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**2011 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION  
ACADEMY ON HUMAN RIGHTS AND HUMANITARIAN LAW  
AMERICAN UNIVERSITY -WASHINGTON COLLEGE OF LAW**

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

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## **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.<sup>1</sup> 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





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,<sup>8</sup> 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.<sup>9</sup>

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

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<sup>8</sup> Preamble and Article 29 of the ACHR.

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

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omission), the duty to respect rights, enshrined in Article 1 of the American Convention on Human Rights





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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 be

treatment, in particular

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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.<sup>19</sup>

In deepening this analysis, the IACtHR

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.

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*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.
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



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mental, and sexual abuse and mistreatment of children.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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 residence<sup>27</sup> can be dismissed, as the case deals with

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<sup>24</sup> 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.

<sup>25</sup> I/A Court H.R., op. cit.

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





This Article define

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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,<sup>37</sup> 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),<sup>38</sup> the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules) (1985),<sup>39</sup> the United Nations Standard Minimum Rules for Non-custodial Measures (known as the Tokyo Rules) (1990),<sup>40</sup> and the United Nations Guidelines for the Prevention of Juvenile Delinquency (known as the Riyadh Guidelines) (1990),<sup>41</sup> 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

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 (...).<sup>43</sup>

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 (...).<sup>44</sup>

Also concerning the principle of specialized justice—but considering it furthermore an *exclusive* right—the Court found that: (...)

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• 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 first aspect to consider in relation to this right is the close connection between Article 19 and Article 17



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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.<sup>56</sup>

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

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.<sup>62</sup>

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.<sup>63</sup>

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 responsible for satisfying [the] material, emotional, and psychological needs<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup>

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.<sup>67</sup>

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.<sup>68</sup>

The IACtHR



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 6<sup>74</sup> (right to life), 7<sup>75</sup> (right to a name and nationality), 8<sup>76</sup> (right to identity and protection against unlawful interference), 14<sup>77</sup> (freedom of thought, conscience and religion), 24<sup>78</sup> (right to health), 27<sup>79</sup> (adequate standard of living and

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<sup>74</sup> 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.

<sup>75</sup> [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.

<sup>76</sup> 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.

<sup>77</sup> 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.

<sup>78</sup> 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;



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

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

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,<sup>86</sup> 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,<sup>87</sup> 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.<sup>88</sup>

To give an example,

Consequently, this limitation of







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necessary that the child understand all of the issues examined, discussed, or involved.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup>

In addition, the IACtHR specified that participation in proceedings is limited to the personal conditions and the

of origin.<sup>110</sup>

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.<sup>111</sup>

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,<sup>112</sup> 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.<sup>113</sup>

Coincidentally, the Committee on Economic, Social and Cultural

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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,<sup>117</sup> 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

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that had elapsed, it was in the best interests of the child to remain with his

*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 necessary.



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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.<sup>128</sup> 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.<sup>129</sup>

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;<sup>130</sup> b) interference in the child's private life should be limited to the minimum needed<sup>131</sup> –and therefore the publicity of a trial in which there is a child victim must be restricted;<sup>132</sup>– c) an ongoing relationship with professionals in charge of providing support and certainty about the process;<sup>133</sup> e) the use of special

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<sup>128</sup> 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

rooms with inter-disciplinary services, recesses during the hearings at times appropriate to the child's age and maturity;<sup>134</sup> 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;<sup>135</sup> and g) the investigation should be expedited unless delays a

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

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



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

The Convention on the Rights of the Child also establishes the duty of the State to take appropriate measures, including positive actions<sup>142</sup> 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 group<sup>143</sup> 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.[ ]<sup>144</sup>

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 (...).<sup>145</sup>

### *Arguments of the State and the Commission*

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

<sup>142</sup> (...) 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.

<sup>143</sup> I/A Court H.R., , 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.

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

<sup>144</sup> I/A Court H.R., , 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.

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

<sup>145</sup> 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.<sup>146</sup>

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

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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 consid**

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

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.<sup>151</sup>

Thus, the IACtHR has already developed its own criteria for what is referred to as integral reparations of the damages<sup>152</sup> 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.<sup>153</sup> Pecuniary damages address the monetary consequences that have a direct causal nexus to the unlawful act.<sup>154</sup>

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<sup>150</sup> See: I/A Court H.R.,





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

