
IN THE INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING THE CHILDREN
OF THE MOUNT ZOLO DISASTER

1997

Republic of Laurentia

v.

Federal Republic of Caledon

MEMORIAL FOR THE RESPONDENT

CASE CONCERNING THE CHILDREN
OF THE MOUNT ZOLO DISASTER

TABLE OF CONTENTS I
INDEX OF AUTHORITIES III
ABBREVIATIONS XIII
JURISDICTION XVI
STATEMENT OF FACTS XVII
QUESTIONS PRESENTED XX
SUMMARY OF ARGUMENTS XXIV

TABLE OF CONTENTS

I. CALEDON ASKS THE COURT TO 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. 1

A. THE EVACUATION OF THE CHILDREN WAS CONSISTENT WITH INTERNATIONAL LAW. 1

B. CALEDON ACTED IN ACCORDANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION. 3

1. Caledon need not return the children, since the exceptions of Arts.13 and 20 apply..... 4

2. Caledon need not return the children, since no application pursuant to Art.8 was made and the children are settled in their new environment (Art.12)..... 7

3. The adoptions were in accordance with Art.16. 8

C. CALEDON ACTED IN ACCORDANCE WITH THE CONVENTION ON THE RIGHTS OF THE CHILD (C.R.C.) 9

1. The C.R.C. is not applicable <i>ratione temporis</i> to the present dispute.....	9
2. Even if the C.R.C. were applicable, Caledon has acted in accordance with the Convention.....	9
a) The evacuation and continued care were consistent with Art.9 C.R.C.	10
b) The foster placement and adoptions were consistent with Arts.20 and 21 C.R.C.	11
D. CALEDON AS A FEDERAL REPUBLIC IS NOT BOUND TO UNDO THE ADOPTIONS.	13

II. CALEDON ASKS THE COURT TO DECLINE, IF RETURN OF THE CHILDREN WERE TO BE COMPELLED, TO AWARD DAMAGES IN ANY AMOUNT WHATSOEVER.	14
A. LAURENTIA CANNOT CLAIM DAMAGES FOR ITS NATIONALS AS THEY HAVE NOT EXHAUSTED LOCAL REMEDIES AND HAVE DOUBLE NATIONALITY.	14
B. CALEDON IS NOT OBLIGED TO PAY ANY DAMAGES TO EITHER LAURENTIA, THE CHILDREN OR THEIR FAMILIES.	14
III. CALEDON ASKS THE COURT TO AWARD TO CALEDON COMPENSATION INCLUDING LOST PROFITS FROM SALES OF CIGARETTES IN LAURENTIA DURING THE IMPORT BAN.	18
A. LAURENTIA HAS VIOLATED THE G.A.T.T. BY BANNING IMPORTS FROM CALEDON.	18
B. THE VIOLATION OF ART.XI CANNOT BE JUSTIFIED AS A REPRISAL.	19
C. LAURENTIA HAS TO PAY COMPENSATION INCLUDING LOST PROFITS	20
IV. CALEDON ASKS THE COURT TO DECLARE THAT THE RETALIATORY PROVISIONS OF THE LAURENTIAN SAVE THE CHILDREN ACT (S.C.A.) ARE IMPERMISSIBLY EXTRATERRITORIAL AND THEREFORE ILLEGAL, AND THAT THE DECISION OF THE COURTS OF CALEDON, DECLINING TO ENFORCE DOE V. CHILDREN'S FOUNDATION, IS CONSISTENT WITH INTERNATIONAL LAW; AND ORDER THAT LAURENTIA RETURN TO CALEDON ON BEHALF OF THE FOUNDATION THE PROPERTY SEIZED AND SOLD, OR ITS VALUE. .	21
A. THE LAURENTIAN S.C.A. IS IMPERMISSIBLY EXTRATERRITORIAL.	21
B. CALEDON HAS NO OBLIGATION TO ENFORCE DOE V. CHILDREN'S FOUNDATION.	24
C. LAURENTIA IS OBLIGED TO RETURN THE SOLD PROPERTY OR ITS VALUE TO CALEDON.	27

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ABBREVIATIONS

A.D.	Annual Digest of Public International Law Cases
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
Austr.	Austria(n)
B.I.L.C.	British International Law Cases
B.I.S.D.	Basic Instruments and Selected Documents
B.Y.I.L.	British Yearbook of International Law
C.d.Cass.	Cour de Cassation
C.R.C.	Convention on the Rights of the Child
C.Y.I.L.	Canadian Yearbook of International Law
Can.	Canadian
Can.J.F.L.	Canadian Journal of Family Law
Civ.Div.	Civil Division
Cor.I.L.J.	Cornell Journal of International Law
Ct.	Court
Ct.App.	Court of Appeals
D.R.	Decisions and Reports
Distr.Ct.	District Court
E.C.J.	European Court of Justice
E.Com.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.L.Q.	Family Law Quarterly
F.L.R.	Family Law Review
F.R.G.	Federal Republic of Germany

Fam.Div.	Family Division
Fr.	France, French
G.Y.I.L.	German Yearbook of International Law
GA-Res.	General Assembly Resolution
Ger.	German(y)
H.C.P.I.L.	Hague Conference on Private International Law
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.J.R.L.	International Journal of Refugee Law
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
I.R.C.F.	International Federation of Red Cross and Red Crescent Societies
I.Y.I.L.	Italian Yearbook of International Law
IRAN-U.S.C.T.R.	Iran-U.S. Claims Tribunal Reports
J.A.I.L.	Japanese Annual of International Law
L.C.P.	Law and Contemporary Problems
N.I.L.R.	Netherlands International Law Review
N.Y.I.L.	Netherlands Yearbook of International Law
Ö.Z.ö.R.	Österreichische Zeitschrift für öffentliches Recht
R.B.D.I.	Revue Belge de Droit International

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
Res.	Resolution
Rev.Crit.D.I.P.	Revue critique de droit international privé
Ser.	Series
Supp.	Supplement
Supr.Ct.	Supreme Court
U.N.H.C.R.	United Nations High Commissioner for Refugees
U.N.T.S.	United Nations Treaty Series
U.N.Y.B.	Yearbook of the United Nations
Va.J.I.L.	Virginia Journal of International Law
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
Z.f.R.V.	Zeitschrift für Rechtsvergleichung

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) of the I.C.J.-Statute. The jurisdiction of the Court has neither been contested nor qualified. There is no dispute as to the jurisdiction of the Court.

STATEMENT OF FACTS

In February 1994 an eruption of Mount Zolo in Laurentia killed over 150,000 persons. Almost every U.N.-Member assisted in world wide relief operations. Laurentia's eastern neighbor Caledon evacuated 15,000 of the most seriously injured people, including 3,000 children. Many of these had been separated from their parents by the disaster. The children's medical condition and the lack of communications infrastructure prevented Caledon from obtaining authorization for the evacuation.

On July 15, 1995, Laurentia gratefully expressed her appreciation for Caledon's tireless efforts. After medical treatment, all children were returned to Laurentia except 400, whose parents had not presented themselves to Caledon's authorities. The remaining children were provided with psychological assistance and placed with foster families in Caledon's Oriente Province. A list of names and particulars was maintained in public records and Laurentia was duly informed.

In May 1995 Caledon announced that the children could stay until safe conditions in Laurentia allowed their return or their natural parents requested so.

On July 9, 1995, Oriente's Governor declared the children wards of the Province and consented to their adoptions, which were granted in individual proceedings by Oriente's courts. No natural parents opposed these adoptions.

On July 1, 1995, Laurentia requested the return of all children. On July 15, 1995, Laurentia stated that the adoptions were inconsistent with international law and called upon Caledon to nullify all adoptions

and return the children to the custody of Laurentia's Ambassador. Caledon's Foreign Minister replied that in Caledon constitutional responsibilities for care and adoption of children were within exclusive competence of the provinces. Being final acts of Oriente's Courts, the adoptions cannot be revoked.

Although Laurentia and Caledon have always maintained extensive trade relations, on October 29, 1995, Laurentia banned all imports of cigarettes from Caledon. In 1991 trade in cigarettes reached U.S.\$800 million. Caledon immediately demanded consultations under Art.XXIII G.A.T.T. which were convened on April 25, 1996. Laurentia's Trade Minister argued that the import ban was imposed in order to obtain return of the children. However, without defending the embargo, Laurentia abrogated the import ban and demanded the children's return, because of the expenses and efforts required.

On June 9, 1996, Laurentia enacted the "Save the Children Act" establishing civil liability for actual and punitive damages of professionals or organizations for "substantial participation in any proceeding before a court of any foreign nation", which contributed to the adoption of Laurentian children without parental consent. In August, 1996, Ms.Montaigne, the Chief Administrative Officer of the Children's Foundation, a Caledonian non-profit organization, visited Laurentia. During her stay she and the Foundation were served with process under the S.C.A. The Foundation participated in the adoption proceedings of Moses Doe, whose parents where killed by the disaster. Moses Doe's aunt and uncle claimed U.S.\$10 million damages from the Foundation.

On October 19, 1996, the Court rendered a default judgment and held the Foundation liable to pay U.S.\$100,000 in actual and U.S.\$5 million in punitive damages. Consequently, Foundation property was sold for U.S.\$500,000, which were paid to Mr. and Mrs.Doe. When they sought enforcement in Caledon, this was refused by the Supreme Court, stating that individual civil liability for acts undertaken to effect implementation of a gubernatorial decree violates Caledon's public policy.

On May 10, 1996, the parties signed a *compromis ad hoc* to submit their dispute to the I.C.J.

Both Caledon and Laurentia are parties to the U.N. Charter, the I.J.C.-Statute, G.A.T.T. and W.T.O., the V.C.L.T., the C.R.C. and the Hague Convention on the Civil Aspects of International Child Abduction.

QUESTIONS PRESENTED

Caledon asks the Court

1. whether the evacuation, the continued care and the adoption of the children were consistent with international law;
2. whether Caledon has to undo these adoptions and return the children to Laurentia;
3. whether Caledon is obliged to pay damages;
4. whether the Laurentian import ban violated the G.A.T.T.;
5. whether Laurentia is obliged to compensate for lost profits;
6. whether the S.C.A. is impermissibly extraterritorial;
7. whether Caledon must enforce the judgment in Doe v. Children's Foundation;
8. whether Laurentia shall return to Caledon on behalf of the Children's Foundation the property seized or its value.

SUMMARY OF ARGUMENTS

As Laurentia is obliged to admit humanitarian assistance for its nationals, Caledon's evacuation of Laurentian children cannot be regarded as unlawful intervention. Moreover, Laurentia acquiesced in the evacuation.

As a private international law Convention the Hague Abduction Convention is not applicable to the present dispute. Even if it were applicable, Caledon need not return the children because no proper application was ever made (Art.8), the children's parents consented to, or acquiesced in, the evacuation and continued care (Art.13(a)), the return, exposing them to a grave risk of psychological harm, would be against the children's best interest (Art.13(b)) and since the children are settled in their new environment (Art.12). Furthermore, the return is prohibited by Caledon's public order (Art.20).

Laurentia cannot demand compliance with the Convention on the Rights of the Child, as it was no party at the time of the incidents. However, Caledon acted in the children's best interest by evacuating the most seriously injured, and by providing continued care by adoptions (Arts.9, 20, 21).

It is legally impossible and would be excessively onerous to undo the adoptions since it would require a total revision of Caledon's constitution.

As local remedies were not exhausted and the children's effective nationality is that of Caledon, Laurentia may not exercise diplomatic protection. Moreover, in international law there is no right to pecuniary compensation for immaterial damage.

Laurentia's import ban on cigarettes is a violation of Art.XI G.A.T.T. which cannot be justified by any of the G.A.T.T.-exceptions. It is no legitimate reprisal since Caledon has not committed an illegal act. Moreover, the import ban is disproportionate and does not fulfill the G.A.T.T.-requirements. Thus, Laurentia has to compensate for lost profits.

The "Save the Children Act" (S.C.A.) is an extraterritorial statute which lacks a basis of jurisdiction to prescribe and is therefore illegal in international law.

By enforcing the S.C.A., Laurentia held liable a Caledonian non-profit organization to pay U.S.\$5 million. There is no duty in international law to enforce foreign judgments. The judgment in Doe v. Children's Foundation lacks any recognized basis of prescriptive or adjudicative jurisdiction. Furthermore, it awards punitive damages which are unknown in international law. Finally, its enforcement would violate Caledon's *ordre public*. Thus, Caledon is not bound to enforce Doe v. Children's Foundation.

The seizure of property in execution of a judgment rendered in excess of jurisdiction violates international law. Thus, Laurentia is obliged to return or compensate the property seized and sold.

I. CALEDON ASKS THE COURT TO 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.

A. THE EVACUATION OF CHILDREN WAS CONSISTENT WITH INTERNATIONAL LAW.

International humanitarian law obliges States to admit assistance to the victims of natural disasters if their own resources are inadequate.¹ This obligation is based on "elementary considerations of humanity"², the duty of cooperation in humanitarian issues (Art.1(3) U.N. Charter) and the duty of States to ensure fundamental human rights such as life, food, housing and medical care to their own nationals.³ Children are entitled to special protection and initial emergency care,⁴ such as evacuation.⁵ The provision of humanitarian aid "cannot be regarded as

¹ Griffiths/Levine/Weller, Sovereignty and suffering, in The Politics of Humanitarian Intervention 33, 46 (J.Harriss ed.1995); Patrnogic, Some reflections on humanitarian principles applicable in relief actions, in Studies and Essays in Honor of J.Pictet 925, 931s (C.Swinarski ed.1984).

² Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 22 (Judgment of Apr.9).

³ U.N.GA-Res.217(III), Universal Declaration of Human Rights [hereinafter U.D.H.R.], Dec.10, 1948, Arts.1, 25, U.N.Doc.A/810 (1948); International Covenant on Economic, Social and Cultural Rights, Dec.19, 1966, Art.11, 993 U.N.T.S. 3 (1976); Macalister-Smith, Disaster Relief: Reflections on the Role of International Law, 45 Z.a.ö.R.V. 25, 42 (1986); Patrnogic, *supra* fn.1, 932; Griffiths/Levine/Weller, *supra* fn.1, 61s.

⁴ U.N.GA-Res.1386(XIV), Declaration of the Rights of the Child, Nov.20, 1959, Principles 2, 8, 13 U.N.Y.B. 192ss (1959); Convention on the Rights of the Child [hereinafter C.R.C.], Nov.20, 1989, Arts.20, 22, 24, 28 I.L.M. 1457ss (1989); Griffiths/Levine/Weller, *supra* fn.1, 62; Macalister-Smith, *supra* fn.3, 29s.

⁵ U.N.H.C.R./U.N.I.C.E.F., Joint Statement on the Evacuation of Children from Former Yugoslavia [hereinafter Statement on Yugoslavia], Aug.13,1992, in E.Ressler, Evacuation of Children from Conflict Areas 25s (1992); I.C.R.C./U.N.H.C.R./U.N.I.C.E.F./ I.F.R.C.S., Joint Statement on the Evacuation of Unaccompanied Children from Rwanda [hereinafter Statement on Rwanda], Jun.27, 1994,

unlawful intervention, or as in any other way contrary to international law."⁶ The U.N. guiding principles, stating that "humanitarian assistance *should* be provided with the consent of the affected country",⁷ show that consent is not necessarily required.⁸ This is especially true where action was taken solely in the affected State's pressing interest and circumstances made it impossible to wait for consent to be given. However, even if consent was required, Laurentia acquiesced in the relief operations. Acquiescence results from "a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title".⁹ Thus, if a State does not protest within reasonable time, it cannot later claim that it did not accept the legality of the act.¹⁰

As part of world-wide relief operations the C.M.C. evacuated 3,000

<http://www.intac.com./PubService/rwanda/UNICEF/rwanda7.txt>.

⁶ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.), 1986 I.C.J. 14, 124s (Judgment of Jun.27).

⁷ U.N.GA-Res.46/182, Strengthening of the coordination of humanitarian emergency assistance of the United Nations, Dec.19, 1991, Annex, para.3, 45 U.N.Y.B. 421s (1991) [emphasis added].

⁸ Helton, The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign, 4 I.J.R.L. 373, 374 (1992); Plender, The Legal Basis of International Jurisdiction, 6 I.J.R.L. 345, 354 (1994); Griffiths/Levine/Weller, *supra* fn.1, 43, 46ss; Taylor, Options for the reform of the international system for humanitarian assistance, in: The Politics of Humanitarian Intervention 91, 102s (J.Harriss ed.1995).

⁹ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) [hereinafter Temple Case], 1962 I.C.J. 6, 30s, 23 (Judgment of Jun.15); MacGibbon, The Scope of Acquiescence in International Law, 31 B.Y.I.L. 143, 170s (1954).

¹⁰ Venezuelan Preferential Case, (Feb.22, 1904), 9 R.I.A.A. 100, 109s (1959); Temple Case, (Sep.op. Fitzmaurice), *supra* fn.9, 62s.

seriously injured children to Caledon for urgent treatment. While due to their medical condition and the lack of communications infrastructure consent could not be obtained prior to the air-lift, Laurentia not only failed to protest, but "gratefully acknowledge[d] the assistance provided", and "expresse[d] its appreciation for the tireless efforts" of Caledon in its diplomatic note. Therefore, the evacuation of the children was consistent with international law.

B. CALEDON ACTED IN ACCORDANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

The Hague Convention¹¹ belongs to the area of family law and private international law, which governs relations between individuals, not between States.¹² The Convention only applies to abductions by parents, family members, or other private persons,¹³ but not to cases of "transferring a person to the 'sovereign power' of another State upon the latter's request"¹⁴. Thus, the Hague Convention is not applicable to inter-state disputes.

Even if the Hague Convention were applicable, Caledon would not be bound to return the children. Under the Convention a removal or

¹¹ Hague Convention on the Civil Aspects of International Child Abduction, Oct.25, 1980, 19 I.L.M. 1501ss (1980).

¹² Schuz, The Hague Child Abduction Convention: Family Law and Private International Law, 44 I.C.L.Q. 771, 772 (1995); Drobniq, Private International Law, 10 E.P.I.L. 330, 330ss (R.Bernhardt ed.1987).

¹³ Dyer, Questionnaire on international child abduction by one parent, in Actes et documents de la Quatorzième session, Tome III, Child Abduction [hereinafter Actes] 9, 9 (1980); Pérez-Vera, Report of the Special Commission [hereinafter Pérez-Vera, Report], in Actes, 172, 183, para.38; Shapira, Private International Law - Aspects of Child Custody and Child Kidnapping Cases, 214 R.d.C. 131, 189ss (1989-II).

¹⁴ Case Concerning the Hague Convention on the Civil Aspects of International Child Abduction, Ger.Const.Ct., (Oct.10, 1995), 35 I.L.M. 529, 534 (1996).

retention is wrongful if it is in breach of rights of custody actually exercised at the time of the wrongful act (Art.3). "Rights of custody" under Art.5(a) include the responsibility for a child's physical and medical care and the authority to determine his/her place of residence.¹⁵ While a removal is wrongful without the custodian's prior consent, a retention becomes wrongful if return is refused after expiry of the period to which the custodian had consented.¹⁶

1. Caledon need not return the children, since the exceptions of Arts.13 and 20 apply.

Under Art.13(a) a child's return may be refused if rights of custody were not actually exercised, or the custodian consented to, or subsequently acquiesced in, a removal or retention. Custody rights are "actually exercised" when a parent "keeps, or seeks to keep, any sort of regular contact" with the child,¹⁷ but not if the alleged abductor instead of the custodian had been caring for the child.¹⁸ Both consent and acquiescence may be inferred from silence or inactivity, in circumstances in which the aggrieved party may reasonably be expected to act.¹⁹ Acquiescence results from a failure to make any meaningful attempt

¹⁵ Shapira, *supra* fn.13, 193; Foyer, General Report, in Actes, *supra* fn.13, 52, 53s.

¹⁶ Re H; Re S, U.K.H.L., [1991] 2 F.L.R. 262, 272 (Jun.13, 1991); Thomson v. Thomson, Can.Supr.Ct., [1994] 3 S.C.R. 551, 592s (Jan.26, 1994); North, Private International Law Problems in Common Law Jurisdictions 93 (1993).

¹⁷ Friedrich v. Friedrich [hereinafter Friedrich], U.S.Ct.App.(6thCircuit), 78 F.3d 1060, 1065s (Mar.13, 1996).

¹⁸ Westbrook, Law and Treaty Responses to International Child Abductions, 20 Va.J.I.L. 669, 695 (1980); Pérez-Vera, Report, *supra* fn.13, 193, 203, paras.65, 95.

¹⁹ Re C, U.K.Ct.App.(Fam.Div.), [1996] 1 F.L.R. 414, 419 (Jul.27, 1995);

to obtain a child's return for a significant period of time,²⁰ i.e. between six and ten months,²¹ irrespective of a subsequent change of mind.²²

During the evacuation custody rights were not actually exercised, as many children had already become separated and nobody kept or sought to keep contact with them, leaving them to the care of the C.M.C. If the custodians had disagreed with the evacuation, they should have protested. While subsequently 600 children were returned upon request, the other custodians, being silent for more than a year, acquiesced in the continued care for the remaining 400. Thus, despite Laurentia's subsequent "change of mind", return of the children may be refused.

Under Art.13(b) a State need not order the return if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him/her in an intolerable situation. Psychological harm may be caused by changing the child's actual living conditions anew, tearing the child away from his/her familiar environment.²³ A court must evaluate the surroundings to which a child

Re A, U.K.Ct.App., [1992] 2 F.L.R. 14, 26 (Feb.12, 1992); Re AZ, U.K.Ct.App., [1993] 1 F.L.R. 682, 685 (Jul.29, 1992).

²⁰ Friedrich, *supra* fn.17, 1070.

²¹ Re S, U.K.Ct.App., [1994] 1 F.L.R. 819, 827 (Feb.3, 1994); Ponath v. Ponath, U.S.Dist.Ct.(Utah), 829 F.Supp. 363, 368 (Aug.17, 1993); W. v. W., U.K.Ct.App.(Fam.Div.), [1993] 2 F.L.R. 211, 217 (Nov.13, 1992).

²² Re A, *supra* fn.19, 27; Re AZ, *supra* fn.19, 691; Re R, U.K.Ct.App., [1995] 1 F.L.R. 716, 726 (Nov.17, 1994).

²³ M.Shamée v. Mme.Shamée, Fr.Supr.Ct.(Civ.Div.), 84 Rev.Crit.D.I.P. 97, 98 (Jul.12, 1994); A. v. A, Austr.Supr.Ct., 7-Ob-596/93 (Oct.27, 1993); L. v. L., Austr.Supr.Ct., 4-Ob-538/92 (Sept.1, 1992).

is to be sent,²⁴ and consider that the child's removal from his/her new family would make him/her suffer a second time.²⁵

A removal of the children from their new families back to the scene of the traumatizing events and to changed conditions would expose them to a grave risk of psychological harm. Thus, Caledon need not return the children.

Under Art.20 return may be refused on grounds of "fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms".²⁶ Such an *ordre public* clause naturally encompasses the protection of infants.²⁷ These principles include the child's best interest (Art.3(1)) and his/her right to a stable place of residence.²⁸ Forming part of Caledon's public order (Oriente Family Code Sec.3.058.), these principles stand against the children's return.

²⁴ Nunez-Escudero v. Tice-Menley, U.S.Ct.App.(8thCircuit), 58 F.3d 374, 377 (Jun.26, 1995); In re Coffield, U.S.Ct.App. (Ohio) 644 N.E.2d 662, 665 (Jun.3, 1994); Silberman, Hague International Child Abduction Convention: A Progress Report, 57 L.C.P. 209, 237 (1994).

²⁵ Thomson v. Thomson, *supra* fn.16, 574, 599; Pérez-Vera, Report, *supra* fn.13, 177s, para.20.

²⁶ Pérez-Vera, Explanatory Report, in Actes, *supra* fn.13, 461s, para.118; U.S. Department of State, Hague International Child Abduction Convention, Public Notice 957, 51 Federal Regulations 10494, 10510 (1986).

²⁷ Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden) [hereinafter Guardianship Case], (Sep.op. Lauterpacht), 1958 I.C.J. 55, 90 (Judgment of Nov.28); E.Ressler/N.Boothby/D.Steinbock, Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements 239 (1988).

²⁸ Dyer, International Child Abduction by Parents, 168 R.d.C. 231, 263 (1980-III).

2. Caledon need not return the children, since no application pursuant to Art.8 was made and the children are settled in their new environment (Art.12).

A person seeking the child's return has to file an application with authorities competent in matters of child custody (Arts.8, 12).²⁹ To be admissible, an application must contain information about the individual child and specify the grounds for the return.³⁰ No proper application has been made for the return of the remaining 400 children. The Laurentian diplomatic notes cannot be regarded as admissible applications, since they were not addressed to competent authorities and lack essential elements.

Even if a correct application were made, the child's return may be refused under Art.12, when proceedings were commenced after one year from the date of the wrongful act and it is demonstrated that the child is now settled in his/her new environment. "Settlement", involving a physical and an emotional element, requires a "long-term settled position" importing security and stability for the child in a new environment,³¹ e.g. his/her home, friends,³¹ school and social community,³²

²⁹ Pérez-Vera, Report, *supra* fn.13, 181, para.30; H.C.P.I.L., Checklist of Issues to be Considered at the Third Meeting of the Special Commission [hereinafter Checklist], para.66 (1997).

³⁰ Pérez-Vera, Explanatory Report, *supra* fn.13, 455, para.100; Farquhar, The Hague Convention on International Child Abduction Comes to Canada, 4 *Can.J.F.L.* 5, 19 (1983).

³¹ Re N, U.K.Ct.App.(Fam.Div.), [1991] 1 F.L.R. 413, 418 (Dec.4, 1990); Re M, U.K.Ct.App.(Fam.Div.), [1996] 1 F.L.R. 315, 321 (Nov.23, 1994); Re S, U.K.Ct.App., [1991] 2 F.L.R. 1, 24 (May 18, 1990); North, *supra* fn.16, 95.

³² David S. v. Zamira S., U.S.Fam.Ct.(N.Y.), 574 N.Y.S.2d 429, 433 (Jan.31, 1991); Re N, *supra* fn.31, 418; O. v. O., Austr.Supr.Ct., 7-Ob-573/90 (May 17, 1990); Checklist, *supra* fn.29, paras.83ss.

and takes about six months to two years.³³ Only if a removed child is unhappy or psychologically injured by remaining in the new environment, he/she should be returned even after one year.³⁴

For more than two years the children have been living in new homes with adoptive families, granting them security and stability. They have adapted to their new environment and established relationships with friends, in school and community. No complaints have arisen of children being unhappy. Moreover, they were even provided psychological assistance. Thus, being settled in their new environment, the children need not be returned.

3. The adoptions were in accordance with Art.16.

According to Art.16 the judicial authorities of the abducted-to State shall not decide on the merits of custody unless an application is not lodged within a reasonable time following receipt of notice of the wrongful act. The period of "reasonable time" is less than one year, as otherwise the relation between Art.16 and Art.12 would be inconclusive.³⁵ More than one year has passed between the evacuation in March 1994 and the adoption procedures commencing in July 1995. As Caledon's courts have not received due notice of the wrongful act and no application under the Convention was lodged, the adoptions were in accordance with Art.16.

³³ Bodenheimer, The Hague Draft Convention on International Child Abduction, 14 F.L.Q. 99, 109s (1980); Westbrook, *supra* fn.18, 694s.

³⁴ H.C.P.I.L., Overall Conclusions of the Special Commission, 1989, 29 I.L.M. 219, 227 (1990).

³⁵ Cf. Pérez-Vera, Explanatory Report, *supra* fn.29, 464, para.121.

C. CALEDON ACTED IN ACCORDANCE WITH THE CONVENTION ON THE RIGHTS OF THE CHILD (C.R.C.).

1. The C.R.C. is not applicable *ratione temporis* to the present dispute.

Caledon became a party to the C.R.C. shortly after 1989, whereas Laurentia did not ratify the Convention until July 1, 1996. While "it is evident that without ratification, signature does not make the signatory State a party",³⁶ it follows that a non-ratifying State "could not claim for any rights [...] until the professed willingness and acceptance had been manifested in the prescribed form."³⁷ Moreover, according to the rule of non-retroactivity in Art.28 V.C.L.T., a treaty will not apply to "any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty".³⁸ Thus, as all facts occurred before Laurentia's ratification on July 1, 1996, the C.R.C. is not applicable *ratione temporis* to the present dispute.

2. Even if the C.R.C. were applicable, Caledon has acted in accordance with the Convention.

According to Art.3 C.R.C., the best interest of the child shall be a primary consideration for all actions concerning children.³⁹ It relates

³⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 28 (Adv.op. of May 28); Ambatielos Case (Greece v. U.K.), 1952 I.C.J. 28, 43 (Judgment of Jul.1).

³⁷ North Sea Continental Shelf Cases (F.R.G. v. Denmark, F.R.G. v. Netherlands), 1969 I.C.J. 3, 26 (Judgment of Feb.20).

³⁸ Vienna Convention on the Law of Treaties, May 23, 1969, Art.28, 8 I.L.M. 679, 690 (1969); Ambatielos Case, *supra* fn.36, 40s.

³⁹ U.N.GA-Res.1386(XIV), *supra* fn.4, Principle 2; 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, Art.5, 40 U.N.Y.B. 821ss (1986); African Charter on the Rights and Welfare of the Child,

to opportunities and facilities enabling the child "to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner."⁴⁰ Thus States have to ensure the survival and development of the child, including the right to life (Art.6), health (Art.24(1)) and an adequate standard of living (Art.24 and 27).⁴¹

a) *The evacuation and continued care were consistent with Art.9 C.R.C.*

Art.9(1) provides that a child shall not be separated from his/her parents unless the separation is necessary for the child's best interest. However, this article was only intended "to apply to separations that arise in domestic situations".⁴² Moreover, unaccompanied children are already separated from both parents and not cared for by an adult responsible to do so.⁴³ Even if Art.9(1) were applicable, in emergency situations the child's best interest necessitates an evacuation, especially if his/her medical condition is life-threatening and adequate treatment is not available.⁴⁴ In any case,

July 1990, Art.4, 1 Afr.J.I.L. 295ss (1993); Alston, The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights, in The Best Interest of the Child, Reconciling Culture and Human Rights 1ss (P.Alston ed.1994).

⁴⁰ U.N.GA-Res.1386(XIV), *supra* fn.4, Principle 2.

⁴¹ VanBueren, The International Law on the Rights of the Child 293, 298 (1995).

⁴² Considerations 1989 Working Group, E/CN.4/1989/48, para.203, in The United Nations Convention on the Rights of the Child, A Guide to the "Travaux Préparatoires" 181 (S.Detrick ed.1992); G.Dorsch, Die Konvention der Vereinten Nationen über die Rechte des Kindes 157 (1994).

⁴³ Ressler/Boothby/Steinbock, *supra* fn.27, 3s; U.N.H.C.R., Refugee Children - Guidelines on Protection and Care 121 (1994).

⁴⁴ Statement on Yugoslavia, *supra* fn.5, 25; Statement on Rwanda, *supra* fn.5, para.1.

the child's interest prevails over parental interests,⁴⁵ and consent of the parents is not required for a separation.⁴⁶

To save their lives, the most seriously injured children had to be evacuated to Caledon for adequate medical treatment. While many were unaccompanied anyway, evacuation was clearly in the children's best interest, given their pressing health situation. Subsequently, permanent care was provided until conditions would be safe in Laurentia. Thus, the evacuation and continued care were consistent with Art.9 C.R.C.

b) The foster placement and adoptions were consistent with Arts.20 and 21 C.R.C.

Art.20 requires States to ensure special protection and assistance for children permanently deprived of their family environment, e.g. by foster placement or adoption. Such protective measures may be taken by the authorities of the child's habitual residence, applying their own law.⁴⁷ Habitual residence changes without the custodian's consent⁴⁸ if a

⁴⁵ X v. The Netherlands, E.Com.H.R., (Mar.13, 1980), 18 D.R. 225, 229 (1981); VanBueren, *supra* fn.41, 75.

⁴⁶ Dorsch, *supra* fn.42, 158.

⁴⁷ Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, Oct.5, 1961, Arts.1, 2, 658 U.N.T.S. 144ss (1969); Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Sept.30, 1996, Arts.5, 15, 35 I.L.M. 1391ss (1996); F. v. F., Austr.Supr.Ct., 1-Ob-577/88 (Jun.15, 1988); Schwimann, Das Haager Minderjährigenschutzabkommen und seine Anwendung in Österreich, 98 JBl. 233, 242 (1976).

⁴⁸ F. v. F., *supra* fn.47; L. v. L., Austr.Supr.Ct., 2-Ob-557/82 (Nov.30, 1982); No.300, Ger.Ct.App.(Stuttgart), 8-W-181/75 (Jun.23, 1975), 22 Fam.R.Z. 644, 646 (1975); Shapira/Siehr, The Jundeff Affair - Comparative Remarks on International Child Kidnapping and Judicial Co-operation, 25 N.I.L.R. 3, 7s (1978).

new "center of life" is established after a certain period of integration,⁴⁹ i.e. six months to one year.⁵⁰ Moreover, children being physically present in a State's territory can be made wards irrespective of their nationality.⁵¹ Inter-country adoption occurs where the adoptive parents have a different habitual residence from that of the prospective adoptee.⁵² In cases of adoption, the best interest is the paramount consideration (Art.21).⁵³ It is generally recognized that the requirement of consent may be governed by the national law of the *forum* State.⁵⁴ State practice shows that parental consent to adoptions may be dispensed with in cases of long-term neglect, or where parents are unknown or cannot be found.⁵⁵

⁴⁹ DeWinter, Nationality or Domicile? The Present State of Affairs 128 R.d.C. 349, 429ss (1969-III); Kropholler, Einige deutsche Erfahrungen mit dem Haager Minderjährigenschutzabkommen, 16 Z.f.R.V. 207, 210 (1975); Shapira/Siehr, *supra* fn.25, 8.

⁵⁰ L. v. L., *supra* fn.48; R. v. R., Austr.Supr.Ct., 2-Ob-609/89 (Dec.19, 1989); Schwimann, *supra* fn.47, 236; Checklist, *supra* fn.29, para.36.

⁵¹ Re B-M, U.K.Ct.App.(Fam.Div.), [1993] 1 F.L.R. 979, 983 (Oct.30, 1992); Lowe/Nicholls, Child Abduction. The Wardship Jurisdiction and the Hague Convention, 24 Family Law 191 (1994).

⁵² Grosman/Inigo, Adoption of Children in Argentina by Local Citizens and Foreign Nationals, in Intercountry Adoptions 153, 158 (E.Jaffe ed.1995).

⁵³ U.N.GA-Res.41/85, *supra* fn.39, Preamble; VanLoon, International Co-operation and Protection of Children with regard to Intercountry Adoption, 244 R.d.C. 191, 317 (1993-VII); Alston, *supra* fn.39, 3s.

⁵⁴ VanLoon, *supra* fn.47, 278; Ressler/Boothby/Steinbock, *supra* fn.27, 244; European Convention on the Adoption of Children, Apr.24, 1967, Art.5(2), 7 I.L.M. 211, 212 (1968).

⁵⁵ Re R, U.K., [1967] 1 W.L.R. 34 (Jul.15, 1966), 9 B.I.L.C. 297 (1973); England: Adoption Act 1976, Sec.16(2)(a)(c); Germany: Civil Code, Sec.1747(3); India: see Intercountry Adoptions, *supra* fn.52, 27ss; Bulgaria: *ibid.*, 58; VanLoon, *supra* fn.47, 264, 266s;

Caledon has taken all appropriate measures to afford the Laurentian children special care and protection. After one year of foster care the remaining children, whose unknown relatives had not requested their return, were declared wards of the Province to enable their long-term placement in adoptive families. Since they had lived in Caledon for more than a year and had acquired a new habitual residence, Caledon's courts were competent to grant the adoptions, which had a merely domestic character. Adoption by their foster parents, ensuring continuity and stability, clearly was in the children's best interest. As the natural parents could not be found and nobody came forward to oppose the adoption petitions, parental consent was not required and replaced by the consent of the Governor. Therefore, the adoptions were in accordance with the C.R.C.

D. CALEDON AS A FEDERAL REPUBLIC IS NOT BOUND TO UNDO THE ADOPTIONS.

In determining the responsibility of a State, its domestic legal system must be taken in account.⁵⁶ Thus a wrongdoing State is not obliged to provide for restitution in kind if this is legally impossible because it would violate its domestic legal order.⁵⁷ This is the case if it required an act beyond the domestic competence of the wrongdoing State, such as to review a final judicial decision.⁵⁸ Furthermore, there

Ressler/Boothby/Steinbock, *supra* fn.43, 244s.

⁵⁶ Polak, Die Haftung des Bundesstaates für seine Gliedstaaten, Ö.Z.ö.R. 382 (1948-I).

⁵⁷ Arangio-Ruiz, Preliminary Report on State Responsibility, 2 Y.I.L.C. pt.1, 6, 28ss (1988); Draft Articles on State Responsibility, Art.43, in Report of the I.L.C. on the work of its 48th session [hereinafter I.L.C.-Draft], U.N.G.A.O.R. 51st session A/51/10 (1996).

⁵⁸ Jiménez de Aréchaga, International Responsibility, in Manual of

is no duty to provide restitution if this were excessively onerous, e.g. if it entailed a comprehensive revision of the constitutional system.⁵⁹

Caledon is a federal State whose constitution does neither allow to annul final court decisions nor to interfere in matters within the competence of her Provinces, such as adoption of children. Restitution, i.e. undoing the adoptions, would require a total revision of Caledon's civil procedure and the constitutional competencies of her Provinces. Thus, to undo the adoptions is both legally impossible and is excessively onerous.

II. CALEDON ASKS THE COURT TO DECLINE, IF RETURN OF THE CHILDREN WERE TO BE COMPELLED, TO AWARD DAMAGES IN ANY AMOUNT WHATSOEVER.

A. LAURENTIA CANNOT CLAIM DAMAGES FOR ITS NATIONALS AS THEY HAVE NOT EXHAUSTED LOCAL REMEDIES AND HAVE DOUBLE NATIONALITY.

A State may only raise claims on behalf of its nationals after effective local remedies available under the law of the accused State have been exhausted.⁶⁰ Prior to the exhaustion of local remedies a breach of international law does not occur.⁶¹

Public International Law, 531, 566 (Sørensen ed.1968); Thomsen, Restitution, 10 E.P.I.L. 375, 377s (R.Bernhardt ed.1987); K.Zemanek/J.Salmon, Responsabilité internationale 69 (1987); Graefrath, Responsibility and Damages Caused: Relationship between Responsibility and Damages, 185 R.d.C. 11, 82 (1984-II).

⁵⁹ Arangio-Ruiz, *supra* fn.57, 33s; Anzilotti, 1 Lehrbuch des Völkerrechts 411s (1929).

⁶⁰ Mavrommatis Palestine Concessions (Greece v. Great Britain), 1924 P.C.I.J. (Ser. A) No. 2, 6, 12 (Judgment of Aug.30); Interhandel Case (Prel.Obj.) (Switzerland v. U.S.A.), 1959 I.C.J. 6, 27 (Judgment of Mar.21); 1 Oppenheim's International Law 522ss (R.Jennings/A.Watts eds. 9thed.1992).

⁶¹ I.L.C.-Draft, *supra* fn.57, Art.22; Fawcett, The Exhaustion of Local Remedies: Substance or Procedure?, 31 B.Y.I.L. 452, 453 (1954).

Caledon provides for remedies in compliance with Art.8 of the Hague Convention. The effectiveness of this remedy is especially shown by the fact that over 600 children were released into the care of the parents or relatives who presented themselves to the authorities of Caledon. However, no custodian has yet commenced this procedure with regard to the 400 remaining children. Thus local remedies have not been exhausted.

Furthermore, in cases of dual nationality a State may not afford diplomatic protection to one of its nationals against a State whose nationality such a person also possesses.⁶² The right of a State to confer its nationality upon individuals is an attribute of its sovereignty.⁶³ This includes the automatic acquisition of nationality upon certain changes in civil status such as adoption.⁶⁴ Moreover, according to the principle of dominant and effective nationality⁶⁵ only the State to which a person has a genuine link, e.g. by habitual residence, center of interests and participation in public life, is allowed to exercise diplomatic protection⁶⁶.

⁶² E.M.Borchard, Diplomatic Protection of Citizens Abroad 575, 588 (1922); Reparation for Injuries Suffered in the Service of the U.N., 1949 I.C.J. 179, 186 (Adv.op. of Apr.11).

⁶³ Nationality Decrees in Tunis and Morocco (France v. Great Britain), 1923 P.C.I.J. (Ser.C) No.2, 453, 461 (~~Counter-Case~~ of the British Government, Dec.23).

⁶⁴ P.Weis, Nationality and Statelessness in International Law 110s (1979); Brownlie, The Relations of Nationality in Public International Law, 39 B.Y.I.L. 284, 308s (1963); Rezek, Le droit international de la nationalité, 198 R.d.C. 333, 361 (1986-III); VanLoon, *supra* fn.47, 298.

⁶⁵ Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 22 (Judgment of Apr.6); Mergé Case (U.S.A. v. Italy), (Jun.10, 1955), 14 R.I.A.A. 236, 247 (1965).

⁶⁶ Iran v. U.S., Case No.A/18 (Full Tribunal, Apr.6, 1984), 5 IRAN-

The children concerned have become nationals of Caledon by adoption (Section 3.071 and note, Code of Oriente). They have been living in Caledon for almost three years, where they have established their habitual residence and their center of interest. Therefore, they have an effective link to Caledon and their Caledonian nationality prevails. Hence, Laurentia cannot afford diplomatic protection to the children.

B. CALEDON IS NOT OBLIGED TO PAY ANY DAMAGES TO EITHER LAURENTIA, THE CHILDREN, OR THEIR FAMILIES.

An injured State is entitled to obtain from the State which has committed an internationally wrongful act reparation in form of restitution in kind, compensation or satisfaction.⁶⁷ If damage cannot be made good by restitution,⁶⁸ State responsibility entails the duty to pay compensation to indemnify economically assessable damage.⁶⁹ Immaterial damage to a State, is not economically assessable.⁷⁰ The adequate remedy for immaterial damage done to a State is satisfaction,⁷¹ which is effected by a declaration of the court.⁷² Therefore, Caledon is not

U.S.C.T.R. 251, 265s (1984-I); Esphahanian v. Bank Tejarat, Case No.157 (Mar.29, 1983), 2 IRAN-U.S.C.T.R. 157, 161 (1983-I).

⁶⁷ I.L.C.-Draft supra fn.57, Arts.43-45.

⁶⁸ *Supra* Chapter I.D.

⁶⁹ I.L.C. Draft, supra fn.57, Art.44; G.Schwarzenberger, 1 International Law 655ss (1957).

⁷⁰ Arangio-Ruiz, Second Report on State Responsibility, 2 Y.I.L.C. pt.1, para.15s (1989).

⁷¹ *Ibid.* 30.; I.L.C. Draft, supra fn.57, Art.45.

⁷² Corfu Channel Case, supra fn.2, 35.; Lusitania Case (U.S.A. v. Germany), (Nov.1, 1923) 7 R.I.A.A. 32, 36 (1956); Rainbow Warrior (New Zealand v. France), (Apr.30, 1990), 82 I.L.R. 499, 579 (1990).

obliged to pay compensation to Laurentia.

As to the children and families, State practice shows that compensation for immaterial damage suffered by individuals is restricted to cases of gross human rights violations, such as death, torture or other physical injuries, and arbitrary deprivation of liberty.⁷³ Mere separation by custody placement does not impose any limitation on personal liberty or freedom to act⁷⁴ and therefore does not amount to a gross human rights violation. Even if pecuniary compensation were due, it would be restricted to cases of severe suffering, which "must be real and actual, rather than sentimental and vague",⁷⁵ and in case of psychological injury directly accountable to the violation.⁷⁶

Where the children suffered mental injuries, they were caused by the disaster itself and not by the evacuation. Caledon provided psychological treatment to the children and thereby mitigated the harmful effects of the separation. If any suffering might be attributable to the evacuation, it is not severe enough to justify monetary compensation.

Even if pecuniary compensation of immaterial damage were due, in human

⁷³ Faulkner v. United Mexican States (U.S.A. v. Mexico), (Sep.Op. American Commissioner, Nov.2, 1926), 4 R.I.A.A. 67, 71 (1951); Baboeram-Adhin and Others v. Suriname, (Apr.4, 1985) 94 I.L.R. 377, 399 (1994); Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms 17 (T.VanBoven et al. eds. 1992); Lillich, Damages awarded by the U.S., in *id.* 225, 237.

⁷⁴ Wooten v. Campbell, U.S.Ct.App.(11th Circuit), 49 F.3d 696, 701 (Apr.6, 1995).

⁷⁵ Lusitania Case *supra* fn.72, 37; Campbell and Fell Case, E.Ct.H.R., (Jun.28, 1984) 78 I.L.R. 293, 346 (1988).

⁷⁶ Graefrath, *supra* fn.58, 99.

rights law solely direct victims are considered as being injured.⁷⁷ Exceptions therefrom are restricted only to close relatives, such as parents or siblings, acting on behalf of the victim in cases where the direct victim has died as a consequence of the violation.⁷⁸ The C.R.C. is designed to protect children's rights. Besides the direct victims, i.e. the children, only parents or siblings could claim damages if affected by the retention of the children.

III. CALEDON ASKS THE COURT TO AWARD TO CALEDON COMPENSATION INCLUDING LOST PROFITS FROM SALES OF CIGARETTES IN LAURENTIA DURING THE IMPORT BAN.

A. LAURENTIA HAS VIOLATED THE G.A.T.T. BY BANNING IMPORTS FROM CALEDON.

Art.XI(1) of the G.A.T.T. prohibits quantitative trade restrictions, such as total imports bans.⁷⁹ The specific exceptions of Art.XI(2) for agricultural products do not apply to manufactured products like cigarettes.⁸⁰ Since on October 29, 1995, Laurentia prohibited all imports of cigarettes from Caledon, it violated Art.XI.

Unilateral suspensions of G.A.T.T. duties towards a specific State for non-economic reasons can only be justified according to Art.XXI if taken

⁷⁷ Mas, Right to Compensation under Article 50, in The European System for the Protection of Human Rights 775, 776 (Macdonald et al. eds. 1993).

⁷⁸ Velásquez Rodríguez Case, Int.Amer.Ct.H.R., (Jul.21, 1989), 95 I.L.R. 233, 316 (1994); Mrs.W. v. United Kingdom, E.Com.H.R., (Feb.28, 1983) 32 D.R. 190, 198 (1983); X. v. Belgium, E.Com.H.R., (Dec.13, 1976) 8 D.R. 220, 221 (1977).

⁷⁹ Restrictions on Imports of Tuna (Mexico v. U.S.A.), (Sept.3, 1991), 39 B.I.S.D.Supp.155, 196s (1993); Schröder, Wirtschaftssanktionen der Europäischen Gemeinschaften gegenüber Drittstaaten, 23 G.Y.I.L. 111, 123s (1980).

⁸⁰ Restrictions on Importation and Internal Taxes in Cigarettes (Thailand v. U.S.A.), (Nov.7, 1990), 37 B.I.S.D.Supp.200, 221ss (1991).

"in times of war or other emergency in international relations" and considered necessary to protect essential security interests.⁸¹ Practice shows that the first prerequisite demands the objective existence of an extraordinarily grave conflict such as the Falkland crisis or the situation in the Middle East before 1970.⁸² States invoking Art.XXI are limited by the principle of good faith⁸³ and must maintain a balance between their security interests and compliance with the G.A.T.T.⁸⁴

As both parties have maintained friendly diplomatic relations ever since, no "emergency in international relations" in the sense of Art.XXI has occurred. Thus the import ban is not justified and violates the G.A.T.T.

B. THE VIOLATION OF ART.XI CANNOT BE JUSTIFIED AS A REPRISAL.

A violation of international law can only be justified as a reprisal if it responds to an internationally wrongful act and the damage inflicted by the reprisal is proportionate, i.e. in due relation to the initial damage.⁸⁵

⁸¹ W.Benedek, Die Rechtsordnung des GATT aus völkerrechtlicher Sicht 167ss (1990).

⁸² L/5319.Rev.1, in G.A.T.T., Analytical Index, Guide to G.A.T.T. Law and Practice [hereinafter Index], 557 (6thed.1994); Report of the Working Party on the Accession of the United Arab Republics, (Feb.27, 1970), 17 B.I.S.D.Supp.33 (1970); J.Jackson/W.J.Davey, International Economic Relations, 915s (2nded.1986).

⁸³ DeGuttry, Some Recent Cases of Unilateral Countermeasures and the Problem of their Lawfulness in International Law, 7 I.Y.I.L. 169, 174s (1986/87); Trade Measures affecting Nicaragua (U.S.A. v. Nicaragua), (Oct.13, 1986), in Index, supra fn.82, 555.

⁸⁴ Statement in the Preparatory Committee in the Geneva Session, Index, supra fn.82, 554; Decision Concerning Art.XXI of the General Agreement, (Nov.30, 1982), 29 B.I.S.D.Supp.23 (1983).

⁸⁵ Case Concerning the Air Services Agreement of 27 March 1946 (U.S.A. v. France), (Dec.9, 1978), 54 I.L.R. 306, 337 (1979); Naulilaa

Since Caledon, as shown above, has acted lawfully, the Laurentian import ban cannot be justified as a reprisal. By the allegedly illegal act, i.e. the humanitarian assistance, Caledon has in fact rescued 3,000 children. However, in response, Laurentia has imposed an import ban on Caledonian products causing severe injuries to the domestic industries to the estimated extent of U.S.\$800 million. This reaction was out of proportion.

Moreover, the G.A.T.T., as other subsystems of international law,⁸⁶ in many instances provides explicitly for responses to illegal acts and stipulates specific requirements, such as panel decisions (Art.XXIII)⁸⁷ or decisions of the U.N. Security Council (Art.XXI(c)) before reprisals can be taken.⁸⁸ In instances not explicitly provided for in the subsystem of G.A.T.T., only the CONTRACTING PARTIES may waive an obligation (Art.XXV para.5). No decision of a panel, of the U.N. Security Council or the CONTRACTING PARTIES has been rendered. Thus, the Laurentian import ban is unlawful.

C. LAURENTIA HAS TO PAY COMPENSATION INCLUDING LOST PROFITS

An injured State is entitled to obtain compensation for damage caused

Arbitration (Portugal v. Germany), (Jul.31, 1928), 2 R.I.A.A. 1011, 1028s (1949).

⁸⁶ Case Concerning U.S. Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran), 1980 I.C.J. 2, 40, (Judgment of May 24); Simma, Self-Contained Regimes, 16 N.Y.I.L. 113, 118ss (1985).

⁸⁷ McGovern, International Trade Regulation, §2.261 (2nded.1996); J.Jackson, World Trade and the Law of the GATT 164ss (1969).

⁸⁸ M.J.Hahn, Die einseitige Aussetzung von GATT Verpflichtungen als Repressalie 364ss (1996); Kuyper, The law of GATT as a special field of International Law: Ignorance, further refinement or self-contained system of international law?, 25 N.Y.I.L. 227, 251s (1994).

to its nationals from the wrongdoing State including loss of profits.⁸⁹
This also applies to cases of G.A.T.T. violations.⁹⁰

The Laurentian import ban has caused the loss of sales of cigarettes to an estimated extent of U.S.\$800 million. Thus, Laurentia is obliged to compensate for the loss sustained.

IV. CALEDON ASKS THE COURT TO DECLARE THAT THE RETALIATORY PROVISIONS OF THE LAURENTIAN SAVE THE CHILDREN ACT (S.C.A.) ARE IMPERMISSIBLY EXTRATERRITORIAL AND THEREFORE ILLEGAL, AND THAT THE DECISION OF THE COURTS OF CALEDON, DECLINING TO ENFORCE DOE V. CHILDREN'S FOUNDATION, IS CONSISTENT WITH INTERNATIONAL LAW; AND ORDER THAT LAURENTIA RETURN TO CALEDON ON BEHALF OF THE FOUNDATION THE PROPERTY SEIZED AND SOLD, OR ITS VALUE.

A. THE LAURENTIAN S.C.A. IS IMPERMISSIBLY EXTRATERRITORIAL.

As the reactions to the Helms Burton Act⁹¹ have shown, the competence to prohibit certain acts by providing liability for their commission is part of a State's jurisdiction to prescribe,⁹² i.e. the authority of a State to make its substantial law applicable to particular situations.⁹³ Where jurisdiction to prescribe concerns foreigners, a State is subject

⁸⁹ Norwegian Shipowners' Claims (U.S.A. v. Norway), (Oct.13, 1921), 1 R.I.A.A. 307, 338 (1948); L.I.A.M.C.O. v. Government of Libya, (Apr.12, 1977), 62 I.L.R. 141, 202ss (1982); A.M.C.O. Asia Corporation v. Indonesia, (Nov.21, 1984), 24 I.L.M. 1022, 1036ss (1985).

⁹⁰ Ostrihansky, Settlement of Interstate Trade Disputes - The Role of Law and Legal Procedures, 22 N.Y.I.L. 163, 206s (1991).

⁹¹ Helms-Burton-Act 1996, 35 I.L.M. 357ss (1996).

⁹² O.A.S., Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act, 1322, 1333, 35 I.L.M. (1996); Lowenfeld, The Cuban Liberty and Democratic Solidarity (Libertad) Act, Congress and Cuba: The Helms-Burton Act, 90 A.J.I.L. 419, 430ss (1996).

⁹³ 1 A.L.I. Restatement (Third) of the Foreign Relations Law of the U.S. [hereinafter Restatement], § 401 (1986); Mann, The Doctrine of Jurisdiction in International Law, 111 R.d.C. 10, 10s (1964-I).

to "limits [...] which international law places upon its jurisdiction."⁹⁴ The regulating State may only exercise jurisdiction to prescribe if there is a substantial link to the regulated action.⁹⁵ Such a link can be established by passive personality, the protective principle or the effects doctrine. The principle of passive personality, based on the link of nationality of the victim, is recognized only for grave criminal offenses such as terrorism or assassination of a State's representative, but not for ordinary torts.⁹⁶ The protective principle does not entitle a State to punish offenses against individuals, but only offenses against the sovereign power of the State, such as falsification of official documents or currency.⁹⁷ According to the effects doctrine a State may regulate conduct taking place outside its territory, but producing direct, substantial and foreseeable effects within its territory.⁹⁸ However, jurisdiction based on the effects

⁹⁴ The Case of S.S. "Lotus" (France v. Turkey) [hereinafter Lotus Case], 1927 P.C.I.J. (Ser.A) No.10, 6, 19 (Judgment of Sept.7); Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), (Sep.op. Fitzmaurice) 1970 I.C.J. 3, 105 (Judgment of Feb.5).

⁹⁵ Meng, Extraterritorialität im öffentlichen Wirtschaftsrecht 525 (1994).

⁹⁶ Restatement supra fn.93, §402, com.(g); Lotus Case, supra fn.94, (Diss.op. Weiss) 46ss.

⁹⁷ Akehurst, Jurisdiction in International Law, 46 B.Y.I.L. 145, 157s (1972/73); Harvard Research on International Law: "Jurisdiction with Respect to Crime", 29 A.J.I.L.Supp. 436, 543ss (1935); Jennings, The Limits of State Jurisdiction, 32 N.J.I.L. 209, 222s (1962).

⁹⁸ 1 A.L.I. Restatement (Second) of the Foreign Relations Law of the U.S. §18(b) (1965); Opinion of Att.Gen. Darmon in Re Wood Pulp Cartel, Ahlström et al. v. Commission of the E.C., E.C.J., Joined Cases 89/85 [1988] E.C.R. 5214 para.57 (May 25, 1988); U.S. v. Aluminum Co. of America (ALCOA), U.S.Ct.App.(2ndCircuit), 148 F.2d 416 (1945), 9 A.I.L.C. 13, 13ss (1972).

doctrine is restricted by the principle of reasonableness.⁹⁹ Whether the exercise of jurisdiction is reasonable, depends i.a. on the nationality of the person whose conduct is regulated and on the extent to which the conduct takes place on the territory of the regulating State.¹⁰⁰ Furthermore, according to the rule of foreign State compulsion, a State may not compel a person to refrain from acting as required by the law of another State and thereby place the person under conflicting orders by both States.¹⁰¹

The S.C.A establishes liability for the conduct of foreigners in foreign territory. Thus it is extraterritorial. It can be based neither on the principle of passive personality nor on the protective principle. Direct effects in Laurentia may have been caused by the adoption decisions of the Caledon courts but not by the Foundation's activities. Furthermore, all criteria of the test of reasonableness point to Caledon's jurisdiction: A Foundation incorporated in Caledon assisted the Caledonian court in rendering a decision in Caledon. Finally, the Foundation was directed by the court and was thereby obliged to

⁹⁹ Mannington Mills Inc. v. Congoleum Corporation, U.S.Ct.App.(3rdCircuit), 595 F.2d 1287 (1979), 24 A.I.L.C. 267, 275 (1984); Timberlane Lumber Co. v. Bank of America et al., U.S.Ct.App.(9thCircuit), 549 F.2d 597 (1976), *id.* 303, 317s; Lowenfeld, International Litigation and the Quest for Reasonableness [hereinafter Lowenfeld, Litigation], 245 R.d.C. 9, 59ss, 77 (1994-I).

¹⁰⁰ Restatement, supra fn.93, §403; Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law, 76 A.J.I.L. 280, 293ss (1982); Roth, Reasonable Extraterritoriality: Correcting the "Balance of Interests", 41 I.C.L.Q. 245, 256s (1992).

¹⁰¹ Interamerican Refining Corporation v. Texaco Maracaibo, Inc., U.S.Distr.Ct., 307 F.Supp 1291 (1970) 25 A.I.L.C. 22, 24s (1984); U.S. v. First National City Bank, U.S.Ct.App.(2ndCircuit), 396 F.2d 897 (1968), 9 A.I.L.C. 95, 98s (1975); Restatement, supra fn.93, §441.

participate in the procedure. Compliance with the S.C.A. would have prevented compliance with a Caledonian court order. Therefore, the S.C.A. is unreasonably extraterritorial and illegal under international law.

B. CALEDON HAS NO OBLIGATION TO ENFORCE DOE V. CHILDREN'S FOUNDATION.

In the absence of treaty provisions, there is no duty to recognize and enforce foreign judgments under general international law.¹⁰² Long-standing State practice without *opinio iuris* does not create legal obligations.¹⁰³ Recognition of foreign judgments is typically not based on *opinio iuris* but on mere comity, i.e. a voluntary unilateral decision which is not required by a rule of international law.¹⁰⁴ Though Caledon has traditionally recognized foreign judicial acts, there is no indication that it had considered itself legally bound to do so.

Furthermore, a foreign judgment is only amenable to enforcement if it was rendered on a generally accepted basis of prescriptive and adjudicative jurisdiction.¹⁰⁵ Service of process on a person only transitorily present is generally rejected as a basis of jurisdiction.¹⁰⁶

¹⁰² Akehurst, supra fn.97, 232ss; Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 A.J.C.L. 1, 4ss (1988); Lipstein, Recognition and Execution of Foreign Judgments and Arbitral Awards, 9 E.P.I.L. 322 (R.Bernhardt ed.1986).

¹⁰³ North Sea Continental Shelf Cases, supra fn.37, 41ss; Guggenheim, Lokales Gewohnheitsrecht, 11 Ö.Z.ö.R. 327s (1961).

¹⁰⁴ Maier, supra fn.100, 281; Hilton v. Guyot, U.S.Supr.Ct. 159 U.S 113 (1895), 5 A.I.L.C. 53, 54s (1972).

¹⁰⁵ Juenger, supra fn.102, 11, 12ss; VonMehren, Recognition and Enforcement of Foreign Judgments, 167 R.d.C. 13, 39, 56ss (1980-II); Seidl-Hohenveldern, International Economic Law, 198 R.d.C. 83, 149s (1986-III).

¹⁰⁶ Restatement, supra fn.93, §421 Com.(e) note.5; Lowenfeld, Litigation,

In addition, for reasons of immunity, courts have no adjudicative jurisdiction over claims arising from the exercise of sovereign power by foreign State officials and private persons in charge of activities *iure imperii*.¹⁰⁷

Ms.Montaigne stayed in Laurentia for only one month in order to visit a Rehabilitation Center. Therefore she was only transitorily present in Laurentia when she was served with process. Finally, the Foundation and Ms.Montaigne were directed by the Caledonian court to notify official documents and thus fulfilled tasks *de iure imperii* for which they enjoyed immunity. Hence, Laurentia had no sufficient basis neither for adjudicative nor for prescriptive jurisdiction¹⁰⁸ and Caledon is not bound to enforce *Doe v. Children's Foundation*.

Even if there were a duty to recognize foreign judgments, States may invoke their *ordre public* to decline enforcement.¹⁰⁹ States have a wide discretion to determine their *ordre public*,¹¹⁰ *i.e.* to determine which provisions are so essential to the domestic legal order that they must

supra fn.99, 81ss; VonMehren, *supra* fn.105, 63; Juenger, *supra* fn.102, 13s.

¹⁰⁷ Restatement, *supra* fn.93, §451 com.(a); Oppenheim, *supra* fn.60, 342ss; Jennings, The Caroline and McLeod Cases, 32 A.J.I.L. 82, 92ss, (1938); Bothe, Die strafrechtliche Immunität fremder Staatsorgane, 31 Z.a.Ö.R.V. 246, 247ss (1971).

¹⁰⁸ *supra*, Chapter IV.A.

¹⁰⁹ Lipstein, General Principles of Private International Law, 135 R.d.C. 97, 169s (1972-I); Juenger, *supra* fn.102, 21s; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Jul.28, 1990, Art.27(1) 29 I.L.M. 1417, 1424 (1990).

¹¹⁰ Guardianship Case, *supra* fn.27, (Sep.Op. Lauterpacht), 100; Seidl-Hohenveldern, *supra* fn.105, 149 (1986).

necessarily exclude the application of any contradicting rule.¹¹¹ The Supreme Court of Caledon sustained that imposing individual civil liability on officials for acts undertaken in order to effect implementation of a gubernatorial decree violates Caledon's *ordre public* (para.23). Thus, Caledon need not enforce *Doe v. Children's Foundation*.

Laurentia's claim on behalf of Mr. and Mrs. Doe includes U.S.\$5 million in punitive damages. However, under international law punitive damages are usually not assessed in interstate disputes.¹¹² Since they are designed to punish offenders and to deter the general public¹¹³ and the legal systems of many States reserve punishment to criminal courts, enforcement of punitive damages is broadly rejected.¹¹⁴

Even where punitive damages are recognized, they may only be awarded if the defendant acted maliciously.¹¹⁵ In any event, it is a basic human right that punitive awards may not be based on retroactive

¹¹¹ Guardianship Case, *supra* fn.27, (Sep.op. Spender), 122; Lipstein, The Hague Conventions on Private International Law, Public Law and Public Policy, 8 I.C.L.Q. 506, 517ss (1959).

¹¹² Lusitania Case, *supra* fn.72, 40; Portugal v. Germany, (Jun.30, 1930), 5 A.D. 200, 200ss (1935); U.S.Department of State, Diplomatic Note, (Jul.8, 1957), 63 I.L.R. 37s (1982); Garcia-Amador, State Responsibility, 94 R.d.C. 365, 479 (1958-II).

¹¹³ Brand, Punitive Damages and the Recognition of Judgments, 43 N.I.L.R. 143, 143ss (1996); J.Rosengarten, Punitive Damages und ihre Anerkennung und Vollstreckung in der B.R.D. 47ss (1993).

¹¹⁴ Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages, Ger.Supr.Ct., IX-ZR-149/91, (Jun.4, 1992), 32 I.L.M. 1320, 1336ss (1993); Oregon Partnership v. Yoshitake Karayama, Jap.H.Ct.(Tokyo), H.J.(1471).89 [1993] (Jun.28, 1993), 37 J.A.I.L. 155, 158s (1994).

¹¹⁵ Hill v. Church of Scientology, Can.Supr.Ct., [1995] 2 S.C.R. 1130, paras.196s (Jul.20, 1995); Whiteman, 1 Damages in International Law, 716ss (1937).

legislation.¹¹⁶

The Foundation, as a non-profit organization, did not participate in the adoption proceeding to its own advantage, but assisted upon a court-order in the search for relatives of the children. There is no indication for malicious intent of the Foundation. The S.C.A was enacted in June 1996, but is applicable to proceedings from June 1995 on. Thus it was enacted retroactively.

For all these reasons, Caledon is not bound to enforce Doe v. Children's Foundation.

C.LAURENTIA IS OBLIGED TO RETURN THE SOLD PROPERTY OR ITS VALUE TO CALEDON.

If the seizure of property of foreign nationals is effected in excess of jurisdiction, it violates international law and entails the duty to retribute or compensate the damage.¹¹⁷

Since the decision in Doe v. Children's Foundation and its enforcement, as shown above, lacks a sufficient basis for jurisdiction, Laurentia has to undo the enforcement acts and to return the sold property or its value.

¹¹⁶ E.g. U.D.H.R., *supra* fn.3, Art.11.

¹¹⁷ Akehurst, *supra* fn.97, 169s; Mann, *supra* fn.93, 10, 11s; Becket, The Exercise of Criminal Jurisdiction over Foreigners, 6 B.Y.I.L. 44, 59ss (1925).