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JUANA OLIN (PETITIONER)

v

.

THE STATE OF IBEROIAAND (RESPONDENT)

MEMORIAL FOR THE STATE

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STATEMENT OF FACTS

- I. The State of Iberoland
 1. Iberoland is a State member of the Organization of American States (OAS). Until 1887, Iberoland relied heavily upon manual labor from the more than fifteen million slaves that were shipped from Africa to support the agricultural economy.
 2. The northern and southern regions of Iberoland are quite separate due to the climatic differences and unequal distribution of natural resources. The population of the south is composed of mostly European descendants, while mostly African descendants and an economically and socially dominating white majority populate the north.
 3. Due to the economic and racial differences between the two regions, Iberoland eventually chose a federal system of government to provide autonomy to its regional governments while giving the central government control over some basic functions in order to provide a measure of cohesion to the country. Iberoland consists of sixteen provinces and the capital, a metropolitan district.
 4. The current 1988 Constitution distributes power between the provincial governments and the central government.
- II. Education in Iberoland and North Shore
 5. The population of African-descendants in Iberoland has received unequal access to education ever since their status as slaves or children of slaves prohibited them from attending school. The province of North Shore had a racially segregated school system until 1922, when pressure from the Federal government and constitutional pressures convinced North Shore to eradicate the system.

6. Even though the school systems in North Shore were integrated after 1922, educational resources are given unequally between the predominantly white and predominantly African-descendant school districts, with almost 80% of the budget going to the predominantly white districts.
7. At the University of North Shore, the percentage of students and professors of African descent is also lower than of whites. In order to limit the number of admitted students, the University of North Shore makes 250 spaces available for incoming students, which the Federal Supreme Court declared to be constitutional. In order to be admitted, applicants are evaluated upon their grade point average (GPA), a personal interview and a general admissions exam. Students must surpass the University's minimum standards in these areas in order to be considered for admission and there are typically more applicants that meet these standards than spaces available. The percentage of students of African descent in the last 10 years has b

presidential incentives through legislation and the Federal Supreme Court has declared most of the programs constitutional.

In 1999, Congress adopted Law No. 678, whose objective was to increase
diverto increase

students of African descent because of her family's financial difficulties and her high academic achievements.

14. Ms. Olin applied to the University of North Shore in 2000. Her grades were above the minimum required by the University and she also passed the admissions exam and the personal interview. However, she was one of the 137 students who were not admitted to the University. Ms. Olin did not apply to other universities in the country because her mother is in declining health.

V. Procedural History 0s1TJ 0.000329TD [(15)Tj /TT1 1 Tf ()Tj /TT0 1

16. On February 25, 2002, the Federal Supreme Court ruled against Ms. Olin. The Court discussed the racial equality within the country and determined that, under the Constitution, public institutions should implement affirmative action policies, such as quotas, as long as they do not alter the distribution of power between the Federal government and the provinces. Since Law No. 678 pertained to education, which Article 5 of the Constitution clearly deems within the purview of the provinces, Law No. 678 invaded the private sphere of the provinces, and was therefore unconstitutional. The Court also analyzed whether North Shore was obligated to adopt a policy of affirmative action and concluded that while affirmative action is desirable, there is no constitutional foundation for such policies. Therefore, the Court held, Ms. Olin is not entitled to demand implementation of affirmative action.

18. On January 1, 2004, the Commission presented the case before the Inter-American Court of Human Rights and argued that Iberoland violated the American Convention on Human Rights, Articles 1, 2, 24 and 28; the Additional Protocol to the American Convention on Human rights or the "Protocol of San Salvador," Article 13; and the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women or the "Convention of Belem do Para," Articles 6(a), 7 and 9. Iberoland did not interpose preliminary exceptions in the case, but in its answer to the complaint of the Commission, it maintained it did not violate any articles in the American Convention, the Protocol of San Salvador or the Convention of Belem do Para.
19. Iberoland ratified the American Convention on Human Rights and accepted the jurisdiction of the Inter-American Court of Human Rights on October 5, 1971. The State ratified the Protocol of San Salvador on May 23, 1989 and signed the Convention of Belem do Para on February 25, 1998.

LEGAL ANALYSIS

I. JURISDICTION OF THE COURT

This Honorable Court has jurisdiction to hear this case. The State of Iberoland is a member of the Organization of the American States and accepted the jurisdiction of the Inter-American Court of Human Rights on October 5, 1971. The State of Iberoland has

¹ Hypo ¶ 32. The Abella case and Article 29(b) of the American Convention on Human Rights also require that the Court apply the most liberal human rights regime to the Petition. *Abella v. Argentina*, Case 11.137, ¶¶ 164-165, OEA/Ser.L/V/II.98, doc. 7 rev. (1997); Organization of American States, American Convention on Human Rights Article 29(b) (1969).

In accordance with Article 32(1) of the ~~Rules~~ of Procedure of the Inter-American Commission⁸, the Petitioner has satisfied the timeliness requirement. The Supreme Court of Iberoland notified Juana Olin of the decision on March 15, 2002 and she presented her petition to the Inter-American ~~Commission~~ Commission on Human Rights on September 10, 2002.⁹ This complies with the six-month timeliness requirement.

II. IBEROLAND IS MAKING TR E MENDOUS PROGRESS TOWARDS ITS GOAL OF PROVIDING EQUAL OPPORTUN ITY IN ALL SPHERES OF LIFE FOR EACH OF ITS CITIZENS, REGARDLESS OF RACE OR ETHNICITY.

A. Iberoland Has Met All of its International Human Rights Treaty Obligations

B. Iberoland Has Moved Resolutely Forward to Grant All of its Citizens Every Requisite Right and Freedom Enshrined Within All International Treaties to Which it is a Party, in Keeping with Article 1(1) of the Convention.

Petitioner argues that Iberoland is in violation of Article 1 of the American Convention on Human Rights. Article 1(1) of the Convention recognizes that:

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

In keeping with Article 1(1) of the Convention, Iberoland under the leadership of President Juan Achebe, has moved resolutely forward to grant greater equality among its different racial sectors, particularly to improve the situation of its citizens, like petitioner, who are of African descent.

C. Iberoland Has Taken Measures in Accordance With Article 2 of the Convention, to Promote Racial Equality Throughout the Nation.

The Commission alleges that Iberoland has violated Article 2 of the Convention, which states that:

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms

The Administration of Iberoland President Juan Achebe has in fact enacted a sweeping array of affirmative action legislation in the nine years since it assumed office.¹⁰

Article 39 of the Federal Constitution of Iberoland states that:

¹⁰ Hypo ¶ 15-17.

the Federal Congress shall have the power to legislate and promote affirmative

States.¹³ It is with this spirit in mind that Iberoland continues to promote racial equality on a national level.

III. IBEROLAND IS WORKING TO ELIMINATE ALL FORMS OF DISCRIMINATION BASED UPON RACE AND ETHNICITY WITHIN EACH OF THE STATE'S CONSTITUENT PROVINCES, IN KEEPING WITH ITS COMMITMENTS AS A SIGNATORY TO ALL RELEVANT INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES.

The Human Rights Committee, the treaty body of the United Nations Covenant on Civil and Political Rights, states that State parties to the Covenant may choose the method of implementation in their territories of their treaty obligations.²⁶ The facts do not state whether Iberoland has signed or ratified the Covenant on Civil and Political Rights, but it can be used as a guide to interpret the American Convention, approaching the level of customary international law.²⁷ Here, Iberoland declares that it has done all that it can to provide for the higher education of the petitioners within the constraints of its federal government structure and its reading of the obligations of State parties to the American Convention.

Since assuming office in 1996, the Achebe Administration has developed a series of policies, incentives and programs to achieve greater equality among the different racial sectors, particularly to improve the situation of the citizens of African descent.²⁸ Iberoland immediately felt the positive results from these efforts. In the last five years, there has been a decrease in the rate of infant mortality, malnutrition, unemployment, and illiteracy among those of African descent.²⁹ In addition, income levels have increased, as well as the indexes of access to basic services such as potable water.³⁰ As Iberoland has a federal system of government, the Federal Congress of Iberoland has used its legislative power to support a great part of the presidential incentives in this area.³¹ The Federal

constitutionality of the great majority of the programs proposed by the Achebe administration.³²

Article 5 of the Federal Constitution of Iberoland states:

[e]ach province shall dictate its own Constitution and shall guarantee said Constitution respects the democratic principles consecrated in the Federal Constitution. The provinces will have exclusive power regarding the security of its citizens, the administration of justice and education

It is readily acknowledged by the Federal government of Iberoland that the province of North Shore, where petitioner resides her home, is perpetuating the racially discriminatory policies that have been a hallmark of its existence for many years. What must be realized in the case before us is that of the 16 provinces that make up the constituent parts of Iberoland, 15 have embraced and implemented the reform agenda advanced by the Achebe administration.³³ The province of North Shore stands as the lone holdout against the inexorable tide of equality-fostering measures that are sweeping Iberoland.

B. Iberoland is Steadily Implementing Equal Rights Measures Throughout the Country Which are Bringing Dramatic Improvements to the Quality of Life of its Minority Citizens.

The State of Iberoland is accomplishing the advancement of the human rights ideals enshrined in the American Convention on Human Rights and other international and regional human rights treaties through the process of fostering the gradual implementation of progressive policies in each of the 16 provinces that make up the federal State. According to the federal provisions of the Iberoland Constitution, each of Iberoland's 16 constituent provinces has exclusive control over all matters pertaining to

³² Id.

³³ Hypo ¶ 18.

the American States must be respected by the American States Parties to the respective conventions, regardless of whether their federal or unitary structure.

The present case is distinguishable from *Garrido*, however. Article 28 is constructed to allow the constituent units of federal states to handle responsibilities that are not within the purview of the federal government. *Garrido*, Argentina had conducted itself as if the federal State had jurisdiction over human rights matters, but then invoked Article 28 to argue that the matter at issue in the case, while clearly related to human rights, was the responsibility of the Province of Mendoza, and not the federal state.

In the case before us, it has been clear from the outset that according to Article 5 of the Federal Constitution of Iberoland, education is the exclusive responsibility of the provinces and not the federal government. The Supreme Court finding *Orlin* stood for the proposition that within a federal state, responsible government parties must be engaged in good-faith efforts within the parameters of the federal system of governance, to implement all international treaty obligations to which that State is party. As long as this is so, then that State cannot be found deficient in its treaty implementation obligations. In keeping with the requirements of the Convention, and more particularly Article 28, Iberoland has made significant strides in bettering the lives of its citizens of African descent, with tangible results, every province of Iberoland, save one.

D. Iberoland Takes its International Treaty Obligations Seriously and is Actively Implementing Legislation to Bring its National Laws into Full Compliance with Those Obligations.

International treaties, such as the United Nations International Convention on the Elimination of all Forms of Racial Discrimination, provide for “special and concrete measures to ensure the adequate development and protection of certain racial groups or

individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”³⁸

Iberoland has made enormous strides in bringing racial equality to all spheres of life to its citizens. Iberoland’s highest court has ruled that the executive and legislative branches of the federal government do not have the ability to force the provinces to adopt federal programs that pertain to education. In like manner, the court ruled that while affirmative action programs are desirable, there is no foundation in the Iberoland Constitution for such an obligation. This Court should find that Iberoland is complying with its obligations as party to the Convention.

IV. JUANA OLIN IS NOT ENTITLED TO AFFIRMATIVE ACTION FOR EDUCATION.

A. There is No Explicit Guarantee of the Right to Education in the American Convention on Human Rights

The American Convention on Human Rights makes no provision for the “right to education” for a state’s citizens, though Article 1 of the ACHR guarantees the freedom from discrimination based on a person’s race, sex, economic status, and several other social conditions.³⁹ Article 2 requires States to implement the rights and freedoms enshrined in the Convention into national legislation if they are not already guaranteed.⁴⁰ Article 24 provides that citizens are entitled, “without discrimination, to equal protection of the law.”⁴¹ Finally, Article 28 requires federal states to “implement all the provisions

³⁸ International Convention on the Elimination of all Forms of Racial Discrimination (CERD), Article 2 ¶ 2.

³⁹ American Convention on Human Rights Article 1, 1144 U.N.T.S. 123 (1969).

⁴⁰ Id. at Article 2.

⁴¹ Id. at Article 24.

to education.⁴⁵ Article 13(3)(c) further provides that, in order to achieve the full exercise of the right to education, "Higher education should be made equally accessible to all, on the basis of individual capacity . . ." Article 13(5) also guarantees that there should be no restriction on the freedom of individuals and entities to direct educational institutions in accordance with domestic legislation.⁴⁷

E. Juana Was Evaluated on the Basis of Individual Capacity

In her claim, Juana never states that the standard of individual capacity was breached.⁴⁸ She was evaluated based upon her GPA, the admissions exam and the personal interview, competing for admission against all students from North Shore, not just Murano students.⁴⁹ It is quite possible that Juana may not have measured up to the standard set by other North Shore students despite the fact that she surpassed the minimum standards set by the University.⁵⁰ In addition, since domestic legislation does not enforce a quota system, and this policy was affirmed by the Supreme Court of Iberoland,⁵¹ the University of North Shore cannot be forced to accept additional students to conform to a "quota." Therefore, the provisions of the Protocol of San Salvador are inapplicable.

F. The International Covenant on Economic, Social and Cultural Rights (ICESCR) Guarantees Higher Education on the Basis of Capacity

⁴⁵ Additional Protocol to the American Convention on Human Rights "Protocol of San Salvador" Article 13(1), OAS T.S. No. 69 (1988).

⁴⁶ Id. at Article 13(3)(c).

⁴⁷ Id. at Article 13(5).

⁴⁸ Hypo ¶ 24.

⁴⁹ Id. at ¶ 23.

⁵⁰ Id.

⁵¹ Id. at ¶ 26 and 27.

Article 13 of the International Covenant on Economic, Social and Cultural Rights requires States to recognize the right of everyone to education.⁵² In view of this right, primary education is to be compulsory and free, secondary education shall be made generally available and accessible to everyone by all appropriate means, and higher education shall be made accessible to all on the basis of capacity and by every appropriate means.⁵³ Secondary and higher education shall have the progressive introduction of free education.⁵⁴

The Committee on Economic, Social and Cultural Rights (ECOSOC) further explains the accessibility requirements under Article 13(2)(d).⁵⁵ There are three dimensions of accessibility: non-discrimination, physical and economic.⁵⁶ Education must be accessible to everyone on the basis of capacity, especially to the most vulnerable

achievement⁶⁰. Admission to the University of North Shore level education is based on individual capacity – students are evaluated on their grade point average, an admissions exam, and a personal interview.⁶¹ Through this system, students receive equality in opportunity for higher level education, though not all who meet the minimum standards are admitted due to the cap on enrollment space.⁶² The Federal Supreme Court has declared this system to be constitutional.⁶³ This cap is not discriminatory and does not exist to prevent women, the socio-economically disadvantaged, or those of African descent from attending the University. It exists merely to limit the number of attendees to a number that the University can feasibly accommodate.⁶⁴ There are typically always a greater number of students who meet the minimum standards than the number that can be admitted.⁶⁵ Since North Shore does make primary and secondary education available to all and higher education is available to all based on individual capacity, Iberoland is compliant with Article 13 of the ICESCR.

V. JUANA OLIN'S REJECTION FROM THE UNIVERSITY OF NORTH SHORE CANNOT BE CONSIDERED "VIOLENCE AGAINST WOMEN" UNDER ARTICLES 6(a), 7 AND 9 OF THE "CONVENTION OF BELEM DO PARA."

A. Guarantees of the "Convention of Belem Para"

The Petitioner alleges that the State violated the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, or the "Convention of Belem do Para," particularly Articles 6(a), 7 and 9.⁶⁶ Article 6(a) states the right of every woman to be free from violence includes the right to be free from all

⁶⁰ Id. at ¶ 22.

⁶¹ Hypo ¶ 13.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Hypo ¶ 29.

forms of discrimination.⁶⁷ Article 7 establishes several measures for State governments to eradicate, punish and prevent violence towards women through proactive legal and legislative measures.⁶⁸ Article 9 requires States parties to “take special account of the vulnerability of women to violence by reason . . . their race or ethnic background . . . [and are] socio-economically disadvantaged . . .”⁶⁹

B. The State Did Not Commit Violence Against Women

Article 1 defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”⁷⁰ Since Juana’s rejection from the University of North Shore does not cause death or physical or sexual harm or suffering, these factors are irrelevant. In order to cause psychological harm or suffering, the act or conduct must be based on gender.⁷¹ Since the facts do not state that gender was mentioned or a factor in her rejection from the University of North Shore, the assumption that she was rejected because she is a woman is unfounded.

C. Case Histories of Violence Against Women

In cases from the European Court of Human rights that address “violence against women,” the cases only refer to acts of physical violence, rape and sexual harassment. In the Case of M.C. v. Bulgaria⁷² the fourteen-year-old applicant had been raped by two men and the police and prosecutor performed an inadequate investigation. In the Case of thw (ra Td [67.i 1

M.M. v. The Netherlands⁷³ the applicant was sexually harassed and intimidated by her husband's attorney. These cases are quite distinguishable from our case, where the violence alleged is lack of admission to a desired university.

D. The "Convention of Belem do Para" is Inapplicable in This Case

Since it cannot be proved that Juana was denied admission to the University of North Shore based on her gender, Article 6 (guarantee that women should be free from all forms of discrimination does not apply) this situation. In addition, denial of admission to a university cannot be considered an act of violence towards women, so the measures in Article 7 that eliminate and prevent violence against women are also inapplicable. Finally, since violence against Juana because she is a woman cannot be proved in this case, Article 9 does not apply even though she is of African descent and from a lower socio-economic region of North Shore. Therefore, the Convention of Belem do Para does not apply.

VI. JUANA OLIN DID NOT EXPERIENCE GENDER DISCRIMINATION PROHIBITED BY THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW).

A. CEDAW Requires Equality of Opportunity for Men and Women

Article 10 of CEDAW requires States parties to "take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education . . .".⁷⁴ Equality of opportunity and access to educational conditions is guaranteed, especially by subsections (a): "same conditions for . . . access to studies and for the achievement of diplomas educational establishments of all categories" and (e): "same opportunities for access to programmes of continuing

⁷³ Case of M.M. v. The Netherlands, Judgment, Application no. 39339/98 (2003).

⁷⁴

education.⁷⁵ These guarantees do not establish a quota system in order to implement equality.

B. The Commission on the Status of Women (CSW) States the Necessity of Equal Access to Education

In the Beijing Platform for Action, Critical Area of Concern B “Education and Training for Women,” the CSW emphasized the need for Governments to take measures to eliminate discrimination in education on all levels and to provide universal access to basic education.⁷⁶

the students who were admitted scored on these criteria. The University admitted students based upon their grades, admissions scores, and the personal interview.⁸⁰ Therefore, it fulfilled its obligation to give equal opportunity for all interested students to apply and they chose the students with the highest possible grades and scores. Thus, there was no violation of Article 10 CEDAW since Juana was given an equal opportunity to apply but was not admitted.

VII. IBEROLAND IS FULLY COMPLIANT WITH THE REQUIREMENTS TO ERADICATE AND PREVENT RACIAL

B. Case History of the Legality of Quotas to Ensure Equality

In *B.M.S. v. Australia*,⁸⁵ the Petitioner made a complaint to the Committee on the Elimination of Racial Discrimination, alleging that the quota system allowing only a certain percentage of foreign-educated doctors to take a series of examinations that would allow them to practice in Australia was discriminatory. The Petitioner made a concurrent complaint to the Human Rights and Equal Opportunity Commission (HREOC), which decided to abolish the quota system, finding it racially discriminatory.⁸⁶ The Commission also stated that as long as quotas are not racially discriminatory, they can be legal, which the Committee on the Elimination of Racial Discrimination affirmed.

would bring about racial equality.⁹² A notable exception is the United States of America, which states “The United States does not accept any obligation under this Convention, in particular . . . Article 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States,” referring to the Equal Protection Clause of U.S. Constitution amendment XIV.⁹³ In two significant U.S. Supreme Court cases, the court decided that any government programs that gave preferential treatment to contractors based on race must undergo a strict scrutiny standard of review and the government must show a compelling state interest to support them, in order not to violate the Constitution’s Equal Protection Clause.⁹⁴

In another U.S. Supreme Court case, the court found that a law school’s admissions policy that analyzed each applicant’s talents, experiences, potential to contribute to the learning environment, as well as race and ethnicity, furthered the school’s “compelling interest” to increase diversity and minority representation among the student body.⁹⁵ Rather than using quotas, the school used this narrow use of race consideration, alongside many other factors, which did not violate the Equal Protection Clause.⁹⁶ Finally, when U.S. President Johnson transferred authority to the Secretary of Labor to develop affirmative action policies, the Department of Labor, several years later, issued Revised Order No. 4, which set goals to increase the presence of minority groups,

⁹² Office of the High Commissioner for Human Rights, Treaty Body Database (International Convention on the Elimination of all Forms of Racial Discrimination) <http://www.unhcr.ch/tbs/doc.fr/Statusfrset?OpenFrameSet> (last accessed 3/19/06).

⁹³ International Convention on the Elimination of All Forms of Racial Discrimination, Reservations, Understandings and Declarations, 40 Cong. Rec. 14326 (1994).

⁹⁴ City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors v. Peña, 515 U.S. 200 (1995).

⁹⁵ Grutter v. Bollinger, 539 U.S. 306, 320 (2003).

⁹⁶ Id. at 321.

but specifically barred “rigid and inflexible quotas.”⁹⁷ In the same way, Iberoland also

exclusive jurisdiction over educational policies under the Constitution.¹⁰⁴ Since the Government of Iberoland did not have an initiative to promote racial equality in education and it was adopted by those provinces who exist, Iberoland has also complied with Article 7 of CERD. Consequently, Iberoland has acted in accordance with all of the applicable Articles of CERD.

VIII. CONCLUSION

The State of Iberoland did not discriminate against Juana Olin based on any category of protected persons, whether gender, economic status, etc. To the contrary, Iberoland has been making great strides in the past decade to promote equality among all segments of the population.

REQUEST FOR RELIEF

Wherefore Respondent requests this Court:

- (1) Find the State in compliance with the American Convention on Human Rights Articles 1, 2, 24, and 28;
- (2) Find the State in compliance with the Additional Protocol to the American Convention on Human Rights, the “Protocol of San Salvador,” Article 13;
- (3) Find the State in compliance with the Inter-American Convention to Prevent, Sanction, and Eradicate Violence Against Women, the “Convention of Belem do Para,” Article 7 in connection with Articles 6(a) and 9.

¹⁰⁴ Id. at ¶ 18 and 19.