2010 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

INTER-AMERICAN COURT OF HUMAN RIGHTS

Richardson, Unzué *et al.*
Applicants

v.

Juvenlandia
Respondent

MEMORIAL FOR THE STATE

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STATEMENT OF FACTS

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

Maria Paz Richardson is a 14-year-old Pobrelandian girl (H.C. ¶ 6). In March of 2002, she accepted the offer of "Pirucha", a Juvenlandian woman promising to get her into Juvenlandia where she could work as a domestic employee and, eventually, become a legal resident (H.C. ¶ 6). Afraid, Maria Paz did not inform her parents (H.C. ¶ 7). She shared the proposal with her 16-year-old cousin, Felicitas Unzué, who decided to accompany her. Her parents verbally authorized her to travel (Clarification Questions 32, "C.Q."). The girls met "Pirucha" at the bus station. She left the girls with "Porota", who would travel with them (H.C. ¶ 9). "Porota" confiscated the phone Lucio Devereux, Felicitas' boyfriend, had given to Felicitas. When they crossed the border, Porota conversed with the Customs and Immigration officers, after having asked the girls for their documents and having told them not to talk to anyone (H.C. ¶ 11). On several occasions, the vehicle they were traveling in was stopped and searched by what seemed to be security forces (H.C. ¶ 12).

In the capital, they were met by a man with a scar on his face who nastily told them to get on a vehicle that would bring them to their place of employment. They were brought to a dirty apartment crowded with younger and older women, some of whom appeared to have been beaten (H.C. ¶ 14). Maria Paz asked for her documents but was told by Porota that they could be

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

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

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

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

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

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

in forma pauperis requesting a review of her conviction (H.C. ¶ 41). Her appeal was admitted by the Court, as it accepted the arguments relating to her lack of a proper legal defence (H.C. ¶ 43). On March 5, 2008, the Supreme Court affirmed her conviction (H.C. ¶ 43).

In November 2002, Felicitas gave birth to her son (H.C. ¶ 19). She was told that her situation would keep her from raising him properly. A well-off family was ready to take care of him. She signed some papers and gave him up (H.C. ¶ 20). Her direct surrender of *de facto* custody led to his adoption by a Juvenlandian family becoming final in July 2004 (H.C. ¶ 22).

Worried that they had not received news from Maria Paz and Felicitas in all those months, their families and Lucio went to the Embassy of Juvenlandia, but there was no record of their departure from Pobrelandia nor of their entry into Juvenlandia (H.C ¶29). In December 2004, while still working at the brothel, Felicitas called Lucio with a cell phone left by a "customer" (H.C. ¶ 28). Lucio and Maria Paz's mother left for Juvenlandia (H.C. ¶ 30).

Lucio and Felicitas' attorney, Mr. Justo, (H.C. ¶ 32) filed a criminal complaint alleging human trafficking, grievous bodily harm, subjecting another to servitude and violation of the Prophylaxis Law. A search warrant was issued for the brothel where Felicitas was thought to be, (H.C. ¶ 34). When the police visited the brothel, it was deserted, and, as a consequence, the complaint was dismissed for lack of evidence (H.C. ¶ 34). Lucio and Mr. Justo filed a writ of *habeas corpus*, and the judge ordered several measures, but they yielded no result (H.C. ¶ 35).

Mr. Justo located the *de facto* custody file and filed suit to recover the child and annul the adoption (H.C. ¶ 36). The request was denied at all instances, as the adoption was legal and in the best interests of the child. He filed an extraordinary appeal, but the Supreme Court denied it for procedural reasons (H.C. ¶ 37).

On December 18, 2006, Lucio asked the Inter-American Commission on Human Rights ("Commission") to issue precautionary measures with respect to Felicitas. The petition was processed immediately (H.C. ¶ 45). Juvenlandia replied that the measures could not be issued, as the requirements had not been met (H.C. ¶ 46). Lucio also filed a petition before the Commission alleging that Juvenlandia had violated the rights of Felicitas and her son under the *American Convention on Human Rights* ("*Convention*") (H.C. ¶ 47). The Commission found that the State had violated its duties and obligations (H.C. ¶ 49). On August 26, 2010, the Commission submitted the case to the Inter-American Court of Human Rights ("Court") (H.C. ¶ 51) and requested provisional measures to locate Felicitas (H.C. ¶ 52). Three months later, Felicitas surfaced, as a result of an investigation on a human trafficking network. She was referred to a service for the protection of human trafficking victims (H.C. ¶ 55).

On August 20, 2008, Maria Paz's attorneys filed a petition before the Commission alleging violations of the Convention committed by Juvenlandia. The Commission issued its report and brought the case before the Court on August 26, 2010 (H.C. ¶ 57).

LEGAL ANALYSIS

I. PRELIMINARY OBJECTIONS

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

Juvenlandia will prove[1] that this petition is inadmissible because domestic remedies have not been exhausted "in accordance with generally recognized principles of international law."[2] Juvenlandia asserts that Maria Paz's human trafficking allegations, her abortion case and Felicitas' adoption case should not be addressed by the Court.

Maria Paz has filed a petition alleging violations of Articles 5, 6 and 7 of the *Convention* without having exhausted the adequate and effective remedies "suitable to address an infringement of a legal right"[3] and "capable of producing the result for which it is designed."[4] The appropriate remedy to address the human trafficking would be to file a criminal complaint, which she failed to do. Also, the abortion case should not be addressed as it is awaiting trial.

With regards to the adoption of the child, Felicitas has undertaken no judicial proceedings in the past six years. Although the State considers that such a remedy would not serve the best interest of the child, should she wish to regain custody, the adequate remedy would be for her to go to family court. The State respectfully submits to the Court that it may not consider the petition until Felicitas has seized the domestic courts, if she so wishes.

[1] *Velásquez-Rodríguez v. Honduras*, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, at para 88 (June 26, 1987).
[2] *Inter-American Convention on Human Rights*, November 22, 1969, OAS, Treaty Series, No 36, 1144 U.N.T.S. 123, (Entry into force on July 18, 1978), article 46(1)a [hereinafter "*American Convention*"].
[3] *Velásquez-Rodríguez v. Honduras*, *supra* note 1, at para. 64.
[4] *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No 4, at para. 66 (July 29, 1988).

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

Lucio alleged violations of instruments other than the *Convention*.[5] The Court cannot examine whether Juvenlandia has violated these conventions as they do not confer competence to the Court.[6] Violations of the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, the "*Belém do Pará Convention*", were also alleged. The Court may only exercise its contentious jurisdiction when provided by "special declaration." [7] It has jurisdiction to assess violations only of Article 7 of this *Convention*.[8] Analysis should be limited to the *American Convention* and Article 7 of the *Belém do Pará Convention*.

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

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

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

[5]*Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, GA Res 263, UNGAOR 54th Sess, Supp No 49, UN Doc A/54/49, (2000).; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November, 2000, U.N. Doc. A/RES/55/25 (hereinafter "*Palermo Protocol*").; as well , *The Inter-American Convention on International Traffic in Minors*, March 18 1994, OAS Treaty Series, No. 79 (Entry into force on August 15 1997) ; *The Inter-American on the International Return of Children*, 15 July 1989, OAS, Treaty Series, No. 70 (Entry into force on Nov. 4 1994).
[6]*Las Palmeras v. Columbia*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, at para. 34 (Dec. 6, 2001).
[7] *American Convention on Human Rights*, *supra* note 2, article 62(3); *González et al. v. Mexico*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 205, at para. 36 (Nov. 16, 2009).
[8] *González et al. v. Mexico*, *supra* note 7, at paras. 40 and 80.
[9]See *Rantsev v Cyprus and Russia*, No 25965/04, [7 January 2010] ECHR, at para 280-282.
[10]See *Velasquez-Rodriguez v. Hondura*, *supra* note 4, at para. 174.

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

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

As provided by Article 1(1) of the American Convention, interpreted in light of Article 11(1) of the *Palermo Protocol*, Juvenlandia respected its obligation to strenghten border control in order to detect and prevent trafficking in persons.[11] It has established human trafficking as a criminal offense in its legislation[12] (H.C. ¶34) and has enacted immigration laws that must be diligently applied by Immigration and Customs Offices at all of Juvenlandia's border crossings (C.Q. 12). An identification document is required to enter Juvenlandia (C.Q. 41). Moreover, to comply with its obligation under Article 19 of the *Convention* to provide a special protection to children against trafficking,[13] travelling minors must have express permission from their parents, signed before a notary public (C.Q. 41). The immigration procedure is long and complex and it cannot be undertaken without the direct participation of the parents (C.Q. 26).

In the present case, "Porota" was the subject of an immigration control (H.C. 11) and random searches (H.C. 12), but it is unclear whether or not State agents saw the girls or if they were hidden. In the event that they were within sight of the agents, it can be presumed that the legality of their entry was controlled. It must be understood that "Porota", a private person, was part of a criminal and clandestine operation and that her role was to smuggle the girls into Juvenlandia in order to exploit them. It is reasonable to believe that if her intentions were indeed to commit a

[11] *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18, Inter-Am. Ct. H.R. (ser. A) No. 18, at para. 140-42 (Sep. 17, 2003) [hereinafter "*Advisory Opinion OC-18*"].
[12] In compliance with Article 5 of the Palermo Protocol, *supra* note 5.
[13] *"Juvenile Reeducation Institite" v. Paraguay*, 2004 Inter-Am. Ct.H.R. (ser. C) No. 112, at para. 231 (Sep. 2, 2004); *Juridical Condition and Rights of the Child*. Advisory Opinion OC-17/02, Inter-Am. Ct.H.R. (ser. A) No 17, at para. 54 (Aug. 28, 2002) [hereinafter "*Advisory Opinion OC-17/02*"].

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

The applicable standard of diligence, as instructed by international law, requires the State to carry out identity controls and to verify minors have the necessary authorizations to travel; nothing in the facts indicates that the State has not lived up to this standard. The obligation incumbent on the State is one of means, not of result.[14] The Court recognised that "the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."[15] It would be unreasonable to engage the State's responsability as long as it is carrying out its prevention duty in good faith and excessive to require an infallible system and the interception of every single trafficking victim**,** at the risk of posing unreasonable obstacles to the free movement of people, as protected by Article 22 of the *Convention*.

Further, the State of Juvenlandia would like to specify that, as recognized by the *Palermo Protocol*, international cooperation is necessary to effectively tackle human trafficking. Without prejudice to Juvenlandia's obligation to prevent, it is necessary to recognize that efforts must be made by bordering countries, especially Pobrelandia, whose apparent tolerance for exploitation rendered Maria Paz vulnerable to "Pirucha's" foul proposal (H.C. 6). By maintaining its population in a general state of poverty, Pobrelandia drives its vulnerable members to accept precarious employment which can lead them, like in the present case, to integrate clandestine operations lead by organized crime and become involuntary accomplices, and later, victims.

[14] *Velasquez-Rodriguez v. Honduras*, *supra* note 4, at para 166, *González et al. v. Mexico*, *supra* note 7, at para 252.
[15] *Case of the Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser C) No 140, at para 124 (January 31 2006).

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

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

Juvenlandia has met its duty to guarantee the rights protected by Articles 5, 6, and 7 of the *Convention*, in accordance with Article 1(1), and Article 7 of the *Belém do Pará Convention*, which forms the regional *corpus juris* in the area of the prevention and punishment of violence against women.[17] One of the measures implemented by Juvenlandia in order to comply with its international obligations is the Prophylaxis Law, which provides for administrative inspections of brothels by police officers (C.Q. 16 and 50). These visits constitute an effective means for the State to comply with its duty to protect and ensure the rights of women working in the sex industry and to intervene in cases where their rights are threatened and where it is clear that they

[16]See Foreign Affairs and International Trade Canada, *Children and Travel (FAQ)*, online: <http://www.voyage.gc.ca/faq/children-travel_enfants-voyage-eng.asp>.
[17]*Case of the Miguel Castro-Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser C) No 160, at para 276 (November 25 2006).

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

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

Moreover, it is unclear from the facts whether or not the omission to question the women was part of an investigation strategy in order to crack down on human trafficking rings and, therefore, it would be premature to conclude to a violation of Article 1(1). In the context of human

[18] *González et al* v. *Mexico*, *supra* note 7, at para 258.
[19] *Case of the Pueblo Bello Massacre* , *Supra* note 15, at para 123, *Case of the* Sawhoyamaxa Indigenous Community *(Paraguay)*, (March 29 2006), Inter-Am Ct HR (Ser C) No 146, at para 280. See also *Kiliç v. Turkey*, 2000 ECHR No. 22492/93, at para (March 28 2000) ; *Osman v. the United Kingdom,* (1998) 95 ECHR, VIII, at para 115-116, (October 28 1998).; *Rantsev v Cyprus and Russia*, *supra* note 9.
[20] *Rantsev v Cyprus and Russia*, *supra* note 9, at para 296.
[21] *Ibid*., at para. 297

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

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

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

With regards to the right to a fair trial and judicial protection, States respect their obligations to protect and ensure human rights when the system for the administration of justice is an effective and efficient tool to provide satisfaction to victims of violence and crime.[22] Regarding Lucio's criminal complaint filed on behalf of Felicitas, a search warrant was issued at the request of the Office of the Public Prosecutor (H.C. 34). Additionally, prior intelligence work by Juvenlandian police permitted to target that specific brothel (C.Q. 40). The search warrant was duly executed but the desertion of the brothel did not permit police officers to gather enough evidence to sustain the criminal complaint; hence the authorities had no other option but to dismiss it. However, it is reasonable to expect that the State remained aware of Felicitas' case and that it was inserted in the context of a larger-scale operation to investigate and dismantle trafficking rings in Juvenlandia. Accordingly, the fact that Felicitas was eventually found as a result of an investigation on human trafficking shows that the State's measures are effective (H.C. ¶ 55).

[22]Inter-Am. C. H.R. Report on Citizen Security and Human Rights, OEA/Ser.L/V/II.Doc.57 (31 december 2009), at para 163 [hereinafter "Report on Citizen Security and Human Rights"].

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

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

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

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

[23] *Caballero-Delgado and Santana v. Colombia*, 1994 Inter-Am. Ct. H.R. (ser. C) No. 17, at para.66 (Jan. 21, 1994).
[24] See Report on Citizen Security and Human Rights, *supra* note 22 especially recommendations #5, 6, 15.

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

A. Juvenlandia has the sovereign right to adopt abortion legislation

Juvenlandia has chosen to authorize abortion in certain circumstances, in accordance with the democratically expressed will of its population. In the other circumstances, the State has adopted, in accordance with Article 4(1) of the *Convention*, measures to protect the right to life of its citizens from the moment of conception. Indeed, it is legitimate for Juvenlandia to consider that the unborn is a person whose life must be protected.[25] Regarding the term "in general" include in Article 4(1), the Commission has established that this does not bar member States from criminalizing abortion.[26] Juvenlandia is also justified in allowing abortion to be performed by a licensed physician when the life or health of the mother is in danger or when the pregnancy is the result of rape or indecent assault of a mentally disabled woman (C.Q. 57).

Juvenlandia understands that since the *Baby Boy* decision in the early 1980s, mentalities may have evolved. For example, it is now unacceptable to oblige a cancer-stricken woman to carry her pregnancy to term if it interferes with her medical treatment.[27] It is true that if Maria Paz had not tried to terminate her pregnancy, her situation would resemble that of "X", a Mexican woman, on behalf of whom the Commission issued precautionary measures asking Colombia to provide her with "adequate medical treatment for the effects of having been sexually violated and having carried a pregnancy under allegedly risk circumstances."[28] The standard is now that countries allow termination of pregnancy at least in cases of sexual violence and risk to the

[25] *A, B and C v. Ireland*, 2010 ECHR No. 25579/05, at para. 222 (Dec. 16, 2010).
[26] *Baby Boy*, Case 2141, Inter-Am. C.H.R., Report No 23/81, OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981), at para. 30.
[27] *"Amelia" (Nicaragua)*, Precautionary Measure 43-10, Inter-Am. C.H.R., (2010).
[28] *X and XX (Mexico)*, Precautionary Measure 270-09, Inter-Am. C.H.R., (2010).

mother's health. As required,[29] a "constitutionality control" was exercised between Juvenlandia's internal legislation and the *Convention* and the State finds that it complies with this standard. In Maria Paz's case, while it can be argued that she tried to terminate her pregnancy because she had been raped, her situation differs from those above as she did not seek treatment. The doctor ultimately saved Maria Paz's life by providing her the proper treatments.

As permitted by the margin of appreciation doctrine,[30] the State has chosen to elevate the right to life as the most important of all. Further, the European Court of Human Rights has stated that in the case of abortion legislation, where it had to determine whether a fair balance had been struck between the right to life and the right to privacy, this margin had to be broad,[31] especially given that there exists no consensus on the moment when life begins.[32] Moreover, Juvenlandia recognizes that the right to life, health, security and humane treatment of the mother also need to be safeguarded. Faced with the challenge of balancing these rights,[33] Juvenlandia is confident that the balance struck by its legislation provides the best protection of the unborn' right to life and the mother's right to humane treatment.

B. The choice of the prosecutor not to dismiss Maria Paz's abortion case respected Article 8(1) of the American Convention as the evaluation of the legal excuse should be left to the judge's appreciation

The prosecutor was justified in refusing to dismiss Maria Paz's abortion case (H.C. ¶ 27), as it did not constitute a situation covered by its law authorising abortion. Indeed, Maria Paz tried to terminate her pregnancy without the assistance of a licensed physician (H.C. ¶ 18). This

[29] *Gelman v. Uruguay*, 2011 Inter-Am. Ct.H.R. (ser. C) No. 221, at para. 193 (Feb. 24, 2011).
[30] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, at para. 58 (Jan. 19, 1984).
[31] *A, B and C v. Ireland*, *supra* note 25, at para. 233.
[32] *Vo v. France*, 2004 ECHR No. 53924/00, at para. 82 (Jul. 8, 2004).
[33] Albin Eser & Hans-Georg Koch, *Abortion and the law: from international comparison to legal policy*, (The Hague: T.M.C. Asser Press, 2005) at p. 262.

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

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

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

A. In the course of Maria Paz's abortion case, the State respected her right to personal liberty provided by Article 7 of the American Convention and her right to be presumed innocent as provided by Article 8(2)

Maria Paz's pre-trial detention in her abortion case does not amount to arbitrary detention. Remand in custody is necessary and lawful, if its purpose is "to ensure that the accused does not prevent the proceedings from being conducted or elude the system of justice."[35] Preventive detention is permissible in case of "a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying

[34] *KL v. Peru*, Communication No. 1153/2003, UN doc. CCPR/C/85/D/1153/2003 (2005), at para. 3.1.
[35] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, 2007 Inter-Am. Ct.H.R. (ser. C) No. 170, at para. 103 (Nov. 21, 2007).

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

Preventive detention is exceptional in nature, and it should be "limited by the principles of legality, the presumption of innocence, need, and proportionality."[37] As required,[38] Maria Paz's pre-trial detention was a measure of last resort, in conformity with the law and was ordered only for the shortest amount of time possible. Once she met the Women's Association and asked to be released (H.C. ¶ 23), her request was granted immediately, as the association provided her with the conditions to live in Juvenlandia (C.Q. 7), such that there was no longer any flight risk in her case. Her detention complied with the obligation to detain minors for the briefest time possible[39] and it was not prolonged once the reasons that justified this precautionary measure ceased to exist.[40] As such, her right to be presumed innocent was safeguarded. In accordance with the Court,[41] this was a precautionary measure, not a punitive one, and it was applied only to the extent necessary and in full compliance with the restrictive application required.[42]

Maria Paz's pre-trial detention satisfies the two-part test developed in the *Giménez v. Argentina* case requiring that there be relevant and sufficient criteria to justify detention and that

[36] *Jorge A. Giménez v. Argentina*, Case 11.245, Inter-Am. C.H.R., Report No 12/96, OEA/Ser.L/V/II.91 Doc. 7 (1996), at para. 84.
[37] *Acosta-Calderón v. Ecuador*, 2005 Inter-Am. Ct.H.R. (ser. C) No. 129, at para. 74 (Jun. 24, 2005).
[38] *"Juvenile Reeducation Institite" v. Paraguay*, 2004 Inter-Am. Ct.H.R. (ser. C) No. 112, at para. 231 (Sep. 2, 2004); *Advisory Opinion OC-17/02*, *supra* note 13, at para. 126.
[39] *Bulacio v. Argentina*, 2003 Inter-Am. Ct.H.R. (ser. C) No. 100, at, para. 135 (Sep. 18, 2003).
[40] *Bayarri v. Argentina*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 187, at para. 74 (Oct. 30, 2008).
[41] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra* note 35, at para. 145.
[42] *Jorge, José y Dante Peirano Basso v. Uruguay*, Case 12.553, Inter-Am. C.H.R., Report No. 86/09, OEA/Ser.L/V/II. Doc. 51, corr. 1 (2009), at para. 74.

authorities exercise "special diligence."[43] Before Maria Paz met the Women's Association, less than nine months had elapsed, which does not exceed "a reasonable limit whereby imprisonment without conviction imposes a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed innocent"[44] and is much less than the two-year maximum duration Juvenlandia provides for preventive detention (C.Q. 23). As required, special diligence was used as "the complexity and scope of the case, in addition to the conduct of the accused, [was] taken into account."[45] Just like in the *Giménez* case, Maria Paz's abortion case was not complex. However, in the former case, the accused was preventively detained for over four years for aggravated robbery.[46] As preference is given to cases involving defendants in custody (C.Q. 18), Juvenlandia respects the Court's standard, that "an accused person in detention is entitled to have his case given priority and expedited by the proper authorities."[47]

For Article 7(5) to be respected, the legality of the pre-trial detention must be determined by a judge.[48] Nothing in the facts indicates that Maria Paz was not brought before a judge and, in accordance with international case-law,[49] it must be presumed that the State acted in good faith. It is therefore assumed that the judicial review was, as required under the Convention, "carried out promptly and in such a way as to guarantee compliance with the law and the detainee's effective enjoyment of his rights, taking into account his special vulnerability."[50] Juvenlandia asserts that not only was Maria Paz's remand in custody necessary and used as a last resort, but it

[43] *Jorge A. Giménez v. Argentina*, *supra* note 36, at para. 83.
[44] *Idem*.
[45] *Ibid*., at para. 103.
[46] *Ibid*., at paras. 2-3.
[47] *Jorge A. Giménez v. Argentina*, *supra* note 36, at para. 100.
[48] *Bayarri v. Argentina*, *supra* note 40, at para. 63.
[49] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] I.C.J. Rep. 135, at para. 278.
[50] *Bayarri v. Argentina*, *supra* note 40, at para. 67.

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

It is being presumed that the prison earnestly attempted to contact Maria Paz's family, as the authority "must immediately notify the next of kin or, otherwise, their representatives for the minor to receive timely assistance from the person notified."[52] Immigration records should be consulted.[53] Given that Maria Paz entered the country illegally, there were no records that could have provided her identity or contact information. As Maria Paz did not tell her parents she was leaving (H.C. ¶ 7), one can expect that once arrested, she stayed silent about how to contact them. Thus, it was impossible to contact them.

Juvenlandia complied with its obligation to deal with Maria Paz's situation "in a manner appropriate to [her] well-being and proportionate both to [her] circumstances and the offence."[54] The authorities lacked information about her; hence keeping her in custody was the proper way of dealing with her circumstances. As required by Article 5(5) of the *Convention* and confirmed by the Court, Maria Paz was housed in a different section from adults[55] (C.Q. 38), where it can be presumed that she was under the supervision of trained staff.[56]

B. Maria Paz' judicial proceedings in her abortion and her murder cases were carried out within a reasonable delay and with due guarantees, in accordance with Article 8 of the American Convention

1. Maria Paz's judicial proceedings were carried out within a reasonable time

[51] *Villagrán-Morales et al. v. Guatemala*, 1999 Inter-Am. Ct.H.R. (ser. C) No. 63, at para. 79 (Nov. 19, 1999)..
[52] *Bulacio v. Argentina*, *supra* note 39, at para. 130.
[53] *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law.* Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16, at para. 94 (Oct. 1, 1999).
[54] *Advisory Opinion OC-17/02*, *supra* note 13, at para. 126.
[55] *Bulacio v. Argentina*, *supra* note 39, at para. 136.
[56] See *Bulacio v. Argentina*, *supra* note 39, at para. 126.

Maria Paz, in her judicial proceedings, was afforded all due guarantees, complying with its duty that this be done irrespective of her migrant status.[57] The complexity of the case, the conduct of the judicial authorities and the procedural activity of the interested party[58] must be considered in assessing whether her judicial proceedings were carried out quickly enough. The State must also consider "the adverse effect the duration of the proceedings would have on the judicial situation of the person."[59] In doing so, it must consider the total duration of the proceedings "from the first procedural act until the order to execute the judgment."[60]

With regards to her murder case, after an assessment of the above elements, it must be concluded that she was tried in a timely manner. Given that this is a criminal matter, the term starts on February 5, 2004 (H.C. ¶ 24), the date she was first detained.[61] The proceedings ended on March 5, 2008 when the Supreme Court affirmed her conviction (H.C. ¶ 43). In all, the judicial proceedings did not exceed 49 months. This case displays some elements of complexity, given that potential witnesses – such as "Porota" – were fugitives (C.Q. 54). The course of action of the judicial authorities was without reproach, as Maria Paz was first convicted in December 2004, only nine months after the murder (H.C. ¶¶ 24-25). It is rather Maria Paz's legal actions which prolonged the proceedings, as her lawyer filed an extraordinary appeal after the procedural deadlines had expired (H.C. ¶ 41). Considering that her case reached the Supreme Court, it must be contrasted with that of *Suárez-Rosero*, where it was found that a delay of 50 months, simply in order for the first trial court to render judgment, was an unreasonable delay.[62]

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[57] *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18, Inter-Am. Ct. H.R. (ser. A) No. 18, at para. 122 (Sep. 17, 2003).
[58] *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, at para. 175 (Sep. 7, 2004); *Juan Humberto Sánchez v. Honduras*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, at para. 129 (Jun. 7, 2003).
[59] *Valle Jaramillo et al. v. Columbia*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 192, at para. 155, (Nov. 27, 2008).
[60] *Tibi v. Ecuador*, *supra* note 58, at para. 168.
[61] See *Case of Suárez Rosero*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, at para. 70, (Nov. 12, 1997).
[62] *Ibid.*, at para. 34.

Again, as for the abortion case, the proceedings do not constitute an unreasonable delay. The proceedings started when a complaint was filed on August 10, 2002 (H.C. ¶ 18). As of August 26, 2010, the case is awaiting trial. It does not constitute a case of a particularly complex nature. She is accused of trying to terminate her pregnancy, as substantiated by the material evidence and the witnesses. While the excessive workload a court may face cannot in itself excuse unreasonable delays in the proceedings,[63] for the better administration of justice, Juvenlandia prioritises the cases it adjudicates. As such, her case is being tried after those involving defendants in custody. Also, the legal actions taken by Maria Paz must be considered. In order for the truth to come to light, it is of the utmost importance that witnesses be heard. In murdering her victim (H.C. ¶ 24), she deprived the court of a key witness in her abortion case, thus rendering the latter more complex. Maria Paz is already detained for first degree murder. As she was handed down a sentence of 15 years in prison (H.C. ¶ 25), of which only seven years were served, the fact that her abortion case is awaiting trial does not yield an adverse effect on her judicial condition, as she must, in any case, carry out her sentence for her murder case.

2. The rights set forth in Article 8 were respected in all of Maria Paz's judicial proceedings

The heat of passion issue raised by Maria Paz, (H.C. ¶ 42) constitutes "factual and evidentiary matters not subject to review in an extraordinary appeal" (H.C. ¶ 44). Juvenlandia, as most countries, does not allow new facts to be introduced in an extraordinary appeal. The Court stated that "the *Convention* does not endorse any specific criminal procedural system. It gives the States the liberty to determine which one they prefer, as long as they respect the guarantees established in the Convention itself, the internal legislation [and] international law."[64]

[63] *Ximenes-Lopes v. Brazil*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 139, at para. 199 (Nov. 30, 2005).
[64] *Fermín Ramírez v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) no. 126, at para. 66 (Jun. 20, 2005).

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

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

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

[65] *Castillo-Petruzzi et al. V. Peru,* 1998 Inter-Am. Ct. H. R. (ser. C) No. 41, at para. 139 (Sep. 4, 1998).
[66] Black's Law Dictionary, Ninth Edition, Bryan A. Garner, p. 815.

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

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

Juvenlandia understands that States should ultimately aim to establish a specialized court system for minors. However, Article 40(3) of the CRC, which was referred to in Advisory Opinion 17,[68] provides that "States Parties *shall seek* to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children" (emphasis added). The Committee on the Rights of the Child ("the Committee"), which interprets this convention, is better placed to establish how to protect minors. It recommended that: "States parties establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice."[69] Thus, this remains an ideal to be reached and the lack of such a system does not constitute a violation *per se*. Likewise, while the Committee also stated that minors should be assisted by specialised

[67] *Advisory Opinion OC-17/02*, *supra* note 13, at para. 109.
[68] *Advisory Opinion OC-17/02*, *supra* note 13.
[69] Committee on the Rights of the Child, General Comment No. 10 on Children's rights in juvenile justice, U.N. Doc. CRC/C/GC310 (Apr. 25, 2007), at para. 93.

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

The adoption of special juvenile criminal justice laws (H.C. ¶44) serves exactly this purpose. A physical separation between regular courts and juvenile courts is not required to ensure that a fair trial is carried out. As the European Commission on Human Rights has established, while "the establishment of juvenile courts is conducive to a fair trial under Article 6, [...] this does not mean that children may never be tried in an adult setting."[72] What matters is not the location where the trial is held, but that it is carried out in circumstances that take into consideration "the age, level of maturity and intellectual and emotional capacity of the child concerned."[73] Indeed, Juvenlandia is of the opinion that the interests of a child are better protected by offering juvenile offenders tailored programs while in jail (C.Q. 51) than by investing in building facilities.

It is not unusual for OAS member states to have children tried by the same courts as adults.[74] The Commission had the opportunity to condemn this practice, but seemed not to find this appropriate. [75] It limited itself to stating that minors "must be investigated and tried by special authorities created for that purpose,"[76] without declaring that the standard was not satisfied.

[70] *Ibid*., at para. 92.
[71] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice,* G.A. Res. 40/33, UNGAOR, 40th Sess., U.N. Doc. A/Res/40/33 (Nov. 29, 1985), rule 14.
[72] *T v. UK*, 1999 ECHR No. 24724/94, Comm Rep, 4.12.98, unreported, at paras. 95-99 (Dec. 16, 1999).
[73] *V v. UK*, 1999 ECHR No. 24888/94, at para. 86 (Dec. 16, 1999).
[74] *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia* (2007), OEA/Ser.L/V/II. Doc. 34, at para. 391 (Jun. 28, 2007).
[75] *Idem*.
[76] *Idem*.

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

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

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

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

[78] Albert W. Alschuler, "Plea Bargaining and its History" (January 1979) 79 Colum L. Rev. 1 at p. 6.

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

[80]Nicholas Bala, *Youth Criminal Justice Law*, (Toronto: Irwin Law, 2003), at p. 366.

[81]Alschuler, *supra* note 78, at p. 1.

[82] Nicholas Bala, *supra* note 80, at p. 363.

[83]*Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ICTY Appeals Chamber (Oct. 7, 1997)International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 45 (2010),art. 62 ter; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. (2009),art. 62 bis; International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), art. 64(8) and (65).

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

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

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

[84] Inter-American Commission on Human Rights, Rules of Procedure, art. 40; Inter-American Court of Human Rights, Rules of Procedure, art. 63.
[85] Ludovic Hennebel, *Le particularisme interaméricain des droits de l'Homme*, (Pedone : Paris, 2009), at p. 90.
[86] *R. v. M. (C.B.)* (1992), 99 Nfld. & P.E.I.R. 280 (P.E.I.C.A.).
[87] Jenia I. Turner, *Plea Bargaining Across Borders: Criminal Procedure*, (New York: Aspen Publishers, 2009) at p. 41.
[88] For the Canadian standard, see *R v. T.W.B.*, [1998] B.C.J. 1044 (B.C.C.A.).
[89] See Supreme Court of Canada decision: *R. V. Burlingham*, [1995] 2 S.C.R. 206, at 230-231.
[90] *Advisory Opinion OC-17/02, supra* note 13, at para. 96.
[91] *Youth Criminal Justice Act*, S.C. 2002, c. 1, art. 36.
[92] Nicholas Bala, "The Young Offenders Act: A Legal Framework", in Joe Hudson, Joseph P. Hornick, and Barbara A. Burrorws, eds., *Justice and the Young Offender in Canada*, (Toronto: Wall & Thompson, 1998) at p. 24.

judge reviewing the plea bargaining to be assured that the truth-seeking function of the criminal justice system was safeguarded. It must be assumed that Maria Paz was not compelled or coerced to plead guilty, thus respecting article 8(2) of the Convention. If the judge is not satisfied that minors understand the charge, they will be obliged to go to trial.[93]

Given the considerable delay in criminal trials in Juvenlandia, (C.Q. at 59) the practice of plea bargaining allows the right to a hearing in a reasonable time to be better protected. For example, in the absence of plea bargaining trials, Canada would not be capable of resolving all its criminal cases.[94] Plea bargaining allows the "certainty about the likely outcome and often a less severe sentence than might occur if there is a trial" [95] that is required.

V. THE ADOPTION OF FELICITAS' SON RESPECTS ARTICLES 8, 17, 19 AND 25 IN RELATION TO ARTICLES 1(1) AND 2 OF THE CONVENTION

A. De facto custody is accepted in Juvenlandia as it ultimately respects the best interests of the child

Both the *American Convention*, in its entirety, and the CRC should be used by the Court "to determine the content and scope of the general provision established in Article 19 of the Convention."[96] Accordingly, *de facto* custody should be viewed in the light of Articles 3, 5, 8, 9, 16, 18, 19 and 27 of the CRC. For example, under Article 18 of the CRC, parents have the primary responsability in the upbringing and development of their child and they must exercise it in accordance with the best interests of the child. Moreover, Article 5 provides that the State must respect this right and duty of parents to provide appropriate direction and guidance to the child in the exercise of the *patria potestad.*

[93] *Youth Criminal Justice Act*, *supra* note 91, art. 32(4).
[94] Nicholas Bala, *supra* note 80, at p. 366.
[95] *Ibid*.
[96] *Advisory Opinion OC-17/02*, *supra* note 13, at paras. 37 and 53; *Villagran-Morales*, *supra* note 51, at para. 19; *Gelman v. Uruguay*, *supra* note 29 , at para. 121.

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

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[97] *Convention on the Rights of the Child*, 20 November, 1989, U.N.T.S. vol. 1577, (Entry into force on 2 September 1990), art. 16.
[98] Audience CIDH. http://www.law.harvard.edu/news/spotlight/classroom/related/testimonyfullnov09.pdf, at p.3.
[99] *Villagran-Morales Case*, Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, at para. 2.
[100] *American Convention on Human Rights*, *supra* note 2, art. 17.
[101] http://www.jus mendoza.gov.ar/organismos/registro_adopcion/ponencias/La%20guarda%20de%20hecho%20y%20la%20autonomia%20de%20la%20voluntad%20frente%20al%20paradigma%20de%20la%20nueva%20ley.htm
[102] *Convention on the Rights of the Child, supra* note 98, preamble.
[103] See for example the reverse effects of the institutionalization of children: Audience CIDH. http://www.law.harvard.edu/news/spotlight/classroom/related/testimonyfullnov09.pdf.

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

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

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

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

[104]Sylvain Vité et Hervé Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption,* Boston, Martinus Nijhoff, Leiden, 2008, at p. 25.
[105]*Convention on the Rights of the Child, supra* note 98, art. 9.

Moreover, a series of tests determine the guardian's suitability and capacity to adopt (C.Q. 8). Hence, Juvenlandia's adoption proceedings are subject to a strict judicial control in order to ensure that the best interests of the child are the paramount consideration and to provide for the best protection of the rights of the child and the family.

In the present case, the State of Juvenlandia confirmed that the adoption was legal (H.C. 37 & 49). This means that all the requirements for the adoption were fully complied with, such as the confirmation by Felicitas of the surrender of her son before a judge, the authentication of the adoptive parents' suitability to adopt and, especially, the determination that it was in the best interests of the baby to be adopted. In all, Felicitas and her son were afforded all due guarantees in the adoption proceedings and their rights under the *Convention* were respected by the State.

ii. C. The request to annul the adoption was duly studied and denied as it was in the best interests of the child

Although the best interests of the child has to be the paramount consideration in all adoption proceedings,[106] Juvenlandia recognizes that other fundamental rights have to be safeguarded, such as "the right not to be arbitrarily separated from his/her parents and to be raised by them, or the right of the biological parents to have their family life preserved, in cases where, for instance, their consent was not adequately given."[107] However, in the present case, there was no arbitrary denial of the rights of the family of the baby: the adoption was legal and legitimate, Felicitas had consented and the adoptive parents cared for him in the best way possible. The best interests of the baby were respected by Juvenlandia's courts, which in this case was to not disrupt the new legitimate and legally acquired bonds between him and his new family.[108] Indeed, this was the

[106] *Convention on the Rights of the Child, supra* note 98, art. 21.
[107] *A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption, supra* note X at p. 26.
[108] *Johansen v. Norway*. 2010 ECHR No. 17383/90, at para. 80 (Aug. 7, 1996).

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

As noted by the Commission, tribunals have the obligation to handle all custody cases with exceptional diligence and without delay.[111] Whereas in the *Forneron* case, the father saw his rights and his daughter's flouted by the suppression of her civil status and undue delays, the present case involves no such delays or irregularities. In all, Juvenlandia's courts rejected the request for the annulment of the adoption based on the best interests of the child, which is perhaps unfavourable for Lucio, but does not indicate that he was not guaranteed a fair trial.

REQUEST FOR RELIEF

The State requests this Court to declare that it lacks competence to address alleged violations where domestic remedies have not been exhausted and where it lacks *ratione materiae* jurisdiction. Alternatively, should this Court reject the preliminary objections, it should find that the State's actions are in compliance with Art. 1(1), 2, 5, 7, 6, 8, 17, 19, 24 and 25 of the *Inter-American Convention on Human Rights* and with Article 7 of the "*Belém do Pará Convention*."

[109] *Gelman v. Uruguay*, *supra* note 38, at para. 125.
[110] Please see *Youth Protection Act*, R.S.Q., c P-34.1 and *Protection de la jeunesse – 10174* (C.A., 2010-10-27), 2010 QCCA 1912, SOQUIJ AZ-50683797, 2010EXP-3648, J.E. 2010-1992. Available online http://www.canlii.org/en/qc/laws/stat/rsq-c-p-34.1/latest/rsq-c-p-34.1 html.
[111] *Milagros Forneron Y Leonardo Anibal Javier Forneron v. Argentina*, Petition 1070-04, Inter-Am. C.H.R., Report No. 117/06, at para. 41.; *Milagros Forneron Y Leonardo Anibal Javier Forneron v. Argentina*, Case 12.584, *supra* note 96, at para. 78. See also *Johansen vs. Norway*, (1996), ECHR, 1196-III, No.13, at para 88.