Team No. 205

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JUANA OLIN (PETITIONER)

v

.

THE STATE OF IBEROLAND (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 disparate 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 politically 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 federal 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 been between 1.2 and 7.3 percent.

III. Political Changes in Iberoland

8. In 1996, Iberoland experienced a drastic political change. The Party for Equality (PI), which ran on a platform based on the elimination of all racial inequalities, won the Presidency and the gubernatorial races of ten of the sixteen provinces of Iberoland. The President, Juan Achebe, became the first citizen of African descent to become President. An overwhelming majority reelected him in 2001.

9. Since Achebe was elected, the administration began developing several policies, incentives and programs to promote greater racial equality and to improve the lives of the citizens of African descent. The Federal Congress has supported the

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 diversity, especially in the public universities. The law became effective in 2000 in 15 of the 16 provinces that adopted the statute. The population of students of African descent increased about 150 to 300 percent in the next three years.

10. The province of North Shore refused to apply Law No. 678 in 2000, stating that: 1) The regulation of all that is related to university education corresponds to the provinces of the federation and not to the Federal Government, 2) The quota system is unconstitutional because it is discriminatory, and 3) The province was not obligated to adopt a system of affirmative action.

11. In 2000, North Shore applied its traditional admissions system. Out of 1,025 applicants, 387 students exceeded the minimum standards. Since only 250 spaces were available, 137 eligible applicants were not admitted. Out of 97 eligible students of African descent, 10 were admitted.

IV. Juana Olin

12. Juana Olin is an 18-year-old student of African descent from Murano, the capital of North Shore. She attended a primarily African-descendant school and achieved the top grades in her class.

13. Ms. Olin's family benefited from several federal programs established by Achebe's administration, such as free admission to the federal health plan and low interest credit for a small business for her father. Ms. Olin also received successive scholarships from the Federal Government that were exclusively for

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

15. After her rejection from the University of North Shore, Ms. Olin filed a lawsuit against North Shore, claiming that Law No. 678 had been violated. She won in the district court, so the Attorney General of North Shore appealed and the Federal Court of Appeals ruled in favor of the province. Therefore, Ms. Olin appealed to the Federal Supreme Court on October 5, 2001, asking the Court to declare: 1) That the Federal State was empowered to legislate issues promoting equality, including the admission of students to provincial universities, due to the constitutional norms and the State's international obligations, and 2) That the quota system established by Law No. 678 was constitutional. Alternatively, Ms. Olin asked the Court to establish that North Shore was required to adopt a system of affirmative action similar to the one adopted on the national level. The Attorney General of Iberoland, on behalf of the Executive Branch, as well as the President of the Federal Congress, submitted briefs supporting Ms. Olin's positions.

16. On February 25, 2002, the Federal Supreme Court ruled against Ms. Olin. The Court discussed the racial inequality within the country and determined that, under the Constitution, public institutions could implement affirmative action policies, such as quotas, as long as they did 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.

V. Inter-American System

17. Ms. Olin was notified of the Supreme Court's ruling on March 15, 2002 and presented her petition to the Inter-American Commission on Human Rights on September 10, 2002. During the celebration of a hearing before the Commission on March 1, 2003, the Government of Iberoland, as is its practice, offered to make an agreement with Ms. Olin. Ms. Olin was offered the possibility of applying to other provincial institutions that had complied with Law No. 678, and a scholarship for her studies. Ms. Olin responded in a note to the Commission on April 15, 2003, stating that she was unable to attend a university far from North Shore because her mother was in poor health and that North Shore's failure to offer another solution prevented a resolution of the process.

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 complaints 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.[1] 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 Petitioner. *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).

also ratified the American Convention on Human Rights and the Protocol of San Salvador and signed onto the Convention of Belem do Para.[2]

A. Domestic Remedies Have Been Exhausted

Pursuant to Article 46(1)(a) of the American Convention on Human Rights,[3] Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights[4] and the decision by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case,[5] the Petitioner has exhausted all domestic remedies.

The Petitioner's case, alleging violations of the quota system established by Law No. 678 and a failure by the government to enforce the law in the province of North Shore, went through the entire judicial process, from the local district court to the Federal Court of Appeals and finally to the Federal Supreme Court, which ruled against her.[6] Since the Petitioner exhausted all of her domestic remedies and the Supreme Court, through extensive legal analysis, found that she did not have a right to demand the adoption and implementation of the quota system in Law No. 678[7], she was given adequate legal opportunity to pursue her rights. Therefore, an appeal to the Inter-American Commission on Human Rights is unnecessary.

B. The Timeliness Requirement Has Been Satisfied

[2] Hypo ¶ 32.
[3] Organization of American States, *American Convention on Human Rights Article 46(a)(1)* (1969).
[4] Organization of American States, *Rules of Procedure of the Inter-American Commission on Human Rights Article 31* (2003).
[5] Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, 4 Inter-Am. Ct. H.R. (ser. C) (1988). The Court affirmed Article 46 of the Convention, stating that all domestic remedies must be exhausted unless there was a violation of due process, denial of access to domestic remedies or unwarranted delay. None of these exceptions apply here.
[6] Hypo ¶ 24-27.
[7] Hypo ¶ 26.

In accordance with Article 32(1) of the Rules of Procedure of the Inter-American Commission,[8] the Petitioner has satisfied the timeliness requirement. The Supreme Court of Iberoland notified Juana Olin of their decision on March 15, 2002 and she presented her petition to the Inter-American Commission on Human Rights on September 10, 2002.[9] This complies with the six-month timeliness requirement.

II. IBEROLAND IS MAKING TREMENDOUS PROGRESS TOWARDS ITS GOAL OF PROVIDING EQUAL OPPORTUNITY 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 to Provide Petitioner With the Opportunity to Obtain a University Education, Within the Parameters of the State's Federal System of Government

The Commission alleges four breaches of the American Convention on Human Rights, specifically Articles 1, 2, 24, and 28. The Commission's case before this Court offers the sovereign State of Iberoland the opportunity to express to the Court its firm belief that it has offered petitioner every opportunity to further her education within the parameters of Iberoland's federal system of government.

The State of Iberoland is in full compliance with the obligations of each of the international and regional instruments to which it is a signatory. In keeping with the object and purpose of the American Convention on Human Rights, the Republic of Iberoland posits that far from sitting in violation of Articles 1, 2, 24 and 28, the government's actions regarding the petitioner here, Ms. Juana Olin, have in fact upheld the ideal of furthering the advancement of human rights that is embodied by the Convention.

[8] Organization of American States, *Rules of Procedure of the Inter-American Commission on Human Rights Article 32(1)* (2003).
[9] Hypo ¶ 28.

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 action measures to guarantee equal treatment, equal access of opportunity and equal and full enjoyment and exercise of the Federal Constitution's recognized rights, as well as of the human rights guaranteed in the international agreements ratified by Iberoland.

Among the programs initiated by President Achebe's administration, the Federal Congress of Iberoland enacted Law No. 678 in 1999 to promote racial equality.[11] One of the objectives of the law is to foster diversity among the student body, particularly in public universities.

D. Iberoland's Actions to Promote Equality for its Citizens of African Descent Line up Squarely with the Goals of the Organization of American States Special Rapporteurship on the Rights of Persons of African Descent and Against Racial Discrimination.

In keeping with the spirit of the Organization of American States (OAS) Special Rapporteurship on the Rights of Persons of African Descent and Against Racial Discrimination, created during the 122nd sessions of the OAS, the administration of President Achebe is committed to bettering the lives of its citizens of African descent. The OAS Special Rapporteurship on the Rights of Persons of African Descent and Against Racial Discrimination was established by the OAS in keeping with the Inter-American Democratic Charter.[12]

This Court has recently ruled that norms prohibiting any kind of discrimination are *erga omnes* or *jus cogens*, and due to their peremptory nature, must be observed by all

[11] Hypo ¶ 17.
[12] Dr. Clare Roberts, Special Rapporteur on the Rights of Persons of African Descent and Racial Discrimination of the Inter-American Commission on Human Rights and President of that Commission; Presentation by Dr. Clare Roberts- Working Group to Prepare a Draft Inter-American Convention Against Racism and all Forms of Discrimination and Intolerance; October 20, 2005- Washington, DC, Organization of American States.

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.

While the Commission alleges a violation of Article 24 by Iberoland, the State rejects this accusation. According to Article 24 of the Convention, "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." As discussed in answer to the Commission's allegation of violations of Articles 1 and 2 of the Convention, Iberoland reiterates that the present administration is making great strides in living up to the human rights ideals enshrined in its Federal Constitution as well as the Convention. Petitioner and her family benefited from various federal programs implemented by President Achebe.[14] She and her family were incorporated into the federal health plan free of cost and her father was able to obtain low interest credit designated for small business projects.[15] In addition, due to her outstanding academic achievements and her family's difficult financial situation, petitioner received successive scholarships from the federal government of Iberoland that were exclusively set aside for students of African descent.[16]

A. Pursuant to Both Sections of Article 28 of the Convention, Iberoland Has Employed Every Legal Device at its Disposal to Ensure That its Citizens of African Descent are Afforded Comprehensive Equal Rights Protections.

[13] Inter-American Court of Human Rights (Inter-Am. Ct. H.R.), Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, September 17, 2003, ¶110.
[14] Hypo ¶ 22.
[15] *Id.*
[16] *Id.*

The Commission alleges that Iberoland sits in violation of Article 28 of the Convention, which is known as the Federal Clause. Article 28(1) states:

> [w]here a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction

Article 28(2) of the Convention provides that:

> [w]ith respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

The Inter-American Commission has interpreted Article 28 of the Convention in two cases concerning Mexico as imposing on the central government responsibility for implementing the Convention regardless of its constitutional division of powers.[17] It has applied the same interpretation to Brazil.[18] This interpretation appears inconsistent with the wording of Article 28. Article 28(1) makes it clear that the drafters of the Convention were cognizant of the fact that in States with federal power structures, implementation of certain legislative provisions must occur at the provincial rather than the national level of government. Article 28(2) then spells out what steps a federal government may take to ensure implementation of treaty provisions at the provincial level.

The Commission will likely argue that Iberoland is under an affirmative obligation to impose Law No. 678 upon the province of North Shore. However, the Supreme Court of Iberoland in *Olin v. The University of North Shore* determined that because Law No. 678 legislated issues pertaining to education, the Federal government

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[17] *Inter-Am. Ct. H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, OC-16/99, October 1, 1999;Id. Inter-Am. Ct. H.R., Advisory Opinion OC-18/03; see also Senate of Canada, Standing Committee on Human Rights, 37th Parliament, 2nd Session, "Enhancing Canada's Role in the OAS: Canadian Adherence to the [ACHR]."*

[18] *Inter-Am. Ct. H.R., Case of Urso Branco Prison v. Brazil (2004).*

had invaded the private sphere of the provinces, making the law unconstitutional.[19] In the wake of the Supreme Court of Iberoland's ruling in *Olin*, the State has offered petitioner the possibility of applying to other provincial universities that have complied with Law No. 678, as well as a scholarship for her studies.[20]

The Federal Republic of Germany argued in a case before the European Court of Human Rights that while a State's constitution is to be interpreted in a light that avoids any conflicts between the State and international law, the commitment to international law only takes effect within the democratic and constitutional system of a State's national law.[21] If a violation of fundamental principles of the constitution cannot otherwise be averted, there is no contradiction with the aim of commitment to international law if the State does not comply with the law established by international treaties, in keeping with the margin of appreciation granted to States by treaties to which they are a party.[22] The Federal Constitutional Court stressed that the European Convention on Human Rights leaves it up to its member States how best to guarantee respect for obligations established by the treaty.[23] The Federal Constitutional Court found that the European Convention does not enjoy the rank of constitutional law within the German system and therefore does not prevail over other ordinary statutes.[24] In its decision, the Federal Constitutional Court determined that international and national law are two different legal regimes, with national law defining the position of international law domestically.[25]

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[19] Hypo ¶ 26.
[20] Hypo ¶ 28.
[21] Eur. Ct. H.R., *Case of Elsholz v. Germany, (Application no. 25735/94), Judgment Strasbourg, 13 July 2000.*
[22] *Id.*
[23] "Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights, Part I/II, Matthias Hartwig, German Law Journal No. 5 (1 May 2005).
[24] *Id.*
[25] *Id.*

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 petitioner 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 Supreme Court of Iberoland has also backed this process by declaring the

[26] Thirteenth Session (1981), General Comment No. 3: Article 2 (Implementation at the National Level), Committee on Human Rights, United Nations Covenant on Civil and Political Rights.
[27] This principle relates to all of the UN treaties mentioned herein.
[28] Hypo ¶ 15.
[29] Hypo ¶ 16.
[30] *Id.*
[31] *Id.*

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 makes 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 today 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.

education.[34] Law No. 678 was proposed by the Achebe Administration and passed by the Federal Congress in an effort to promote racial equality.[35] Article 45 of Law No. 678 states:

> In all of the higher public academic institutions, whether federal, provincial, or municipal, a minimum of twenty percent of the spaces available for admission shall be reserved for students of African descent. In order to be eligible for consideration, the applicants must surpass the minimum standards set up by the institution as to academic grades, the written exam and the oral interview

The Committee on Economic, Social and Cultural Rights, the treaty body of the United Nations Convention on Economic, Social, and Cultural Rights, explains that although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.[36] Iberoland believes that its responsibility as a party to the American Convention on Human Rights is to guide each of its constituent provinces along the path towards increased human rights protections for all citizens.

C. <u>The Federal Clause of the Convention Obligates Iberoland to Push for the Implementation of Human Rights Measures Within the Confines of its Federal System of Government. It Cannot Impose Laws on its Provinces that its Highest Court Deemed to be Unconstitutional.</u>

The Inter-American Court has held that "a State cannot plead its federal structure to avoid complying with an international obligation."[37] The Court concluded in the *Garrido* case that international provisions that concern the protection of human rights in

[34] Hypo ¶ 5.
[35] Hypo ¶ 17.
[36] Nineteenth Session (1998) General Comment No. 9: The Domestic Application of the Covenant; B. The Status of the Covenant in the Domestic Legal Order, 5. ; Committee on Economic, Social, and Cultural Rights; United Nations Covenant on Economic, Social, and Cultural Rights.
[37] *Inter-Am. Ct. H. R., Garrido and Baigorria Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of August 27, 1998. Series C No. 39; para. 46. Argentina.*

the American States must be respected by the American States Parties to the respective conventions, regardless of whether theirs is a 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 have responsibilities that are not within the purview of the federal government. In *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 in *Olin* stood for the proposition that within a federal state, the 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 a 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, in 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 in 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 a 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.

of the Convention over whose subject matter it exercises legislative and judicial jurisdiction."[42]

B. The State Did Not Discriminate Against Juana Olin Based on Protected Status

The University of North Shore's refusal to admit Juana was not based on her status as a person of African descent, as a woman, or as a person of a lower economic status compared to other applicants. Therefore, Juana cannot claim discrimination based on any of these conditions in Article 1.[43] Since these protections are inapplicable to her lack of admission to the University of North Shore, Article 2 also does not apply. Further, equal protection under the law, and the guarantee of acceptance by higher education institutions are not equivalent. The former is a public right guaranteed by the State, while the latter is a private measure left to the discretion of the institution.

C. There is No Constitutional Jurisdiction Over the Area of Education

Article 5 of the Iberoland Constitution establishes that the provinces are responsible for guaranteeing the right to education,[44] thus the education guarantee is outside the jurisdiction of the federal government, making Article 28 of the American Convention on Human Rights inapplicable. Since none of the Articles in the American Convention on Human Rights apply, the State of Iberoland did not violate the Convention.

D. The "Protocol of San Salvador" Provides For Higher Education on the Basis of Individual Capacity

Article 13(1) of the Additional Protocol to the American Convention on Human Rights, also known as the "Protocol of San Salvador," states that "Everyone has the right

[42] *Id. at* Article 28.
[43] Hypo ¶ 23.
[44] Hypo ¶ 5.

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 . . ."[46] 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)(c).[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 groups, with no discrimination on any of the prohibited grounds.[57] Education must also be within safe physical reach, such as a close geographical location or by distance-learning programs.[58]

G. Iberoland is Compliant With the Requirements of the ICESCR

Education is available to North Shore students through the secondary level.[59] Juana in particular has even received successive scholarships for her education from the Federal Government based on her family's financial situation and her high academic

[52] International Covenant on Economic, Social & Cultural Rights Article 13, 993 U.N.T.S. 3, (1996).
[53] *Id. at* Article 13(2)(a)(b)(c).
[54] *Id. at* Article 13(2)(c).
[55] Committee on Economic, Social & Cultural Rights, *Implementation of the International Covenant on Economic, Social & Cultural Rights General Comment No. 13: The Right to Education* ¶ 6(b) (Twenty-first session, 1999) E/C.12/1999/10
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Hypo ¶ 8.

achievements.[60] 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 by 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 do 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 of . . . 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. Bulgaria*,[72] the fourteen-year-old applicant had been raped by two men and the police and prosecutor performed an inadequate investigation. In the *Case of*

[67] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Para" Article 6(a) (1994).
[68] *Id. at* Article 7.
[69] *Id. at* Article 9.
[70] *Id. at* Article 1.
[71] *Id.*
[72] *Case of M.C. v. Bulgaria*, Judgment, Application no. 39272/98 (2004).

M.M. v. The Netherlands,[73] 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(a)'s guarantee that women should be free from all forms of discrimination does not apply in this situation. In addition, denial of admission to a university cannot be considered as 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 in educational establishments of all categories" and (e): "same opportunities for access to programmes of continuing

[73] *Case of M.M. v. The Netherlands*, Judgement, Application no. 39339/98 (2003).
[74] Convention on the Elimination of All Forms of Discrimination against Women Article 10 (December 18, 1979) A/RES/34/180.

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 Commission also recommended that Governments seek or allocate appropriate budgetary amounts to encourage the further education and training, as well as financial assistance, to women seeking further education.[77] Finally, the Commission encouraged flexible education programs to help women in many different circumstances achieve their educational goals.[78]

C. Juana Was Given Equal Opportunity and Access In Her Application to the University of North Shore

Juana was given the opportunity to apply to the University of North Shore and was subject to the same minimum requirements as all other applicants, both male and female. The facts do not state that no women were allowed entrance into the University of North Shore, or that the 137 applicants who were not admitted were women who had been singled out for rejection even though they surpassed the minimum requirements.[79] Finally, while Juana had the highest grades of her class, we do not know how she compared to the other students who took the exam or the interview or how much higher

[75] *Id. at* subsections (a) and (e).
[76] U.N. Committee on the Status of Women, *FWCW Platform for Action: Education and Training of Women B.1* (September 1995) http://www.un.org/womenwatch/daw/beijing/platform/educa htm#object1
[77] *Id. at B.5.*
[78] *Id. at B.6.*
[79] Hypo ¶ 23.

the students who were admitted scored on these criteria. The University admitted students based upon their grades, admissions exam 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 of 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 DISCRIMINATION UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION.

A. The Convention on the Elimination of All Forms of Racial Discrimination (CERD) Requires States To Take Affirmative Steps to Eliminate Racial Discrimination

Article 2 of CERD condemns racial discrimination and requires States to ensure that public authorities and institutions refrain from racial discrimination and to take proactive steps to eradicate such discrimination from government policies as well as "by any persons, group or organization."[81] Article 3 condemns racial segregation, requiring States to eliminate the practice in territories under their jurisdiction.[82] Article 5(e)(v) guarantees everyone the right to economic, social and cultural rights, in particular "the right to education and training."[83] Finally, Article 7 calls for States to "adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information . . ." in order to combat racial prejudice and promote "understanding, tolerance and friendship among nations and racial or ethnical groups."[84]

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[80] *Id.*
[81] International Convention on the Elimination of All Forms of Racial Discrimination Article 2 (1966).
[82] *Id. at* Article 3.
[83] *Id. at* Article 5(e)(v).
[84] *Id. at* Article 7.

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

In *B.M.S. v. Australia*, 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.[85] 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.[87] Similarly, the Federal Supreme Court of Iberoland determined that public authorities could adopt measures of affirmative action, such as quotas, as long as they did not alter the distribution of power allocated by Article 39 of the Constitution.[88] Since Law No. 678 legislated issues regarding education, which is in the private sphere of the provinces according to Article 5 of the Constitution, the Supreme Court found it to be unconstitutional.[89] Further, since Law No. 678 regulates admission to higher public academic institutions based on race,[90] it is racially discriminatory and thus unacceptable under the decision in *B.M.S. v. Australia*.[91]

Other states that have ratified CERD have conflicting views on the issues of affirmative action and quotas. Most states have not made any sort of reservation to Article 7 of CERD, which encourages states to implement measures (or quotas) that

[85] *B.M.S. v. Australia*, Communication No. 8/1996 ¶ 2.3, CERD/C/54/D/8/1996 (May 10, 1999).
[86] *Id. at* ¶ 2.9.
[87] *Id. at* ¶ 7.22.
[88] Hypo ¶ 26.
[89] *Id. at* ¶5.
[90] *Id. at* ¶ 17.
[91] *B.M.S. v. Australia*, Communication No. 8/1996, CERD/C/54/D/8/1996 (May 10, 1999).

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,

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[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.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet (last accessed 3/19/06).
[93] International Convention on the Elimination of All Forms of Racial Discrimination, *U.S. Reservations, Understandings and Declarations*, 140 Cong. Rec. 14326 (1994).
[94] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors v. Pena*, 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 encourages policies that promote racial equality, as long as they fall within Constitutional limits.[98] The Supreme Court stated that quotas, while allowed, are not mandated.[99]

C. Iberoland's Positive Steps Toward Racial Equality Ensure The State's Compliance with CERD

With the election of a government committed to promoting racial equality and the introduction of many government initiatives to reduce inequality, Iberoland is compliant with the requirements under Article 2 of CERD. Segregation in the education system in North Shore ended in 1922, under pressure from the Government.[100] Since citizens are free to live (and thus attend schools) wherever they choose, Article 3 does not apply. Education in Iberoland and North Shore is available through secondary education and Juana has even received successive scholarships from the Federal Government due to her financial situation and her high academic achievements.[101] Since education is available for students through the secondary level, Iberoland fulfills the requirements set by Article 5(e)(v).

Finally, even though Article 5 of the Iberoland Constitution delineates education as within the exclusive power of the provinces,[102] the Federal Government did pass an affirmative action law (Law No. 678) to promote racial equality, particularly in public universities.[103] Fifteen out of the sixteen provinces adopted this law, with the exception of North Shore, which argued that it was not required to apply this law since it had

[97] Department of Labor, *Revised Order Number 4*, 41 C.F.R. § 60-2.16(e)(1) (1971).
[98] Hypo ¶ 26.
[99] Hypo ¶ 27.
[100] *Id. at* ¶ 8.
[101] *Id. at* ¶ 22.
[102] *Id. at* ¶ 5.
[103] *Id. at* ¶ 17.

exclusive jurisdiction over educational policies under the Constitution.[104] Since the Government of Iberoland did make an initiative to promote racial equality in education and it was adopted by those provinces who wished to, 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 race, 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.