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

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**Case Concerning  
Granting of Refugee Status**

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Government of Freedonia,

Applicant,

v. .

Government of Balboa,

Respondent.

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February Term  
1994

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On Submission to the  
International Court of Justice

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**MEMORIAL FOR THE APPLICANT**

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TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u> . . . . .	iii
<u>STATEMENT OF JURISDICTION</u> . . . . .	vi
<u>STATEMENT OF FACTS</u> . . . . .	vi
<u>QUESTIONS PRESENTED</u> . . . . .	ix
<u>SUMMARY OF THE PLEADINGS</u> . . . . .	x
<u>PLEADINGS AND AUTHORITIES</u> . . . . .	1
<u>I. THE DECLARATIONS BY FREEDONIA AND BALBOA UNDER ARTICLE 36(2) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE GRANT THIS COURT COMPULSORY JURISDICTION.</u> . . . . .	1
A. THE CURRENT DISPUTE AROSE AFTER 4 JUNE 1993, THEREBY INVALIDATING BALBOA'S USE OF THE RESERVATION <i>RATIONE TEMPORIS</i> . . . . .	2
B. THE DISPUTE IS ESSENTIALLY INTERNATIONAL IN CHARACTER, THUS RENDERING BALBOA'S USE OF THE FREEDONIAN SELF-JUDGING CLAUSE INVALID. . . . .	3
1. BALBOA MUST USE GOOD FAITH IN APPLYING THE SELF-JUDGING RESERVATION. . . . .	4
2. THIS DISPUTE IS ESSENTIALLY INTERNATIONAL IN CHARACTER AND THUS WITHIN THIS COURT'S COMPULSORY JURISDICTION. . . . .	4
a. <u>This dispute involves the interpretation and application of multilateral treaties.</u> . . . . .	5
b. <u>Customary and general principles of international law also apply to Balboa's actions.</u> . . . . .	6
<u>II. FREEDONIA POSSESSES <i>JUS STANDI</i>, OR LEGAL STANDING, TO ASSERT THE RIGHTS OF NON-NATIONALS BEFORE THE ICJ FOR HUMANITARIAN PURPOSES.</u> . . . . .	8
A. INTERNATIONAL INTEREST IN PRESERVING INDIVIDUAL HUMAN RIGHTS, INCLUDING THOSE OF CHILDREN AND REFUGEES, JUSTIFIES FREEDONIA'S INTERVENTION. . . . .	8
B. PRINCIPLES AND RULES CONCERNING BASIC HUMAN RIGHTS ARE OBLIGATIONS <i>ERGA OMNES</i> , THEREBY GIVING FREEDONIA LEGAL STANDING TO INTERVENE. . . . .	9

	<u>Page</u>
<b><u>III. THE PANKHURSTS AND LABORIANIS QUALIFY AS REFUGEES UNDER INTERNATIONAL LAW.</u></b> . . . . .	10
<b>A. THE 1951 CONVENTION ACCORDS REFUGEE STATUS TO THE PANKHURST FAMILY AND LABORIANIS.</b> . . . . .	11
1. HILARY PANKHURST FULFILLS THE NECESSARY CRITERIA FOR CHARACTERIZATION AS A REFUGEE AS ARTICULATED BY THE 1951 CONVENTION. . . . .	12
2. AS MEMBERS OF HILARY'S IMMEDIATE FAMILY, ROUSSEAU AND EMILY SATISFY THE 1951 CONVENTION'S REQUIREMENTS FOR REFUGEE STATUS, DESPITE THEIR ILLEGAL ENTRY INTO BALBOA. . . . .	14
3. THE 1951 CONVENTION ALLOWS FOR A GROUP DETERMINATION OF THE LABORIANIS REFUGEE STATUS. . . . .	15
<b>B. THE LABORIANIS ALSO QUALIFY AS REFUGEES UNDER CUSTOMARY INTERNATIONAL LAW.</b> . . . . .	16
1. CONSISTENT STATE PRACTICE PROTECTS THOSE WHO FLEE BROADLY BASED CIVIL STRIFE OR CIVIL WAR. . . . .	16
2. <i>OPINIO JURIS</i> SUPPORTS THE PROPOSITION THAT THE LABORIANIS QUALIFY FOR REFUGEE STATUS. . . . .	19
<b><u>IV. INTERNATIONAL LAW REQUIRES BALBOA TO TRANSFER THE PANKHURSTS AND LABORIANIS TO THE CONTROL OF THE FREEDOMIAN AUTHORITIES BECAUSE BALBOA HAS FAILED TO ENSURE THE PROTECTION OF THEIR INTERNATIONALLY GUARANTEED RIGHTS.</u></b> . . . . .	20
<b>A. THE PRINCIPLE ON NON-REFOULEMENT FORECLOSES BALBOA'S ABILITY REPATRIATE THE PANKHURSTS OR LABORIANIS.</b> . . . . .	21
<b>B. BALBOA CONTINUES TO VIOLATE INTERNATIONAL LAW BY FORCIBLY DETAINING THE PANKHURSTS AND LABORIANIS AFTER THEY HAVE RECEIVED ADMISSION INTO FREEDONIA.</b> . . . . .	22
<b><u>V. BALBOA, AS A SIGNATORY TO THE 1989 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, OWES A SPECIAL DUTY TO PROTECT THE INTERNATIONAL RIGHTS OF THE PANKHURST AND LABORIAN CHILDREN.</u></b> . . . . .	22
<b><u>CONCLUSION</u></b> . . . . .	25

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>TREATIES AND OTHER INTERNATIONAL AGREEMENTS</b>	
Charter of the Organization of African Unity, May, 25, 1963, U.N.T.S. 479 No. 6947. . . . .	8
Charter of the Organization of American States, April 30, 1948, U.N.T.S. 119, No. 1609. . . . .	8
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U.N. Charter . . . . .	7-9
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**CASE LAW**

<u>Asylum</u> (Colom. v. Peru) 1950 I.C.J. 266. . . . .	6
<u>Barcelona Traction</u> (Belg. v. Spain) 1970 I.C.J. 4. . . . .	10
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<u>Interhandel</u> (Switz. v. U.S.) 1959 I.C.J. 6. . . . .	2
<u>Nottebohm</u> (Liech. v. Guat.) 1955 I.C.J. 4. . . . .	8

	<u>Page</u>
<u>Nuclear Tests</u> (Austral. v. Fr.) 1974 I.C.J. 253. . . . .	6
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**MISCELLANEOUS**

8 U.S.C. §1182(d)(5)(A) (1982). . . . .	18
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Jerome B. Elkind, <u>Non-Appearance Before the International Court of Justice</u> (1984). . . . .	3, 4
Sir Gerald Fitzmaurice, <u>The Law and Procedure of the International Court of Justice, Vol. II</u> (1986). . . . .	5
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	<u>Page</u>
Atle Grahl-Madsen, <u>The Status of Refugees in International Law, Vol. I</u> (1966). . . . .	7, 14
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### STATEMENT OF JURISDICTION

The Governments of Freedonia and Balboa have submitted the following matter to the International Court of Justice (ICJ) under declarations made under Article 36(2) of the ICJ statute.

### STATEMENT OF FACTS

Hilary Pankhurst, citizen of Draconia and prominent international minority rights lawyer, received an invitation in April 1993 to speak at the International Conference on the Protection of Minority Rights, in the neighboring state of Balboa. (Para. 2,3) Hilary dutifully applied to the Draconian government for permission to leave the country. (Para. 3) Draconia granted Hilary's application, issuing an exit visa valid only for attending the conference. (Para. 3)

In May, Hilary presented her paper, which was highly critical of Draconia's repressive and harsh treatment of minority groups. (Para. 4) She also supplied reports detailing various human rights abuses within Draconia. (Para. 4) Her presentation received extensive international media coverage. (Para. 4)

The night before her scheduled return to Draconia, Hilary's husband informed her that Draconian police had ransacked their apartment, seizing numerous papers and personal documents, including her duplicate passport. (Para. 5) Hilary, fearing persecution upon her return home, applied the next morning to Balboan officials for permission to remain in Balboa. (Para. 5)

The Balboan Ministry of Immigration initially denied her application, alleging she did not "fulfill the necessary criteria for characterization as a refugee as articulated in the 1951 Geneva Convention on Refugees, or the 1967 Protocol to that Convention." (Para. 6) The Balboan Minister of Immigration expressed recognition of these conven-

tions as "generally accepted international law." (Para. 6) However, in early June, Balboa officially denied Hilary's application for asylum. (Para. 7) Rejecting the principle of *non-refoulement*, Balboa expressed a willingness to repatriate Hilary to Draconia. (Para. 7)

Concurrently with these events, Hilary's husband, Rousseau, and daughter, Emily, were placed under house arrest in Draconia. (Para. 7) Friends of the family, however, helped the pair escape by heroically leading them into Balboa. (Para. 7) Before a family reunion was possible, the Balboans arrested the Pankhursts. (Para. 8) Hilary was arrested to prevent her departure from Balboa, and Rousseau and Emily were detained for entering Balboa illegally. (Para. 8) Balboa denied applications for asylum by Rousseau and Emily because they entered Balboa illegally, and also did not consider them refugees. (Para. 8)

Balboa quartered Hilary and Rousseau in a refugee "hotel" along with several hundred war refugees from neighboring Laboria. (Para. 9) Despite massive human rights violations and a horrible civil war in Laboria, the Balboans did not consider the Laborians as refugees. (Para. 9) The Laborians, however, could not be repatriated because the responsible Laborian agencies were not functioning. (Para. 9)

Balboa stripped Emily and the Laborian children from their parents, isolating them in foster homes and denying them exposure to their native language and culture. (Para. 10) The adult refugees, segregated by gender, suffered under bleak conditions in the "hotel." (Para. 10) Their movement was stifled, food was sparse, and rooms were small, dimly-lit, and crowded. (Para. 10)

In mid-July, to end this intolerable abuse of human rights, the government of Freedonia offered a home to the Pankhursts and imprisoned Laborian refugees. (Para. 11) The refugees eagerly accepted the

offer but the Balboan government subjectively refused to deliver the refugees to Freedonian control. (Para. 11)

To secure the humane release of the Pankhursts and the Laborians, Freedonia initiated proceedings in this Court against Balboa. (Para. 12) Balboa is a member of the United Nations, signatory to the 1989 Convention on the Rights of the Child, and a party to the Vienna Convention on the Law of Treaties. (Title Page) Despite a jurisdictional declaration under Article 36(2) of this Court's Statute and further consent to appear for resolution of this matter, Balboa nonetheless objected to this Court's jurisdiction in August 1993. (Title Page, Para. 13) In the face of continued silence from Draconian authorities, this Court combined the jurisdictional question with the merits. (Para. 13)

### QUESTIONS PRESENTED

- I. Whether the International Court of Justice possesses compulsory jurisdiction over this case when the dispute between Freedonia and Balboa arose after 4 June 1993, and when the matter is essentially international in character?
- II. Whether Freedonia has legal standing to intervene before this Court on behalf of non-nationals to preserve their human rights when Balboa continues to violate its obligations under international law to protect human rights?
- III. Whether the Pankhursts and Laborians qualify as refugees when Hilary Pankhurst satisfies the requirements of the 1951 Convention, when Rousseau and Emily Pankhurst also satisfy the requirements of the Convention despite their illegal entry into Balboa, and when the Laborians qualify as refugees under both the 1951 Convention and customary international law?
- IV. Whether international law requires the transfer of the Pankhursts and Laborians to Freedonian control when Balboa continues to violate their human rights guaranteed in the 1951 Convention, the Universal Convention on the Rights of the Child, and customary international law?

### SUMMARY OF THE PLEADINGS

Declarations by Freedonia and Balboa pursuant to Article 36(2) of the Statute of the International Court of Justice grant the Court compulsory jurisdiction over this matter. The Freedonian declaration contains two reservations, both of which Balboa may use through reciprocity. The reservation *ratione temporis*, excluding all matters arising before 4 June 1993, does not apply because this dispute began after that date. The self-judging clause, reserving jurisdiction over matters essentially within Balboa's national jurisdiction, does not apply because this case is essentially international in scope. This Court thus possesses jurisdiction over this matter and may adjudicate on the merits.

Freedonia may bring this claim on behalf of non-Freedonian nationals in order to preserve human rights. Provisions in various internationally accepted documents as well as decisions of this Court stand for the proposition that protecting human rights is an obligation of all States. It is this obligation which provides Freedonia with legal standing to appear before this Court on behalf of the Pankhursts and Laborians.

International law recognizes the plight of the Pankhurst and Laborians as a legitimate basis for according them refugee status. The Pankhurst and Laborians fulfill the necessary criteria for characterization as refugees under the 1951 Geneva Convention. Additionally, the Pankhurst and Laborians qualify for asylum under an expanded definition of refugee status exemplified by customary international law. This expanded definition recognizes flight from broadly based civil strife or civil war as a legitimate basis for granting asylum claims.

International law requires Balboa to transfer the Pankhursts and Laborians to the control of the Freedonian authorities because Balboa has failed to ensure the protection of their internationally guaranteed rights. By virtue of their refugee status, the Pankhursts and Laborians are entitled to the rights of *non-refoulement* and freedom of movement to a country of second asylum. Balboan actions indicate a willingness to violate these international rights. By transferring the refugees to the Freedonian authorities, the ICJ ensures the protection of their international rights.

Balboa, as a signatory to the 1989 United Nations Convention on the Rights of the Child (UNCRC), owes a special duty to protect the international rights of Emily Pankhurst and Laborian children. Balboa's violation of Articles 9, 10 and 20 of the UNCRC demonstrate its willingness to disregard international obligations. Freedonia's offer of asylum effectuates the policies of the UNCRC by providing a haven in which the families can be reunified.

## PLEADINGS AND AUTHORITIES

### I. THE DECLARATIONS BY FREEDONIA AND BALBOA UNDER ARTICLE 36(2) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE GRANT THIS COURT COMPULSORY JURISDICTION.

In the present case, the jurisdiction of the International Court of Justice (ICJ) stems from Article 36(2) of the Statute of the Court (the Optional Clause), as both parties have made declarations pursuant to Article 36(2).<sup>1</sup> The Freedonian declaration contains two reservations.<sup>2</sup> The first, a reservation *ratione temporis*, excludes from the ICJ's jurisdiction all matters arising on or before 4 June 1993.<sup>3</sup> The other, a self-judging reservation, excludes jurisdiction over matters essentially within Freedonia's national jurisdiction, as determined by the government of Freedonia.<sup>4</sup>

Balboa may claim both Freedonian reservations under the doctrine of reciprocity. Reciprocity allows a State to invoke reservations contained in the declaration of the opposing State, even though they do not appear in its own declaration.<sup>5</sup> Because reciprocity binds both parties to a dispute with the reservations of the other, the ICJ must use the more restrictive reservation in determining its own jurisdiction.<sup>6</sup> However, the ICJ possesses jurisdiction over this dispute because neither Freedonian reservation applies.

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<sup>1</sup> Record, Title Page.

<sup>2</sup> Record, paragraph 12.

<sup>3</sup> Record, paragraph 12.

<sup>4</sup> Record, paragraph 12.

<sup>5</sup> Certain Norwegian Loans (Fr. v. Nor.) 1957 I.C.J. 9.

<sup>6</sup> Edith Brown Weiss, Reciprocity and the Optional Clause, in The International Court of Justice at a Crossroads 82, 83 (Lori Fisler Damrosch ed., 1987).

**A. THE CURRENT DISPUTE AROSE AFTER 4 JUNE 1993, THEREBY INVALIDATING BALBOA'S USE OF THE RESERVATION RATIONE TEMPORIS.**

The ICJ determines the exact moment at which a dispute arises and thus passes judgment on the applicability of a reservation *ratione temporis*.<sup>7</sup> Keeping with its power to decide its own jurisdiction, this Court historically has interpreted reservations *ratione temporis* narrowly.<sup>8</sup> This keeps any limitations on the Court's compulsory jurisdiction as narrow as possible.<sup>9</sup> The Interhandel case illustrates this viewpoint in holding that a dispute commences with the date of breakdown in negotiations.

In Interhandel, the U.S. raised preliminary objections to the Court's jurisdiction because the U.S. declaration under the Optional Clause excluded all matters arising before 26 July 1946.<sup>10</sup> The Court rejected the U.S. claim, ruling the dispute between Switzerland and the U.S. began on 26 July 1948, the date the U.S. first rejected the Swiss demands for the return of Interhandel's assets.<sup>11</sup> Thus, even though the factual background of Interhandel arose prior to the date contained in the U.S. reservation, for purposes of this Court's jurisdiction the dispute began well afterwards.

The present case mirrors Interhandel. Although the first refugees entered Balboa during the Summer of 1992, Freedonia first involved herself in July, 1993, when Balboa summarily rejected

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<sup>7</sup> Renata Szafarz, The Compulsory Jurisdiction of the International Court of Justice 59 (1993).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Interhandel (Switz. v. U.S.) 1959 I.C.J. 6, 10-11, 16. The U.S. froze the assets of Interhandel, a Swiss-owned subsidiary of I.G. Farben, during WWII. Discussions regarding the return of these assets began in 1945, culminating with the U.S. rejecting the Swiss demands for the assets return in 1948.

<sup>11</sup> Id. at 21.

Freedonia's offer of resettlement.<sup>12</sup> Thus, any dispute between Balboa and Freedonia cannot properly be considered to have begun until mid-July, 1993, as the present dispute commenced at that exact moment. This interpretation conforms with the Court's policy of providing compulsory jurisdiction the widest possible scope.<sup>13</sup> Balboa's reciprocal application of the Freedonian reservation *ratione temporis* therefore does not preclude this Court's jurisdiction, as the dispute began after 4 June 1993.

**B. THE DISPUTE IS ESSENTIALLY INTERNATIONAL IN CHARACTER, THUS RENDERING BALBOA'S USE OF THE FREEDONIAN SELF-JUDGING CLAUSE INVALID.**

Balboa, through reciprocity, may also use Freedonia's self-judging reservation and assert that this dispute is one essentially within Balboa's national jurisdiction. However, Balboa must determine the domesticity of the dispute in good faith.<sup>14</sup> Furthermore, Article 36(6) empowers the ICJ to make its own determination of jurisdiction.<sup>15</sup> This power of *competence de la competence* allows the court to avoid arbitrary dismissals based on a unilateral characterization of the facts, and make compulsory jurisdiction as unqualified as possible.<sup>16</sup> Thus, if this Court decides international law controls in this matter, then it cannot fall essentially within the national jurisdiction of Balboa, and the Court possesses jurisdiction under Article 36(2).

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<sup>12</sup> Record, paragraphs 9, 12.

<sup>13</sup> Szafarz, *supra* note 7, at 93.

<sup>14</sup> Szafarz, *supra* note 7, at 53-55; see also Jerome B. Elkind, Non-Appearance Before the International Court of Justice 149, n. 126 (1984).

<sup>15</sup> Statute of the International Court of Justice, June 26, 1945, art. 36(6), 59 Stat. 1055, T.S. No. 933, 3 Bevens 1153, 1176 Y.B.U.N 1052; see also Szafarz, *supra* note 7, at 14-15. The principle of *competence de la competence* is "universally recognized in legal doctrines."

<sup>16</sup> Ibrahim Shihata, The Power of the International Court of Justice to Determine Its Own Jurisdiction 299-300 (1965).

1. BALBOA MUST USE GOOD FAITH IN APPLYING THE SELF-JUDGING RESERVATION.

As a party to the Convention on the Law of Treaties (Vienna Convention), Balboa must apply the self-judging clause *pacta sunt servanda*. This doctrine, as articulated in Article 26 of the Vienna Convention, states "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>17</sup> Good faith is also a general principle of international law.<sup>18</sup> Balboa must therefore claim this dispute falls essentially within her national jurisdiction in good faith. This Court, under Article 36(6), also may subject Balboa's decision to judicial review.<sup>19</sup> Any other interpretation would violate the general principle of *nemo iudex in sua causa* (no one may judge their own case) by allowing States to adjudge their own cases.<sup>20</sup> Furthermore, permitting states to assert self-judging reservations in bad faith would contravene the spirit of Article 36(6).<sup>21</sup> Lastly, if a state invoked a self-judging reservation in bad faith, Article 36(6) empowers the ICJ to decide otherwise and disregard the viewpoint of the state involved.<sup>22</sup>

2. THIS DISPUTE IS ESSENTIALLY INTERNATIONAL IN CHARACTER AND THUS WITHIN THIS COURT'S COMPULSORY JURISDICTION.

In ruling on the applicability of a self-judging reservation to a particular dispute, a key issue is whether international or municipal

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<sup>17</sup> Convention on the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/Conf. 39/27 [hereinafter Vienna Convention].

<sup>18</sup> Ian Brownlie, Principles of Public International Law 19 (4th ed. 1990).

<sup>19</sup> Szafarz, *supra* note 7, at 54.

<sup>20</sup> Elkind, *supra* note 14, at 117.

<sup>21</sup> Szafarz, *supra* note 7, at 54.

<sup>22</sup> Id. at 55.

law controls. Sir Hersch Lauterpacht articulated a workable standard for making this determination, stating international law itself best answers the question.<sup>23</sup> According to Lauterpacht, jurisdiction is "international in nature when there exists a concrete rule of international law [sic. 'or treaty provision'] limiting the State's freedom of action."<sup>24</sup> This Court validated Lauterpacht's reasoning in the Right of Passage case, holding the parties' reliance on various treaty provisions, custom, and general principles of international law placed the dispute within the international sphere.<sup>25</sup> Both treaty provision as well as customary and general principles of international law govern Balboa's actions. This dispute therefore falls within the realm of international law, permitting this Court to exercise compulsory jurisdiction.

a. This dispute involves the interpretation and application of multilateral treaties.

For instance, Balboa, as a signatory to the United Nations Convention on the Rights of the Child (UNCRC), must treat Emily Pankhurst and the Laborian children in accordance with the terms of the UNCRC.<sup>26</sup> As a signatory to the Vienna Convention, Balboa must also apply the UNCRC *pacta sunt servanda* and in compliance with the clear and generally accepted interpretation of the Declaration's provisions.<sup>27</sup>

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<sup>23</sup> Sir Hersch Lauterpacht quoted in Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. II 599-600 (1986).

<sup>24</sup> Id.

<sup>25</sup> Right of Passage over Indian Territory (India v. Port.) 1957 I.C.J. 125.

<sup>26</sup> Vienna Convention, *supra* note 17, art. 26.

<sup>27</sup> Id., arts. 26, 31.

Additionally, although Balboa is not a signatory to the 1951 Convention Relating to the Status of Refugees ("1951 Convention") or its 1967 Protocol, the Balboan Minister of Immigration publicly stated that Balboa recognizes the guidelines therein as generally accepted international law.<sup>28</sup> This Court's Nuclear Tests decision may legally bind Balboa to this public admission, as "interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."<sup>29</sup> This decision therefore obligates Balboa to abide by the 1951 Convention's definitions and guidelines. Finally, both the Vienna Convention and this Court recognize a treaty provision becomes binding on a non-party State if the rule gains wide acceptance or matures into a customary rule of international law.<sup>30</sup> Thus this dispute is properly characterized as international in scope because it involves the interpretation and application of various multilateral treaty provisions.

b. Customary and general principles of international law also apply to Balboa's actions.

Customary principles of international law limit Balboa's freedom of action. Certain elements of the 1951 Convention have evolved into customary international law, including the right to have a fair and reasonable determination made regarding one's claim for asylum and the doctrine of *non-refoulement*.<sup>31</sup> Balboa recognizes, through the explicit

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<sup>28</sup> Record, paragraph 6.

<sup>29</sup> Nuclear Tests (Austral. v. Fr.) 1974 I.C.J. 253, 268.

<sup>30</sup> Vienna Convention, *supra* note 17, art. 38; Asylum (Colom. v. Peru) 1950 I.C.J. 266, 276.

<sup>31</sup> Atle Grahl-Madsen, The Status of Refugees in International Law, Vol. I 98, 181 (1966).

statements of Balboan officials, the customary status of these principles.<sup>32</sup> Additionally, the UNCRC has evolved into custom, considering its unanimous passage by the U.N. General Assembly and rapid ratification by states.<sup>33</sup> The applicability of these customary doctrines bring this dispute under international law.

General principles of international law also apply. The case involves many basic human rights of both the adults and children, including the right to family life, the right to leave any state, and the right to a recognized nationality.<sup>34</sup> Universally recognized documents such as the U.N. Charter and the Universal Declaration Human Rights (UDHR) embody these concepts as norms which no state may arbitrarily ignore.<sup>35</sup> Because these general rules of international law regulate Balboa's treatment of the Pankhurst's and Laborians, the dispute does not fall within the national jurisdiction of Balboa, essentially or otherwise.

In sum, the present dispute parallels the Right of Passage case and demands a similar holding. The terms of several treaties, as well as numerous customary and general principles of international law, comprise the legal heart of the dispute. Through its powers under Article 36(6), this Court must find the present dispute essentially international in scope, and not within the national jurisdiction of Balboa. Therefore, the ICJ is properly seised of jurisdiction and may adjudicate this case on the merits.

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<sup>32</sup> Record, paragraph 6.

<sup>33</sup> Brownlie, *supra* note 18, at 5-7.

<sup>34</sup> Universal Declaration of Human Rights, Dec. 10, 1948, U.N. Doc. A/811 [hereinafter UDHR].

<sup>35</sup> U.N. Charter, Preamble, Ch. X; UDHR, *supra* note 34, Preamble.

**II. FREEDONIA POSSESSES JUS STANDI, OR LEGAL STANDING, TO ASSERT THE RIGHTS OF NON-NATIONALS BEFORE THE ICJ FOR HUMANITARIAN PURPOSES.**

The present dispute arose when Freedonia sought to intervene on behalf of the Pankhursts and Laborians. When a state seeks to bring an action before the ICJ on behalf of an individual person or corporation, that entity normally must be a national of the intervening state.<sup>36</sup> This Court so held in several cases, including Panevezys-Salstutiskis Railway and Nottebohm.<sup>37</sup> However, other provisions of international law, in addition to other ICJ opinions, stand for the viability of State action before this court on behalf of non-nationals.

**A. INTERNATIONAL INTEREST IN PRESERVING INDIVIDUAL HUMAN RIGHTS, INCLUDING THOSE OF CHILDREN AND REFUGEES, JUSTIFIES FREEDONIA'S INTERVENTION.**

The current dispute involves basic human rights which Balboa has denied or limited to both the Pankhursts and Laborians. These rights are in addition to those which Balboa must afford these people according to its obligations under the UNCRC and 1951 Convention, and include freedom of movement, right to nationality, and exemption from arbitrary interference with home and family.<sup>38</sup> The furtherance and protection of these basic rights concern all civilized nations, as evidenced by international and regional treaties and declarations.<sup>39</sup> Indeed, the U.N. Charter, to which both Balboa and Freedonia are parties, states the U.N. shall promote "universal respect for, and

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<sup>36</sup> Brownlie, *supra* note 18, at 397-403.

<sup>37</sup> Panevezys-Salstutiskis Railway (Est. v. Lith.) 1924 P.C.I.J. (ser. A) No. 2, at 6; Nottebohm (Liech. v. Guat.) 1955 I.C.J. 4.

<sup>38</sup> UDHR, *supra* note 34, arts. 12-15.

<sup>39</sup> U.N. Charter, Preamble, arts. 1, 55-56; UDHR, *supra* note 34; Charter of the Organization of African Unity, May, 25, 1963, U.N.T.S. 479 No. 6947; Charter of the Organization of American States, April 30, 1948, U.N.T.S. 119, No. 1609.

observance of, human rights and fundamental freedoms" and that "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."<sup>40</sup> Such definitive statements in generally accepted international documents, particularly Article 56 of the U.N. Charter, provide a solid foundation for the intervention of a third-party state on behalf of a non-national in order to preserve basic human rights. Intervention therefore effectuates the aims of the international community in this regard.

The situation currently facing the Pankhursts and Laborians presents a unique dilemma. Without the aid of Freedonia, they are left without a champion for their cause. Laboria and Draconia are either unwilling or unable to bring any action on their behalf, and individuals may not appear before this court.<sup>41</sup> Deprivation of any remedy for these refugees might result unless this Court permits Freedonia to interfere. Furthermore, should Balboa prevail on this issue, the Court effectively will eviscerate Article 56 of the U.N. Charter, and severely limit the ability of concerned third-party states to preserve human rights. To avoid such a tragic result, Applicant respectfully urges this Court to recognize Freedonian *jus standi* and adjudicate upon the merits.

**B. PRINCIPLES AND RULES CONCERNING BASIC HUMAN RIGHTS ARE OBLIGATIONS *ERGA OMNES*, THEREBY GIVING FREEDONIA LEGAL STANDING TO INTERVENE.**

This court, in the 1970 Barcelona Traction case, held principles and rules concerning basic human rights as obligations *erga omnes*, or

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<sup>40</sup> U.N. Charter, arts. 55-56.

<sup>41</sup> Statute of the International Court of Justice, *supra* note 15, at art. 34(1).

binding on all states.<sup>42</sup> This obligates the entire international community to observe and protect human rights.<sup>43</sup> Obligations *erga omnes* also concern all states, and "[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection."<sup>44</sup> This Court therefore implicitly recognizes the ability of States to intervene on behalf of a non-national to preserve human rights.

These statements by the Court distinguish cases such as Nottebohm and Panevezys-Salstutiskis Railway from the present dispute. Those cases involved not obligations *erga omnes*, but rather obligations "arising *vis-a-vis* another state in the field of diplomatic protection." Obligations stemming from the subject of diplomatic protection simply do not rise to the same level as obligations *erga omnes* - they do not concern all states.<sup>45</sup> Because this Court recognizes the legal interest of Freedonia in preserving basic human rights guaranteed by international law, the Court should also provide Freedonia a legal remedy to that end by finding *jus standi*. The ICJ should find it may properly entertain jurisdiction of this matter under Article 36(2) of the statute of the Court, and further that Freedonia has *jus standi* to bring this action on behalf of the Pankhursts and Laborians.

### III. THE PANKHURSTS AND LABORIAN QUALIFY AS REFUGEES UNDER INTERNATIONAL LAW.

The Pankhursts and Laborians fulfill the necessary criteria for characterization as refugees under the 1951 Convention. Additionally,

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<sup>42</sup> Barcelona Traction (Belg. v. Spain) 1970 I.C.J. 4, at 32.

<sup>43</sup> Id.; see also Brownlie, *supra* note 18, at 598 n.2.

<sup>44</sup> Barcelona Traction, *supra* note 42, at 32.

<sup>45</sup> Id.

they qualify under an expanded concept of refugee status, which recognizes flight from broadly based civil strife or civil war as a legitimate basis for granting refugee status.

**A. THE 1951 CONVENTION ACCORDS REFUGEE STATUS TO THE PANKHURST FAMILY AND LABORERS.**

The 1951 Convention requires an individual's well-founded fear of persecution to arise for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>46</sup> The Convention's requirement of a well-founded fear of persecution examines whether the individual's subjective fear of persecution finds support in the objective situation.<sup>47</sup> Elaborating upon the necessity of the subjective and objective elements of the Convention's well-founded fear requirement, the United Nations High Commissioner on Refugees (UNHCR) states:

In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.<sup>48</sup>

State practice concerning the well-founded fear requirement led to the development of a "reasonable possibility" test.<sup>49</sup> The "reasonable possibility" test provides the applicable standard for determining whether an objective situation corroborates the individual's subjective fear of persecution.<sup>50</sup>

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<sup>46</sup> Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 2545, 1954.

<sup>47</sup> James C. Hathaway, The Law of Refugee Status 75 (1991).

<sup>48</sup> Id. at 75.

<sup>49</sup> Id. at 77.

<sup>50</sup> Id.

The 1951 Convention views persecution as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection.<sup>51</sup> This definition mirrors the Convention's recognition that "human beings shall enjoy fundamental rights and freedoms without discrimination."<sup>52</sup> Additionally, the definition conforms with scholarly interpretation of the Convention's use of persecution.<sup>53</sup> Finally, the 1951 Convention requires the alleged persecution result for reasons of race, religion, nationality, membership of a particular social group or political opinion in order to qualify for asylum.

1. HILARY PANKHURST FULFILLS THE NECESSARY CRITERIA FOR CHARACTERIZATION AS A REFUGEE AS ARTICULATED BY THE 1951 CONVENTION.

A refugee's migration to a country of asylum often begins with an existing well-founded fear of persecution. When a person leaves her country for reasons other than fear of persecution, and the fear arises while she remains abroad, she then qualifies as a refugee *sur place* and gains the protection of the Convention and Protocol.<sup>54</sup> Hilary who left Draconia to attend a conference in Balboa, and whose fear of persecution arose while away, qualifies as a refugee *sur place*.

Subjective and objective analysis of Hilary's fear of persecution indicates that she qualifies for asylum under the Convention and Protocol. Subjectively, she fears retaliatory measures by the Draco-

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<sup>51</sup> Id. at 105.

<sup>52</sup> 1951 Convention, *supra* note 46, art. 1.

<sup>53</sup> Hathaway, *supra* note 47, at 105; Guy S. Goodwin-Gill, The Refugee in International Law 38 (1983).

<sup>54</sup> Office of the U.N. High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, ¶94-6, U.N. Doc. HCR/IP/4/ENG REV (1988).

nian government for her heavily publicized and caustic criticism of Draconian minority rights policies. The objective situation in Draconia supports Hilary's subjective fear of persecution. The police ransacked her apartment, confiscating her research papers and duplicate passport.<sup>55</sup> The police also placed her husband, Rousseau, and daughter, Emily, under house arrest.<sup>56</sup> These events strongly suggest the Draconian government intends to persecute Hilary if she is forcibly repatriated.

The repressive measures directed against Hilary by the Draconian government demonstrate Draconia's willingness to invade her basic human rights. In particular, Draconia's ransacking of the Pankhurst apartment and the subsequent seizure of Hilary's papers violates her right to the protection of personal and familial privacy and integrity. Furthermore, Draconia's arrest of Rousseau and Emily substantiates the government's intent to violate Hilary's right to the protection of familial privacy and integrity.

The retaliatory measures taken against Hilary and her family exemplify Draconia's intent to persecute Hilary for her political ideology. Draconian authorities searched the Pankhursts' apartment and seized Hilary's research papers and duplicate passport.<sup>57</sup> They also arrested Rousseau and Emily following Hilary's refusal to return home upon the expiration of her visa.<sup>58</sup> These actions evidence Draconia's efforts to suppress Hilary's expression of her political opinions.

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<sup>55</sup> Record, paragraph 5.

<sup>56</sup> Record, paragraph 5.

<sup>57</sup> Record, paragraph 5.

<sup>58</sup> Record, paragraphs 6-7.

2. AS MEMBERS OF HILARY'S IMMEDIATE FAMILY, ROUSSEAU AND EMILY SATISFY THE 1951 CONVENTION'S REQUIREMENTS FOR REFUGEE STATUS, DESPITE THEIR ILLEGAL ENTRY INTO BALBOA.

State practice establishes that asylum based on fear of persecution for membership in a social group includes claims based on family affiliation.<sup>59</sup> This state practice of recognizing asylum claims based upon familial affiliation stems from international legal recognition of the family as the natural and fundamental unit of society.<sup>60</sup> Family unity, respect for family life, and protection of the family have long been recognized and espoused in human rights instruments.<sup>61</sup> Therefore, Emily and Rousseau possess equal status as Hilary by virtue of their familial relationship, and deserve equal protection as refugees under the 1951 Convention.

The illegal entry of Rousseau and Emily Pankhurst into Balboa does not damage their claim for asylum. Article 31(1) of the 1951 Convention specifically indicates that "States shall not impose penalties, on account of illegal entry or presence, on refugees who enter or are present in their territory without authorization and show good cause for their illegal entry or presence."<sup>62</sup> Rousseau and Emily's escape from house arrest implies they could not have obtained the required exit visas. Consequently, their illegal entry into Balboa satisfies Article 31's requirement of good cause. Therefore, Article 31(1) precludes Balboa from denying Rousseau and Emily's claim

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<sup>59</sup> Grahl-Madsen, *supra* note 31, at 415-416.

<sup>60</sup> Hathaway, *supra* note 47, at 164.

<sup>61</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, 1950.; U.N.G.A. Res. 217A(III), December 10, 1948; U.N.G.A. Res 2200 (XXI), December 19, 1966, entered into force March 23, 1976.

<sup>62</sup> 1951 Convention, *supra* note 46, art. 31(1).

for asylum. They otherwise satisfy the 1951 Convention's requirements and deserve asylum.

3. THE 1951 CONVENTION ALLOWS FOR A GROUP DETERMINATION OF THE LABORIAN REFUGEE STATUS.

The 1951 Convention defines refugee status in terms of the individual.<sup>63</sup> These terms provide a mechanism for an individual determination of refugee status. However, the international community, when faced with the expanding burden of accommodating large groups of refugees, relaxed this individualized standard for evaluation of asylum claims.<sup>64</sup> This was necessary, because in cases of mass migrations, individualized determinations were impracticable.<sup>65</sup> Thus, a *prima facie* determination of refugee status for groups no longer requires every member of the group to demonstrate an individualized well-founded fear of persecution. Instead, group determination concentrates on the objective situation in the group's country of origin.

A group determination of the Laborian refugee status demonstrates they possess well-founded fears of persecution, based on the objective situation in Laboria. They fled a violent civil war and consequent massive human rights violations.<sup>66</sup> If repatriated, they face a reasonable possibility of becoming the victims of the ongoing rights violations. The Laborians possess a well-founded fear of persecution as the situation in Laboria satisfies the objective proof requirement.

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<sup>63</sup> Id., art. 1.

<sup>64</sup> Goodwin-Gill, *supra* note 53, at 114-15.

<sup>65</sup> Id.

<sup>66</sup> Record, paragraph 9.

**B. THE LABORIANS ALSO QUALIFY AS REFUGEES UNDER CUSTOMARY INTERNATIONAL LAW.**

Customary international law provides protection for individuals or groups who flee broad based civil strife or civil war. Customary international law reflects the current legal practice of States. In order for a legal principle to qualify as custom, the State asserting the custom must demonstrate a consistent State practice, which is followed out of a sense of legal obligation or *opinio juris*.<sup>67</sup>

1. CONSISTENT STATE PRACTICE PROTECTS THOSE WHO FLEE BROADLY BASED CIVIL STRIFE OR CIVIL WAR.

Although the 1951 Convention initially adopted a restrictive view of the criteria necessary for refugee status, the scope and importance of the Convention has expanded in practice through the evolution of the institutional competence of the UNHCR, the establishment of regional protection arrangements, and the practice of States.<sup>68</sup> The culmination of these events resulted in the customary protection of individuals whose flight results from broadly based civil strife or civil war.

The commitment toward non-Convention refugees embodied in Council of Europe resolutions<sup>69</sup> created a legal commitment in the domestic laws of many European countries. For instance, the concept of "B" status in Swedish law allows persons outside the scope of the Convention, who remain abroad for valid humanitarian reasons, to receive temporary residence permits.<sup>70</sup> Similarly, Portugal grants asylum to persons

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<sup>67</sup> Brownlie, *supra* note 18, at 7.

<sup>68</sup> Hathaway, *supra* note 47, at 11.

<sup>69</sup> Council of Europe, Parliamentary Assembly Recommendation 773 (1976).

<sup>70</sup> Atle Grahl-Madsen, International Refugee Law Today and Tomorrow, *Archiv des Volkerrechts* 411, 425 (1982).

fleeing armed conflict or broadly based human rights violations.<sup>71</sup> Germany tolerates the residence of persons who face civil war, foreign occupations, or other adverse political conditions in their country of origin.<sup>72</sup> Dutch law allows for a grant of asylum to persons at risk due to difficult political circumstances in their country of origin that fall short of persecution.<sup>73</sup> Under Great Britain's discretionary refugee policy, persons perceived by the authorities to have a valid reason for not returning to their country may receive asylum, whether or not they meet the Convention refugee definition.<sup>74</sup> Even French policy, which closely resembles the Convention definition, authorized the admission of Cambodian, Laotian, and Vietnamese citizens, regardless of whether they meet the strict refugee definition.<sup>75</sup> The policies of these and other states demonstrate that while European states have constructed policies to safeguard national sovereignty over the admission of refugees in flight from broadly based disturbances, there exists a general practice of not returning persons to states in which there exists a significant risk of danger due to internal upheaval or armed conflict.<sup>76</sup>

A similar array of special programs exist in other regions of the

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<sup>71</sup> Act 38/80, August 1, 1980, Art. 5, paragraph 2, amended by Act 415/83, November 24, 1983 cited in Kay Hailbronner, Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking? 26 Va. J. Int'l. L. 857, 881 (1986).

<sup>72</sup> Deutscher Bundestag, 10 Wahlperiode, Drucksache 10/3346 (1985) cited in Hailbronner, *supra* note 71, at 881.

<sup>73</sup> Hailbronner, *supra* note 71, at 881.

<sup>74</sup> R. Sexton, Political Refugees, Non-refoulement and State Practice, 18 Vand. J. Transnt'l. L. 731, 791 (1985).

<sup>75</sup> Hailbronner, *supra* note 71, at 882-83.

<sup>76</sup> Note on the Consultations on the Arrivals of Asylum-seekers and Refugees in Europe, U.N. Doc. A/AC.96/INF. 174 (1985).

world. For instance, in Australia, no legal distinction exists between conventional and other refugees, and as a result persons displaced by serious disturbances of public order may benefit from asylum.<sup>77</sup> Canadian law authorizes the admission of persons for reasons of public policy or due to the existence of compassionate or humanitarian considerations.<sup>78</sup> Even the United States temporarily admits classes of persons outside the Convention refugee definition under the Attorney General's parole power.<sup>79</sup>

African States recognize that broadly based civil strife accords refugee status to those whose flight results from a well-founded fear of persecution arising from the civil strife.<sup>80</sup> The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) defines the regional criteria for refugee status.<sup>81</sup> Article 1(2) of the OAU Convention applies the term "refugee" to asylum seekers who leave their country of origin owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order.<sup>82</sup> Individuals in these situations acquire refugee status and privileges. Furthermore, they do not have to justify their fear of persecution as required by the 1951 Conven-

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<sup>77</sup> Hailbronner, *supra* note 71, at 886.

<sup>78</sup> Immigration Act, R.S.C. 1985, c.1-2, s.114(2).

<sup>79</sup> 8 U.S.C. §1182(d)(5)(A) (1982).

<sup>80</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 14 U.N.T.S. 691. Entered into force June 20, 1974 [hereinafter OAU Convention].

<sup>81</sup> Id., art. 1(2).

<sup>82</sup> Id.

tion.<sup>83</sup> In sum, the OAU takes a humanitarian as well as pragmatic approach to refugee migration caused by the internal strife of civil war.

The 1984 Cartagena Declaration embodies Latin America's general commitment toward refugees.<sup>84</sup> The Cartagena Declaration creates an encompassing refugee definition, calling for consideration of the objective situation of large groups of refugees.<sup>85</sup> In particular, the Cartagena Declaration protects persons fleeing their country because their lives have been threatened by violence, aggression, foreign occupation, and massive human rights violations.<sup>86</sup> Like the Cartagena Declaration, consistent state practice demonstrates a recognition for the plight of large groups of people fleeing civil strife through a grant of refugee status.

2. *OPINIO JURIS* SUPPORTS THE PROPOSITION THAT THE LABOR-  
IANS QUALIFY FOR REFUGEE STATUS.

The Statute of the ICJ refers to *opinio juris* as a "general practice accepted as law."<sup>87</sup> The ICJ has developed two methods of approach for determining the existence of *opinio juris*.<sup>88</sup> In many cases the Court assumes the existence of *opinio juris* on the basis of evidence of a general practice.<sup>89</sup> However, in a minority of cases, the Court

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<sup>83</sup> E. Arboleda, Refugee Definition in Africa and Latin America: The Lessons of Pragmatism, 3 Int'l. J. Ref. L. 185, 194 (1991).

<sup>84</sup> See Annual Report of Inter-American Commission on Human Rights 1985-85, OEA/Ser.L./II.66, doc. 10, rev. 1, at 190-93.

<sup>85</sup> Arboleda, *supra* note 83, at 203.

<sup>86</sup> Id.

<sup>87</sup> Statute of the International Court of Justice, *supra* note 15, at art. 38(2).

<sup>88</sup> Brownlie, *supra* note 18, at 7.

<sup>89</sup> Id.

adopted a more rigorous approach by calling for more positive evidence of the recognition of the state practice in question.<sup>90</sup>

The Laborians qualify for refugee status under either approach. As discussed, the general practice of states supports according refugee status to those who flee civil strife or civil war. Furthermore, even among countries which have not ratified the 1951 Convention or regional treaties, evidence exists of a willingness to protect refugees who may not meet the Convention definition. For instance, in 1987, Pakistan and Iran sheltered the largest concentration of humanitarian refugees in the world.<sup>91</sup> Similarly, Hong Kong, Thailand and other Southeast Asian nations have in most cases provided temporary refuge to Indochinese migrants in refugee-like situations pending their resettlement abroad.<sup>92</sup> Even in the absence of explicit treaty obligations, diverse nations continue to assist refugees who flee civil strife. This demonstrates a wide-spread recognition of a legal obligation to provide for these refugees.

**IV. INTERNATIONAL LAW REQUIRES BALBOA TO TRANSFER THE PANKHURSTS AND LABORIANAS TO THE CONTROL OF THE FREEDONIAN AUTHORITIES BECAUSE BALBOA HAS FAILED TO ENSURE THE PROTECTION OF THEIR INTERNATIONALLY GUARANTEED RIGHTS.**

By virtue of their refugee status, the Pankhursts and Laborians are entitled to the rights of *non-refoulement* and freedom of movement to a country of second asylum. These entitlements stem from Balboa's acceptance of the 1951 Convention as customary international law.<sup>93</sup>

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<sup>90</sup> Id.

<sup>91</sup> A. Billar, An Historic Movement, 53 *Refugees* 8, 9 (1988).

<sup>92</sup> Hathaway, *supra* note 47, at 23-24.

<sup>93</sup> Record, paragraph 6.

**A. THE PRINCIPLE ON NON-REFOULEMENT FORECLOSES BALBOA'S ABILITY REPATRIATE THE PANKHURSTS OR LABORIANIS.**

*Non-refoulement* prohibits a state from returning a refugee to a country where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.<sup>94</sup> As previously discussed, Balboa's recognition of the 1951 Convention as the applicable international law binds Balboa to all of the Conventions provisions, including the principle of *non-refoulement*.

Since the advent of the 1951 Convention, the principle of *non-refoulement* has gained wide acceptance and has been incorporated into a number of international treaties and resolutions.<sup>95</sup> Additionally, the U.N. continues to reaffirm its position against *refoulement* in General Assembly Resolutions.<sup>96</sup> The UNHCR and various scholars have also unequivocally stated their support for the principle of *non-refoulement*.<sup>97</sup> Despite the international community's recognition of *non-refoulement*, Balboa initiated repatriation negotiations with Draconia regarding Hilary.<sup>98</sup> Balboa also indicated a willingness to *refoules* the Laborians.<sup>99</sup> By transferring the Pankhursts and Laborians to the control of the Freedomian authorities the ICJ ensures the protection of their right to *non-refoulement*.

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<sup>94</sup> 1951 Convention, *supra* note 46, at art. 33.

<sup>95</sup> Goodwin-Gill, *supra* note 53, at 97-8; Hathaway, *supra* note 47, at 24-7.

<sup>96</sup> G.A. Res. 67, U.N. GAOR 32nd Sess., Supp No. 31, 627; G.A. Res. 107, U.N. GAOR 42nd Sess., Supp. No. 41, 878.

<sup>97</sup> Excerpt from Note on International Solidarity and Refugee Protection Submitted by the U.N. High Commissioner on Refugees to the 39th Session of the UNHCR Executive Committee, 67 Refugees 22 (1988).

<sup>98</sup> Record, paragraph 7.

<sup>99</sup> Record, paragraph 9.

**B. BALBOA CONTINUES TO VIOLATE INTERNATIONAL LAW BY FORCIBLY DETAINING THE PANKHURSTS AND LABORIAN AFTER THEY HAVE RECEIVED ADMISSION INTO FREEDONIA.**

Article 31(2) of the 1951 Convention indicates that a determination of refugee status necessarily includes the right to migrate to a separate country of asylum.<sup>100</sup> Additionally, U. N. General Assembly recommends that all nations share in the burden of resettling refugees.<sup>101</sup> Freedonia attempts to effectuate these policies by granting asylum to the Pankhursts and Laborians. However, Balboa continues to violate these policies by forcibly detaining the refugees and refusing to recognize Freedonia's humanitarian aid. Balboa's refusal to comply with the 1951 Convention and U.N. recommendations demonstrates their willingness to violate international law.

**V. BALBOA, AS A SIGNATORY TO THE 1989 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, OWES A SPECIAL DUTY TO PROTECT THE INTERNATIONAL RIGHTS OF THE PANKHURST AND LABORIAN CHILDREN.**

The UNCRC recognizes the special position which the child and family occupy in international law.<sup>102</sup> Balboa, as a signatory to the UNCRC, explicitly pledges itself to uphold the principles of the special international rights accorded to the child and family by the Convention. However, Balboa, by violating Articles 9 and 20 of the Convention fails to comply with its treaty obligations. These violations contravene Balboa's duty to adhere to its voluntarily assumed international commitments, as well as its duty to preserve basic human rights.

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<sup>100</sup> 1951 Convention, *supra* note 46, art. 31(2).

<sup>101</sup> G.A. Res. 67, *supra* note 96, at 627; G.A. Res. 107, *supra* note 96 at 878.

<sup>102</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR Annex, U.N. Doc. A/44/736 (1989). Reprinted in 28 I.L.M. 1456 (1990) [hereinafter UNCRC].

Article 9 of the UNCRC stipulates that, if a State separates a child from her parents, the State must provide a proceeding during which the parents and child may present their views concerning the separation.<sup>103</sup> The State must respect the right of the separated child to maintain personal relations and direct contact with both parents on a regular basis.<sup>104</sup> Although silent as to whether Balboa provided the proceeding required under Article 9, the facts describe Balboa's forcible separation of the families and detention of the men, women and children in separate facilities.<sup>105</sup> These actions violate the Pankhursts' and Laborians' right to family life by denying the parents their right to maintain consistent and direct contact with their children. Balboa's actions violate its explicit obligations under the UNCRC.

Article 20 of the UNCRC stipulates that a child temporarily deprived of his or her family life is entitled to special protection by the State.<sup>106</sup> Additionally, the State, in considering the needs of the child, shall give due regard to the child's ethnic, religious, cultural and linguistic background.<sup>107</sup> By placing the refugee children in Balboan foster homes where the foster parents speak only the native Balboan language, Balboa demonstrates its insensitivity to the children's cultural and linguistic needs.<sup>108</sup>

Article 10 of the UNCRC addresses the importance of allowing the

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<sup>103</sup> Id., art. 9.

<sup>104</sup> Id.

<sup>105</sup> Record, paragraph 10.

<sup>106</sup> UNCRC, *supra* note 102, art. 20.

<sup>107</sup> Id.

<sup>108</sup> Record, paragraph 10.

child or his parents to enter or leave a country for the purpose of family reunification.<sup>109</sup> Freedonia attempts to effectuate this policy by offering a sanctuary where the Pankhurst and Laborian families can be reunified. Conversely, Balboa continues to frustrate this policy by forcibly separating and detaining the families within Balboa. The release of the Pankhursts and Laborians to Freedonian authorities effectuates the intent of the UNCRC and ensures the protection of their internationally guaranteed human rights.

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<sup>109</sup> Id., art. 10.

CONCLUSION

For the foregoing reasons the Government of Freedonia respectfully requests this Court to declare and adjudge the following:

- 1) That this Court has jurisdiction over the current dispute between Freedonia and Balboa,
- 2) That Freedonia possesses *jus standi* to intervene before this Court on behalf of the Pankhursts and Laborians to ensure their internationally guaranteed human rights,
- 3) That the Pankhursts and Laborians qualify as refugees under all applicable international law, and
- 4) That the continued Balboan violation of their rights guaranteed under the 1951 Convention, UNCRC, and customary international law requires their transfer to the control of Freedonian authorities.

Respectfully submitted,

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Agents for Applicant  
State of Freedonia