2009 Inter-American Human Rights Moot Court Competition
Academy on Human Rights and Humanitarian Law
American University – Washington College of Law

Rosalie Fournier and Bruno Tamba v. Tynalandia

Bench Memorandum
(CONFIDENTIAL)

I. Introduction

1. The purpose of this memorandum is to offer the judges a guide to the main legal arguments that the teams might use in support of their pleadings on behalf of the Inter-American Commission on Human Rights (hereinafter "the Commission" or "IACHR") or the State of Tynalandia. This document is not meant to be an exhaustive analysis of the legal issues raised in this case, nor does it exhaust all possible arguments that the competition participants may use. They may present arguments that are different from or complementary to the ones discussed herein.

2. The aim of the hypothetical case is to have the participants think about the international obligations of States with regard to the human rights of migrants, particularly taking into account that increased migration in the region has caused receiving countries to take measures to restrict the entry of foreigners and to eliminate illegal immigration. In many cases, the rights of migrants are violated during their crossing, during the process of integrating into society at their destination, or during the return to their country of origin. Of particular concern is the apparent degree of mistreatment of individuals, xenophobia and discrimination, the lack of due process, the mass deportations of undocumented migrants, the prolonged detention of migrants under the same circumstances as common criminals, and separation from their families and community.

3. To this effect, the hypothetical case poses a situation that is affecting thousands of migrants in the hemisphere and encompasses issues such as the legality of detention, the right to a defense, discrimination, and the prohibition against the arbitrary influence of the State on the private lives of individuals, among others. This memorandum should be read in conjunction with the hypothetical case and the answers to the clarification questions.

II. General considerations regarding the international responsibility of States with respect to their immigration policy

4. Currently, the international responsibility of States for the violation of the human rights of individuals who inhabit their territory—whether they are citizens or aliens—is broadly recognized. Nevertheless, the State's international responsibility for acts committed against individuals within its borders is a modern concept of public

international law. Originally protected by the principle of sovereignty, they were not held to any kind of international responsibility of this nature.

5. The argument of state sovereignty is still used frequently to defend the ability of States to define their immigration laws and policies and, therefore, decide legally on the entry, stay and removal of foreigners within their borders. In cases before the Commission, States have alleged that they enjoy absolute sovereign authority to detain and remove excludable aliens, and that individuals who are in their countries in violation of the law do not enjoy the substantive right to liberty or any procedural rights in connection with their detention.[1] Likewise, it has been asserted that a sovereign State has the right to exclude from its territory aliens whose presence is not in the public interest, is potentially harmful to public safety or threatens the economic, social or political welfare of its citizens.[2]

6. The Commission has noted that States historically have been given considerable discretion under international law to control the entry of foreigners into their national territory,[3] and that the exercise of this control can be an element of the State's obligation to guarantee the safety of its population.[4] At the same time, the Commission has affirmed that this discretion must be exercised in accordance with the international human rights obligations of States. In particular, the Commission has held that the basic human rights protections enshrined in the instruments of the inter-American system must be guaranteed for all persons under the authority and control of the OAS Member States, and that their enforcement does not depend upon factors such as the person's citizenship, nationality or any other factor, including his immigration status.[5]

7. With regard to the issues relating to the legal aspects of migration, the Inter-American Court has held that: "in the exercise of their power to establish migratory policies, it is licit for States to establish measures relating to the entry, residence or departure of migrants who will be engaged as workers in a specific productive sector of the State, provided this is in accordance with measures to protect the human rights of all persons and, in particular, the human rights of the workers."[6] In particular, the Court has established that "the State may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature."[7]

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[1] See: IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, paras. 174-176.

[2] See: IACHR, Report No. 19-02, Petition 12.379 Mario Alfredo Lares-Reyes, Vera Allen Frost and Samuel Segura (United States), February 27, 2002, para. 38.

[3] IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 177.

[4] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, paras. 134-142.

[5] IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 179. See also IACHR Report 109-99, Case 10.951 Coard et al. (United States), September 29, 1999, para. 37.

[6] I/A Court H.R. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 169.

[7] I/A Court H.R. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 172.

8. In examining the potential responsibility of a State in connection with its immigration laws and policy, it is important to bear in mind Article 27 of the Vienna Convention on the Law of Treaties, which states, in reference to domestic law and the observance of treaties, that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Consequently, "the exercise of that sovereignty by a State can in no way justify violation of human rights, as the American Convention imposes certain limitation on the exercise of public power by member states."[8]

9. It must also be recalled that Article 1(1) of the American Convention establishes the obligation to respect the rights and freedoms recognized therein, and that the States freely assume this obligation upon ratifying the Convention. As such, a State's failure to comply with the general duty to respect and guarantee human rights gives rise to international responsibility.

10. This responsibility arises from the fact that every person has attributes inherent in his human dignity that entitle him to fundamental rights that cannot be denied and which, consequently, are superior to the power of the State.[9] As such, "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights."[10]

III. Considerations regarding the applicability of non-inter-American instruments and case law to the inter-American system

11. Consistent with the practice of the Inter-American Court and the Inter-American Commission, this memorandum will make reference to a variety of international instruments and standards to interpret the rights enshrined in the American Convention. Likewise, considering that some of the issues covered in the hypothetical case have not been developed extensively by the bodies of the inter-American system, it is likely that the participants will analyze the facts of the case in light of international instruments that are not part of the inter-American system itself, as well as in light of the decisions of other regional or international human rights bodies. It is therefore necessary that the teams justify the reasons for which the decisions or standards they invoke could serve as guidelines for the interpretation of the American Convention on Human Rights.

12. The authority of the Inter-American Court and the Commission to interpret comprehensively the human rights protection standards enshrined in the inter-American instruments is derived from Article 29 of the American Convention on Human Rights. That Article provides that: "No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent

[8] IACHR, Report No. 49-99, Case 11.610 Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz (México), April 13, 1999, para. 30.
[9] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 73.
[10] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 134.

than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

13. According to Article 29, it is not possible to diminish the standard of protection attained nationally or internationally. As such, it can be asserted that this standard enables the bodies for the protection of human rights to interpret the American Convention without minimizing the standard of protection attained at the national, regional or worldwide level.

14. Furthermore, the Inter-American Court has observed in the American Convention a "tendency to integrate the regional and universal systems for the protection of human rights. The Preamble recognizes that the principles on which the treaty is based are also proclaimed in the Universal Declaration of Human Rights and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope. [Similarly], several provisions of the Convention likewise refer to other international treaties or to international law, without speaking of any regional restrictions. (See, e.g., Convention, Arts. 22, 26, 27 and 29.)."[11]

15. The Court has considered that "it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States."[12] The Court has also held that the American Convention is part of an international *corpus juris* for the protection of human rights, which must be taken into consideration when establishing the content and scope of one of the provisions of the Convention.[13]

16. In light of the foregoing, the instruments and standards that are not part of the inter-American system can be used when interpreting the provisions of the American Convention. Nevertheless, it must be taken into account that several experts consider it necessary for the treaties used to interpret the American Convention to have been ratified by the State in question. Otherwise, it could be considered that such interpretation is subjecting a State to obligations under a treaty it has not ratified.

17. Finally, the participants may argue that the rules for the interpretation of international law established under the Vienna Convention on the Law of Treaties require that the first interpretation be the literal one. Thus, it could be argued that if the text of the treaty is clear, it is inadmissible to seek alternative interpretations.

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[11] I/A Court H.R., "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 41.
[12] I/A Court H.R., "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 40.
[13] I/A Court H.R., Case of the "Street Children" (Villagrán-Morales et al.), Judgment of November 19, 1999, paras. 192 & 194.

IV. The Obligation to Respect Rights and the Duty to Adopt Provisions of Domestic Law

18. Articles 1(1) and 2 of the American Convention on Human Rights state:

> Article1. Obligation to Respect Rights
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> 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.
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> Article 2. Domestic Legal Effects
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> 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.

19. The very origin of a State's responsibility is derived from its failure to comply with the obligations set forth in Articles 1(1) and 2 of the Convention.[14] Article 1(1) of the American Convention on Human Rights establishes the obligation to respect and guarantee rights that is incumbent upon every signatory State. Article 2 of this same instrument establishes the obligation of States to bring their legal systems into line with the rights listed therein.

20. Article 1(1) imposes upon States the obligation to respect and guarantee rights. The obligation to respect rights entails a limitation to the exercise of government power, so as to establish certain spheres of the human realm that cannot be violated, and which the State cannot penetrate. The obligation to guarantee rights entails the duty to organize the entire State apparatus to ensure the full and free exercise of human rights.[15]

21. The general duty established in Article 2 of the Convention requires taking measures in two respects. It entails, on one hand, the suppression of standards and practices of any kind that involve the violation of the guarantees provided for in the Convention, and on the other, the issuance of standards and the development of practices

[14] I/A Court H.R., Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 111; Case of the Mapiripán Massacre, Judgment of September 15, 2005. Series C No. 134, para. 111; and Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

[15] I/A Court H.R., Case of Velásquez Rodríguez, Judgment of July 29, 1988, Series C No. 4, paras. 165 et seq.

conducive to the effective observance of such guarantees.[16] In the opinion of the Inter-American Court, a State is responsible for the violations of rights that arise from its failure to take efficient measures in the judicial, legislative and executive spheres.[17]

22. Taken together, Articles 1(1) and 2 of the Convention mean that a State whose judicial structure or procedural laws do not include mechanisms for the protection of rights must create them and make them accessible to all persons subject to its jurisdiction. Furthermore, if such mechanisms exist but are not effective due to various circumstances, the State is obligated to reform them so that they become effective vehicles for the satisfaction of those rights.[18]

23. In Advisory Opinion 18, the Inter-American Court explained that States are bound by the general obligation to respect and guarantee human rights regardless of any circumstance or consideration, including the immigration status of individuals.[19]

24. It should also be made clear that, in order to establish that there has been a violation of the rights enshrined in the Convention, it is sufficient to demonstrate that there has been government support or tolerance of the infringement of the rights recognized in the Convention,[20] or omissions that have allowed such violations to be perpetrated.[21]

25. In their analysis of the hypothetical case, the participants will have to argue as to whether the State of Tynalandia, by act or omission, infringed any of the rights established in the American Convention with respect to Rosalie Fournier or her son, Bruno Tamba, thereby breaching the general obligations imposed by Article 1(1) of the Convention. Likewise, the participants must consider whether Tynalandia's laws, including Law 24.326, in and of themselves violate Article 2 of the Convention, which requires the States to adopt the standards necessary to enforce the rights and freedoms enshrined in the American Convention, but also requires them to refrain from passing laws that are contrary to the Convention.

V. Considerations regarding the rights alleged to have been violated

26. This section of the memorandum will examine each one of the rights that the Commission alleged before the Inter-American Court to have been violated in connection

[16] I/A Court H.R., Case of the Mapiripán Massacre, Judgment of September 15, 2005. Series C No. 134, para. 109; I/A Court H.R., Case of Lori Berenson Mejía, Judgment of November 25, 2004. Series C No. 119, para. 219; I/A Court H.R., Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004. Series C No. 112, para. 206 and I/A Court H.R., Case of the "Five Pensioners", Judgment of February 28, 2003. Series C No. 98, para. 165.
[17] I/A Court H.R., Case of Velásquez Rodríguez, Judgment of July 29, 1988, Series C No. 4, para. 166.
[18] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 89.
[19] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 6 of the operative part of the judgment.
[20] I/A Court H.R., Case of the 19 Tradesmen, Judgment of July 5, 2004. Series C No. 109, para. 141; Case of Juan Humberto Sánchez, Judgment of June 7, 2003, Series C No. 99, para. 44; and Case of Cantos, Judgment of November 28, 2002, Series C No. 97, para. 28.
[21] I/A Court H.R., Case of the Mapiripán Massacre, Judgment of September 15, 2005. Series C No. 134, para. 110; Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 112.

with the situation of Rosalie Fournier and Bruno Tamba in the State of Tynalandia. Following a statement of the content of each one of the rights asserted according to the provisions of the American Convention, an attempt will be made to provide the judges with a guide to the standards that the Inter-American Court and the Commission have established with respect to each one of those rights. Based on those standards, we shall attempt to outline the possible arguments that the Commission and the State might make in their respective pleadings.

a. Right to Personal Liberty

27. The Right to Personal Liberty is enshrined in Article 7 of the American Convention:

Article 7. Right to Personal Liberty

> 1. Every person has the right to personal liberty and security.
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
> 3. No one shall be subject to arbitrary arrest or imprisonment.
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
> 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
> 7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

28. The Inter-American Court has stated that "the essence of Article 7 of the American Convention is the protection of the liberty of the individual from arbitrary or unlawful interference by the State and the guarantee of the detained individual's right of defense."[22] In examining the hypothetical case, the teams must be able to differentiate

[22] I/A Court H.R., Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004. Series C No. 112,

between detention in the context of a criminal proceeding and detention in the context of an administrative proceeding with a view to the deportation of an individual, and debate whether the guarantees contained in Article 7 of the Convention are likewise applicable to both types of detention.

29. With respect to the applicability of the guarantees contained in Article 7 of the Convention to the detention of migrants with a view to their deportation, the Commission has established that any deprivation of the liberty of an individual must be informed by the rules prescribed in Article 7 of the Convention, and that those rules are not limited to detentions involving the investigation and punishment of crimes but also extend to other spheres in which the State can administer its authority. Such spheres include the detention of individuals for purposes of controlling the entry and residence of foreigners within the State's borders, or for reasons having to do with their physical or mental health, and during occupations governed by international humanitarian law that may require the internment of the civilian population as a security measure or for compelling safety reasons.[23]

30. After determining the applicability to the case of the guarantees contained in Article 7 of the Convention, each team must present arguments as to whether, given the facts of the hypothetical case, any of the guarantees have been violated by the State. As such, the specific content of those guarantees will be examined below in light of the American Convention and other applicable standards.

31. Subparagraphs 2 and 3 of Article 7 of the American Convention refer to the prohibition against unlawful or arbitrary detention, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality."[24]

32. The unlawfulness of detention is determined by its imposition outside the factual assumptions regulated by the law. Furthermore, the arbitrariness of such detention is determined by its imposition outside the parameters of necessity and proportionality. According to the Inter-American Court, detention becomes arbitrary when it is imposed "for reasons and by methods which, although classified as legal, could be deemed to be

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para. 223; Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 66; Case of Bulacio, Judgment of September 18, 2003. Series C No. 100, para. 129; and Case of Juan Humberto Sánchez, Judgment of June 7, 2003, Series C No. 99, paras. 82-83.

[23] IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 210.

[24] I/A Court H.R., Case of Gangaram Panday, Judgment of January 21, 1994, Series C No. 16, para. 47.

incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality."[25] Likewise, The Court has held that "the arrest may become arbitrary if in its course facts attributable to the State, considered incompatible with the respect to the detained person's human rights, occur."[26]

33. Similarly, "Subparagraphs 4, 5 and 6 of Article 7 of the American Convention establish positive duties that impose specific requirements both on the agents of the State and on third parties acting with its tolerance or acquiescence and who are responsible for the detention."[27]

34. Subparagraph 4 of Article 7 "sets forth a mechanism to avoid unlawful or arbitrary conduct from the very act of deprivation of liberty on, and to ensure defense of the detainee. Both the detainee and those representing him or with legal custody over him have the right to be informed of the motives of and reasons for the detention and about the rights of the detainee."[28] When an individual is deprived of his liberty, and before he makes an initial statement to the authorities, he must be notified of his right to contact a third person such as a relative, attorney or consular official, as the case may be, to inform that person that he is in the State's custody.[29]

35. Subparagraph 5 of Article 7 refers to the need for judicial oversight and provides that every arrest of an individual must be submitted promptly to judicial review as a suitable means of control to prevent arbitrary and unlawful arrests. As such, a person deprived of his liberty without judicial supervision must be released or brought immediately before a judge.[30] Immediate judicial supervision enables the judge to guarantee the detainee's rights, authorize the adoption of protective or coercive measures, when strictly necessary, and generally ensure that the defendant is treated in a manner consistent with the presumption of innocence.

36. International standards do not specify deadlines for a detainee's appearance before a judge without delay following his arrest, but rather indicate that the time periods

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[25] I/A Court H.R., Case of Gangaram Panday, Judgment of January 21, 1994, Series C No. 16, para. 47; See also: Case of Acosta Calderón, Judgment of June 24, 2005. Series C No. 129, para. 52 (d).

[26] I/A Court H.R., Case of López Álvarez, Judgment of February 1, 2006, Series C No. 141, para. 66.

[27] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 108; Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 91; Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 71; and Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Series C No. 99, para. 81.

[28] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 109; Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 92; Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 72; and Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Series C No. 99, para. 82. In the same respect, See: Case of Bulacio, Judgment of September 18, 2003. Series C No. 100, para. 128.

[29] I/A Court H.R., Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 93; and Case of Bulacio, Judgment of September 18, 2003. Series C No. 100, para. 130.

[30] I/A Court H.R., Case of Acosta Calderón, Judgment of June 24, 2005. Series C No. 129, para. 77; Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 115; Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 95; and Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 72, para. 73; and, in the same respect, See: European Court of Human Rights, Case of Brogan et al., Judgment of November 29, 1988, Series A no. 145-B, paras. 58-59 & 61-62.

must be determined on a case by case basis. On this point, the European Court of Human Rights has held that although the word "immediately" must be interpreted in accordance with the special characteristics of each case, no situation, however serious it may be, gives the authorities the power to unreasonably prolong the period of detention.[31]

37. Furthermore, subparagraph 5 of Article 7 of the Convention also establishes that the detainee has the right to be tried within a reasonable period of time, or otherwise be released without prejudice to the continuation of the proceedings. With respect to this issue, the Inter-American Court has noted that preventive detention "cannot be for longer than a reasonable time and cannot endure for longer than the grounds invoked to justify it. Failure to comply with these requirements is tantamount to a sentence without a conviction, which is contrary to universally recognized general principles of law."[32]

38. Subparagraph 6 of Article 7 of the Convention is related to Article 25 of the same instrument, and addresses the need for effective recourse to judicial supervision. In other words, this subparagraph establishes the right to the writ of habeas corpus, the purpose of which is judicial verification of the lawfulness of the deprivation of liberty. With respect to this remedy, the Court has held that its mere formal existence is insufficient, and that it must be effective.

39. It should be noted that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[33] also contains a broad and detailed catalog of human rights for migrant workers and their families, and in Articles 16 and 17 specifically guarantees the right of migrant workers to freedom and personal safety. Subparagraph 4 of Article 16 of that instrument indicates that migrant workers and their families shall not be subjected—individually or collectively—to arbitrary arrest or detention, and that they shall not be deprived of their liberty except for reasons and by procedures established by law. Subparagraph 5 of Article 16 adds that migrant workers who are arrested must be informed at the time of their arrest and, if possible, in a language they understand, of the reasons for their arrest. It also states that they must be notified promptly, in a language they understand, of the charges against them. In accordance with this International Convention, they also have the right to have the consular authorities of their State of origin notified promptly of their arrest or detention, and of the reasons for such measure. Likewise, it establishes the right to communicate with those authorities (Article 16, subparagraph 7).

40. Subparagraph 6 of Article 16 of the above-cited International Convention establishes the right of migrant workers detained for criminal offenses to be brought without delay before a judge or other official legally authorized to exercise judicial

[31] European Court of Human Rights, Case of Brogan et al., Judgment of November 29, 1988, Series A no. 145-B, paras. 58-59 y 61-62; and I/A Court H.R., Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 73; Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Series C No. 99, para. 84; and Case of Bámaca Velásquez Judgment of November 25, 2000. Series C No. 70, para. 140.

[32] I/A Court H.R., Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004. Series C No. 112, para. 229; and Case of Suárez Rosero, Judgment of November 12, 1997. Series C No. 35, para. 77.

[33] UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly in its Resolution 45/158 of December 18, 1990, entered into force on July 1, 2003.

functions, as well as the right to be tried within a reasonable period of time or be released. According to subparagraph 8 of that article, in the exercise of this remedy, migrant workers shall receive the assistance—without cost if necessary—of an interpreter when they cannot speak or understand the language used.

41. Under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the preventive detention of persons awaiting trial must not be the general rule, but their freedom may be subject to guarantees that ensure the defendant's appearance at trial or at any other stage of the proceedings and, if applicable, for the pronouncement of judgment. Article 17 of said international instrument provides that migrant workers accused of crimes shall be kept separate from convicts, except in extraordinary circumstances, and shall be subject to a different set of rules in keeping with their status as persons who have not been convicted. It is also made clear that if their detention is due to the violation of immigration laws, they shall be housed, to the extent possible, in places other than those used to house convicts or detainees awaiting trial.

A. PLEADINGS OF THE COMMISSION

42. The pleadings of the Commission may be based on the assertion that, even though Rosalie Fournier was arrested within the context of a deportation proceeding and not in a criminal proceeding, her detention must comply with the requirements established under Article 7 of the American Convention. The Inter-American Commission has found in a case involving the detention of migrants that the right to personal liberty "applies to every individual falling within the authority and control of the State and must be afforded to all such persons without distinction."[34]

43. The Commission may assert that, although States have the authority to guarantee their security and maintain public order, they cannot do so without limits; rather, the pursuit of that aim is conditioned upon respect for the fundamental rights of the individuals subject to their jurisdiction. The Commission might point out that Rosalie Fournier was arrested after having been the victim of racial profiling due to her status as a person of African descent, as she was not caught *in flagrante delicto*. As such, the Commission could assert the possibility that the alleged theft of the computer was only a pretext to question and detain the persons of African descent who worked at the hotel, and that this could make the arrest arbitrary, since Rosalie Fournier's fundamental right not to be discriminated against on the basis of her race would have been violated.

44. In the opinion of the Inter-American Court, unless it is demonstrated that a person was arrested *in flagrante delicto*, it must be shown that the arrest was made pursuant to an order issued by the proper judicial authority.[35] Accordingly, the Commission could add that Rosalie Fournier was not arrested pursuant to an appropriate judicial warrant, and that the arrest of an individual without a warrant requires legal and

[34] IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 209.
[35] I/A Court H.R., Case of Suárez Rosero, Judgment of November 12, 1997, Ser. C No. 35, paras. 43 & 44.

factual justification—which has not been demonstrated by the State—and that Article 7(2) of the Convention was therefore violated.

45. The Commission could further add that there was no danger of Rosalie Fournier fleeing or obstructing the investigation, given that she demonstrated total cooperation with the authorities from the beginning of the case. In this respect, it can be said that there was no valid reason to keep her in custody while awaiting the hearing before the Immigration Judge, and that there were less restrictive measures that could have been used to ensure Rosalie Fournier's appearance at trial.

46. The Commission might also note that Rosalie Fournier's detention was not immediately submitted to a judge for review. To the contrary, nearly six months passed before the hearing was held before the 3rd Immigration Court of Tynalandia. The lack of immediate judicial supervision could constitute a violation of Article 7 of the Convention. Specifically, Rosalie Fournier should have been brought before a judge when her deportation proceedings began, in order for the judge to decide whether her detention was reasonable and justified. Rosalie Fournier had the right to have a judge determine whether she was a flight risk or a danger to the community. If both questions were answered in the negative, she had the right to remain free until a hearing was held on the merits of her case.

B. PLEADINGS OF THE STATE

47. The State could argue on its behalf that it has the authority and even the obligation to guarantee security and maintain public order within its borders, and therefore can detain people who are in Tynalandia in violation of its laws. In this respect, the State may assert that even the Inter-American Commission has held that in regulating access to their territories, States may in some circumstances subject aliens to administrative detention, but only if such detention is based on grounds and procedures established by law, is not arbitrary, and provided that they allow for prompt judicial supervision and control.[36]

48. The State of Tynalandia could argue that, in accordance with international standards, the deprivation of liberty was carried out in strict compliance with the procedures established under its domestic law. On this point, it is noted that Law 24.326 provides for the mandatory deportation of aliens who have committed aggravated federal offenses. Thus, the detention was imposed in accordance with the assumptions governed by the Law, which was in force as of 1994 and it was therefore foreseeable for those who, like Rosalie Fournier, knew that they were in the country without permission to reside or work there, despite having committed crimes set forth in that Law.

[36] IACHR Report 109-99, Case 10.951 Coard et al. (United States), September 29, 1999, para. 45; Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 212; Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 137.

49. The State might add that the deprivation of Rosalie Fournier's liberty was not arbitrary *per se,* given that its purpose was to prevent her from evading a possible deportation order against her. Thus, it could be argued that it is reasonable and proportionate to detain a person who knows that he is facing a mandatory deportation proceeding, above all for purposes of ensuring his appearance at the hearing. Further, the fact that Rosalie Fournier does not have documents to reside in Tynalandia creates a presumption that she will likely evade justice.

50. In this regard, the State could base its argument on the Court's decision in the *Suárez Rosero* case, in which it held that the legitimate reasons justifying the imposition of preventive detention are limited by the necessity of guaranteeing that the defendant will not evade justice.[37] In the same vein, in the *Tibi* case, the Court reaffirmed that the only reasons that justified the imposition of preventive detention were the risks of flight and the obstruction of the investigation.[38]

51. The State could argue that the detention was justified when it was established that Rosalie Fournier was in the country in violation of the law, and therefore it can be asserted that she was arrested *in flagrante delicto* and a judicial warrant was not required.

52. In the case that the State does not use this argument, it could be asserted that Rosalie Fournier was arrested not to be criminally prosecuted, but rather that it was an administrative detention to determine her immigration status. Thus, the purpose of the arrest was not to exercise the punitive power of the State to prosecute her criminally; rather it was to determine whether it was proper to legalize her immigration status or deport her to her country of origin. The State could argue that this detention is consistent with the assertion of the Commission when it stated that, "even in the worst cases, undocumented immigrants do nothing more than transgress administrative regulations. They are not criminals nor are they suspected of any crime. They should be held in detention centers and not in regular prisons."[39]

53. Tynalandia may emphasize that Rosalie Fournier was not held with common prisoners, but in a center for migrants, bearing in mind the provisions of the basic human rights guarantees. Thus, according to the facts, Rosalie Fournier was detained at the Gándara Center, which is a center designed exclusively for the detention of migrants, and she was therefore not detained with people prosecuted or convicted for common criminal offenses. Accordingly, the State could maintain that Rosalie Fournier's detention could be considered exceptional and preventive—not punitive—in nature.

54. The State might point out in its defense that when Rosalie Fournier arrived at the police station on May 27, 2003, she was informed that she was under arrest pursuant to the enforcement of Law 24.326, which was applicable to her. Likewise, upon her arrival at the police station, she was informed that she could make the necessary

[37] I/A Court H.R., Case of Suárez Rosero, Judgment of November 12, 1997, Ser. C No. 35, para. 77.
[38] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 180.
[39] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 110.

telephone calls to contact her relatives, employers or others. At the beginning of her interview with the immigration officer, she was informed of the reasons for her arrest, as well as her rights as a detainee, including the right to call an attorney or notify her consulate.

55. The State might assert that, in observance of the provisions of subparagraph 5 of Article 7, Rosalie Fournier was detained only until a court hearing could be held, thus guaranteeing the judicial review of her detention. Tynalandia could also indicate that its laws provide for remedies, such as habeas corpus, that are effective for determining the lawfulness of an arrest. Nevertheless, Rosalie Fournier failed to make use of such remedies.

56. The State may maintain that the detention was not prolonged excessively and that, to the contrary, it was made certain that it was as brief as possible. Only six months passed between the time of Rosalie Fournier's arrest and the hearing before the 3rd Immigration Court of Tynalandia, and the court took less than one month to issue final judgment. As such, the State could claim that Ms. Fournier's right to be tried within a reasonable period of time was guaranteed, especially taking into account that there are thousands of immigrants detained in Tynalandia awaiting a decision as to their deportation.

57. Tynalandia could maintain, as other States have in cases before the Commission,[40] that the American Convention does not limit the extent, purpose or modes of detention in immigration cases, and that in the Republic of Tynalandia immigrants have the full ability to challenge their detentions in judicial and administrative proceedings.

b. Right to Judicial Guarantees and Protection

58. Article 8 of the American Convention on Human Rights establishes the right to procedural due process in the following terms:

Article 8. Right to a Fair Trial

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
>
> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[40] See: IACHR: Report No. 19-02, Petition 12.379 Mario Alfredo Lares-Reyes, Vera Allen Frost and Samuel Segura (United States), February 27, 2002.

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
b. prior notification in detail to the accused of the charges against him;
c. adequate time and means for the preparation of his defense;
d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
g. the right not to be compelled to be a witness against himself or to plead guilty; and
h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

59. For there to be real trial rights in a case, all of the requirements needed to exercise a right must be met. In other words, certain conditions must be met to ensure the adequate defense of those whose rights or obligations are under judicial consideration.[41] Therefore, Article 8 makes reference to a series of guarantees, including the following: the right to a hearing before a competent, independent, and impartial tribunal, previously established by law; the right to adequate time and means to prepare a defense; the right to be tried within a reasonable period of time; and the right to have certain procedural due process guarantees respected, such as the presumption of innocence, the right to defend oneself *pro se* or with the assistance of an attorney of one's choice, and to communicate freely and privately with that attorney, and the right to be assisted free of charge by a translator or interpreter.

[41] I/A Court H.R., Case of the Yakye Axa Indigenous Community, Judgment of June 17, 2005. Series C No. 125, para. 108; Case of Lori Berenson Mejía, Judgment of November 25, 2004. Series C No. 119, para. 132; Case of Herrera Ulloa, Judgment of July 2, 2004. Series C No. 107, para. 147; Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 118; Case of Myrna Mack Chang, Judgment of November 25, 2003. Series C No. 101, para. 202; Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Series C No. 99, para. 124; Case of Hilaire, Constantine and Benjamín et al., Judgment of June 21, 2002. Series C No. 94, para. 147; Case of Loayza Tamayo, Judgment of September 17, 1997. Series C No. 33, para. 62; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 118; in the same respect, see: Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 28.

60. In examining the hypothetical case, the teams must be able to analyze the differences between criminal proceedings and administrative proceedings, and to distinguish common administrative proceedings from those administrative proceedings that are punitive in nature. In light of this debate, the teams must determine whether the guarantees contained in Article 8 of the Convention are applicable to the proceedings described in the hypothetical case.

61. With regard to the applicability of the Article 8 guarantees to the different types of proceedings, the Inter-American Court has stated that, "Article 8 of the American Convention applies to all the requirements that should be observed by the procedural bodies, whatsoever they may be, so that a person may defend himself adequately against any act of the State that could affect his rights."[42] The Court has made clear that, in accordance with Article 8(1), due process affects the determination of civil, labor, tax or any other kinds of rights and obligations, and is not applicable to criminal cases only. [43] The Court has further indicated that, "the rules of due process and the right to fair trial must be applied not only to judicial proceedings, but also to any other proceedings conducted by the State or under its supervision."[44]

62. According to The Court, "the right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons."[45] As such, "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights."[46]

63. Even though the case law of the inter-American system specifies that the guarantees contained in Article 8 of the American Convention may be applied not only to criminal proceedings but also to administrative or other types of proceedings, the scope of the application of Article 8 guarantees to other types of proceedings continues to be the subject of debate, and both the Commission and the Court have continually specified the degree to which those guarantees are applicable to the different cases under their consideration. As such, the teams must discuss the scope of Article 8's application in light of the circumstances of hypothetical case. The next section therefore will analyze the specific content of the procedural due process rights contained in Article 8, particularly those that may be pertinent to the analysis of this case.

64. Article 8(1) refers to the *juez natural* [an independent judge whose position is created by law with general jurisdiction over an issue before or at the time it arises]. On

[42] I/A Court H.R., Case of Yatama, Judgment of June 23, 2005. Series C No. 127, para. 147.
[43] I/A Court H.R. Case of Ivcher-Bronstein, Judgment of February 6, 2001. Series C No. 74, para. 103; Case of Baena Ricardo et al., Judgment of February 2, 2001. Series C No. 72, para. 125; and Case of the Constitutional Court, Judgment of September 24, 1999. Series C No. 55, para. 70.
[44] I/A Court H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 117.
[45] I/A Court H.R., Case of Baena Ricardo et al., Judgment of February 2, 2001. Series C No. 72, para. 127.
[46] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 134.

this point, the Court has held that due process entails the participation of a an independent and impartial judicial body and requires that every person subject to a trial of any kind before a State body must have the guarantee that such body is impartial and acts within the terms of the legally provided procedures to hear and determine the case brought before it.[47] On this issue, the Commission has specified that "Decisions in the area of migration cannot be left to non-specialized administrative or police officials. […] Conferring the power on administrative officials is compatible with international human rights law. Nonetheless, the requirements of impartiality and accountability mentioned above must be met."[48]

65. Article 8(1) also addresses the reasonableness of time periods in the case. On this point, The Court has held that "to examine the reasonability of this process pursuant to the terms of Article 8(1) of the Convention, the Court takes into account three elements: a) the complexity of the matter, b) the procedural activity of the interested party, and c) the behavior of the judicial authorities."[49] The Commission has not always applied these three elements in the analysis of the reasonableness of time periods in all cases, given that some of these elements are not necessarily applicable to certain proceedings. For example, in criminal proceedings involving a crime in which the State has exclusive power to prosecute, the lack of procedural action on the part of the interested party cannot be used to excuse an unreasonable delay on the part of the State.

66. Article 8(2)(a) establishes the defendant's right to be assisted free of charge by a translator or interpreter. This is so because "the guarantees established in Article 8 of the American Convention presume that the victims should have extensive possibilities of being heard and acting in the respective proceedings."[50] With respect to the necessity of interpretation, the Court has held that it is related to the need to recognize and resolve the factors of real inequality faced by individuals brought before the justice system. According to the Court, "the presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. […] This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-

[47] Case of Lori Berenson Mejía, Judgment of November 25, 2004. Series C No. 119, para. 144; Case of Castillo Petruzzi et al., Judgment of May 30, 1999. Series C No. 52, para. 131; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 20; and Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 30.

[48] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 99(a).

[49] I/A Court H.R., Case of Acosta Calderón, Judgment of June 24, 2005. Series C No. 129 para. 105; and Case of the Yakye Axa Indigenous Community, Judgment of June 17, 2005. Series C No. 125, para. 65.

[50] I/A Court H.R., Case of the Constitutional Court, Judgment of September 24, 1999. Series C No. 71, para. 81; Case of Durand and Ugarte, Judgment of August 16, 2000. Series C No. 68, para. 129.

linked, form the body of procedural guarantees that ensures the due process of law."[51] The Commission has also had the opportunity to opine on the matter, indicating that "an immigrant, whatever his legal status, must be able to understand the proceedings he is involved in and all the procedural rights he is entitled to. Thus, translation and interpretation in his language must be made available as necessary."[52]

67. Article 8(2)(b) "orders that the competent judicial authorities notify the accused of the charges presented against him, their reasons, and the crimes or offenses he is charged with, prior to the execution of the process. In order for this right to fully operate and satisfy its inherent purposes, it is necessary that this notification be given before the accused offers his first statement. Without this guarantee, the latter's right to duly prepare his defense would be infringed."[53]

68. Article 8(2)(c) addresses the opportunity for victims or their relatives to have the adequate time and means to assert their defense. On this point, the Inter-American Commission has specified that "a migrant worker must have and be able to effectively exercise the right to be heard, to have his say and defend his right not to be expelled. The right to a hearing should include the right to be informed of evidence to be used against him and the opportunity to counter it, and to produce and present relevant evidence in his own favor, with a reasonable amount of time granted to do so."[54]

69. As a complement to the provision of Article 8(2)(c), Articles 8(2)(d) and (e) guarantee the assistance of private or court-appointed counsel in judicial proceedings. The Inter-American Court has indicated that the Convention guarantees the right to legal assistance in criminal cases, and has found that the lack of a defense attorney is a violation of the right to a fair trial.[55] At the same time, in the Court's opinion, "the right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal."[56] In the opinion of the IACHR, "A person facing possible expulsion must have the opportunity of being represented by an attorney of his choosing or other qualified persons. It may be that the state cannot be asked to provide a lawyer free of charge as in

[51] I/A Court H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 97; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 120. In the same respect, see: Case of Hilaire, Constantine and Benjamín et al., Judgment of June 21, 2002. Series C No. 94, para. 146; Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 121.

[52] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 99(c).

[53] I/A Court H.R., Case of Acosta Calderón, Judgment of June 24, 2005. Series C No. 129, para. 118; and Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 187.

[54] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 99(b).

[55] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 194.

[56] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 126.

criminal proceedings but free representation should at least be offered to indigents. Further, the information referred to in the preceding paragraph should include some form of specialized advice or the rights that assist the immigrant."[57]

70. Also as a complement to the right to a defense, Article 8(2)(d) and (e) guarantees the detained alien's right to consular assistance for purposes of obtaining the assistance recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations. It should be clarified that neither the Commission nor the Court has jurisdiction to issue an opinion on the responsibility of a State with respect to violations of the Vienna Convention on Consular Relations itself. They can only consider the degree to which a State Party has given full effect to the requirements of Article 36 of the Vienna Convention on Consular Relations in order to evaluate that State's observance of due process trial rights in accordance with Article 8 of the Convention.[58]

71. With respect to consular protection, the Inter-American Court has held that "when an individual is deprived of his liberty, and before he makes an initial statement to the authorities, he must be notified of his right to contact a third person such as a relative, attorney or consular official, as the case may be, to inform that person that he is in the State's custody." In the Inter-American Court's interpretation, determining the notification that most properly gives meaning to the concept "without delay" enshrined in the Vienna Convention requires an examination of the purpose of the notification given to the defendant. Given that the purpose of such notice is for the alien to be able to avail himself of an effective defense, the notification must be given at the time he is deprived of his liberty and in all cases before he gives an initial statement to the authorities.[59]

72. The Court has made clear that the consul "may assist the detainee in various acts of defense, such as granting or hiring legal counsel, obtaining evidence in the country of origin, corroborating the conditions under which legal assistance is provided, and observing the situation of the accused while he is in prison."[60] Thus, consular notification is a minimum guarantee to provide aliens with the opportunity to prepare an adequate defense and have a fair trial. Therefore, the Court has found that failure to observe this right renders the respective criminal proceeding null and void and constitutes a violation of Article 8 of the Convention.[61]

73. Article 8(2)(h) guarantees the right to appeal to a higher court. On this point, the Court has explained that, "regardless of the label given to the existing remedy to

[57] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 99(d)
[58] IACHR, Report No. 52/02, Petition 11.753 Ramón Martínez Villareal (United States), October 10, 2002, para. 77.
[59] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 106.
[60] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 112. Case of Bulacio, para. 130; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para.. 86.
[61] I/A Court H.R., Case of Acosta Calderón, Judgment of June 24, 2005. Series C No. 129, para. 125; Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 195; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 122.

appeal a judgment, what matters is that the remedy guarantees a full review of the decision being challenged."[62]

74. With respect to trial rights, Article 18 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also provides that migrant workers and their relatives shall have the same rights as the citizens of the State in question before its tribunals and courts of justice. Like the American Convention, that international instrument indicates that a migrant worker shall have the right to be heard publicly, and with the due guarantees, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights or obligations of a civil nature. It adds that he shall have the right to minimum guarantees, such as the presumption of innocence; the right to be informed promptly, in a language he understands and in detail, of the nature and causes of the accusation filed against him; to have the adequate time and means for the preparation of his defense and to communicate with a defense attorney of his choice; to be tried without unreasonable delay; to be present during the proceedings and to defend himself pro se or to be assisted by a defense attorney of his choice; to be informed, if he has no defense attorney, of the right to have one, and, whenever required in the interest of justice; to have a court-appointed attorney, free of charge if he lacks sufficient means to pay; to be assisted free of charge by an interpreter if he does not speak or understand the language used by the court, and others. Article 23 of that International Convention also refers to the right to have recourse to the protection and assistance of the diplomatic or consular authorities of one's State of origin, in the case of removal in particular.

75. Article 25 of the American Convention on Human Rights establishes the right to judicial protection:

> Article 25. Judicial Protection
>
> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> 2. The States Parties undertake:
>
> to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
> to develop the possibilities of judicial remedy; and
> to ensure that the competent authorities shall enforce such remedies when granted.

[62] I/A Court H.R., Case of Herrera Ulloa, Judgment of July 2, 2004. Series C No. 107, para. 165.

76. The Inter-American Court has stated that Article 25(1) of the Convention is a general provision that encompasses the procedural institution of *amparo* [an appeal for relief under the Constitution in a case of violation of civil rights], as a simple and brief procedure for the protection of fundamental rights. According to the Court, this Article also establishes, in broad terms, the obligation of States to offer persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights. It further provides that the guarantee established therein is applicable not only to the rights contained in the Convention but also to those recognized by the Constitution or under the law.[63]

77. According to the Inter-American Court, Article 25(1) incorporates the principle, recognized under international human rights law, of the effectiveness of the procedural means or instruments designed to guarantee such rights. "According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power [sic] lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy."[64]

78. With respect to the applicability of Article 25 of the American Convention to the facts described in the hypothetical case, the Inter-American Commission has held that proceedings to deport aliens, regardless of whether those persons are documented or undocumented, must offer effective remedies that enable the person in deportation proceedings to request the protection of his rights.[65]

79. In accordance with the provisions of Article 25 of the American Convention, Article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that when a judicial authority issues a final decision, the parties shall have the right to assert the grounds for their opposition to their removal, as well as to submit their case to the proper authority for review, unless there are compelling national security reasons against it. While such review is pending, they shall have the right to request a stay of execution of the removal order.

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[63] I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No 9, para. 23.
[64] I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No 9, para. 24.
[65] IACHR, Third Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2002, para. 77.

80. The IACHR has explained that it is legal for deportation decisions to be made in the administrative sphere. However, in all cases there must be an opportunity for the judicial review of decisions, whether through appeals to courts for the judicial review of administrative acts or by means of *amparo* or habeas corpus. According to the Commission, it is not necessary for every administrative deportation decision to be examined *de novo* by a court, but it is necessary for the judges to maintain a minimum of supervision with regard to the legality and reasonableness of the decisions of the administrative authority, in order to comply with the Article 1(1) duty to guarantee rights and the right to a swift and effective remedy provided in Article 25 of the American Convention.[66]

PLEADINGS OF THE COMMISSION

81. The Inter-American Commission might observe that decisions have already been issued on the application of procedural due process rights to deportation proceedings. The IACHR has indicated with respect to the issue that "a decision on the legal status of a migrant worker does affect his chances of making a living, working under decent conditions, feeding his family and providing an education for his children. It will also affect his right to raise a family and the special protection extended to minors within a family. In some cases, personal liberty may be affected for the duration of the proceedings. Consequently, the value at issue in such proceedings is similar to liberty, or at least closer to liberty than would be the case in other administrative or judicial proceedings. Thus, at the very least, minimum threshold of complete of due process guarantees should be provided."[67]

82. As for the specific guarantees that were violated, the Commission could allege that the State failed to comply with its obligation to provide Rosalie Fournier with a court-appointed attorney and the free assistance of a translator or interpreter. The Commission could point out that on at least two occasions Rosalie Fournier gave statements to the authorities of the State of Tynalandia without an attorney to represent or advise her. Likewise, the Commission can allege the violation of Rosalie Fournier's right to be assisted free of charge by a translator or interpreter, enshrined in Article 8(2)(a) of the Convention, particularly because the only occasion on which she did have an interpreter was during the hearing before the Immigration Judge. From the time of her arrest, during her initial statements before the authorities, and throughout her deportation proceedings, Rosalie Fournier was not informed in her own language of the proceedings against her, or of her procedural rights.

83. In addition, the Commission might consider that the State of Tynalandia was required to notify the consulate of Evaristo of Rosalie Fournier's arrest, and that its failure to do so limited the opportunities for a defense that may have been available to her in this case. Although the content of this right addresses the obligation to notify the

[66] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 99(e).
[67] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 98.

detained person of his right to consular assistance and does not necessarily establish the obligation to notify the respective consulate directly, the Commission could support this position by recalling that the Inter-American Court has found that, "the provision recognizing consular communication serves a dual purpose: that of recognizing a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance."[68] Similarly, the International Court of Justice has held that Article 36(1)(b) of the Vienna Convention creates obligations for the receiving State with respect to the sending State, as well as with respect to the detainee.[69] In this regard, the Commission could assert that Tynalandia breached its obligation to guarantee the right of the State of Evaristo to assist its citizens through its consular officers, and it could allege that the failure to observe this international duty rendered the entire proceeding conducted against Rosalie Fournier null and void.

84. Furthermore, the Commission could allege that Rosalie Fournier's right to a defense was violated because she was not given a real opportunity to defend her right not to be deported. Although a hearing was held before the Immigration Judge, Law 24.326 does not allow for any defenses and does not allow the judges to weigh the competing interests at stake in cases of undocumented aliens who have been convicted of an aggravated criminal offense. Thus, Rosalie Fournier did not have an effective opportunity to defend herself and prove that her presence in Tynalandia is not a threat to public safety, that she was a victim of human trafficking, that she committed the prostitution offense 20 years ago, that she has been a good member of society since then, that she has strong family and personal reasons to stay in Tynalandia, that deportation would entail permanent separation from her 14-year-old son and that she has no ties to Evaristo.

85. With regard to the right to appeal to a higher court and to judicial protection, the Commission can argue that, although the decision was rendered by an Immigration Judge, Law 24.326 does not afford the judge sufficient leeway to balance the different rights that may be affected by virtue of the deportation order. The Law also does not afford any discretion to The Court of Appeals, and appeals of this type are usually denied *in limine* by that court. Therefore, this remedy does not provide a real possibility for the comprehensive review of the Immigration Judge's decision. The Commission can argue that these judicial remedies are illusory, and therefore cannot be considered effective, and as such are a violation of Articles 8(2)(h) and 25 of the American Convention.

PLEADINGS OF THE STATE

86. With regard to the application of trial rights to proceedings for the determination of immigration status and to the deportation measures imposed by a State's authorities in the enforcement of its immigration policy, the State could observe that even the Inter-American Commission has found that when dealing with deportation proceedings it is necessary to analyze the *quantum* of procedural due process rights and

[68] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 80.
[69] International Court of Justice, LaGrand, 2001 ICJ Reports 466, paras. 77 & 128.

their relationship to the interest or right at stake in each case. Thus, according to the IACHR, what migrant workers risk is significant, but it is not the same thing as personal liberty or the possibility of losing it for several years—which is what is at stake in a criminal proceeding. Therefore, the Commission itself has maintained that not all of the guarantees required for a fair trial in criminal matters are applicable to deportation or exclusion.[70]

87. As for the specific guarantees contained in Article 8, the State can argue that it guaranteed at all times Rosalie Fournier's opportunity to be represented by an attorney of her choice, and that it is not required to provide her with a free defense attorney because it is not a criminal proceeding. The State could assert that nothing in the Convention indicates that the State must provide legal counsel free of cost to all foreigners who may be subject to deportation, and that it nevertheless referred Ms. Fournier to several free services available in cases like hers, which she made use of throughout her deportation proceedings. As such, Ms. Fournier had legal representation during the proceeding and during the hearing before the Immigration Judge, and the State can maintain that the Commission is in no position to allege violations of Ms. Fournier's right to avail herself of the services of a defense attorney.

88. The State could argue that its principal duty is the protection of its citizens, and that to those ends it is justified in deciding that certain categories of crimes are a threat *per se* to the safety and welfare of the community, without it meaning that the State has failed in its duty to admit defenses against the legal consequences of having committed such a crime.

89. In terms of the opportunity to have an interpreter, the State can argue that Rosalie Fournier has lived in Tynalandia for more than two decades, accessing employment and services of various kinds, and even communicates with her son in Spanish, and therefore it can be assumed that she understands the language. Even so, during the hearing held on November 28, 2003 before the Immigration Judge, the State provided Rosalie Fournier with an interpreter to ensure that she could fully access her right to a defense and understand the charges against her. The State could argue that it was not required to provide an interpreter for the meetings between Rosalie Fournier and her attorney, as she was at complete liberty to choose an attorney who spoke her language.

90. On the issue of notice of the right to consular assistance, the State can argue that it is not required to notify the consulate of Evaristo directly of Rosalie Fournier's arrest, but rather that it is required only to notify the detainee of her opportunity to contact the consulate, and to guarantee that she has every chance for such communication. On this point, the State can assert that the alien detainee's right to consular notice pertains to the individual and not the sending State. "In effect, this article is unequivocal in stating that rights to consular information and notification are 'accorded' to the interested person. In this respect, Article 36 is a notable exception to

[70] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, 98.

what are essentially States' rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations."[71] Similarly, the International Court of Justice has held that an individual's right to communicate with his consulate at the time of his arrest is an "individual" right.[72] Although it has been recognized that the right to consular notification has effects on the sending State, it does not mean that the content of the right is an obligation to notify the consulate directly. It only means that the failure to notify the detainee of his right to consular assistance can have consequences for the sending State.[73] The State of Tynalandia might observe that on the morning of May 28, 2003, the immigration officer who interviewed Rosalie Fournier at the police station informed her of her right to contact the consulate, and therefore met the requirement established under Article 8 of the American Convention in conjunction with Article 36 of the Vienna Convention on Consular Relations. The State might indicate that notifying the consulate without the detainee's authorization or against her wishes could have been a violation of her rights. Therefore, it is only required to offer the detainee the opportunity to avail herself of consular protection. The Inter-American Court has also addressed this issue, holding that the right to consular notification is conditioned solely upon the wishes of the interested person.[74]

91. The State can further argue that the deportation proceedings were held before an impartial judge whose position was previously established by law, and that the case was reasonable in length.

92. As for the right to judicial protection contained in Article 25 of the Convention, the State can assert that Rosalie Fournier's access to justice was fully guaranteed, given that on November 28, 2003 a hearing was held before the 3rd Immigration Judge of the Republic of Tynalandia, in which both Rosalie Fournier and her attorney participated with all due guarantees. Likewise, her right to judicial review was guaranteed in that the judgment of December 18, 2003 could have been reviewed on appeal by the Tynalandia Court of Appeals, which has full authority to review the decision *de novo.* The State can point out that this possibility for appeal is sufficient to fulfill the duty to provide an effective remedy in accordance with the American Convention.

93. The State might bring to the Court's attention the decision rendered by the Commission in a case brought against Canada involving the deportation of a citizen of Trinidad and Tobago. The case was declared inadmissible by the Commission based on the fact that the petitioner had several opportunities to turn to the Canadian courts at different stages of the respective proceedings prior to the issuance of the final order of deportation.[75]

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[71] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 82.
[72] International Court of Justice, LaGrand, 2001 ICJ Reports 466, para. 78.
[73] For a comprehensive study of the impact of the right to consular notification, and in particular the right to notification of the right to consular assistance as a human right, see: Cerna, Christina: *Impact on the Right to Consular Notification,* in: The Impact of Human Rights Law on General International Law. Oxford University Press, 2009.
[74] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 90.
[75] IACHR, Report No. 27/93, Petition 11.092 Cheryl Monica Joseph (Canada), October 6, 1993.

c. Principles of Legality and Non-Retroactivity

94. Article 9 of the American Convention on Human Rights provides:

Article 9. Freedom from Ex Post Facto Laws

> No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

95. With respect to this Article, the Inter-American Court has stated that: "Under the rule of law, the principles of legality and non-retroactivity govern the actions of all State organs, in their respective spheres of competence, particularly when they must exercise their powers to punish."[76] In their analyses of the case, the teams should debate whether Article 9 of the Convention is applicable to administrative matters, in addition to obviously being applicable to criminal matters.

96. As to the applicability of Article 9 to administrative proceedings, the Inter-American Court has held that the terms used in that article appear to refer exclusively to criminal matters. Nevertheless, the Court considered it necessary to take into account that, "administrative sanctions, as well as penal sanctions, constitute an expression of the State's punitive power and that, on occasions, the nature of the former is similar to that of the latter. Both, the former and the latter, imply reduction, deprivation or alteration of the rights of individuals, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals, and subject to a careful verification of whether or not there was unlawful conduct. Likewise, and for the sake of legal security, it is indispensable for the punitive rule, whether of a penal or an administrative nature, to exist and to be known or to offer the possibility to be known, before the action or omission that violate it and for which punishment is intended, occurs. The definition of an act as an unlawful act, and the determination of its legal effects must precede the conduct of the subject being regarded as a violator. Otherwise, individuals would not be able to orient their behavior according to a valid and true legal order within which social reproach and its consequences were expressed. These are the foundations of the principles of legality and unfavorable non-retroactivity of a punitive rule."[77]

[76] I/A Court H.R., Case of Lori Berenson Mejía, Judgment of November 25, 2004. Series C No. 119, para. 126; Case of De la Cruz Flores, Judgment of November 18, 2004. Series C No. 115, para. 80; and Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, para. 177.
[77] I/A Court H.R., Case of Baena Ricardo et al., Judgment of February 2, 2001. Series C No. 72, para. 106.

97. The Inter-American Court has even held that, "According to the principle of the non-retroactivity of the unfavorable penal norm, the State is prevented from exercising its punitive power in the sense of applying retroactively penal laws that increase sanctions, establish aggravating circumstances or create aggravated types of offenses. It is also designed to prevent a person being penalized for an act that, when it was committed, was not an offense or could not be punished or prosecuted."[78]

98. It should be noted that Article 17(7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that no migrant worker or member of his family may be tried or punished for a crime for which he has already been convicted or acquitted in a final judgment in accordance with the laws and criminal procedure of the interested State. Article 19 of the same international instrument adds that no migrant worker shall be convicted for acts or omissions that were not criminal offenses under national or international law at the time they were committed; nor shall a harsher sentence be imposed than what was applicable at the time of their commission.

A. PLEADINGS OF THE COMMISSION

99. The Commission might note that it has already issued its opinion in other cases with respect to the retroactive enforcement of immigration laws, finding that the due process standards contained in the instruments of the inter-American system can be applied not only to criminal cases but also to cases that are not criminal in nature, including non-criminal cases against non-citizens, to determine civil, labor or other rights and obligations.[79]

100. The Commission could add that, although it is not a criminal proceeding, deportation—which results in uprooting the immigrant from his family or community ties—is an example of the exercise of the punitive power of the State, and therefore the principles of legality and non-retroactivity are applicable to it.

101. After clarifying that Article 9 can be applicable to the facts described in the case, the Commission could assert that the laws of Tynalandia violate the provisions of that Article, given that they assign specific consequences to persons who have been convicted in the past of criminal offenses whose classification is changed by virtue of the Law. Thus, by virtue of the implementation of Law 24.326, passed in 1994, Rosalie Fournier's deportation was decided in 2003 based on a crime that she committed in early 1982, and for which she had already complied with the sentence imposed by the judge at that time. The Commission could argue in this respect that the retroactive enforcement of Law 24.326, which imposed the mandatory deportation of those immigrants who had

[78] I/A Court H.R., Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, para. 175. See also: Case of Baena Ricardo et al., Judgment of February 2, 2001. Series C No. 72, para. 106; and Case of Castillo Petruzzi et al., Judgment of May 30, 1999. Series C No. 52, para. 120.

[79] IACHR, Report No. 56-06, Petition 08-03 Wayne Smith (United States), July 20, 2006, para. 51. IACHR, Report No. 49-99, Case 11.610 Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz (México), April 13, 1999, paras. 46 & 65-70.

committed crimes previously classified as aggravated offenses, is a violation of Article 9 of the Convention.

102. The Commission could argue that retroactive laws are contrary to legal certainty, in that they do not allow individuals to base their expectations on the laws currently in force if these laws may change at any time and be enforced retroactively. In this respect, the Commission could make an argument based on the cruel effects on the lives of individuals of a deportation order issued retroactively. For instance, if Rosalie Fournier had been deported in 1982, at the time of the events that caused her to be deported in 2003, she would not have started a family and would not have strengthened her ties to the community for approximately 20 years. As such, by the retroactive enforcement of Law 24.326, Rosalie Fournier is essentially being punished for an act she committed two decades earlier; even though she complied with the penalty imposed against her at the time, today that act is bringing consequences not only to her but also to her son and her close friends.

B. PLEADINGS OF THE STATE

103. With respect to the application of Article 9 to the facts described in this case, the State could maintain that there is no evidence that Article 9 of the American Convention was originally designed to be applied to detention and deportation in immigration cases, and that it is applicable only to criminal cases. The State could note on this point that the Commission itself has established that, "deportation in an immigration context is not a punishment for past crimes but rather is a civil consequence of a non-national's lack of right to be in the [the State] and his or her failure to abide by the domestic laws therein."[80]

104. The State might argue that, if deportation were a punishment or a penalty, then certain guarantees must be implemented, given that it would be like imposing a second sentence for a crime for which the defendant has already been punished. However, if deportation is considered to be only a legal consequence of Rosalie Fournier's lack of a right to stay legally in Tynalandia, the principle of non-retroactivity of penalties would not be applicable.

105. Consequently, the State could maintain that, in the context of an administrative deportation proceeding, it is authorized in the enforcement of its immigration laws to raise matters that occurred prior to the enactment of such laws. The State might also assert that, in passing Law 24.326, the legislature made clear its intention to apply the new definition of aggravated criminal offense to conduct that occurred prior to the enactment of the law, regardless of whether the conviction occurred before or after its enactment.

[80] IACHR, Report No. 56-06, Petition 08-03 Wayne Smith (United States), July 20, 2006, para. 28.

106. The State could assert that to do otherwise "would compromise the ability of a state to amend its laws or immigration policy to respond to changing world economic and social conditions."[81]

d. Right to Privacy

107. Article 11 of the American Convention on Human Rights provides:

Article 11. Right to Privacy

> 1. Everyone has the right to have his honor respected and his dignity recognized.
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
> 3. Everyone has the right to the protection of the law against such interference or attacks.

108. There is a similar provision in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 14 of which provides that, "no migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honor and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks."

109. The Inter-American Commission has stated that the main purpose of Article 11 of the American Convention is to protect individuals from arbitrary actions of State authorities that infringe upon their private sphere, and it has noted that the purpose of said provision is to ensure that all regulations (or other measures) restricting this right are consistent with the standards and objectives of the Convention, and reasonable under the prevailing circumstances.[82]

110. The Commission, in accordance with the rulings of the European Court, has specified clearly that the provisions of Article 11 cover numerous factors pertaining to the dignity of the person, including, for instance, the ability to develop one's own personality and aspirations, determine one's own identity and define one's own personal relationships.[83] According to the case law of the IACHR, Article 11 guarantees a sphere that no one can encroach upon, a field of activity that is absolutely each person's own.

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[81] Other States have made this argument before the Commission. See: IACHR, Report No. 56-06, Petition 08-03 Wayne Smith (United States), July 20, 2006.
[82] IACHR, Report No. 4/01, Case 11.625 María Eugenia Morales de Sierra (Guatemala), para. 47.
[83] IACHR, Report No. 4/01, Case 11.625 María Eugenia Morales de Sierra (Guatemala), para. 46. See also, *inter alia*, European Court of Human Rights, Gaskin v. United Kingdom, Ser. A No. 169; Niemetz v. Germany, Ser. A No. 251-B, para. 29.

111. Subparagraph 2 of Article 11 of the Convention specifically prohibits "arbitrary or abusive" interference with this right. The provision indicates that, in addition to the condition of legality, which must be observed whenever a restriction is imposed upon the rights enshrined in the Convention, the State has the special obligation to prevent "arbitrary or abusive" interference. The Commission has opined on this point that the idea of "arbitrary interference" refers to elements of injustice, unpredictability, and the absence of reasonableness and proportionality in the State's interference in private life.[84] According to the Commission, "the guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances."[85]

112. In Advisory Opinion 17, the Inter-American Court found that the right of every person to receive protection against arbitrary or illegal interference with his family is an implicit component of the right to protection of the family and the child. The Court added that children have the right to live with their families, who are called upon to meet their material, emotional and psychological needs, and that Article 11(2) of the American Convention on Human Rights must be taken into special consideration when examining the separation of a child from his family.[86]

113. The Court has made clear that a court case in and of itself does not constitute an unlawful infringement upon the honor or dignity of the person. The case serves the purpose of settling a controversy, although it may indirectly entail problems for those persons who are subject to the litigation. To maintain otherwise, according to the Court, would exclude outright the resolution of controversies by courts for the judicial review of administrative acts.[87]

114. It can be concluded from the foregoing that, although the right to privacy, like other rights, is not absolute, every restriction or limitation to a person's exercise of his right to privacy must be prescribed by law and must be necessary to the safety of all; it must be consistent with the just demands of a democratic society, and its implementation must be proportionate and closely tailored to the legitimate purpose that makes it necessary.[88]

A. PLEADINGS OF THE COMMISSION

115. In light of the above reasoning, the Commission could point out, first, that Rosalie Fournier's detention for six months prior to the hearing before the judge was a violation of Article 11 of the Convention, given that there were less restrictive means that the State could have used to ensure her presence at the trial without having to separate her from her son, thus interfering in her private life.

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[84] IACHR, IACHR, Report No. 38/96, Case 10.506 X & Y (Argentina), October 15, 1996, paras. 91 & 92.
[85] IACHR, Report No. 4/01, Case 11.625 María Eugenia Morales de Sierra (Guatemala), para. 47.
[86] I/A Court H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 71.
[87] I/A Court H.R., Case of Cesti Hurtado. Judgment of September 29, 1999. Series C No. 56, para. 177. See also: Case of Bueno Álves, para. 122.
[88] See, IACHR, Report No. 38-96, Case of X & Y (Argentina), October 15, 1996, para. 71.

116. Second, the Commission could argue that the fact that the police officers who were investigating the theft of the computers asked her about her immigration status in Tynalandia, when that was not part of the purpose of the investigation, could also constitute an arbitrary interference in her private life.

117. Third, the Commission could assert that considering prostitution to be a crime, and moreover, raising it to the category of an aggravated federal offense, entails an arbitrary intrusion into the private life of a woman, in that it limits her right to have voluntary sexual relations with whomever she considers appropriate, regardless of whether such relations are commercial in nature. The Commission could argue that classifying prostitution as a criminal offense is inconsistent with the rest of the obligations contained in the American Convention. Although there are no decisions on this issue within the inter-American system, the teams could support this position by citing the international standards developed in the context of the right to work, as well as in the context of women's right to health, which have recognized the harm associated with the criminalization of sex work and the necessity of decriminalizing this practice.[89] The Commission could further underscore that, although Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women establishes the obligation of States to take all appropriate measures, including legislative measures, to abolish all forms of traffic in women and exploitation of prostitution of women, it cannot be interpreted to mean that prostitution should be a crime. The Commission can stress that it is not the same thing to speak of prostitution as to speak of forced prostitution, given that the former is a free and consensual exchange of sexual relations, while forced prostitution is an illegal practice. Likewise, the Commission can refer to the fact that the Committee on the Elimination of Discrimination against Women has considered that poverty and unemployment compels many women to engage in prostitution, which makes them especially vulnerable to violence since their status—which in some cases is illegal—tends to marginalize them. The Committee has therefore recommended that States adopt preventive measures, including criminal regulations, to protect the women who have become involved in prostitution. However, it has not been recommended that States take measures to penalize them.[90] It should be noted that the prohibition against prostitution can be even more serious in the case of migrants, in that the fear of deportation prevents sex workers from filing complaints in cases of violence or abuse.

118. Finally, the Commission could emphasize that the right not to be subject to arbitrary or abusive interference in one's private life includes the protection of a person's ties to his community and to his society beyond family relationships. On this point, the Commission could note that Rosalie Fournier lived in Tynalandia for a longer period of

[89] The United Nations International Guidelines on HIV/AIDS suggest that criminal laws should decriminalize sex work that does not involve victimization, and regulate safety conditions in order to protect sex workers and their clients. See: UN High Commissioner for Human Rights and UNAIDS, 1998: Guideline 4 (para. 29c).

[90] See: Committee on the Elimination of Discrimination against Women, General Comment 19 (1992), paras. 13-16 & Recommendation No. 24.

time than she had lived in Evaristo. Tynalandia is where she has developed strong ties to the community, including the community of Evaristans who reside in Tynalandia, with whom she has formed not only a dance group but also a deep friendship.

119. In this respect, the Commission could argue that, the fact that Law 24.326 prescribes deportation as a mandatory measure applicable to all cases in which a person has committed an aggravated criminal offense, it prevents the judge from balancing the need for proportionality between this measure and the interests at stake, among them Ms. Fournier's right to develop her community and professional ties in Tynalandia. The IACHR could add that the lack of consideration for these relationships becomes more serious the longer a person's stay in the receiving country, which in this case is Tynalandia.

120. In this case, the decision of the State of Tynalandia has totally deprived Rosalie Fournier of her connection to the place she now considers her home, which is aggravated by the fact that she has no known family or social ties to Evaristo. As such, the impact that the State's decision on Rosalie Fournier's human rights should have been, at the very least, taken into serious consideration by the judge. Nevertheless, Law 24.326 does not grant the judge sufficient discretion to consider potential arbitrary interference with a person's private life. The Commission can assert that the lack of proportionality between the effects of deportation on Rosalie Fournier's private life and the reasons for carrying out that deportation rendered that decision arbitrary.

B. PLEADINGS OF THE STATE

121. The State can argue on its behalf that the interference in Rosalie Fournier's private life was adequately justified by virtue of the provisions of Law 24.326, the purpose of which is to maintain public order in Tynalandia and protect the safety of its citizens. The State can maintain that when the legislature passed the Law it had already considered the balance between the effects of deportation on a person and the need to prohibit the stay in Tynalandia of those individuals who have committed certain criminal offenses, and it arrived at the conclusion that the welfare of society in general takes precedence over the need for certain individuals to maintain their social ties. Therefore, there is no need for judges to repeat this analysis on a case by case basis.

122. With regard to the possibility of using alternative means other than detention so as to not interfere in Rosalie Fournier's private life, the State could assert that, given that she was faced with an imminent deportation order, detention was the only reasonable means of ensuring her appearance at trial.

123. The State can further argue that the right to privacy does not imply that Rosalie Fournier has the right to conceal the unlawfulness of her immigration status from the authorities.

124. The State can also maintain that it has full authority to define what acts constitute criminal offenses insofar as they threaten the public safety of its citizens, and

in this respect it could assert that prostitution is a practice that is dangerous to society and sometimes associated with other crimes. The State might add that it even has the obligation to take all measures necessary to assist in the fight against the exploitation of prostitution, and that by doing so it is in observance of Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, which establishes the obligation of States to take all appropriate measures, including legislative measures, to abolish all forms of traffic in women and exploitation of prostitution of women. Likewise, the State could note that in the case of *Tremblay v. France*, the European Court affirmed that forced prostitution is incompatible with human rights and human dignity.[91] Similarly, General Comment 28 on Article 3 of the United Nations International Covenant on Civil and Political Rights (*CCPR/C/21/Rev.1/Add.10; A/55/40, Vol. I, (2000), Annex VI B (p. 133-139*) establishes the obligation of States to report to the Committee on the measures taken to eliminate forced prostitution.

125. Aside from this, the State could argue that, in the case that there had been a real infringement of Rosalie Fournier's social and community ties in Tynalandia, such infringement was not the result of an act or omission of the State with that purpose; rather, it was a consequence of Rosalie Fournier's conduct, for which the State cannot be held responsible.

126. The State recalls the fact that Rosalie Fournier was in Tynalandia, in violation of its laws, from June 1981 to January 2004, and therefore the State, in accordance with its duty to guarantee order and the welfare of its citizens, can argue that it has a legitimate interest in removing her.

e. Right to Protection of the Family

127. Article 17 of the American Convention on Human Rights provides:

> Article 17. Rights of the Family
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> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
> 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of

[91] European Court of Human Rights, Case of Tremblay v. France, Judgment of September 9, 2007. It should be noted that the European Court did not rule on whether prostitution itself constituted inhuman or degrading treatment in light of the provisions of Article 3 of the European Convention.

dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

128. The Inter-American Court has decided that, for there to be a violation of Article 17 of the Convention, the infringement upon family life must have occurred by virtue of a specific act or omission of the State for that purpose, and not as a consequence of, for instance, a criminal proceeding or the forced disappearance of a person.[92]

129. In the Commission's opinion, Article 17 "recognizes the central role of the family and family-life in the individual's existence and society, in general. It is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances."[93] At the same time, the IACHR has recognized that the right to rights of the family "can suffer certain limitations that are inherent to it. Special circumstances such as incarceration or military service, even though they do not suspend this right, inevitably affect its exercise and complete enjoyment."[94] In addition to incarceration, deportation is a circumstance that undoubtedly could adversely affect the exercise of this right.

130. With respect to the detention of individuals and the right to protection of the family, the Commission has considered that "the state is still obliged to facilitate and regulate contact between detainees and their families and to respect the fundamental rights of all persons against arbitrary and abusive interferences by the state and its public functionaries."[95]

131. Likewise, the Commission has held that "the state is obligated to facilitate contact between the prisoner and his or her family, notwithstanding the restrictions of personal liberty implicit in the condition of the prisoner. In this respect the Commission has repeatedly indicated that visiting rights are a fundamental requirement for ensuring respect of the personal integrity and freedom of the inmate and, as a corollary, the right to protection of the family for all the affected parties. Indeed, and particularly because of the exceptional circumstances of imprisonment, the state must establish positive provisions to effectively guarantee the right to maintain and develop family relations. Thus, the necessity of any measures restricting this right must adjust themselves to the ordinary and reasonable requirements of imprisonment."[96]

132. With regard to decisions involving the deportation of a family member, the Inter-American Commission has recognized that the rights governing the protection of the family can be pertinent elements in the context of the principles and standards of the inter-American human rights system for the evaluation of the removal of non-citizens from

[92] I/A Court H.R., Case of Fermín Ramírez, Judgment of June 25, 2005. Series C No. 126, para. 121. and Case of Castillo Páez, Judgment of November 3, 1997. Series C No. 34, paras. 85-86.

[93] IACHR, Report No. 38-96, Case of X & Y (Argentina), October 15, 1996, para. 96.

[94] IACHR, Report No. 38-96, Case of X & Y (Argentina), October 15, 1996, para. 97.

[95] IACHR, Report No. 38-96, Case of X & Y (Argentina), October 15, 1996, para. 97.

[96] IACHR, Report No. 38/96, Case 10.506 (Argentina), October 15, 1996, para. 98.

OAS Member States.[97] In the Commission's view, States undoubtedly have the right and the duty to maintain public order through by controlling the entry, residence and removal of foreigners. However, this right must be weighed against the harm that could be caused to the rights of the individuals involved in a particular case.[98]

133. According to the Inter-American Commission, in cases involving the removal of individuals who have been permanent residents for a long period of time, the removal proceedings must take the rights of the family into sufficient account. The Commission has thus indicated that: "where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicates that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious indeed."[99]

134. The Commission has been emphatic in recommending that States undertake actions designed to improve "the conformity of decision-making at all levels with the international obligation to consider the principle of family reunification and unity" as well as "the adherence of such decisions to the standard by which removals separating families are a highly exceptional measure requiring an extremely serious justification to override the resulting interference with family life."[100] The Inter-American Court has addressed the separation of children from their families, indicating 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."[101]

135. The European Court has held that the mutual enjoyment of parents and children living together is a fundamental element of family life,[102] and has also found that there can be situations in which the right to family unity weighs more than the State's interest in deporting a non-citizen, even when it is considered that this presents a threat to society and public order. In this respect, the European Court has considered it relevant to examine the proportionality of the objective of the permanent deportation of an individual an individual in relation to his ties to his country of origin, the country of destination, and particularly his family relationships. According to the European Court,

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[97] See IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, paras. 18-21. See also Report No. 56-06, Petition 08-03 Wayne Smith (United States), July 20, 2006, para. 50.

[98] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 166.

[99] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 166.

[100] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 180 (recommendations 2 & 3).

[101] I/A Court H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 77.

[102] European Court of Human Rights, Case of Buchberger v. Austria, Judgment of December 20, 2001, para. 35; Case of K. & T. v. Finland, Judgment of July 12, 2001, para. 151; Case of Elsholz v.Germany, Judgment of July 13, 2000, para. 43; Case of Bronda v. Italy, Judgment of June 9, 1998, para. 51; and Case of Johansen v. Norway, Judgment of August 7, 1996, para. 52.

any decision made by a State with the aim of preserving public order, in the case that it interferes with a right protected by the Convention, must be necessary in a democratic society. In other words, it must be justified by a compelling social need that is proportionate to the legitimate aim pursued.[103]

136. Upon weighing the interests at stake in deportation proceedings, the European Court has ruled in several cases that an immigrant's ties to his community are so strong that his removal is either unnecessary in a democratic society, or is not proportionate to the legitimate aim pursued, and therefore has found a violation of the right to respect for family life. The European Court has taken into account criteria including the length of time the immigrant has stayed in the receiving country, his ties to his country of origin, his family relationships in the receiving country, the effects on the family and the community where he lives.[104] In fact, the European Court has found that the immigrant's rights prevail over the State's arbitrary interference in his life, even in cases where the immigrant has been convicted of serious crimes.

137. The United Nations Human Rights Committee has spoken to this issue in the same respect. Recognizing the importance of taking family unity into account in cases of deportation, the Committee has found that deportation is an illegitimate violation of the right to family unity.[105] This Committee has even determined that it is necessary for hearings to be held prior to the deportation to consider the family ties.[106]

138. Article 56(3) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that considerations as to whether to remove a migrant worker or a member of his family must take into account humanitarian considerations, as well as the time of the person's resident in the State where he is employed.

A. PLEADINGS OF THE COMMISSION

139. The Commission might argue that the State of Tynalandia has violated the rights of the family on two occasions: It did so, first, upon separating Rosalie Fournier from her son during her detention, and second, upon ordering that she be deported and barred from returning to Tynalandia.

140. With regard to the detention, the Commission could argue that Rosalie Fournier should not have been detained, given that there are alternatives to detention that could have been used to guarantee her appearance at trial without having to separate her from her family. Regarding the place of detention, the Commission could stress that the

[103] European Court of Human Rights, Case of Mehemi v. France, Judgment of 1997, para. 34 and Case of Bouchelikia v. France, Judgment of 1998, paras. 65 & 48.
[104] European Court of Human Rights, Case of Moustaquim v. Belgium, Judgment of February 18, 1991; Cas e of Beldjoudi/Teychene v. France, Judgment of 1990; Case of Lamguindaz v. United Kingdom, Judgment of June 28, 1993.
[105] UN Human Rights Committee, Case of Winata v. Australia, Judgment of July 26, 2001, Communication No. 930/2000. See also: Case of Madafferi v. Australia, Judgment of August 26, 2004.
[106] UN Human Rights Committee, Caso Stewart v. Canada, Judgment of November 1996; Case of Canepa v. Canada, Judgment of April 11, 1997.

Gándara Center was 13 hours away from the city where Rosalie Fournier's son lived, and that by taking her there the State prevented the natural contact between her and her son Bruno Tamba, who she saw for the last time on May 27, 2003.

141. The Commission could argue in relation to the deportation that the decision to deport Rosalie Fournier was made on the basis of a law that prescribes the mandatory deportation of persons who commit aggravated criminal offense, and therefore did not enable the authorities to conduct any analysis with respect to the possible rights or interests affected by the decision. As such, the Commission could emphasize that the inevitable harm that would be caused to the family relationship of Rosalie Fournier and her son was not taken into account by the authorities who decided on her deportation.

142. The Commission can argue that the reasons justifying the interference in the Fournier family's life were not sufficiently serious, given that they dealt with a crime committed more than twenty years ago, and that therefore, if the judges had had the opportunity to weigh these reasons on one hand, and the infringement upon her family life on the other, Rosalie Fournier's deportation clearly would have been disproportionate and unnecessary. Because it is disproportionate, the deportation is an arbitrary interference with the family and a violation of Article 17 of the Convention.

B. PLEADINGS OF THE STATE

143. Concerning the way in which Rosalie Fournier's detention could have affected her right to protection of the family, the State might argue that the Gándara Center is the closest immigrant detention center to the city where Rosalie Fournier was living, and that it could not have held her in one of the regular detention centers in the city, as that would mean detaining her with individuals prosecuted or convicted of criminal offenses, in violation of Article 7 of the Convention. The State can underscore that it did not at any time restrict Rosalie Fournier's right to receive visits, and that it facilitated regular telephone contact with her family.

144. Aside from this, the State could argue that, although it does not deny that Rosalie Fournier and Bruno Tamba's right to family life was adversely affected, it was not the outcome of an act or omission of the State of Tynalandia with that purpose; rather, it was a consequence of Rosalie Fournier's acts, for which the State cannot be held liable. In this respect, the State could base its arguments on the Inter-American Court's decision in the cases of *Fermín Ramírez* and *Castillo Páez*,[107] which held that for Article 17 to be violated it must be proven that the State had the intention of causing such infringement upon family life.

145. The State can further argue that the interference in Rosalie Fournier's private life was adequately justified by virtue of the provisions of Law 24.326, the purpose of which is to maintain public order in Tynalandia and protect the safety of its citizens. The State can assert that the legislature already considered the balance between the

[107] I/A Court H.R., Case of Fermín Ramírez, Judgment of June 25, 2005. Series C No. 126, para. 121, and Case of Castillo Páez, Judgment of November 3, 1997. Series C No. 34, paras. 85-86.

effects of deportation and the seriousness of allowing persons who have committed certain criminal offenses to remain in the country, and therefore it is not necessary for the judges to repeat this analysis.

146. The State can argue, as other States have in proceedings before the Commission, that subjecting its decision to the necessity of legal protection by virtue of family considerations, "would be tantamount to a 'blank check' in terms of a purported substantive right to be at liberty in a country not their own without regard to that State's immigration or other legislation."[108]

147. The State recalls the fact that Rosalie Fournier was in Tynalandia, in violation of its laws, from June 1981 to January 2004, and that it therefore has a legitimate interest in removing her.

f. Rights of the Child

148. Article 19 of the American Convention on Human Rights provides:

Article 19. Rights of the Child

> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

149. The Inter-American Court has held that children, in addition to being entitled to the human rights that pertain to all human beings, also have special rights derived from their status. Therefore, the Court has found that Article 19 must be understood as an additional, complementary right established under the treaty for persons requiring special protection due to their physical and emotional development.[109] The IACHR has stated on this point that "the recognition of a duty of special protection for children is based on the need to protect the full range of their interests—in the social, economic, civil and political spheres."[110]

150. In this respect, according to the Court, States have the duty to take special measures for the protection and assistance of the children under their jurisdiction, and "with respect to protection of the rights of children and adopting measures to attain said protection, the ruling principle is that of the highest interest of the child, based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential."[111]

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[108] See IACHR Report No. 19/02, Case 12.379 Mario Alfredo Lares-Reyes, Vera Allen Frost and Samuel Segura (United States), February 27, 2002, para. 40.

[109] I/A Court H.R., Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004. Series C No. 112, para. 147; and Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 54.

[110] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 164.

[111] I/A Court H.R., Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 124; Case of Bulacio, Judgment of September 18, 2003. Series C No. 100, para. 134; Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 56.

151. The Court has also found that the measures referred to in Article 19 of the American Convention "go well beyond the sphere of strictly civil and political rights. The measures that the State must undertake, particularly given the provisions of the Convention on the Rights of the Child, encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment."[112]

152. It should also be recalled that Article 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) states that every child has the right to the protection that his status as a minor requires from his family, society and the State, and that every child has the right to grow under the protection and responsibility of his parents, save in exceptional, judicially-recognized circumstances.

153. In addition, Article 19 of the American Convention is informed by the provisions of the United Nations Convention on the Rights of the Child. The Inter-American Court has understood it so, in stating that "both the American Convention and the Convention on the Rights of the Child are part of a broad international *corpus juris* for protection of children that aids this Court in establishing the content and scope of the general provision defined in Article 19 of the American Convention."[113]

154. The Convention on the Rights of the Child contains several provisions that are particularly relevant to the present case. In Article 3, it establishes that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

155. Article 8 of the Convention on the Rights of the Child, in conjunction with Article 11(2) of the American Convention, requires the States Parties to respect children's right to family relationships in accordance with law and without unlawful interference, as these family relationships are part of their identity. Together with Article 8, Article 16 states expressly that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation," establishing the right of every child to the protection of the law against such interference or attacks.

156. The aforementioned Convention on the Rights of the Child also contains specific references to cases involving the separation of the child from his parents, and in Article 9 establishes that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such

[112] I/A Court H.R., Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004. Series C No. 112, para. 149.

[113] I/A Court H.R., Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 166; Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 24; and Case of the "Street Children" (Villagrán-Morales et al.), Judgment of November 19, 1999, para. 194.

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." Subparagraph 2 of Article 9 adds that any proceedings brought to determine the separation of the child from his parents must offer all of the interested parties the opportunity to participate in the proceedings and make their opinions known. Subparagraph 3 of Article 9 notes the obligation of States to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, unless it is against the child's best interests.

157. Furthermore, Article 10 of the Convention on the Rights of the Child addresses the obligation of States to deal "in a positive, humane and expeditious manner" with all requests made by a child or his parents to enter or leave a State for purposes of family reunification. That Article provides that, for purposes of guaranteeing the right to maintain personal relations and direct contacts periodically with both parents, States shall respect the rights of the child and his parents to leave any country, including their own, and to enter their own country. This right may only be subject to restrictions that are stipulated by law and necessary to protect national security, public order, public health or morals, or the rights and freedoms of other persons, and that are consistent with the other rights recognized in that Convention.

158. Finally, it is relevant to take into account that Article 12 of the Convention on the Rights of the Child stipulates that States must guarantee a child who is able to form his own opinion the right to express his opinion freely in all matters affecting him, and to take the child's opinion into due consideration according to his age and maturity. With specific regard to judicial or administrative proceedings affecting him, it states that the child shall be given the opportunity to be heard, whether directly or through a representative or appropriate body.

159. The Inter-American Court has examined judicial proceedings with the potential to affect the rights of children, and with respect to the matter has held that any action affecting a child "must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy."[114] The Court has also noted that "the guarantees set forth in Articles 8 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in Article 19 in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed."[115]

[114] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 112-114.
[115] I/A Court H.R., Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004. Series C No. 112, para. 209; and Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 95

160. Even beyond judicial proceedings, the Court has affirmed 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."[116] The Inter-American Commission has agreed that the duty of special protection implies necessarily that the interests of the child be taken into account in the State's rendering of decisions that affect him, and that such decisions must look out for the protection of the child's interests.[117] The IACHR has expressed its particular concern for the lack of procedural opportunities for the interests of the child to be considered in proceedings involving the deportation of one or both parents.[118]

161. With specific regard to respect for the rights of the child and the right to family life in deportation proceedings, the Commission has opined that States must undertake additional actions designed to improve compliance, in the making of decisions at every stage of the proceedings, with the obligation to take into account the child's interest in every decision that affects him, and to guarantee, in cases where the child is able to express his opinions, that they be considered.[119]

162. It should be noted that, with respect to the particularly vulnerable situation of children who are separated from their families, the Committee on the Rights of the Child issued a General Comment in 2005 on the "treatment of unaccompanied and separated children outside their country of origin" (General Comment No. 6). It is possible that the participants will cite this Comment in support of their arguments. Nevertheless, it is necessary for the judges to bear in mind that this General Comment restricted its application to unaccompanied minors and minors separated from their families who are outside the country of their nationality. Accordingly, General Comment No. 6 does not apply to children who have not crossed an international border.

PLEADINGS OF THE COMMISSION

163. The Commission may argue that it has not been proven that the child's best interests was the main consideration of the Tynalandian immigration authorities when they ordered Rosalie Fournier's deportation and left Bruno Tamba in the custody of his father, with whom he had only had a sporadic relationship. Furthermore, the IACHR can assert that Bruno Tamba, who was 14 years old at the time and therefore able to form his own opinion, was not given any chance during the proceedings to participate in them and make his opinion known. No procedural opportunity for the participation of an appropriate body to represent Bruno Tamba's interests was even provided.

164. The Commission might also argue that the mandatory deportation of persons who have been convicted of aggravated criminal offenses, as prescribed in Law 24.326,

[116] I/A Court H.R., Advisory Opinion 17, para. 65.
[117] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 163.
[118] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 159.
[119] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, para. 180.

directly violates the right to have every decision to separate a child from his father or mother adequately considered in light of the best interests of the child. Although the State made reference in its judgment to Bruno Tamba's best interests, it does not appear that the judge had the opportunity to decide in light of those best interests, for instance, that Rosalie Fournier's deportation was improper. As such, it cannot be said that the best interests of the child were a sufficiently serious and essential consideration, since Law 24.326 does not afford the judges sufficient discretion to make a different decision based on the child's interests.

165. The Commission can point out that the deportation of his mother, inasmuch as it was a measure that was disproportionate to the aim pursued, also infringed upon Bruno Tamba's right to protection from the arbitrary interference of the State in his family life, depriving him permanently of his right to be under the care of his mother and to maintain daily contact with her.

PLEADINGS OF THE STATE

166. The State can argue that it was precisely in application of the principle of the best interests of the child that the judicial authorities decided it was better for Bruno Tamba to remain in Tynalandia under the care of his father, with whom he had already lived without incident while Rosalie Fournier was detained prior to her hearing before the Immigration Judge. The State can assert that there are better conditions in Tynalandia than in Evaristo to provide the best protection and assistance to Bruno Tamba, who, moreover, is a citizen of Tynalandia, and as such has access to all of the health, education and welfare benefits that the State has to offer.

167. The State can argue that, since Bruno Tamba is a citizen of Tynalandia, he could not have been legitimately removed to Evaristo together with his mother. Furthermore, to do so would have meant separating Bruno Tamba from his father without any necessary justification. In this respect, the State can maintain that the interests of the minor child Bruno Tamba were indeed taken into account, and are even part of the December 18, 2003 judgment.

168. The State can argue that it was in the child's best interest to remain in the custody of his father and continue with his education in Tynalandia. The State might add that it respects the child's right to leave the country at any time to go and visit his mother in Evaristo.

g. Freedom of Movement and Residence

169. Article 22 of the American Convention on Human Rights provides:

Article 22. Freedom of Movement and Residence

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

> 2. Every person has the right to leave any country freely, including his own.
> 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
> 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
> 5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
> 6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
> 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
> 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
> 9. The collective expulsion of aliens is prohibited.

170. In relation to this Article, the Inter-American Court has held that "liberty of movement is an indispensable condition for the free development of a person."[120] The Court has also agreed with the UN Human Rights Committee[121] that freedom of movement and residence consists, *inter alia*, of the following: "a) the right of all those lawfully within a State to move freely in that State, and to choose his or her place of residence; and b) the right of a person to enter his or her country and the right to remain in one's country."[122]

171. With regard to the restrictions to which this right may be subjected, the Inter-American Court has held that: "freedom of movement and residence, including the right to leave the country, may be restricted, in accordance with the provisions of Articles 22(3) and 30 of the Convention. However, these restrictions must be expressly established by law, and be designed to prevent criminal offenses or to protect national security, public order or safety, public health or morals, or the rights and freedoms of others, to the extent necessary in a democratic society."[123] The Court has also called attention to the requirement that restrictions to this right must be proportionate to the legitimate aim pursued in a democratic society, so that they are applied only if there are

[120] I/A Court H.R., Case of the Moiwana Community, Judgment of June 15, 2005. Series C No. 124, para. 110; in the same respect, see: Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, para. 115.
[121] UN Human Rights Committee, General Comment No. 27 of November 2, 1999.
[122] I/A Court H.R., Case of the Moiwana Community, Judgment of June 15, 2005. Series C No. 124, para. 110.
[123] I/A Court H.R., Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, para. 117.

no other less restrictive means, and only for the length of time strictly necessary to perform their function.[124]

172. The Inter-American Commission has found that subparagraph 6 of Article 22 of the Convention means that States are required to legislate deportation powers, and that the decisions made pursuant to such laws must be part of the regulated activities of government rather than part of its discretional sphere. The Commission explained that the meaning of "law" in Article 22 refers not only to acts of the legislative branch in a formal sense; also, in the material sense, the content of such acts must be consistent with the constitution and the rule of law, as well as with obligations arising from international treaties.[125]

173. In cases submitted to it for consideration, the Inter-American Commission has decided that the right guaranteed by Article 22(6) of the American Convention is violated when citizens are expelled in violation of their human rights to due process and effective judicial protection.[126] Consistent with that decision, it has found that Article 22 does not protect aliens from being removed or extradited in accordance with legal proceedings and due process guarantees.[127]

174. In the same respect, Article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that every removal case shall be examined and decided individually, and that migrant workers may only be removed from a State Party pursuant to the decision of the proper authority in accordance with law. Article 22 of that international instrument specifies that the decision shall be communicated to them in a language they can understand. It shall be communicated to them in writing if they so request, when not otherwise mandatory, and, except in extraordinary circumstances justified by national security reasons, the reasons for the decision shall also be specified. The interested parties shall be informed of these rights prior to the decision or, at the latest, at the time such decision is rendered.

175. General Comment No. 15 of the UN Human Rights Committee is of particular interest on this issue.[128] In this Comment, the Committee indicated that Article 13 of the International Covenant on Civil and Political Rights[129] is applicable to all proceedings aimed at the mandatory removal of an alien, and directly regulates only the proceedings and not the substantive basis for the removal. According to the Committee, the purpose of this article clearly is to prevent arbitrary removals by allowing expulsions only "in

[124] I/A Court H.R., Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, para. 133.
[125] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 97(4).
[126] See, IACHR, Report No. 49-99, Case 11.610 Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz (México), April 13, 1999.
[127] IACHR, Report No. 2/92, Case 10.289 Sheik Kadir Sahib Tajudeen (Costa Rica), February 4, 1992.
[128] UN Human Rights Committee, General Comment No. 15, "The Position of Aliens under the Covenant," 27th Session, (U.N. Doc. HRI/GEN/1/Rev.7 at 159) (1986).
[129] Article 13 states: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

pursuance of a decision reached in accordance with law." In that Comment the Committee considered that "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require. Discrimination may not be made between different categories of aliens in the application of article 13."

PLEADINGS OF THE COMMISSION

176. In light of the foregoing, the Commission could argue that the purpose of Law 24.326—that is, to respond to the economic crisis and increased illegal immigration in Tynalandia—is not proportionate to the measures established in the Law, which are too severe on the immigrants. The Commission could argue that it is not legitimate, in light of the standards of the Convention, for a person to be deported because of his criminal activity. Thus, the Commission could argue that although it is possible to restrict the right enshrined in Article 22 by virtue of a law, Law 22.326 is incompatible with the provisions of the Convention, given that it contradicts fundamental rights guaranteed therein, such as the right to a defense and the prohibition against retroactive laws, among others.

177. The Commission could also note that, given that the decision to deport Rosalie Fournier was made without adhering to all of the due process guarantees, the decision was a violation of the right to freedom of movement set forth in Article 22 of the Convention.

178. The Commission might argue that Article 22 was violated in that the deportation decision failed to take into account that Rosalie Fournier would have to face conditions of structural inequality in the Republic of Evaristo because women only attained equality under the law in 1979, and *de facto* equality still does not exist.

179. The Commission might also argue that the fact that the bar against Rosalie Fournier's returning to Tynalandia is a permanent measure and not a temporary one is a violation of Article 22 of the Convention, given that she is not able to attempt to return legally to Tynalandia, and the measure provides no remedy whereby her situation can be examined individually in the future. As such, in the case that circumstances in the Republic of Evaristo change in the future, or her personal circumstances are different, the enforcement of Law 24.326 violates her right to be able to request asylum in Tynalandia, which is enshrined in subparagraph 7 of Article 22 of the Convention.

PLEADINGS OF THE STATE

180. The State can argue that the right enshrined in Article 22 has not been violated, given that individuals who are in the country in violation of the immigration laws have no right to movement and residence there.

181. The State can point out that Rosalie Fournier's deportation was conducted in strict adherence to the provisions of Law 24.326, in force since March of 1994, and with respect for the guarantees of due process of law. Rosalie Fournier, like more than one million immigrants, was deported pursuant to Law 24.326, which is designed to prevent crime and maintain security and public order in Tynalandia—purposes that can be considered legitimate in every democratic society.

182. The State could add that there is not enough evidence that Rosalie Fournier has legitimate reasons not to return to the Republic of Evaristo, that there is nothing to indicate that she would be the victim of persecution in her country of origin, and that there is not enough information to allege discrimination toward all women in Evaristo. Therefore, the State could argue that, upon deporting Rosalie Fournier, who was in the country in violation of the laws of Tynalandia, it acted within the limits of possible restrictions to Article 22, in light of its right to decide and legislate matters concerning the entry and departure of aliens within its borders.

h. Right to Equal Protection under the Law

183. Article 24 of the American Convention on Human Rights provides:

> Article 24. Right to Equal Protection
>
> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

184. The Inter-American Commission has stated that the principle of non-discrimination is one of the pillars of any democratic system and a fundamental basis of the system for the protection of human rights founded by the OAS.[130] On the importance of this right, it has been affirmed that equality and non-discrimination are fundamental underlying principles in every international human rights system. Their denial would mean the very denial of this system in its entirety. Such is the magnitude of this fundamental principle that a reservation to it would be contrary to the object and purpose of the respective treaty, and therefore invalid.[131]

185. In Advisory Opinion 18, the Inter-American Court of Human Rights held, *inter alia*, that: the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law; that it has entered the domain of *jus cogens;* and that it entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.[132]

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[130] IACHR, Report No. 4/01, Case 11.625, María Eugenia Morales de Sierra, Guatemala, January 19, 2001, OEA/Ser.L/V/II.95 Doc. 7 rev. in 144 (1997), para. 36.
[131] Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in Cook, Human Rights of Women, pp. 268-269 (free translation).
[132] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paragraphs 3, 4 & 5 of the operative part of the judgment.

186. It is important to clarify that, in accordance with the criterion of the Inter-American Court, there is no discrimination if "the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind."[133]

187. It should also be underscored that Article 24 is not the only equality clause in the American Convention, as the concept is likewise included in Article1.1 of the Convention.[134] In one of its most recent cases,[135] the Court ruled that the allegations of the petitioners with respect to equality before the law should be analyzed under Article 1.1 rather than Article 24, and it introduced a differentiation between the two articles into its case law. According to the Court, the difference between the two articles lies in that the general obligation of Article 1.1 refers to the duty of the State to respect and guarantee the rights contained in the American Convention "without discrimination," while Article 24 protects the right to "equal protection under the law." In other words, if a State discriminates in its respect for or guarantee of a Convention right, it violates Article 1.1 and the substantive right in question. On the other hand, if the discrimination involves the unequal protection of domestic law, it is a violation of Article 24.

188. In this respect, the Court has held that "Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein 'without any discrimination.' In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is *per se* incompatible with that instrument." On the other hand, Article 24 of the Convention "prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations."[136]

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[133] I/A Court H.R., Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, Para. 57. The IACHR addressed this same issue in IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 238.

[134] This article provides that: "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."

[135] I/A Court H.R., Case of Apitz-Barbera et al. ("First Court of Adminstrative Disputes") v. Venezuela. Judgment of August 5, 2008. Series C No. 182.

[136] I/A Court H.R., Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, paras. 53 & 54.

189. On the issue of equal protection of the law with respect to citizens and aliens, the Court has ruled that "States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, and proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity."[137]

190. The Inter-American Court has recognized the need to distinguish between *de jure* inequality (between citizens and aliens under the law) and *de facto* inequality (structural inequality). Likewise, the Court has noted the existence of cultural prejudices toward migrants that allow for the recurrence of conditions of vulnerability, such as ethnic prejudices, xenophobia and racism, that make it difficult for migrants to assimilate into society and lead to the impunity of human rights violations committed against them.[138]

191. According to the Court, the fact that the principle of equality and non-discrimination is fundamental and is applied irrespective of the legal status of a person in a State does not mean that no action can be taken against migrants who fail to comply with the State's laws. The important thing is that, when taking the appropriate measures, States respect their human rights and guarantee the exercise and enjoyment of those rights for every person within their borders, without discriminating against them on the basis of their legal or illegal status, or for any other reason.[139]

192. The Inter-American Commission has established that, bearing in mind the general obligations enshrined in Article 1(1) of the Convention, States cannot discriminate in their immigration policy on the basis of race, color, creed, national or social origin, political or any other opinion, language, economic status, birth, sex, gender, sexual orientation, or any other social condition. According to the IACHR, although it is permissible for immigration policy to discriminate between citizens and aliens, and between aliens with legal status and those without it, there is no reason for the exception of immigration policy from the principle of non-discrimination.[140]

193. In the same respect, the Inter-American Commission has recognized that in democratic societies it is considered appropriate for States to treat aliens differently from others within the State's jurisdiction; however, it has made clear that States must

[137] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 119.
[138] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 112 & 113.
[139] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 118.
[140] IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, April 16, 2001, para. 97(3).

demonstrate that every distinction of this kind is reasonable and proportionate to the aim pursued under the circumstances.[141]

194. Bearing in mind that States cannot discriminate or tolerate discriminatory situations prejudicial to migrants, the teams should discuss whether, in light of the facts of the case, it has been demonstrated that Rosalie Fournier was treated differently (as compared to documented immigrants or citizens of Tynalandia) because of her status as an undocumented immigrant, or whether it has been demonstrated that Rosalie Fournier was treated differently because of her status as a woman of African descent. In the case that the existence of different treatment is established, the teams should examine whether it was reasonable, objective and proportionate and whether it constituted a human rights violation.[142]

A. PLEADINGS OF THE COMMISSION

195. On one hand, the Commission can point out that discrimination toward migrants has been increasing in Tynalandia since the 1990s, particularly toward Evaristans, who have even been the victims of acts of violence. The Commission can recall that Law 24.326 was created with the particular objective of stopping illegal migration. It can further note that more than two million Evaristans reside in Tynalandia, the majority of them illegally, and so the Law indirectly has a greater impact on Evaristans. According to the facts, 65% of the individuals who have been deported pursuant to the enforcement of Law 24.326 are Evaristans. Likewise, the law establishes deportation as a consequence of criminal acts committed by foreigners in Tynalandia, while the citizens of Tynalandia do not have to face such severe consequences. In this respect, the Commission can argue that the different treatment toward migrants, who face deportation as a penalty for their criminal acts, is neither reasonable nor proportionate in relation to the State's aim of stopping illegal immigration or preserving public order, and furthermore, that the Evaristan population in Tynalandia has sustained disproportionate effects in the enforcement of Law 24.326.

196. In addition, the Commission can assert that Rosalie Fournier's arrest took place in the midst of a situation designed exclusively to question persons of African descent, and therefore that Rosalie Fournier was discriminated against on the basis of her race by the officers in charge of the investigation of the alleged computer theft. Furthermore, the Commission can argue that the State had knowledge of the discriminatory situation and tolerated it anyway. On this point, the Commission can argue that it is unreasonable that—according to Rosalie Fournier's statements—only the employees of African descent to be questioned in the investigation of the computer theft, and that it therefore constituted discriminatory treatment that is inadmissible in light of Article 24 of the Convention.

B. PLEADINGS OF THE STATE

[141] IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 239.
[142] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 119.

197. As for the alleged discrimination against Rosalie Fournier on the basis of her status as an undocumented immigrant, the State can argue that, although there may have been different treatment, it is permissible in the context of immigration policy to make certain distinctions between citizens and aliens, as well as between undocumented aliens and aliens who have legalized their status. Beyond these differences, Tynalandia can affirm that its State policy does not establish differences among undocumented immigrants themselves; rather, they are all given the same treatment, regardless of their nationality, sex, race, gender or any other status. As such, the State could argue that the distinctions created by Tynalandian law are reasonable, objective and proportionate, and do not constitute discriminatory treatment.

198. With respect to the alleged discrimination against Rosalie Fournier on the basis of her race, the State can simply argue that the Commission has not been able to demonstrate that there was discriminatory treatment in this specific case. The State can argue that the investigation into the computer theft did not focus only on persons of African descent, and that it was based on a legitimate investigation into a theft that the State authorities became aware of Rosalie Fournier's immigration status, without her race ever having caused a government official to question her immigration status.