

**REPUBLIC OF ASMARA v. REPUBLIC OF CALEDONIA**

**Memorial for \_\_\_\_\_(your side)**

Counsel for \_\_\_\_\_(your side)

Lead Appellant's or Respondent's name

Junior Appellant's or Respondent's name

Team name

The Republic of Caledonia submits that its decision not to return Jasmine and Cristina to Asmara did not violate Caledonia's obligations under international law. Caledonia cites Articles 20 and 13-b of the Convention on the Civil Aspects of International Child Abduction (CCAICA) in its decision not to expel Jasmine and Cristina. Furthermore, it would be illegal for Caledonia to expel them under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child. (CRC)

Caledonia further submits that it was permitted and even obligated not to give effect to its bilateral treaty with Asmara on the basis that said treaty would require Caledonia to decide matrimonial cases using a system of law that exists in direct violation of international law.

In Part I of this Memorial, Caledonia addresses its decision not to return Jasmine and Cristina to Asmara. In Part II, Caledonia rebuts Asmara's contention that it is required to give effect to their 1992 bilateral treaty.

## **Argument**

### **I. Caledonia's decision not to return Jasmine and Cristina to Asmara did not violate Caledonia's obligations under international law.**

The Convention on the Civil Aspects of International Child Abduction provides two exceptions where States are not required to return children that would otherwise be considered "wrongfully removed." First, Article 13-b states that the requested State is not bound to order the return of the child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The Court should consider the opinion of United States District Judge Denny Chin in *Blondin v. Dubois* in interpreting this clause. In particular, the Court should focus on whether there is a grave risk of physical or psychological harm. The facts of the case as well as the Secretary General's Report on the Impact of Armed Conflict on Children

paragraphs 2, 3, 43, and 44 establish that such a grave risk indeed exists.

Even if the Court concludes that there is no such grave risk, Caledonia is permitted to refuse to return the children under Article 20 of the CCAICA. Two of Caledonia's fundamental principles relating to the protection of fundamental freedoms prohibit Caledonia from returning the children. First, returning the children would violate the principles of children's right to life and security as provided for in the Convention on the Rights of the Child Art. 6-2, 19-1, 32. Second, returning Jasmine and Cristina would violate their freedom of religion. (ICCPR 18, 27, CRC 8-1, 14-1, 30, UN Charter 1-3) In particular, the ICCPR Article 18 states "Everyone shall have the right to freedom of thought, conscience, and religion... to manifest his religion or belief in worship, observance, practice and teaching."

Caledonia also recognises higher international law that would prohibit the expulsion of the children regardless of the CCAICA. Returning the children would violate both their and their mother's freedom of movement. (ICCPR 12-2, 13, CRC 10-2) It would also violate their rights as refugees under the Convention Relating to the Status of Refugees (CRSR) since Caledonia has recognized their refugee status and they fit the definition provided in Article 2. (CRSR 2, 32, 33-1) The freedom of movement and the rights of refugees in the ICCPR, the CRSR and the CRC represent peremptory norms of international law and supersede the CCAICA.

Even if the court rejects the three arguments above, it should still respect the primacy of the interests of the child. This represents a clear peremptory norm of international law and is contained in the Convention on the Elimination of all Forms of Discrimination Against Women (CEAFDAW) Article 16-1-d and the CRC Article 3-1. The Court should consider the commentary of the CEDAW Committee General Recommendation 21 with regard to Article 16-1-d. Considering the likelihood that return would lead to conscription and physical and psychological harm, it is clearly in the best interests of the children to remain in Caledonia.

## II. Caledonia was not required to give effect to its 1992 bilateral treaty.

Asmara's divorce laws are in violation of treaties to which it and Caledonia are parties – especially Articles 3, 23-4, and 26 of the ICCPR and Articles 2, 5, 15-3, 16-1-a, b, c of the CEAFDAW. It is true that Asmara's divorce laws do not explicitly discriminate against women. However, Asmara's divorce laws codify a system of discrimination against women that is in violation of international law. This is evidenced by the gross inequality of the situation - the male spouse terminates ninety percent of divorce cases. Such a situation is regarded by the international community as being tantamount to explicit statutory discrimination against women. This international consensus is evidenced by the CEDAW Committee's General Recommendation 21, specifically Sections 12, 44, and 47. It is further evidenced by UN Document CCPR/C/79/Add.95 submitted by the Human Rights Committee relating to the case of Algeria. In this situation, Algeria's Family Code created a situation where the statute itself was in compliance with international law, but a *de facto* system of inequality existed. The Committee noted that the inequalities created by the Family Code placed Algeria into nonconformity with the CEAFDAW. This document shows that the international community believes that a system of matrimonial law that creates inequality is in violation of international law, especially conventions such as the CEAFDAW. Asmara's divorce laws create inequalities – therefore, they are in violation of international law.

Because Asmara's divorce laws violate norms of international law, Articles 53 and 64 of the Vienna Convention on the Law of Treaties (recognised by the international community as customary international law in cases such as the Golder Case) mandate that the bilateral treaty must be rendered void. As previously discussed, Asmara's divorce laws are in violation of treaties including the CEAFDAW and the ICCPR. These treaties are representative of customary international law, as evidenced by their near-universal acceptance. Therefore, under Articles 53 and 64 of the Vienna Convention on the Law of Treaties, the bilateral treaty is void under the principle of *jus cogens*.

Even if the treaty is not void under the principle of *jus cogens*, Caledonia was allowed to not give its treaty effect under international law as stated in the Fisheries Jurisdiction Case (UK v. Ireland) decided by the ICJ, specifying that countries are not bound to treaties when the obligations imposed by it have been “radically transformed.” The current situation has created circumstances that fit such a description. This treaty was intended to streamline the resolution of matrimonial cases with an eye towards creating a comfortable situation for all parties involved. In the current situation, the treaty creates anything but a comfortable situation – rather, Caledonia is being asked to ignore the rights of an extremely brave woman who left an oppressive government in order to freely practise her religion and free her children from certain harm. This situation clearly is a “radical transformation” of Caledonia’s obligations under the bilateral treaty.

#### Conclusion

For the foregoing reasons, this Court should find (1) that Caledonia’s decision not to return Jasmine and Cristina to Asmara did not violate Caledonia’s obligations under international law, and (2) that Caledonia is not required to give effect to its 1992 bilateral treaty.

Dated: Saline, Michigan Respectfully Submitted,

11 March 2001

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Lead Appellant’s or Respondent’s name

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Junior Appellant’s or Respondent’s name

Counsel for \_\_\_\_\_ (your side)