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, lack of due process, the mass deportations of undocumented migrants, 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 product 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, 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,
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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

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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 as a consequence of 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 ex[.o(ol28ol)-2(a)4(n)-20(y Tw 13.62 0 Td1(,)10( )13 0.0020

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 detainee's human rights, occur."[26]

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must be determined on a case by case basis.[31] 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.

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 helno7-orpus10(t)-2mv(o7-oTd [(7ul2(t)-2-2(, a)4(r)3(t)-2(3.89(ve)4(nt)-2(i)(p

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 computers 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.

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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 pertinent 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

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[37] I/A Court H.R., Case of Suárez Rosero, Judgment of November 12, 1997. Series 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.

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

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 a 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 resw 2.27 (he)4( )]TT

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 exercising 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

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,

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.

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 defense 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 crime to support her drug addiction, that she committed the 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 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

what are essentially States' rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations."[71]

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 "[u]nder 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 v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C No. 119, para. 79.

97. The Inter-American Court has even held

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

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.

116. Second, the Commission could argue that the fact that the police officers who were investigating the theft of the computer 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 this 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 moer pra pru5c.c4(s)-1(ur)-7ru5c. snaai.o:i20 Td [22(, t)-4(ce s302be),4c ehi 0 Td [(I)

time than she had lived in Evista. Tynalandia is where she has developed strong ties to the community, including the community of Estadians 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

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

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 and propriety of 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,

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 "a 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 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 g 8 Tw 2 to uent hiar.(r)-17[(A)nd 2(c)4(u,Tc 0 m)-12,eucu,Tc

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

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 area's 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 1 TfA2(he)4( )-10(l)-7-1(r)3((he)41(a)4(l)19 Tw

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 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

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

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[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 obligations of States Parties [illegible]

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 a

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 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.

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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

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 discretionary 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, but also, in the material sense, the content of such norms 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 him in a language he 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

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[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 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

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

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]

197. As for the alleged discrimination against Rosalie Fournier on the basis of her