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

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

**November 2022**

# “EMILIA CORTEZ & FAMILY,

*Petitioner*

**v.**

# “THE REPUBLIC OF CULEBRITA”

*State*

**MEMORIAL FOR THE PETITIONER**

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\*As reported by IACHR Press Office at <https://oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/105.asp>

# STATEMENT OF FACTS

Emilia Cortez is an afro-indigenous woman living in rural Culebrita with her brother, three of her children, and two of her grandchildren.1 Her brother Jesus Marano, was the candidate from the Culebrita People’s Party (CPP) for Governor of Italpa in the last election. He lost to the incumbent, Fernando Magalhaes, who is a member of the People’s Front of Culebrita (PFC), the ruling party of the Nunez family. On January 14th, 2021 Emilia’s youngest daughter Esther, who was fourteen years old, gave birth to a baby girl named Francesca.2 Francesca and Esther both tested positive for drugs and Francesca was removed from her mother's care and placed in a regional facility for orphans. Esther was convicted of child endangerment and baby Francesca was put up for adoption. Emilia, of course, applied to adopt her granddaughter as did nine other families, and five including Emilia were selected as finalists by the Ministry of Family Services. The Ministry of Family Services placed baby Francesca with the Herdez family, a rich family from the capital who are politically active. The Ministry of Family Services considered the factors equally without regard or preference for Emilia's status as a relative of baby Francesca.3

Emilia and her daughter Esther, who had completed a drug rehabilitation program and had passed all her drug tests, sued the state to have baby Francesca placed in her grandmother's custody. The regional court ruled in favor of the family and said “preference should be given to the biological family over other applicants”.4 However, the Herdez family appealed and the lower court's ruling was overturned by the appellate court and the Supreme Court declined to hear the case.5 The Chief Justice of the Appellate court that heard the case was part of the same

1 Hypothetical Section VI.

2 Hypothetical Section II. Part 1

3 Clarification Question 40

4 Clarification Question 48

5 Hypothetical Section III Part 1 and Part 2

political party as the Herdez family and President Nunez to which the Herdez family has also donated money.6 Human Rights Watch and the UN Commission on Human Rights also noted: “significant, systemic-wide corruption” in Culebrita.7

6 Clarification Questions 60 & 62

7 Clarification Question 63

# LEGAL ANALYSIS

## Admissibility

* 1. **Statement of Jurisdiction**

The Republic of Culebrita became a founding member of the Organization of American States (OAS) in 1948. It has recognized the jurisdiction of the Inter-American Court of Human Rights since 1981.

## Exhaustion of Domestic Remedies

The Cortez family filed suit against Culebrita and won at the regional level. However, that verdict was overturned by the appellate court. The Cortez family applied to the Supreme Court for redress but the Supreme Court refused to hear the case.

## Violations

Conforming to the IACHR’s findings for the Republic of Culebrita the Petitioner asserts the violations of the right to a fair trial, and a family life, and consequently requests that the Court order the State to perform restitutio in integrum.

The Petitioner asserts violations of Articles 8 and 17 of the American Convention on Human Rights(ACHR) and Article 17 of the American Declaration on the Rights of Indigenous Peoples(ADRIP).

# ARGUMENTS ON THE MERITS

Article 8. Right to a Fair Trial

The IACHR noted that in the appellate court case “representation was considerably skewed in favor of the much more well-represented Herdez family.” The Herdez family had

private attorneys compared to the Cortez families’ public defender. It was only at this stage when the Herdez family's greater resources and access to the system were brought into play that the appellate court overturned the district court which was closer to the case and had greater fact-finding capacity. The IACHR held that this constitutes a violation of the Cortez’s right to a fair trial.

Article 17. Right to a Family and Article 16 of the UN Convention on the Rights of the

Child

Article 17.1 of the American Convention on Human Rights states that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. The CRC Article 16 states “No child shall be subjected to arbitrary or unlawful interference with his or her … family.” In the case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala the court held that the state violates this article when it arbitrarily interferes with family cohesion. In the case of Gelman v. Uruguay, the court said that the state erred by interfering with the plaintiff's ability “to be with his family and reestablish a relationship with it” violating both the rights of the plaintiff and his child. These cases and the plain reading of Article 17 make it clear that children should be placed with their families preferably with their parents or if that is not possible with other close relatives. The precedent makes clear that in cases of adoption, the families of children should be considered first, and other families should be considered only if the child's family would be unsuitable guardians.

This was not done in the case at hand. The Republic of Culebrita’s formal policy did not give any special consideration to Emelia Cortez’s status as baby Francesca’s grandmother and instead considered her as only one candidate among many during the adoption process. It should be clear that as her grandmother Emelia had a relevant family connection with baby Francesca.

While the IACHR has not spoken on that specific relationship other courts have. The European Court of Human Rights noted in the case of Marckx v. Belgium that “"family life," within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance, those between grandparents and grandchildren.”

It is clear therefore that the State’s official policy of not giving priority to near relatives in these kinds of adoption cases is a violation of Article 17. The only way it would not be so was if Emelia Cortez and Francesca’s other near relatives were not fit guardians. This is not the case.

This can be clearly seen in the Cortez household and in the fact that the state did not object to her caring for any of her children or her other grandchildren living in her home. For that matter, Esther was found with the same drugs in her system as Francesca, but Esther was returned to her mother's custody showing that the Ministry of Family Services does not consider Emelia’s household a dangerous or unfit environment to raise a child.

The IACHR has also found similar violations in a case in Argentina involving a thirteen-year-old who gave birth to a boy who was adopted by a married couple without her consent and while the child's grandmother had expressed her intention to adopt the child.

Article 17 of the American Declaration on the Rights of Indigenous Peoples Article 17 of the ADRIP states that “States shall recognize, respect, and protect the

various indigenous forms of family, in particular, the extended family.” This extended family clearly includes the relationship of a grandchild to her grandmother and the right of a child to be raised by her external family.

The Article also states that “In determining the best interests of the child, courts and other relevant institutions shall take into account the right of every indigenous child, in community with members of his or her people, to enjoy his or her own culture.”

These provisions of the ADRIP were violated by the state removing Francesca Cortez from her family and placing her with a European descended family without regard to the potential harm done by removing her from her culture and extended family who were willing and ready to provide for her.

## Request for Relief

For the foregoing reasons, the petitioner respectfully asks that the court:

Apply all recommendations of the Inter-American Commission on Human Rights

1. Provide comprehensive redress to the Cortez family to restore the ties between mother and child
2. Investigate the actions and proceedings of the adoption system and the regional appellate court’s decision
3. Adopt non-recurrence measures designed to ensure that all adolescents receive free legal support during custody cases
4. Fund public policies and training of adoption and judicial agents regarding custody processes involving minors and juvenile delinquents.8

Instruct the state to reconsider the adoption decision of Francesca Cortez giving proper weight to her right to be raised by her family and her right to remain in her culture.

8 Hypothetical Section 4 Part 6