

**2010 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**Richardson, Unzué *et al.***  
*Applicants*

**v.**

**Juvenlandia**  
*Respondent*

***MEMORIAL FOR THE STATE***

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## **STATEMENT OF FACTS**

Juvenlandia is a wealthy democratic federation (Hypothetical Case ¶ 1-2, “H.C.”) in the Americas. For several years, as it has been at the top of the index of Latin American countries (H.C. ¶ 2). As a result, in the past two decades, Juvenlandia has seen an influx of immigrants from bordering countries, such as Pobrelandia (H.C. ¶ 5).

Maria Paz Richardson is a 14-year-old Pobrelandian girl (H.C. ¶ 6). In March of 2002, she accepted the offer of “Pirucha”, a Juvenlandian woman promising to get her into Juvenlandia where she could work as a domestic employee and, eventually, become a legal resident (H.C. ¶ 6). Afraid, Maria Paz did not inform her parents (H.C. ¶ 7). She shared the proposal with her 16-year-old cousin, Felicitas Unzué, who decided to accompany her. Her parents verbally authorized her to travel (Clarification Questions 32, “C.Q.”). The girls met “Pirucha” at the bus station. She left the girls with “Porota”, who would travel with them (H.C. ¶ 9). “Porota” confiscated the phone Lucio Devereux, Felicitas’ boyfriend, had given to Felicitas. When they crossed the border, Porota conversed with the Customs and Immigration officers, after having

retrieved upon reimbursing the trip's costs. The scarred man then raped her, advising her that she should behave appropriately. As a result, she became pregnant (H.C. ¶ 15).

They were forced to work at the apartment, which served as both living quarters and brothel, for six months. They were very closely monitored as they could never leave the place without being accompanied by some very aggressive men (the "thugs"). While they complained at first, they stopped when they saw that this yielded brutal attacks (H.C. ¶ 16).

Once, police officers conducted an administrative inspection under the Prophylaxis Law (H.C. ¶ 17 and C.Q 16). The thugs had provided the girls with answers to be given should they be questioned. The officials completed their visit without asking any question (H.C. ¶ 17).

On August 10, 2002, Maria Paz tried to terminate her pregnancy, which led to haemorrhaging and a visit to a health center. The doctor reported the incident to the police, who filed a complaint against her alleged abortion (H.C. ¶ 18). She was sent to the minors' section (C.Q. 38) of the Women's Prison on August 14, 2002. A Women's Association provided her with an attorney who secured her release, granted on May 10, 2003 (C.Q. 56). As of August 26, 2010, she is awaiting trial (C.Q. 28 and H.C. ¶ 57). In the prosecutor's understanding, there was no final conviction of her rape, so the charges were maintained (H.C. ¶27).

On February 5, 2004, Maria Paz took a kitchen knife and stabbed the man with the scarred face outside the brothel. She remained at the scene and the police arrived within minutes (H.C. ¶ 24). On December 10, 2004, after entering a plea bargain in which she admitted her guilt, she was convicted and sentenced to 15 years in prison for first degree murder (H.C. ¶ 25). Her trial was held in a regular criminal court, under the juvenile criminal justice laws (H.C. ¶ 26).

Maria Paz had not filed an appeal before the Supreme Court and the procedural deadlines had passed. Represented by the National University's legal aid center (H.C. ¶ 40), she filed an appeal

*in forma pauperis* requesting a review of her conviction (H.C. ¶ 41). Her appeal was admitted by



## LEGAL ANALYSIS

### **I. PRELIMINARY OBJECTIONS**

#### **A. Admissibility requirements have not been met because domestic remedies have not been exhausted**

Juvenlandia will prove<sup>1</sup> that this petition is inadmissible because domestic remedies have not been exhausted “in accordance with generally recognized principles of international law.”<sup>2</sup>

Juvenlandia asserts that Maria Paz’s human trafficking allegations, her abortion case and Felicitas’ adoption case should not be addressed by the Court.

Maria Paz has filed a petition alleging violations of Articles 5, 6 and 7 of the *Convention* without having exhausted the adequate and effective remedies “suitable to address an infringement of a legal right”<sup>3</sup> and “capable of producing the result for which it is designed.”<sup>4</sup>

The appropriate remedy to address the human trafficking would be to file a criminal complaint, which she failed to do. Also, the abortion case should not be addressed as it is awaiting trial.

## **B. Lack of jurisdiction *ratione materiae* of the Court for certain instruments**

Lucio alleged violations of instruments other than the *Convention*.<sup>5</sup> The Court cannot examine whether Juvenlandia has violated these conventions as they do not confer competence to the Court.<sup>6</sup> Violations of the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, the “*Belém do Pará Convention*”, were also alleged. The Court may only exercise its contentious jurisdiction when provided by “special declaration.”

<sup>7</sup> It has jurisdiction to assess violations only of Article 7 of this *Convention*.<sup>8</sup> Analysis should be limited to the *American Convention* and Article 7 of the *Belém do Pará Convention*.

## **II. JUVENLANDIA MET ITS DUTY TO RESPECT AND ENSURE THE RIGHTS PROTECTED BY ARTICLES 5, 6, 7, 8, 19 AND 25, IN RELATION WITH ARTICLE 1(1) AND 2 IN THE CASE OF MARIA PAZ RICHARDSON AND FELICITAS UNZUÉ BY INVESTIGATING ALLEGATIONS OF HUMAN TRAFFICKING**

### **A. Juvenlandia was diligent in preventing the traffic of Maria Paz and Felicitas**

Since human trafficking leads to serious violations of the right to humane treatment, to a life free of slavery<sup>9</sup> and to personal liberty and security, Juvenlandia has a duty to prevent and investigate human trafficking, punish those involved and ensure compensation for the victims.<sup>10</sup> In this case, Juvenlandia respected its obligations under Articles 1(1) and 25 of the *Convention*, in light of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (“*Palermo Protocol*”). The State took all necessary measures, following

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<sup>5</sup>*Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, GA Res 263, UNGAOR 54th Sess, Supp No 49, UN Doc A/54/49, (2000).; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November, 2000, U.N. Doc. A/RES/55/25 (hereinafter “*Palermo Protocol*”); as well , *The Inter-American Convention on International Traffic in Minors*, March 18 1994, OAS Treaty Series, No. 79 (Entry into force on August 15 1997) ; *The Inter-American on the International Return of Children*, 15 July 1989, OAS, Treaty Series, No. 70 (Entry into force on Nov. 4 1994).

<sup>6</sup>*Las Palmeras v. Columbia*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, at para. 34 (Dec. 6, 2001).

<sup>7</sup> *American Convention on Human Rights*, *supra* note 2, article 62(3); *Gonzál R Ieeal R; v; M4(e)xnco]TJ /TT0 1 Tf 0.003 Tc 0.020*

the standard of due diligence, to prevent human trafficking, such as immigration and border measures and administrative inspections under the Prophylaxis Law.

*1. Juvenlandia's immigration and border control measures respects its prevention duties in relation to Articles 5, 6, 7 of the American Convention*



crime and render successful this operation, she and her accomplices would have taken all necessary measures to circumvent the law and the adequate preventive border measures set up by the State, such as the possible falsification of the girls' documents. Her criminal manoeuvres thus permitted them to enter the territory illegally and in an unrecorded fashion (H.C. 11).

The

Moreover, recognizing the necessity to adopt special measures to deflect children from being trafficked, Juvenlandia submits that duly controlling a minor's departure from a country would be the best way to inhibit that problem. Prevention is not only the duty of the recipient State, but also of the State of origin, mainly as it has direct access to personal records, including the custodial situation of children. Shockingly, some States do not require parental authorization for the departure of children out of the country, but only for their return<sup>16</sup>, making them particularly vulnerable to kidnapping and trafficking. The fight against trafficking in minors is primarily a matter of international cooperation and accepting such a lax control of transits comes in direct conflict with the State's international obligations towards children.

*2. The administrative inspection conducted by State officials did not result in any violations of Maria Paz's and Felicitas' rights*

Juvenlandia has met its duty to guarantee the rights protected by Articles 5, 6, and 7 of the *Convention*, in accordance with Article 1(1), a wt ikind30.004 Tc anf4(rk.lb)-20(y)20( o(e)4(-12(y)20( 2(ow)

may be victims of violence.<sup>18</sup> Police officers did, in fact, conduct an inspection at the brothel where Maria Paz and Felicitas were living (H.C. 17).

The State's obligation to prevent and protect individuals in their relations with each other "is conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger."<sup>19</sup> As for Maria Paz and Felicitas, it can be disputed whether or not their presence in the brothel constituted a real and immediate danger to their rights under Articles 5, 6, 7 and 19. In the *Rantsev* case, the *European Court of Human Rights* judged that "against the general backdrop of trafficking issues in Cyprus," police authorities had sufficient indicators to give rise to a "credible suspicion that Ms. Rantseva was, or was at a real and immediate risk of being, a victim of trafficking."<sup>20</sup> In their custody was a young woman whose profile corresponded exactly to that of the archetypal victim and they neglected to immediately inquire into whether Ms. Rantseva had been trafficked.<sup>21</sup> On the contrary, in the present case, while the real and imminent danger criterion was maybe applicable to the women who showed traces of violence, it was clearly not the case for Maria Paz and Felicitas, as they did not seem in danger and showed no signs of having been beaten. Their mere presence at the brothel was not an immediate da

trafficking, police officers implementing investigation protocols must adapt to the difficulties of working with women who are both victims and unwilling accomplices of the criminals that exploit them. Considering that trafficking victims usually refuse to speak to anyone, especially State officials, as they are terrified of the consequences or sometimes suffering from the Stockholm Syndrome, it might be a pertinent explanation that in an integrated strategy the officers decided to postpone contact with the victims for further investigation.

**B. Once it was brought to its attention that human trafficking victims were on its territory, Juvenlandia responded with due diligence**

*1. The criminal complaint filed on behalf of Felicitas Unzué was appropriately processed*

With regards to the right to a fair trial and judicial protection, States respect their obligations to protect and ensure human rights when the system for the administration of justice is an effective and efficient tool to provide satisfaction to victims of violence and crime.<sup>22</sup> Regarding Lucio's criminal complaint filed on behalf of Felicitas, a search warrant was issued at the request of the Office of the Public Prosecutor (H.C. 34). Additionally, prior intelligence work by Juvenlandian police permitted to target that specific brothel (C.Q. 40). The search warrant was duly executed but the desertion of the brothel did not permit police officers to gather enough evidence to sustain the criminal complaint; hence the authorities had no other option but to dismiss it. However, it is reasonable to expect that t0.27 Tw 10.15( F)-2(ea r)5(ig(th)2t)-2(o)1ide (n)-14m6mk

2. *The writ of habeas corpus filed on behalf of Felicitas was carried out with exceptional diligence by the State*

The writ of *habeas corpus* filed on behalf of Felicitas was duly processed and executed with exceptional diligence by the State authorities (H.C. 35). Indeed, the judge ordered and exhausted several measures involving searches of brothels and inquiries to different State entities; when those measures failed, he ordered new ones. Yet, it remained impossible to find Felicitas then since she was obviously not in the State's custody. One cannot conclude to a violation of Article 25 as the writ of *habeas corpus* filed on behalf of Felicitas was appropriately processed and "the fact that this remedy was not successful [...] does not constitute a violation of the guarantee of judicial protection."<sup>23</sup>

3. *Juvenlandia implemented measures providing physical and emotional recovery for Felicitas Unzué*

Consistent with its duties under the *Convention*, as interpreted in light of the *Palermo Protocol*, and following the Commission's recommendations,<sup>24</sup> Juvenlandia referred Felicitas to a service for the protection of human trafficking victims (H.C. 55) and provided her with the help of a State service for undocumented immigrants (C.Q. 48). She is now receiving comprehensive psychological and medical treatment and she has been placed in contact with her family from Pobrelandia. Moreover, Juvenlandia decided to enforce the non-binding recommendation set forth in Article 7 of the *Palermo Protocol* and provided Felicitas with the possibility of obtaining legal immigration status in order to offer her the best possible chances of rehabilitation.

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<sup>23</sup>*Caballero-Delgado and Santana v. Colombia*, 1994 Inter-Am. Ct. H.R. (ser. C) No. 17, at para.66 (Jan. 21, 1994).

<sup>24</sup>See Report on Citizen Security and Human Rights, *supra* note 22 especially recommendations #5, 6, 15.

### **III. JUVENLANDIA'S ABORTION STATUTE IS IN CONFORMITY WITH ARTICLES 5, 7, 8 AND 19 IN RELATION TO ARTICLES 1(1) AND 2 OF THE CONVENTION**

#### **A. Juvenlandia has the sovereign right to adopt abortion legislation**

Juvenlandia has chosen to authorize abortion in certain circumstances, in accordance with the democratically expressed will of its population. In the other circumstances, the State has adopted, in accordance with Article 4(1) of the *Convention*, measures to protect the right to life of its citizens from the moment of conception. Indeed, it is legitimate for Juvenlandia to consider that the unborn is a person whose life must be protected.<sup>25</sup> Regarding the term “in general” include in Article 4(1), the Commission has established that this does not bar member States from criminalizing abortion.<sup>26</sup> Juvenlandia is also justified in allowing abortion to be performed by a licensed physician when the



requirement was included because Juvenlandia is most concerned by the health of pregnant women and will not allow them to resort to unsafe abortions. Despite the fact that the foetus was anencephalic and that this could have represented a danger to Maria Paz's health that could have warranted a legal abortion,<sup>34</sup> it is noted that when she tried to terminate her pregnancy, she was unaware she carried an anencephalic foetus, thus making it an invalid excuse.

Maria Paz's lack of medical attention and despair could perhaps excuse her unsupervised abortion, but only if the court is convinced that her pregnancy was the result of rape. One of the prosecutor's obligation is to apply the law with due diligence. He refused to dismiss the charges because it is his duty to ensure that the law is respected. While it was his opinion that the excuse of rape required a final conviction (H.C. ¶ 27), no judge has requested this of Maria Paz. As the interpretation of the law on abortion has yet to be fixed by the Supreme Court of Juvenlandia, this question should be settled by the judge at her trial.

**IV. UNDER ARTICLES 7 AND 8 OF THE CONVENTION, JUVENLANDIA FULFILLED ITS OBLIGATIONS TO RESPECT MARIA PAZ'S PERSONAL LIBERTY AND ENSURE JUDICIAL GUARANTEES WERE AFFORDED**

**A. In the course of Maria Paz's abortion case, the State respected her right to(us)-1(e)->s(O)**



evidence.”<sup>36</sup> Maria Paz was detained based on a suspicion that if released, she would flee, as she was “a foreigner, she did not have a domicile in the country or any other established roots; she was not employed; and she had no relatives or acquaintances in Juvenlandia” (C.Q. 7). Hence, there were reasonable motives to believe that she would evade justice.

Preventive detention is exceptional in nature, and it should be “limited by the principles of legality, the presumption of innocence, need, and proportionality.”<sup>37</sup> As required,<sup>38</sup>

authorities exercise “special diligence.”<sup>43</sup> Before Maria Paz met the Women’s Association, less than nine months had elapsed, which does not exceed “a reasonable limit whereby imprisonment

also weighed her vulnerability in doing so (H.C. ¶44). This situation clearly differs from that of street children being placed in detention,<sup>51</sup> as Maria Paz was accused of a criminal offence.

It is being presumed that the prison earnestly attempted to contact Maria Paz's family, as the authority “



Again, as for the abortion case, the proceedings do not constitute an unreasonable delay. The proceedings started when a complaint was filed on August 10, 2002 (H.C. ¶ 18). As of August 26, 2010, the case is awaiting trial. It does not constitute a case of a particularly complex nature. She is accused of trying to terminate her pregnancy, as substantiated by the material evidence and the witnesses. While the excessive workload a court may face cannot in itself excuse unreasonable delays in the proceedings,

In this case, the heat of passion issue is inadmissible because it was known to the defendant at the time of the trial. Maria Paz had access to counsel and it is expected that, as required, she was able to communicate with her lawyer in full confidentiality.<sup>65</sup> It is unknown whether Maria Paz even divulged to the public defender that the crime was committed in the heat of passion. It would be incorrect to assert that the standard of due diligence imposed on Maria Paz's lawyer requires that all possible defences be alleged in court. If she did inform him of this fact, perhaps it did not fit with the line of defence the lawyer found was in the best interest of Maria Paz. In the absence of information as to what was discussed between Maria Paz and her lawyer, it is premature for this Court to condemn the public defender for not providing an appropriate defence to his client. Maria Paz pleaded guilty to a charge of first degree murder, which indicates that she admitted to the premeditation of the murder (H.C. ¶25). Accordingly, the heat of passion defence is incompatible with the facts first brought forward.

Here, "her personal circumstances relating to her vulnerability [were] sufficiently weighed in the lower court's judgment" (H.C. at ¶ 44). Maria Paz's status as an illiterate foreigner does not relieve her of the obligation to respect the law. Let it be reminded that *ignorantia juris non excusat*.<sup>66</sup> Maria Paz is accused of committing murder, a criminal offense in all countries, and known by everyone, literate or not. The murder offense is an incident that must be dissociated from her victim status. Given that her circumstances do not amount to a defence in the murder case, Juvenlandia reiterates that Maria Paz was afforded an appropriate defence and that no mitigating circumstances were left unconsidered.

### **C. Juvenlandia's juvenile justice laws fulfill its obligations under article 8, 25 and 19 of the Convention**

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<sup>65</sup> *Castillo-Petruzzi et al. V. Peru*, 1998 Inter-Am. Ct. H. R. (ser. C) No. 41, at para. 139 (Sep. 4, 1998).

<sup>66</sup> Black's Law Dictionary, Ninth Edition, Bryan A. Garner, p. 815.

1. *Juvenlandia's adoption of a special criminal judicial system for minor satisfies the requirements of articles 5(5), 8 and 19 of the Convention*

Maria Paz's trial in a regular criminal court does not constitute a violation of articles 8, 25 and 19, as she was tried under criminal laws that are different from those applied to adults (H.C. ¶ 44). This special regime, provided for in the Juvenile Justice Act, incorporates the requirements of the *Convention on the Rights of the Child* ("the CRC") (C.Q. at 64). Article 5(5) of the *American Convention* stipulates that "[m]inors while subject to criminal proceedings shall [...] be brought before specialized tribunals." The Court has stated that children under 18 must be heard by "specialized jurisdictional bodies."<sup>67</sup> The fact that Maria Paz was tried in a regular court (H.C. ¶26) does not mean that she was not heard by a specialized body in that court.

Juvenlandia understands that States should ultimately aim to establish a specialized court system for minors. However, Article 40(3) of the CRC, which was referred to in Advisory Opinion 17,<sup>68</sup> provides that "States Parties *shall seek* to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children" (emphasis added). The Committee on the Rights of the Child ("the Committee"), which interprets this convention, is better placed to establish how to protect minors. It recommended that: "States parties establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment

defenders,<sup>70</sup> let it be reminded that the observations of the Committee remain “soft law”, that is non-binding observations. The essence of Articles 5(5) and 8, in conjunction with article 19, of the *Convention*, is that children need to be guaranteed a fair and just trial.<sup>71</sup>

The adoption of special juvenile criminal justice laws (H.C. ¶44) serves exactly this purpose. A physical separation between regular courts and juvenile courts is not required to ensure that a



Also, the Committee has lauded several countries in the hemisphere for establishing a special criminal juvenile justice system, without stating that a separate special court must be created.<sup>77</sup>

## 2. *Plea bargaining involving minors respects Articles 8 and 19 of the Convention*

Plea bargaining, including in the case of a minor, is in conformity with international law and respects the right to not be compelled to plead guilty provided for in Article 8(2)g) of the *Convention*. Common law countries often resort to this procedure and have been doing so for over a century.<sup>78</sup> Plea bargaining is the norm in several OAS States.<sup>79</sup> In Canada, plea bargaining is a common practice<sup>80</sup> and in the United States, “roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty.”<sup>81</sup> Both for adults and minors, most criminal charges do not result in trials but are resolved by guilty pleas.<sup>82</sup> Plea bargaining is used at international criminal courts,<sup>83</sup> indicating that this practice is accepted by the international community. Were the Court to declare a violation of Article 8, it would be asking several countries of the Americas to change their legislation, which has proven to be

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<sup>77</sup>Committee on the Rights of the Child, Concluding Observations: The Plurinational State of Bolivia, U.N. Doc. CRC/C/BOL/CO/4 (Oct. 16, 2009), at para. 82(c); Committee on the Rights of the Child, Concluding Observations: Mexico, U.N. Doc. CRC/C/MEX/CO/3 (Jun. 8, 2006), at para. 70; Committee on the Rights of the Child, Concluding Observations: Ecuador, U.N. Doc. CRC/C/15/Add.2623 (Sep. 13, 2005), at para. 71.

<sup>78</sup> Albert W. Alschuler, “Plea Bargaining and its History” (January 1979) 79 Colum L. Rev. 1 at p. 6.

<sup>79</sup>St Lucia Criminal Code, sec. 871; Jamaica, *The Criminal Justice (Plea Negotiations and Agreements) Act*, available at: [http://www.japarliament.gov.jm/attachments/412\\_Criminal%20Justice%20\(Plea%20Negotiations%20and%20Agreements\)%20Regulations%202010.pdf](http://www.japarliament.gov.jm/attachments/412_Criminal%20Justice%20(Plea%20Negotiations%20and%20Agreements)%20Regulations%202010.pdf),

<sup>80</sup>Nicholas Bala, *Youth Criminal Justice Law*, (Toronto: Irwin Law, 2003), at p. 366.

<sup>81</sup>Alschuler, *supra* note 78, at p. 1.

<sup>82</sup> Nicholas Bala, *supra* note 80, at p. 363.

<sup>83</sup>*Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ICTY Appeals Chamber (Oct. 7, 1997) International Criminal Tribunal for the

effective and to safeguard the rights of the accused. Also, it must be noted that the Inter-American system's friendly settlement procedure<sup>84</sup> presents analogies with plea bargaining.<sup>85</sup>

Plea bargaining should not be construed as obliterating the defendant's due process guarantees. It is expected that Juvenlandia adopted legislation similar to that of other democratic States. Canada regularly resorts to this practice and its courts have held that it respects the *Canadian Charter of Rights and Freedoms*,<sup>86</sup> which provides for due process guarantees very similar to, if not identical or more protective than, those found in the Convention.

The practice of plea bargaining, specifically in cases involving juvenile offenders, is usually carefully regulated. Many jurisdictions require that "the plea accurately reflects the facts of the case."<sup>87</sup> While it has been recognised that youths may not fully comprehend the consequences of plea bargaining,<sup>88</sup> the judge, prosecutor and counsel must act "honourably and forthrightly."<sup>89</sup> This is in accordance with the special protection afforded to minors under Article 19 of the *Convention* and the required difference in the proceedings conditions for minors.<sup>90</sup> A judge will confirm a plea bargain if he is satisfied that the facts support the charge.<sup>91</sup> Latitude is given to the judge, who may choose not to impose the sentence the accused requests.<sup>92</sup> In Maria Paz's case, she was caught *in flagrante delicto*, as the police arrived on the scene of the crime within minutes of her stabbing the victim (H.C. ¶ 24). The factual evidence is sufficiently clear for a

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<sup>84</sup> Inter-American Commission on Human Rights, Rules of Procedure, art. 40; Inter-American Court of Human Rights, Rules of Procedure, art. 63.

<sup>85</sup> Ludovic Hennebel, *Le particularisme interaméricain des droits de l'Homme*, (Pedone : Paris, 2009), at p. 90.

<sup>86</sup> *R. v. M. (C.B.)* (1992), 99 Nfld. & P.E.I.R. 280 (P.E.I.C.A.).

<sup>87</sup> Jenia I. Turner, *Plea Bargaining Across Borders: Criminal Procedure*, (New York: Aspen Publishers, 2009) at p. 41.

<sup>88</sup> For the Canadian standard, see *R v. T.W.B.*, [1998] B.C.J. 1044 (B.C.C.A.).

<sup>89</sup> See Supreme Court of Canada decision: *R. V. Burlingham*, [1995] 2 S.C.R. 206, at 230-231.

<sup>90</sup> *Advisory Opinion OC-17/02*, *supra* note 13, at para. 96.

<sup>91</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1, art. 36.

<sup>92</sup> Nicholas Bala, "The Young Offenders Act: A Legal Framework", in Joe Hudson, Joseph P. Hornick, and Barbara A. Burrows, eds., *Justice and the Young Offender in Canada*, (Toronto: Wall & Thompson, 1998) at p. 24.



*De facto* custody in Juvenlandia respects all these principles; parents can comply with their obligations and respect the best interests of their child. It allows them to temporarily place their child in the good care of another family while they are unable to assure the best conditions for his or her development, without arbitrary interference from the State.<sup>97</sup> Experts on the rights of children are unanimous in saying that "membership in a nurturing family is a necessary condition for healthy physical and mental development."<sup>98</sup> This Court also specified that children deprived of the right to grow up in a nurturing family may not develop a life project or seek out a meaning for their own existence.<sup>99</sup> Also, *de facto* custody is the ultimate expression of *patria potestad*; it allows a direct participation of the parents in deciding their child's future and what is in his or her best interests without altering the legal bonds that unite them, ultimately respecting their right to family.<sup>100</sup> For a number of reasons, mothers can sometimes be in conflict with their maternity<sup>101</sup> and their situation cannot always allow for a legal abortion. In those cases, new mothers are momentarily incapable of raising their baby in a family environment and an atmosphere of happiness, love and understanding.<sup>102</sup> *De facto* custody is one of the most comprehensive ways for them to deal with this very personal issue and at the same time to act in the best interests of their child. Indeed, other options can result in irreversible negative effects on the child.<sup>103</sup>

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<sup>97</sup>*Convention on the Rights of the Child*, 20 November, 1989, U.N.T.S. vol. 1577, (Entry into force on 2 September 1990), art. 16.

<sup>98</sup>Audience CIDH. <http://www.law.harvard.edu/news/spotlight/classroom/related/testimonyfullnov09.pdf>, at p.3.

<sup>99</sup>*Villagran-Morales Case*, Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, at para. 2.

<sup>100</sup>*American Convention on Human Rights*, *supra* sh Tc (s)-2i90 Tw p94 rrrh Tcnh Tt .N.115 T( Tw 320 1 TC-t11 Tw 7.048 0 Td8 0 T66

The *de facto* custody of the baby by another family followed his best interests and respected his rights, as well as Felicitas' rights. In accordance with the mother's will, the baby was temporarily placed in the care of a good family as she was unable at that time to assure the best conditions for him (H.C. 20). The placement of the child was done in his best interests as the family cared for him in the best way possible, materially and emotionally (H.C. 49). To ensure that the *de facto* custody of the baby was traceable, Felicitas signed the necessary papers (H.C. 36). The *de facto* custody was judicially converted into pre-adoptive custody which led to a final adoption in July 2004 (H.C. 22).

**i. B. The adoption of Felicitas Unzué's son was carried out legally**

To interpret the scope of the State' obligations under Article 19, especially regarding adoption proceedings, it is necessary to refer to Article 21(a) of the CRC. This Article states that the adoption must only be authorized by competent authorities who determine the child's adoptability and, if required, that the persons concerned have given their informed consent. More importantly, Article 21 specifies that the best interests of the child shall be the "paramount consideration" in all adoption proceedings. In sum, Article 21 "emphasizes the importance of putting the child and his needs at the centre of all decisions which concern him."<sup>104</sup>

In Juvenlandia, adoption proceedings are regulated by the Code of Civil Procedure and are subject to judicial intervention at every step, from the attribution of pre-adoptive custody to the final judgment of adoption (C.Q. 8). In cases of *de facto* custody, in order to ensure that an informed consent to the adoption was given and that children are not separated from their parents against their will,<sup>105</sup> parents must affirm the surrender of the child before a judge (C.Q. 8).

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<sup>104</sup>Sylvain Vité et Hervé Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption*, Boston, Martinus Nijhoff, Leiden, 2008, at p. 25.

<sup>105</sup>*Convention on the Rights of the Child, supra* note 98, art. 9.



only family he had ever known and all expert reports predicted that a separation from his adoptive parents could have harmful effects (H.C. 49).<sup>109</sup> To this effect, Juvenlandia's legislation on children resembles that of Canada's "life project" vision that prioritizes maximum stability and continuity in the life of the child.<sup>110</sup> Moreover, the adoptive parents' rights had to be safeguarded since they care for the child in the best way possible (H.C. 49) and the adoption process was, *prima facie*, carried out in good faith.

As noted by the Commission, tribunals have the obligation to handle all custody cases with exceptional diligence and without delay.<sup>111</sup> Whereas in the *Forneron* case, the father saw his