

2011 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION
ACADEMY ON HUMAN RIGHTS AND HUMANITARIAN LAW
AMERICAN UNIVERSITY -WASHINGTON COLLEGE OF LAW
CASE OF RICHARDSON, Unzué et al. v. Juvenlandia
BENCH MEMORANDUM – RESERVED FOR THE
EXCLUSIVE USE OF THE JUDGES

CONFIDENTIAL

Index

Part One. General considerations

1. Introduction

2. The concept of the child in international human rights law (Article 19 of the American Convention on Human Rights in conjunction with Article 1of the Convention on the Rights of the Child)

3. General criteria on the international responsibility of the State.....

 a) Introduction

 b) Obligation to respect and guarantee human rights.....

 c) International responsibility of the State for the acts of third parties and its duty of prevention.....

Part Two. Specific considerations. Rights violated

1. Right to life and humane treatment (Articles 4 and 5 of the American Convention on Human Rights)

2. Prohibition of slavery and involuntary servitude (Article 6 of the American Convention on Human Rights) in relation to the right to personal liberty (Article 7 of the Convention).....

3. Rights of the child (Article 19 of the American Convention on Human Rights).....

4. Rights of the family (Article 17 of the American Convention on Human Rights).....

 4.1. Some considerations regarding the best interests of the child.....

 4.2. Relationship between the best interests of the child and the right of the child to be heard.....

5. Guarantees of due process and judicial protection (Articles 8 and 25 of the American Convention on Human Rights

6. Right to equal protection (Article 24 of the American Convention on Human Rights)

Part Three. Reparations (international responsibility of the State and its duty to make reparations)

1. Initial considerations

2. General considerations regarding reparations

3. Injured parties (victims)

4. Pecuniary and non-pecuniary damages

5. Reparations measures at the international level.....

Part One. General considerations.

1. Introduction

This document was prepared in order to provide the judges of the Competition with basic tools regarding the main facts and legal issues set forth in the hypothetical case. As such, the objective is not to undertake an exhaustive analysis of all the issues raised in the case, nor for this document to be a scholarly text or an academic reference work.

Bearing that in mind, it is expected that the participants will raise other topics and issues in addition to the ones addressed herein. Accordingly, the judges should assess positively the participants' use of arguments that differ from or complement the ones discussed herein, provided that they are pertinent from the legal standpoint considered, and consistent with the strategy advanced by the participants as litigants in the case.

As is evident from the facts presented in the case, the State in question has ratified a large number of international instruments.¹ This preliminary clarification is made so that the participants may assert and use different international instruments in support of their claims, and thereby comprehensively interpret the American Convention on Human Rights (hereinafter, ACHR or the Convention), the case law developments of the Inter-American Court of Human Rights (hereinafter, IACtHR or the Court)—in both its contentious and advisory jurisdiction—and, as appropriate, the decisions of the Inter-American Commission on Human Rights (hereinafter, IACHR or the Commission) with other sources of international law.

Schematically, the case initially presents a scenario that is increasingly prevalent in the hemisphere: the separation of girls² from their families and their communities through human trafficking for purposes of commercial sexual exploitation (locally or internationally); the different discussions raised with respect to the criminal offense of abortion; the issue of adoption and the consent of the biological mother, including the complex use

¹ The American Convention on Human Rights (known as the "Pact of San José" and its Additional Protocol in the Area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador;" the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; ; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child, as well as its two Optional Protocols: the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; the Inter-American Convention on the Forced Disappearance of Persons; the Inter-American Convention on International Traffic in Minors; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which complements the United Nations the Convention against Transnational Organized Crime (known as the "Palermo Convention"). *Juvenlandia* is also a Member State of the United Nations and of the Organization of American States.

² In this document the general expression "child" will be used to refer indistinctly to girls, boys, and adolescents, although those expressions may also be used.

of the category of “best interests of the child” and its impact on other areas; various problems in the region’s juvenile justice systems arising from the use of standards similar to those used in the general justice system; and, finally, access to justice for victims who are underage foreigners facing enormous social vulnerability.

Given that many of the standards for the legal protection of children in the region are works in progress due to their vagueness and lack of specificity, the case raises numerous issues that enable the participants to create new arguments and legal approaches to the issue.

In addition, it is important to recall that the trafficking of children (in this case girls) for purposes of sexual exploitation affects an enormous number of human rights. That allows for multiple frameworks and approaches in the presentation of the case.

It is suggested that this document be read together with the hypothetical case and its clarification questions and answers.

In laying out the facts most relevant to the application of the law to the facts of the case, this document has made cuts to the original narrative; many of the facts are related to different rights, which would lead to the repetition of facts in different chapters of this document. Therefore, the text of the hypothetical case should be read in its entirety.

To conclude this introductory section, it should be kept in mind that various expository structures can be used logically to approach the case, all of which are equally efficient for those purposes.

One approach could be to take the situation of each one of the three victims, and from there examine the violation of each right alleged. The presentation could also be structured following the usual format of the decisions issued within the inter-American system, which is to make arguments right by right. As mentioned earlier, this is the traditional method that the Bench Memos from previous competitions have used, and this document maintains that format.

Finally, the framework related to children’s rights is no small matter, in that the case law of the regional system has varied in its interpretation of the issue. The basic question is whether Article 19 itself contains children’s rights as an autonomous right, or whether it is a right that modifies all the other rights of all other persons by adding additional protection for children, which corresponds to the State’s greater duties to provide for and guarantee the rights of children.

The case attempts to present both aspects, but it is important to keep in mind the difficulty that the issue has posed in the case law, for reasons that will not be discussed herein for the sake of brevity.

2. The concept of the child in international human rights law (Article 19 of the American Convention on Human Rights in conjunction with Article 1 of the Convention on the Rights of the Child)

The American Convention on Human Rights does not define the term “child.” Therefore, in accordance with the Vienna Convention on the Law

of Treaties,³ the regional system applies the concept established in the specific international human rights law convention: the Convention on the Rights of the Child (hereinafter, occasionally referred to also as the CRC).⁴

This instrument defines as a child “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”⁵

The IACtHR has ruled on this point and assumed this standard in Advisory Opinion OC-17/02, *Juridical Condition and Human Rights of the Child*.⁶

3. General criteria on the international responsibility of the State

a) Introduction

In examining the responsibility of the State for the events that took place in this case, it is recommended that the participants first make reference to the nature of the human rights treaties.

Next, Articles 1 and 2 of the American Convention on Human Rights should be analyzed with reference to the international obligations of the States to protect of human rights, and with special emphasis on the valid and applicable *corpus juris* regarding the protection of children’s rights.

Finally, it is necessary to examine the responsibility of the State for both the actions and omissions of its agents.

Below is a synthesis of considerations on the specified points.

The special nature of human rights treaties was established in numerous decisions of international bodies for the protection of human rights. In that respect, the IACtHR has established that human rights treaties are inspired by higher common values centered on the protection of the human person.⁷

The States thus assume obligations with respect to the individuals under their jurisdiction. Such obligations may be passive (do not kill, do not violate physical safety, and others), or they may be positive obligations.

b) Obligation to respect and guarantee human rights

Article 1 of the American Convention on Human Rights establishes the States’ obligation to respect rights, in the following terms:

³ Vienna Convention on the Law of Treaties, 1969, Article 31.

⁴ Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989) entered into force Sept. 2 1990

⁵ Article 1 of the Convention on the Rights of the Child.

⁶ I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, Chapter V.

⁷ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 105.

- “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.”

In addition, Article 2 of the Convention regulates the duty of the States to enact provisions of domestic law, so that:

“(…) Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

Although the American Convention on Human Rights refers expressly to general standards of international law for its interpretation and application,⁸ the obligations contained in Articles 1.1 and 2 of the Convention are the basis for the determination of the international responsibility of a State for violations of the Convention, which is the definitive origin of the State’s international responsibility.

These general obligations in turn give rise to special duties, which can be determined according to the subject’s particular needs for protection, whether based on his or her personal status (in the hypothetical case the petitioners are two girls) or his or her specific situation, such as extreme poverty, status as a foreigner, social exclusion, and/or status as a child—as in the instant case.

States have the obligation to guarantee all rights. That entails the duty to organize the entire State apparatus to ensure the full and free exercise of the human rights enshrined in the American Convention.

In this respect, the IACtHR has stated that: “(…) As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁹

Specifically, in one case involving children as victims, the IACtHR found that any undermining of human rights is attributable to the State if it can be attached, according to the rules of international law, to the act or omission of any government authority, thus giving rise to the responsibility of the State in the terms provided for under the American Convention. In that respect, in every circumstance in which a government body or employee, or public institution, unduly infringes one of those rights (by active conduct or by

⁸ Preamble and Article 29 of the ACHR.

⁹ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 166.

omission), the duty to respect rights, enshrined in Article 1 of the American Convention on Human Rights, has been violated.¹⁰

Furthermore, to establish that there has been a violation of the rights enshrined in the American Convention does not require a *prima facie* determination—as under domestic criminal law—of the guilt or the intent of its perpetrators; nor is it necessary to individually identify the State agents who committed the acts alleged to be violations.¹¹

In another case also related to children (but children deprived of their liberty and in the custody of the State), the IACtHR stated that the general duty of Article 2 of the American Convention entails taking measures in two different respects: first, the suppression of standards and practices of any kind that involve the violation of the guarantees provided for in the Convention; and in addition, the enactment of laws and the development of practices conducive to the effective observance of those guarantees.¹²

One of the issues to be decided in the instant case is whether the State had met these two types of obligations. As such, the arguments should discuss whether the State, by act or omission, violated the rights of the girls, and of the son of one of them, upon a proven failure to observe its duty to respect, prevent, and guarantee; they should also discuss whether the State met or failed to meet its obligation to take special measures to effectively guarantee the rights of the girls.

c) International responsibility of the State for the acts of third parties and its duty of prevention

The IACtHR has held that the international responsibility of the State may also arise from the acts of private parties, in principle not attributable to the State. Indeed, the States Party to the American Convention are the ones that must ensure respect for the standards of protection and ensure the effectiveness of the rights enshrined therein for all people; however, those State obligations extend beyond the relationship between its agents and the individuals subject to its jurisdiction, and it becomes a positive obligation of the State to take the necessary measures to ensure the effective protection of human rights in private relationships and relationships among individuals as well.

The IACtHR has held that the determination of State responsibility requires that, at the time of the events, the authorities were aware, knew, or should have known of the existence of a real and immediate risk to the life of an individual or group of individuals, and failed to take the

¹⁰ I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 75: "(...) The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention."

¹¹ I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.)*, op. cit., para. 75.

¹² I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 206.

necessary measures—within the scope of its authority—that could reasonably be expected to prevent or avert that risk.¹³

Some possible arguments of the Commission and the State

On this point concerning the international responsibility of the State, and on the matter of the trafficking of the girls—which is a key issue since it gave rise to the facts and determined several of the consequences that the case presents—the Inter-American Commission can argue that various State agents (immigration personnel, police officers, etc.) were in a position to verify the violation of some of the girls' rights, but failed—due to various omissions or acts of negligence—to put a stop to that situation.

On its behalf, the State can argue that it is not possible to attribute the acts committed by third parties (Porota and her pimp accomplices) to it as if they were the State's own acts; nor could such acts give rise to the State's international responsibility unless the petitioners can demonstrate that the conduct of the private individuals is attributable by action or omission to state agents. In principle, that could not be proven beyond the girls' incomplete references to the acts of the customs, immigration, and police personnel.

In the State's opinion, its actions were limited to the sphere of its own responsibility and were related to the proper filing of the court cases for the complained-of acts (for example, the searches conducted within the context of the *habeas corpus* action and thereafter, which ultimately were successful).

It can also assert that the domestic legal remedies were used effectively to identify and determine the responsibilities of the alleged perpetrators of the crimes against the girls.

The State can further argue that all of the legal proceedings respected due process of law, and that *Juvenlandian* law is characterized precisely for recognizing and regulating all of the human rights treaties the country has signed.

Part Two. Specific considerations. Rights violated.

1. Right to life and humane treatment (Articles 4 and 5 of the American Convention on Human Rights)

The arguments are presented jointly with respect to both girls.

Relevant facts

- Two girls from *Pobrelandia*, a country on *Juvenlandia's* northern border (María Paz, age 14, and Felicitas, age 16), were taken by an

¹³ I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, paras. 123 & 124.

adult from *Juvenlandia* (Porota), who convinced them to move to the other country, where they could work as domestic employees and, in time, obtain legal residence in order to attend school and eventually get a better job.

- When they crossed the border between the two countries, Porota asked the girls for their documents and had a conversation with the Customs and Immigration officers that the girls could not hear.

- When they arrived in the neighboring country—and to the surprise of both girls—it was to a very dirty apartment crowded with other women. Some were younger and some were older; they had little clothing, and some of them showed signs of having been beaten.

- María Paz became frightened and reacted by asking for her documents so she could leave the place. Porota told her that they were going to keep the girls' documents until they could pay for their trip. María Paz got nervous and began shouting. Then, a man took her by force, raped her. Felicitas fainted (not long afterwards, she learned that she was pregnant). María Paz became pregnant as a result of the rape.

Applicable law

The right to humane treatment is regulated under Article 5 of the American Convention on Human Rights, which establishes that:

- “1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”

The infringement of the right to humane treatment is evident in the case, especially with regard to the provisions of sections 1 and 2 of the Article reprinted above, in that the girls' physical, mental, and moral integrity was not respected.

In addition, as this right is related to equality before the law, and to gender issues, a (weaker) argument could be developed to compare the situation of a trafficking victim to torture or cruel, inhuman or degrading

treatment, in particular based on the interpretation suggested by some scholarly opinions that systematic rape constitutes a form of torture.

In a different vein, without ignoring the central importance of the right to humane treatment in this case, the guarantee of the right to life cannot be separated from its analysis—especially in the case of children.

Article 4 of the American Convention on Human Rights states with regard to this matter that:

“1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.”

The proposed analysis should start by recalling the standard defined by the Inter-American Court of Human Rights—the highest regional court—precisely in an emblematic case related to child victims, which establishes that the right to life is a fundamental human right, the full enjoyment of which is a prerequisite to the enjoyment of all other human rights.¹⁴ As such, unless it is respected, all other rights will be meaningless.¹⁵

The case law of the IACtHR has established that the observance of Article 4, in conjunction with Article 1.1 of the American Convention, not only prescribes that no person be deprived arbitrarily of his life (negative obligation) but also requires that States take all appropriate measures¹⁶ to protect and preserve the right to life (positive obligation).¹⁷

Thus, according to the case law of the IACtHR, the right to life also includes the right to be free from conditions that hinder or prevent access to a dignified existence.¹⁸

¹⁴ I/A Court H.R., *Case of the “Street Children,”* op. cit., para. 144.

¹⁵ *Idem* para. 144; & I/A Court H.R., *Case of the “Juvenile Reeducation Institute,”* op. cit., para. 156.

¹⁶ I/A Court H.R., *Case of the Pueblo Bello Massacre,* op. cit., para. 120.

¹⁷ I/A Court H.R., *Case of the “Street Children,”* op. cit., paras. 144-146.

¹⁸ *Idem*, para. 144.

This obligation requires special arrangements in the case of children, bearing in mind the special protection standards established in the American Convention and in the Convention on the Rights of the Child.¹⁹

In deepening this analysis, the IACtHR specified that States must not hinder access to the conditions that guarantee a dignified life for children.²⁰ Accordingly, the IACtHR emphasized the need to take positive measures (special protection) to prevent the violation of this right.²¹

Some possible arguments of the Commission and the State

The Commission could argue that the State violated Article 4.1 of the ACHR, in conjunction with Article 1.1, insofar as it failed to take the necessary positive measures within the sphere of its authority to prevent or avert the infringement of the right to life of the girls who—coopted into going to *Juvenlandia*—were not ensured decent living conditions after entering the country under those illegal circumstances.

As the guarantor of the right to life of the individuals under its jurisdiction as understood in the above sense, it was reasonable to expect the State to have adequate and efficient controls on the immigration and transportation of minors in order to prevent illegal travel. According to this criterion and to the IACtHR case law cited in the notes based on Article 19 of the American Convention, the victims' suffering—indicative of their degrading living conditions—would be attributable to the State due to its failure of prevention, because the victims were two girls.

The police corruption is also clear in the case, inasmuch as the controls provided for to verify the activities and conditions of the brothel were not performed; had they been, they would have ended María Paz's and Felicitas's suffering much earlier.

For its part, the State can argue that it is a disproportionate and unpredictable burden to require it to foresee any possible threat to the lives of each and every one of its citizens and the individuals who enter the country, especially from acts not carried out by State agents (there are only vague and sketchy references made by the girls regarding the acquiescence of state agents when they were traveling).

The State can further argue that it has laws regulating the investigation of the crime of human trafficking, which was done by the judicial authorities involved (for example, through the previously mentioned searches), and that it provides exemplary punishments as well as protection to the rescued victims, which were also applied in the case.

With regard to the corruption of the immigration authorities (relating to the irregular entry) and the police (in relation to the controls stemming from the Prophylaxis Law), the State can maintain that there are

¹⁹ I/A Court H.R., *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 138; & I/A Court H.R., *Case of the "Street Children,"* op. cit., para. 146.

²⁰ *Case of the "Street Children,"* op. cit., para. 144; & I/A Court H.R., *Case of the "Juvenile Reeducation Institute,"* op. cit., para. 156.

²¹ I/A Court H.R., Advisory Opinion OC-17/02, op. cit., para. 87.

administrative verification procedures and that it will take all of the measures necessary to determine whether the alleged corruption existed, as well as to punish the guilty public servants.

2. Prohibition of slavery and involuntary servitude (Article 6 of the American Convention on Human Rights) in relation to the right to personal liberty (Article 7 of the Convention)

Relevant facts

- María Paz became frightened and reacted by asking for her documents so she could leave the place. Porota told her that they were going to keep the girls' documents until they could pay for their trip. María Paz got nervous and began shouting. Then, Porota's accomplice took her by force, raped her, and told her that from that point on she would be well advised to behave herself if she wanted to stay out of trouble. María Paz became pregnant as a result of the rape.

- They were forced to work for six months at that place, which served as both a living quarters and a brothel. They were prevented from leaving unless accompanied by some very aggressive men they referred to as "the thugs." Every so often they were given some money to buy food and personal hygiene items.

- Any complaint—no matter how mild—was met with a brutal attack, so eventually they stopped complaining. They never received any medical attention. They were frequently given pills. The girls did not know what the pills were for, but they had very strange effects on them. After taking the pills, the girls would lose consciousness and later wake up on a mattress, nearly always beaten and blood-stained.

- On one occasion, government officials visited the place. The young women realized that the thugs had been tipped off in advance, since they told the girls what answers they had to provide in the event that they were questioned. They had to say that they were the girlfriends of two of the men, and that they just lived there. The officials did not ask any questions, in spite of the conditions of the place and the fact that some of the women showed signs of having been beaten, and they went out with the thugs to eat at a neighborhood bar on the corner.

- Felicitas's attorney and her boyfriend filed a criminal complaint alleging human trafficking, grievous bodily harm, subjecting another to servitude, and violation of the Prophylaxis Law. The court issued a search warrant at the request of the Office of the Public Prosecutor, but when it was executed, the brothel was deserted. In view of the lack of evidence, the complaint was dismissed without further proceedings. The Office of the Public Prosecutor did not file an appeal.

2011 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION
ACADEMY ON HUMAN RIGHTS AND HUMANITARIAN LAW
AMERICAN UNIVERSITY - WASHINGTON COLLEGE OF LAW
CASE OF RICHARDSON, Unzué et al. v. Juvenlandia

Applicable law

The American Convention protects this sphere of personal liberty in providing that:

“1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article, the following do not constitute forced or compulsory labor:

a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

d. work or service that forms part of normal civic obligations.”

In addition, the treaty regulates the right to personal liberty in Article 7, in the following terms:

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. 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 detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

The relationship between Article 6 and Article 7 is direct, and this document will not address it for reasons of brevity. It is clear in this case how the personal safety and liberty of the girls Felicitas and María Paz was affected by the facts under examination—which amount, basically, to their subjection to servitude. Although it could be argued that the Articles are mutually exclusive, the clearest relationship appears to be that of a broader category and a subclass. What is relevant here are the provisions of section 1. It can also be asserted that the infringement of liberty as a consequence of the trafficking was proven throughout the trip, since the girls' lack of documents drastically reduced their chances of breaking free from their captors.

In addition, as part of the broad *corpus juris* on the protection of the human rights of children, the specific international instrument ratified by *Juvenlandia* that provides a definition of “human trafficking” must also be considered:

““Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (...); and
“Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the possible, such border controls as may be necessary to prevent and detect trafficking in persons. (...).”²²

Articles 19 and 39 of the Convention on the Rights of the Child—applicable in the instant case according to the rule established by the IACtHR in the *Case of the “Street Children” (Villagrán-Morales et al.)*²³—establish the duty to take various protective measures against the physical,

²² Articles 3.a and 11.1 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, which complements the *United Nations the Convention against Transnational Organized Crime*.

²³ Judgment of November 19, 1999, Series C No. 63, para. 194, op. cit. *supra*.

mental, and sexual abuse and mistreatment of children.²⁴ Compliance with that duty, according to the IACtHR, requires—at a minimum—a serious investigation and the due punishment of those responsible, the physical and mental recovery and the social reintegration of child victims, and the protection of child victims' privacy.

To complement the above, it is also possible to make indirect use of an argument that the IACtHR developed in a case involving child victims and personal liberty. According to this argument, the protection of liberty safeguards both the protection of physical liberty and personal safety, in a context in which the absence of guarantees could result in the subversion of the rule of law and the deprivation of minimum legal protections for detainees.²⁵ In a broad sense, "(...) liberty is the ability to do or not do all that is lawfully allowed. In other words, it is the right of every person to organize his individual and social life in keeping with his own choices and beliefs, and in accordance with the law. Security, on the other hand, is the absence of interferences that restrict or limit liberty beyond what is reasonable. Defined as such, liberty is thus a basic human right, inherent in the attributes of the person, that crosscuts the entire American Convention."²⁶

In a complementary manner, it should be noted that Article 35 of the the Convention on the Rights of the Child provides that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." Likewise, Article 7 of the Inter-American Convention on International Traffic in Minors states that "The States Parties undertake to adopt effective measures, under their domestic law, to prevent and **severely** punish the international traffic in minors defined in this Convention." (emphasis added).

Finally, the argument for the possible autonomous violation of Article 22 of the American Convention on Human Rights relating to the right of free movement and residence²⁷ can be dismissed, as the case deals with

²⁴ "By the same token, and for the purposes of this Advisory Opinion, the States Party to the American Convention are under the obligation, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of this Convention, to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities." I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 87.

²⁵ I/A Court H.R., *Case of the "Street Children,"* op. cit., para. 135.

²⁶ I/A Court H.R., *Case of Chaparro-Álvarez and Lapo-Íñiguez v. Ecuador.* Judgment of November 21, 2007. Series C No. 170, para. 52.

²⁷ "1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

underage children who were brought into the country illegally, and whose right of movement and residence requires that a legal representative legal (of legal age) give them permission to exercise it.

Some possible arguments of the Commission and the State

The Commission could allege the violations of the abovementioned standards, interpreted in light of the duty of special protection of children based on Article 19 of the American Convention on Human Rights. This could be based, for example, on the ineffectiveness of the immigration controls and the corruption of the immigration officers who allowed the irregular entry of two girls into the country; on the ineffectiveness of the ground controls; on the corruption of the public servants in charge of monitoring vehicular traffic; on the corruption of the police and/or other administrative public servants in charge of ensuring the proper enforcement of the Prophylaxis Law, etc.

For its part, State's main argument is that the acts alleged were not committed by state agents and that, as previously indicated, it has provided all the measures under domestic law to investigate the crimes, punish those responsible, and offer special care to the victims.

3. Rights of the child (Article 19 of the American Convention on Human Rights)

Relevant facts in addition to those already stated and to others that are presented later with regard to trafficking and adoption

4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.”

- On February 5, 2004, after being released from jail, María Paz, who was then 16 years old, positioned herself outside the brothel with a kitchen knife. At nightfall she saw the man who had sexually assaulted her leave the place, walking as if he were drunk. She jumped on him and stabbed him in the neck with the knife. She remained at the scene, panic-stricken, and was detained by Chocha, one of the women who also lived at the brothel and apparently ran the place. Chocha had come out quickly to the street and called the police, who arrived within minutes.

- After a plea bargaining agreement, in which she admitted her guilt, María Paz was convicted on December 10, 2004, under the juvenile criminal justice laws of *Juvenlandia*, enacted subsequent to the ratification of the Convention on the Rights of the Child, and sentenced to 15 years in prison for first degree murder.

- She was tried in a regular criminal court, due to the fact that the case law of the Supreme Court of *Juvenlandia* holds that the special jurisdiction derived from the international treaties signed by the country (the CRC in particular)²⁸ refers only to the right to the application of a special legal system for minors under the age of eighteen; it does not call for a specialized court system separate from the regular criminal justice system which, ultimately, must respect the criminal and procedural rights of any person accused of a crime, and is suitable for implementing the specific guarantees derived from the juvenile criminal justice laws currently in effect in *Juvenlandia*.

- The abortion case was still at the pre-trial stage. The prosecutor had opposed its dismissal based on the legal excuse of rape, given that, in his understanding, there was no final conviction against the perpetrator that could exempt María Paz from being tried and, possibly, convicted.

Applicable law

With respect to children, Article 19 of the Convention establishes the main rule on the protection of children in the inter-American system as follows:

“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.”

This rule has been interpreted by the IACtHR relatively recently. In the opinion of this regional court “(...) this provision must be construed as an added right which the Convention establishes for those who, because of their physical and emotional development, require special protection.”²⁹

²⁸ Article 40.3: “(...) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions **specifically** applicable to children alleged as, accused of, or recognized as having infringed the penal law (...)” (emphasis added).

²⁹ See: I/A Court H.R., OC-17/02, op. cit., para. 54; I/A Court H.R., *Case of the Gómez-Paquiyaui Brothers v. Peru*, op. cit. para. 164; & I/A Court H.R., *Case of the "Juvenile*

This Article defines a sphere of protection of children's human rights that requires additional State obligations. The special protection of children is based on the acknowledgment that States must, given the particular life circumstances of children that make them more vulnerable, take special measures in addition to those that would be appropriate for adults in an equivalent case.

In that respect, the IACtHR has established that "(...) numerous international instruments," broadly accepted by the international community, "devolve to the State the obligation to adopt special measures of protection and assistance for the children within its jurisdiction."³⁰

Thus, in the words of the region's highest human rights court, "(...) [the] true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children."³¹

The Court has also ruled, systematically, that cases in which children and adolescents are the victims of human rights violations are particularly serious, as provided in the American Convention on Human Rights and other international instruments.³²

Along these lines, it has stated that "(...) [the] Adoption of special measures to protect children is a responsibility both of the State and of the family, community, and society to which they belong."³³

According to the IACtHR, when States violate the rights of at-risk children, they make them the victims of a dual attack. First, in the positive sense—by failing in their duty to provide a positive benefit—they deprive them of minimum living conditions (decent life) and hinder the "full and harmonious development of his or her personality."³⁴ In other cases, in the negative sense, they attack their physical, mental, and moral integrity, and even their very lives.³⁵

It is essential to bear in mind that the IACtHR has held that the American Convention on Human Rights, as well as the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), are part of a very comprehensive international *corpus juris* for the protection of the human rights of children.³⁶ Thus, the legal framework

Reeducation Institute," op. cit., para. 147; See also: I/A Court H.R., *Case of Servellón-García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 133.

³⁰ *Case of the "Street Children*," op. cit., para. 146.

³¹ I/A Court H.R., OC-17/02, op. cit., paras. 53 & 137/6.

³² I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Judgment of September 8, 2005. Series C No. 130, para. 134. See also: *Case of the "Street Children*," op. cit., para. 146; I/A Court H.R., *Case of the Gómez-Paquiyaury Brothers* , op. cit., para. 162; & I/A Court H.R., *Case of Bulacio*, op. cit., para. 133.

³³ I/A Court H.R., OC-17/02, op. cit., para. 62.

³⁴ CRC, Preamble.

³⁵ I/A Court H.R., *Case of the "Street Children*," op. cit., para. 191; I/A Court H.R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, para. 121.

³⁶ *Case of the "Street Children*," op. cit., para. 194; & I/A Court H.R., OC-17/02, op. cit., para. 24. Previously, the Inter-American Commission had stated that: "(...) For an interpretation of a State's obligations vis-a-vis minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international instruments that contain

for the protection of children's human rights is not limited to the provisions of Article 19 (the content of which qualifies and influences all of the rights contained in the American Convention by increasing State obligations with respect to the matter because it deals with children); rather, it includes, for purposes of its interpretation, the provisions contained in the 1924 and 1959 Declarations of the Rights of the Child,³⁷ the Convention on the Rights of the Child, and its two Optional Protocols (in particular, for purposes of the present analysis, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography),³⁸ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules) (1985),³⁹ the United Nations Standard Minimum Rules for Non-custodial Measures (known as the Tokyo Rules) (1990),⁴⁰ and the United Nations Guidelines for the Prevention of Juvenile Delinquency (known as the Riyadh Guidelines) (1990),⁴¹ as well as the international human rights instruments with a general scope.

Because two of the three victims are girls, the pertinent provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará") must also be considered in the application of the previously mentioned rule established by the IACtHR.

This *corpus juris* is not only composed of the above-cited convention standards and provisions of "soft law"; it also includes—for purposes of interpretation—the decisions issued by the United Nations Committee on the Rights of the Child in the performance of its specific mandate.

Another provision that is particularly relevant to the case under examination is Article 3 of the Convention on the Rights of the Child: "(...) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁴² This issue will be analyzed more extensively in the chapter on the rights of the family as it concerns the separation of the baby from his mother Felicitas to be given up for adoption.

In other respects, the special protection of children also includes special judicial treatment. This is an important issue raised in the criminal case against María Paz.

even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject. This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of the American Convention and on the consistent practice of the Court and of the Commission in this sphere." IACHR, Report No. 41/99, case 11.491, *Minors in Detention v. Honduras*, March 10, 1999, para. 72.

³⁷ Adopted by the V Assembly of the League of Nations on September 24, 1924 and by the United Nations General Assembly on November 20, 1959, respectively.

³⁸ General Assembly resolution A/RES/54/263 of May 25, 2000.

³⁹ Adopted by General Assembly resolution 40/33 of 29 November 1985.

⁴⁰ Adopted by General Assembly resolution 45/110 of December 14, 1990.

⁴¹ Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

⁴² Article 3 of the Convention on the Rights of the Child.

In this regard, it has been held that “(...) It is evident that a child participates in proceedings under different conditions from those of an adult. To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings (...).”⁴³

The IACtHR added complementarily that: “(...) while procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees (...).”⁴⁴

Also concerning the principle of specialized justice—but considering it furthermore an *exclusive* right—the Court found that: “(...) children under 18 who are accused of conduct defined as crimes by penal law must be subject, for the case to be heard and appropriate measures to be taken, only to specific jurisdictional bodies different from those for adults (...).”⁴⁵

Along the same lines, the IACtHR further established that: “(...) one obvious consequence of the importance of handling matters that pertain to children differently, and specifically those matters having to do with some unlawful behavior, is the establishment of specialized jurisdictional bodies to hear cases involving conduct defined as crimes and attributable to juveniles. The Convention on the Rights of the Child provides that States shall seek to promote ‘the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law’ (...).”⁴⁶

Beyond numerous general references on the issue (or references to the provisions of the Convention on the Rights of the Child), the IACtHR explained that: “(...) the special jurisdiction for children in conflict with the law (...) should feature, *inter alia*, the following: 1) first, the system should be able to provide measures for dealing with such children without resorting to judicial proceedings; 2) should judicial proceedings be necessary, the juvenile court should be able to order a variety of measures, such as psychological counseling for the child while on trial, control over the way the child’s testimony is taken, and regulation of the public nature of the proceedings; 3) it should also have a sufficient margin of discretion at all stages of the proceedings and at the different levels of juvenile justice administration; and 4) those who exercise discretion should be specially qualified or trained in the human rights of the child and child psychology to avoid any abuse of the discretionary authority and to ensure that the measures ordered in any case are appropriate and proportionate (...),”⁴⁷ aspects that do not appear, *in totum*, to have been ensured in the proceedings against María Paz.

In accordance with these rules, the IACtHR ruled categorically that the State of Paraguay, by failing to establish a specialized court for

⁴³ I/A Court H.R., OC-17/02, op. cit., para. 96.

⁴⁴ *Idem*, para. 97.

⁴⁵ *Ibidem*, para. 109, emphasis added.

⁴⁶ I/A Court H.R., *Case of the "Juvenile Reeducation Institute,"* op. cit., para. 210.

⁴⁷ *Idem*, para. 211.

children in conflict with the law, or proceedings that differed from adult proceedings and adequately took their special juvenile status into account, had violated Articles 2 and 8.1 de the American Convention, both in relation to Articles 1.1 and 19 of the American Convention.⁴⁸

General Comment No.10 of the Committee on the Rights of the Child (hereinafter, occasionally, GC 10)⁴⁹ additionally requires as a component of special jurisdiction the systematic and ongoing training of the staff on the child's physical, mental, and social development, on the needs of the most vulnerable children, and on the available measures that do not involve the use of court proceedings.⁵⁰ In this case, the requirement seems not to have been met, above all with regard to the possibility of not bringing court proceedings in the first case against María Paz for the termination of her pregnancy.

Some possible arguments of the Commission and the State

The Commission can argue that the State is required to guarantee (as mentioned above, and underscored by the IACtHR), not only a specific legal system but also the creation of specialized courts in which to develop a special process that guarantees the rights to which children are entitled under the above-cited Convention. The most appropriate way to ensure that the constitutional rights of minors are effectively respected, and to provide them with the special treatment they require due to their status, is through a specialized court responsible for such matters. It is essential then to make use of a "specialized justice system" with a specific structure and proceedings to handle those conflicts that arise. Such a system does not exist in *Juvenlandia*.

Furthermore, the Commission can argue that plea bargaining with criminal defendants under the age of eighteen also adversely affects the guarantee of special protection insofar as they are treated the same as adults.

The State, for its part, might argue that the special protection of children, to the extent that a special legal framework is ensured—as it is in *Juvenlandia*—diminishes the importance of the specialization of the juvenile courts as such. Moreover, the existence of juvenile courts or tribunals would take the situation back to the days in which, in the name of unjustified paternalism, minors involved in criminal cases were not entitled to all of the the criminal procedure guarantees.

Thus, the fact that any judge is in a position to comprehensively protect the rights of the child by applying international principles in favor of minors weakens the emphasis on the need to have a judiciary different from the one that tries adults.

From the State's perspective, the country's criminal judges are a sufficient "specific" authority in relation to other judges when it comes to hearing and deciding cases in which a minor is alleged to have committed a criminal offense. The procedure for their selection is the same as that used for

⁴⁸ *Ibidem*, para. 213.

⁴⁹ Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, (44th session, Geneva, January 15 – February 2, 2007) CRC/C/GC/10, April 25, 2007.

⁵⁰ *Idem*, para. 97.

all other judges, but their knowledge of international standards for the protection of children (the Convention on the Rights of the Child and other provisions that are part of the broad *corpus juris* for the protection of children's human rights) is also evaluated. The specialization is derived from those factors, rather than from giving a different title to the judge or the court.

Moreover, in accordance with regional comparative law, it can be noted that the existence of juvenile judges and adult judges is often based on the allocation of jurisdiction and not on the issue of specificity in the terms set forth under Article 40.3 of the Convention on the Rights of the Child and 5.5 of the American Convention.

In addition, the specificity of a court authority should be measured not only by the special training but also by the fact that such authority must apply a special law or procedure (juvenile justice system), as happened in the case of María Paz. On this point, it should be noted that *Juvenlandia* has been held up as a model for other countries in the region for its consistency with the requirements derived from international human rights law.

Article 40.3 of the Convention on the Rights of the Child does not refer only to court authorities when it talks about specificity; rather, it includes all of the institutions that might deal with children who are accused or found to have violated the criminal laws. As such, it is also appropriate to examine whether the judges involved in the case had the cooperation of other State offices specifically designed and/or trained according to this provision. In response to this question, the State of *Juvenlandia* answers affirmatively, since all of the related agencies and actors specially trained in that area were involved.

Accordingly, the State could argue that there is no international rule that prohibits plea bargaining for minor defendants, which obviously required the consent of the defendant and her defense attorney. It could also argue that it was a practical and expeditious option that the judicial system offers for purposes of complying fully with the guarantee of a speedy trial, and to determine the legal status of a defendant, which, in the case of a minor, is justifiably even more urgent.

4. Rights of the family (Article 17 of the American Convention on Human Rights)

Relevant facts

- Eight months after arriving in the capital, Felicitas started having contractions. A woman was called in to act as a midwife, but she said that it was necessary for a cesarean to be performed at a health center. Felicitas was taken to a place that seemed like a clinic, and her son was born there. She was immediately transported back to the brothel, and when she asked for her baby she was told that he had to be in intensive care and would therefore remain at the clinic for a time.

- One week later she was told that she could not keep him because she was not going to be able to raise him properly, but that a financially well-off family could take responsibility for him and provide him with everything she would not be able to give him. She was taken to an office where she signed some papers and said a tearful goodbye to her baby with a kiss to his forehead. Porota and her accomplice were present at all times. They greeted the man who had them sign the papers as if they already knew him, and he gave them manila envelopes that they quickly put in their pockets.

- According to the Civil Code of *Juvenlandia*, the direct surrender of a child (known as *de facto* custody) is not unlawful, and is legally accepted as pre-adoptive custody.

- Felicitas's baby was adopted by a family in the capital of *Juvenlandia* based on her direct surrender of *de facto* custody of the child. The adoption became final in July of 2004.

- Felicitas's boyfriend Lucio's attorney made several inquiries that enabled him to locate the *de facto* custody file on Lucio's son, and he then filed suit in family court to recover the child and annul the adoption.

- The request was denied at every stage of the proceedings, on the argument that the adoption was legal and that, given the length of time that had elapsed, it was in the best interests of the child to remain with his adoptive family because it was the only family he had ever known. The Supreme Court denied the extraordinary appeal on procedural grounds.

Applicable law

Several provisions must be interpreted together in relation to the facts described above. The main provision is contained in Article 17 of the American Convention on Human Rights, which states:

“Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.”

The first aspect to consider in relation to this right is the close connection between Article 19 and Article 17 (reprinted above), insofar as the provisions for the protection of children in public international law were traditionally included within the provisions on the protection of the family (together with protection of pregnant women), because the child could not be represented outside a family relationship as the autonomous holder of subjective rights.

International human rights law reaffirms a child's human right to live and remain with his own family, interpreted broadly in the regional system as "(...) all persons linked by close kinship."⁵¹

This right entails the child's living and remaining with his own family of origin; and if that is not possible, with his extended family or loved ones. Only in exceptional circumstances—and in order to meet another specific human right, such as the right to live as part of a family—does it involve living with another family outside the household to which the child belongs through the legal concepts of temporary or permanent placement such as adoption.

Numerous provisions of the Convention on the Rights of the Child must be considered in deciding the instant case, by application of the rule established by the IACtHR in the aforementioned *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*,⁵² which invokes a broad *corpus juris* of international protection of the rights of children.

The centrality of the family as a children's human right is one of the strictest rules in the Convention on the Rights of the Child.⁵³ This Convention recognizes the duty of parents to raise their children; therefore, it states that the separation of a child from his parents against their will must be exceptional, is justified only when it is in the best interests of the child, and is subject to judicial oversight. The treaty further prescribes, not exhaustively, that such separation is admissible in cases of child abuse, sexual abuse, or neglect.⁵⁴

With regard to the protection of the family, and consistent with Article 11.2 of the American Convention, Article 8 of the Convention on the Rights of the Child requires the States Party to respect the right of the child to preserve his or her identity (including nationality, name and family relations as recognized by law), without unlawful interference. It further provides that when the child is unlawfully deprived of some or all of the elements of his identity, the States Party must provide the appropriate assistance and protection with a view to re-establishing his identity quickly.⁵⁵

Article 9 of the CRC also contains specific references for cases involving the separation of the child from his parents, in establishing that "(...) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial

⁵¹ I/A Court H.R., Advisory Opinion No.17, op. cit., para. 70.

⁵² Judgment of November 19, 1999, Serie C No. 63, para. 194.

⁵³ Convention on the Rights of the Child, Preamble & Articles 5, 9, 18 & 27.

⁵⁴ Beijing Rules, Rule 18.2.

⁵⁵ It is also important to note the provisions of Article 16 of the Convention on the Rights of the Child: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks."

review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."⁵⁶

Article 10 of the Convention on the Rights of the Child also refers to the States' obligation to deal "in a positive, humane and expeditious manner" with all applications made by a child or his or her parents to enter or leave a State Party for the purpose of family reunification. That Article provides that, for purposes of guaranteeing the right to periodically maintain personal relations and direct contact with both parents, the States must respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. This right can be subject only to the restrictions prescribed by law that are necessary to protect national security, public safety, public health or morals, or the rights and freedoms of other persons and that are consistent with the other rights enshrined in that Convention.

In interpreting this treaty, the Committee on the Rights of the Child recommended that: "Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child."⁵⁷

The Committee likewise added: "The Committee's experience is that the child's right to be heard is not always taken into account by States parties. The Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family."⁵⁸

For its part, the IACtHR has specified that the lack of financial resources cannot be the *sole* basis for separating the child from his or her parents,⁵⁹ which implies that it may be one element to be weighed among other factors. It concluded that separation must be exceptional and, preferably, temporary,⁶⁰ and it must be the outcome of proceedings respectful of guarantees when it involves the suspension or modification of parental responsibilities.⁶¹

The IACtHR also issued an opinion on the separation of children from their families, stating that "(...) the child must remain in his or her

⁵⁶ The same Article adds that in those proceedings all of the interested parties shall be offered the opportunity to participate in them, and to make their opinions known, and also that the States Party shall respect the rights of the child who is separated from one or more parent to maintain direct contact and personal relations with both parents on a regular basis, unless it is contrary to the best interests of the child.

⁵⁷ General Comment No. 12, op. cit., para. 53.

⁵⁸ General Comment No. 12, op. cit., para. 54.

⁵⁹ I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 76.

⁶⁰ I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 77.

⁶¹ I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 114.

household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary."⁶²

In addition, in the view of the IACtHR, the rights of the family, in addition to being set forth expressly in Article 17 of the American Convention on Human Rights and in Article 15 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), gives meaning to the right to identity.⁶³

On this point, the IACtHR has held that every person has the right to live or maintain direct contact or personal relationships with his or her family, given that the family, as a natural and fundamental element of society, in principle, is "is responsible for satisfying [the] material, emotional, and psychological needs"⁶⁴ of every human being. As such, the highest regional Court has underscored the importance of this right with respect to all members of the family, including parents and siblings, in stating that the State is required to favor, in the broadest sense, the development and strengthening of the family nucleus.⁶⁵

The IACtHR has also held that: "(...) To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter."⁶⁶

The IACtHR has further stated with regard to the separation of children from their families that "(...) the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary."⁶⁷

In addition, the Inter-American Commission has noted that the duty to provide special protection for children necessarily entails that the child's interests be taken into account when the State makes decisions that affect him, and that such decisions see to it that the child's interests are the protected.⁶⁸

The IACtHR has held in relation to this right that "(...) To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter."⁶⁹

This leads to the consideration—even if it is basic—of the issues raised by the concept of the best interests of the child in the analysis of the instant case.

4.1. Some considerations regarding the best interests of the child

⁶² I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 77.

⁶³ I/A Court H.R., *Case of the Serrano-Cruz Sisters v. El Salvador*. Judgment of November 23, 2004. Series C No. 118, para. 139.

⁶⁴ I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 71.

⁶⁵ *Idem*, para. 66.

⁶⁶ *Ibidem*, para. 65.

⁶⁷ I/A Court H.R., OC-17/02, op. cit., para. 77.

⁶⁸ IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc. 40 rev., February 28, 2000, para. 163.

⁶⁹ I/A Court H.R., OC-17/02, para. 65.

The legal concept “best interests of the child” is enshrined in Article 3 of the Convention on the Rights of the Child, and has been addressed extensively in scholarly opinions and in case law.⁷⁰ Notwithstanding the numerous critiques to which it has been subjected, this principle—in the prevailing legal scholarship as well as in the international case law—has been an inevitable benchmark in the long process of establishing the rights of children.

At the regional level, the IACtHR itself has held that: “(...) the phrase ‘best interests of the child,’ set forth in Article 3 of the Convention on the Rights of the Child, entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives.”⁷¹

The notion of “best interests of the child” has been defined in many ways in scholarly works. For decades it was used and interpreted as a “blank check”⁷² that justified all kinds of arbitrary acts in the public sphere. Later, particularly after the principle was included in the Convention on the Rights of the Child, it began to be considered an interpretive tool for resolving conflicts among competing rights.

At the regional level (unlike in other parts of the world) it is not identified with the rationale of parental authority; rather, it is considered a guiding principle for State actions with regard to children.⁷³

⁷⁰ It should be noted that the concept of the best interests of the child has been used since the 18th Century in English law. It was thus explained that: “(...) it appears in the practice of the Chancery Court at the end of the 18th century, and in the 19th century the Guardianship of Infants [Act] of 1886 prescribed that the child’s welfare was a relevant consideration, together with others (the conduct and wishes of the parents). The 1925 Act made the child’s welfare the first and paramount consideration. In the interpretation of the Children Act of 1989, which states that: ‘the child’s welfare shall be the court’s paramount consideration’ (section 1), this principle acted as the ‘only’ consideration,” in RIVERA HERNÁNDEZ, FRANCISCO, *El interés del menor*, Dykinson, Madrid, 2007, p. 27.

⁷¹ Advisory Opinion No. 17, op. cit., Conclusion 2; See also: Concurring Opinion of Judge CAÑADO TRINDADE, para. 60.

⁷² “(...) This Article of the CRC is the one most frequently cited in all of the Argentine case law. However, there is not a single judgment—out of the hundreds that are based on this provision—that examines or develops it, even minimally. It is used generally to provide the reasoning for the judgments; but because it is an overly vague provision, it is not possible to consider that a judgment based exclusively on this Article could do so. It is apparent in these judgments that the judge makes a decision based on his or her assessment of the case and in order to justify it, he or she maintains that the decision is based on Article 3,” in BELOFF, MARY, *Quince años de vigencia de la Convención sobre Derechos del Niño en la Argentina*, in BOVINO, ALBERTO, COURTIS, CHRISTIAN & ABRAMOVICH, VÍCTOR (Eds.), *La aplicación de los tratados internacionales de derechos humanos en el ámbito interno. Balance y perspectivas: 1994-2005*, Del Puerto, Buenos Aires, 2006, p. 290.

⁷³ See: ALSTON, PHILIP, *The best interests of the child. Reconciling culture and human rights*, Clarendon Press, Oxford, 1994. See also: BREEN, CLAIRE, *The standard of the best interests of the child. A Western tradition in international and comparative law*, Martinus Nijhoff Publishers, Kluwer Law, 2002.

Under Spanish law, it is considered that the best interests of the child “(...) determine that when the interest of a minor is at stake, it must be placed above others and before another solution, unless sufficient reasons require otherwise. [In that case], it must be justified, and it must be demonstrated that the restrictive measure is necessary and appropriate, and that it is proportionate to the case,” in RIVERA HERNÁNDEZ, op. cit., pp. 34 & 35.

The various definitions of the best interests of the child do coincide in what can be defined as a mandate to the State to favor specific rights of children in contentious situations in which individual rights or collective interests must be restricted or limited. It thus presents a specific regulatory content that assumes that certain children's rights have a "best interest" or priority over other individual rights and/or collective interests. Those rights that are not subject to limitations of any kinds are recognized expressly by the Convention on the Rights of the Child in Articles 6⁷⁴ (right to life), 7⁷⁵ (right to a name and nationality), 8⁷⁶ (right to identity and protection against unlawful interference), 14⁷⁷ (freedom of thought, conscience and religion), 24⁷⁸ (right to health), 27⁷⁹ (adequate standard of living and

⁷⁴ "1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

⁷⁵ "[1.] The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

⁷⁶ "1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

⁷⁷ "1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."

⁷⁸ "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

development), 28⁸⁰ (right to education), 31⁸¹ (right to rest, recreation, and play) and 40⁸² (criminal trial rights).

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.”

⁷⁹ “1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”

⁸⁰ “1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”

⁸¹ “1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”

⁸² “1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the

Nevertheless, this priority cannot operate as a general rule and guarantee all of the rights of children in all situations where there may be competing rights, since the Convention on the Rights of the Child itself establishes that there are certain children's rights that give way to specific collective interests and/or the individual rights of third parties.⁸³

In other words, it is asserted that there is a minimum essential content of the rights of the child within the Convention on the Rights of the Child that would clearly limit State activity by preventing arbitrary action on its part. This minimum content, or hard nucleus⁸⁴ would include the right to life, nationality and identity, to freedom of thought and conscience, to health, to education, to an adequate standard of living, to engage in age-appropriate

child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offense."

⁸³ CRC, Articles 10, 13 and 15.

⁸⁴ Terminology used by Garzón Valdés, Ernesto, *Desde la modesta propuesta de "Swift" hasta las casas de engorde. Algunas consideraciones respecto de los derechos del niño*, in *Revista Doxa*, Alicante, No. 15-16, 1994, pp. 731-743.

activities (recreational, cultural) and to the guarantees inherent in criminal law and criminal procedure.⁸⁵

The best interests of the child defined in this way gives priority to the public policies meant to guarantee the minimum essential content of those rights set forth in the Convention on the Rights of the Child,⁸⁶ as an expression of the State's positive duties.

Similarly, the recognition of a set of children's rights as essential minimum content offers an interpretive guide for deciding cases in which there is a conflict between rights recognized in the Convention on the Rights of the Child, between those rights and other rights guaranteed to children and, finally, between the rights of children and the rights of adults. Accordingly, when the Convention on the Rights of the Child determines that a right must yield to the best interests of the child,⁸⁷ it means that that right may be restricted in order to guarantee the rights that make up the aforementioned basic core or minimum essential content.⁸⁸

To give an example, the right of children to be heard and for their opinions to be taken into account depends, by application of Article 12 of the above-cited international Convention, on their age, degree of maturity, and ability to form an independent opinion on matters that affect them and their best interests. This formula makes it possible to reconcile the child's autonomy in the exercise of his rights with the need to take measures to protect those rights that belong to the basic nucleus, even against his will and/or his wishes.⁸⁹

⁸⁵ Freedman, Diego, *Algunas consecuencias de la recepción del interés superior del niño*, presented and adopted at the South American Pre-Conference on the Rights of Children and Adolescents, Morón, 2010, DVD, Fundación Encuentro por la Ciudadanía Social, Buenos Aires, 2010.

⁸⁶ A parallel can be drawn between the minimum essential content and the concept of "*coto vedado*" ["hard nucleus"] to refer to the set of basic needs that are non-negotiable in a democracy. On this point, "(...) The possibility of satisfying basic needs defines the scope of the non-negotiable, of what in other works I have called the '*coto vedado*' ["hard nucleus"], with the intent to designate those aspects of social coexistence that cannot be compromised. The impossibility of compromise here is not a factual impossibility; rather, it is normative: it is the ethic that prohibits negotiating the possibility of satisfying basic needs (save in exceptional cases of tragic situations). Compliance with the obligations of maintaining the hard nucleus includes, of course, the humane and decent treatment of children, but also of adults. When such is not the case, the members of a society become vulnerable beings, subject to exploitation by the dominant minority. In this respect, it could be said that an unjust society is one that institutionalizes the vulnerability of its members, or, to stay within the framework of this work, that keeps part of its population in a state of helpless infantilism," in GARZÓN VALDEZ, Ernesto, "*Desde la modesta propuesta*" de J. Swift a las casas de engorde. *Algunas consideraciones acerca de los derechos de los niños*, Revista "Doxa. Cuadernos de Filosofía del Derecho", No. 15-16, Vol. II, 1994, p. 741.

⁸⁷ This occurs with Article 9 of the Convention on the Rights of the Child, which regulates the right of the child to live with and have contact with his or her parents.

⁸⁸ FREEDMAN, Diego, *Funciones normativas del interés superior del niño*, op. cit., p. 511.

⁸⁹ On this point, it was added that: "(...) in the case of children, the exercise of their autonomy is conditioned upon a situation of radical vulnerability. Persons in such a situation are not able to negotiate fair relationships of reciprocity of rights and obligations for themselves (...) In the case of absolute vulnerability, it is not enough to eliminate the situation of oppression; rather, assistance measures are required. Therefore, cases of absolute vulnerability are clear cases of justified paternalism. Children are absolutely vulnerable and that makes them basically incompetent in the strict sense of the word: not only can they not measure the extent of some

Consequently, this limitation of the child's autonomy will depend on his or her age and maturity; therefore, there must be a proportional relationship: the greater the child's age, maturity, and astuteness, the more active role the child will play. However, this does not mean that the child is not entitled to rights; rather, it means that there are justified limitations to their exercise within the framework of international human rights law (Article 3 of the Convention on the Rights of the Child and Article 19 of the American Convention on Human Rights).

It is thus necessary to take into account each particular situation, bearing in mind that while a child with a certain degree of maturity might be able to exercise one right, he would not at that same intellectual and developmental level be able to exercise other rights that entail a greater capacity for understanding (and, potentially, more serious consequences).

This approach has been adopted by the IACtHR, which has also recognized the developmental maturity of children and its influence on their participation in case proceedings: "Evidently, there is great diversity in terms of physical and intellectual development, of experience and of the information known by those who are included in that group. The decision-making ability of a 3-year-old child is not the same as that of a 16-year-old adolescent. For this reason, the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests, which are the ultimate objective of International Human Rights Law in this regard."⁹⁰ Along these lines, it emphasized that the child's best interests, as well as his specific conditions, must be taken into account in order for him to take part in the court case or administrative proceeding that involves him.⁹¹

Along these lines, the IACtHR linked the principle of the best interests of the child to the special protective measures meant to promote child development, but without providing further explanation⁹² (on this point, see the Chapter related to Article 19 of the American Convention on Human Rights).

Subsequently, the Court held that "The prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children."⁹³

According to this case law criterion, the equivalence between the content of Article 19 of the American Convention on Human Rights (special measures of protection for children) and Article 3 of the Convention

of their actions; they also are not in a position to satisfy their basic needs for themselves," in GARZÓN VALDEZ, Ernesto, *Desde la modesta propuesta...*, op. cit., pp. 737 & 738.

⁹⁰ Advisory Opinion No. 17, op. cit., para. 101. Thus, "It is therefore necessary to accept that the minor cannot be foreign to his or her own trial, a witness and not a protagonist of his or her case, and that the parents –or guardians- also have their own rights to assert and for this reason they must participate in the trial, each with an advisor, promoter or defense counsel undertaking their defense fully and effectively." Advisory Opinion No. 17, op. cit., para. 29 of the Concurring Opinion of Judge GARCÍA RAMÍREZ.

⁹¹ Advisory Opinion No. 17, op. cit., para. 102.

⁹² I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 56/61

⁹³ I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 134.

on the Rights of the Child (best interests of the child) seem to be nearly absolute.

In one case in particular, the IACtHR found that the Dominican Republic, by denying nationality to the Yean and Bosico girls, had acted contrary to the best interests of the child.⁹⁴ It thus linked the infringement of human rights (in this case, access to nationality) to the best interests of the child.

The Convention on the Rights of the Child not only returns to that interest on repeated occasions (Articles 9.1 and 3, 18, 20.1, 37.c and 40.2.b.iii) but also it does so with a very particular meaning and scope in relation to the rights of the child and the family considered herein: "(...) States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration" (Article 21).

The Committee on the Rights of the Child, which is the body responsible for monitoring and interpreting the Convention on the Rights of the Child at the international level, has still not issued a specific document on the matter. However, it has stated in several country reports and General Comments that the principle of the best interests of the child requires that the different branches of the State (executive, legislative, and judicial)⁹⁵ take active measures and, furthermore, that the best interests of the child be determined in consultation with the child so as to take his opinion into account as a crucial factor.⁹⁶

In the words of the Committee, and with regard to an issue related especially to this case: "(...) Where adoption is envisaged "the best interests of the child shall be the paramount consideration" (art. 21), not just 'a primary consideration' (art. 3).⁹⁷"

The Committee maintains that it is a matter of the States Party taking all necessary measures "to ensure that the general principle of the best interests of the child is appropriately integrated in all legal provisions as well as in judicial and administrative decisions and in projects, programs and services which have an impact on children."⁹⁸

4.2. Relationship between the best interests of the child and the right of the child to be heard

Finally, it is relevant to keep in mind that Article 12 of the Convention on the Rights of the Child establishes that the States must guarantee the child's right to be heard in all matters that affect him, and duly

⁹⁴ I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. op. cit., para. 166.

⁹⁵ General Comment No. 5 (2003), *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, para. 13.

⁹⁶ General Comment No.12 (2009), *The right of the child to be heard*, para. 71.

⁹⁷ General Comment No.7, *Implementing child rights in early childhood*, 2005, CRC/C/GC/7/Rev. 1, para. 36.b, emphasis added.

⁹⁸ See, *inter alia*: *Concluding Observations of the Committee on the Rights of the Child: Suriname*. 06/28/2000. CRC/C/15/Add.130., para. 28.

consider his opinions according to his age and level of maturity. With specific regard to the administrative or judicial proceedings that affect him, it states that the child shall be given the opportunity to be heard, whether directly or through a representative or an appropriate body. This right, which, as noted, is directly related to the best interests of the child, seems to have been infringed in the various civil and criminal proceedings that were conducted in the case under examination herein.

On this point, the Committee on the Rights of the Child found that the States must provide the means and conditions for the opinions of children to be considered in decision-making, in policy-making, and in the process of drafting and evaluating laws.⁹⁹

Accordingly, it set various guidelines that must be considered for a better interpretation and application of this broad and complex right, among which the following are worth noting:

a) to bear in mind that the right to be heard is one of the fundamental principles of the Convention on the Rights of the Child;

b) that there are certain groups of children, especially the youngest children, (as well as those that belong to socially excluded or disadvantaged groups), that face particular obstacles in the realization of this right;

c) to consider the right not to exercise it as an option and not as an obligation;

d) to recall the States' duty to inform and advise the child so he or she may exercise this right;¹⁰⁰

e) the reference to the exercise of this right being related to the child's being "capable of forming his or her own views" should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible;¹⁰¹ and

f) age alone cannot determine the significance of a child's views, as children's levels of understanding are not uniformly linked to their biological age.¹⁰²

In other words, except in cases in which the child's ability to express himself is still very limited (as, for example, during the first months of life), it is the responsibility of the State to have the mechanisms and procedures that make it possible to know the child's opinion and understand his interests and views. In the case examined herein, that does not seem to have occurred.

In that respect, the Committee on the Rights of the Child stated that the child does not have to prove his or her capacity.¹⁰³ Accordingly, it underscored the need to use non-verbal forms of communication (body language, drawings, or facial expressions) and explained that it is not

⁹⁹ Committee on the Rights of the Child, General Comment No.12, *The right of the child to be heard (art. 12)*, of July 20, 2009, para. 12, hereinafter, occasionally, GC 12.

¹⁰⁰ Committee on the Rights of the Child, General Comment No.12, op. cit., paras. 16 & 25.

¹⁰¹ Committee on the Rights of the Child, General Comment No.12, op. cit., paras. 20.

¹⁰² Committee on the Rights of the Child, General Comment No.12, op. cit., paras. 29.

¹⁰³ Committee on the Rights of the Child, GC 12, op. cit., para. 20.

necessary that the child understand all of the issues examined, discussed, or involved.¹⁰⁴

Article 12 of the Convention on the Rights of the Child also regulates a fundamental issue: the right of the child to participate in any judicial or administrative proceedings that affect him or her.¹⁰⁵ This provision is a notable difference from the more traditional cases, in which the child had no opportunity to participate, or to be heard, and would instead be represented by his or her parents or a government employee.

In this respect, the Committee on the Rights of the Child considered that the child could act directly or through a representative such as his or her parents, attorney, or other person (such as a social worker or a psychologist). The relevant point is to avoid a possible conflict of interest between the child and his or her representative, and to ensure that any representative has the knowledge and experience to express the child's true interests.¹⁰⁶

It should also be recalled that the Committee stated that participation is the child's right, and therefore, he or she can also decide not to be heard in a proceeding.¹⁰⁷

In addition, the IACtHR specified that participation in proceedings is limited to the personal conditions and the best interests of the child, and as much access as possible should be sought.¹⁰⁸ In this respect, it held that there is "(...) great diversity in terms of physical and intellectual development, of experience and of the information known by those who are included in that group. The decision-making ability of a 3-year-old child is not the same as that of a 16-year-old adolescent. For this reason, the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests, which are the ultimate objective of International Human Rights Law in this regard."¹⁰⁹

By the same token, the judicial proceedings must also be adapted, for example, by limiting publicity in order to safeguard the honor and privacy of the child.

Finally, two of the guidelines provided by the Convention on the Rights of the Child for the adoption of persons under the age of eighteen must be kept in mind: first, the need to ensure state intervention (administrative or judicial) in order to guarantee proper oversight; and second, the notification, participation, and informed consent of the children's parents, relatives, and legal representatives, because of the specific consequences that adoption entails with regard to the relationship between the child and his or her family

¹⁰⁴ Committee on the Rights of the Child, GC 12, op. cit., para. 21.

¹⁰⁵ "[Such proceedings include], for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of [...] crimes, [claims relating to] health care, social security [...], asylum-seeking and refugee children, [and] [...] mediation and arbitration," General Comment No. 12, op. cit. para. 32.

¹⁰⁶ Committee on the Rights of the Child, General Comment No. 12, op. cit., para. 36.

¹⁰⁷ Committee on the Rights of the Child, General Comment No. 12, op. cit., para. 16.

¹⁰⁸ I/A Court H.R., OC-17/02, para. 102.

¹⁰⁹ I/A Court H.R., OC-17/02, para. 101.

of origin.¹¹⁰

On this issue, the Committee on the Rights of the Child has stated: “The Committee’s experience is that the child’s right to be heard is not always taken into account by States parties. The Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child’s views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.”¹¹¹

The IACtHR has stated in this respect that a lack of financial resources cannot be the only basis for separating the child from his or her biological parents. It has concluded that separation should be exceptional, preferably temporary,¹¹² and it must be the outcome of proceedings respectful of the rights of all parties involved (children and parents) when it involves the suspension or modification of parental responsibilities.¹¹³

Coincidentally, the Committee on Economic, Social and Cultural Rights has expressly provided that the right of children to achieve healthy development “requir[es] measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, **emergency obstetric services and access to information, as well as to resources necessary to act on that information.**”¹¹⁴

At the same time, it recognized the importance of providing information to children, while respecting their private life and guaranteeing access to appropriate sexual and reproductive health services.¹¹⁵

Arguments of the Commission and the State

The Commission can argue that the baby’s separation from Felicitas adversely affected the right to family life of both of them, including their life plans. It is broadly recognized that one of the many human rights to which children are entitled is the right to live and remain with their family.¹¹⁶

¹¹⁰ On this point, it should be noted that the Convention on the Rights of the Child refers to appropriate “counseling,” which, at a minimum, would entail the participation of Felicitas (and her boyfriend) with an attorney to represent them in the case.

¹¹¹ General Comment No.12, op. cit., para. 54.

¹¹² I/A Court H.R., Advisory Opinion No.17, op. cit., para. 77.

¹¹³ I/A Court H.R., Advisory Opinion No.17, op. cit., para. 114.

¹¹⁴ General Comment No.14, op. cit., para. 14, emphasis added.

¹¹⁵ General Comment No.4, op. cit., para. 23, and also: “Adolescents have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society. It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practice healthy behaviors. This should include information on the use and abuse, of tobacco, alcohol and other substances, safe and respectful social and sexual behaviors, diet and physical activity,” para. 26.

¹¹⁶ In the regional system for the protection of human rights, relatives have been defined as “all persons linked by close kinship.” I/A Court H.R., Advisory Opinion No.17, op. cit., para. 70.

Thus, it must be taken into account that this basic right was infringed in the case of both Felicitas and her baby.

It is obvious in this case that Felicitas's consent was vitiated by the fact that she was subject to involuntary servitude. In addition, the invocation of the best interests of the child to deny review of the adoption on clear grounds of nullity (the vitiation of consent, which was not given freely) can never serve to validate an unlawful act or to lead to the suppression of a person's identity and the violation of other rights, including the quintessential right to family life.

Furthermore, from the children's perspective, the observance of Article 12 of the Convention on the Rights of the Child has not been proven in terms of the participation of the representatives of the children involved (officials), bearing in mind the particularly vulnerable situation that the minor Felicitas and her son found themselves in at the time.

As mentioned earlier, the Convention on the Rights of the Child also recognizes the duty of parents to raise their children as an element of this right. Therefore, it is established that the separation of the child against their will must be exceptional, is justified only when it is in the best interests of the child, and is subject to judicial oversight. It could occur, for example, in cases of child abuse, sexual abuse, or neglect,¹¹⁷ none of which has been proven in this case.

It is clear in this case that the actions of the *Juvenlandian* authorities did not meet the previously described requirements, not only due to the original vitiation of the consent of the mother Felicitas and the corruption revealed in the surrender of the child for adoption but also in the proceeding conducted to grant the adoption (for example, it was not confirmed whether the parents had been given proper notice of the case in order to guarantee their right of defense) as well as in the father's subsequent attempts to have the adoption annulled and to recover his son.

The State also failed to comply in this case with all of the measures related to providing sexual and reproductive healthcare to Felicitas and María Paz.

The State can argue that there was no violation of the rights of the family in relation to the adoption of Felicitas's baby, since it was the result of a regulated judicial proceeding to which the minor Felicitas had consented; in spite of her status as a minor, she could have sought assistance in order to understand the extent of her decision and to assume responsibility for her own acts.

The principle of the best interests of the child recognizes the need for the intervention of the State when the child cannot live with his family group because his rights are at risk. Moreover, the originating set of international standards that makes up the broad *corpus juris* for the protection of the human rights of the child requires the State to take positive measures with respect to children who are in special circumstances of vulnerability as, in this case, Felicitas's son clearly was.

Respect for the child's right to live in his household also has a flip side, which is separation as extraordinary measure. This right is so

¹¹⁷ Beijing Rules, Rule 18.2.

important in the general structure of the Convention on the Rights of the Child that the treaty specifically prescribes an obligation to promote the maintenance of ties in spite of distance: the State must favor the development of these ties and not hinder them.¹¹⁸ This is precisely what the *Juvenlandian* authorities were in the process of doing (by having psychologists and social workers interview the family groups involved, the expert reports that were written, the environmental studies, etc.).

While it is true that there is a State obligation to assist families—recognized in the Convention on the Rights of the Child¹¹⁹ as well as by the IACtHR¹²⁰—related to the need to encourage the development and strengthening of the family nucleus,¹²¹ here it was considered, initially and with Felicitas's prior consent, that it was necessary to remove the baby from his mother's custody in order to guarantee his physical and psychological health, especially since his extended family resided in *Pobrelandia* and his mother was unable to care for him properly.

As the legal proceedings continued, no one objected to the initial measure being turned into an adoption. Therefore, the State considers that the complaint alleged is not supported by the facts of the case or by the laws in force that protect the baby.

In sum, it is clear that the measures taken have been in the baby's best interests and supported by the broad body of human rights law for the protection of the rights of the child. Any attempt to change the situation and recognize the parents' claims would only benefit them and not the baby; in other words, it would be in the interest of the parents but contrary to the best interests of the baby.

5. Guarantees of due process and judicial protection (Articles 8 and 25 of the American Convention on Human Rights)

Relevant facts

- Driven to despair by the situation, and unable to make any further contact with his girlfriend, Lucio asked the attorney to help him find Felicitas and their son. They filed a writ of habeas corpus on behalf of his girlfriend. The sitting judge ordered several measures involving searches of brothels in the area, inquiries to immigration authorities, hospitals, and security forces, as well as investigations based on newspaper advertisements offering sexual services. The judge exhausted all of the measures requested by Lucio's attorney, and ordered new measures when the prior measures failed to yield results; nevertheless, it was impossible to find Felicitas.

- Felicitas's boyfriend Lucio's attorney made several inquiries that enabled him to locate the *de facto* custody file on Lucio's son, and he then filed suit in family court to recover the child and annul the adoption.

- The request was denied at every stage of the proceedings, on the argument that the adoption was legal and that, given the length of time

¹¹⁸ CRC, Article 10.

¹¹⁹ CRC, Article 18.

¹²⁰ I/A Court H.R., Advisory Opinion No. 17, op. cit., para. 53 & 88.

¹²¹ I/A Court H.R., Advisory Opinion No.17, op. cit., para. 56.

that had elapsed, it was in the best interests of the child to remain with his adoptive family because it was the only family he had ever known. The Supreme Court denied the extraordinary appeal on procedural grounds.

- Since no appeal had been filed before the Supreme Court—and although the procedural deadlines had expired—the attorneys from the legal aid center assisted María Paz’s mother and met with María Paz to tell her to file an appeal *in forma pauperis* requesting a review of the conviction. In accordance with Article 42 of the Supreme Court Procedure Act of *Juvenlandia*, untimely extraordinary appeals filed by incarcerated persons are admissible when such persons are clearly lacking proper defense.

- María Paz’s effective lack of a proper defense was based on the fact that the public defender that had been appointed to her case had: a) failed to challenge the judgment on the grounds of violation of the special jurisdiction, as it had been handed down by a regular criminal court (the public defender himself was not specialized); b) failed to allege the unconstitutionality of plea bargaining based on the violation of the right to due process and a defense at trial, as well as the fact that it involved an act committed by a minor under 18 years of age—in which case the use of plea bargaining is not permitted; c) omitted to assert the excuse that the act was committed in the heat of passion; and d) ignored the circumstance that the case involved an illiterate foreigner who was the victim of a human trafficking ring.

- The Supreme Court admitted the appeal *in forma pauperis*, but subsequently, and after hearing from the Prosecutor General of *Juvenlandia*, the Court affirmed the judgment based on the Prosecutor General’s arguments.

- The arguments of the Prosecutor General on which the Supreme Court judgment was based were the following: (1) The guarantee of specialized jurisdiction derived from international treaties, in particular from the Convention on the Rights of the Child, does not require that there be a specialized court system or agency; rather, it requires the application of criminal laws that are different from those applied to adults, which had been proven in this case because otherwise María Paz would have received a life sentence; (2) There is no international standard that prohibits plea bargaining for minors, and that—on the contrary—this concept is part of the special juvenile criminal justice law of *Juvenlandia*, and has been used as an example by other countries in the region as an appropriate standard of compliance to guarantee that the case be of a reasonable duration; (3) The heat of passion issue referred to factual and evidentiary matters not subject to review in an extraordinary appeal; and (4) The defendant’s personal circumstances relating to her vulnerability had been sufficiently weighed in the lower court’s judgment, which ruled out, in a reasoned and well-founded manner, the possibility that these factors could mitigate the defendant’s culpability and result in a lighter sentence.

- The abortion case was still at the pre-trial stage. The prosecutor had opposed its dismissal based on the legal excuse of rape, given that, in his understanding, there was no final conviction against the perpetrator that could exempt María Paz from being tried and, possibly, convicted.

Applicable law

The IACtHR has ruled on the issue of court proceedings that may affect the rights of children. It has established that any proceeding that affects a child “(...) must be perfectly justified according to the law, it must be reasonable and relevant in substantive and [procedural] terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.”¹²²

The IACtHR has also held that “(...) The guarantees set forth in Articles 8 and 25 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in Article 19, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.”¹²³

The obligation to investigate human rights violations is also one of the positive measures States must take to guarantee the rights recognized in the Convention.¹²⁴ The obligations that arise from the relationship between Articles 1.1 and 8 of the Convention include the obligation to investigate seriously—and not just as a mere formality—the acts that may have violated a right enshrined in the Convention (in the case examined herein, María Paz and Felicitas’s right to freedom and physical safety, for example).¹²⁵

Based on this obligation, the IACtHR has established that one of the criteria that must be met is to conduct an investigation that takes into account the context of the violation of the protected right, considers all of the possible perpetrators, and involves follow-up that covers all possible theories in order to investigate and punish the perpetrators of the violation.¹²⁶

According to this interpretation of the rules at stake, when government authorities become aware of acts such as the ones examined in this case, they must open a serious, impartial, and effective investigation. Such investigation must be conducted by all available legal means and must seek to determine the truth. In the instant case, this is especially clear in light of the relationship between the investigation into the human trafficking network and the rape, the investigation into the termination of the pregnancy, and María Paz’s subsequent criminal conviction for murder.¹²⁷

Another legal issue that might also be considered in this case is whether the IACtHR has jurisdiction to examine the most salient features of a specific criminal case—more specifically, the manner in which an act that is unlawful or possibly a violation of the two girls’ human rights was investigated. On this point, the considerations with respect to the participation of children in criminal cases as victims or witnesses are important.

¹²² I/A Court H.R., Advisory Opinion No.17, op. cit., paras. 112/114.

¹²³ I/A Court H.R., *Case of the "Juvenile Reeducation Institute,"* op. cit., para. 209; & I/A Court H.R., OC-17/02, op. cit., para. 95.

¹²⁴ I/A Court H.R., *Case of Velásquez-Rodríguez*, op. cit., paras. 166 & 176; I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 110; & I/A Court H.R., *Case of Zambrano-Vélez et al. v. Ecuador*. Judgment of July 4, 2007. Series C No. 166 para. 88.

¹²⁵ I/A Court H.R. *Case of Zambrano-Vélez et al.* op. cit., para. 120.

¹²⁶ *Idem*, para. 158.

¹²⁷ I/A Court H.R., *Case of García-Prieto et al. v. El Salvador*. Judgment of November 20, 2007. Series C No. 168, para. 101.

One particular related issue is the consideration of the statement of a child victim as evidence more than as a mechanism of access to justice. This point must be taken into account in this case insofar as the investigation of the facts should not entail the revictimization of the girls. In many cases, the child's statement is a fundamental and decisive piece of evidence, given that these types of crimes generally take place in the private sphere. However, the production of such evidence is a traumatic experience for the child. As such, it is necessary for there to be appropriate means and personnel available when subjecting a child to this type of proceeding.¹²⁸ Basically, it must be ensured that children are questioned in an appropriate manner, with safeguards to protect his or her mental well-being, and that they are not confronted by either the alleged perpetrator of the crime or his or her defense attorney; in other words, all possible contact should be avoided.¹²⁹

The specific treatment that the justice system must ensure for child victims of crime includes the following:

a) caring and sensitive treatment, "taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity;"¹³⁰ b) interference in the child's private life should be limited to the minimum needed¹³¹ –and therefore the publicity of a trial in which there is a child victim must be restricted;¹³²– c) an ongoing relationship with professionals in charge of providing support and certainty about the process;¹³³ e) the use of special

¹²⁸ United Nations Economic and Social Council [ECOSOC] *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, Guideline 23: "In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions." Guideline 31 provides that "(...) (a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording."

¹²⁹ *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, op. cit., Guideline 31. Pursuant to these rules, the protection of a child witness or victim who testifies in a trial such as the ones discussed herein requires that this act not be detrimental to the child's physical or mental health (prevent revictimization). Therefore, the testimony must be handled by a specialized professional (psychologist or psychiatrist), since officers of the court do not always have the necessary training to conduct this activity appropriately, and it should be taken by means of a Gessel Chamber or a similar device that prevents repetition as well as possible assertions on the part of the defense that the testimony is not valid.

¹³⁰ *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, op. cit., Guideline 10.

¹³¹ *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, op. cit. Guideline 12.

¹³² *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, op. cit., Guideline 28.

¹³³ According to Guideline 30, the professionals who take part must: (a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests; (b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with

rooms with inter-disciplinary services, recesses during the hearings at times appropriate to the child's age and maturity;¹³⁴ f) child victims, their parents or guardians and legal representatives should be promptly and adequately informed of the availability of health, psychological, social and other relevant services, of the applicable procedures and their most important steps, of the rights of the child, of the mechanisms for review of the decisions, of the provision of protective measures and support mechanisms;¹³⁵ and g) the investigation should be expedited unless delays are in the child's best interest.¹³⁶

Likewise, and in relation to María Paz's situation as a criminal defendant, it is relevant to note that the Committee on the Rights of the Child has stated: "(...) The child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a 'translation' of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand;" and "Providing the child with an official document is not enough and an oral explanation may often be necessary. [...] It is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences."¹³⁷

There are no major theoretical or jurisprudential discussions regarding the fact that the right to a fair trial includes a set of conditions, both procedural and substantive, under which proceedings must be conducted, and regarding the roles of the different parties involved. As stated previously, these conditions have not been proven in this case.

These conditions must include the effectiveness and timeliness of the judicial proceedings. The American Convention on Human Rights requires that the domestic proceedings and remedies available to those whose rights have been violated be capable of obtaining the result for which they were designed. In other words, the proper service of justice requires that the remedies and proceedings be conducted with due diligence.

Arguments of the Commission and the State

The Commission can argue—on the basis of the aforementioned case law and other consistent case law—that the IACtHR not only has jurisdiction but in fact is required to render a decision on the lines of investigation conducted by the authorities of *Juvenlandia* to analyze whether

them throughout the process.

¹³⁴ *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, op. cit., Guideline 30.

¹³⁵ *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, op. cit., Guideline 19.

¹³⁶ *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, op. cit., Guideline 30: "c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited."

¹³⁷ Committee on the Rights of the Child, General Comment No. 10, op. cit. paras. 47 & 48.

in the case of María Paz there were any violations of Articles 8 and 25 of the American Convention on Human Rights.¹³⁸

It is clear that these (minimum) conditions were not met in this case. The intervening court authorities were not effective in their work. They ignored the arguments relating to the “heat of passion” defense in María Paz’s case, and her special condition of vulnerability that would justify, in the event that it were considered, a special non-custodial measure following a possible admission of guilt on her part. They were also ineffective in investigating the rape she suffered initially.

Along these lines, the Commission could also assert that the investigation and the court case were not conducted with the proper guarantees of legality, diligence, and responsibility, or **in a timely manner**, appropriate to the special nature of the criminal defendant (the child María Paz). The State itself must investigate every situation in which a violation of the rights recognized in the American Convention on Human Rights (freedom, humane treatment, etc.) is alleged, and it is not appropriate for such investigation to be a mere formality or for arguments to be dismissed for procedural reasons, given the direct effect that the due diligence would have had on the criminal case filed against the girl.

Therefore, this obligation must be assumed by the State as its own legal duty, and not just as a simple procedure that involves private interests and depends upon the personal or procedural initiative of the victim; on the contrary, the government authority must exhaustively seek the truth of the allegations that María Paz’s rights were violated.

The fact cannot be ignored that the case involves the murder of an adult male who was a pimp who used the sexual services of a girl and therefore was a participant in the violation of her basic rights; nor can it be ignored that María Paz was in a situation of absolute vulnerability. The treatment she received was completely inconsistent with the dignity and worth that must be accorded to the individuals covered by the Convention on the Rights of the Child.

From the State’s point of view, the admission of an appeal filed after the procedural deadline had passed is already indicative of the relevance of the issue of children’s rights in *Juvenlandia*. It entails the recognition of additional rights for María Paz as compared to convicted adults and the appropriate consideration of her special condition of vulnerability.

To conclude this point, with respect to the other argument that the Commission claims was not considered, the State could maintain that the defendant’s personal circumstances of vulnerability were sufficiently weighed in the judgment of the trial court that dismissed, in a reasoned and well-

¹³⁸ The Inter-American Court has held that: “(...) The focal point of analysis of whether the proceedings in this case were effective is whether they complied with the obligation to investigate with due diligence. This obligation requires that the body investigating a violation of human rights use all available means to carry out all such steps and inquiries as are necessary to achieve the goal pursued within a reasonable time. The obligation to employ due diligence is particularly stringent and important in the face of the seriousness of the crimes committed and the nature of the rights violated,” *Case of the Rochela Massacre v. Colombia*. Judgment of May 11, 2007. Series C No. 163, para. 156; *idem*, para.158.

founded decision, the assertion that those reasons should mitigate her culpability and allow her to receive an even lighter sentence.

The State thus adhered to the guidelines of the Committee on the Rights of the Child, insofar as “(...) the reaction to an offense should always be in proportion not only to the circumstances and the gravity of the offense, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of [the] CRC (...). In cases of severe offenses by children, measures proportionate to the circumstances of the offender and to the gravity of the offense may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration. (...).”¹³⁹

6. Right to equal protection (Article 24 of the American Convention on Human Rights)

Relevant facts

- One day on which she had been with ten “customers,” María Paz, exhausted from the pain and desperate over her situation, tried to terminate her pregnancy. The hemorrhaging did not stop, so she was taken to the health center. The doctor on duty reported the incident to the police, who filed a complaint against her alleged abortion. The report stated that the fetus was anencephalic. A few days later, María Paz was transferred to the Women’s Prison in the capital.

Applicable law

Article 24 of the American Convention provides that:

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

In establishing the prohibition of discrimination, Article 2¹⁴⁰ of the Convention on the Rights of the Child states expressly that race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, and birth are “suspect categories.”

At the same time, these categories extend to the child’s parents or legal representatives. When the unequal treatment is based on a suspect

¹³⁹ General Comment No.10, op cit, para. 71.

¹⁴⁰ CRC, Article 2: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

category, it is assumed to affect the right to equality, and a compelling state interest must be asserted to justify the discriminatory rule.¹⁴¹

The Convention on the Rights of the Child also establishes the duty of the State to take appropriate measures, including positive actions¹⁴² to protect children from discrimination based on their family origin.

The IACtHR has ruled on this issue: "(...) This Court has stated that the cases in which the victims of human rights violations are children are particularly serious. The prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children. Moreover, the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group¹⁴³ Likewise, the State should pay special attention to the needs and rights of the alleged victims in consideration of their status as girls, as women belonging to a vulnerable group.["]¹⁴⁴

In the same respect, it has been established that: "States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). In this regard, training of all professionals involved in the administration of juvenile justice is important (...), as well as the establishment of rules, regulations or protocols which enhance equal treatment (...).¹⁴⁵

Arguments of the State and the Commission

¹⁴¹ UN Human Rights Committee, General Comment 18: *Nondiscrimination*, 1989, para. 7.

¹⁴² "(...) States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations," I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 104.

¹⁴³ I/A Court H.R., *Case of the "Street Children"*, op. cit., para. 146; I/A Court H.R., *Case of the Gómez-Paquiyaury Brothers*, op. cit., para. 162; & I/A Court H.R., *Case of Bulacio*, op. cit., para. 133.

¹⁴³ I/A Court H.R., Advisory Opinion No. 17/02, paras. 56, 57 & 60.

¹⁴⁴ I/A Court H.R., *Case of the "Street Children"*, op. cit., para. 146; I/A Court H.R., *Case of the Gómez-Paquiyaury Brothers*, op. cit., para. 162; & I/A Court H.R., *Case of Bulacio*, op. cit., para. 133.

¹⁴⁴ Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 24: *Article 12 of the Convention (Women and Health)*, adopted at the 20th session, 1999.

¹⁴⁵ General Comment No.10, cit, para. 6.

In the Commission's opinion, the State should have paid special attention to the needs and rights of the alleged victims in consideration of their status as girls, as women belonging to a vulnerable group.¹⁴⁶

In particular, the Commission might make arguments with regard to the statutory definition of the offense of abortion; the unfeasibility of the procedural requirements defended by the Public Prosecutor for the operation of the defense that [the pregnancy] was the result of a rape; the circumstance that, in any case, it was an anencephalic fetus; and, in short, the evidence that all of the girls' suffering (arising from the existence of a human trafficking ring for purposes of sexual exploitation) was due to their status as poor women.

In the State's opinion, the alleged discrimination cannot be proven, since María Paz received the same treatment and legal consideration (a reduced sentence due to her lesser degree of culpability) as any other underage person found guilty of an act defined as a criminal offense under the laws of *Juvenlandia*.

The State could argue with respect to the statutory definition of the criminal offense of abortion that the provision is not discriminatory because it seeks to guarantee life from conception in accordance with Article 1 of the American Convention. Furthermore, in order to recognize and balance the rights at stake as they relate to women, the Criminal Code contains exculpatory provisions.

Part Three. Reparations (international responsibility of the State and its duty to make reparations)

1. Initial considerations

This final section will address, in general terms, the main theoretical and practical aspects of the reparation of the violations committed against María Paz, Felicitas and her baby.

These include the scope of the international responsibility of the State, the special rights of the victims as underage girls, and the appropriate general and specific reparations measures.

In their written briefs as well as in their oral arguments, the participants should present their arguments and positions comprehensively with respect to the reparations they request for the rights they consider the State of *Juvenlandia* to have violated. It is important that the petitioners make their arguments regarding their claims for **comprehensive** reparations so as to take into account the components of this reparation and what they consider would be an effective judicial remedy in the case examined herein.

The participants in the competition should argue this point in terms of the components of what the Inter-American Court has considered comprehensive reparations. These components, which are examined below,

¹⁴⁶ I/A Court H.R., *Case of the "Street Children,"* op. cit., para. 146; I/A Court H.R., *Case of the Gómez-Paquiyaui Brothers*, op. cit., para. 162; & I/A Court H.R., *Case of Bulacio*, op. cit., para. 133.

¹⁴⁶ Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 24: *Article 12 of the Convention (Women and Health)*, op. cit., para.

include restitution, indemnification or compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition.

For this specific case, it is important that the participants address the multiplicity of issues and rights at stake, as well as, based on this complexity and diversity, explore different measures of restitution for the various rights infringed in light of the general rule (and collateral rules, for the reasons previously explained) of Article 19 of the American Convention on Human Rights (special protective measures for children).

1. General considerations regarding reparations

The IACtHR has stated in its case law that it is a principle of international law that every international violation resulting in harm entails the duty to redress such harm adequately.¹⁴⁷ When an unlawful act attributable to a State is committed, it gives rise immediately to the international responsibility of the State for the violation of the international rule in question, with the resulting duty to redress and put a stop to the consequences of the violation.¹⁴⁸

Article 63.1 of the American Convention on Human Rights reflects this customary rule, which is one of the fundamental principles of contemporary international law on State responsibility.

Reparation of the harm arising from the violation of an international obligation requires—assuming that it is possible—the full and *complete* restitution (*restitutio in integrum*) of the victims' rights. This consists of the reestablishment of the situation that existed prior to the violation of the right. If that is not possible, the international court deciding the case must determine a series of measures (for example, to recognize citizenship, reestablish freedom or identity, return assets and property, allow a person to return to his or her place of origin or place of employment, among other things) in order—in addition to guaranteeing the rights that were violated—to redress the consequences of the violations and establish the payment of indemnification as compensation for the harm caused.¹⁴⁹

The State under the obligation to provide redress cannot invoke provisions of domestic law to modify or breach its reparations obligations, which are regulated in all aspects (scope, nature, manner, and determination of beneficiaries) by international law.

Reparations are measures that seek to make the effects of the violations disappear. Their nature and their amount depend on the harm caused. Reparations cannot entail the enrichment or the impoverishment of

¹⁴⁷ I/A Court H.R., *Case of the "Street Children,"* op. cit., para. 146; See also: I/A Court H.R., *Case of the Gómez-Paquiyaury Brothers*, op. cit., para. 162; & I/A Court H.R., *Case of Bulacio*, op. cit., para. 133.

¹⁴⁷ *Case of the Gómez-Paquiyaury Brothers*, cit. para. 187; I/A Court H.R., *Case of the "Juvenile Reeducation Institute,"* op. cit., para. 257; & I/A Court H.R., *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para. 39.

¹⁴⁸ *Case of the Gómez-Paquiyaury Brothers*, op. cit., para. 188.

¹⁴⁹ *Case of the Gómez-Paquiyaury Brothers*, op. cit., para. 189.

the victim or his or her successors. In this respect, the reparations must bear relation to the previously stated violations.¹⁵⁰

It is pertinent to the present case that the IACtHR has also weighed the personal situation of victims: “In determining reparations in the instant case, the Court must consider the fact that there were children involved who were very poor and whose human rights were grievously violated.”¹⁵¹

Thus, the IACtHR has already developed its own criteria for what is referred to as “integral reparations of the damages”¹⁵² in cases involving children.

In this case, logically, the parties must demonstrate the causal nexus between the facts, the violations alleged, the harm caused, and the measures requested.

2. Injured parties (victims)

María Paz Richardson
Felicitas Unzué
Felicitas’s son

3. Pecuniary and non-pecuniary damages

Throughout its case law, the IACtHR has established that a human rights violation gives rise to different types of harm that must be redressed in order to [remedy] “the consequences of the measure or situation that constituted the breach of such right.”

A distinction is thus drawn among different types of damages, based on two main categories: pecuniary damages and non-pecuniary damages.

The case law of the IACtHR has developed the concept of pecuniary damages and the situations in which it is appropriate to provide compensation for such damages.¹⁵³ Pecuniary damages address the monetary consequences that have a direct causal nexus to the unlawful act.¹⁵⁴

¹⁵⁰ See: I/A Court H.R., *Case of the “Street Children,”* op. cit., Concurring Opinion of Judge A. A. Cançado Trindade, para. 35.

¹⁵¹ I/A Court H.R., *Case of the “Juvenile Reeducation Institute,”* op. cit., para. 262.

¹⁵² See: I/A Court H.R., *Case of the “Street Children,”* op. cit., Concurring Opinion of Judge A. A. Cançado Trindade, para. 35.

¹⁵³ I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname.* Merits. Judgment of December 4, 1991. Series C No. 11, paras. 50, 71 & 87; I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz,* op. cit., para. 166; I/A Court H.R., *Case of Zambrano-Vélez et al.* op. cit., para. 138 & I/A Court H.R., *Case of Escué-Zapata v. Colombia.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 132.

¹⁵⁴ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala.* Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; I/A Court H.R., *Case of La Cantuta,* op. cit., para. 213 & I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 166.

The pecuniary damages recognized by the IACtHR include indirect or consequential damages, lost wages or income, and detriment to family assets (considered separately), as well as other expenses incurred during the case.

The Court has recognized pain and suffering, harm to an individual's life plan, and psychological, physical, and collective damages as non-pecuniary damages, although not always explicitly.

4. Reparations measures at the international level

In relation to this topic, and in the event that the State is held responsible, it is expected that the participants will identify the potential reparations that the Commission could request based—as previously mentioned—on the type of harm, the causal nexus or link between the proposed reparations measures and the alleged violations, as well as the type of measures that could redress the harm caused.

In light of those considerations, the Commission could argue that based on the proven violations of the American Convention on Human Rights and the resulting grievous harm, the Court should order comprehensive reparations.

The Commission could ask that for the State to take, *inter alia*, the following reparations measures:

a) *Indemnification or compensation* to provide redress to the victims for the physical and emotional damages they sustained, as well as for lost opportunities, pecuniary damages, lost income, damage to their reputation, and medical and other similar costs.

In this case, a specific amount of money would be requested in relation to the mental, emotional, and physical harm sustained by the victims, as well as for the damages arising from their relatives' travel from *Pobrelandia* to *Juvenlandia* (fares, hotels, food, local transportation, telephone calls, etc.).

b) Rehabilitation measures seeking to reduce the physical and psychological suffering of the victims. This would be through the provision of medical, psychological, and psychiatric services to restore the dignity and reputation of the victims.

In this case, a request could be made for special treatment for Felicitas and María Paz, the placement of María Paz and Lucio in a program to reconnect with their son, and the provision of assistance for their baby.

c) Measures of satisfaction that entail taking the steps to investigate and prosecute the perpetrators of the human rights violations, the ascertainment and dissemination of the truth, the search for disappeared persons, the location and return of the remains of deceased relatives, public acknowledgment by the State of its responsibility, as well as public apologies and official testimonies, measures to commemorate and render homage to the victims, the placement of plaques and/or the erection of monuments, and acts to reclaim the memory of the victims.

Based on the State's duty to investigate and punish violations, such measures also include conducting an effective investigation of the government employees who acted intentionally or negligently in failing to comply with the State's duty to prevent the conduct that harmed the girls in this case.

Thus, in view of the facts of the case under examination and relating to the investigation that would be appropriate for the offense of human trafficking, other measures in addition to the ones taken could be requested of the judicial authorities, such as: a) urging the authorities of *Pobrelandia* to gather additional information from the victims' domicile and in relation to their relatives; b) attempting to determine victims' point of contact with the recruiter (Porota) in order to identify her and verify her immigration activity; c) obtaining statistics from *Pobrelandia* in order to determine whether the trafficking of boys, girls, and adolescents for purposes of commercial sexual exploitation is a criminal phenomenon of which the authorities are aware and to which they are paying the proper attention; d) determining whether any initial payment or money was given to the victims as a means to induce them; e) verifying the records that would enable authorities to reconstruct the trip based on witness testimony, fuel expenditures, etc.; to determine whether Porota was the person who filled out any immigration card or paperwork and to have it examined by an expert and compared to other irrefutable documents (for example, a *Juvenlandian* passport, driver's license, and so on), etc.

In addition, requests could be made for an effective investigation into the rape of María Paz; the closure of the criminal abortion case; the shutting down, prosecution, and punishment of all of the individuals involved in the human trafficking network; the prosecution and punishment of all of the criminally responsible state agents (immigration and police); a review of the adoption of Felicitas's son, and the appointment of a guardian *ad litem* while the case is tried, among other things.

d) Legislative reforms to the domestic law based on the duty to act.

In the case, the following would be requested:

- The amendment of the Juvenile Justice Act to eliminate plea bargain agreements;
- The amendment of the Judiciary Act to create juvenile courts and Appeals Chambers specializing in juvenile justice;
- The amendment of the adoption law to prohibit the direct surrender of *de facto* custody and declare the invalidity of surrenders certified by a notary public;
- The amendment of the civil procedure law to ensure due process in proceedings held to determine whether a minor is adoptable, with broad powers of appeal for the biological parents. There should also be another proceeding, clearly distinct from the prior one, in which the adoption of the child is decided in an expedited fashion, subject to review in cases where substantive defects in the declaration of adoptability have been proven;
- The amendment of administrative provisions related to the control of entry into and departure from the country;
- The amendment of the Prophylaxis Law; and

2011 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION
ACADEMY ON HUMAN RIGHTS AND HUMANITARIAN LAW
AMERICAN UNIVERSITY - WASHINGTON COLLEGE OF LAW
CASE OF RICHARDSON, Unzué et al. v. Juvenlandia

- the decriminalization of abortion and/or the determination that a final rape conviction not be required in order for the legal excuse of rape to be admissible in cases involving the termination of a pregnancy, as well as the authorization for abortion to be performed in the case of an anencephalic fetus without the need to obtain permission from a court.

e) Guarantees of non-repetition that refer to the implementation of suitable administrative, legislative, or judicial measures to ensure that the victims are not again subjected to human rights violations. In this case, this would include:

- The training of public servants, employees, judges, and other state agents;
- Public awareness campaigns; and
- The modernization of the computer systems that record entry into and departure from the country.

For its part, the State could argue that it acted diligently under its domestic law to provide redress to the victims in large part for the matters considered herein, especially with regard to the investigation of the criminal offenses and the rehabilitation of the victims—that is, of both María Paz as a convicted person, and Felicitas as a victim of human trafficking.