

Introduction

The objectives of this Bench Memorandum are twofold: firstly, to provide judges of the Jessup Competition with an overview of law and authority applicable to the case at hand; and secondly, to recommend avenues of exploration for oral rounds judges to pursue in the course of participants' presentations. The format of this Bench Memo shall mirror the claims brought by the Applicant, Laurentia, and by the Respondent, Caledon. Following the prayers of the parties relating to each issue submitted to the Court shall be an overview of applicable law and authorities, arguments which may be presented by each party, and relevant counterarguments. Judges should keep in mind that this is not meant to be an exhaustive treatise on the issues raised by the facts, but rather an outline of the most relevant arguments and authorities parties may draw upon. It is likely that parties will invoke sources not discussed here, but it is the authors' hope that the information provided will assist judges in evaluating whatever arguments may be brought before them.

I. The Legality of Caledon's Retention of the Laurentian Children

a. General Considerations

In order to be successful in its argument that the continued presence of the children in Caledon is improper and that the return of the children must be ordered, Laurentia must establish that Caledon's retention of the children is either in violation of the children's rights; violates Laurentia's rights as a sovereign state; is in violation of Caledon's obligations towards Laurentia; or in violation of Caledon's obligations towards the children. The body of law relevant to this issue concerns the rights of the child and of the family and their relation to states during times of emergencies, including states' responsibilities to nationals and aliens in the event of natural disasters.

The rights and obligations of each state and the individuals involved vary as the pressures of the emergency situation subside and normalcy returns to the conflicted state. While there is no settled law dictating the treatment of unaccompanied children following natural disasters, the court may look to important conventions on the rights of individuals and children in particular and to national practice concerning the treatment of displaced persons.

Laurentia may argue that the measures taken by the State, i.e. demand for return of the children, are consistent with that State's duty to protect the best interests of the children in question and that Caledon's failure to return the children violates the children's rights of family, nationality, religion, education, language as established by general principles of international law and applicable conventions. Caledon's counterargument would be that the best interests of the children in question require that the adoption decrees be upheld.

In evaluating Laurentia's claim that the retention of the children in Caledon is wrongful, parties' discussion should be focused on the rights and obligations of states to individuals in the context of the facts presented in the *Compromis*. Agents for Laurentia are likely to argue that Caledon has taken actions which overstep its authority and violate the sovereign rights of Laurentia and the individual rights of the children and families in question. In exploring this issue, the Court may wish to focus its inquiry on exploring the standards by which the States Parties' actions may be assessed. In particular, agents for Laurentia and Caledon may be pressed to show how the facts support their arguments that they have adhered to and their opponents have violated relevant treaties, custom, and general principles of international law.

1. Duty of States to Assist Children

The right of children to receive relief and assistance in times of distress and the duties of states to provide such assistance were first articulated in the Declaration of Geneva 1924, also known as the Declaration of the Rights of the Child of 1924, which was adopted by the League of Nations. This sentiment is repeated and amplified in subsequent international conventions and declarations including the Declaration of the Rights of the Child of 1959, and, more recently, Article 20 of the Convention on the Rights of the Child.¹

The Court should note that Laurentia and Caledon were both signatories of the Convention on the Rights of the Child when the events in question occurred. While Caledon's ratification was complete before the events in question took place, Laurentia did not ratify the instrument until July 1, 1996. Either Party may argue that Laurentia's delayed ratification of the Convention on the Rights of the Child entails limitations on parties' rights to seek enforcement of provisions of that treaty. This line of argument is weakened, however, by the almost universal recognition of the principles which the Convention articulates.² The right of the child to receive special assistance from states in those instances where the child is separated from her or his family is clearly established as a general principle of international law by numerous conventions and state practice.³

Agents for Caledon may argue that the actions undertaken by Caledon were pursuant to its duty to assist the children of the Mount Zolo disaster. Caledon may point to the fact that it facilitated the repatriation of all children who were of suitable age or who were claimed by family members as support for its argument that it was not acting unreasonably. Caledon should argue that its actions were appropriate under the circumstances and that the best interests of the children now require allowing them to be allowed to stay with their new families. Laurentia may argue, on the other hand, that the initiation of adoption proceedings was wrongful and that the subsequent retention rises to the level of harmful state action.

2. Duty of States to Return Children Wrongfully Removed or Retained

Laurentia and Caledon are parties to the Convention on the Civil Aspects of International Child Abduction (hereinafter, the Abduction Convention). As such, they are bound to assist in whatever way possible in the return of children wrongfully removed or retained in states where the child is not habitually resident. Article 3 of the Abduction Convention provides, in relevant part, that:

The removal or retention of a child is to be considered wrongful where -

¹ According to Article 20 of the UN Convention on the Rights of the Child,

(1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

(2) States Parties shall in accordance with their national laws ensure alternative care for such a child.

(3) Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's ethnic, religious, cultural and linguistic background.

² The Convention obtained more signatures at its signing ceremony than any previous U.N. human rights treaty; broke records by going into force just six months after its signing ceremony; and more nations have become States Parties to the Convention than to any other U.N. human rights treaty. Cynthia Price Cohen, *THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS*, DR. Maria Rita Saulle, ed. (1995: Transnational Publishers) at xx-xxi, published originally as *CODICE INTERNAZIONALE DEI DIRETTI DEL MINORE* (1992: Edizione Scientifiche Italiane).

³ See the 1924 Geneva Declaration of the Rights of the Child, Principle II; the 1949 Geneva Convention IV, Article 24; the 1959 UN Declaration on the Rights of the Child, Principle 6; the 1961 Hague Convention on the Protection of Infants, Article 4; the 1986 United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Part A, Article 4; and the United Nations Convention on the Rights of the Child, Article 20.

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.⁴

Laurentia's expression of gratitude for Caledon's medical evacuations indicate that Laurentia does not feel that the initial removal of the children to Caledon was inappropriate.⁵ It is impractical, therefore, for Laurentia to argue that the removal of the children from Laurentia was wrongful. Instead, Laurentia should focus its claim under the Abduction Convention on Caledon's continuing retention of the children. Under this provision, then, in order for a claim of violation to be successful, Laurentia must establish that the continued retention of the Laurentian children is in violation of someone's custodial rights in Laurentia.

"Custodial rights" are defined in the Convention as "relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Laurentia must thus establish that it had and never gave up the right to determine the children's place of residence.

The general principle of natural parental rights and obligations of custody over their children and the parents' rights to control of their children's upbringing, including education and religion, are reflected in numerous instances of state practice and international conventions.⁶ The Convention on the Rights of the Child provides in Article 18(1) that, "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

If the children had been placed with adoptive parents against the will of their natural parents, "custodial rights" would be clearly implicated. However, with regard to the Laurentian children that were the subjects of the adoption petitions in Caledon, no natural parents ever came forward. Caledon may argue that since Article 3(a) of the Abduction Convention requires custodial rights to have been violated and no person has come forward to exercise such rights, that the children should be considered as being in the custody of Caledon. In support of this argument, Caledon may point to Laurentia's lack of objection to Caledon's May 1995 decree which asserted that the Laurentian children would be kept in Caledon until there was persuasive evidence that "safe conditions" had been restored to Laurentia, or natural parents came forward to claim them.⁷

⁴ Abduction Convention, Article 3.

⁵ See July 15, 1995, diplomatic note from the Laurentian Foreign Minister delivered to the Ambassador from Caledon: "The Republic of Caledon gratefully acknowledges the assistance provided to us by the world community after our recent catastrophe, and in particular expresses its appreciation for the tireless efforts of the Federal Republic of Caledon." (*Compromis* at para. 14.)

⁶ Anna Mamalakis Pappas, *LAW AND THE STATUS OF THE CHILD*, 13 *Colum. Human Rights L. Rev.* vol. 1 (1981) (a project of the UNITAR Research Division examining practice in thirteen countries representative of a variety of legal traditions, including Australia, China, Colombia, the Congo, Cuba, Czechoslovakia, Egypt, England, Greece, Israel, Kenya, Norway, and the United States); ICCPR Art. 18(4); ICESCR Art. 13(3); ACHR Art. 12(4).

⁷ See May 1995 decree of Caledon's Minister of the Interior announcing that his Ministry would reimburse the Oriente foster parents in full for all their expenses and that the Laurentian children would be kept out of harm's way until there was persuasive evidence that "safe conditions" had been restored to Laurentia, or natural parents came forward to claim them. (*Compromis* at para. 8)

b. Balancing the Interests of the Child against the Interests of the State

Laurentia may find strong support for its claim that the children's adoption in Caledon is against their best interests in the Convention on the Rights of the Child. According to this Convention, it is the duty of States to

- a. ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;
- b. recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin....⁸

The Brazilian member of the working group further clarified her delegation's view that Article 21(b) "must be interpreted in the sense that intercountry adoption will only be envisaged as an alternative means of child care, when all other possibilities are exhausted."⁹ Further, under the Hague Convention on the Protection of Infants (1961),¹⁰ measures taken by authorities of the state of a child's nationality for the protection of that child will generally be recognized by the state of the child's residence. An exception exists, however, in those instances where such recognition would violate the *ordre public* of the state of residence.¹¹

While a state may not interfere with valid parental or guardianship powers, no state may base a claim of guardianship purely on national interests. Instead, the best interests of the child should be considered paramount. In this case, Laurentia may claim that by virtue of the nationality of the children and their Laurentian origins, the State of Laurentia should be deemed to have guardianship and custody rights over those children. Following this line of reasoning, Laurentia would argue that the retention of

⁸ The Child Rights Convention Article 21.

⁹ Report of the Working Group on a Draft Convention on the Rights of the Child, 2 March 1989, II/23/369; *also see* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE TRAVEAUX PREPARATOIRES, Sharron Detrick, ed. Martinus Nijhoff Publishing.

¹⁰ Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Commission Internationale de l'Etat Civil, The Hague, 5 October 1961. According to Article 1, "[t]he judicial or administrative authorities of the State of the habitual residence of an infant have power, subject to the provisions of articles 3 and 4, and paragraph 3 of article 5 of the present Convention, to take measures directed to the protection of his person or property." According to Article 3, "[a] relationship subjecting the infant to authority, which arises directly from the domestic law of the State of the infant's nationality, shall be recognized in all the contracting States."; According to Article 4, If the authorities of the State of the infant's nationality consider that the interests of the infant so require, they may, after having informed the authorities of the State of his habitual residence, take measures according to their own law for the protection of his person or property. That law shall ... govern [the effects of said measures] both in respect of the relations between the infant and the persons or institutions responsible for his care, and in respect of third persons.... The measures ... shall replace any measures which may have been taken by the authorities of the State where the infant has his habitual residence." According to the third paragraph of Article 5, "[i]n the case of change of residence of an infant who was under the protection of authorities of the State of his nationality, measures taken by them according to their domestic law shall remain in force in the new State of their new habitual residence."

¹¹ Hague Convention on Private International Law, Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants; Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55, 90 (In the only International Court of Justice decision concerning child protection, Judge Lauterpacht recognized in his separate opinion that the protection by states of infants is an aspect of *ordre public* and that the failure of states to live up to their responsibilities in this regard is a violation of *ordre public*).

the children in Caledon violates such guardianship rights. This line of argument should be challenged on the grounds that the best interests of the child take priority over the interests of the state.

Agents for Laurentia may argue that the measures taken by the State of Laurentia, i.e. demand for return of the children, are consistent with that State's duty to protect the best interests of the children in question and that Caledon's failure to return the children violates the children's rights of family, nationality, religion, education, language as established by general principles of international law and applicable conventions.¹² Caledon's counterargument would be that it is under an affirmative obligation by the same principles to act in the best interests of the children in question and that such interests require that the adoption decrees be upheld. Caledon's strongest argument would be that the Oriente courts which heard the adoption petitions used the best interests analysis when determining the merits of the particular cases. In support of this point, agents for Caledon may cite the fact that the decree of the Governor of Oriente Province simply paved the way for individual proceedings to be commenced per the Code of Oriente Province Family Law Title, which in section 3.058(a) provides, "[i]n consideration of any petition for the adoption of a child, the Court shall be guided first and foremost by its reasoned determination of the child's best interests."¹³

Under the Abduction Convention, even if a breach of custodial rights has been established, the return of the child in question may not be required if the child has become settled in its new environment¹⁴ or return would be harmful to that child.¹⁵ Thus, Caledon may argue that even if Laurentia can establish wrongfulness, Caledon is not bound to return the children. Laurentia, on the other hand, would argue that no evidence has been presented that the children have become settled in Caledon and that the return of the children would not be harmful to them.

Caledon has strong support for the argument that it was under a positive obligation to respond to the needs of the children in question. The way in which it responded, Caledon would argue, responded to the best interests of the children and was appropriate given the situation. Caledon may further argue that the return of the children would go against the principle of the best interest of the child and thus against the Caledon's *ordre public*. Thus, if Caledon can establish that undoing the adoptions would be against the best interests of the child, its argument against returning the children would be strengthened.

¹² The Convention on the Rights of the Child, for example, gives specific recognition to the child's interests of individual personality, including the rights to freedom of expression, association, assembly, religion, and privacy.

¹³ Federal Republic of Caledon, The Code of Oriente Province Family Law Title, Chapter 3, section 3.058. Section 3.058(b) further states,

"As elements of, or in addition to, the best interests of the proposed adoptee, the court may consider the following factors:

- (i) The suitability of the petitioner(s) as parents of the proposed adoptee;
- (ii) the desirability of maintaining family unity;
- (iii) the conditions in which the proposed adoptee would live were the adoption petition to be granted or were it not to be granted;
- (iv) the material and spiritual well-being of the prospective adoptee; and
- (v) the public interest.

¹⁴ Abduction Convention, Art. 12 (In the event that a judicial or administrative proceeding for the return of a child pursuant to the Convention is commenced in the requested state within a year of the wrongful retention, then the judicial or administrative authority "shall order the return of the child forthwith." If such proceeding are commenced more than one year after the illegal retention, then the authority shall order the return of the child unless "the child is now settled in its new environment.").

¹⁵ Abduction Convention, Art. 13 (A requested state is not required to return a child who has been wrongfully retained if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation).

Caledon is a federated state, and domestic care issues, such as adoption, are left to the provincial governments within Caledon. In the Province of Oriente, the Family Law Title of Oriente governs adoptions in that province, including the adoptions of the Laurentian children. Oriente provincial law provides for jurisdiction of its District Courts to hear adoption petitions, and sets forth certain minimum requirements necessary in order for an adoption petition to be granted. Family Law Title, § 3.050(a). Caledon may thus argue that the federal government may not interfere in the affairs of constituent provinces.

Laurentia may argue that Caledon cannot invoke its domestic law to justify its actions in this case. According to Article 27 of the Vienna Convention on the Law of Treaties, a state may not invoke provisions of internal law as justification for failure to comply with treaty provisions of its internal law as justification for failure to comply with treaty obligations.

There is strong support, however, for Caledon's argument that these matters should be left to the courts of Oriente Province. Adoption without parental consent in those cases where parents are unavailable is not explicitly regulated on the international level. Instead, adoption is presumptively left to the purview of national law.¹⁶ While state practice in this area varies greatly,¹⁷ it is presumed under numerous international instruments and by state practice that the State in which the child is found has primary jurisdiction over that child.¹⁸ It is common state practice to allow adoptions of unaccompanied children without parental consent if the parents cannot be located.¹⁹

Laurentia could further argue that Caledon's Central Authority, the Province of Oriente, is in violation of Article 7 in not taking all appropriate measures to secure the voluntary return of the child or bring about an amicable resolution of the issues,²⁰ initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child,²¹ or to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.²²

The Abduction Convention states that the judicial and administrative authorities in a requested state are not to adjudicate the merits of any custody issue after they have received notice of wrongful retention.²³ This raises the question of whether, given the facts, the Caledonian authorities should have been on notice of the alleged wrongful retention prior to approving any of the adoption petitions. If so, the adoptions themselves may have been wrongful under the Convention.

Laurentia may argue, however, that even if there were no notice of the wrongful retention prior to the adoption proceedings and decrees, the decrees themselves may not provide a defense to a claim brought pursuant to the Convention:

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested state shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.²⁴

¹⁶ Everett M. Ressler et al., *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (1988).

¹⁷ ECOSOC Commission for Social Development, Protection and Welfare of Children: Report of the Secretary General, E/CN.5/504 (1974).

¹⁸ Ressler et al. at 265-266.

¹⁹ Ressler et al. at 245.

²⁰ Convention on the Civil Aspects of International Child Abduction Article 7(c).

²¹ Convention on the Civil Aspects of International Child Abduction Article 7(f).

²² Convention on the Civil Aspects of International Child Abduction Article 7(h).

²³ Abduction Convention, art. 16.

²⁴ Abduction Convention, art. 17.

Laurentia should argue that the Caledonian adoption decrees cannot form the sole basis for refusing to return the children. Caledon should respond by saying that, indeed, the decrees do not form the sole basis for such refusal. Rather, the Caledonian authorities, in refusing to return the children, took into account the reasons for issuing the adoption decrees in the first place, which the authorities were allowed to do under Article 17 of the Abduction Convention.

II. Laurentia's Claim for Reparations Flowing from Caledon's Retention of the Children of the Mount Zolo Disaster

Laurentia has posited that Caledon is liable to Laurentia for an amount calculated to compensate each Laurentian child and their families for harm flowing from Caledon's illegal retention of the children of the Mount Zolo disaster. Confirmation of this assertion requires that several elements be satisfied. First and foremost, it must be confirmed that Caledon's actions were illegal. Second, that Caledon is liable to Laurentia for harm or damages stemming from such actions. And third, that such liability is quantifiable in monetary terms.

In support of its argument that Caledon must pay damages to Laurentia, Laurentia may cite the International Law Commission's Draft Articles on State Responsibility, which state that all states are equally responsible under international law for their illegal acts.²⁵ If it is established that one state is criminally responsible to another, then reparation will be due to the injured state.²⁶ According to the *Chorzow Factory* case, the object of reparations is to reverse, as far as possible, "all the consequences of the illegal act and re-establish the situation which would in all probability have existed if the act had not been committed."²⁷ Thus, Laurentia may argue that Caledon should pay to it, on behalf of the children and their families, an amount calculated to address the harm done to them.

Caledon has asked in its counterclaim that this Court declare that the adoptions of the children evacuated to Caledon were not inconsistent with international law, or, in the alternative, that Caledon as a Federal Republic is not bound by international law to undo the adoptions. Laurentia may argue, however, that it is an accepted principle that a State may not relieve itself of responsibility by invoking either provisions or omissions of its domestic legislation.²⁸ In this vein, federal states are recognized as not being allowed to exonerate themselves by asserting that individual member states are independent or autonomous; they will be responsible on the international plane for the actions omissions of these member states.²⁹

In order for a claim for compensation to be sustainable by this Court, consideration of valuation and loss must be addressed. It is likely that Laurentia will claim that the children's extended absence from Laurentia has caused hardship for the children and their families. It is difficult, however, to quantify such hardship as a compensable loss. Tribunals may, however, be cautious in providing for compensation in the case of non-material loss. Laurentia may argue that the moral wrong of Caledon's inappropriate retention of the children is sufficient to require compensation. Laurentia may point, for

²⁵ I.L.C. Draft Arts. on State Responsibility, 1979, II Y.B.I.L.C., (Pt. II), Draft Art. 2.

²⁶ "...[A]ny breach of an engagement involves an obligation to make a reparation." P.C.I.J. Rep., ser. A, No. 17 (1928) at 29.

²⁷ *Chorzow Factory Case*, P.C.I.J. Rep., ser. A, No. 17 at 47 (1928).

²⁸ *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J. Rep., ser. A/B, No. 46 at 167 (1932).

²⁹ Rebecca Wallace, *International Law* (2d ed.) (1992) at 167.

example, to the position of the European Court of Human Rights which has recognized the principle that moral damage or moral wrong does give rise to entitlement to compensation.³⁰

In determining the adequacy of such an award, the Court must take into consideration issues of remoteness and the measure of damages. Parties may therefore be expected to support their side's position by resort to the facts of the case and analogy to *opinio juris*. The controversy which continues to surround such matters was illustrated by the *Nuclear Tests Cases (Australia v. France)*.³¹ In that case, the court struggled to determine what amounted to "material damage" and the requirements of proof relating to special damages.

While it is generally recognized that damages may be awarded for non-material loss, international tribunals have been reluctant to grant punitive damages. The lack of such awards is highlighted in the *Lusitania Case* which states, "...Counsel has failed to point to us any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favour of another presenting a claim on behalf of its nationals."³² Such denial of punitive damages is not absolute, however, as attested to by the \$25,000 award given against the United States as a "material amend in respect of the wrong suffered by Canada" in the *I'm Alone Case*.³³

III. The Laurentian "Save the Children Act" of 1996

Caledon claims (a) that the retaliatory provisions of Laurentia's Save the Children's Act are impermissibly extraterritorial and therefore illegal under international law; (b) that the decision of Caledon's courts to decline to enforce *Doe v. Children's Foundation* is consistent with international law; and (c) that Laurentia should be ordered by this Court to offer reparations to Caledon, either in the form of the return of the Children's Foundation property which had been seized and sold, or in the form of monetary compensation in the amount of the value of the property at issue. Laurentia seeks enforcement of the judgment in *Doe v. Children's Foundation* in Caledon, or reparations from Caledon in the form of monetary compensation in the amount of the unsatisfied judgment against the Children's Foundation.

In addressing the parties' claims relating to the Laurentian Save the Children Act, its application by Laurentian Courts, and enforcement in Laurentia and Caledon, the Court should consider the prescriptive jurisdiction upon which the legislation of the Act is based, the adjudicative jurisdiction under which the case of *Doe v. Children's Foundation* is brought into the Laurentian legal system, and the jurisdictional issues of enforcement in Laurentia and Caledon of the Laurentian court's award to the family of Moses Doe.

Although international law has not developed a definitive set of rules relating to a State's jurisdiction on the international plane, it is an accepted principle of international law that a State is sovereign within its borders. When a State seeks to apply its laws beyond its own borders, issues of extraterritoriality arise and a conflict with the foreign State's sovereign territorial jurisdiction occurs. In the case at hand, Laurentia has promulgated a law which purports to assign liability to any social worker or organization which provides testimony in an adoption proceeding in Caledon involving the children of the Mount Zolo disaster.³⁴ Caledon characterizes these provisions of the Save the Children Act as

³⁰ European Convention on Human Rights, Article 50; *De Wilde, Ooms and Versyp Cases*, E.C.H.R. Series A, vol. 14, pp. 9-11; *Ringeisen Case*, E.C.H.R. Series A, vol. 15, pp. 22-23.

³¹ I.C.J. Reports, 1974, p. 253.

³² (*United States v. Germany*) 7 R.I.A.A. 307 at 388 (1922).

³³ (*Canada v. United States*), 3 R.I.A.A. 1609 (1933/35); 29 A.J.I.L. 326 (1935).

³⁴ *Compromis* at para. 19.

retaliatory and requests that the Court declare that they are impermissibly extraterritorial and therefore illegal.³⁵

Consistent with the principle of territorial jurisdiction, prescriptive jurisdiction, or the power to legislate or prescribe law, is traditionally recognized as being within a State's purview when it relates to acts or omission within that State's territory. States may, however, base claims of prescriptive powers extending beyond their borders on a number of principles. In the instant case, agents for Laurentia may base their arguments in favor of their State's extraterritorial jurisdiction either on the principle of effects jurisdiction, also known as the principle of objective territorial jurisdiction, or on the principle of passive personality.

According to the effects or objective territorial principle, a state may proscribe conduct which commences outside a state and effectuates harm within the State. This approach to extraterritorial jurisdiction was first articulated in the *Alcoa* case in 1945.³⁶ In response to Laurentia's reliance on this principle, Caledon may point to the fact that the effects principle has not gained prevalence in the international community and, in fact, some countries strongly disagree with it. The United Kingdom, for instance, asserts that while jurisdiction may be justified according to the nationality and the protective principles, it is never justified when based on the effects principle.³⁷

Agents for Laurentia may assert that the *SS Lotus Case* provides authority for the Laurentian Parliament's legislation based on the dicta in that opinion that unless conduct is prohibited by international law, it is permitted.³⁸ It should be noted, however, that under the facts of *Lotus*, since the acts in question occurred on the high seas, the assertion of jurisdiction over the defendants did not conflict with the territorial jurisdiction of any other state. In the present case, Laurentia's assertion of jurisdiction over those taking part in foreign adoption proceedings brings the Save the Children Act into direct conflict with the territorial jurisdiction of Caledon. Because of such distinguishing features and the fact that a cloud of doubt continues to hang over the *Lotus Case*,³⁹ its invocation as support for such a proposition is dubious at best.

In replying to Caledon's accusation of impermissible exertion of extraterritorial jurisdiction, Laurentia may also invoke the passive personality principle. Under this principle, a state may assert jurisdiction over an alleged wrongdoer in a foreign state if the victim involved is its national. While some states have recognized jurisdiction based on the passive personality principle, its application has only achieved general acceptance in regard to terrorist attacks on, or torture of, a State's nationals or assassinations of a State's officials.⁴⁰ This principle thus cannot be relied upon as the sole justification for exercises in extraterritorial jurisdiction.

³⁵ *Compromis* at para. 26.

³⁶ *United States v. Aluminum Company of America*, 148 F. 2d 416 (1945).

³⁷ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994).

³⁸ (1927) P.C.I.J. Ser. A, no. 10 at 19.

³⁹ See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) at 77 ("In the great debate on extraterritorial jurisdiction those who believe it is lawful ... have invoked the *Lotus Case* as authority for the proposition that, unless conduct is *prohibited* by international law, it is permitted. Although I am not unsympathetic to the exercise of extraterritorial jurisdiction over certain conduct, I do feel that one cannot read too much into a mere dictum of the Permanent Court. This is, for me, another example of the futility of deciding law by reference to an unclear dictum of a court made long years ago in the face of utterly different factual circumstances.")

⁴⁰ See the 1963 Tokyo Convention on Offenses aboard Aircraft, Article 4(b), 704 U.N.T.S. 219; the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5(1)(c), 23 I.L.M. 1027 (1984); Third Restatement of Foreign Relations Law of the United States, sec. 402(g).

Laurentia may seek to assert the *Lotus Case* as authority for the application of the passive personality principle. The same cautions that apply to the use of *Lotus* to support the effects principle apply to its invocation under the rubric of the passive personality principle. Caledon, in arguing against the authority of the *Lotus Case* may note that the passive personality principle has not subsequently been adopted as a basis of jurisdiction in factually similar contexts.⁴¹

Finally, it should be noted that agents for Caledon may attempt to argue that the Save the Children Act was, in fact, an *ex post facto* law and should therefore be recognized as against public policy and illegal under international law. Laurentia may argue, however, that Caledon did not raise this issue in its submission to the Court and that this issue, therefore, may not be brought before the Court at this time. If the Court were to decide that it was not improper for Caledon to raise this issue, it could not appropriately address it based on the information presented in the *Compromis*. While it is a general principle of international law that *ex post facto* laws are indeed abhorred, it is not clear from the *Compromis* whether this was, in fact, an *ex post facto* application or whether the proceedings in question in fact did occur after the law was promulgated.⁴² Thus, Caledon's arguments along this line are not convincing.

Caledon seeks an order that Laurentia return to Caledon the property belonging to the Children's Foundation that was seized and sold, or its value.⁴³ Caledon may argue that the courts of Laurentia did not have adjudicative jurisdiction over the Children's Foundation. It is accepted as a general principle of law, however, that states have adjudicative jurisdiction over persons and things found within their territory. Laurentia may argue that although the Children's Foundation is a foreign corporation, and Ms. Yolanda Montaigne is a national of Caledon, she is subject to service as an agent of the Children's Foundation when she is in Laurentia.

Caledon may argue that the facts of the present case show that Laurentia has overstepped justifiable bounds in its quest to punish Caledon and its citizens for performing their duty in attending to the needs of the children. In support of its argument that Laurentia's actions be weighed against the dictates of reasonableness and rights of Caledon, agents for Caledon may point to the *Barcelona Traction Case*. In that case, Judge Fitzmaurice recognized that State's assertions of extraterritorial jurisdiction are subject to international legal limits, specifically pointing out that States should accord respect to the sovereignty of other States.⁴⁴

Additionally, Caledon seeks a declaration that the decision of the courts of Caledon to decline enforcement of the Laurentian court's judgment in *Doe v. Children's Foundation*, is consistent with international law. Under international law, there is no general requirement that one State should enforce another's judgments. Caledon may argue that such extraterritorial enforcement of judgments is a matter of comity and that Caledon, therefore, is not under any obligation to recognize or enforce the judgments of Laurentian courts. The classical definition of comity may be drawn from the United States Supreme Court's *Hilton v. Guyot*,

⁴¹ See International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 439 U.N.T.S. 217; the Geneva Convention on the High Seas of 1958, 450 U.N.T.S. 82; the UNCLOS Convention of 1982, A/CONF./62/121, 1982.

⁴² Agents for Caledon may point out that the "Save the Children Act" was promulgated on June 9, 1996, after the majority of adoption proceedings had been completed,⁴² but it is unclear from the *Compromis* whether the proceedings concerning Moses Doe took place before or after the law was promulgated.

⁴³ *Compromis* at para. 26.

⁴⁴ 1970 I.C.J. Reports 3, 105 ("[I]nternational law does not impose hard and fast rules on States delimiting spheres of national jurisdiction ... but leaves to States a wide discretion on the matter. It does, however, (a) postulate the existence of limits -- though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.").

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁴⁵

Comity remains the foundation of extraterritorial enforcement in international law.

In support of the claim for enforcement of the *Doe* court's judgment in Caledon, agents for Laurentia may argue that a custom of enforcement of Laurentian judgments in Caledon has been established and that Laurentia may therefore expect Caledon to honor the judgment in the case of *Doe*. In the *Right of Passage Case* the International Court of Justice held that "practice that has continued over an extended period of time and accepted as law between the States gives rise to a right and a correlative obligation."⁴⁶

According to the *Compromis*, Caledon's refusal to enforce *Doe* was the first incidence of Caledon's Supreme Court refusing to enforce a foreign judgment between the two countries. Laurentia may, therefore, argue that Caledon's refusal in this case is in violation of a custom in existence between the two states. In view of the overwhelming acceptance of comity as the basis for extraterritorial enforcement of awards, and a general current of *opinio juris* reflecting hostility towards long-arm jurisdiction, this argument is likely to be unconvincing. The United States stands against most of the world in favor of long-arm or extra-territorial jurisdiction. Thus, *opinio juris* beyond U.S. borders would argue strongly for finding enforcement based upon an alleged bilateral custom untenable.

IV. The Laurentian Cigarette Import Ban

Caledon seeks an award to compensate for lost profits from the sales of cigarettes in Laurentia during the import ban. Laurentia makes no prayer for relief on this issue. Since both States are party to the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization, matters pertaining to this issue are primarily governed by the rules relating to these institutions as per the requirements of Article 26 of the Vienna Convention on the Law of Treaties. Provisions of the GATT and WTO instruments relevant to this case include, GATT Article XXI (prohibiting import restrictions); GATT Article XXIII (prohibiting unilateral actions by any one country); and Article 23 of the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes (providing that members shall make a determination as to violations through dispute settlement).

According to the facts of the case, Laurentia imposed an import ban on all cigarettes from Caledon. Subsequently, Caledon instituted dispute resolution proceedings in the WTO.⁴⁷ During the consultation process, Laurentia chose not to defend the import ban for financial reasons and withdrew the import ban while maintaining its legitimacy.⁴⁸

⁴⁵ 159 U.S. 113, 163-64 (1895).

⁴⁶ In the *Right of Passage* case the countries of Portugal and India had had a uniform practice with regard to private persons, civil officials and goods in general for longer than one and a quarter centuries. The *Compromis* is unclear how many years Caledon has recognized Laurentia's judgments. Thus, it is uncertain whether this practice rises to the level of custom.

⁴⁷ *Compromis* at 18.

⁴⁸ See statement of Laurentian Trade Minister, *Compromis* at 18.

A. Does the International Court of Justice have competence to hear the claims arising from the GATT?

Laurentia may argue that it was improper for Caledon to bring the issue of lost profits before the International Court of Justice. While the draft charter of the International Trade Organization made provisions for consultation with the International Court of Justice⁴⁹ the ITO never came into being and the General Agreement on Tariff and Trade ("GATT") made no similar provisions for ICJ consultation. Two reasons are given for this. The first is the provisional nature of the GATT, and the second is the general attitude among GATT members that bringing GATT issues before the ICJ would compromise the spirit of collaboration within the regime.⁵⁰

In Article 9(2) of the Marakesh Agreement Establishing the World Trade Organization, the Ministerial Conference and the General Council reserve for themselves the exclusive authority to adopt interpretations of the GATT and the Multilateral Trade Agreements.⁵¹ This may, given past practice, be interpreted to mean that no tribunal outside the WTO can adjudicate disputes arising from the GATT and conceivably lead to the conclusion that the Court could refuse to adjudicate the issues relating to Laurentia's import ban on Caledonian cigarettes, and the claim of lost profits.

On the other hand, the Statute of the International Court of Justice gives the court jurisdiction over all cases referred to it by parties.⁵² The Court specifically has jurisdiction over disputes relating to the nature and extent of reparations for breaches of international law.⁵³ Further, Article 34 gives the ICJ the power to request information relevant to its cases from public international organizations.⁵⁴ The International Court of Justice held in the *North Sea Continental Shelf Case* that since the jurisdiction of the Court derives from the special agreement between the parties, the Court's task is primarily a matter of ascertainment of the intention of the parties by the interpretation of the special agreement.⁵⁵

Caledon submitted the issue of the cigarette import ban to the International Court of Justice. Laurentia did not place the matter before the Court. This request potentially puts the GATT related issues within the purview of the Court, if the court wishes to accept it. The Court should use its discretion in interpreting any conflict between the grant of jurisdiction to the Court and the possible denial of jurisdiction by the Marakesh Agreement.

B. Was Laurentia's import ban on Caledonian cigarettes a violation of the GATT?

On its face, the import ban was a violation of the GATT. Article XI of the GATT prohibits import restriction, and Article XXIII prohibits unilateral action by any one country. Articles XX and XXI provide exceptions to the basic rules of GATT.

1. Article XX - General Exceptions

Laurentia's cigarette import ban does not fit neatly within any of the stated exceptions in Article XX.⁵⁶ Teams are likely to claim one or more of the Article XX exceptions as justification for import ban. The most likely exceptions are public morals or the protection of human life or health.

⁴⁹ Long, Olivier. Law and the Limitations in the GATT Multilateral Trade System. Graham & Trotman/ Martinus Nijhoff Publishers, London (1987), at 1.

⁵⁰ *Id.* at 65.

⁵¹ Pescatore, Pierre, William J. Davey, and Andreas F. Lowenfeld. Handbook of GATT Dispute Settlement.

⁵² Statute of the International Court of Justice, Article 36(1).

⁵³ *Id.* Article 36 (2). See *Corfu Channel*, 1949 I.C.J. Reports 4.

⁵⁴ Statute of the International Court of Justice, Article 36(2).

⁵⁵ 1969 I.C.J. Reports 3.

⁵⁶ Article 20 "General Exceptions" states,

GATT panels have strictly enforced the conditions on exceptions imposed in Article XX.⁵⁷ Of particular concern is that exceptions not be a disguised restriction on international trade. In the case of Laurentia's import ban, the restriction is an explicit restriction on international trade. In addition to constraints on exceptions in the preamble, the subparagraphs contain additional requirements. The measure must be necessary, or related to the stated goal of the exception. Panels have narrowly construed "necessary."⁵⁸ One panel stated, "[i]f it is necessary in achieving a health objective to use a GATT inconsistent measure, the least inconsistent measure must be used."⁵⁹ In the *Tuna/Dolphin* case, the panel found that the United States' measures were not necessary to the protection of dolphin life because other avenues, such as negotiating international cooperative arrangements, were available.⁶⁰ This would support Caledon's argument that the Laurentian ban was inappropriate since it will be difficult for Laurentia to show that this was the least restrictive measure they could have taken.

Another difficulty with assessing the necessity of the import ban and subsequent applicability of any of the exceptions is the indirect nature of the link between the ban and the welfare of the children. Central to the *Tuna/Dolphin* dispute were the efforts of the United States to protect the welfare of dolphins outside US territory. The panel addressing that dispute found, when examining the drafting history, that Article XX(b) was concerned with the life or health of humans, animals, or plants, *within* the jurisdiction of the importing state.⁶¹

In the instant case, the children are not physically in Laurentia, but an argument may be made that they are nonetheless within the jurisdiction of Laurentia. This returns us to the issue of which party has jurisdiction over the children. If Laurentia is deemed to have jurisdiction over the children, the ban may be justified if it was necessary to the welfare of the children. If Caledon has jurisdiction, the ban was not justified.

The second difficulty which must be addressed is the lack of a direct link between the absence of Caledonian cigarettes in Laurentia and the welfare of the Mount Zolo children. According to former Director-General of GATT, Olivier Long, GATT panels try to separate the trade and political elements in a dispute, and leave the political elements to other organizations.⁶² Laurentia's import ban stems from a political rather than a trade injury, and so is considered outside the purview of the WTO. The import ban is not linked to the physical welfare of the children but rather only by political threads.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- a) necessary to protect public morals
- b) necessary for the protection of human, animal, or plant life or health,...
- d) necessary to secure compliance with laws or regulations which are not inconsistent with provisions of this Agreement, including customs enforcement, ...

⁵⁷ See e.g. United States - Section 337 of the Tariff Act of 1930, BISD 36S/345; Canada - Administration of the Foreign Investment Review Act (FIRA), BISD 30S/140; Japan - Restrictions on Imports of Certain Agricultural Products, BISD 35S/163.

⁵⁸ See Canada - Administration of Foreign Investment Review Act (FIRA).

⁵⁹ Thailand - Restrictions on importation of and Internal Taxes on Cigarettes, BISD 37/200.

⁶⁰ United States - Restrictions in Imports of Tuna, Report of the GATT Panel, August 16, 1991, 30 I.L.M. 1594. (1991).

⁶¹ *id.* at 1620.

⁶² Long at 81-82.

Before a WTO Dispute Resolution Body or a Court applying Dispute Resolution Body standards, Caledon would most likely win a claim that the ban was illegitimate. However, once Laurentia agreed to withdraw the import ban, Caledon's complaint was satisfied. Thus, the legitimacy of Caledon's demand for an order of economic compensation from this Court is highly questionable.

2. GATT Article XXI Security Exceptions

GATT Article XXI provides for exceptions protecting essential security interests. No clear interpretation of Article XXI has been adopted. In addition, there has been no decision as to whether a panel could challenge a state's invocation of Article XXI. The exceptions in Article XXI generally refer to protection of sensitive information, trade in frisonable materials, traffic of arms, ammunition, and other implements of war, and ability to meet obligations under the UN Charter.⁶³ A potentially applicable exception is the time of war or other emergency in international relations exception found in Article XXI(b)(iii).⁶⁴ Three cases have arisen pertaining to Article XXI, and none have established clear guidelines for its application.

In the case of the United States trade embargo against Nicaragua, the United States claimed an Article XXI "national security interest" justification for the sanctions.⁶⁵ A panel was established to examine the dispute, but was instructed not to look into the claim of an Article XXI exception. As a result, the panel could reach no conclusion as to the legality of the trade sanctions. The contracting parties were divided as to whether a panel could question a country's claim of essential security interests. During the 1987 sessions, Nicaragua continued to request a lifting of the embargo, and the United States continued to claim that the GATT could not review trade embargoes imposed for national security reasons.⁶⁶

Laurentia could claim an essential security interest justification for the imposition of the import ban. The reluctance of the WTO/GATT to review claims of essential security interest could preclude Caledon's request for compensation for lost profits. Though Laurentia chose not to defend the import ban before a dispute resolution panel, the press statement released may preserve Laurentia's claim that the import ban was legal. Article XXI provides Laurentia with the strongest justification, as it appears to be unreviewable at this time.

3. Countermeasures under GATT Article XXIII

In accordance with Article XXIII of the GATT, countermeasures should only be taken by a contracting party after an attempt at resolution has been made through the WTO dispute resolution process, and a recommendation by the Contracting Parties as to appropriate countermeasures.⁶⁷ Article XXIII(1) however, requires that any authorized countermeasures be in response to a direct or indirect benefit accruing under the GATT. The injury claimed by Laurentia is the retention of the children by Caledon. This is not a nullification or impairment of Laurentia's rights under the GATT.

C. Other issues of International Law relating to the import ban

The International Court of Justice is not the WTO and is not bound by the practices of the WTO. Caledon is requesting economic compensation for damages it suffered during the import ban on cigarettes. So the Court may consider relying only on international law outside the international trade regime to settle the matter. The *Nautilla* Arbitration from 1928 sets out the customary law of reprisals. The Tribunal set out three requirements of a legitimate reprisal:

⁶³ General Agreement on Tariffs and Trade, Article XXI (a).

⁶⁴ *id.* Article 21 (b)(iii).

⁶⁵ GATT Activities 1986: An annual review of the work of the GATT. pp. 58-59.

⁶⁶ GATT Activities 1987, pp. 69-70.

⁶⁷ General Agreement on Tariffs and Trade, Article XXIII(2).

- 1) That there was a previous violation of international law by the other party.
- 2) That the reprisal was preceded by an unsuccessful demand for redress.

The legitimacy of the import ban as a reprisal cannot be determined until a finding is made about the legality of Caledon's refusal to return the children. If the first condition is found to have been met, the import ban was a legitimate reprisal. Before Laurentia imposed the ban, Laurentia demanded the return of the children and was refused.⁶⁸ There were further diplomatic discussions, and Caledon refused mediation suggested by the Secretary General of the United Nations.⁶⁹ Only after this did Laurentia impose the import ban.⁷⁰

It has been the practice of numerous tribunals to allow compensation for reasonably foreseeable loss of profits.⁷¹ Caledon may thus argue that its claim in this regard is justified. Whether by resort to the GATT or to general principles of international law, Caledon has a strong argument that Laurentia's import ban was wrongful since it will be difficult for Laurentia to make the requisite links between the welfare of the children of the Mount Zolo disaster and such economic sanctions.

⁶⁸ *Compromis* at 14, 15.

⁶⁹ *Compromis* at 16.

⁷⁰ *Compromis* at 17.

⁷¹ See, e.g., *Norwegian Shipowners' Claims (1922)*, R.I.A.A. I, p. 307 at p. 338.