

THE 2020 EUGENE SCASSA MOCK OAS PROGRAM
INTER-AMERICAN COURT OF HUMAN RIGHTS MOOT COURT COMPETITION

THE CHURICHAYAN LEGAL AID PROJECT & THE YGUARA FAMILY

Petitioner

v.

THE REPUBLIC OF BANAGUAY

Respondent

Memorial for the Petitioner

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STATEMENT OF FACTS

The Republic of Banaguay (henceforth “Banaguay” or “State”) is an independent unitary republic with a total population of approximately ten million.¹ Banaguay is the native homeland of the Banaguayans, who makeup approximately 70% (7,251,000) of the total population of Banaguay.² In Banaguay there is a significant indigenous population, around two million, of ethnic Churichayans who live primarily in the southeastern quarter of the country.³ Banaguay achieved its independence from their colonial powers in 1932, and subsequently the Banaguayan majority formed a republic, led by a military-backed president and unicameral legislature.⁴ This legislature is made up of 35 members, 17 of which are appointed by the president while the other 18 are at-large delegates.⁵ The Churichayans are not barred from serving in the legislature; however, longstanding codes of gerrymandering and electoral suppression have resulted in only *one* ethnic Churichayan serving in the legislature currently.⁶ The current president of Banaguay is Marco Carajillo, an ethnic Banaguayan from a well-established political family with strong ties back to the original ruling house established after the revolution in 1932.⁷ President Carajillo was elected for a third term in 2018 carrying nearly 90% of the Banaguayan vote and only 8% of the Churichayan minority, resulting in President Carajillo winning 72% of all votes cast.⁸

Several groups over the past eighty years have formed groups to press for increased Churichayan autonomy or even outright independence from the State.⁹ The two main groups, the Churichayan People’s Liberation Front (henceforth “CPLF”) and the People’s Front of Churichaya

¹ Hypothetical ¶1

² Hypothetical ¶2

³ *Id.*

⁴ Hypothetical ¶3

⁵ *Id.*

⁶ *Id.*

⁷ Hypothetical ¶10

⁸ *Id.* See also the President of Banaguay does not have any term limits, but is voted on every four years.

⁹ Hypothetical ¶7

(henceforth “PFC”) formed together in 1997 to form the Churichayan Independence Coalition (henceforth “CIC”).¹⁰ The more militant members from the former PFC, now in the CIC, formed a secondary group called the Shimmering Path.¹¹ The Shimmering Path is not directly affiliated with the CIC, and the CIC has denounced terrorism and militaristic threats.¹²

After the election of President Carajillo in 2014 and 2018, the CIC argued against the results of the election. The CIC alleged the government engaged in voter intimidation, voting booth discrepancies, ballot box stuffing, and the allowance of foreign interference in both vote counting and the gathering process.¹³ These accusations led to election monitoring by both the Organization of American States (henceforth “OAS”) and the United Nations (henceforth “UN”) whose access was limited by state military police.¹⁴ Both the OAS and the UN released damning reports regarding vote discrepancies, irregularities, and attempts at voter suppression levied against the Churichayan minority.¹⁵ Since the disputed election in 2014, the Shimmering Path has increased their activities in an attempt to combat and bring attention to the practices utilized by the Carajillo government.

In an attempt to stave off the increased activity of the Shimmering Path, President Carajillo enacted the “See Something Say Something Program” (henceforth “Program”) on September 1, 2017.¹⁶ The Program offered cash rewards for tips regarding the *presence of terrorist cells* or the *actions of terrorist supporters*, and tips that lead to arrests are reimbursed with an amount up to \$1,000.00 US Dollars.¹⁷

¹⁰ Hypothetical ¶7, 8

¹¹ *Id.* at ¶8

¹² *See Id.*

¹³ Hypothetical ¶11

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Hypothetical ¶13

¹⁷ *Id.* Emphasis added.

In the summer of 2018, a global pandemic of a strain of Influenza-B known as Orinoco Flu (henceforth “Flu”) was declared by the World Health Organization (henceforth “WHO”).¹⁸ The WHO called for complete economic shutdowns across the globe due to the Flu’s high transmission and mortality rate.¹⁹ In August of 2018, Banaguay issued a stay-at-home order for all citizens as a result of the Flu.²⁰ This stay-at-home order included the provision that public school buildings will be off-limits for the fall semester, but that learning would continue in an online setting, with necessary assistance when needed provided by the State, beginning September 1, 2018.²¹ This assistance came in the form of the State providing cameras and laptops to households that could not afford these products through a lend/lease program.²²

On October 3, 2018, Jamir Yguara, a ten-year old fifth grade student, was participating in an online class where his teacher noticed a flag of the Shimmering Path in the background.²³ In Banaguay it is illegal to display the logo or flag of the Shimmering Path publicly; however, there is no law against owning them.²⁴ Rather, it is illegal to knowingly support, either financially or materially, any of the *operations* of the Shimmering Path.²⁵ Pursuant to the Program, the teacher submitted a tip to the authorities.²⁶ Four days later on October 7th, Jamir’s home was entered and searched by the Banaguayan National Police’s Anti-Terrorism Force in accordance with a warrant issued by a municipal court.²⁷

¹⁸ Hypothetical ¶14

¹⁹ *Id.*

²⁰ Hypothetical ¶15

²¹ *Id.*

²² Hypothetical ¶16

²³ Hypothetical ¶17. *See also* Clarification Question 16. Students are required to have their video cameras on during class for purposes of participation and attendance.

²⁴ Hypothetical ¶9

²⁵ *Id.* Emphasis added.

²⁶ Hypothetical ¶18

²⁷ Hypothetical ¶19

On October 9, 2018, Jamir and his mother Ana Yguara are released only after the father, Josef Yguara, admitted to being the only person responsible for the purchase and hanging of the flag.²⁸ Josef is held on suspicion of terrorism *without* legal counsel until January 10, 2019.²⁹ During the time Josef was held without counsel, an investigation was conducted into any possible connections between Josef and the Shimmering Path. The investigation concluded that there were *no actual links* between Josef and the Shimmering Path.³⁰ As a result of his extended detainment, Josef lost his private-sector job and his family's house was foreclosed upon on November 30, 2018, and Jamir and his mother were left homeless until Josef's release on January 10th.³¹

On March 20, 2019, the Yguara family brought a civil suit against Banaguay seeking the recovery of the value of their home, lost wages for Josef as a result of his extended detainment, and \$250,000 for mental and physical distress.³² The court dismissed the case, whereas it was then brought before the regional appellate court and eventually the Banaguyan Supreme Court, who subsequently awarded \$80,000 for unspecified damages.³³

On March 1, 2020, the Churichayan Legal Aid Project, on behalf of the Yguara family, filed a petition with the Inter-American Court on Human Rights, alleging a violation of Article 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 10 (Right to Compensation), 11 (Right to Privacy), 16 (Right to Free Association), 17 (Right of the Family), and 21 (Right to Property).³⁴ Banaguay refused to acknowledge any conduct that violated its obligation under the American Convention in relation to the event in question, arguing that Josef

²⁸ Hypothetical ¶20

²⁹ *Id.*

³⁰ Hypothetical ¶21

³¹ Hypothetical ¶22

³² Hypothetical ¶25

³³ Hypothetical ¶25, 26

³⁴ Hypothetical ¶27

willfully and *knowingly* financially supported a terrorist organization.³⁵ The Inter-American Commission issued a report, declaring that the case was admissible and found violations of Articles 5,7,10,11, and 21.³⁶ The report recommended that the State roll back the provision that terrorists be held without legal counsel and that the Yguara family should be entitled to damages; however, the State did not find it necessary to implement any of the recommendations made by the Commission.³⁷ Because the State failed to implement any of the recommendations, the case was submitted to the Inter-American Court of Human rights on October 3, 2020, alleging the violation of the same articles specified in the Commission's report.³⁸

³⁵ Hypothetical ¶29. Emphasis added.

³⁶ Hypothetical ¶30

³⁷ Hypothetical ¶31, 32. Clarification Question 13

³⁸ *Id.* at 32

LEGAL ANALYSIS

I. Jurisdiction and Possibility of Remedy

A. Statement of Jurisdiction

Banaguay ratified the American Convention on Human Rights in 1969 and recognized the jurisdiction of the Inter-American Court of Human Rights in 2000.³⁹

Further, Banaguay is a party to the Inter-American Convention Against Terrorism, the American Declaration of the Rights and Duties of Man, and the Inter-American Convention to Prevent and Punish Torture.⁴⁰

B. Family Exhausted Domestic Remedies

After appealing to the municipal court, the appellate court, and finally the Supreme Court, the Yguara family has been unable to obtain proper reward for the damages levied against them by the state.⁴¹ Further, Banaguay has failed to implement any of the recommendations made by the Commission in regards to the State's violation of the American Convention on Human Rights.⁴² Because of this inadequacy, the Yguara family is now seeking remedy through the Inter-American Court of Human Rights.⁴³

II. Violations: The American Declaration on Human Rights

Petitioners assert violations of Articles 5, 7, 8, 10, 11, 16, and 21 and request that the Court provide proper remedy as a result of both the State's actions against the Yguara family and the State's inaction to implement any of the recommendations made to it by the Commission.

³⁹ Hypothetical ¶6

⁴⁰ *Id.* Clarification Question 12 & 13.

⁴¹ Hypothetical ¶26, 27

⁴² Hypothetical ¶31

⁴³ *Id.*

III. Arguments on the Merits

A. Right to Humane Treatment

Article 5 of the American Convention on Human Rights states that “every person has the right to have his physical, mental, and moral integrity respected” and that “punishment shall not be extended to any person other than the criminal.”⁴⁴ Further, “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”⁴⁵ Torture is further understood “to be any act intentionally performed whereby physical *or mental pain* or suffering is inflicted on a person” and that the existence of circumstances such as “domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.”⁴⁶

Upon the arrest of the Yguara family, Jamir and Ana were not released until Josef admitted to being the sole person responsible for the purchase and hanging of the flag.⁴⁷ Upon this admission, Josef continued to be held in custody while an investigation took place that resulted in *no actual link* between him and the Shimmering Path.⁴⁸ While in custody the State obtained a confession whereupon Josef stated that he supported the efforts of the Shimmering Path; however, like the conclusion of the investigation, he admitted *no direct involvement* in terrorist activity.⁴⁹ During the subsequent legal proceedings, Josef argued in the municipal court that his confession was coerced, but the trial court chose to not address the issue in their dismissal of the case.⁵⁰ The families

⁴⁴ See American Convention on Human Rights at 5(1)&(3).

⁴⁵ See *Id.* at 5(2).

⁴⁶ See Inter-American Convention to Prevent and Punish Torture at (2)&(5). Emphasis added.

⁴⁷ Hypothetical ¶20

⁴⁸ Hypothetical ¶21

⁴⁹ *Id.* Emphasis added.

⁵⁰ Hypothetical ¶25

counsel at the time argued that the coercion was of a mental sort, that Josef was aware that if he did not cooperate fully, even to the point of self-incrimination, his family would be placed in dire circumstances.⁵¹

Looking back to the Inter-American Convention to Prevent and Punish Torture and the American Convention on Human Rights, torture is defined as mental pain intentional inflicted upon someone.⁵² For Josef, this mental pain is exceedingly obvious. First, the State did not release his wife and son until he first took sole responsibility for the purchase of the flag.⁵³ Second, even against the worries of Josef, his family was placed in dire circumstances. The Yguara family lost their house while Josef was in custody, leaving Ana and Jamir homeless, and Josef lost his job.⁵⁴ The Court has further recognized that there are two types of victims of physical and mental pain: direct victims and indirect victims.⁵⁵ The law protects both types equally. In this case, Ana and Jamir are the indirect victims of Josef's mental pain.

Additionally, the State's citation of Josef's confession in an attempt to escape providing the necessary remedies is unfounded.⁵⁶ Because the confession was obtained through an infliction of mental pain, this confession should not have been admissible in court.⁵⁷ In light of this, the State's argument against remedy because of Josef's confession is moot.

⁵¹ Clarification Question 18

⁵² See Footnote 44-46

⁵³ Hypothetical ¶20

⁵⁴ Hypothetical ¶22

⁵⁵ See esp. *Bámaca Velásquez v. Guatemala* (2000), Judge Garcia Ramirez Concurring and *Cantoral Huamaní and García Santa Cruz v. Peru* (2007).

⁵⁶ Hypothetical ¶29. See also *Barrios Family v. Venezuela* (2011).

⁵⁷ See Inter-American Convention to Prevent and Punish Torture at (10).

B. Right to Personal Liberty

Article 7 of the American Convention on Human rights states in part that “anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or the detention.”⁵⁸

Josef Yguara was denied this right. The Program in which the flag was reported states that cash rewards are given for tips regarding the *presence* of terrorist cells or the *actions* of terrorist supporters.⁵⁹ Hanging a flag within the privacy of one’s home does not constitute the presence of a terrorist cell or the actions of terrorist supporters.⁶⁰ Further evidence to this point is provided by the State who has expressed nowhere in law that it is illegal to own a flag of the Shimmering Path.⁶¹

The teacher in reporting, and the State in their search of the Yguara home, must prove either of these elements. They simply cannot. Given it is not illegal to own a flag of the Shimmering Path, it cannot then be implied that because Mr. Yguara had a flag in his bedroom there exists a terrorist cell in his home. To this point, the State is silent. Further, in providing the tip to the authorities, the teacher did not observe the *actions* of terrorist supporters.⁶² Quite simply, a 10-year old participating in online school does not meet the condition of actions of a terrorist supporter.

This Court has similarly agreed with this argument in the past.⁶³ It is unlawful for the State to arrest someone when the State itself does not follow their own statutes and

⁵⁸ See American Convention on Human Rights at 7(6).

⁵⁹ Hypothetical ¶13. Emphasis added.

⁶⁰ See Edwards, George. “International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy”, *Yale International Law Review*.

⁶¹ Hypothetical ¶9. See esp. Anti-Terrorism Act of 2001.

⁶² See Diggelmann, Oliver & Cleis, Maria Nicole. “How the Right to Privacy Became a Human Right”, *Human Rights Law Review*.

⁶³ See *Castillo Paez v. Perú* (1997)

Constitution. Additionally, it is unlawful for the State to detain someone if he is not actively committing a criminal act or while a state of emergency is in effect.⁶⁴ Neither did the state declare a state of emergency nor was Mr. Yguara in process of committing a criminal act. The State would have to prove that there was an insurmountable urgency in order to arrest Mr. Yguara without legitimate judicial authorization and then hold him without legal counsel.⁶⁵ In the aforementioned case, the suspects in question that were detained were released nine days later because a Special Prosecutor found that the state improperly applied the insurmountable urgency standard and that the deprivation of liberty they experienced was not proportional to evidence presented against them.⁶⁶ This case mirrors *Yarce et al.* in this regard. The evidence presented against Mr. Yguara was a screenshot from his son during class. Nowhere in this image was a criminal act occurring or was Mr. Yguara even seen in the image. To hold Mr. Yguara without legal counsel for three months because he admitted to purchasing a flag is entirely illegitimate in the face of the proportionality standard established by this Court.⁶⁷

C. Right to a Fair Trial

Article 8 of the American Convention on Human rights states in part that “every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven *according to law*” and that during these proceedings every person has the right “to be assisted by legal counsel.”⁶⁸ Additionally, any “confession of guilt by the accused shall be valid only if it is made without coercion *of any kind*.”⁶⁹

⁶⁴ *Id.*

⁶⁵ *See Yarce et al. v. Columbia* (2016)

⁶⁶ *Id.*

⁶⁷ Hypothetical ¶17, 20, 21.

⁶⁸ *See American Convention on Human Rights* at 8(2)d. Emphasis added.

⁶⁹ *Id.* at 8(3).

Further, as expounded upon in the American Declaration of the Rights and Duties of Man, “every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights” and that “every person may resort to the courts to ensure respect for his legal rights” and that the “courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”⁷⁰

These rights have been violated by the State in their denial of legal counsel to Josef Yguara. Petitioners recognize that the State mandates that they may hold terrorist suspects without legal counsel for the purposes of interrogation and investigation until the completion of investigation, but this recognition is far from agreement.⁷¹ Additionally, this Court has established three factors to determine if a detention is arbitrary: unreasonableness, unpredictability, and proportionality.⁷² Further, if a pretrial detention period extends beyond the limits of law and reason, the release of the detainee is necessary.⁷³ Because, as was seen in the argument against the Program, the State did not abide by their own policy in the execution of the Program, Josef Yguara should not have been considered a terrorist suspect. The State, in holding Josef Yguara, relies upon the application of a faulty standard which by itself does not pass muster either domestically, in accordance with the State’s own law *or* in light of the Court’s precedent. The American Convention on Human Rights and the American Declaration of the Rights and Duties of Man do not suppose that a State can escape their duty to protect the rights of its

⁷⁰ See American Declaration of the Rights and Duties of Man at Articles XVII & XVIII

⁷¹ Clarification Question 12.

⁷² See *Argüelles et al. v. Argentina* (2014)

⁷³ *Id.*

citizens because the State considers someone a terrorist.⁷⁴ The rights expounded upon in these documents imply no exception.⁷⁵

D. Right to Compensation

Article 10 of the American Convention on Human Rights states that “every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgement through a miscarriage of justice.”⁷⁶

In the case of the Yguara family their judgement was carried out through a miscarriage of justice. This miscarriage of justice has been expounded upon throughout this document, thus they are entitled under the American Convention on Human Rights to be compensated for the damages incurred upon them by the State.

E. Right to Free Association

Article 16 of the American Convention on Human Rights states in part that “everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”⁷⁷ Further, the American Declaration of the Rights and Duties of Man specifies that “every person has the right to assemble peaceably with others in a formal public meeting or an informal gather, in connection with matters of common interest of *any nature*.”⁷⁸ Additional, this declaration states that “every person has the right to associate with others to promote, exercise, and protect his

⁷⁴ See esp. American Declaration of the Rights and Duties of Man at Articles XVII & XVIII where “every person has the right to be recognized everywhere as a person having rights and obligations” and “every person may resort to the courts.”

⁷⁵ See also Inter-American Convention Against Terrorism at Article 15(3) where “any person taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including the enjoyment of all rights and guarantees.”

⁷⁶ See American Convention on Human Rights at 10.

⁷⁷ See American Convention on Human Rights at 16.

⁷⁸ See American Declaration of the Rights and Duties of Man at Article XXI.

legitimate interests of political, economic, religious, social, cultural, professional, labor union, or other nature.”⁷⁹

Josef Yguara attended a Shimmering Path rally that took place in his village in 2017.⁸⁰ Any contention that this attendance implies that Mr. Yguara is a terrorist is unfounded as it was not illegal, both by the law of the State and by international convention. Mr. Yguara is free to associate with or attend these rallies in light of both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.⁸¹ This right has been recognized, and applied, by this Court.⁸² This Court found that it is unlawful for the State to limit the ability of groups to operate in the public sector. Furthermore, the State must prove that the measures limiting free association must be necessary and proportional to safeguard the public order.⁸³ While it is true that Mr. Yguara purchased a flag of the Shimmering Path during this rally, a nexus is not formed with the State’s law against knowingly supporting, either financially or materially, any of the operations of the Shimmering Path.⁸⁴ The State has as law on their books that it is not illegal to own a flag of the Shimmering Path, but that it is illegal to knowingly support, financially or materially, any of their operations.⁸⁵ These contradicting provisions cannot signal that the mere purchase of a single flag, a flag flown in the privacy of one’s home, constitute financial or material support of the operations of the Shimmering Path. It was not a blank check to the cause of the Shimmering Path, rather Mr. Yguara paid money in

⁷⁹ *Id.* at Article XXII

⁸⁰ Clarification Question 9.

⁸¹ *See* Footnote 68-70.

⁸² *See e.g. Baena Ricardo et al. v. Panama* (2001) and *Yarce et al. v. Columbia* (2016)

⁸³ *Id. at Baena Ricardo et al. v. Panama* (2001). *See also Kawas Fernández v. Honduras* (2009) where the Court applied the above doctrine and concluded that the State must respect and guarantee fundamental human rights for the exercise of freedom of association.

⁸⁴ Hypothetical ¶9, 21.

⁸⁵ *Id.* at ¶9.

exchange for a good. Mr. Yguara is free to associate with the ideology of the Shimmering Path, and that is all he has done.

G. Right to Property

Article 21 of the American Convention on Human Rights states in part that “everyone has the right to the use and enjoyment of his property” and that “no one shall be deprived of his property except upon payment of just compensation.”⁸⁶ Further, the American Declaration of the Rights and Duties of Man states that “every person has a right to own such property as meets the essential needs of decent living and helps maintain the dignity of the individual and the home.”⁸⁷

The State has failed to provide just compensation for the loss of both the Yguara family home and Mr. Yguara’s wages. The Supreme Court of Banaguay awarded damages of \$80,000, far less than the combined value of the Yguara family home and Mr. Yguara’s wages, totaling \$96,000.⁸⁸ The State, in their unlawful detention of Mr. Yguara, must provide just compensation to the Yguara family.

⁸⁶ See American Convention on Human Rights at 21(1)&(2).

⁸⁷ See American Declaration of the Rights and Duties of Man at Article XXIII

⁸⁸ See Hypothetical ¶25 and Clarification Question 2.

REQUEST FOR RELIEF

For the above stated reasons, the petitioner respectfully asks that the Court:

- (1) Find the State in violation of Articles 5, 7, 8, 10, 11, 16, and 21 of the American Convention on Human Rights.
- (2) Require that the State provides just compensation to the Yguara family in the amount of \$96,000 for the loss of their home and Mr. Yguara's job.
- (3) Require that the State provides just compensation to the Yguara family in the amount of \$250,000 for mental and physical distress.
- (4) Require that the State repeal the Anti-Terrorist Act to allow for persons accused of terrorism to be represented by legal counsel.