
IN THE INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING THE CHILDREN
OF THE MOUNT ZOLO DISASTER

1997

Republic of Laurentia

v.

Federal Republic of Caledon

Due to differences in printers, the pagination in the Table of Contents will differ from the actual page numbers in this document.

MEMORIAL FOR THE APPLICANT

CASE CONCERNING THE CHILDREN
OF THE MOUNT ZOLO DISASTER

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Convention: Text and Legal Analysis, Pub.Notice 957, 51 Fed.Reg.
10494 (1986)

U.S.A.: 42 U.S.C. Sec.11603(e) (2) (1988)

U.S.A.: Helms-Burton-Act, Sec.301

ABBREVIATIONS

A.I.L.C.	American International Law Cases
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
All.E.R.	All England Law Reports
Ann.Dig.	Annual Digest of Public International Law Cases
B.Y.I.L.	British Yearbook of International Law
Basl.J.M.	Basler Juristische Mitteilungen
C.C.P.R.	International Covenant on Civil and Political Rights
C.Cass.	Cour de Cassation
C.E.S.C.R.	International Covenant on Economic, Social and Cultural Rights
C.T.S.	Consolidated Treaty Series
C.Y.I.L.	Canadian Yearbook of International Law
Can.J.Fam.L.	Canadian Journal of Family Law
Civ.Div.	Civil Division
Corn.I.L.J.	Cornell International Law Journal
Ct.App.	Court of Appeals
D.R.	Decisions and Reports
Distr.Ct.	District Court
E.C.H.R.	European Commission of Human Rights
E.Ct.H.R.	European Court of Human Rights
E.P.I.L.	Encyclopedia of Public International Law
F.Y.I.L.	Finnish Yearbook of International Law
Fam.Div.	Family Division
G.A.O.R.	General Assembly Official Records
G.Y.I.L.	German Yearbook of International Law
H.C.P.I.L.	Hague Conference on Private International Law
H.Ct.	High Court
H.L.	House of Lords

H.R.L.J.	Human Rights Law Journal
H.R.Q.	Human Rights Quarterly
I.C.L.Q.	International and Comparative Law Quarterly
I.C.R.C.	International Committee of the Red Cross
I.C.R.M.	International Children's Rights Monitor
I.L.C.	International Law Commission
I.L.J.	International Law Journal
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
J.A.I.L.	Japanese Annual of International Law
J.W.T.	Journal of World Trade
N.I.L.R.	Netherlands International Law Review
N.J.I.L.	Netherlands Journal of International Law
N.J.W.	Neue Juristische Wochenschrift
N.Z.L.R.	New Zealand Law Reports
Nord.J.I.L.	Nordic Journal of International Law
R.B.D.I.	Revue Belge de Droit International
R.Crit.D.I.Priv.	Revue Critique de Droit International Privé
R.d.C.	Recueil des Cours
R.G.D.I.P.	Revue Générale de Droit International Public
R.I.A.A.	Reports of International Arbitral Awards
R.I.W.	Recht der Internationalen Wirtschaft
RabelsZ.	Rabels Zeitschrift
S.Afr.	South Africa(n)
S.Ct.	Supreme Court
U.N.H.C.R.	United Nations High Commissioner for Refugees
U.N.H.R.C.	United Nations Human Rights Committee
U.N.T.S.	United Nations Treaty Series
V.C.L.T.	Vienna Convention on the Law of Treaties

Y.I.L.C.

Yearbook of the International Law Commission

Z.a.ö.R.V.

Zeitschrift für ausländisches öffentliches Recht und
Völkerrecht

JURISDICTION

Laurentia and Caledon have agreed to submit their dispute concerning the Children of the Mount Zolo Disaster to the I.C.J. pursuant to Art.36(1) I.C.J.-Statute. However, Laurentia contests the jurisdiction of the Court as to the dispute over the G.A.T.T.

STATEMENT OF FACTS

Laurentia, a developing country, always has maintained friendly diplomatic relations with its eastern neighbor Caledon. In February 1994, the eruption of Mount Zolo, a Laurentian volcano, killed over 150,000 persons. Following the eruption, worldwide assistance in disaster relief was provided.

Contributing to these efforts the C.M.C., a part of Caledon's Ministry of Defense transferred 15,000 Laurentian citizens, among them 3,000 children, to Caledon. The C.M.C. made no efforts to obtain consent from the children's parents or authorization from Laurentia. Only the vaguest information about the children was maintained and provided to Laurentia.

400 children under the age of 14 were placed with foster families in Oriente, Caledon's most distant province. Oriente's population has a language, orthodox religion and cultural heritage differing from Laurentia's.

In May 1995, Caledon announced to keep the children in Caledon until "safe conditions" had been restored in Laurentia or natural parents claimed their return.

On June 28, 1995, the Way of Righteousness Party won the elections in Oriente. This party stands for "traditional Oriente values" like mandatory religious instruction and public display of faith.

On July 1, 1995, Laurentia demanded the immediate return of the children. On July 9, the Governor of Oriente declared the children wards of the Province and consented to their adoptions by his "fellow

pilgrims". Within the next nine months all 400 children were adopted without parental consent. The adoptions automatically conferred Caledon's nationality on the children.

Laurentia strongly condemned the "organized kidnapping" of her children stating that the adoptions were inconsistent with international law and the rights of the children and their families in Laurentia. It called upon Caledon to undo the illegal adoptions and to deliver all children to the custody of Laurentia's Ambassador. Caledon refused to repatriate the children stating that Caledon's federal structure prevented her from reversing provincial decisions.

After a further exchange of notes Laurentia suspended all imports of cigarettes from Caledon. Caledon requested consultations under Art.XXIII G.A.T.T. Laurentia qualified the import ban as lawful, but did not defend it before the W.T.O. for financial reasons and demanded the return of the children.

On June 9, 1996, Laurentia enacted the "Save the Children Act" which established civil liability for professionals and organizations contributing to adoptions of Laurentian children before foreign courts if effected without parental consent.

The Children's Foundation, a private organization incorporated in Caledon and active in Laurentia, contributed to some 50 "adoptions". While staying in Laurentia for one month, Ms.Montaigne, a Caledon citizen and the Foundation's Chief Administrative Officer, was served with process in a civil action, pursuant to the S.C.A., instituted by Mr. and Mrs.Doe for having contributed to the adoption of their nephew Moses Doe. Neither Ms.Montaigne nor the Foundation appeared before the

court. On October 19, 1996, judgment was rendered awarding U.S.\$100,000 in actual and U.S.\$5 million in exemplary damages against the Foundation. In execution of the judgment Foundation property was seized and sold for U.S.\$500,000 which were promptly paid to the Does. Thereafter, they entered a motion to enforce the judgment in Caledon. Caledon's courts, for the first time, refused to enforce a judgment rendered in a country with which Caledon upheld friendly diplomatic relations.

On May 10, 1996, the parties signed a compromis to submit their dispute to the International Court of Justice.

Laurentia and Caledon are parties to the U.N.-Charter, the C.R.C, the Child Abduction Convention, G.A.T.T./W.T.O. and the V.C.L.T.

QUESTIONS PRESENTED

Laurentia asks the Court

1. whether Caledon by removing and detaining the Laurentian children violated international law;
2. whether Caledon is obliged to return the Laurentian children;
3. whether the adoptions of the Laurentian children were illegal under international law;
4. whether Caledon is responsible for acts of her territorial sub-units;
5. whether Caledon is obliged to compensate immaterial damage of the children and their families;
6. whether Caledon is obliged to enforce the judgment in Doe v. Children's Foundation;
7. whether, and if so to what extent, the I.C.J. has jurisdiction as to the G.A.T.T. dispute;
8. whether the import ban was consistent with international law.

SUMMARY OF ARGUMENTS

The removal and retention of Laurentian children were wrongful under the Child Abduction Convention. The children must be returned immediately under Art.12 since no exception of Art.13 applies. The adoptions by Caledon's courts violated Art.16 as custody disputes must not be decided in the abducted-to country. The court may order the children's return at any time (Art.18).

The separation, detention and adoptions of Laurentian children violate the Child Rights Convention and customary law. The separation breached parental rights under Arts.5 and 18 and was not in the children's best interests. Mandatory religious instruction violates parental rights to ensure their children's religious education. The adoptions violate Art.21 as they were effected without parental consent and were contrary to the principle of subsidiarity and to the children's best interests.

Caledon cannot invoke her internal legal system to justify violations of international law.

The transborder removal of Laurentian children without Laurentia's consent and the compulsory conferment of Caledon nationality violated Laurentia's sovereignty.

State responsibility requires the immediate return of the children. Laurentia may exercise its right to diplomatic protection on behalf of her nationals, since the involuntary imposition of Caledon nationality on the children does not deprive Laurentia of this right.

Caledon has to compensate the children and their families for immaterial damage caused by the human rights violations.

The S.C.A., a legitimate blocking statute against Oriente's extraterritorial Family Law, has a valid basis of prescriptive jurisdiction, established by the territorial and effects principles, and is therefore consistent with international law.

Her long-standing enforcement practice that led to bilateral custom and acquiescence precludes Caledon from refusing enforcement. The presence of the Children's Foundation and the fact that injury was suffered in Laurentia form a sufficient basis of adjudicative jurisdiction.

Caledon cannot invoke public policy since no "officials" were made liable. Moreover, officials may incur civil liability for violations of international law, especially of human rights.

There is no reason to reject enforcement of punitive damages, since they are a civil remedy for private wrong. As alternative to an enforcement order, Caledon under State responsibility must pay exemplary damages to Laurentia on behalf of Mr. and Ms.Doe.

Since the G.A.T.T provides exclusive dispute settlement mechanisms, the I.C.J. has no jurisdiction to decide G.A.T.T.-disputes, especially when national security interests are involved.

However, as a proportionate response to Caledon's violations of international law, the import ban was a legitimate reprisal.

I. LAURENTIA REQUESTS THE COURT TO DECLARE THE CONTINUED DETENTION IN CALEDON OF LAURENTIAN CHILDREN, IRRESPECTIVE OF WHETHER THEY HAVE BEEN "ADOPTED" ACCORDING TO THE LAWS OF CALEDON OR ANY POLITICAL SUBDIVISION THEREOF, ILLEGAL IN INTERNATIONAL LAW, AND ORDER THE IMMEDIATE RETURN OF THOSE CHILDREN.

A. THE REMOVAL, CONTINUED DETENTION AND ADOPTION OF LAURENTIAN CHILDREN BY CALEDON VIOLATES THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

The Hague Convention is applicable *ratione materiae* and *personae* to the present dispute. Its purpose is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence"¹ in order to restore the pre-abduction *status quo*.² As the Convention's coverage was intended to be as general as possible,³ not only natural persons, but also other bodies, like courts,⁴ may be holders of custody rights (Art.3).⁵ Since no express provision on child

¹ Hague Convention on the Civil Aspects of International Child Abduction, Oct.25,1980, Preamble, para.2, 19 I.L.M. 1501ss (1980).

² Shapira, Aspects of Child Custody and Kidnapping Cases, 214 R.d.C. 136, 192, 197 (1989-II); Anton, The Hague Convention on International Child Abduction, 30 I.C.L.Q. 537, 543 (1981); U.S. Department of State, Hague International Child Abduction Convention: Text and Legal Analysis [hereinafter U.S.Dept.State], Public Notice 957, 51 Fed.Reg.10494, 10505 (1986).

³ Pérez-Vera, Report of the Special Commission, in Actes et documents de la Quatorzième session, Tome III, Child Abduction [hereinafter Actes et documents] 172, 183, para.38 (1980); Dyer, International Child Abduction by Parents, 168 R.d.C. 231, 256 (1980-III).

⁴ Thomson v. Thomson, Can.S.Ct., [1994] 3 R.C.S. 551, 587s (Jan.26,1994).

⁵ Pérez-Vera, Explanatory Report, in Actes et documents, *supra* fn.3, 451, para.80; D.McClean, Morris: The Conflict of Laws 227s (4thed.1993).

abductors exists, State organs are not excluded from the Convention's scope as potential abductors.⁶

1. The removal, or alternatively, the subsequent retention of Laurentian children was wrongful under Art.3.

According to Art.3 the removal or retention of a child is wrongful if it is in breach of custody rights, which were either actually exercised or would have been so but for the removal or retention. Rights of custody include the right to determine the child's place of residence (Art.5). While a removal is wrongful if undertaken without the custodian's consent, a retention becomes wrongful if the consent for the child's stay has expired or is withdrawn.⁷ Besides natural persons, also courts vested with jurisdiction to determine the custody of a child are "exercising rights of custody within the broad meaning of [...] the Convention".⁸ It is presumed that custody rights are actually exercised, unless the abductor proves the contrary.⁹ Moreover, a child's habitual residence cannot be altered unilaterally by the abductor.¹⁰ Finally, an

⁶ Pérez-Vera, *supra* fn.5, paras.81s; Mansel, Neues internationales Sorgerecht, 35 N.J.W. 2176 (1990).

⁷ Re H; Re S, U.K.H.L., [1991] 2 F.L.R. 262, 272 (Jun.13,1991); Pérez-Vera, *supra* fn.5, para.12; U.S.Dept.State, *supra* fn.2, 10503.

⁸ Thomson v. Thomson, *supra* fn.4, 588; B v. B, U.K.Ct.App.-Civ.Div., [1993] 2 All.E.R. 144, 149 (May 7,1992); Re B-M, U.K.H.Ct.-Fam.Div. [1993] 1 F.L.R. 979, 986 (Oct.30,1992).

⁹ Pérez-Vera, *supra* fn.5, para.73; U.S.Dept.State, *supra* fn.2, 10507.

¹⁰ Re S, U.K.H.Ct.-Fam.Div., [1994] 1 F.L.R. 82, 94 (Jul.14,1993); Friedrich v. Friedrich, U.S.Ct.App.(6thCircuit), 983 F.2d 1396, 1401s (Jan.22,1993) [hereinafter Friedrich I]; H.C.P.I.L., Report of the

applicant for a child's return is not required to have custody rights to invoke the Convention.¹¹

In March 1994, the C.M.C. removed 3,000 Laurentian children to Caledon. No efforts were made to obtain consent. It is to be presumed that custody rights were actually exercised either by the surviving parents or by Laurentian courts vested with jurisdiction to decide on petitions for custody, which were historically permitted to close relatives.

Even if the removal was not wrongful, the subsequent retention of 400 Laurentian children in Oriente was. Consent could only be presumed for temporary medical treatment, but not for detention and foster placement. Laurentia explicitly demanded the children's return by the diplomatic notes of July 1 and 15, 1995. Therefore, the removal, or alternatively, the retention were wrongful.

2. Caledon has to return the 400 Laurentian children under Art.12.

Pursuant to Art.12 a child must be immediately returned when the proceedings for the return have been started within one year after the wrongful act. Even after one year the court must order the return, unless the abductor shows that the child is settled in the new environment.¹² "Settlement" requires "more than mere adjustment to the

Second Special Commission Meeting (1993), 33 I.L.M. 225, 241 (1994).

¹¹ Re J, U.K.H.Ct.-Fam.Div. (June 19,1989), H.C.P.I.L., Preliminary Document No.2, 70, 75 (1989); Lowe/Nicholls, Child Abduction: The Wardship Jurisdiction and the Hague Convention, 24 Family Law 191, 192 (1994).

¹² Pérez-Vera, *supra* fn.5, para.109.

surroundings"¹³ and depends on the child's physical and emotional relations to his/her environment, e.g. school, friends and religious and social activities.¹⁴

Since the children have a language, religion and culture greatly differing from the fundamentalist traditions in Oriente, they cannot be regarded "settled" in their new environment.

3. Caledon cannot invoke the exceptions of Art.13 to refuse the return of the children.

Persons opposing the child's return have to establish that an exception under the Convention applies.¹⁵ In view of the Convention's objects these exceptions must be narrowly construed.¹⁶ The removal or retention is considered presumptively harmful to the child, whereas the return serves the child's best interests.¹⁷ Thus, in case of doubt return prevails.¹⁸ A court has discretion to order the child's return at

¹³ Re N, U.K.H.Ct.-Fam.Div., [1991] 1 F.L.R. 413, 417 (Dec.4,1990).

¹⁴ Ibid., 417s; Re S, U.K.Ct.App., [1991] 2 F.L.R. 1, 24 (May 18,1990); David S. v. Zamira S., U.S.Fam.Ct.(N.Y.), 574 N.Y.S.2d 429, 433 (Jan.31,1991).

¹⁵ Pérez-Vera, *supra* fn.5, para.114; U.S.Dept.State, *supra* fn.2, 10509; cf. 42 U.S.C. Sec.11603(e) (2) (1988).

¹⁶ Pérez-Vera, *supra* fn.5, para.34; Anton, *supra* fn.2, 551; LeGette, International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception, 25 Texas I.L.J. 287, 289 (1990).

¹⁷ Memorandum Prepared by the Permanent Bureau of the Hague Conference on Private International Law, [hereinafter Memorandum], Oct.10,1995, 35 I.L.M. 535, 537 (1996); Pérez-Vera, *supra* fn.5, para.24.

¹⁸ Decision No.5-U.F.266/94, Ct.App.(Hamm) (Jan.18,1995), 60 RabelsZ. 475, 479 (1986); Böhmer, Die 14. Haager Konferenz über IPR 1980,

any time (Art.18).¹⁹

According to Art.13(1)(a) a child's return might be refused if custody rights were not actually exercised, or the parent had consented to, or acquiesced in, the removal or retention. Custody rights are actually exercised, unless there is "a long period of unexplainable neglect of the child".²⁰ Acquiescence may result from inactivity only if different conduct might reasonably be expected, and requires knowledge of the wrongful act.²¹

At the time of evacuation custody rights continued to be exercised, since the separation was of mere temporary nature, explainable by the chaotic aftermath of the disaster. Moreover, the parents did not acquiesce in their children's retention, as Caledon had not properly informed them. Laurentia officially demanded the children's return. The disastrous circumstances explain Laurentia's period of inactivity.

Under Art.13(1)(b) the return might be refused if there is a grave risk that the child will be exposed to physical or psychological harm or otherwise be placed in an intolerable situation. Art.13(1)(b) only applies to truly exceptional cases, like physical violence or "returning

46 RabelsZ. 643, 649 (1982).

¹⁹ Re A, U.K.Ct.App., [1992] 2 F.L.R. 14, 28 (Feb.12,1992); Clarke v. Carson, H.Ct. (Auckland), [1996] 1 N.Z.L.R. 349 (Oct.6,1995).

²⁰ Friedrich v. Friedrich [hereinafter Friedrich II], U.S.Ct.App. (6th Circuit), 78 F.3d 1060, 1066 (Mar.13,1996).

²¹ Re A, U.K.Ct.App., *supra* fn.19, 26; Re S, U.K.Ct.App.-Fam.Div., [1994] 1 F.L.R. 819, 825 (Feb.3,1994); Re AZ, U.K.Ct.App., [1993] 1 F.L.R. 682, 686 (July 29,1992).

the child to a zone of war, famine, or disease", and must not be used to litigate the child's best interests and "to speculate where the child would be happiest".²² Since the abductor may not "create the psychological situation, and then rely on it",²³ grave risk requires more than merely taking the child away from his/her present environment.²⁴ Finally, limited financial resources will not place children in an intolerable situation.²⁵

There is no evidence that upon return the Laurentian children would be exposed to any exceptional situation. Since the children's best interests must not be litigated, their mere return to Laurentia neither constitutes a grave risk nor an intolerable situation.

Therefore, Caledon cannot invoke the exceptions of Art.13 to refuse the return of the children.

4. The adoptions violate Art.16 and cannot be invoked to refuse the return of the children (Art.17).

The authorities of the abducted-to State shall not decide the merits of custody rights after receiving notice of a wrongful act, unless it

²² Friedrich II, *supra* fn.20, 1068s; U.S.Dept.State, *supra* fn.2, 10510; Memorandum, *supra* fn.17, 541.

²³ C v. C, U.K.Ct.App.-Fam.Div., [1989] 2 All.E.R. 465, 471 (Dec.14,1988).

²⁴ Re A, U.K.Ct.App., [1988] 1 F.L.R. 365, 372 (Jun.10,1987); Thomson v. Thomson, *supra* fn.4, 597; Friedrich II, *supra* fn.20, 1068.

²⁵ Friedrich II, *supra* fn.20, 1068s; U.S.Dept.State, *supra* fn.2, 10510; Farquhar, The Hague Convention on International Child Abduction comes to Canada, 4 Can.J.Fam.L. 5, 25 (1983).

has been determined that the child is not to be returned or an application is not lodged within reasonable time (Art.16). Hence, the State of habitual residence has exclusive jurisdiction to decide the merits of custody disputes.²⁶ Moreover, a custody decision in the requested State is no ground for refusing the child's return (Art.17).

Since July 1995 Oriente's courts have granted 400 adoptions of Laurentian children, which under Oriente's laws totally terminated existing parental rights. By the diplomatic notes of July 1 and 15, 1995, Caledon's authorities have received notice of the wrongful acts. Since it is not yet decided that the children need not be returned and the adoptions were granted after the request for return, Caledon violated Art.16. Pursuant to Art.17 Caledon has to return the children despite the adoptions.

B. THE SEPARATION, CONTINUED DETENTION AND ADOPTIONS OF LAURENTIAN CHILDREN VIOLATE THE CONVENTION ON THE RIGHTS OF THE CHILD (C.R.C.).

1. The C.R.C. is applicable *ratione temporis* to the present dispute, or, alternatively, its provisions are binding as customary international law.

While Caledon became a party shortly after 1989, Laurentia ratified the C.R.C. on July 1, 1996. Since human rights treaties, such as the C.R.C., create rights for every individual within a State's jurisdiction, irrespective of nationality,²⁷ or of corresponding

²⁶ Pérez-Vera, *supra* fn.5, paras.14s, 121; Currier v. Currier, U.S.Distr.Ct.(New Hampshire), 845 F.Supp. 916, 920 (Mar.16,1994); Schuz, The Hague Child Abduction Convention: Family Law and Private International Law, 44 I.C.L.Q. 771, 781 (1995).

²⁷ *E.g.* Convention on the Rights of the Child (C.R.C.), Nov.20,1989, Art.2, 28 I.L.M. 1457 (1989); European Convention on Human Rights, Nov.4,1950, Arts.1, 14, 213 U.N.T.S. 221, 224ss (1955); American

performance by other parties, the obligations of State parties have a non-reciprocal, objective character.²⁸ Thus, a State may claim violations of such obligations even if the events had taken place prior to the date when the claimant became a party to that treaty.²⁹ The I.C.J. confirmed this principle, when it gave retroactive effect to the objective rights created by the Genocide Convention.³⁰ Moreover, the rule of non-retroactivity in Art.28 V.C.L.T. relates only to "any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."³¹ If a situation, like a detention, has continuing character,³² a treaty is applicable even if the situation commenced before the entry into force.³³ Thus, as the

Convention on Human Rights (A.C.H.R.), Nov.22,1969, Art.1, 9 I.L.M. 99ss (1970).

²⁸ Ireland v. United Kingdom, E.Ct.H.R. (Jan.18,1978), 58 I.L.R. 190, 291 (1980); Effect of Reservations on the Entry into Force of the American Convention, I.A.Ct.H.R. (Sept.24,1982), 67 I.L.R. 559, 568s (1984); G.VanBueren, The International Law on the Rights of the Child 397 (1995).

²⁹ Decision of the Commission as to the Admissibility of Application No.788/60 (Austria v. Italy), E.C.H.R. (Jan.11,1961), 4 Y.E.C.H.R. 116, 140 (1962); A.Verdross/B.Simma, Universelles Völkerrecht 479s (1984).

³⁰ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections) (Bosnia-Herzegovina v. Yugoslavia), 1996 I.C.J., para.34 (Judgment of Jul.11); cf. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (Adv.Op. of May 28).

³¹ Vienna Convention on the Law of Treaties, May 23,1969 [hereinafter V.C.L.T.], Art.28, 8 I.L.M. 679, 690 (1969).

³² Soriano De Bouton v. Uruguay, U.N.H.R.C., No.R.9/37 (Mar.27,1981), 62 I.L.R. 256, 259s (1982); De Touron v. Uruguay, U.N.H.R.C., No.R.7/32 (Mar.31,1981), *ibid.*, 261, 266.

³³ Draft Articles on the Law of Treaties with Commentaries, in Report of the I.L.C. on the Work of its 18th Session, 2 Y.I.L.C. 187, 212, para.3

C.R.C. creates objective rights and the detention of Laurentian children is of a continuing character, the C.R.C. is applicable *ratione temporis*.

Even if the C.R.C. was not applicable, Laurentia may claim violations of its provisions as part of customary international law.³⁴ This is evidenced by the world-wide recognition of children's rights,³⁵ the unanimous adoption of the C.R.C.,³⁶ and the nearly universal participation of 187 States.³⁷

2. The separation and subsequent detention of Laurentian children violate parental rights under Arts.5, 9 and 18 of the C.R.C.

States shall respect the rights of parents, members of the extended family or legal guardians (Art.5), who have "the primary responsibility for the upbringing and development of the child" (Art.18(1)).³⁸ This

(1966); Appl.No.214/56 (DeBecker v. Belgium), E.C.H.R. (Jun.9,1958), 2 Y.E.C.H.R. 214, 230ss (1958-59).

³⁴ U.N.I.C.E.F., The Process: From Signature to Ratification, Introduction, para.6, URL: <http://www.unicef.org/crc/process.htm#accession>; Heintze, Probleme bei der völkerrechtlichen Kodifizierung der Menschenrechte, 2 F.Y.I.L. 469, 472s (1991); Balton, The Convention on the Rights of the Child: Prospects for International Enforcement, 12 H.R.Q. 120, 122s (1990).

³⁵ Geneva Declaration of the Rights of the Child 1924, International Documents on Children 3 (G.VanBueren ed.1993); U.N.GA-Res.1386(XIV), Declaration of the Rights of the Child [hereinafter 1959 Declaration], Nov.20,1959, 13 U.N.Y.B. 192 (1959); International Covenant on Economic, Social and Cultural Rights [hereinafter C.E.S.C.R.], Dec.16,1966, Art.10(3), 993 U.N.T.S. 3 (1976); International Covenant on Civil and Political Rights [hereinafter C.C.P.R.], Dec.19,1966, Art.24, 999 U.N.T.S. 171 (1976).

³⁶ C.R.C., *supra* fn.27, U.N.Doc.A/44/736 (1989).

³⁷ Report of the Secretary-General, Status of the Convention on the Rights of the Child, Sept.27,1996, U.N.Doc.A/51/424 (1996); *cf.* North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. The Netherlands), 1969 I.C.J. 3, 42, para.73 (Judgment of Feb.20).

³⁸ Himes, Introduction, in Implementing the Convention on the Rights of

includes the parental right to ensure the child's religious and moral education in conformity with their own convictions.³⁹

Under Art.9(1) children may only be separated from their parents against the latter's will if competent authorities determine that the separation is necessary for the child's best interests. While, generally, the best interests are a primary consideration (Art.3(1)), respect for family unity⁴⁰ is a guiding principle in cases of evacuation of children.⁴¹ Past experience of U.N.H.C.R. and U.N.I.C.E.F. has shown that "evacuation often is more harmful than helpful to the children", because of the trauma of separation from the family, estrangement of families, loss of ethnic and cultural identity and, finally, the fact that children may become "lost" due to lack of documentation and be placed for adoption.⁴² Even if a temporary evacuation was necessary,

the Child 1, 12s (J.R.Himes ed.1995); L.LeBlanc, The Convention on the Right of the Child 112ss (1995); 1959 Declaration, Principle 6, *supra* fn.35.

³⁹ C.R.C., Art.14(2), *supra* fn.27; C.C.P.R., Art.18(4), *supra* fn.35; A.C.H.R., Art.12(4), *supra* fn.27; C.E.S.C.R., Art.13(3), *supra* fn.35; Boucaud, Recourse Procedures Against the Violation of Children's Rights in European Countries, in Monitoring Children's Rights 145, 152 (E.Verhellen ed.1996); Kjeldsen, Busk Madsen and Pedersen v. Denmark, E.Ct.H.R. (Dec.7,1976) 58 I.L.R. 117, 143, para.53 (1980).

⁴⁰ C.R.C., Preamble, paras.5s, *supra* fn.27; C.E.S.C.R., Art.10(1), *supra* fn.35; C.C.P.R., Art.23(1), *supra* fn.35; A.C.H.R., Art.17(1), *supra* fn.27.

⁴¹ U.N.H.C.R./U.N.I.C.E.F., Joint Statement on the Evacuation of Children from Former Yugoslavia, Aug.13,1992, in E.M.Ressler, Evacuation of Children 25, 26s (1992).

⁴² *Ibid.*, 26; David, Former Yugoslavia: Evacuation in question, 9 I.C.R.M. 4s (1992/No.3-4); Boothby, Children, War and Trauma, Children in Emergencies 15 (Rädda Barnen ed.1986).

"[c]hildren should be moved to safe areas as close as possible to their homes and families"⁴³ and must be returned as soon as separation is no longer necessary.⁴⁴ Finally, a State has to collect detailed data about the children's identity⁴⁵ and provide their families with information regarding their whereabouts (Art.9(4)).

As a result of the evacuation to Caledon, about 3,000 Laurentian children were separated without parental consent or a decision by a competent authority. In view of the harmful consequences of evacuations the children's best interests rather required their stay in Laurentia. Even if the children's condition necessitated evacuation, only a temporary separation for medical treatment, but no prolonged detention and foster placement in Caledon's easternmost Province would have been justified. Caledon neither properly collected data when evacuating the children nor informed their families. Moreover, the children, whose own religion, language and culture Governor Jones described as "pagan", are subjected to mandatory religious education in Oriente. Therefore, by separating and detaining Laurentian children Caledon violated parental rights.

⁴³ U.N.H.C.R./U.N.I.C.E.F., *supra* fn.41, 31; David, *supra* fn.42, 5; Boothby, *supra* fn.42, 15s.

⁴⁴ Considerations 1982 Working Group, E/1982/12/Add.1, C, para.19, The United Nations Convention on the Rights of the Child, A Guide to the "Travaux Préparatoires" 165, 168 (S.Detrick ed.1992) [hereinafter Travaux Préparatoires]; P.Veerman, The Rights of the Child and the Changing Image of Childhood 192 (1992).

⁴⁵ U.N.H.C.R./U.N.I.C.E.F., *supra* fn.41, 27; Additional Protocol II to the Geneva Conventions, Jun.8,1977, Art.78(3), 16 I.L.M. 1442 (1977).

3. The adoptions violate the requirements of Art.21(a),(c) and the principles of subsidiarity (Art.21(b)) and continuity of upbringing (Art.20(3)).

States shall ensure that adoptions are authorized only by competent authorities who determine, in accordance with applicable law, that the adoption is permissible in view of the child's family status and that persons concerned have given their informed consent (Art.21(a)). In cases of intercountry adoptions⁴⁶ the requirements of adoptability and consent are exclusively governed by the laws and authorities of the child's State of origin,⁴⁷ which is confirmed by international instruments,⁴⁸ as well as national adoption laws of sending and receiving countries.⁴⁹ As many alleged orphans still have living relatives, adoption should only be considered as a last resort after at

⁴⁶ VanLoon, International Co-Operation and Protection of Children with Regard to Intercountry Adoption, 244 R.d.C 191, 203 (1993-VII).

⁴⁷ G.Parra-Aranguren, Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, paras.108ss (1993); VanLoon, *supra* fn.46, 280s; VanBueren, *supra* fn.28, 98.

⁴⁸ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption [hereinafter Intercountry Adoption Convention], May 29,1993, Art.4, 32 I.L.M. 1134ss (1993); Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Art.5, Nov.15,1965, 4 I.L.M. 338ss (1965); Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24,1984, Arts.3, 15, 24 I.L.M. 460ss (1985).

⁴⁹ *Cf.* Romania: in Intercountry Adoptions 41 (E.Jaffe ed.1995); Bulgaria: *ibid.*, 67; Poland: *ibid.*, 81ss; Costa Rica: *ibid.*, 144ss; Argentina: *ibid.*, 158ss; France: Mme.Torlet c. Procureur général, Fr.C.Cass. (1ère Chambre civile) (Nov.7,1984), 74 R.C.D.I.P. 534s (1985); Japan: Revised Provisions of HOREI, Art.20, 33 J.A.I.L. 69 (1990); Belgium: Civil Code (Revised), Art.344(3), 35 N.I.L.R. 133 (1988); Austria: Statute on Private International Law, Sec.26, Fed.Gaz.304/1978.

least two years have passed.⁵⁰ According to the subsidiarity principle of Art.21(b) intercountry adoption may only be considered if the child cannot be placed suitably in his/her country of origin.⁵¹ Moreover, States should pay due regard "to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (Art.20(3)).

The Oriente courts granted adoptions for 400 Laurentian children without parental consent. However, only Laurentia, the children's State of origin, is competent to dispense with the requirement of consent, applying Laurentian law. The minimum waiting period of two years has not yet expired. Moreover, Caledon failed to consider alternative care in Laurentia, which would have guaranteed continuity in the children's upbringing. On the contrary, the continuity is endangered by major linguistic, cultural, ethnic and religious differences between Caledon and Laurentia. Therefore, Caledon violated the C.R.C.

C. CALEDON CANNOT INVOKE HER INTERNAL LEGAL SYSTEM AS JUSTIFICATION FOR VIOLATING INTERNATIONAL LAW.

Under international law federal States are responsible for acts of an organ of a territorial sub-unit.⁵² Wrongdoing States may not invoke the

⁵⁰ U.N.H.C.R./U.N.I.C.E.F., *supra* fn.41, 27; David, *supra* fn.42, 4.

⁵¹ M.Freeman/P.Veerma, The Ideologies of Children's Rights 107 (1992); Considerations 1989 Working Group, E/CN.4/1989/48, para.369 (Brazilian Statement), in Travaux Préparatoires, *supra* fn.44, 316; U.N.GA-Res.41/85, 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, Dec.3 1986, Arts.3, 17, 40 U.N.Y.B. 821ss (1986); Intercountry Adoption Convention, Art.4(b), *supra* fn.48.

⁵² Draft Articles on State Responsibility, in Report of the I.L.C. on the Work of its forty-eighth session, U.N.Doc.A/CN.4/L.528/Add.2

provisions of their internal law, including their constitutional systems, as justification for a breach of international law.⁵³

Oriente Province is a territorial sub-unit of Caledon. Therefore, Caledon is responsible for the conduct of any organ of Oriente Province and may not invoke its constitution as justification.

D. THE TRANSBORDER REMOVAL OF LAURENTIAN CHILDREN WITHOUT LAURENTIAN CONSENT AND THE IMPOSITION OF CALEDON NATIONALITY VIOLATED CUSTOMARY INTERNATIONAL LAW.

(a) Under international law a State must not carry out sovereign acts in the territory of another State without the latter's consent.⁵⁴ Thus, a State authorizing the abduction of a person by its agents from the territory of another State violates international law.⁵⁵ As confirmed by State practice⁵⁶, the wrongdoing State is obliged to return the abducted

[hereinafter I.L.C.-Draft], Art.7.

⁵³ Case of the Free Zones of Upper Savoy and the District of Gex (Switzerland v. France), 1932 P.C.I.J. (Ser.A/B) No.46, 96, 167 (Judgment of Jun.7); Hyacinthe Pellat Case, French-Mexican Claims Commission, (Jun.7,1929), 5 R.I.A.A. 534, 535 (1952); V.C.L.T., Art.27, *supra* fn.31.

⁵⁴ The Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (Ser.A) No.10, 6, 18 (Judgment of Sept.7) [hereinafter Lotus Case]; Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.), 1986 I.C.J. 14, 110s (Judgment of June 27).

⁵⁵ Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity 407, 407s (Y.Dinstein/M.Tabory eds.1989); Glennon, State Sponsored Abduction: A Comment on the U.S. v. Alvarez-Machain, 86 A.J.I.L. 746, 747 (1992).

⁵⁶ Irregular Apprehension (U.S.A. v. Canada) Incident of Jan.4,1991, 86 A.J.I.L. 109, 109s (1992); In Re Jolis, F.Trib.Cor. d'Avesnes (Jul.22,1933) 7 Ann.Dig. 191 (1940); Canada et Etats-Unis, (Aug.30,1974) 79 R.G.D.I.P. 462, 462s (1975); State v. Ebrahim, S.Afr.S.Ct, (Feb.26,1991), 95 I.L.R. 417, 441ss (1994); Preuss, Settlement of the Jacob Kidnapping Case, 30 A.J.I.L. 122, 122s (1936).

person immediately.⁵⁷

The C.M.C., a part of Caledon's Ministry of Defense, abducted 3,000 Laurentian children to Caledon without even attempting to obtain Laurentia's consent. Thus, Laurentia violated international law and is obliged to return the children.

(b) International law does not permit compulsory conferment of nationality upon aliens.⁵⁸ Moreover, when such conferment affects a considerable number of nationals of another State, this violates the latter's sovereignty.⁵⁹

Pursuant to Sec.3.071 Code of Oriente Province and Art.II, Sec.6(b) of Caledon's Constitution the "adopted" children automatically became nationals of Caledon. 400 Laurentian citizens were compulsorily naturalized. Hence, Caledon violated Laurentia's sovereignty.

E. LAURENTIA ASKS THE COURT TO ORDER THE IMMEDIATE RETURN OF THE CHILDREN.

An internationally wrongful act entails the responsibility of the wrongdoing State.⁶⁰ Consequently, the responsible State must provide for reparation which "wipes out all consequences of the illegal act and re-

⁵⁷ 1 A.L.I. Restatement (Third) of the Foreign Relations Law of the U.S. [hereinafter Restatement], Sec.432 Com.(c) (1986); U.S. Supreme Court: Brief for the United Mexican States as amicus curiae in Support of Respondent in U.S. v. Alvarez-Machain (Nov.29,1991), 31 I.L.M. 934, 950 (1992).

⁵⁸ In Re Rau, (Germany v. Mexico), (Jan.14,1930), 6 Ann.Dig. 251 (1931-32); Flegenheimer Claim, (Italy v. U.S.), (Sept.20,1958), 25 I.L.R. 91, 112 (1958-I).

⁵⁹ Weis, Nationality and Statelessness in International Law 112 (1979).

⁶⁰ I.L.C.-Draft, *supra* fn.52, Art.1; Zemanek, Responsibility of States: General Principles, 10 E.P.I.L. 362, 363 (R.Bernhardt ed.1987).

establishes the situation which would [...] have existed if the act had not been committed".⁶¹ Reparation includes restitution and compensation.⁶² As to restitution, the I.C.J. in the *Tehran Hostage Case* ordered the return of the persons wrongfully detained in the American Embassy.⁶³

Since Caledon wrongfully detains the Laurentian children, it is obliged to repair the wrongful act by delivering them to the Laurentian authorities.

II. LAURENTIA ASKS THE COURT TO AWARD DAMAGES TO LAURENTIA, IN AN AMOUNT CALCULATED TO COMPENSATE EACH LAURENTIAN CHILD WHO WAS UNLAWFULLY AND INVOLUNTARILY DETAINED IN CALEDON, AS WELL AS TO THE FAMILY OF EACH SUCH CHILD.

A. LAURENTIA MAY EXERCISE DIPLOMATIC PROTECTION ON BEHALF OF THE DETAINED CHILDREN AND THEIR FAMILIES.

Under international law a State is entitled to protect its nationals when they are injured by acts of another State contrary to international law.⁶⁴ Usually, a State may not act on behalf of a national against a

⁶¹ Case Concerning the Factory at Chorzów (Germany v. Poland) [hereinafter Chorzów Case], 1928 P.C.I.J. (Ser.A) No.17, 4, 47 (Judgment of Sept.13); I.Brownlie, 1 System of the Law of Nations: State Responsibility 199 (1983).

⁶² I.L.C.-Draft, *supra* fn.52, Arts.43s; Zemanek, *supra* fn.60, 369.

⁶³ Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), 1980 I.C.J. 2, 44s (Judgment of May 24); *cf.* Rainbow Warrior Case (New Zealand v. France), (Apr.30,1990), 82 I.L.R. 499, 572 (1990);

⁶⁴ The Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (Ser.A) No. 2, 6, 12 (Judgment of Aug. 30); Case Concerning the Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 32 *passim* (Judgment of Feb.5).

State whose nationality this person also possesses.⁶⁵ However, the forced imposition of nationality cannot deprive the State of origin of its right to protection.⁶⁶ Caledon illegally imposed its nationality on the Laurentian children.⁶⁷ Therefore, Caledon may not invoke the double nationality of the children in order to contest Laurentia's right to protect them.

Finally, the exercise of diplomatic protection requires that the individual has exhausted the local remedies of the respondent State,⁶⁸ except the respondent State injures a person who is outside that State's jurisdiction at the time of the injury,⁶⁹ or if the injured alien has no voluntary link with the respondent State.⁷⁰ The families were not within Caledon's jurisdiction when they were deprived of their children and the conferment of Caledon's nationality upon the children was not voluntary. Hence, the local remedies rule does not apply and Laurentia is entitled

⁶⁵ E.M.Borchard, The Diplomatic Protection of Citizens Abroad 575, 588 (1922).

⁶⁶ George Pinson Case, French-Mexican Claims Commission (Oct.19,1928), 5 R.I.A.A. 327, 381 (1952); In Re Rau, *supra* fn.58, 251; Compulsory Acquisition of Nationality Case, Ct.App.(Cologne) (May 16,1960), 32 I.L.R. 166, 167 (1966); Weis, *supra* fn.59, 107.

⁶⁷ *Supra* I.D. (b).

⁶⁸ Interhandel Case (Switzerland v. U.S.A.), 1959 I.C.J. 6, 27 (Judgment of Mar.21).

⁶⁹ Head, A Fresh Look at the Local Remedies Rule, 5 C.Y.I.L. 142, 153 (1967).

⁷⁰ Jiménez de Aréchaga, International Responsibility, 159 R.d.C. 267, 296 (1978-I); Meron, The Incidence of the Rule of Exhaustion of Local Remedies, 35 B.Y.I.L. 83, 94 (1959); Amerasinghe, The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights, 28 Z.a.ö.R.V. 258, 295 (1968).

to exercise diplomatic protection on behalf of the families and their children.

B. CALEDON IS OBLIGED TO PAY DAMAGES.

International law provides for pecuniary indemnification for immaterial damage of individuals,⁷¹ such as emotional harm or distress,⁷² even though they are difficult to measure by money standards.⁷³ In the *Lusitania Case*, the Tribunal held that "[m]ental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards".⁷⁴ In cases of human rights violations not only the victim but also close family members and next of kin are directly injured.⁷⁵ Especially in case of detention relatives suffer anguish and stress caused by the disappearance and the uncertainty concerning the fate and whereabouts of the detained person.⁷⁶

⁷¹ Jiménez de Aréchaga, *International Responsibility*, in Manual of Public International Law 531, 534 (M.Sørensen ed.1968).

⁷² Velásquez Rodríguez Case, I.A.Ct.H.R. (July 21,1989), 95 I.L.R. 233, 237 (1994); Almeida de Quinteros Case, U.N.H.R.C. (Jul.21,1983), 79 I.L.R. 168, 179 (1989); Viana Acosta Case, U.N.H.R.C. (Mar.29,1984), 79 I.L.R. 225, 233 (1989).

⁷³ Lusitania Case (U.S.A. v. Germany), (Nov.1,1923), 7 R.I.A.A. 32, 40 (1956); LAFICO Case (LAFICO v. Burundi), (Mar.4,1991), 96 I.L.R. 279, 329 (1994).

⁷⁴ Lusitania Case, *supra* fn.73, 36.

⁷⁵ Appl.No.100/55, E.C.H.R. (May 31,1956), 1 Y.E.C.H.R. 162, 162 (1959); Mrs.W. v. Ireland, E.C.H.R. (Feb.28,1983), 32 D.R. 211, 214 (1983); Velásquez Rodríguez Case, *supra* fn.72, 316.

⁷⁶ Almeida de Quinteros Case, *supra* fn.72, 179; Communication No.275/1988, H.R.C. Report, Vol.2, 161s (1990); T.Zwart, The Admissibility of Human Rights Petitions 70 (1994).

The children suffered serious psychological traumata by their removal, the separation from their parents and their subsequent detention. Their parents suffered mental and emotional harm due to the separation from the children, as well as anguish and stress caused by Caledon's negligence to provide sufficient information concerning the whereabouts and fate of their children.

Therefore, Caledon has to pay damages to each Laurentian child detained in Caledon and to his/her family.

III. LAURENTIA ASKS THE COURT TO ORDER CALEDON TO ENFORCE THE JUDGMENT OF THE LAURENTIAN COURT IN DOE V. CHILDREN'S FOUNDATION, OR, IN THE ALTERNATIVE, AWARD TO LAURENTIA, ON BEHALF OF MR. AND MRS. DOE, AN AMOUNT EQUIVALENT TO THE UNCOLLECTED PORTION OF THE JUDGMENT IN THAT CASE.

A. THE "SAVE THE CHILDREN ACT 1996" (S.C.A.) IS CONSISTENT WITH INTERNATIONAL LAW.

In the *Lotus Case* the P.C.I.J. held that in respect of the scope of application of their laws and jurisdiction of their courts States have "a wide measure of discretion which is only limited in certain cases by prohibitive rules".⁷⁷ Practice shows that international law requires a substantial connection between the regulating State and the activity or facts to be regulated.⁷⁸ Such a connection is generally seen in the

⁷⁷ Lotus Case, *supra* fn.54, 19; Maier, Jurisdictional Rules in Customary International Law, in Extraterritorial Jurisdiction in Theory and Practice 64, 66 (K.M.Meesen ed.1996); Akehurst, Jurisdiction in International Law, 46 B.Y.I.L. 145, 177 (1972-73).

⁷⁸ Maier, *supra* fn.77, 90; I.Brownlie, Principles of Public International Law 310 (4thed.1990); Restatement, *supra* fn.57, Sec.403, 244ss (1987); Mann, The Doctrine of Jurisdiction in International Law, 111 R.d.C. 1, 46s (1964-I).

territory of the acting State.⁷⁹ Thus, a State may regulate any activity having injurious consequences in its territory.⁸⁰ According to the effects doctrine, a State may regulate the conduct of persons outside its territory when this conduct produces substantial effects within its territory,⁸¹ or when rights and interests of its citizens are prejudiced.⁸²

Under the laws of Oriente the adoptions of Laurentian children had the effect of a total termination of rights of natural parents or competent authorities in Laurentia. The S.C.A. is intended to prevent these substantial effects by providing for liability of any professional who contributes to adoptions without consent of the families. Therefore, the S.C.A. is consistent with international law.

Moreover, in response to unlawfully extraterritorial legislation affected States may react with defensive legislation in the form of blocking statutes.⁸³ Such legislation may sanction compliance with the

⁷⁹ Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, 53 B.Y.I.L. 1, 4ss (1982); Akehurst, *supra* fn.77, 152ss.

⁸⁰ Lotus Case, *supra* fn.54, 25; C.C.Hyde, 1 International Law 800 (2nd ed.1947); Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y.I.L. 146, 159 (1957).

⁸¹ United States v. Aluminum Co. of America, U.S.Ct.App.(2nd Circuit), 148 F.2d 416 (1945), 9 A.I.L.C. 13 (1st Ser.1972); Timberlane Lumber Co. v. Bank of America, U.S.Ct.App.(9th Circuit), 549 F.2d 597 (1977), 24 A.I.L.C. 303, 313s (1st Ser.1984); Leasco Data Process Equipment Corp. v. Robert Maxwell et al., U.S.Ct.App.(2nd Circuit), 468 F.2d 1326 (1972), 26 A.I.L.C. 31, 35 (1st Ser.1984); Helms-Burton-Act of 1996, Sec.301(9), 35 I.L.M. 357, 374 (1996); Restatement, *supra* fn.57, Sec.402, Com.(d), rep.note 2, 237.

⁸² Clagett, Title III of the Helms-Burton Act is Consistent with International Law, 90 A.J.I.L. 434, 435 (1996)

⁸³ Grossfeld/Rogers, A Shared Values Approach to Jurisdictional

foreign extraterritorial law.⁸⁴

The Oriente Family Code allows for adoptions of Laurentian children in violation of the exclusive competence of Laurentian authorities regarding adoptability and consent. As their competence to determine these requirements and the consent of Laurentian parents may be replaced by the Governor's consent, the Oriente Family Code extraterritorially interferes with Laurentia's jurisdiction concerning her own citizens. By sanctioning compliance with the Family Code the S.C.A. aims at protecting the competence of authorities and rights of families in Laurentia. Thus, the S.C.A. is a legitimate form of blocking legislation.

B. CALEDON IS OBLIGED TO ENFORCE THE JUDGMENT IN DOE V. CHILDREN'S FOUNDATION.

Enforcement of foreign judgments is a matter of comity.⁸⁵ Comity is generally understood as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation".⁸⁶ International comity, rooted in the principles of sovereign

Conflicts in International Economic Law, 32 I.C.L.Q. 931, 934 (1983); Brownlie, *supra* fn.78, 308; Bowett, *supra* fn.79, 22ss; Roth, Reasonable Extraterritoriality: Correcting the "Balance of Interests", 41 I.C.L.Q. 245, 251s (1992).

⁸⁴ A.Verdross/B.Simma, *supra* fn.29, 785; Roth, *supra* fn.83, 251; Fruehauf Corporation v. Massardy, Fr.Ct.App.(Paris) (May 22,1956), 5 I.L.M. 476 (1966).

⁸⁵ Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 A.J.C.L. 1, 7s (1988).

⁸⁶ Hilton v. Guyot, U.S.S.Ct., 159 U.S. 113 (1895), 5 A.I.L.C. 53, 55 (1st Ser.1972).

equality and reciprocity,⁸⁷ "[i]n truth [...] is only another word for international law."⁸⁸ Moreover, a State may also be obliged to enforce foreign judgments by custom. In the *Right of Passage Case* the I.C.J. affirmed that "long continued practice between two States accepted by them as regulating their relations" gives rise to bilateral custom.⁸⁹ Such practice may be evidenced by an accumulation of uniform decisions of national courts.⁹⁰ Finally, the principle of good faith requires States to be consistent in their conduct, since it gives rise to reliance and expectations by other States.⁹¹ Thus, in the *Temple Case* the I.C.J. held that a State is precluded by its conduct, lasting for fifty years, from later asserting a change in its attitude on which another State has relied.⁹²

International comity requires Caledon to enforce the judgment in Doe

⁸⁷ I.Detler, The International Legal Order 15ss (1994); Juenger, *supra* fn.85, 7.

⁸⁸ Mann, The Doctrine of International Jurisdiction Revisited After Twenty Years, 186 R.d.C. 13, 87 (1984-III); Brownlie, *supra* fn.78, 30.

⁸⁹ Case Concerning Right of Passage Over Indian Territory (Portugal v. India), 1960 I.C.J. 6, 39 (Judgment of Apr.12).

⁹⁰ 1 Oppenheim's International Law 41 (R.Jennings/A.Watts eds. 9thed.1992); Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1926 P.C.I.J. (Ser.A) No.7, 4, 19 (Judgment of May 25).

⁹¹ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) [hereinafter Temple Case], 1962 I.C.J. 6, 42 (J.Alfaro, sep.op., June 15); McGibbon, Estoppel in International Law, 7 I.C.L.Q. 468, 468 (1958).

⁹² Temple Case, *supra* fn.91, 32.

v. Children's Foundation. The decision of the Supreme Court was the first time in Caledon's history that it refused to enforce a judgment of a country with whom Caledon maintained diplomatic relations. As Laurentia and Caledon have maintained diplomatic relations since the early 1920s, the long-standing and consistent practice of enforcement for almost a century has given rise to bilateral custom between the two countries. During this period enforcement has never been denied on grounds of public policy, which made Laurentia rely on the future continuance of this practice. Thus, Caledon is precluded from changing its practice of enforcing Laurentian judgments. For all these reasons, Caledon is obliged to enforce Doe v. Children's Foundation.

C. CALEDON CANNOT REFUSE ENFORCEMENT ON GROUNDS OF LACK OF ADJUDICATIVE JURISDICTION.

A court has jurisdiction if the subject-matter of litigation is sufficiently linked to the *forum* State.⁹³ Such a generally accepted basis of jurisdiction is the presence of a person, whether permanent or temporary and whether accompanied by residence, as well as of property within the territory of a State.⁹⁴ Mere transitory presence, e.g. while changing planes at an airport, does not establish jurisdiction.⁹⁵

⁹³ Fairhurst v. Simitch, Fr.C.Cass. (Feb.6,1985), 74 R.C.D.I.P. 369, 371 (1985).

⁹⁴ Adams v. Cape Industries p.l.c., U.K.Ct.App.-Civ.Div., [1991] 1 All.E.R. 987, 1004 (Jul.27,1989); United States v. Field, U.S.Ct.App.(5thCircuit), 532 F.2d 404 (1976), 23 A.I.L.C. 129, 129 (1stSer.1982); Restatement, *supra* fn.57, Sec.421(2)(a), Com.(i) and rep.note (5), 305, 308; Oppenheim, *supra* fn.54, 384.

⁹⁵ Fastiff, The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments, 28 Corn. I.L.J. 469, 483

Furthermore, courts have jurisdiction over a person carrying on activities outside the State which cause actual harm suffered within the territory.⁹⁶

Ms.Montaigne, an officer of the Children's Foundation, spent a full month in Laurentia. The Foundation itself owns property and has carried on activities in Laurentia since the early 1960s. Presence extending over four weeks is more than "transitory". The harm caused by her and the Foundation was suffered by Laurentian parents and relatives within Laurentia. Hence, the judgment was rendered by a competent court and Caledon may not invoke lack of adjudicative jurisdiction.

The Compromis stipulates that Ms.Montaigne is a private citizen and that the Children's Foundation is a private organization. Therefore, the rejection of the enforcement on the ground that Caledon law knows no civil liability for "officials" implementing a gubernatorial decree is unfounded. Even if the Foundation's employees were to be considered State officials, this is no valid ground to reject enforcement. A State's officials concerned with the enforcement of its laws may be sued for damage caused in exercise of their duty.⁹⁷ This is particularly true when the damage was suffered in breach of international law, especially of human rights.⁹⁸

(1995); Restatement, supra fn.57, Sec.421, Com.(e), 307.

⁹⁶ Decision 20-O-314/88, Ger.County-Ct.(Berlin) (Jun.13,1989), 35 R.I.W. 988 (1989); Zekoll, Zur Vollstreckbarkeit eines US-amerikanischen Schadensurteils, 36 R.I.W. 302, 303 (1990).

⁹⁷ Molina v. Comision Reguladora Del Mercado de Henequen, U.S., 91 N.J.L. 382 (S.Ct.1918), 6 A.I.L.C. 123, 130 (1stSer.1973); Truax v. Raich, U.S.S.Ct., 39 U.S. 33 (1915), 13 A.I.L.C. 303, 305 (1stSer.1975).

⁹⁸ Filartiga v. Pena-Irala, U.S.Ct.App.(2ndCircuit), 630 F.2d 876 (1979),

The adoptions to which the employees of the Foundation substantially contributed, violated human rights under the C.R.C. Thus, the Laurentian court had adjudicative jurisdiction.

D. CALEDON CANNOT REFUSE TO ENFORCE DEFAULT JUDGMENTS OR PUNITIVE DAMAGES.

A default judgment has the same effect as a judgment following proceedings in which all parties participated, provided that the defendant was properly served with process and was given sufficient time to prepare a defense.⁹⁹

Ms.Montaigne and the Foundation were properly served with process at the end of August 1996. The default judgment was delivered on October 19. A period of almost two months must be considered sufficient to prepare a defense. It was the defendants' choice not to respect the summons. Hence, enforcement may not be denied because the judgment was rendered by default.

The judgment in Doe v. Children's Foundation also contains punitive damages. Punitive damages are not criminal penalties but civil remedies for a private wrong.¹⁰⁰ They are awarded upon private motion and are

1 A.I.L.C. 15 (2ndSer.1986); Letelier v. Republic of Chile, U.S., 488 F.Supp. 665 (D.D.C. 1980), 3 A.I.L.C. 356, 365 (2ndSer.1987); VonDardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246 (D.D.C. 1985), 3 A.I.L.C. 138, 146s (2ndSer.1987); Helms-Burton-Act, *supra* fn.81, Sec.301(10); Henkin, International Law: Politics, Values and Functions, 216 R.d.C. 9, 268s (1989-IV).

⁹⁹ Restatement, *supra* fn.57, Sec.481, Com.(i), rep.note 5, 597, 600s; Decision No.6-U-2499/94, Ger.Ct.App.(Munich) (Nov.11,1994), 41 R.I.W. 1026s (1995); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept.16,1988, Art.27(2), 28 I.L.M. 623, 629 (1989).

¹⁰⁰ G.D.S. v. E.S., Ger.S.Ct., IX-ZR-149/91 (Jun.4,1992), 32 I.L.M. 1327, 1338 (1993); Holbein v. Rigot 245 So.2d 57 (Fla.1971), 21 A.I.L.C.

paid to the plaintiff and not to the State. Even States whose legal systems do not know punitive damages as such provide for "private penalties" in one form or another.¹⁰¹ Therefore it is not appropriate to refuse the enforcement of a foreign judgment only because punitive damages are unknown to the requested State's law.¹⁰²

There is no indication in the *Compromis* that punitive damages are unknown to Caledon law, therefore Caledon may not invoke public policy to reject enforcement. However, even if Caledon's legal system did not provide for punitive damages, proceedings under the S.C.A. must be instituted by private persons and actual and exemplary damages recovered under the S.C.A. are entirely paid to the plaintiffs for the damage they have suffered. Therefore, they are civil remedies the enforcement of which may not be refused on public policy grounds.

E. IN THE ALTERNATIVE, CALEDON MUST PAY TO LAURENTIA, ON BEHALF OF MR. AND MRS. DOE, AN AMOUNT EQUIVALENT TO THE UNCOLLECTED PORTION OF THE JUDGMENT.

Even if Caledon were not obliged to enforce the judgment, Laurentia may act on behalf of the Does. Since they have incurred damage as any other Laurentian family,¹⁰³ they are entitled to full compensation which

166, 167 (1st Ser.1971); Hay, The Recognition and Enforcement of American Money Judgments in Germany, 40 A.J.C.L. 729, 746 (1992).

¹⁰¹ Brand, Punitive Damages and the Recognition of Judgments, 43 N.I.L.R. 143, 172 (1996); Siehr, Zur Anerkennung und Vollstreckung ausländischer Verurteilungen zu "punitive damages", 37 R.I.W. 705, 707 (1991).

¹⁰² Northcon v. Yoshitaka Katayama et al., Jap.Distr.Ct.(Tokyo) (Feb.18,1991), 35 J.A.I.L. 177, 181s (1992); S.F. Inc. v. T.C.S. AG, Sw.Civ.Ct.(Basel) (Feb.1,1989), Basl.J.M. 31, 38 (1991).

¹⁰³ See *supra* II.B.

includes - as confirmed by State practice¹⁰⁴ - exemplary damages.

IV. LAURENTIA ASKS THE COURT TO DECLARE THAT IT HAS NO JURISDICTION TO DECIDE A G.A.T.T./W.T.O. DISPUTE, OR, IN THE ALTERNATIVE, THAT LAURENTIA IS NOT OBLIGED TO COMPENSATE CALEDON FOR THE CIGARETTE IMPORT BAN.

A. THE COURT HAS NO JURISDICTION TO DECIDE G.A.T.T./W.T.O. DISPUTES.

According to Art.IX(2) W.T.O.-Agreement the "exclusive authority to adopt interpretations of this Agreement" is vested upon the Ministerial Conference and the General Council of the W.T.O.¹⁰⁵ Whereas Art.96 of the Havana Charter referred to the I.C.J. for interpretations of the I.T.O., no such provision was included in G.A.T.T./W.T.O., since judicial procedures were not considered adequate to foster economic cooperation.¹⁰⁶ The objective of G.A.T.T. is to preserve a balance of concessions amongst its members and not to have sanctions pronounced for possible breaches of its provisions.¹⁰⁷ Consequently, Art.23 of the G.A.T.T.-Dispute Settlement Understanding 1994 provides for the exclusiveness of G.A.T.T. remedies,¹⁰⁸ none of which refers to the

¹⁰⁴ "I'm Alone" Case (Canada v. U.S.A.), (Jan.23,1924), 3 R.I.A.A. 1613, 1618; Janes Case, (Mexico v. U.S.A.), (Nov.16,1926), 3 Ann.Dig. 218, 217 (1929); I.L.C.-Draft, supra fn.52, Art.45(2) (b).

¹⁰⁵ Marrakesh Agreement Establishing The World Trade Organization, E.McGovern, International Trade Regulation 4:1 (1995).

¹⁰⁶ Long, La place du droit et ses limites dans le système commercial multilatéral du G.A.T.T., 182 R.d.C. 9, 82 (1983-IV); G.Malinverni, Le règlement des différends dans les organisations internationales économiques 105ss (1974).

¹⁰⁷ Long, supra fn.106, 83.

¹⁰⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112, 128 (1994); Brand, Competing Philosophies of G.A.T.T. Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement, 27 J.W.T. 117, 137 (1993);

I.C.J. Hence, the I.C.J. is not competent to settle G.A.T.T. disputes and thus - to the extent the present dispute concerns the G.A.T.T. - the Court has no jurisdiction.

B. EVEN IF THE COURT HAS JURISDICTION, LAURENTIA WAS ENTITLED TO IMPOSE THE IMPORT BAN PURSUANT TO ART.XXI G.A.T.T.

According to Art.XXI(b)(iii) G.A.T.T. a member State has the right to take actions "it considers necessary for the protection of its essential security interests" in time of war or other emergency in international relations. Practice confirms that each contracting party is "the sole judge of what [is] necessary in its essential security interests",¹⁰⁹ because they are "eminently a matter on which an international court can have no useful opinion"¹¹⁰. The I.C.J. stated in the *Nicaragua Case* that it had no jurisdiction over measures taken by States pursuant to Art.XXI(b) G.A.T.T.¹¹¹ Hence, the I.C.J. has no jurisdiction to decide upon the measures taken by Laurentia to protect its security interests. Even if the Court had jurisdiction, Laurentia invoked the security exception in good faith, since State-sponsored kidnapping is a security interest of every State.¹¹² Thus, by enacting the import ban Laurentia

M.J.Hahn, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie 156 (1996); Stoll, Die W.T.O., Neue Welthandelsorganisation, neue Welthandelsordnung, 54 Z.a.Ö.R.V. 241, 276s (1994).

¹⁰⁹ G.A.T.T., Analytical Index: Guide to G.A.T.T. Law and Practice [hereinafter Index], 554, 555 (6th ed.1994); E.McGovern, supra fn.105, 13.21-2; Carreau, Les moyens de pression économique au regard du F.M.I., du G.A.T.T. et de l'O.C.D.E., 18 R.B.D.I. 20, 25s (1984/85).

¹¹⁰ Jennings, Recent Cases on 'Automatic' Reservations to the Optional Clause, 7 I.C.L.Q. 349, 362 (1958); I.F.I.Shihata, The Power of the International Court to Determine Its Own Jurisdiction 273 (1965).

¹¹¹ Nicaragua Case, supra fn.54, 116, para.222.

¹¹² Glennon, supra fn.55, 754.

lawfully exercised its right to protect its essential security interests.

C. THE IMPORT BAN IS JUSTIFIED AS A REPRISAL.

A State injured by a breach of international law, after having unsuccessfully requested the injuring State to remedy the wrong, is entitled to respond with a proportionate reprisal.¹¹³ Moreover, if the reprisal was justified under general international law "it could not be illegal under G.A.T.T."¹¹⁴

Laurentia on two occasions requested Caledon to cease the wrongful detention of Laurentian children. Caledon did not abide by those requests and refused any cooperation. Compared to the grave breaches of Laurentian children's human rights and of Laurentia's territorial sovereignty, the response was proportionate. Thus, Laurentia acted lawfully and is therefore not required to pay compensation.

¹¹³ Naulilaa Case (Portugal v. Germany), (Jul.31,1928), 4 Ann.Dig. 526, 527 (1931); Case Concerning the Air Services Agreement of 27 March 1946 (U.S.A. v. France), (Dec.9,1978), 54 I.L.R. 304, 338 (1979); Nicaragua Case, *supra* fn.54, 127, para.249; I.L.C.-Draft, *supra* fn.52, Art.47.

¹¹⁴ Index, *supra* fn.109, 670.