

THE 2022 EUGENE SCASSA MOCK OAS PROGRAM  
INTER-AMERICAN COURT OF HUMAN RIGHTS MOOT COURT COMPETITION

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**IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

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November 2022

Emilia Cortez and Family

*Petitioner*

v.

The Republic of Culebrita

*Respondent*

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**MEMORIAL FOR THE PETITIONER**

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## STATEMENT OF JURISDICTION

The Republic of Culebrita gained independence from Portugal in 1935.<sup>1</sup> Following this, Culebrita became a founding member of the OAS in 1945. Culebrita maintains membership in the Organization of American States, United Nations, Mercosur, and PROSUR.<sup>2</sup> The republic also holds seats on the Economic Commission for Latin America and the Caribbean (ECLAC) and ratified the Geneva Convention in 1949, the American Convention on Human Rights (ACHR) in 1970, and the UN Convention on the Rights of the Child in 1990. Culebrita has recognized the jurisdiction of the Inter-American Court of Human rights since 1981.<sup>3</sup>

Regarding the exhaustion of domestic resources, the Cortez family filed an appeal of the adoption of Esther's daughter, Francesca, with the Provincial Court of Italpa. The court issued an injunction against the adoption and the judge ordered that Francesca be returned to the custody of the Cortez family. The Herdezes filled an appeal of the court's decision and were granted a stay for the appeals process. The appellate court overturned the decision of the lower court and returned legal custody to the Herdezes.<sup>4</sup> The Cortez family filed an appeal of this decision to the Culebrita Supreme Court. After the Supreme Court refused to hear the case, the Cortez family filed an application with the Inter-American Commission on Human Rights.<sup>5</sup>

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<sup>1</sup> Hypothetical § I ¶ 3

<sup>2</sup> Hypothetical § V ¶ 2

<sup>3</sup> Hypothetical § V ¶ 3

<sup>4</sup> Hypothetical § III ¶ 2

<sup>5</sup> Hypothetical § IV ¶ 1

## STATEMENT OF THE FACTS

Francesca Cortez was born on January 14<sup>th</sup> 2021.<sup>6</sup> One week after her birth, Francesca was removed from her mother Esther’s custody and turned over to the Ministry of Family Services when Esther was arrested.<sup>7</sup> Less than a month later, Francesca was placed on a public adoption list and her grandmother Emilia Cortez immediately filed an application for Francesca’s adoption.<sup>8</sup> In addition to Emilia’s application, ten other adoption applications were filed.<sup>9</sup> These applications were narrowed down to five potential placements by the Culebrita Ministry of Family Services.<sup>10</sup> These five applications included the Cortez family and also Maxmillian and Margarita Herdez, a wealthy couple who live in the capital city of Culebrita.<sup>11</sup> On June 30<sup>th</sup>, the Herdezes were granted pre-placement of Francesca Cortez, pending a full adoption.<sup>12</sup> After the three month pre-placement period, the Herdezes were granted full custody of Francesca.<sup>13</sup>

During this time, Esther Cortez was released from juvenile detention early after completing her rehabilitation program successfully.<sup>14</sup> Four days after Francesca’s adoption, Esther and Emilia Cortez filed an appeal of the adoption decision.<sup>15</sup> This appeal was successful and the judge ordered Francesca be returned to the custody of the Cortez family stating that, “there was insufficient evidence... to show that the child would be unsafe in the custody of Esther’s immediate family.”<sup>16</sup> The Herdezes filed an appeal of the court’s decision and were granted a stay for the appeals process. Two months later, the regional appellate court heard the case and

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<sup>6</sup> Hypothetical § II ¶ 1

<sup>7</sup> Hypothetical § II ¶ 2

<sup>8</sup> Hypothetical § II ¶ 3

<sup>9</sup> Hypothetical § II ¶ 3

<sup>10</sup> Hypothetical § II ¶ 4

<sup>11</sup> Clarification Question 12

<sup>12</sup> Hypothetical § II ¶ 4

<sup>13</sup> Hypothetical § II ¶ 5

<sup>14</sup> Hypothetical § II ¶ 6

<sup>15</sup> Hypothetical § II ¶ 6

<sup>16</sup> Clarification Question 28

overturned the original decision, thus returning custody of Francesca to the Herdez. <sup>17</sup> The Cortez family filed an appeal with the Culebrita Supreme Court but the Supreme Court refused to hear the case. <sup>18</sup>

Assisted by Family Rights International, the Cortez family filed an application with the Inter-American Commission on Human Rights. <sup>19</sup> After investigation, the Commission filed their Admissibility and Merits Report finding violations of ACHR Articles 8, 17, and 24. <sup>20</sup> The Republic of Culebrita denied the violations <sup>21</sup> and refused to implement the recommendations of the Commission. <sup>22</sup> The case was then submitted to the Inter-American Court of Human Rights. <sup>23</sup>

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<sup>17</sup> Hypothetical § III ¶ 2

<sup>18</sup> Hypothetical § III ¶ 2

<sup>19</sup> Hypothetical § IV ¶ 1

<sup>20</sup> Hypothetical § IV ¶ 4

<sup>21</sup> Hypothetical § IV ¶ 5

<sup>22</sup> Hypothetical § IV ¶ 7

<sup>23</sup> Hypothetical § IV ¶ 7

## PLEADINGS

### **I. ESTHER AND EMILIA CORTEZ’S HUMAN RIGHTS WERE VIOLATED** **UNDER INTERNATIONAL HUMAN RIGHTS PROTECTIONS**

#### **A. -- ACHR Article 17 – Rights of the Family**

The Republic of Culebria violated the Cortez family’s rights under American Convention on Human Rights (ACHR) Article 17: Rights of the Family and the UN Convention on the Rights of the Child Article 5 by mishandling Francesca’s removal from her home.

ACHR Article 17(1) Family’s Right to be Protected:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*<sup>24</sup>

UN Convention on the Rights of the Child Article 5:

*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*<sup>25</sup>

After declaring Esther Cortez “unfit” to be a parent and arresting her, Francesca was turned over to the Ministry of Family Services.<sup>26</sup> She was then kept in a regional facility for only a month before being placed on a public adoption list.<sup>27</sup> In the intermediary time, the state failed to prove the Cortez household to be an unfit living situation for Francesca.<sup>28</sup> Instead of providing support or resources to help the Cortez family raise Francesca safely and successfully, the state simply removed her from her home and her

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<sup>24</sup> American Convention on Human Rights – Article 17

<sup>25</sup> UN Convention on the Rights of the Child – Article 5

<sup>26</sup> Hypothetical § II ¶ 2

<sup>27</sup> Hypothetical § II ¶ 3

<sup>28</sup> Clarification Question 48

family. In both the case of *Fornerón and daughter v. Argentina*, and *Ramírez Escobar et al. v. Guatemala* the court declared, “family separation as one of the most severe examples of State interference with personal rights.”<sup>29</sup> <sup>30</sup> Thus, this separation should only be allowed to occur as a last effort when all others have been unsuccessful. In addition to state’s lack of evidence against the Cortez family, Esther Cortez successfully completed her rehabilitation program and has passed all her drug tests since.<sup>31</sup> Thus, the only accusation that has been leveled against any member of the Cortez family has been proven, by the state, to be resolved since September 18<sup>th</sup> 2021. The Republic of Culebrita violated the Cortez family’s rights under ACHR Article 17 by mishandling the removal and subsequent adoption of Francesca Cortez.

#### **B. ACHR Article 8 – Right to a Fair Trial**

The Republic of Culebrita violated the Cortez family’s rights under ACHR Article 8: Right to a Fair Trial by allowing unnecessary delays to the judicial proceedings without also fostering a relationship between Francesca and the Cortez family. ACHR Article 8 states:

*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.*

The court has reiterated on numerous occasions the need for appropriate haste when dealing with cases involving minors, particularly when the outcome of the case has a direct effect on the child’s continued living situation. Despite an initial judgment for the

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<sup>29</sup> *Fornerón and daughter v. Argentina*

<sup>30</sup> *Ramírez Escobar et al. v. Guatemala*

<sup>31</sup> Hypothetical § II ¶ 6

Cortez family,<sup>32</sup> Francesca remained in the exclusive custody of the Herdez's for the entirety of the judicial proceedings. While visitation from the Cortez family was permitted, it was, "made difficult by distance and cost of travel" and was certainly not encouraged or supported by the Herdez family or the state during proceedings. In previous cases involving minors where timeliness of a trial has been questioned, the court has considered the following criteria: "(1) the complexity of the case; (2) the interested party's procedural activity from the date of the first procedural act to the date a final judgment is issued; (3) any judicial authority's conduct; and (4) the impact on the legal situation of the alleged victim."<sup>33</sup> <sup>34</sup> To answer this criteria in the current case: While this is a delicate case requiring proper consideration of all variables, it is not particularly complex. Esther and Emelia have been prompt and responsive throughout the entire legal proceedings. Cases of custody are extremely sensitive to the timeline of when the case is decided as one of the primary goals is to cause the least amount of distress and disruption to the child's life. In the case of *Fornerón and daughter v. Argentina*, "One judge noted that, had the final ruling occurred earlier, the Court would have likely held differently."<sup>35</sup> As Francesca was placed into the care of the Herdez family so quickly and remained there throughout all judicial proceedings, the court is now even more cautious to return her to a home she never should have been removed from. The Republic of Culebrita violated the Cortez family's rights under ACHR Article 8: Right to a Fair Trial by allowing unnecessary delays to the judicial proceedings without also fostering a relationship between Francesca and the Cortez family.

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<sup>32</sup> Hypothetical § III ¶ 1

<sup>33</sup> *V.R.P. and V.P.C., et al. v. Nicaragua*

<sup>34</sup> *Gonzales Lluy et al. v. Ecuador*

<sup>35</sup> *Fornerón and daughter v. Argentina*

**C. - ACHR Article 24 – Right to Equal Protection**

Esther Cortez's rights were violated under ACHR Article 24 as she did not receive equal protection against the more privileged Herdez family during the adoption proceedings of her daughter Francesca. Article 24 states that,

*“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”*

Although Esther received some legal advice, it was negligible in comparison to the legal counsel received by the exponentially wealthier and more privileged Herdez family whom she was pitted against. Legal proceedings are often confusing and difficult to understand if an individual is not a trained legal professional. This discrepancy in resources during the court proceedings, further increased the discrepancies between the two families. Thus, Esther Cortez's human rights were violated under ACHR Article 24 as she did not receive equal protection during the adoption proceedings of her daughter Francesca.

**II. FRANCESCA CORTEZ'S RIGHT TO IDENTITY AND COMMUNITY WAS VIOLATED UNDER INTERNATIONAL HUMAN RIGHTS PROTECTIONS**

**A. - ACHR Article 12: Freedom of Conscience and Religion**

The Republic of Culebrita violated Francesca Cortez's rights under ACHR Article 12: Freedom of Conscience and Religion because of how her adoption was processed.

Article 12 protects the rights of individuals to Freedom of conscience and religion.<sup>36</sup>

This Article includes protections for learning and practicing beliefs both as an individual and in a group. Francesca Cortez was removed from her family in the rural village of Castaneo<sup>37</sup> and placed with a family far away in the urban capital city.<sup>38</sup>

The Republic of Culebrita violated Francesca Cortez's rights under this article by removing her from the community she was born into and placing her in a home so far removed as to make it difficult for her to access her community and culture of origin.<sup>39</sup> In the case of *Fornerón and daughter v. Argentina*, the court found that a state relocating a child in a manner that makes the child grow up without contact to, or influence from, their family is a violation to that child's right to identity.<sup>40</sup> Because the Republic of Culebrita removed Francesca both from her home and the community she was born into and relocated her to a family where it was nearly impossible for her family to maintain contact with her through her childhood, Culebrita violated Francesca's rights under ACHR Article 12.

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<sup>36</sup> American Convention on Human Rights – Article 12

<sup>37</sup> Hypothetical § II ¶ 1

<sup>38</sup> Hypothetical § IV ¶ 3

<sup>39</sup> Hypothetical § IV ¶ 3

<sup>40</sup> *Fornerón and daughter v. Argentina*

**B. - UN Rights of the Child Article 30:**

The Republic of Culebrita violated Francesca Cortez’s human rights protected under Article 30 of the UN Convention on the Rights of the Child. Article 30 protects children of indigenous descent,

*In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.<sup>41</sup>*

Francesca Cortez was born into a family of Afro-Indigenous descent<sup>42</sup> in the rural village of Castaneo.<sup>43</sup> The Culebrita Ministry of Family Services removed her from her home and granted first pre-placement and then full custody to the Herdez family.<sup>44</sup><sup>45</sup> The Herdez family lives in the urban capital city of Culebrita.<sup>46</sup> The state failed to protect Francesca’s right to community with those in her culture by moving her to a household that is both culturally and geographically removed from her heritage. The Inter-American Commission on Human Rights found that it was “difficult by distance and cost of travel”<sup>47</sup> to have visitation with the Cortez family. This potential visitation only includes her birth family, not taking into consideration other members of Francesca’s indigenous community or cultural practices in the village. Francesca Cortez’s rights under Article 30 were violated by the state removing her from her culture of origin and adopting her out to a family that is fully removed from her ancestral community

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<sup>41</sup> UN Convention on the Rights of the Child – Article 30

<sup>42</sup> Clarification Question 26

<sup>43</sup> Hypothetical § II ¶ I

<sup>44</sup> Hypothetical § II ¶ 4

<sup>45</sup> Hypothetical § II ¶ 5

<sup>46</sup> Hypothetical § IV ¶ 3

<sup>47</sup> Hypothetical § IV ¶ 3

**C. – ACHR Article 19: Rights of the Child**

Culebrita violated Francesca's rights under ACHR Article 19: Rights of the Child by not taking appropriate measures to ensure she could maintain ties to her heritage. Article 19 protects the rights of the child,

*Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.*<sup>48</sup>

The state's duty to protect Francesca Cortez's rights is only increased by her status as a minor. Her position in society is even more vulnerable because of her age. Culebrita removing Francesca from her family and maintaining her placement with the Herdez's throughout the legal proceedings,<sup>49</sup> despite an initial decision in favor of the Cortez family,<sup>50</sup> placed Francesca in a particularly vulnerable position. As a result of this position, she lost out on the benefits of her community during one of the most important years of development in her life. Culebrita violated Francesca's rights under ACHR Article 19 by failing to take appropriate measures to ensure she could maintain ties to her heritage during one of the most vulnerable years of her life.

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<sup>48</sup> American Convention on Human Rights – Article 19

<sup>49</sup> Hypothetical § III ¶ 2

<sup>50</sup> Hypothetical § III ¶ 1

**Request for Relief**

For the aforementioned reasons and in alignment with the recommendations of the Inter-American Commission on Human Rights, Esther and Emilia Cortez respectfully request that the court:

1. Order the Republic of Culebrita to provide comprehensive support and redress to transition Francesca back to the custody of the Cortez family.
2. Order the adoption process and agents involved be investigated.
3. Order the funding of increased education and training for Culebrita adoption and judicial authorities.