

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 and Family,

Petitioner

v.

The Republic of Culebrita,

Respondent

SPAINHOUR AND SLAYMAKER
MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Republic of Culebrita ('State,' 'Republic') was a founding member of the Organization of American States ('OAS') in 1945.¹ It has since ratified several human rights and international law treaties, not the least of which being the American Convention on Human Rights ('ACHR') – signed in 1969, adopted 1970.² The State has recognized the contentious jurisdiction of the Inter-American Court of Human Rights ('IACHR') since 1981 and, as of 1990, Culebrita is party to the United Nations Convention on the Rights of the Child ('CRC').³

As mentioned, the State recognizes this Court's jurisdiction. However, the contentiousness of said jurisdiction places Culebrita in a precarious position: weighing its own domestic statutes against the international treaties it parties itself to, the ACHR notwithstanding. The Republic of Culebrita aims, in this case, to make abundantly clear its priority, as a sovereign entity, to protect the life and rights of its people, and to take care that laws – both domestic and international – are faithfully executed. In pursuit of that effort, the State humbly submits the present memorial in recognition of the IACHR's inductive authority.

¹ *Case Record*, §V(2).

² *Id.*, §V(3).

³ *Ibid.*

STATEMENT OF THE FACTS

Francesca Cortez was born to Esther Cortez on 14 January 2022. Esther, age 14, is the daughter of Emilia Cortez (hereinafter referred to as ‘Co-Petitioner’ and ‘Petitioner,’ respectively).⁴ At the time of birth, it was discovered that both Co-Petitioner and her baby were toxicating illicit drugs. The hospital, being concerned for the infant, informed the police – leading to Co-Petitioner's arrest on 21 January. Co-Petitioner’s speedy trial found her behavior wanting and unbecoming of a caretaker; she was consequently labeled unfit to parent, owing to the endangerment of Francesca.⁵

At the close of Co-Petitioner’s criminal trial, Francesca Cortez was removed from the Cortez home. On 5 February 2022, the child was made available for adoption.⁶ Between February and April 2022, 10 applications were received for Francesca.⁷ Because the adoption list was widely disseminated through both private and public channels, Petitioner was among the first to submit their application for adoption on 5 February 2022.⁸ Subsequent to the narrowing down of candidates, a local representative for the Ministry of Family Services interviewed and inspected the Cortez household.⁹

The investigative process took place over approximately two- and one-half months, concluding on 25 June 2022.¹⁰ Five days later, on 30 June, pre-placement was granted to the selected adoptive family – Maxmillian and Margarita Herdez.¹¹ Upon completion of pre-

⁴ *Case Record*, §II(1).

⁵ *Id.*, §II(2).

⁶ *Id.*, §II(3).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*; *Clarification Questions*, #55.

¹⁰ *Case Record*, §II(4).

¹¹ *Ibid.*

placement on 30 September 2022, a prerequisite for the legal transfer of custody, the Herdez's became Francesca Cortez's permanent legal guardians.¹²

Though she remains on juvenile parole through December 2023, Co-Petitioner was released from detention, after completing a free rehabilitation program, on 18 September 2022.¹³ On 4 October, Co-Petitioner joined Petitioner in filing suit to enjoin the adoption of Francesca.¹⁴ A provincial judge issued an injunction to enjoin the adoption on 17 November and, on that same day, the Herdez family filed an appeal to the judgement – the court issued a temporary stay while the merits were considered.¹⁵ The appeal was accepted and heard by a panel of three judges. On 15 January 2022, the appellate court delivered judgement in favor of the Herdez family.¹⁶ The Supreme Court of Culebrita rejected to grant certiorari to a third appeal by Petitioners. The case, in their view, had been satisfactorily considered and produced no error of law.¹⁷

¹² *Case Record*, §II(5).

¹³ *Id.*, §II(6).

¹⁴ *Ibid.*

¹⁵ *Case Record*, §III(1).

¹⁶ *Id.*, §III.2.

¹⁷ *Id.*

PLEADINGS

I. THE STATE SATISFIED THEIR INTERNATIONAL AND DOMESTIC BURDENS TO PROTECT ITS YOUTH.

A. *Concerning ACHR Article 19: Rights of the Child; CRC Article 33*

The circumstances surrounding the birth of Francesca Cortez, including the presence of illicit toxicants in her blood, as well as the criminal history of her extended and immediate family, were sufficient delinquencies of care to warrant appropriate action, in accordance with domestic law, for the protection of Francesca from the use of or forced trafficking of such substances.

Article 19 of the ACHR grants:

*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.*¹⁸

In *Villagran-Morales et al. v. Guatemala* (1999), the Court contended the existence of an international *corpus juris* protecting the child. The ACHR and the CRC exist as limbs to that "body of law." Consequently, the Court suggested that the full body of pertinent, international law should help establish the content and scope of Article 19.¹⁹ This position of "evolutive interpretation," according to the "existing circumstances," was affirmed ten years later in *V.E.P. and V.P.C., et al. v. Nicaragua* (2009);²⁰ There, the Court referenced its "long held" tradition of "using other treaties," when examining whether state conduct is compatible with international standards.²¹

¹⁸ Organization of American States. "American Convention on Human Rights." Treaty Series, No. 36. San Jose: Organization of American States. Article 19. 1969.

¹⁹ *Villagran-Morales et al. v. Guatemala* (1999)

²⁰ *Ibid.*; *V.E.P. and V.P.C., et al. v. Nicaragua* (2009).

²¹ *Ibid.*

The State sought to redeem the Court's advice in *Villagran-Morales* and in *V.E.P.* – to use other treaties in aid of establishing the scope of ACHR Article 19. Therefore, in addition to this Court's own *stare decisis*, the State weighed its obligation pursuant to Article 33 of the CRC, under which and as a party to the convention, the State is obliged to “take all appropriate measures...to protect children from...narcotic drugs” as well as to “prevent the use of children in...production and trafficking of such substances.”²²

Article 33 of the CRC reads:

*States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.*²³

Considering the Court's discussion in *Villagran-Morales* and *V.E.P.*, it was concluded that the presence of illicit drugs in Francesca Cortez's blood, as well as the criminal propensity of her extended family and household – which includes convictions for trafficking narcotics – constituted enough merit, in the view of the Republic, to take appropriate measures for the prevention of further mental or physical harm to the infant's development.²⁴ In this case, the baby was placed for adoption and, using methods established by law, moved to the home most suited to her needs – principally: proximity to her indigenous peoples, culture, and language as well as to medical resources requisite for rehabilitation.²⁵

²² UN Commission on Human Rights. “Convention on the Rights of the Child.” Geneva: UN Commission on Human Rights. Article 33. 1990.

²³ *Ibid.*

²⁴ *Clarification Questions*, #21.

²⁵ “Families are given first priority when it comes to custody and child placement, but in a situation such as this, with five families having equal access to the application process and given equal consideration, all factors are considered equally” (*Clarification Questions*, #40); UN Commission on Human rights. “Convention on the Rights of the Child.” Geneva: UN Commission on Human Rights. Article 33. 1990.

B. Concerning CRC Article 39; ACHR Article 19

In addition to the State's duty concerning preventative protection from narcotic drugs, Article 39 of the CRC mandates that the state promote the recovery of children when they suffer exposure to any form of neglect; the State obliged this duty by ensuring adoptive placement in a suitable home.

CRC Article 39 provides:

*States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*²⁶

In *Serrano-Cruz Sisters v. El Salvador* (2005) and *López Álvarez v. Honduras* (2006) this court, through Judge A.A. Cançado Trindade, iterated its reliance upon Article 39 in the CRC.²⁷ Thereupon, the State rests its case for not only the removal of Francesca Cortez from the Cortez home, but also her placement with the Herdez family. Owing to State obligations discussed in the next section, the petitioner was afforded due participation in the home selection process, receiving review by the Ministry of Family Services.²⁸ However, at the conclusion of the adoption selection process, the Ministry found that the Herdez family, which possesses vastly superior resources with which to rehabilitate the child, was a more suitable home for her.²⁹

In recognition of this Court's interpretation of Article 19, as mentioned in *Villagran-Morales, V.E.P.*, and *Serrano-Cruz*, the State conferred with the CRC when deciding how best to

²⁶ UN Commission on Human rights. "Convention on the Rights of the Child." Geneva: UN Commission on Human Rights. Article 39. 1990.

²⁷ "Furthermore, this Court considers it necessary to emphasize that Article 39 of the Convention on the Rights of the Child establishes the State's obligation 'to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, [...] or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'" (*Serrano-Cruz Sisters v. El Salvador*, 2005); "The inseparability that I maintain between Articles 25 and 8 of the American Convention (*supra*) leads to the characterization of the access to justice, understood as the complete realization of the same as part of the domain of the *jus cogens*." (*López Álvarez v. Honduras*, 2006).

²⁸ *Case Record*, §II(3); *Clarification Questions*, #55.

²⁹ *Id.*, §VI(2)(ii).

rehabilitate Francesca Cortez. Removing the baby from a harmful environment was not enough; the State had to be sure that the baby would have access to requisite medical care from her infancy. Later, in suit, a duly elected district judge, followed by a panel of three appellate judges, all reified the State's judgement.³⁰ Ergo, the State maintains its correctness in acting to remove Francesca from the Cortez residence and in placing her with a more fit family.

C. *Concerning ACHR Article 26*

The dictum in ACHR Article 19 is unworkably vague and the State's actions, guided by the Court's jurisprudence, facilitated a progressive development toward more protective rights of the child. Consequently, by consulting the *corpus juris* of international law concerning the rights of the child – under the tutelage of the Court – the State sought to subsidize its effort to satisfy the Article's requirements. The UN Convention on the Rights of the Child is *the* seminal instrument for the protection of the child, it was the primary instrument consulted.

ACHR Article 26 instructs:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

In *Forneron and Daughter v. Argentina* (2012), as in *Villagran-Morales* but more explicitly, the Court posited a *corpus juris* of international law which, “should serve to define the content and scope of the obligations assumed by the State when analyzing the rights of children.”³¹ If violations of “the rights to judicial guarantees...judicial protection...and...the rights of the child *must* be interpreted in light of...international *corpus juris*,” then the State

³⁰ *Clarification Questions*, #44.

³¹ “In the instant case, the Court considers that the alleged violations of the rights to judicial guarantees, to judicial protection, to protection of the family and to the rights of the child must be interpreted in light of the international *corpus juris* on the protection of children. As this Court has stated on other occasions, this *corpus juris* should serve to define the content and scope of the obligations assumed by the State when analyzing the rights of children” (*Forneron and Daughter v. Argentina*, 2005).

dutifully performed every diligence requisite of its assumed obligations, derived from the unworkably vague ACHR Article 19.³² Furthermore, State's efforts to produce a palatable outcome in this case led to the expansion of child rights – whereby State, as party to plethora of international agreements, has demonstrated willingness to hold itself severally liable to them all.

II. THE CORTEZ FAMILY RECEIVED DUE PROCESS OF LAW AND EQUALITY BEFORE AN INDEPENDENT AND IMPARTIAL AUTHORITY.

A. *Concerning ACHR Article 8; ACHR Article 25*

The State of Culebrita satisfied the Cortez's Article 8 right to a fair trial, under the ACHR – both in Esther Cortez's criminal proceedings and, subsequently, in a suit seeking to enjoin Francesca Cortez's adoption by the Herdez family. In both instances, Petitioners were privy to that "right to be heard," as the Court said in *Chinchilla Sandoval v. Guatemala* (2016), "before a competent and independent tribunal."³³ In that case, the Court discussed the extent to which, "obligations toward victims of...violations under Article 25...must be in accordance with...due process under Article 8(1). There is, in this case, no substantiative claim by petitioner to reify their position that Republic failed to afford them that due process.

ACHR Article 8(1):

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.

ACHR Article 25(1):

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

³² *Ibid.*; Italicized for emphasis.

³³ *Chinchilla Sandoval v. Guatemala* (2016)

Co-Petitioner received a speedy trial when charged with child endangerment.³⁴ Said trial was overseen and decided by a duly elected district judge, who had been previously established by law, as insisted upon by the Court in *Chinchilla*.³⁵ Co-Petitioner's sentence was satisfied four months early, in September 2021.³⁶ In the subsequent civil proceedings, seeking to enjoin the removal of Francesca Cortez to the Herdez household, the Cortez family received a judgement favorable to them.³⁷

The provincial court's decision was rendered on the basis of, "insufficient evidence [from] the State... [showing that] the child would be unsafe in the custody of [the Cortezes]."³⁸ On appeal, the State contended, as it does here, that its international obligations, stemming from the CRC, sufficiently justify the State's actions in consideration of both the petitioner's child endangerment and familial criminal propensity.³⁹ There, a three-judge tribunal agreed with the State; concluding that Francesca Cortez's adoption carried with it no lack of diligence or due process and that she should be placed with the Herdezes.⁴⁰

Therefore, no substantive argument exists which could posit State abrogation of Petitioners' Article 8 and/or Article 25 rights pursuant to the ACHR. For this reason, the State defends its assertion: That petitioner was afforded the opportunity to expostulate the adoption and to propose their own merits for consideration as Francesca's caretakers—thereby satiating the dictates of ACHR Articles 8 and 25.

³⁴ *Case Record*, §II(2).

³⁵ "...everyone has the right to 'be heard, with due and within a reasonable time' before a competent and independent tribunal, previously established by law..." (*Chinchilla Sandoval v. Guatemala*, 2016).

³⁶ *Clarification Questions*, #31; *Case Record*, §II(6).

³⁷ *Id.*, §III(1).

³⁸ *Clarification Questions*, #48.

³⁹ See subsections I.A, I.B, and I.C.

⁴⁰ *Case Record*, §III(2).

B. Concerning ACHR Article 24

Financial disparity is not only a factor outside State control, but also extraneous given that: Both parties were given equal opportunity to have their case heard by an independent tribunal, priorly established by law.

ACHR Article 24 says:

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

Adverse judgement is not sufficient basis to allege discrimination. Despite the fact that adoption proceedings lack a criminal nature, the Cortez family was supplied a public defender – representing the thorough consideration given by the State to the family’s standing.⁴¹ As a matter of fact, and by the letter of appurtenant laws, there is no merit to Petitioners’ claim of unequal protection.

III. CULEBRITA’S ALLEGED CORRUPTION IS IMMATERIAL TO THE PRESENT CASE.

A. Concerning Alleged Corruption

Informed by this Court’s assessment of adoption procedures, espoused in *Ramirez Escobar v. Guatemala* (2018), the State followed due process in the adoption proceedings for Francesca Cortez.⁴²

The Court explained that, to determine the compatibility between the adoption procedures carried out in [Ramirez] and the American Convention, it must confirm whether the State: (1) verified that the Ramírez children could be legally adopted; (2) considered the best interests of the children and their best interests were the State’s primary consideration when it made the decision regarding adoption; (3) guaranteed the children’s right to be heard; (4) confirmed that there was no ability for the child to receive proper care in Guatemala before authorizing international adoption; and (5) confirmed no undue economic benefits were granted to any person or entity during the adoption procedures.⁴³

⁴¹ *Case Record*, §IV(2).

⁴² *Ramirez Escobar v. Guatemala* (2018).

⁴³ *Ibid.*

In this case, the State was confident in Francesca's adoptability, pursuant to a judicial condemnation of Co-Petitioner's parental dereliction.⁴⁴ The State also remains adamant that the removal of Francesca served her best interests, and that its intention to follow those interests purveyed through every step of the adoption. Considering the ethnic and cultural background of the child, the State gave preference to national applicants over international ones.

Furthermore, the connection between the Nunez and Herdez families is extenuated; President Nunez does not hold a seat at his family's lumber mill and is not responsible for its continuity.⁴⁵ Neither he, nor his niece Tamara Nunez participated in the adoption.⁴⁶ As such, State is confident that no undue economic benefits were granted or received during the procedures. Therefore, the corruption alleged against the State, levied by the Human Rights Watch and UN Commission on Human Rights, is inapposite to the present case; Petitioners enjoyed the level of due process stipulated by the Court in *Ramirez*.

⁴⁴ *Case Record*, §I(2).

⁴⁵ *Clarification Questions*, #1.

⁴⁶ *Clarification Questions*, #55; *Id.*, #64.

REQUEST FOR RELIEF

In conclusion, the State implores that the Court, in recognition of the arguments delivered above, issue the following:

- I. Reify the State's dedication, and adherence to, the ACHR and its components, namely those Articles which gave impetus to the present case: Article 8 (Right to Fair Trial), Article 19 (Rights of the Child), Article 24 (Right to Equal Protection), Article 25 (Right to Judicial Protection), and Article 26 (Progressive Development).
- II. Acknowledge the State's effort, by consulting a profusion of international treaties, to afford maximum rights and protections for its citizens.
- III. If the Court should be predisposed to hold State in violation of any ACHR article, first remand the merits of the case back to the State, so that it may consider them anew in its court of last resort.