Article 19 of UDHR.¹¹⁵ Hilary has been very critical of the policies of her government regarding the minorities in Draconia, both internally and internationally, which has lead her to fear persecution.

b. The Definition of Refugee under the CSR 51 Extends to Refugees *Sur Place*

The fact that Hilary left Draconia for the purpose of attending a conference¹¹⁶ and did not flee as a result of a well-founded fear of persecution does not defeat her claim to be accorded refugee status. The Convention's definition¹¹⁷ extends to persons who are already outside their country before the persecution begins.¹¹⁸ These people are identified as refugees *sur place*.¹¹⁹ International law recognizes that, if while abroad, an individual expresses views which jeopardize the possibility of a safe

¹¹³ C. Wydrzynski, "Refugees and the Immigration Act", 25 *Mc Gill LJ* 154 (1979); Zahirdeen Rajudeen v. Minister of Employment and Immigration., 55 N.R. 129, (F.C.A.) (1985).

¹¹⁴ Grahl Madsen, *supra* n. 109, at 224.

¹¹⁵ *Id.* at 227, 228.

¹¹⁶ Problem at 3.

¹¹⁷ CSR 51, *supra* n. 64, art. 1(A)(2).

¹¹⁸ G. Gilbert, "Right of Asylum : A Change of Direction" 32 *ICLQ* 633 at 646 (1983);

¹¹⁹ P. Weis, "The Concept of Refugee in International Law", *J du droit* 928 at 972 (1960).

return to her home state, she is entitled to be considered a Convention refugee.¹²⁰

3. The Rights Accorded to a Refugee under the CSR 51 Extend to Her Immediate Family Members

The immediate family members of a refugee may claim to be victims of indirect persecution,¹²¹ particularly in the case of a government which seeks out relatives of its opponents in order to intimidate or put down potential opposition.¹²² State practice is in favour of extending the benefit of CSR 51 to the immediate family members of the refugees.¹²³ In the present case, Rousseau and Emily have been victims of indirect persecution by the Draconian government.¹²⁴ Rousseau and Emily, being the immediate family of Hilary, are entitled to equal protection under the CSR 51.

4. Hilary and Her Family are to be Accorded Their Rights under the CSR 51

a. **Their Detention Cannot be Justified under Article 31(2) of the Convention which Permits a State to Impose Necessary Restrictions**

Article 31(1) permits restrictions upon the refugees until their status is regularized or until they obtain admission into another country. Balboan authorities were bound to lift all restrictions once it became clear they were refugees under Article 1A(2)¹²⁵ or alternatively when they found admission into Freedonia.¹²⁶ Moreover, Article 31(2) requires Balboa to facilitate their admission into Freedonia. Detention of refugees for the mere convenience

¹²⁰ A. Fragomen, "The Refugee :A Problem of Definition", 3 *CWRJIL* 45 at 55 (1970); See also Chaudri v. Minister of Employment and Immigrations, 69 N.R 114, (F.C.A.) (1986).

¹²¹ Grahl Madsen, *supra* n. 109, at 423.

¹²² *Ibid.*

¹²³ Ad Hoc Committee's Report of its First Session, UN Doc. E/AC.32/5 (E/1618), 40; Grahl Madsen, *supra* n. 109, at 413.

¹²⁴ Problem at 4.

¹²⁵ Grahl Madsen, *supra* n.109, at 437.

¹²⁶ Problem at 11.

of immigration officials amounts to an abuse of Article 31.¹²⁷ Further, the restrictions imposed must be temporary.¹²⁸

b. Involuntary Repatriation of Hilary and Her Family by the Balboan Authorities is Prohibited by the Rule of Nonrefoulement.

Article 33(1) prohibits the refoulement of refugees in any manner whatsoever to the frontiers of territories where their lives and freedom would be threatened on account of, *inter alia*, their political opinions. Article 33 is not dependent upon the legality of the refugee's presence,¹²⁹ and it applies the moment a *prima facie* refugee sets foot in the territory of the state.¹³⁰ Further, it is not dependant upon their lawful presence.¹³¹ The application of the rule of nonrefoulement is independent of any formal determination of refugee status by Balboa.¹³² Article 33(2) cannot be invoked to deny the benefit of Article 33(1) as Hilary and her family are neither a threat to the security of the community or the country nor have they been convicted of a serious crime.

c. The Denial of Access to Courts is Inconsistent with the Provisions of CSR 51

The refugees detention is in violation of the right of access to courts guaranteed to refugees under Article 16(1). They were neither granted legal services nor were judicial remedies made available. This right is so fundamental that it does not permit any derogation.¹³³

¹²⁷ Grahl Madsen, *supra* n.109, at 418.

¹²⁸ *Id.* at p.420.

¹²⁹ Refugee(Germany), 28 ILR 297 (July 14, 1959).

¹³⁰ Grahl Madsen, *supra* n. 109, at 93.

¹³¹ N. Robinson, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation* at 112 (1953).

¹³² G. Goodwin-Gill, "Nonrefoulement and New Asylum Seekers", 26 *Va JIL* 897, at 902 (1986).

¹³³ CSR 51, *supra* n. 64, art. 42 ; 1967 Protocol, *supra* n. 102, art. VII.

C. The Treatment of Refugee Children is Inconsistent with the Provisions of Convention on the Rights of Child 1989¹³⁴

1. Balboa, a Signatory to the CRC 89 is Obligated to Accord to the Refugee Children the Rights under the Convention

a. The Absence of Ratification does not Preclude Balboa's Obligations under the CRC 89

At present, Balboa is a signatory¹³⁵ to the CRC 89. Although Article 47 of the CRC 89 declares the present Convention is subject to ratification by its signatories, it does not obviate Balboa's obligations arising under it. Article 47 is to be read in the light of Article 18 of the Vienna Convention on The Law of Treaties.¹³⁶ Article 18 imposes an obligation upon a state to refrain from acts which would defeat the object and purpose of a treaty during the interval between signature and its ratification.¹³⁷ Balboa, a party¹³⁸ to the VCLT is bound by the rule *pacta sunt servanda*¹³⁹ to observe Article 18. The failure to accord those rights arising under CRC 89 defeats it's object and purpose.

2. Balboa has not Afforded the Refugee Children Full Enjoyment of the Rights under CRC 89

Article 22¹⁴⁰ imposes upon Balboa an obligation to ensure that a child seeking refugee status receives appropriate protection and humanitarian assistance in the enjoyment of the rights set forth in the present Convention. At present the children have been taken from their parents and have been placed in Balboan foster homes. This is in violation of Article 9(1)¹⁴¹ which

¹³⁴ entered into force Sep. 20 1990, 28 ILM 1448. [hereinafter CRC 89]

¹³⁵ Problem at introduction.

¹³⁶ opened for signature May 23, 1969, art. 18, 1155 UNTS 331, entered into force Jan. 27, 1980 [hereinafter VCLT].

¹³⁷ *Ibid.*; L. Oppenheim, *supra* n. 43, at 1238.

¹³⁸ Problem at introduction.

¹³⁹ VCLT, *supra* n. 136, art. 26; L. Oppenheim, *supra* n.43, at 1249.

¹⁴⁰ CRC 89, *supra* n. 134.

¹⁴¹ *Ibid.*

requires a state party to ensure that a child shall not be separated from his or her parents against their will.

Moreover, Article 18(1)¹⁴² recognizes the principle that parents have common responsibilities for the upbringing and development of the child. Article 30¹⁴³ guarantees a child seeking refugee status the right to enjoy his culture and to use his own language. The Balboan authorities, by placing the children in foster homes where only the native Balboan language is spoken, are denying the right guaranteed under Article 30.

IV. BALBOA IS OBLIGED TO ACCORD TEMPORARY REFUGE TO THE LABORIAN REFUGEES

The Laborians, fleeing generalized violence and other threats to their lives and security caused by internal armed conflict within Laboria are entitled to be accorded temporary refuge by Balboa.

A. The Practice Of Temporary Refuge Has Attained The Status Of Customary Law

Customary norms of international law emerge from consistent state practice accompanied by *opinio juris*. Modern international law recognizes that states' general acquiescence to a customary practice may occur in a short period of time¹⁴⁴ and that only widespread state practice, rather than a unanimity of practice is necessary to establish a norm.¹⁴⁵ Adherence to the principle of temporary refuge is widespread in Africa,¹⁴⁶ Southeast Asia,¹⁴⁷

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ North Sea Continental Shelf (FRG v. Den., FRG v. Neth.), [1969] ICJ 3, at 41-2 (Feb. 20); C. Jenks, *Law in the World Community*, at 8-9 (1961).

¹⁴⁵ J. Brierly, *The Basis of Obligation in International Law*, at 309 (1958); I. Brownlie, *supra* n. 45, at 9 (1990).

¹⁴⁶ *Refugees*, (Jan. 1985) at 8 (Chad); *Refugees*, (July 1984) at 28 (Uganda); *Refugees*, (Dec. 1985) at 7 (Zambia).

¹⁴⁷ *Refugees*, (Dec. 1985) (presence of Laos and Vietnamese refugees in Thailand); "Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World with Particular Reference to Colonial and Other Dependant Countries and Territories Mass Exodus Situation", at 24-25, U.N.

South Asia,¹⁴⁸ Western Europe,¹⁴⁹ and Latin America.¹⁵⁰ Further, direct expressions of legal obligations are not the primary evidentiary source of *opinio juris* for temporary refuge.¹⁵¹ *Opinio juris* is evidenced by the protest of states when a norm is breached.¹⁵² States failing to afford temporary refuge to victims of internal armed conflict have met with international protest and criticism.¹⁵³ Moreover, *opinio juris* is implicit in the very consistency of state practice, given the material costs that conformity to the norm entails.

V. THE GOVERNMENT OF BALBOA IS UNDER A DUTY NOT TO REPATRIATE THE REFUGEES TO THEIR RESPECTIVE COUNTRIES

A. The Intended Repatriation Of The Refugees By Balboa Would Be In Violation Of The Established Rule Of Nonrefoulement

In the event the Court, decides that the guidelines under the CSR 51 or the obligations arising there from are not binding upon Balboa and or that temporary refuge has not attained the status of customary international law, the intended repatriation of the refugees, would be a breach of international obligation on the second and different ground, that it breaches the customary rule of nonrefoulement.

Doc. E/CN.4/1503 Annex 1 (1981) (presence of Filipino refugees in Malaysia; *N Y Times* 24, Oct 4, 1985 at 6, Col. 1 (presence of Cambodian refugees in Malaysia).

¹⁴⁸ G. Goodwin Gill, *The Refugee in International Law*, at 111 (1983) (presence of East Pakistani refugees in India); *World Refugee Survey* 1984 at p. 55 (presence of Afghan refugees in Pakistan).

¹⁴⁹ *Refugees*, (Sept.1984) at 15 (presence of Lebanese refugees in Cyprus); *Refugees*, (Mar.1984) at 9 (presence of Lebanese refugees in Syria).

¹⁵⁰ *World Refugee Survey* 1984 at 53-54 (presence of Nicaraguan refugees in Honduras and Costa Rica).

¹⁵¹ Perluss and Hartman, "Temporary Refuge: Emergence of a Customary Norm", 26 *Va JIL* 551, at 577 (1986).

¹⁵² A'D Amato, *The Concept Of Custom In International Law*, at 91 (1971); Akehurst, "Custom As A Source Of International Law", 47 *BY* 1, at 18 (1974).

¹⁵³ Report of the United Nations High Commissioner for Refugees, 34 UNGAOR Supp. (No.12) at 1, para 2, UN. Doc.A/34/12. (1979); *Refugees* (May 1985) at 34.

1. The Rule of Nonrefoulement in Article 33 is Declaratory of Customary International Law and as such Binds Balboa

The principle of nonrefoulement is a rule of customary international law¹⁵⁴ binding on all states irrespective of CSR 51.¹⁵⁵ Both the CSR 51 and the 1967 Protocol¹⁵⁶ have enjoyed widespread participation.¹⁵⁷ The recurrence of the rule against refoulement in specialized and regional instruments,¹⁵⁸ in the form of norm creating provisions¹⁵⁹ is indicative of its status as a customary rule.¹⁶⁰ United Nations General Assembly resolutions¹⁶¹ urging member states to observe scrupulously the principle of nonrefoulement are indicative of widespread state practice.¹⁶² Further, recourse to *travaux preparatoires* of article 33 indicates it to be "... an expression of generally accepted principle..."¹⁶³ indicating that the principle was intended to be declaratory of customary international law.¹⁶⁴ This is further evidenced by the prohibition of reservation to Article 33 as

¹⁵⁴ G. Goodwin-Gill, *supra* n. 148, at 142-3, 218-9.

¹⁵⁵ CSR 51, *supra* n. 64.

¹⁵⁶ 1967 Protocol, *supra* n. 102.

¹⁵⁷ Greig, "The Protection of Refugees and Customary International Law", 8. *Aust YBIL* 130 (1983); G. Goodwin-Gill, *International Law and Movement of Persons Between States*, at 141 (1978); see also 13 *HRLJ* 3, at 63 (1992).

¹⁵⁸ Organization of African Unity Convention on Refugee Problems in Africa, art. 11, entered into force Sept. 10, 1969, 1001 UNTS 45 [hereinafter OAU Convention]; Declaration On Territorial Asylum, UNGAR 2312, 22 UNGAOR Supp. (No. 16) at 81, UN Doc. A/6716 (1967) [hereinafter UNDTA 67].

¹⁵⁹ North Sea Continental Shelf, *supra* n. 144, at 41-42.

¹⁶⁰ Starke, "Treaties as a Source of International Law," 23 *BY* 341, at 344 (1946).

¹⁶¹ UNGAR 34/60, 34/61 of 29 Nov. 1979 and 36/125 of 14 Dec. 1981; See also the Conclusion of the Executive Committee on UNHCR Programme, in Report of the 32nd. Session, UN Doc. A/AC 96/601 (22 Oct. 1981).

¹⁶² D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", 32 *BY* 97 (1955-6).

¹⁶³ Resolution adopted by the Conference on the Status of Stateless Person, Final Act of 28 Sept. 1954, 360 UNTS 117.

¹⁶⁴ R.R Baxter, "Multilateral Treaties as Evidence of Customary International Law", 41 *BY* 225, at 287 (1965-66); P. Hyndman, "Asylum and Non Refoulement-Are These Obligation Owed to Refugees Under International Law", 57 *Phil LJ* 57, at 62 (1982).

provided in Article 42.¹⁶⁵

2. Customary International Law Extends the rule of Nonrefoulement to Laborians

The principle of nonrefoulement in customary international law protects not only convention refugees but also displaced persons fleeing from civil strife.¹⁶⁶ This is evidenced by state practice and conventional international law.¹⁶⁷

B. Balboa Is Under An Obligation To Facilitate The Resettlement Of The Refugees In Freedonia

United Nation General Assembly through its resolutions has advocated three possible solutions to the refugee problem.¹⁶⁸ These being voluntary repatriation, establishment in the country of residence or resettlement in a third country.¹⁶⁹ In the present situation, voluntary repatriation is an impossibility¹⁷⁰ and Balboan authorities have indicated their refusal to resettle them in their territory.¹⁷¹ As such, Balboa is under a duty to facilitate resettlement of the refugees in Freedonia. This solution has been reiterated in various international instruments.¹⁷² A state holds only territorial and not personal supremacy over aliens within its boundaries. As such it cannot deny the right of an alien under Article 13(2) of UDHR which guarantees the right to leave any country¹⁷³. Moreover, Freedonia's request

¹⁶⁵ CSR 51, *supra* n. 64, art. 42.

¹⁶⁶ G. Goodwin Gill, *supra* n. 132, at 900.

¹⁶⁷ OAU Convention, *supra* n. 158, art. 1(2); Cartagena Declarations on Refugees, Nov. 22, 1984, art. III para 3, reprinted in Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser. L/V/II.66/doc.10, rev.i(1984-85).

¹⁶⁸ Res 1285 (XIII) of Dec. 5, 1958; 1390 (XIV) of Nov. 20, 1959; 1499 (XV) of Dec. 5, 1960; 1673 (XVI) of Dec. 18, 1961.

¹⁶⁹ *Ibid.*

¹⁷⁰ Problem at *passim*.

¹⁷¹ Problem at 9.

¹⁷² CSR 51, *supra* n. 64, art. 31 & 32; UNDTA 67, *supra* n. 158, art. 3.3; OAU Convention, *supra* n. 158, art. 11.5.

¹⁷³ L. Oppenheim, *supra* n. 43, at 939.

is in concert with the true spirit of international cooperation as exhorted by the United Nations in resolving the refugee crisis.¹⁷⁴

VI. PRAYER FOR RELIEF

Considering that Hilary, her family and the Laborians no longer enjoy the protection of their original states;

Considering that Freedonia has offered them asylum;

Taking Into Account the interests of all states in the observance of, and respect for, human rights obligations ;

Whereas Balboa has failed to accord the appropriate standard of treatment to these refugees;

And Further that the treatment of aliens is governed by principles of international law;

Freedonia respectfully prays that this Court declare:

- 1) that it has jurisdiction to hear this dispute; and
- 2) that, as Balboa is not properly ensuring the protection of the internationally guaranteed rights of Hilary, her family and the Laborian refugees, international law requires the transfer of the refugees to the control of Freedonian authorities.

Respectfully submitted,

Agents for Freedonia

¹⁷⁴ CSR 51, *supra* n. 64, Preamble; see also The Conference of Plenipotentiaries on the Status of Refugee and Stateless Persons, Recommendation IV; UNDTA 67, *supra* n. 158, art. 2.2 .