American University Washington College of Law
Academy on Human Rights and Humanitarian Law

TENTH ANNUAL INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

BENCH MEMORANDUM

CONFIDENTIAL

BENCH MEMORANDUM SUMMARY

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A. Jurisdiction *Ratione Loci*

Arguments of the Commission

- The American Convention on Human Rights does not place any territorial limitations upon the responsibility of States Parties for the rights and freedoms protected under that treaty, or upon the jurisdiction of the Commission or the Court to consider complaints alleging violations of the Convention by States Parties

- The Inter-American Commission has recognized the extraterritorial responsibility of States within the inter-American system based upon the exercise by a State of authority and control over an individual, and the United Nations Human Rights Committee has reached a similar conclusion concerning the International Covenant on Civil and Political Rights

- Belor clearly exercised authority and control at all relevant times over the 56 individuals captured and detained at the Citadel, as well as over Ferris Blanco, Laura Gray and Robert Suarez.

- Belor should not be permitted to avoid its human rights obligations simply by moving individuals, including its own citizens, outside of the region of the Americas

Arguments of the State

- The OAS Charter and the American Convention premise the authority and jurisdiction of the Organization of American States and its organs on its status as a regional organization whose mandate is limited to the hemisphere of the Americas

- While the Inter-American Commission on Human Rights has recognized the extraterritorial responsibility of OAS Member States, its decisions in this respect have nevertheless been limited to extraterritorial conduct occurring within the region of the Americas

- The European Court of Human Rights limited its jurisdiction to conduct falling within the *espace juridique* of State Parties to the European Convention on Human Rights.

- Both Belor and New Atria are subject to the jurisdiction of the UN Human Rights Committee and the International Criminal Court and therefore alternative remedies may be available.

IV. PROVISIONAL MEASURES **17**

Arguments of the Commission

- The prosecution is seeking the death penalty against Ferris Blanco for the crimes alleged against him and therefore he faces a threat of irreparable harm to his life and physical integrity based upon this punishment and its associated mental duress

- The threat of harm is grave and urgent, as Mr. Blanco's trial is scheduled to commence in one month and his trial and appeal could be concluded before the Inter-American Court decides upon this case

- A stay of execution would maintain the *status quo* and avoid frustrating the *restitutio in integrum* of Mr. Blanco until the Court has an opportunity to decide upon the case

Arguments of the State

- Ferris Blanco is not presently under a grave or urgent threat of irreparable harm, as he has only been charged with a capital crime and could be acquitted or sentenced to a punishment other than death

- Granting provisional measures in the present circumstances would require the Court to presume that the criminal proceedings against Mr. Blanco would be unfair and therefore prejudge the merits of an issue before the Court.

V. MERITS

A. Allegations relating to the Unnamed Detainees at the Citadel

1. Right to Liberty and Right to Judicial Protection **21**

Arguments of the Commission

- As Belor has not lawfully suspended Article 7 or 25 of the Convention in accordance with the terms of Article 27 of the same treaty, it must guarantee all of the protections in the Article to the detainees at the Citadel

- These rights have not been guaranteed, as the detainees have now been held for almost 4 years with no judicial determination of the legality of their detentions and with no effective judicial supervisions of the protection of their other non-derogable rights

- doubts have been raised concerning the legal status of the individuals detained at the Citadel under international humanitarian law and their corresponding susceptibility to detention, based upon information indicating that some of the detainees did not take part in the fighting at Venzaar but were abducted by mistake during Belor's military operations, and therefore the legal status of the detainees should be determined by a competent tribunal.

Arguments of the State

- Long-established rules of international humanitarian law permitted Belor to seize the Citadel detainees on the battlefield and to detain them for the duration of

hostilities, and as a consequence neither their apprehension nor their detention is arbitrary within the meaning of Article 7 of the Convention.

- The armed conflict between Belor and the Scorpions is non-international in nature and therefore the detainees are not privileged combatants and the review of status provisions under Article 5 of the Third Geneva Convention do not apply

- The status of the unnamed detainees individuals at the Citadel has been properly supervised, given the access by the ICRC, the habeas corpus petition brought on their behalf in the General Court of Belor, and the fact that Belor has already released five of the detainees.

2. Right to Humane Treatment **30**

Arguments of the Commission

- Both international human rights and humanitarian law prohibit ill treatment of detainees or prisoners, including the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment

- The practices of requiring detainees to stand for extended periods of time and depriving detainees of sleep for prolonged extended periods, have been among the interrogation techniques considered by international human rights bodies to constitute inhumane treatment

- The Court should not discount the possibility that the impact of these practices upon individual detainees may reach a level of severity so as to constitute torture, particularly given information that the detainees include women and men between the ages of 16 and 63.

Arguments of the State

- In making their allegations of ill-treatment, the Commission has relied upon statements made by released detainees who should not be considered impartial or reliable witnesses, and who acknowledged in any event that they never witnessed any prisoners being physically assaulted by guards or interrogators

- There is no evidence indicating that methods involving prolonged standing and sleep deprivation, used separately or in combination, result in a degree of fear, anxiety or suffering that would constitute torture or cruel, inhuman or degrading punishment or treatment.

- The interrogation methods have produced important information that, in the case of detainee Victor Gallagher, may have averted a potential terrorist attack on Belor's Parliament and are therefore crucial tools in the fight against terrorism.

B. Allegations relating to Ferris Blanco

1. Right to Liberty, Right to Humane Treatment, and Right to Judicial Protection **35**

Arguments of the Commission

- International humanitarian law does not apply in Mr. Blanco's circumstances as he was not apprehended in the course of the fighting in New Atria but was

abducted in Belor four months after the fighting in Venzaar ended

- Mr. Blanco's arrest was not executed pursuant to a warrant issued by a proper court, there was no compelling evidence that he was captured *in flagrante delito,* and he was not informed of the reasons for his detention or promptly notified of the charge or charges against him

- There is no evidence indicating that the use of shackles or the black bag on Mr. Blanco was necessary, which constituted inhuman treatment and severely humiliated Mr. Blanco in front of his congregation members

- Mr. Blanco was denied access to any court or tribunal for over 1 ½ months following his apprehension, and the habeas corpus petition brought on his behalf was not effective as the Court simply deferred to the military's determination that Mr. Blanco was an unprivileged combatant and that ICRC supervision of his detention was sufficient

Arguments of the State

- Mr. Blanco's apprehension was justified under international humanitarian law as he was captured within the broader context of the on-going armed conflict between the Republic of Belor and the Scorpions, and based upon compelling evidence of his participation as a combatant in the Embassy bombings

- The hooding or shackling of combatants when they are apprehended is not explicitly prohibited under international humanitarian law and these precautions were justified in light of Mr. Blanco's senior position in the Scorpions

- Mr. Blanco's detention has been effectively supervised through access by the ICRC and a habeas corpus application to the General Court of Belor

2. Right to a Fair Trial **40**

Arguments of the Commission

- Mr. Blanco's criminal proceedings have been rendered unfair by violations committed from the outset of his investigation, including the unlawful and inhumane manner of his arrest

- The special tribunal fails to satisfy minimum fair trial standards, as it was not established though regular laws passed by a democratically-elected legislature and does not afford Mr. Blanco his right to independent counsel of his own choice

- As crimes charged against Mr. Blanco were enacted after the New Atria Embassy bombings occurred in violation of the right to freedom from ex post facto laws, and the crime of terrorism as defined under the order establishing the special tribunal is vague and overbroad in violation of the principle of legality.

Arguments of the State

- The means by which Mr. Blanco was apprehended by Belor were fully in accordance with applicable international humanitarian law and were required by the exceptional nature of the situation

- According to pertinent precedents, including the views of the UN Human Rights Committee, it is permissible to use special tribunals to try civilians, provided that the minimum requirements of due process are guaranteed.

- Article 15(2) of the International Covenant on Civil and Political Rights expressly acknowledges that the right to freedom from ex post facto law does not apply to an "act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations", which include war crimes and crimes against humanity

- The crime of terrorism as defined in the in Order is sufficiently clear to satisfy the principle of legality

C. Allegations relating to the members of the Gir Temple

1. Right to freedom of assembly, right to freedom of association, and right to freedom of conscience and religion **45**

Arguments of the Commission

- The actions of the State in freezing the assets of the Gir Temple limited the free enjoyment of the Temple members' rights by closing the Temple and leaving its members with no proper venue within which to freely exercise their common religion as well as their right to assemble and associate

- The reporting requirements under the legislation further limited the members' rights through a "chilling effect" that suppressed the willingness of present and potential members of the Gir Temple to freely and openly meet and practice their religion

- The limitations imposed through the legislation are not necessary insofar as the State has failed to provide evidence that all New Atrians, all members of the Corpion religion, or all members of the Gir Temple present a threat to Belor's security

- The limitations are also disproportionate and discriminatory insofar as they target all members of particular national, religious and ethnic groups rather than being more closely tailored to more specific characteristics of the Scorpions as a terrorist organization

Arguments of the State

- The rights of the members of the Temple have not been limited, as it is not apparent that they could not assemble and associate in another location, or that this would necessarily have to take place in an establishment specifically affiliated with the Corpion religion

- Any limitations are necessary, proportionate and non-discriminatory in light of evidence of a direct connection between New Atrian nationals, members of the Corpion religion, and the Gir Temple and the devastating terrorist attacks carried out by the Scorpions

- The certificate process under Article 32 of the Act ensures that the process for monitoring financial transactions and impeding assets potentially connected with terrorism are expeditious and protect sensitive information, and at the same time

are subject to review and confirmation by the judicial branch.

2. Right to equal protection of the law and nondiscrimination **51**

Arguments of the Commission

- Articles 13, 14 and 32 of the Defense of Freedom Act create distinctions based on religion or national origin which have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms

- The State has failed to show that the distinctions created in the Defense of Freedom Act are based on substantial factual differences between New Atrians, members of the Corpion religion, or the members of the Gir Temple and others not governed by the legislation or that there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.

Arguments of the State

- The legislative measures were enacted by the democratically-elected legislature in Belor in order to assist law enforcement and other authorities to identify and prevent members of a demonstrably dangerous terrorist group, the Scorpions, from perpetrating further attacks against Belor and its people.

- The measures are rationally connected to that objective based upon factual evidence of connections between the Scorpions, New Arian nationals who subscribe to the Corpion religion, and members of the Gir Temple, including senior Scorpion members such as Ferris Blanco

- The distinctions created are proportionate, given the methodology of terrorist groups by which they take advantage of their ability to blend in with the general population and the correspondingly difficulty in identifying more specific characteristics that would permit authorities to distinguish potential terrorists from other members of the population

3. Right to privacy **56**

Arguments of the Commission

- Belor has failed to justify the need for the personal information requested under section 13 and 14 of the Defense of Freedom Act, which encompasses details intimately connected with the victims' identify and autonomy, or that the need for this information is proportionate to the considerable degree of interference in the private lives of the congregation members

- Section 13, 14 and 32 of the Defense of Freedom Act do not contain any provisions limiting the manner in which the government may use information gathered under these sections nor do they provide any mechanism for the persons concerned to access or otherwise control the use of the information, including its provision to foreign governments.

- The General Court was compelled under section 32 to issue the order requested by the Minister of Finance based only upon the presentation of a certificate, and the congregations members at the Gir Temple had no opportunity to challenge or

otherwise participate in the process that led to this serious intervention into their privacy

Arguments of the State

- The information requested under sections 13 and 14 of the Act was necessary in order to identify and locate persons who presented a real and imminent of terrorist violence to Belor and its citizens but who operate clandestinely by disguising themselves in otherwise legitimate religious and other organizations.

- Belor's treaty obligations, including those under section 4 of the Inter-American Convention against Terrorism and Article 8 of the International Convention for the Suppression of the Financing of Terrorism, oblige it to take measures to identify funds that may be used or allocated in connection with terrorism-related offenses and to share that information with other state parties

- Any suggestion by the Commission that the information gathered under sections 13 or 14 of the Act may be misused or inaccurate have not been substantiated, but rather the information has properly facilitated successful anti-terrorism operations

- The certificate procedure under section 32 of the Defense of Freedom Act provides a proper balance between judicial control over potential abuse and the need to engage in secret surveillance in order to detect, obstruct and prevent assets and transactions that finance terrorism.

4. Right to property **60**

Arguments of the Commission

- The State's conduct in monitoring the financial transactions of the congregation members at the Gir Temple and freezing the assets of the Temple interfered with the individual and collective property rights of the congregation

- Placing the Temple on the list of establishments under Schedule III to the Act has stigmatized its members as potential terrorists and exposed them to potentially serious measures under international terrorism treaties.

- The State has not produced compelling evidence indicating that any congregation members may have been engaged in financial or other transactions connected to terrorism or that they measures were otherwise necessary or proportionate.

- Congregation members have no right to information concerning whether or how Belor might share their financial information with domestic and foreign authorities, nor do they have the ability to challenge such uses of their financial information or their inclusion in Schedule III to the Act

Arguments of the State

- To the extent that the State's actions related to the financial assets of the Gir Temple rather than its individual members, it is not apparent that the allegations fall within the competence of the Court as relating to the property rights of a natural person under Article 1(2) of the Convention .

- The request for the financial records, the monitoring of the financial transactions, and the freezing of the financial assets were all authorized under a law passed by the democratically-elected legislature in Belor and required under relevant anti-terrorism treaties and UN Security Council Resolutions.

- In light of the information from Victor Gallagher, the measures were necessary in order to effectively prevent the funding of terrorist activities by the Scorpions in Belor, and were proportionate to that objective

- The certificate procedure under section 32 of the Defense of Freedom Act provides a proper balance between judicial control over potential abuse and the need to engage in secret surveillance in order to detect, obstruct and prevent assets and transactions that finance terrorism.

D. Allegations relating to Laura Gray and Robert Suarez

1. Right to personal liberty, right to seek asylum, right to a fair trial, and right to judicial protection **63**

Arguments of the Commission

- The true motivation for Belor's actions in arresting and deporting Laura Gray and Robert Suarez was not the expiration of their visas, but to facilitate New Atria's prosecution of Ms. Gray and Mr. Suarez on charges connected with a 1997 hostage-taking

- The State therefore should have followed proper extradition procedures as contemplated under Article 6 of the Hostages Convention, and as a consequence the arrest, detention and deportation of Ms. Gray and Mr. Suarez were irregular and improper.

- Ms. Gray and Mr. Suarez feared persecution through politically-motivated prosecutions in New Atria and the possibility of inhuman treatment if they were detained at the Citadel and therefore should have been given a fair hearing to determine their asylum claim and to invoke the right of non-refoulement

- The judge's discretion under section 17 of the Defense of Freedom Act to hear from Ms. Gray and Mr. Suarez and his refusal to exercise that discretion contravened their right to a fair trial and was inadequate to judicially safeguard their other fundamental rights.

Arguments of the State

- It is not disputed that Laura Gray and Robert Suarez overstayed their visas, and accordingly their were lawfully arrested, detained and deported under section 17 of the Defense of Freedom Act

- As New Atria had issued indictments against both individuals for a serious non-political crime, Ms. Gray and Mr. Suarez were clearly excluded from receiving refugee status and therefore had no valid refugee claim to pursue

- Ms. Gray and Mr. Suarez's claims relating to nonrefoulement were meritless, as they were based upon speculation as to whether they might be held at the Citadel, as well as unreliable allegations made by released detainees regarding interrogation techniques that, even if true, would not constitute torture or other

inhuman treatment .

- The right of Ms. Gray and Mr. Suarez to judicial protection was fully respected by Belor through the legal proceedings invoked under section 17 of the Defense of Freedom Act and through the habeas corpus petition that was pursued on their behalf in Belor's courts.

VI. REPARATIONS **71**

BENCH MEMORANDUM

Blanco and others v. Republic of Belor (The New Atria Embassy Bombings Case)[1]

I. INTRODUCTION

A. Context

In an application lodged with the Inter-American Court of Human Rights (the "Inter-American Court" or the "Court) on May 29, 2004, the Inter-American Commission on Human Rights (the "Inter-American Commission" or "Commission") has alleged the international responsibility of the Republic of Belor for the following violations of the American Convention on Human Rights (the "American Convention") and related instruments, based upon the facts in the New Atria Embassy Bombings Case hypothetical:

> 1. with respect to the apprehension, detention, treatment, and criminal investigation of Ferris Blanco, violations of Articles 1(1), 5, 7, 8, 9 and 25 of the American Convention on Human Rights and the State's obligations under Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture;
> 2. with respect to the detention and treatment of unnamed Citadel detainees, violations of Articles 1(1), 5, 7, 8 and 25 of the American Convention on Human Rights and the State's obligations under Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture;
> 3. with respect to the application of sections 13, 14 and 32 of the Defense of Freedom Act to the named members of the congregation of the Gir Temple and the closure of the Temple, violations of Articles 1(1), 11, 12, 15, 16, 21, and 24 of the American Convention on Human Rights;
> 4. with respect to the application of section 17 of the Defense of Freedom Act to Laura Gray and Robert Suarez and their subsequent arrest and deportation, violations of Articles 1(1), 7, 8, 22 and 25 of the American Convention on Human Rights.

The Commission has also requested the Court to adopt provisional measures pursuant to Article 63(2) of the American Convention and Article 25 of the Court's Rules of Procedure in favor of Ferris Blanco requiring Belor to suspend the criminal proceedings against him pending the determination of his complaint before the Inter-American system.

The Republic of Belor has raised a preliminary objection to the Court's jurisdiction *ratione loci*, in respect of both the request for provisional measures and the claims relating to Mr. Blanco and the other detainees at the Citadel, on the ground that the alleged victims were located outside of Belor's territory and beyond the geographic region encompassed by the Organization of American States.

The Inter-American Court has convened one hearing to receive arguments in the three principal phases of these proceedings: preliminary objections; request for provisional measures; and merits and reparations. Accordingly, teams are expected to address each of these areas in their oral and written arguments.

[1] The hypothetical case and bench memorandum were prepared by Brian Tittemore, Principal Specialist with the Inter-American Commission on Human Rights. The author wishes to thank Washington College of Law students Fabiola Carrion, Catherine Croft, Jacqueline Ferrand, Vanessa James, and Vlada Musayelora for their valuable research assistance. The author is also grateful to Washington College of Law Professor Robert K. Goldman and Dean's Fellow Matías Hernandez for their insightful comments on the hypothetical, and to Competition Coordinator and attorney Shazia Anwar, Center for Human Rights and Humanitarian Law Director Hadar Harris, and WCL Academy on Human Rights and Humanitarian Law Co-Directors Claudia Martin and Diego Rodríguez-Pinzón for their generous support and assistance throughout the process.

The purpose of this bench memorandum is to outline the main legal issues and corresponding arguments that each team may raise. It is intended to serve as a guide and is not meant to be exhaustive. Structurally, the memorandum sets out the pertinent facts, the applicable law, and the arguments of the Commission and the State in respect of each issue issues raised by the hypothetical.

B. Focus of the Hypothetical

The 2005 Inter-American Human Rights Moot Court Competition hypothetical focuses upon the challenges in securing protection for fundamental human rights and freedoms in the struggle against terrorism, particularly in the post-September 11, 2001 environment where terrorist groups are capable of perpetrating massive acts of violence on a global basis. In this connection, four topics in particular are raised by the circumstances in the problem and should inform the teams' presentations as well as the questions of judges:

1. the extraterritorial application of the inter-American system to anti-terrorism measures taken by OAS Member States outside of the Americas;
2. the limits of employing provisional measures in the context of domestic judicial proceedings;
3. the role of other areas of international law in interpreting and applying international human rights protections in the context of efforts to prevent, punish and suppress terrorism. In particular:
    a. Parts A and B of the merits of the case, which address the situation of the unnamed Citadel detainees and Ferris Blanco, require teams to address the application and effect of international humanitarian law upon the rights invoked under the American Convention, to the extent that the circumstances arose in connection with a non-international armed conflict;
    b. Parts C and D of the merits of the case, which address the situation of the named members of the Gir Temple and the detention and removal of Laura Gray and Robert Suarez, require teams to address the application and effect of international anti-terrorism treaties enumerated under Article 2 of the Inter-American Convention Against Terrorism upon the rights invoked under the American Convention;
4. the appropriate balance to be struck in limiting or restricting particular rights where the free exercise of those rights can be closely connected with and exploited by terrorist organizations and their members, including the right to privacy, the right to property, and the right to seek and receive asylum.

As indicated in the responses to the requests for clarification, the Republic of Belor has not declared a state of emergency, and therefore the issues in the case should be canvassed on the understanding that none of the rights or freedoms involved has been the subject of a lawful derogation under Article 27 of the American Convention. In this regard, the arguments of teams should demonstrate an understanding that several rights implicated by the problem, including the right to humane treatment and the right to judicial protection, are non-derogable in any event under both international human rights law and, where applicable, international humanitarian law. Further, the problem challenges the teams to consider, in a practical context, to what extent it may be necessary to adjust conventional conceptions of guaranteeing internationally-protected rights in a manner that takes into account the particular characteristics and dangers of terrorist violence.

In light of the broad range of issues raised by the hypothetical, judges are encouraged to coordinate their questions to permit an evaluation of how effectively each team uses their time to cover the three areas of the hearing, as well as the quality of their substantive arguments in each area.

II. TIME LINE

- 1980 – New Atria gained its independence from the Republic of Belor
- 1985 – Radical anti-Drune Corpions formed a militant group known as the Scorpions.
- June 1, 2001 – Belor's embassy in New Atria and the embassies of two Belor allies were the targets of massive and simultaneous bombings and a car bomb exploded outside of the main stock exchange in Belor's capital of Haladonia.
- June 2, 2001 – Belor's President, Anna Martin, delivered a televised speech stating that Belor faced a grave national security threat and presenting the new Defense of Freedom Act.
- June 2, 2001 – New Atria's armed forces stormed Venzaar, a neighborhood in the capital city of Kawori, in search of Scorpions and their supporters. Belor deployed troops to assist in the conflict.
- June 10, 2001 - Belor and New Atria entered into a bilateral agreement concerning the status of Belor's armed forces and control over the Citadel.
- June 10, 2001 – Belor's Parliament passed the Defense of Freedom Act.
- mid-June 2001 – The Venzaar conflict ended and Belor and New Atria dispatched troops to secure the province of Roveen. Army units remain in Roveen to the present day where fighting with the Scorpions has remained sporadic.
- June 27, 2001 – Belor's Cabinet of Ministers ordered the establishment of a special tribunal at the Citadel in New Atria
- August 2001 – Belor agreed to provide the International Committee of the Red Cross with access to the Citadel detainees at the end of August.
- August 13, 2001 – Belor released five detainees from the Citadel.
- October 14, 2001 – Members of Belor's armed forces apprehended Ferris Blanco and transported him to the Citadel under instruction from Boris Thompson, the Minister of National Defense.
- October 20, 2001 – The General Court requested permission to monitor the financial accounts of Gir Temple members and freeze Gir Temple assets.
- October 21, 2001 – The General Court granted the orders regarding the Gir Temple accounts.
- November 2, 2001 – New Atria informed Belor that Laura Gray and Robert Suarez had been indicted by the New Atrian courts for the crime of hostage-taking in connection with the abduction of a business leader in New Atria in 1997.
- November 15, 2001 – Department of Security and Immigration officials obtained arrest and deportation orders against Laura Gray and Robert Suarez.
- November 16, 2001 – Immigration officers arrested Laura Gray and Robert Suarez and they were deported to New Atria and transferred to the Citadel to await trial.
- December 1, 2001 – Belor announced that it considered Ferris Blanco's detention authorized under applicable international humanitarian law and that the special tribunal in New Atria had commenced an investigation into Mr. Blanco's role in the embassy bombing.
- December 2, 2001 – Rights International filed a habeas corpus petition in Belor courts on behalf of Ferris Blanco and unnamed Citadel detainees.
- December 10, 2001 – Rights International filed two constitutional actions with the General Court of Belor. One action was lodged on behalf of all New Atrian members of the Gir Temple. The second action challenged the arrest and deportation of Laura Gray and Robert Suarez.
- January 21, 2002 – The General Court dismissed the Rights International habeas corpus petition.
- March 13, 2002 – The General Court of Belor dismissed both Rights International constitutional actions.

- September 20, 2002 – The High Court dismissed the final appeal from the Ferris Blanco and unnamed Citadel detainee habeas corpus petition.
- November 14, 2002 – The High Court of Belor dismissed the final appeals from the General Court judgments on Rights International's constitutional actions.
- January 5, 2003 – Rights International filed a petition with the Commission on behalf of Mr. Blanco, Laura Gray, Robert Suarez, and others.
- October 5, 2003 – The Commission found all claims from the Rights International petition to be admissible.
- March 13, 2004 – The Commission adopted preliminary merits report finding Belor responsible for violations of the Inter-American Convention to Prevent and Punish Torture and of the American Convention on Human Rights.
- May 6, 2004 – Belor informed the Commission that it did not intend to implement the recommendations contained in the Commission's preliminary merits report.
- May 29, 2004 – The Inter-American Commission on Human Rights decided to refer the matter to the Inter-American Court of Human Rights.
- May 2005 – The Inter-American Court of Human Rights has convened a hearing in Washington, D.C.

III. PRELIMINARY OBJECTIONS

A. Jurisdiction *ratione loci*

Pertinent facts

The Republic of Belor is one of the founding Member States of the Organization of American States (OAS) and a State Party to the American Convention on Human Rights. It is also a Member State of the United Nations and has ratified the International Covenant on Civil and Political Rights and its first optional Protocol.[2]

New Atria is a vast developing country on the eastern coast of Africa. It has been granted Permanent Observer status with the OAS but is not a Member State of the Organization, nor is it a Member State of the African Union. Like Belor, New Atria is a Member State of the United Nations and has ratified the International Covenant on Civil and Political Rights and its first optional Protocol.[3]

In the course of the fighting in Venzaar, a neighborhood on the outskirts of the New Atrian capital of Kawori, Belor captured 56 individuals, who were immediately sent to an abandoned fortress, known as the "Citadel", located in New Atria's southern territory.[4]

Ferris Blanco, who is a dual national of Belor and New Atria, was apprehended by Belor's armed forces in that country's capital of Haladonia, who subsequently transported him by military plane to New Atria where he was also detained at the Citadel.[5]

Through an agreement with New Atria, Belor was given "control over the premises and security at the Citadel as well as the authority to enact, adjudicate and enforce laws for the order and governance of the facility and its inmates", and Belor's armed forces were granted immunity

[2] Hypothetical, paras. 1, 37.

[3] Hypothetical, paras. 1, 38.

[4] Hypothetical, para. 11.

[5] Hypothetical, paras. 21, 22.

from civil or criminal process before New Atria's courts.[6]

Applicable Law

According to the hypothetical, the events outlined above are alleged to be attributed to the Republic of Belor, but took place in whole or in part within the territorial jurisdiction of New Atria, thereby raising the question of the extraterritorial and extra-regional application of the Inter-American human rights system.

In its past jurisprudence, the Inter-American Court has not specifically addressed the question of whether or to what extent the jurisdiction of the Inter-American human rights system may extend to acts that are attributable to a State Party to the American Convention on Human Rights but that take place outside of that State's territory, whether inside or outside of the region of the Americas.

The Inter-American Commission, on the other hand, has held in past decisions that it has jurisdiction to entertain complaints regarding acts or omissions attributable to an OAS Member State that occur outside of the territorial jurisdiction of that State, in circumstances where the Member State issue exercises authority and control over the person or situation concerned.[7] In the case of *Coard v. United States*, for example, the Commission recognized the extraterritorial application of the American Declaration of the Rights and Duties of Man to acts undertaken by the United States within the territorial jurisdiction of Grenada in the following terms:

> Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[8]

Similarly, in its March 12, 2002 decision granting precautionary measures in favor of individuals detained by the United States at its military base at Guantanamo Bay, Cuba, the Inter-American Commission stated that "the determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control."[9]

It is notable, however, that in these cases, the conduct at issue had taken place within the geographic region of the Americas. The Commission has not issued a decision addressing the application of the Inter-American human rights system outside of the American continent. At the same time, in its reports on the situation of human rights of particular Member States, the Commission has alluded to its possible intervention in situations relating to the treatment by an

[6] Hypothetical, para. 11.

[7] *See e.g.* IACHR, Precautionary Measures adopted in respect of the detainees in Guantanamo Bay (March 12, 2002); Saldaño v. Argentina, Report No. 38/99, Annual Report of the IACHR 1998, paras. 15-20; Coard *et al*. v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, para. 37.

[8] Coard *et al*. v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, para. 37, citing, *inter alia*., IACHR, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17, 1985, Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, doc. 21, rev. 1, 1985.

[9] IACHR, Precautionary Measures adopted in respect of the detainees in Guantanamo Bay (March 12, 2002).

OAS Member State of one of its nationals, even if this occurs outside of the region of the Americas. In its second country report on Suriname, for example, the Commission, after describing threats alleged to have been perpetrated by the Government of Suriname against Surinamese citizens exiled in the Netherlands, indicated that it would await the findings of a Dutch judicial investigation into the incidents "before adopting any measure on this matter."[10]

Other international human rights bodies have also had occasion to address the issue of extraterritorial jurisdiction within the framework of their supervisory systems. In its General Comment 31 concerning the "Nature of the General Legal Obligation on States Parties to the Covenant", the UN Human Rights Committee stated broadly that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party", and specified that this principle applies "to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[11] The Committee has applied this reasoning to, for example, members of Germany's security forces who are deployed internationally.[12] On like grounds, the courts of some states have found jurisdiction to adjudicate state conduct that occurs beyond its borders.[13]

The European Court of Human Rights, on the other hand, has limited its contentious jurisdiction to the territorial region of the States Parties to the European Convention on Human Rights, subject to certain limited exceptions. In its December 2001 inadmissibility decision in the *Bankovic v. Belgium et al* Case, the Court found that it lacked jurisdiction over a claim involving air strikes perpetrated by NATO member states against Belgrade in 1999, in part because the Federal Republic of Yugoslavia did not fall within the *espace juridique* of the European human rights system. The Court stated:

> In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."[14]

At the same time, the European Court has recognized the extraterritorial responsibility of Contracting States to the European Convention in certain limited circumstances, including where a state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or though the consent, invitation or acquiescence of the government of that state, exercises all or some of the powers normally to be exercised by that

[10] IACHR, Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, doc. 21, rev. 1, 1985, Ch. V.E.

[11] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

[12] Human Rights Committee, Concluding observations on Germany's Fifth Periodic Report, U.N. Doc. CCPR/CO/80/GER (4 May 2004), para. 11.

[13] See, e.g., R. v. Secretary of State for Defense, [2004] All E.R. (D) 187, Queen's Bench Div. (14 December 2004); Cook v. The Queen [1998] S.C.R. 597; Rasul v. Bush, 321 F.3d 1134 (June 28, 2004)(USSC).

[14] Eur. Court H.R., Bankovic v. Belgium *et al*. Case, Application No. 52207/99, para. 80.

government.[15]

Finally, several provisions of applicable Inter-American treaties are relevant to the debate on this issue. In particular, the Preambles to the OAS Charter and the American Convention and Article 1 of the OAS Charter explicitly refer to the regional character of the OAS and its human rights system,[16] while Articles 1(1), 44 and 62 of the American Convention contain no explicit territorial restrictions on the obligations of State Parties under the Convention or the contentious jurisdiction of the Commission or the Court.[17]

It is also notable that according to the *travaux preparatoires* of the American Convention, a reference to "territory" in the original draft American Convention was removed during the special conference on the Convention in 1969, apparently to address situations in which member states might exercise jurisdiction outside of their territorial jurisdiction. In particular, according to the drafting history for the Convention, Article 1 of the original draft prepared by the Inter-American Commission read: "The States Parties undertake to respect the rights and freedoms recognized herein and to ensure to all persons within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms…". In its explanatory note to this provision, the Commission indicated that it was drafted based upon Article 2 of the ICCPR, which includes an explicit reference to territory as well as jurisdiction. However, the reference to "territory" was subsequently removed during the Conference of San Jose. According to the report of the U.S. delegation on the 1969 inter-American conference on protection of human rights:

> A working group of Committee I was named to consider various proposed changes to the draft convention. The main change adopted in the working group and subsequently in the committee was deletion of the words "within their territory and" before the words "subject to their jurisdiction." **Panama was particularly interested in this deletion to protect the human rights of persons residing in the Panama Canal Zone which is subject to U.S. jurisdiction but is not U.S. territory.** [emphasis added] [18]

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[15] See, e.g., Eur. Court H.R., Loizidou v. Turkey (Prelim. Obj.)(1995) 20 E.H.R.R. 99; Cyprus v. Turkey. See also Eur. Court H.R., Case of Issa and others v. Turkey, Merits Judgment, Application No. 31821 (16 November 2004), paras. 65-71.

[16] See, e.g., OAS Charter, Preamble ("Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation **on this continent**, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man) (emphasis added); American Convention on Human Rights, Preamble ("Reaffirming their intention to consolidate **in this hemisphere**, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man) (emphasis added).

[17] See, e.g., American Convention, Article 1(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."; Article 44 ("Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."); Article 62 ("1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement).

[18] Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, November 9-22, 1969, p. 15, reproduced in BUERGENTHAL AND MORRIS, HUMAN RIGHTS – THE INTER-AMERICAN SYSTEM, Part II, Ch. III, Booklet 15.

Arguments of the Commission[19]

The Inter-American Court has jurisdiction to entertain all aspects of the case presented to it, including Belor's responsibility for acts or omissions committed outside of its territory and within the territorial jurisdiction of New Atria.

The American Convention on Human Rights does not place any territorial limitations upon the responsibility of States Parties for the rights and freedoms protected under that treaty, or upon the jurisdiction of the Commission or the Court to consider complaints alleging violations of the Convention by States Parties. To the contrary, during the drafting of Article 1(1) of the Convention, a reference to territory was removed specifically to take into account instances in which States Parties may exercise jurisdiction beyond their territories. [20]

While the Inter-American Court has not yet specifically addressed this jurisdictional issue, the Inter-American Commission has recognized the extraterritorial responsibility of States within the Inter-American system by premising the responsibility of Member States under the American Convention and the American Declaration, and correspondingly the Commission's contentious jurisdiction, upon the exercise by a State of authority and control over an individual or situation.[21] Further, the Commission has not explicitly restricted or qualified these findings based upon whether the conduct at issue is alleged to have occurred inside or outside of the region of the Americas.

The United Nations Human Rights Committee has likewise found that States Parties to the ICCPR must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[22] The domestic courts of some states have reached similar conclusions.[23]

While the European Court of Human Rights has suggested that its jurisdiction may be limited to the *espace juridique* of the States Parties to the European Convention on Human Rights, this decision should be interpreted in the context of the particular situation of the Bankovic Case,[24] where the situation alleged against the States at issue involved the aerial bombardment of a territory rather than the exercise of authority and control over the liberty and security of specific individuals.[25]

In the present case, Belor clearly exercised authority and control at all relevant times over the 56 individuals captured and detained at the Citadel, including Ferris Blanco, and the arrest

[19] In the procedure before the Court, the State would normally be called upon first to present its arguments as the party raising the preliminary objection.

[20] Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, November 9-22, 1969, p. 15, reproduced in BUERGENTHAL AND MORRIS, HUMAN RIGHTS – THE INTER-AMERICAN SYSTEM, Part II, Ch. III, Booklet 15.

[21] See, e.g., Coard *et al*. v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, para. 37.

[22] See, e.g., Human Rights Committee, Concluding observations on Germany's Fifth Periodic Report, U.N. Doc. CCPR/CO/80/GER (4 May 2004), para. 11.

[23] See, e.g., R. v. Secretary of State for Defense, [2004] All E.R. (D) 187, Queen's Bench Div. (14 December 2004); Cook v. The Queen [1998] S.C.R. 597; Rasul v. Bush, 321 F.3d 1134 (June 28, 2004)(USSC).

[24] Eur. Court H.R., Bankovic v. Belgium *et al*. Case, Application No. 52207/99.

[25] See, e.g., Eur. Court H.R., Loizidou v. Turkey (Prelim. Obj.)(1995) 20 E.H.R.R. 99; Ocalan v. Turkey, (2003) 37 E.H.R.R. 238, para. 93.

and deportation of Laura Gray and Robert Suarez.[26] This authority and control is evidenced by the fact that Belor's armed forces were responsible for capturing, apprehending or arresting these individuals, and by the terms of the agreement between New Atria and Belor, which provide Belor with "control over the premises and security at the Citadel as well as the authority to enact, adjudicate and enforce laws for the order and governance of the facility and its inmates."

Further, an interpretation in favor of jurisdiction would be in the best interests of human rights, as it does not appear that the courts in New Atria have any jurisdiction to entertain claims against Belor's armed forces in that country, and any jurisdiction that might be exercised by the UN Human Rights Committee or the International Criminal Court is purely speculative at this stage. Consequently, if the Inter-American Court declines jurisdiction, the detainees may be left without recourse or a remedy for serious violations of their fundamental human rights. States like Belor should not be permitted to avoid their human rights obligations simply by moving individuals, including its own citizens, outside of the region of the Americas.

Arguments of the State

The Inter-American Court does not have jurisdiction to consider the Commission's request for provisional measures in favor of Ferris Blanco, or the allegations relating to the situation of Ferris Blanco, Laura Gray or Robert Suarez outside of Belor's territory and within the territory of New Atria, on the ground that the alleged victims are located outside of Belor's territory and beyond the geographic region encompassed by the OAS.

In this regard, both the OAS Charter and the American Convention on Human Rights clearly premise the authority and jurisdiction of the OAS and its organs, including its mandate relating to human rights, on its status as a regional organization whose mandate is limited to the hemisphere of the Americas.[27]

While the Inter-American Commission has recognized the extraterritorial responsibility of OAS Member States, its decisions in this respect have been limited to extraterritorial conduct occurring within the region of the Americas, and nothing in the Commission's reasoning suggests that it contemplated acts occurring outside of the regional jurisdiction of the OAS. Similarly, according to the *travaux preparatoires* for the Convention, the removal of the reference to "territory" in Article 1(1) of the American Convention contemplated the extraterritorial conduct of States Parties within the Western Hemisphere.[28] Therefore, interpreting the treaties of the Inter-American system to limit the responsibility of States Parties to acts and omissions committed within the territory of the Americas would be consistent with existing jurisprudence, a reasonable interpretation of the intention of the treaty drafters, and the international principle according to which the jurisdictional competence of a state is primarily territorial.[29]

The jurisprudence of other human rights bodies supports this approach. In particular, the

[26] See similarly Ocalan v. Turkey, (2003) 37 E.H.R.R. 238.

[27] See, e.g., OAS Charter, Art. 1 ("The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. **Within the United Nations, the Organization of American States is a regional agency**) (emphasis added).

[28] Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, November 9-22, 1969, p. 15, reproduced in BUERGENTHAL AND MORRIS, HUMAN RIGHTS – THE INTER-AMERICAN SYSTEM, Part II, Ch. III, Booklet 15 (observing that Panama was particularly interested in removing the reference to "territory" in the draft Convention "to protect the human rights of persons residing in the Panama Canal Zone which is subject to U.S. jurisdiction but is not U.S. territory).

[29] See, e.g., BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed., 1998), pp. 289, 301, 312-314.

Court is encouraged to adopt the approach of the European Court of Human Rights in the Bankovic Case, in which it limited its jurisdiction to conduct falling within the *espace juridique* of Contracting States and the basis that the European Convention was "not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[30] While the United National Human Rights Committee has adopted what appears to be a broad "power or effective control" test for the application of the ICCPR,[31] this approach should be viewed in light of the global reach of the United Nations and of the Committee itself.

Indeed, in the present case, the evidence shows that both the Republic of Belor and New Atria ratified the ICCPR and its optional protocol without pertinent reservations prior to the occurrence of the facts at issue in this case. Therefore, it is possible that the UN Human Rights Committee might have jurisdiction to receive a complaint relating to aspects of the case occurring in New Atria. Further, as both the Republic of Belor and New Atria have ratified the Rome Statute of the International Criminal Court, that Court might have jurisdiction to investigate any international crimes that the Petitioners may allege have occurred in relation to events in New Atria. Accordingly, this does not appear to be a case in which the alleged victims may be left without an international remedy.

IV. PROVISIONAL MEASURES

Pertinent Facts

At the time of presenting its Application to the Inter-American Court on June 1, 2004, the Commission requested pursuant to Article 63(2) of the American Convention that the Court order provisional measures in favor of Ferris Blanco "requiring Belor to suspend the criminal proceedings against him pending the determination of his complaint before the Inter-American System."[32]

Specifically with regard to the criminal proceedings against Ferris Blanco, the hypothetical, as supplemented by the responses to the requests for clarification, indicates that on May 6, 2004, Belor informed the Commission that:

- the special tribunal at the Citadel had charged Mr. Blanco with war crimes, crimes against humanity, and terrorism in connection with his alleged role in the New Atria embassy bombings
- The prosecution is seeking the death penalty in the case
- Mr. Blanco has been provided with access to a military defense attorney in accordance with the tribunal's regulations
- Mr. Blanco's trial is expected to begin in June 2005[33]

If he is convicted, Mr. Blanco can appeal his conviction and sentence from the General Court to the High Court of Belor.[34] Finally, in its Application before the Court, the Commission has

[30] Eur. Court H.R., Bankovic v. Belgium *et al*. Case, Application No. 52207/99, para. 80.

[31] See, e.g., Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

[32] Hypothetical, para. 34.

[33] Hypothetical, para. 33. See also response to clarification question 8.

[34] Hypothetical, para. 14.

challenged the compatibility of the tribunal proceedings with the due process and fair trial protections under the American Convention.[35]

Applicable Law

Article 63(2) of the Convention provides the Court with the authority to adopt provisional measures:

> (2) In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 24(1) of the Rules of the Court provides similarly:

> 1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.

According to the terms of Article 63(2) of the American Convention, therefore, three conditions are necessary to support a request for provisional measures, namely a situation that is "extremely grave", "urgent", and involves a threat of "irreparable damage to persons".

In considering past requests for provisional measures, the Court has consistently observed that in general, the purpose of provisional measures under national legal systems is to preserve the rights of parties to a dispute to ensure that the any future judgment on the merits will not be prejudiced by their actions *pendente lite*.[36] Moreover, in the Court's view, the purpose of provisional measures in international human rights law goes further, because, in addition to their essentially preventative nature, they effectively protect fundamental human rights, since they seek to avoid irreparable damage to persons. According to the Court,

> [u]nder International Human Rights Law, the nature of provisional measures is not only that of a safeguard, in the sense that they preserve a juridical situation, but also fundamentally protective, because they protect human rights. Provided that the basic requirements of extreme gravity and urgency and of preventing irreparable damage to persons are met, provisional measures become a true preventative guarantee of a competent, independent and impartial judge previously established by law.[37]

The Court has also suggested that it would not be appropriate to order provisional measures in circumstances in which doing so would advance criteria on the merits of a case that is before the Inter-American system.[38]

In the context of these general considerations, the Inter-American Court has ordered provisional measures in a variety of circumstances in which it has found, at least *prima facie*, that the requirements under Article 63(2) have been satisfied. These have included situations involving:

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[35] Hypothetical, para. 34. See also Part V(B)(2) below.

[36] See, e.g., I/A Court H.R., James *et al*. Case, Order of August 29, 1998, Ser. E.

[37] See, e.g., I/A Court H.R., Case of Urso Branco Prison (Brazil), Order of June 18, 2002, Considerations, para. 9.

[38] See, e.g., I/A Court H.R., Cesti Hurtado Case (Peru), Order of September 11, 1997, Considerations, para. 5.

a. immediate threats of violence to the life or physical integrity of a person or a group of persons, for example attacks or threats of attacks by illegal armed groups;[39]

b. detention conditions that imperil the health and physical integrity of a person or group of persons, for example substandard and dangerous prison conditions;[40]

c. expulsion or deportation of a person or group of persons from a state where doing so may imperil the rights to life, to humane treatment, to the special protection of the child by its family, and to freedom of movement and residence;[41]

d. exploitation of natural resources and other activities that cause immediate and irreparable damage to lands in which a person or group of persons are found by the Court to have a right to use and enjoy.[42]

The Court has also adopted orders in which provisional measures function in the nature of an injunction, to stay the implementation of a domestic procedure pending the outcome of a case before the Court challenging that procedure under the American Convention. This has occurred most frequently in cases involving criminal defendants who have been sentenced to death, where the Court has requested states to preserve the life and physical integrity of the defendants so as not the hinder the processing of cases before the Court that challenge the propriety of those death sentences.[43]

Arguments of the Commission

It is both appropriate and necessary for the Court to order provisional measures in favor of Ferris Blanco, in the circumstances of the present case. The State has not disputed, and indeed had admitted, that Mr. Blanco has been indicted by the special tribunal at the Citadel and charged with very serious crimes. Further, the maximum penalty available for these crimes is capital punishment and the prosecution is seeking the death penalty against Mr. Blanco. The present case therefore raises a threat of irreparable harm to Mr. Blanco's life and physical integrity, as required under Article 63(2) of the Convention.

This conclusion is reinforced by past cases in which the Court has granted provisional measures in relation to the possible application of capital punishment in criminal prosecutions. While in these cases death sentences had already been pronounced, measures had not necessarily been taken by the state concerned in these cases to carry out the sentence, for example by reading warrants of execution.[44] Further, Mr. Blanco remains under an equally grave

[39] See, e.g., ; I/A Court H.R., Case of 19 Merchants (Colombia), Order of September 3, 2004; I/A Court H.R., Clemente Teherán et al. Case (Colombia), Order of June 19, 1998.

[40] See, e.g., I/A Court H.R., Case of Urso Branco Prison (Brazil), Order of June 18, 2002; I/A Court H.R., Case of the Mendoza Prisons (Argentina), Order of November 22, 2004.

[41] See, e.g., I/A Court H.R., The Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic (Dominican Republic), Order of May 26, 2001.

[42] See, e.g., I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community (Nicaragua), Order of September 6, 2002.

[43] See, e.g., I/A Court H.R., James *et al*. Case (Trinidad and Tobago), Order of August 29, 1998, Ser. E; I/A Court H.R., Case of Boyce and Joseph (Barbados), Order dated November 25, 2004; I/A Court H.R., Case of Raxcacó et al. (Guatemala), Order dated August 30, 2004.

[44] See, e.g. James *et al.* Case, Order of the Court of May 11, 1999, Inter-Am. Ct. H.R. (Ser. E) (1999), Having seen, para. 8.

and urgent threat of irreparable harm if his criminal prosecution proceeds. Mr. Blanco's trial is scheduled to commence in one month and his trial and appeal could be concluded before the Court decides upon the case. In these uncertain circumstances, the Court's decision should favor protecting Mr. Blanco's right to life and physical integrity by granting the measures requested.

Moreover, the grave and urgent threat of irreparable harm faced by Mr. Blanco arises not only from the possible imposition of a death sentence *per se*, but from the mental duress that Mr. Blanco will suffer knowing that he might be sentenced to death and detained on death row[45] and from other harmful features of the criminal process against him. In particular, the Commission has presented compelling arguments illustrating that the procedures before the Special Tribunal fail to comply in many fundamental respects with the fair trial standards prescribed under the American Convention. Therefore, permitting these proceedings to continue would inflict upon Mr. Blanco unwarranted trauma that arises from prosecutions of this nature and would unnecessarily impose upon Mr. Blanco the stigma of a war criminal.

For its part, the State does not suffer any loss or prejudice by postponing the criminal proceedings against Mr. Blanco. Rather, a stay would simply maintain the *status quo* and avoid frustrating the *restitutio in integrum* of Mr. Blanco until the Court has an opportunity to decide upon the merits of the case, which, as the Court has recognized, is a fundamental purpose of provisional measures under internal law.

Arguments of the State

The present circumstances fail to satisfy any of the three conditions prescribed under Article 63(2) for ordering provisional measures. First, Ferris Blanco is not presently under a threat of irreparable harm. He has only been charged with a capital crime, but has not yet been tried and convicted, much less sentenced to death. In these respects, the circumstances faced by Mr. Blanco fall far short of other capital cases in which the Court has granted provisional measures, where the beneficiaries had been sentenced to death and, in some circumstances, had been read warrants of execution.[46] Even in the event that Mr. Blanco is convicted and sentenced to death and the Court subsequently finds violations of his rights under the American Convention, these violations could be remedied through means such as commutation and compensation and therefore are not irreparable.

Further, Mr. Blanco's situation is neither extreme grave nor urgent. Not only has Mr. Blanco not yet been tried for his crimes or sentenced to death, at this point it is equally possible

[45] In this regard, the Inter-American Court made the following observations in the Hilaire, Constantine and Benjamin et al. Case in finding Trinidad and Tobago responsible for violating the rights of 32 death row inmates in that State to humane treatment under Article 5 of the Convention:

> Likewise, in Soering v. United Kingdom, the European Court found that the "death row phenomenon" is a cruel, inhuman and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution, during which prisoners sentenced to death suffer severe mental anxiety in addition to other circumstances, including, among others: the way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; the detention conditions while awaiting execution; delays in the appeal process or in reviewing the death sentence during which time the individual experiences extreme psychological tension and trauma; the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail.

I/A Court H.R., Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago, Judgment of June 21, 2002, Ser. C No. 94 (2002), para. 167.

[46] See, e.g., I/A Court H.R., James *et al*. Case (Trinidad and Tobago), Order of August 29, 1998, Ser. E; I/A Court H.R., Case of Boyce and Joseph (Barbados), Order dated November 25, 2004.

that Mr. Blanco could be acquitted of the charges against him, or, if convicted, sentenced to a punishment other than death. Moreover, even in the event that Mr. Blanco is convicted and sentenced to death, he has the right to appeal his conviction and sentence to the High Court of Belor.

Finally, granting provisional measures in the present circumstances would require the Court to presume that the criminal proceedings against Mr. Blanco would be unfair and therefore prejudge the merits of the issues presented in the Commission's Application.[47]

V. MERITS

A. Allegations relating to the Unnamed Detainees at the Citadel

1. Right to Liberty and Right to Judicial Protection

Pertinent Facts

Following the Embassy bombings, Belor deployed its armed forces to New Atria to assist in the armed altercation in Veneer between New Atria's armed forces and the Scorpions. During the course of two weeks of protracted and intense fighting, Belor captured 56 individuals, who were subsequently transferred to the Citadel in New Atria's southern territory.[48] The 56 individuals remain unidentified, except for limited information provided by Belor indicating that all of the detainees were nationals of New Aria or other third countries and included both men and women between the ages of 16 and 63.[49] However, according to information provided by five detainees released from the Citadel on August 13, 2001, some of the individuals who remained in the prison had not taken part in the fighting in New Atria but were abducted by mistake during Belor's military operations.[50]

Belor took the position that the detainees were unprivileged combatants who were not entitled to the protection of the Geneva Conventions, and consequently that they could be captured and interned until the end of hostilities with the Scorpions.[51]

The detainees were not brought before a court or other tribunal, initially or at any time during their detention. However, Rights International lodged a habeas corpus petition with the General Court of Belor on behalf of the detainees, requesting, *inter alia*, that the detainees be brought before the domestic courts in Belor to determine the legality of their apprehensions and detentions or be released.[52] The General Court ultimately dismissed the habeas petition for lack of jurisdiction on the basis that the detainees were not located within Belor's territory, and this decision was upheld on appeal to the High Court of Belor.[53]

At the same time, the International Committee of the Red Cross (ICRC) was given access to the detainees approximately two months after their initial detention. In accordance with

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[47] See, e.g., I/A Court H.R., Cesti Hurtado Case (Peru), Order of September 11, 1997, Considerations, para. 5.

[48] Hypothetical, para. 11.

[49] Hypothetical, para. 12.

[50] Hypothetical, para. 15.

[51] Hypothetical, para. 12.

[52] Hypothetical, para. 27.

[53] Hypothetical, para. 28.

its standard practice, the ICRC has dialogued with the government of Belor about the detentions but has maintained the confidentiality of the information that it has gathered.[54]

Applicable Law

With respect to the allegations concerning the rights to liberty, the right to judicial protection, and the right to humane treatment of the Citadel detainees, as well as the allegations concerning Ferris Blanco in Part V(B) below, it is pertinent that these events occurred in the context of an armed conflict between the armed forces of Belor and the Scorpions, which raises the application of international humanitarian law[55] to the detainees' circumstances. Accordingly, it is necessary to articulate the basis upon which international humanitarian law might apply in this case and how it might affect the interpretation and application of Articles 7 and 25 of the Convention to the alleged victims.

(a) Application of international humanitarian law

The Inter-American Commission has found that in situations of armed conflict, both international human rights law and international humanitarian law apply,[56] with international humanitarian law serving as *lex specialis* in determining whether and under what circumstances the provisions of international human rights instruments may have been violated by a state party.[57] The International Court of Justice has similarly concluded that the protection offered by human rights conventions does not cease in times of armed conflict, but that international humanitarian law may also be pertinent as the applicable *lex specialis* in evaluating states' obligations under international law in armed conflict situations.[58]

Further, in defining the interrelationship between international human rights law and international humanitarian law during armed conflicts, the Inter-American Commission has observed that the American Convention and other universal and regional human rights instruments were not designed specifically to regulate armed conflict situations and do not contain specific rules governing the use of force and the means and methods of warfare in that context. Therefore, in the Commission's view, it is necessary in such circumstances to look to and apply definitional standards and relevant rules of international humanitarian law as sources of authoritative guidance in the assessment of the respect of the Inter-American Instruments in combat situations.[59] Accordingly, the Commission has held that it is appropriate, and indeed

[54] Hypothetical, para. 16.

[55] International humanitarian law is a branch of international law that applies in situations of armed conflict and which principally regulates and restrains the conduct of warfare or the use of violence so as to diminish its effects on the victims of the hostilities. The victims of armed conflict who are afforded this protection include civilians, prisoners of war, and any other members of armed forces placed *hors de combat* by sickness, wounds, detention or any other cause and who have fallen into the hands of an adverse party. IACHR, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999, at 74, para. 10. *See also* M. SASSOLI & A. BOUVIER, *HOW DOES LAW PROTECT IN WAR*, (ICRC, 1999), at 67.

[56] IACHR Report on Colombia (1999), *supra*, at 74, Part IV, para. 9; Case 11.137, Report Nº 5/97, Abella (Argentina), Annual Report of the IACHR 1997, para. 158; IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 doc. 5 rev. 1, 22 October 2002, paras. 61-62.

[57] IACHR Report on Colombia (1999), *supra*, at 74, Chapter IV, paras. 8-11. *See also* Abella Case, *supra,* paras. 158-159; Case 11.142, Report Nº 26/97, Arturo Ribón Avilan (Colombia), Annual Report of the IACHR (1997), para 171.

[58] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 240, para. 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, I.C.J. Reports 2004, para. 106. See also UNHRC, General Comment No. 31(80), para. 11; Goldman Report, paras. 23-31.

[59] *See* IACHR Report on Colombia (1999), *supra*, at 75, Chapter IV, para. 12. *See also* Abella Case, *supra*, para. 161; IACHR Report on Terrorism and Human Rights, para. 61.

imperative, for relevant norms of international humanitarian law to be taken into account while interpreting the international human rights law instruments in situations of armed conflict. The Commission has also noted that international humanitarian law is pertinent to the Commission's interpretation of and application of human rights protection to the extent that, in many instances, states' treaty obligations in these regimes of international law prescribe interrelated and mutually reinforcing standards of protection.[60]

The Inter-American Court has taken a similar approach in relation to norms of international humanitarian law applicable in non-international armed conflicts as well as other international human rights treaties to which a State Party to the American Convention may be bound, such as the UN Convention on the Rights of the Child.[61] With respect to common Article 3 to the Geneva Conventions in particular, the Court has stated that

> there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.[62]

Finally, the Inter-American Commission has emphasized that, because of the implications that the application of international humanitarian law may have upon the extent and manner in which the fundamental rights of individuals, including their right to liberty, should be guaranteed by a state, fair procedures must exists for determining the status of individuals taken into custody by a state in order to ensure that they are afforded the international protections to which they are entitled.[63]

With respect to terrorism-related violence in particular, the Inter-American Commission and other experts have observed that the perpetration of terrorist or counter-terrorist actions may give rise to or occur in the context of situations of armed conflict.[64] These authorities have also emphasized, however, that the fact that an armed conflict has been triggered or occasioned by the acts of an armed group engaged in terrorist violence does not, in and of itself, affect the legal status of the hostilities or the parties involved or the obligation of the parties to observe international humanitarian law.[65]

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[60] IAHCR Report on Terrorism and Human Rights, para. 45.

[61] See, e.g., I/A Court H.R., Bamaca Velaquez Case, Judgment of November 25, 2000, Ser. C No. 70, paras203-214; I/A CourtH.R., Las Palmeras Case, Preliminary Objections, Judgment of February 4, 2000, Ser. C No. 67, paras. 32-34; I/A Court H.R., Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Ser. A No. 16 paras. 29 *et seq* (interpreting the fair trial provisions of the American Convention in light of pertinent provisions of the Vienna Convention on Consular Relations; I/A Court H.R., Villagran Morales Case, Judgment of November 19, 1999, Ser. C No. 63 (1999), paras. 178-198 (interpreting the American Convention on Human Rights in light of pertinent provisions of the UN Convention on the Rights of the Child).

[62] See, e.g., I/A Court H.R., Bamaca Velaquez Case, Judgment of November 25, 2000, Ser. C No. 70, para. 209.

[63] *See* IACHR, Precautionary Measures Requested in Respect of the Detainees in Guantanamo Bay, Cuba (United States), March 12, 2002; IACHR Report on Terrorism and Human Rights, para. 74.

[64] IACHR Report on Terrorism and Human Rights, para. 73. See similarly United Nations Commission on Human Rights, Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, U.N. Doc. E/CN.4/2005/103 (7 February 2005) (hereinafter "Goldman Report"), para. 18.

[65] Id.

In the present case, the facts in the hypothetical strongly indicate that the unnamed detainees at the Citadel were captured in the course of an armed conflict as defined under international law, namely a resort to armed force between states or low intensity and armed confrontations between State authorities and organized armed groups or between such groups within a State.[66] Further, the facts presented indicate that the armed confrontation took place between the armed forces of two allied states, Belor and New Atria, and the armed members of a group within a State, namely the Scorpions as a militant group located in New Atria. Therefore, the regime of international humanitarian law governing non-international armed conflicts should, at a minimum, be considered to apply to the circumstances of the detainees at the Citadel. This includes Article 3 common to the Four Geneva Conventions,[67] as well as Additional Protocol II[68] which develops and supplements many of the protections contained in common Article 3. While Additional Protocol II is specifically applicable in a more narrowly defined category of internal armed conflicts, namely those which take place in the territory of a state between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement international humanitarian law,[69] the Inter-American Commission has observed that notwithstanding the narrower application of Additional Protocol II, certain of its provisions, including the fundamental guarantees under Articles 4, 5 and 6, are considered to develop protections prescribed in common Article 3 and should therefore likewise be considered to apply in all non-international armed conflicts.[70] Therefore, in the context of the present problem, teams should consider the application of common Article 3 as well as Article 4, 5 and 6 of Additional Protocol II, regardless of whether it is possible to determine whether the Scorpions satisfy the requirements of Article 1 of Additional Protocol II.

It is also possible for teams to argue that the regime governing international armed conflicts applies to the circumstances of the present problem, on the basis that the Scorpions satisfy the requirements under Article 1(4) of Additional Protocol I to the Geneva Conventions, namely that they constitute a people "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."[71] In the absence of additional facts in the hypothetical suggesting the application of Additional Protocol I, however, as well as the fact that New Atria achieved independence from Belor 11 years before the armed conflict in the present case arose, the more prudent approach for teams would involve basing their arguments upon the rules governing non-international armed conflicts, while drawing upon some principles common to the law governing international armed conflict, as appropriate.

(b) Interpretation and application of Articles 7 and 25 of the American

[66] Abella Case*, supra*, para. 152. *See similarly* International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadić, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

[67] Article 3 Common to the Four Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field , 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287).

[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609.

[69] Additional Protocol II, Article 1.

[70] IACHR, Report on Terrorism and Human Rights, para. 63.

[71] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, Art. 1(4).

Convention in light of international humanitarian law

Article 7 of the American Convention on Human Rights protects the right to personal liberty in the following terms:

> Article 7.1. 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.

In addition, Article 25 of the Convention provides for the right to judicial protection in the following terms:

> Article 25. 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: a. 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; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.

The responses to the requests for clarification on the hypothetical made clear that Belor has not taken any measures under Article 27 of the American Convention to suspend these or any other provisions under the Convention.[72]

As suggested by the above methodology, in defining the content of the right of the detainees at the Citadel to personal liberty, reference must be made to pertinent provisions of both international human rights law and international humanitarian law. The Inter-American Commission has observed in this respect that the interrelation between these two regimes of law may give rise to varying requirements as to when a person may be detained, for what duration, and subject to what supervisory mechanisms; in all circumstances, however, such requirements must conform to and be continuously evaluated in accordance with the fundamental principles of necessity, proportionality, humanity and non-discrimination.[73]

Accepting that the apprehension and detention of the Citadel detainees took place in the

[72] Response to request for clarification number 24.

[73] IACHR Report on Terrorism and Human Rights, para. 137. See similarly Coard *et al.* (United States), Case 10.951, Report Nº 109/99, Annual Report of the IACHR 1999, paras. 37-42.

context of a non-international armed conflict, several corollary considerations as to the international legal obligations of Belor should frame the arguments of the parties on this issue.

First, as Belor has not declared a state of emergency under Article 27 of the Convention, it is presumptively required to guarantee all of the rights prescribed under the Convention, including Articles 7 and 25. Even in the event that Belor had endeavored to suspend these provisions, however, it would, in accordance with the doctrine of the Inter-American human rights system, nevertheless remain bound to guarantee certain fundamental aspects of the right to liberty and personal integrity which are considered necessary for the protection of non-derogable rights or which are non-derogable under the state's other international obligations. These protections have been held to include the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, prompt access to legal counsel, family and, where necessary or applicable, medical and consular assistance, prescribed limits upon the length of prolonged detention, and maintenance of a central registry of detainees.[74] These protections have also been held to include *habeas corpus* or other appropriate judicial review mechanisms to supervise detentions, promptly upon arrest or detention and at reasonable intervals when detention is extended.[75]

Specifically with respect to the right to judicial protection, the organs of the Inter-American system have long held that the obligation to respect and ensure fundamental human rights necessary requires that simple and prompt recourse to competent courts or tribunals be available to secure the protection of those rights. According to the Inter-American Court,

> the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention."[76]

The terms of Article 25 of the American Convention fortify and supplement this obligation, by requiring state parties to organize the governmental apparatus and all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of those human rights.[77] Further, the Inter-American Court has held that the declaration of a state of emergency, whatever its breadth, cannot entail the suppression or ineffectiveness of the judicial guarantees that states are required to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.[78]

At the same time, in light of the existence of an armed conflict situation, consideration must also be given to international humanitarian law rules and principles as the applicable *lex*

[74] See IACHR Report on Terrorism and Human Rights, para. 127, citing, inter alia, IACHR, Ten Years of Activities 1971-1981 (General Secretariat, OAS: 1982), at 317-318, 342; Report on the Situation of Human Rights in Argentina (1980), OEA/Ser.L/V/II.49, doc. 19, 11 April 1980 (1980), at 24-27; IACHR, Report on the Situation of Human Rights in Colombia (1981), OEA/Ser.L/V/II.53, doc. 22, 30 June 1981 at 15-18.

[75] See, e.g., I/A Court H.R. Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations,* January 30, 1987, Ser. A Nº 8, para. 35. *See also* I/A Court H.R., Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights), October 6, 1987, Ser. A Nº 9, para. 31.

[76] I/A Court H.R., Castillo Páez Case, Judgment of November 3, 1997, Ser. C No. 34, para. 82. *See also* I/A Court H.R., Mayagna (Sumo) Awas Tingni Community Case, August 31, 2001, Ser. C Nº 79, para. 112.

[77] See, e.g., I/A Court H.R, Advisory Opinion OC-11/90, Exceptions to Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a), and 46(2)(b) American Convention on Human Rights), August 10, 1990, Series A Nº 11, para. 23.

[78] See I/A Court H.R., Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights), October 6, 1987, Ser. A Nº 9, para. 25. *See also* American Convention on Human Rights, Article 27(2).

specialis in interpreting and applying the protections under Articles 7 and 25. The Inter-American Commission has noted in this respect that there are several characteristics particular to the manner in which international humanitarian law regulates the justifications for and conditions and supervision of deprivations of liberty that must inform an analysis of the state's compliance with its international human rights obligations in armed conflict situations.[79]

In particular, international humanitarian law permits the internment of combatants by a party to the conflict as a fundamental component of achieving the party's military objectives, namely to prevent the opposing party from benefiting from the continued participation of members of their forces who have laid down their arms or those placed *hors de combat* by sickness, wounds, detention or any other cause.[80] For these reasons, international humanitarian law generally permits the internment of combatants to continue until their repatriation at the cessation of active hostilities.[81] Further, Article 5 of the Third Geneva Convention provides that where a person has committed belligerent acts and has fallen into the hands of the enemy and his or her status as a prisoner of war is in doubt, the person will be presumed to be a prisoner of war until such time as his or her status is determined by a "competent tribunal."[82]

Conversely, international humanitarian law generally permits the administrative detention or internment of civilians and others who have not taken any active part in hostilities only under exceptional circumstances. In particular, such detention may only be undertaken pursuant to specific provisions, and may be authorized only when imperative concerns of security require it, when less restrictive measure could not accomplish the objective sought, and when the action is taken in compliance with the grounds and procedures established in pre-existing law.[83] The applicable rules of international humanitarian law relative to the detention of civilians also require that any detention be made pursuant to a "regular procedure," which shall include the right of the detainee to be heard and to appeal the decision, and any continuation of the detention must be subject to regular review.[84]

With respect to non-international armed conflicts, the Inter-American Commission has previously noted that international humanitarian applicable to internal armed conflicts similarly does not prohibit the capture and detention of persons who take an active part in hostilities, but prohibits the detention or internment of civilians except where necessary for imperative reasons of security.[85] The Commission has also noted that where circumstances justifying the detention of combatants or civilians exist, common Article 3 and Articles 4 and 5 of Additional Protocol II subject the treatment of persons deprived of their liberty for reasons related to the armed conflict to minimum standards of humane treatment and protection[86]

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[79] See IACHR, Precautionary Measures Requested in Respect of the Detainees in Guantanamo Bay, Cuba (United States), March 12, 2002IACHR Report on Terrorism and Human Rights, para. 141.

[80] ICRC, COMMENTARY ON THE TH RD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (ICRC, Jean S. Pictet, ed., 1960), at 178. See also IACHR Report on Terrorism and Human Rights, para. 142-143.

[81] The Inter-American Commission has suggested that, by reason of the particular and more specific international legal principles underlying the detention of combatants in armed conflict, applicable international law should not be considered to provide for any entitlement on the part of detained combatants to be informed of the reasons for their detention, to challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel. IACHR Report on Terrorism and Human Rights, para. 142.

[82] Third Geneva Convention, Art. 5. See also IACHR, Report on Terrorism and Human Rights, para. 144; ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra*, at 551-552 and N. 29.

[83] Coard *et al.* Case, *supra*, paras. 52, 53, 54. *See also* Additional Protocol I, Article 75(3).

[84] Coard *et al.* Case, *supra*, paras. 52, 53, 54.

[85] *See* IACHR Report on Colombia (1999), *supra*, Ch. IV, para. 122.

[86] IACHR Report on Terrorism and Human Rights, para. 135.

Concerning the supervision of the status of persons deprived of their liberty in situations of armed conflict, the Inter-American Commission has noted the existence of particular specific review mechanisms that must be made available to persons protected under international humanitarian law treaties. These include, for example, a "competent tribunal" under Article 5 of the Third Geneva Convention and Article 45(1) of Additional Protocol I to determine the status of a person who has committed a belligerent act and has fallen into the hands of the enemy, an "appropriate court or administrative board" under Article 43 of the Fourth Geneva Convention, to reconsider, as soon as possible and thereafter periodically, a decision to place persons protected under the Fourth Geneva Convention in internment or assigned residence in the territory of a party to the conflict, and a "right of appeal" under Article 78 of the Fourth Geneva Convention in respect of a decision by an Occupying Power to subject protected persons to assigned residence or to internment.[87] In light of these particular and more specific principles and provisions applicable in armed conflicts, as well as the fact that the detention of victims of armed conflict may be the subject of supervision by the International Committee of the Red Cross,[88] the Commission has suggested that applicable international law should not be considered to provide for any entitlement on the part of detained combatants to be informed of the reasons for their detention, to challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel.[89]

Finally, the Inter-American Commission has recognized that there may be circumstances, for example where the continued existence of active hostilities becomes uncertain or where a belligerent occupation continues over a prolonged period of time, in which the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum human rights standards of detainees. In such circumstances, the Commission has indicated that in its view

> the paramount consideration must at all times remain the effective protection pursuant to the rule of law of the fundamental rights of detainees, including the right to liberty and the right to humane treatment. Accordingly, where detainees find themselves in uncertain or protracted situations of armed conflict or occupation, the Commission considers that the supervisory mechanisms as well as judicial guarantees under international human rights law and domestic law, including *habeas corpus* and amparo remedies, may necessarily supercede international humanitarian law where this is necessary to safeguard the fundamental rights of those detainees.[90]

Arguments of the Commission

The detention of the unnamed individuals at the Citadel without effective access to courts for the protection of their fundamental rights clearly violates Belor's obligations under both the American Convention and applicable international humanitarian law. As Belor has not lawfully suspended Article 7 or 25 of the Convention in accordance with the terms of Article 27 of the same treaty, it must guarantee all of the protections on the Article to the detainees at the Citadel. These include, most fundamentally, the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to be tried within a reasonable time or to be released, and the entitlement to recourse before a competent court in order that the court many decide without delay on the lawfulness of the arrest or detention and order the person's release if the arrest or detention is unlawful.

[87] IACHR Report on Terrorism and Human Rights, para. 347.

[88] *See* Article 3 common to the 1949 Geneva Conventions; Third Geneva Convention, Article 9.

[89] IACHR Report on Terrorism and Human Rights, para. 142.

[90] IACHR Report on Terrorism and Human Rights, para. 146, citing, *inter alia*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 Am. J. Int'l L. 238, 266 (1996).

In the present case, the grounds and procedures for the detention of the individuals at the Citadel are not clear, and they have not been informed of the reasons for their detention or brought promptly before a judge or other competent court to have the legality of their detentions determined. Rather, they have now been held for almost 4 years with no judicial determination of the legality of their detentions and with no effective judicial supervisions of the protection of their other non-derogable rights.

To the extent that the State may argue that the apprehension and detention of the detainees is justified under the law of armed conflict, both the Inter-American Court and Commission have acknowledged that relevant provisions of conventional and customary international humanitarian law may be taken into consideration as elements for the interpretation of the American Convention. However, in the present case, the imprisonment of the Citadel detainees also fails to satisfy applicable rules under international humanitarian law. In particular, there is evidence, in the form of statements made by 5 detainees who have been released from the Citadel, indicating that some of the detainees did not take part in the fighting at Venzaar but were abducted by mistake during Belor's military operations. This in turn raises doubts as to the legal status of the individuals detained at the Citadel. In this regard, international humanitarian law applicable in both international and non-international armed conflicts place restrictions of the ability of a state to detain civilians or other persons who have not actively taken part in hostilities, by permitting their detention only in exceptional circumstances and requiring that the detainees have access to a procedure to appeal and regularly review any continuation of their detention.[91] In addition, by the State's own admission, the detainees include women and children, to whom special protections under international humanitarian law may apply. Therefore, it is crucial for the detainees to be given access to a competent court to determine their legal status and, correspondingly, the rights to which they are entitled, including their right to liberty.

In the present case, the State has not, to public knowledge, taken any measures to have a court determine the legal status of each of the detainees, nor have the detainees been given access to a judge or other official authorized by law to exercise judicial power to challenge their detentions. The actions of the State are therefore patently contrary to fundamental protections for the right to liberty under both international human rights law and international humanitarian law, and the unnamed detainees have been the victims of serious violations of Article 7 of the Convention.

Arguments of the State

The apprehension and continued detention of the unnamed individuals at the Citadel are patently justified under Belor's international obligations and, moreover, are necessary measures in order to fulfill Belor's commitments under international anti-terrorism treaties.

It is clear from the facts that the detainees at the Citadel were captured in the course of an armed conflict between Belor and a terrorist group known as the Scorpions, which claimed responsibility for one of the worst terrorist attacks in New Atrian history, causing the deaths of three Ambassadors and 317 other civilians. As individuals captured in the course of an armed conflict, long-established rules of international law permitted Belor to seize the combatants on the battlefield and to detain them for the duration of hostilities, and as a consequence neither their apprehension nor their detention is arbitrary within the meaning of Article 7 of the Convention.[92]

[91] See Coard *et al.* (United States), Case 10.951, Report Nº 109/99, Annual Report of the IACHR 1999, paras. 52, 53, 54. *See also* Additional Protocol I, Article 75(3).

[92] See ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (ICRC, Jean S. Pictet, ed., 1960), at 178. See also IACHR Report on Terrorism and Human Rights, para. 142-143.

Further, the armed conflict between Belor an the Scorpions is non-international in nature and therefore that the review of status provisions under Article 5 of the Third Geneva Convention do not apply. Even in the event that the conflict was considered international in nature, it is clear that the Scorpions fail to satisfy the requirements of Article 4 of the Third Geneva Convention, are unprivileged combatants, and are therefore not entitled to have their status determined by competent tribunals under Article 5 of the Third Geneva Convention in any event.

Finally, it is also evident that Belor has ensured that the detention of the unnamed individuals at the Citadel is properly supervised. The ICRC has been given access to the detainees and Belor has been cooperating with the Red Cross to ensure that applicable norms of international humanitarian law are respected. Further, the detainees were given access to the domestic courts in Belor through a habeas corpus petition brought by Rights International, and the release of the 5 detainees on August 13, 2001 illustrates that Beloran authorities at the Citadel are actively reviewing the circumstances of the detainees and are prepared to release them if they are no longer considered to constitute security risks.

2. Right to Humane Treatment

Pertinent facts

Belor indicated that the detainees in the Citadel included both men and women between the ages of 16 and 63.[93]

According to the five detainees released by Belor on August 13, 2001, detainees at the Citadel have been interrogated by members of Belor's armed forces. The interrogators are said to have started with offering incentives, such as access to books or particular foods, for favorable information. Where these methods were not successful, more coercive techniques were used. These are alleged to have included forcing detainees to stand for two, four or eight hour intervals, which could be followed by 48 or 72 hours of sleep deprivation.[94]

The released detainees also indicated that they never witnessed any prisoners being physically assaulted by guards or interrogators.[95]

At the end of August 2001, Belor agreed to give the ICRC access to the detainees at the Citadel. In accordance with its standard practice, the ICRC has dialogued with the government of Belor about the detentions but has maintained the confidentiality of the information that it has gathered.[96]

A statement taken during the interrogation of one detainee, Victor Gallagher, identified Ferris Blanco as a potential planner of the Embassy bombings and led to his apprehension at the Gir Temple in Haladonia.[97] In a public statement following Mr. Blanco's capture, Belor's Minister of Defense indicated that in the course of apprehending Mr. Blanco, Belor's armed forces found detailed blueprints of Belor's Parliament Buildings in the Temple's main administration office.[98]

[93] Hypothetical, para. 12.

[94] Hypothetical, para. 15.

[95] Hypothetical, para. 15.

[96] Hypothetical, para. 16.

[97] Hypothetical, para. 20, 21.

[98] Hypothetical, para. 22.

Applicable Law

Article 5 of the American Convention provides for the right to humane treatment as follows:

> Article 5.1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Further, Article 2 of the Inter-American Convention to Prevent and Punish Torture,[99] which Belor ratified in 1986, provides a specific definition of torture as follows:

> For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article.[100]

As with the right to personal liberty, the issues pertaining to the right of the detainees at the Citadel to humane treatment have arisen in the context of an armed conflict and therefore raise the potential application of international humanitarian law. In this regard, the treaty provisions and related customary international law governing both international and non-international armed conflicts provide for essentially equivalent protections for the humane treatment of persons detained in connection with armed conflict. For example, Article 3 Common to the Four 1949 Geneva Conventions provides a general right to humane treatment, applicable in all armed conflicts:

> Article 3
>
> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely,

[99] Inter-American Convention to Prevent and Punish Torture, signed at Cartagena de Indias, Colombia, on December 9, 1985 at the fifteenth regular session of the General Assembly.

[100] The Inter-American Commission has considered that for torture to exist three elements have to be combined: 1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; 2. it must be committed with a purpose (*inter alia* personal punishment or intimidation) or intentionally (i.e. to produce a certain result in the victim); 3. it must be committed by a public official or by a private person acting at the instigation of the former. Case 10.970, Report Nº 5/96, Raquel Martín de Mejía (Peru), Annual Report of the IACHR (1995), at 185.

> without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Articles 4 and 5 of Additional Protocol II to the Geneva Conventions reinforces and supplements the humane treatment guarantees for all persons who do not take a direct part or who have ceased to take part in hostilities and/or whose liberty has been restricted in the context of a non-international armed conflict.

In the context of international armed conflicts, similar proscriptions against torture and other cruel or inhumane treatment can be found in Articles 13 and 14 of the Third Geneva Convention applicable to prisoners of war, Articles 27, 32 and 37 of the Fourth Geneva Convention applicable to civilians, and Articles 11 and 75 of Additional Protocol II, the latter of which is applicable to "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol."

Moreover, these protections under international humanitarian law parallel to a significant extent those enshrined under Article 5 of the American Convention and similar provisions of other international human rights treaties. Indeed, the Inter-American Commission has observed that

> [p]erhaps in no other area is there greater convergence between international human rights law and international humanitarian law than in the standards of humane treatment and respect for human dignity. While governed by distinct instruments, both regimes provide for many of the same minimum and non-derogable requirements dealing with the humane treatment of all persons held under the authority and control of the state.[101]

Therefore, to the extent that both international human rights law and international humanitarian law provide for minimal and non-derogable requirements dealing with the humane treatment of all persons held under the authority and control of the state, the determination of whether Belor may be responsible for violations of Article 5 of the Convention in relation to the treatment of the detainees at the Citadel should not be altered by, but rather should be reinforced by, the application of corresponding norms of international humanitarian law as the *lex specialis.*

It is notable that neither the American Convention nor the Convention to Prevent and

[101] IACHR Report on Terrorism and Human Rights, citing, ICTY, The Prosecutor v. Furundzija, Nº IT-95-17/1-T, Judgment of December 19, 1998 (Trial Chamber II), para. 183, appealed to the ICTY Appeals Chamber, Prosecutor v. Anto Furundžija, Case Nº IT-95-17/1-A, Judgment of July 21, 2000 (ICTY Appeals Chamber).

Punish Torture establish what should be understood by "inhuman or degrading treatment," or how it is to be differentiated from torture. Nevertheless, the jurisprudence of both the Inter-American Court and Commission as well as other international human rights bodies provide some benchmarks for evaluating when particular treatment or practices might constitute torture or other cruel, inhumane or degrading punishment or treatment and therefore contravene the minimum protections of humane treatment under international law. According to the European Court of Human Rights, a treatment must attain a minimum level of severity in order to be considered "inhuman or degrading." The evaluation of this "minimum" level is relative and depends on the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim.[102] Further, the European Court has suggested that the essential criterion to distinguish between torture and other cruel, inhuman or degrading treatment or punishment "primarily results from the intensity of the suffering inflicted".[103] The Inter-American Commission[104] and Court have referred to and relied upon this jurisprudence from the European system in interpreting the protections under Article 5 of the American Convention. The Inter-American Court has held, for example, that the degrading aspect of a treatment is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance,[105] and that the degrading aspect of the treatment can be exacerbated by the vulnerability of a person who is unlawfully detained.[106]

With respect to the issue of methods of interrogation in particular, one of the leading precedents remains the European Court of Human Right's judgment in the case of *Ireland v. UK* case,[107] in which that Court found certain interrogation techniques to constitute inhumane treatment but not torture as prohibited by Article 3 of the European Convention on Human Rights. As described in the Court's judgment, the methods of interrogation included the combined application of five particular techniques, namely:

> (a) wall-standing (forcing the detainees to remain for periods of some hours in a "stress position"); (b) hooding (putting a hood over the detainees' heads and, at least initially, keeping it there all the time except during interrogation); (c) subjection to noise (pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise); (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the detention centre and pending interrogations.[108]

Based in part upon this judgment as well as other international decisions and instruments, including the United Nations Standard Minimum Rules for the Treatment of Prisoners,[109] the Inter-American Commission in its Report on Terrorism and Human Rights

[102] Eur. Court H.R., Ireland v. United Kingdom, Judgment of October 9, 1979, Series A Nº 25, paras. 162-163.

[103] Eur. Court H.R., Ireland v. United Kingdom, Judgment of October 9, 1979, Series A Nº 25, para. 167.

[104] See, e.g., Case 10.832, Report Nº 35/96, Luis Lizardo Cabrera (Dominican Republic), Annual Report of the IACHR 1997, paras. 77, 78.

[105] I/A Court H.R., *Loayza Tamayo* Case, September 19, 1997, Series C Nº 33, at para. 57.

[106] Loayza Tamayo Case, *supra*, citing Eur. Court HR, Ribitsch v. Austria judgment of 4 December 1995, Series A Nº 336, para. 36.

[107] Ireland v. United Kingdom, *supra*.

[108] Ireland vs. United Kingdom, *supra*, para. 96.

[109] UN Standard Minimum Rules for the Treatment of Prisoners, August 30, 1955, First UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex I, E.S.C. res. 663c, 24 UN ESCOR Supp. (Nº 1) at 11, UN Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 UN ESCOR Supp. (Nº 1) at 35, UN Doc E/5988 (1977).

specified that all methods of interrogation that may constitute torture or other cruel, inhuman or degrading treatment are strictly prohibited, and that this could include severe and deliberate mistreatment causing very serious and cruel suffering, such as

- severe beatings
- suspending prisoners in humiliating and painful ways
- rape and sexual aggression
- electric shocks
- suffocation
- burns
- the extraction of fingernails or teeth[110]

The Commission also suggested that more subtle treatments, such as exposure to excessive light or noise, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance, total isolation and sensory deprivation,[111] could possibly constitute torture or other cruel inhumane or degrading punishment or treatment, although each situation must be evaluated on its own facts. Finally, the Commission highlighted the existence under both international human rights law and international humanitarian law for women and children, which must also be taken into account in evaluating a State's compliance with the right to humane treatment.[112]

Arguments of the Commission

Both international human rights and humanitarian law prohibit ill treatment of detainees or prisoners, including the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment. These guarantees are non-derogable under both international human rights law and international humanitarian law and must be respected in all circumstances. Belor, as a party to both the American Convention and the Inter-American Torture Convention as well as the four 1949 Geneva Conventions and the two additional protocols, is obliged to treat detainees and prisoners humanely, whether in times of peace or times of war.

In the present case, authorities at the Citadel have subjected detainees to methods of interrogation that constitute cruel, inhuman or degrading treatment and, possibly in some instances, torture. In particular, the practices of requiring detainees to stand for extended periods of time and depriving detainees of sleep for prolonged extended periods have been among the interrogation techniques considered by international human rights bodies to constitute inhumane treatment. In its seminal judgment in the Ireland v. UK Case, for example, the European Court of Human Rights found a series of practices, including wall-standing for periods of hours and depriving detainees of sleep pending their interrogations, to violate the prohibition against

[110] IACHR Report on Terrorism and Human Rights, para. 211, citing "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, referred to in ICTY, Prosecutor v. Delalic, Case Nº IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras. 298-306.

[111] IACHR Report on Terrorism and Human Rights, paras. 212, 213, citing, inter alia, citing "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Report of the Special Rapporteur, Mr. P. Koo jmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, para. 119; Muteba v. Zaire, (124/1982) Report of the Human Rights Committee, UN Official Records of the General Assembly, 22nd Session, Supplement Nº 40, (1984), Communication Nº 124/1982, Democratic Republic of the Congo, 24/07/84. CCPR/C/22/D/124/1982, para. 10.2; Setelich v. Uruguay, (63/1979) Report of Human Rights Committee, UN Official Records of the General Assembly, 14th Session, Communication Nº 63/1979: Uruguay. 28/10/81 CCPR/C/14/D/63/1979, para. 16.2.

[112] IACHR Report on Terrorism and Human Rights, paras. 169-178, citing, inter alia, UN Convention on the Rights of the Child, Art. 37; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted at Belem do Pará, Brazil on June 9, 1994, at the twenty-fourth regular session of the General Assembly; paras. 194-199, citing Additional Protocol I, Arts. 76, 77; Additional Protocol II, Arts. 4, 5. 212, 213.

inhuman or degrading treatment under Article 3 of the European Convention on Human Rights.[113]

Similarly, in the present case, the combined infliction of forced standing and sleep deprivations should be considered to constitute cruel, inhumane or degrading punishment or treatment under Article 5(2) of the American Convention. Moreover, the Court should not discount the possibility that, in particular cases or instances, the impact of these practices upon individual detainees may reach a level of severity so as to constitute torture, in light of the personal characteristics of the detainee, including his or her age, sex and state of health. The limited information available to the public indicates that the detainees have been held without charge for almost four years, which has likely had a detrimental impact upon other mental health, Further, the State has acknowledged that the detainees at the Citadel include women and men between the ages of 16 and 63 and there is no indication that these prisoners have been spared from the interrogation practices described by the released detainees. In these circumstances, and absent effective access by the detainees to domestic courts to challenge their conditions of detention, the Court should find that Belor is responsible for subjecting unnamed detainees at the Citadel to torture and other cruel, inhuman or degrading punishment or treatment, contrary to Article 5 of the American Convention and its obligations under Articles 1 and 6 of the Inter-American Torture Convention.

Arguments of the State

The Commission has failed to establish that the State is responsible for violating any of its international legal obligations, including Article 5 of the American Convention or Articles 1 or 6 of the Inter-American Torture Convention, in respect of the treatment of the detainees at the Citadel. First, the Petitioners have relied upon statements made by five former detainees, whose impartiality and reliability is questionable at best. While the State released the five detainees on the basis that no longer presented a security threat to Belor, the detainees were nevertheless apprehended in the context of fighting with the Scorpions and their links with that terrorist organization, together with their discontent for having been detained by Belor, constitute compelling reasons for the Court to suspect that they have fabricated or exaggerated their accounts of conditions within the Citadel.

Even in the event that the statements of the released detainees are taken to be accurate, they do not disclose evidence of treatment that would be considered inhuman or degrading under international human rights or humanitarian law, much less torture. The detainees themselves acknowledged that they never witnessed any prisoners being physically assaulted by guards or interrogators. Concerning alleged practices of prolonged standing and sleep deprivation, according to the released prisoners these techniques were only used in exceptional circumstances when the use of positive incentives proved unsuccessful. Further, these two techniques fall far short of the five techniques considered by the European Court of Human Rights in the Ireland v. United Kingdom Case,[114] where additional practices of hooding, subjection to noise and deprivation of food and drink were also used. There is no evidence indicating that methods involving prolonged standing and sleep deprivation, used separately or in combination, result in a degree of fear, anxiety or suffering that would constitute torture or cruel, inhuman or degrading punishment or treatment.

It is also pertinent for the Court to consider the fact that many of the detainees at the Citadel are likely members of the Scorpions, an international terrorist group that has claimed responsibility for one of the worst terrorist attacks in New Atrian history, and that has vowed to perpetrate such attacks in Belor, as evidenced by the explosion of a car bomb at the stock exchange in Haladonia on June 1, 2001. It is therefore crucial for authorities at the Citadel to

[113] Eur. Court H.R., Ireland v. United Kingdom, Judgment of October 9, 1979, Series A Nº 25, paras. 162-163.

[114] Eur. Court H.R., Ireland v. United Kingdom, Judgment of October 9, 1979, Series A Nº 25, paras. 162-163.

obtain evidence from detainees concerning the circumstances of the New Atria Embassy bombing as well as plans for similar attacks in the future. The facts indicate that Belor's interrogation of Citadel detainees has been successful and saved lives. In particular, information gathered from one detainee, Victor Gallagher, led to the capture of a senior member of the Scorpions, Ferris Blanco, and averted a potential terrorist attack on Belor's Parliament, as evidenced by the blueprints found in the Gir Temple when Blanco was apprehended.

Finally, in accordance with longstanding practice under international humanitarian law, Belor has given the ICRC access to the detainees at the Citadel. Accordingly, any potential concerns regarding the conditions or treatment of the detainees can be raised by the ICRC and Belor will take those concerns into consideration. This is the appropriate and adequate mechanism for supervising persons detained in armed conflict situations.

B. Allegations relating to Ferris Blanco

1. Right to liberty, right to humane treatment, and right to judicial protection

Pertinent facts

In the course of interrogating prisoners at the Citadel, Belor obtained a statement from Victor Gallagher, a senior member of the Scorpions captured by the Belor armed forces, who claimed that he had met with an individual named Ferris Blanco in Haladonia one-year prior to the embassy bombings to identify possible Beloran targets of violence. According to Mr. Gallagher, Belor's embassy in New Atria was included on the list of possible targets.[115]

Through the government's records of fingerprints and congregation lists submitted pursuant to the Defense of Freedom Act, Belor's intelligence agency located an individual identified as Ferris Blanco at the Gir Temple, one of the Corpions' main shrines in Haladonia. According to the records, Mr. Blanco was a dual national of Belor and New Atria, a member of the Corpion ethnic and religious group, and the President of the congregation at the Gir Temple.[116]

On October 14, 2001, on the order of Belor's Minister of National Defense, Boris Thompson, members of Belor's armed forces entered the Gir Temple and apprehended Mr. Blanco. According to congregation members who witnessed the event, the soldiers placed a black bag over Mr. Blanco's head and shackled his hands and feet before removing him from the Temple. Mr. Blanco was then taken to a nearby air base, transported by military plane to New Atria, and detained in the Citadel.[117] In a statement issued shortly after Mr. Blanco's apprehension, Minister Thompson indicated, inter alia, that declared that the government had captured one of the master minds behind the New Atria atrocities and that Mr. Blanco, like the other detainees captured during the struggle against the Scorpions, would be brought to justice before the tribunal in New Atria. Minister Thompson also indicated that in the course of apprehending Mr. Blanco at the Gir Temple, the armed forces found detailed blueprints of Belor's Parliament Buildings in the Temple's main administration office.[118]

On December 1, 2001, Belor announced that it considered Mr. Blanco, like the other detainees, to be an unprivileged combatant captured and detained in connection with an ongoing armed conflict with the Scorpions and therefore that his apprehension and detention were

[115] Hypothetical, para. 20.

[116] Hypothetical, para. 21.

[117] Hypothetical, para. 22.

[118] Hypothetical, para. 22.

authorized under applicable international humanitarian law.[119]

Rights International filed a habeas corpus petition with the courts in Belor challenging Mr. Belor's detention, treatment and fair trial rights and requesting, *inter alia*, that he be brought before Belor's domestic courts to determine the legality of his apprehension and detention or be released.[120] The General Court found that it had jurisdiction to entertain Mr. Blanco's petition but deferred to the military's determination that Mr. Blanco was an unprivileged combatant captured in the course of an armed conflict, declined to address the treatment of Mr. Blanco on the ground that these issues were more appropriately dealt with by applicable mechanisms under international humanitarian law, and declined to address the question of the fairness of Mr. Blanco's legal proceedings, on the ground that the claim was premature.[121]

Applicable Law

The pertinent law pertaining to the right to personal liberty, including the right not to be subjected to arbitrary or unlawful arrest, as well as the right to humane treatment, and their application inside and outside of armed conflict situations, are outlined in Parts V(A)(1) and (2) above.

Concerning these allegations in the context of Mr. Blanco's circumstances, it is particularly pertinent to note the case law of the Inter-American system under Article 7 of the Convention, according to which no one may be deprived of liberty except in cases or circumstances expressly provided by law, and that any deprivation of liberty must strictly adhere to the procedures defined thereunder.[122] This includes ensuring against arbitrary arrest and detention by strictly regulating the grounds and procedures for arrest and detention under law. The Inter-American Court has indicated, for example, that unless it is demonstrated that an individual was apprehended *in flagrante delicto*, his or her arrest must be shown to have been effected with a warrant issued by a competent judicial authority.[123]

Also pertinent to the treatment of Mr. Blanco, the Inter-American Commission has suggested, in light of the UN Minimum Standard Rules for the Treatment of Prisoners, that instruments of restraint, such as handcuffs, chains, irons and strait-jacket, should never be applied as a punishment, as they constitute prohibited corporal punishments, and that chains and irons in particular should never be used as restraints.[124]

As in the case of the unnamed detainees at the Citadel, insofar as the circumstances of

[119] Hypothetical, para. 26.

[120] Hypothetical, para. 27.

[121] Hypothetical, para. 28.

[122] *See, e.g.,* IACHR, Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111 doc. 21 rev., 6 April 2001, Chapter VII, para. 37, *citing* Case 11.245, Report Nº 12/96, Jorge Alberto Giménez (Argentina), Annual Report of the IACHR 1995; I/A Court H.R., *Suárez Rosero* Case, Judgment of November 12, 1997, Ser. C Nº 35, para. 43.

[123] I/A Court H.R., *Suárez Rosero* Case, Judgment of November 12, 1997, Ser. C Nº 35, para. 43, para. 44.

[124] IACHR Report on Terrorism and Human Rights, para. 209, citing UN Standard Minimum Rules for the Treatment of Prisoners, August 30, 1955, First UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex I, E.S.C. res. 663c, 24 UN ESCOR Supp. (Nº 1) at 11, UN Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 UN ESCOR Supp. (Nº 1) at 35, UN Doc E/5988 (1977), Rule 33. The Commission also suggested that while international humanitarian law standards do not expressly provide for a similar proh bition, the fact that irons and chains may inflict pain and cause physical damage suggests that even in armed conflict situations, the use of such instruments should be strictly limited to exceptional situations that require such measure, such as the transportation of detainees or the temporary protection of the detainees or their guardians, when there is no alternative restraint available, and only for the period of time requiring such measure.

Mr. Blanco's apprehension and detention are considered to have taken place in the context of an armed conflict, the requirement of judicial protection under the American Convention should be interpreted in light of the applicable *lex specialis* of international humanitarian law.

Arguments of the Commission

The evidence before the Court establishes that the manner in which Ferris Blanco's apprehension was carried out and his subsequent removal to and detention in the Citadel constituted flagrant violations of his right to humane treatment and his right to liberty under Articles 5 and 7 of the American Convention.

First, Mr. Blanco's arrest was not affected pursuant to a warrant issued by a proper court as required under Article 7(2) of the Convention and there was no compelling evidence that he was captured *in flagrante delito.* Further, he was not informed of the reasons for his detention or promptly notified of the charge or charges against him, contrary to Article 7(4) of the Convention, and he was not promptly brought before a judge or other officer authorized by law to exercise judicial power, nor was he provided recourse to a competent court to challenge the lawfulness of his arrest, in violation of Articles 7(5) and (6) of the Convention. Rather, he was unlawfully removed from his country of nationality and detained in a military facility with no effective access to domestic resources in his state, contrary to the right to judicial protection under Article 25 of the Convention.

The State is also responsible for violating Mr. Blanco's right to humane treatment because of the manner in which his abduction was carried out. In particular, a black bag was placed over Mr. Blanco's head and his hands and feet were shackled before he was removed from the Temple. Pertinent international instruments have acknowledged that the use of restraints against prisoners should be exceptional. Article 33 and 34 of the UN Standard Minimum Rules for the Treatment of Prisoners, for example provides as follows:

> 33. Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances: (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority; (b) On medical grounds by direction of the medical officer; (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.
>
> 34. The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.[125]

There is no evidence in the circumstances of the present case indicating that the use of shackles on Mr. Blanco was necessary, nor was there any apparent justification in placing a black bag upon his head. Not only did this constitute inhuman treatment, but it severely humiliated Mr. Blanco in front of his congregation members, in violation of his right to have his physical, mental and moral integrity respected and not to be subjected to cruel, inhuman or degrading punishment or treatment.

Finally, Belor is responsible for violating Mr. Blanco's right to judicial protection under Article 25 of the Convention, by failing to provide him with simple and prompt recourse to a competent court or tribunal for the protection against acts that violated his fundamental rights

[125] UN Standard Minimum Rules for the Treatment of Prisoners, *supra*, Articles 33, 34.

under Belor's Constitution and the American Convention. Mr. Blanco was denied access to any court or tribunal for over 1 ½ months following his apprehension. Further, although Rights International brought a habeas corpus petition on his behalf on December 1,2001, the General Court of Belor simply deferred to the military's determination that Mr. Blanco was an unprivileged combatant and therefore that his detention was authorized under the laws of war and would more be more appropriately supervised by mechanisms under international humanitarian law. This cannot be considered either prompt or effective access to judicial protection within the terms of Article 25 of the Convention, and according Belor has also failed to respect this provision in respect of Mr. Blanco.

The State may argue that its conduct is justified under international humanitarian law. However, unlike the unnamed detainees at the Citadel, Mr. Blanco was not apprehended in the course of the fighting in Venzaar, New Atria, but rather was abducted in Belor four months after the fighting in Venzaar ended. The only evidence linking Mr. Blanco to the New Atria Embassy bombing is a statement taken from a detainee at the Citadel that many have been obtain under methods of interrogation that constitute torture or other cruel, inhuman or degrading treatment or punishment. Accordingly, the Court should not consider the application of international humanitarian law in interpreting and applying the requirements of Articles 5, 7 and 25 of the Convention to Mr. Blanco. In any event, the Commission has previously suggested that the shackling of prisoners in the context of an armed conflict should be subjected to restrictions similar to those under international human rights law, and accordingly Mr. Blanco's treatment during his apprehension should be considered contrary to norms of humane treatment applicable at all times, including during armed conflicts.[126]

Arguments of the State

As in the case of the unnamed detainees at the Citadel, the capture and imprisonment of Ferris Blanco was authorized under international humanitarian law and therefore did not constitute an arbitrary arrest or detention under Article 7 of the American Convention. While Mr. Blanco was not apprehended specifically in the course of the armed altercation in the neighborhood of Venzaar in New Atria, he was captured within the broader context of the armed conflict between the Republic of Belor and New Atria and the Scorpions. This armed conflict began with the armed attack against Belor's embassy in New Atria and has continued to the present, as sporadic fighting with the Scorpions has continued in the New Atrian province of Roveen. As the President of Belor declared in her televised speech on June 2, 2001, this conflict will continue until the terrorist group known as the Scorpions has been subdued and eradicated and they no longer present a threat to the security of Belor and its people.

Further, the State has compelling evidence of Ferris Blanco's participation as a combatant in the Embassy bombings and possibly other armed attacks against Belor and its allies. Victor Gallagher, a senior member of the Scorpions captured by Belor, informed officials at the Citadel that he understood that Mr. Blanco had planned many of the attacks perpetrated by the Scorpions and was the source of significant financial contributions for the group, and further, than he had met with Mr. Blanco in Haladonia one-year prior to the embassy bombings to identify possible Beloran targets of violence and that Belor's embassy in New Atria was on the possible list of targets. Moreover, when Mr. Blanco was ultimately apprehended at the Gir Temple, where he served as President of the congregation, detailed blueprints of Belor's Parliament Buildings were found in the Temple's main administration office, thereby confirming and amplifying the ongoing threat that Mr. Blanco poses to Belor's security. The fact that Mr. Blanco has since been charged with war crimes, crimes against humanity and terrorism reinforces the State's position that it has been appropriate and necessary to apprehend and detain Mr. Blanco.

[126] IACHR Report on Terrorism and Human Rights, para. 209.

In this context, Ferris Blanco should not only be considered to be a member of an armed group with which Belor is at war and to have actively taken part in hostilities against Belor, but he is a senior member of the Scorpions responsible for masterminding the devastating attacks against the embassies on June 1, 2001. Accordingly, Belor was entitled under the law of armed conflict to apprehend Mr. Blanco and to detain him as an unprivileged combatant at the Citadel. While Belor had no obligation under international humanitarian law to bring Mr. Blanco before a court to determine the lawfulness of his arrest and detention, it is notable that a *habeas* petition was nevertheless pursued on Mr. Blanco's behalf before the General Court in Belor, in which that Court found that it had jurisdiction to consider the mater, but deferred to the military's determination that he was an unprivileged combatant captured in the course of an armed conflict and that his detention was authorized under the laws of war. While the Commission may disagree with this finding, it has failed to establish before the Inter-American Court that this determination contravenes any provisions of the American Convention.

With regard to Mr. Blanco's treatment during his apprehension, it is the State's position that rules governing the treatment of prisoners, such as the UN Standard Minimum Rules for the Treatment of Prisoners, were designed for peacetime and should not be applied to the treatment of prisoners in times of war. Further, there are no rules under international humanitarian law prohibiting the hooding or shackling of combatants when they are apprehended. In the present case these precautions were justified, in light of Mr. Blanco's senior position in the Scorpions and the possibility that he may have been freed with the assistance of other congregation members at the Gir Temple or by other clandestine Scorpions members who might identify him en route to the air base.

Finally, with respect to the issue of judicial protection, as in the case of the other unnamed detainees, the supervision of Mr. Blanco's detention should be considered to be governed by international humanitarian law as the applicable *lex specialis*, and Article 25 of the American Convention should be interpreted and applied to Mr. Blanco in this context. As an unprivileged combatant captured in the course of a non-international armed conflict, Mr. Belor is not entitled to the specific review procedures prescribed under the Third and Fourth Geneva Conventions. At the same time, in accordance with longstanding practice under international humanitarian law, Belor has given the ICRC access to the detainees at the Citadel. Accordingly, any potential concerns regarding the conditions or treatment of the detainees can be raised by the ICRC and Belor will take those concerns into consideration. This is an appropriate and adequate mechanism for supervising persons detained in armed conflict situations. Moreover, although it was not required under applicable international law, Mr. Blanco was nevertheless provided with effective access to the General Court of Belor shortly after his detention to challenge all aspects of his detention and treatment through his habeas corpus petition.

2. Right to a Fair Trial

Pertinent facts

In addition to the facts set out in Part V(B)(1) above, the following facts are pertinent to the protection of Mr. Blanco's fair trial protections.

During the interrogation of a senior member of the Scorpions, Belor The State obtained information during an interrogation of a senior member of the Scorpions that Mr. Blanco may be the source of significant financial contributions for the Scorpions and that he may have planned many of the attacks perpetrated by the Scorpions, including the attack on the New Atria Embassies.[127]

[127] Hypothetical, para. 20.

On May 6, 2004, after Mr. Blanco had been in detention for 30 months, Belor informed the Commission that the special tribunal in New Atria had charged Mr. Blanco with war crimes, crimes against humanity and terrorism in connection with his alleged role in the embassy bombings, that the prosecution would be seeking the death penalty, the Mr. Blanco had been provided with access to a military defense attorney in accordance with the tribunal's regulations, and his trial would commence in July 2005.[128]

The special tribunal was established by an order of Belor's Cabinet of Ministers and had the following characteristics:[129]

- The tribunal is competent to prosecute war crimes, crimes against humanity, and terrorism as defined under the terms of the order
- Prosecutions would be held before three retired judges from Belor's High Court
- Detainees would be given military defense lawyers assigned by Belor's Minister of National Defense, but cannot retain private attorneys[130]
- The maximum punishment would be the death penalty
- A defendant could appeal his conviction and sentence to Belor's High Court
- The Order included provisions governing the production of testimonial and documentary evidence, the conditions under which the proceedings could be closed to the public, and the protection of state secrets and other privileged information

In the response to request for clarification number 4, teams were instructed not to address violations of Articles 4(2) or (5) of the Convention concerning the extension or reestablishment of the death penalty, as the Commission had not considered or determined violations of these provisions.

Applicable Law

Article 8 of the American Convention provides for the right to a fair trial, which includes, inter alia, the right to a hearing by a competent, independent, and impartial tribunal, previously established by law, the right to adequate time and means for the preparation of his defense and 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. Further, Article 9 of the American Convention specifically provides for the right to freedom from ex post facto laws, including the proscription that "[n]o 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."

Pertinent provisions of international humanitarian law treaties, including Article 75(4) of Additional Protocol I and Article 6 of Additional Protocol II.[131] provide for essentially parallel fair

[128] Hypothetical, para. 33; Response to clarification request number 8.

[129] Hypothetical, paras. 13, 14.

[130] Response to clarification request number 31.

[131] See, e.g., Additional Protocol II, Article 6(1) "This Article applies to the prosecution and punishment of criminal offences related to the armed conflict. (2) **No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality**. In particular: (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him **and shall afford the accused before and during his trial all necessary rights and means of defence**; (b) No one shall be convicted of an offence except on the basis of individual penal responsibility; (c) **No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed;** nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall

trial protections in the context of international and non-international armed conflicts, and indeed were drawn largely from human rights law.[132]

As the Inter-American Commission and other international authorities have observed, this in turn makes clear that most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law.[133] These protections therefore must be guaranteed in the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict.

Of particular pertinence to the circumstances of Ferris Blanco's criminal proceedings, these fundamental fair trial protections have been held within the Inter-American system to include the following:

> (a) guarantee of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege* principles), requiring that any laws that purport to proscribe conduct be classified and described in precise and unambiguous language that narrowly defines the punishable offense, and accordingly require a clear definition of the criminalized conduct establishing its elements and the factors that distinguish it from behaviors that are not punishable or involve distinct forms of punishment.
>
> In this regard, the Commission and the Court have previously found certain domestic anti-terrorism laws, such as those previously prescribed in Peru, to violate the principle of legality because they have attempted to prescribe a comprehensive definition of terrorism that is inexorably overbroad and imprecise;[134]
>
> (b) the right not to be subjected to ex post facto laws, as provided for in Article 9 of the American Convention. It is notable in this respect, however, Article 15(2) of the ICCPR concerning the corresponding right under the Covenant provides that "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations";
>
> (c) The right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards. In respect of the prosecution of civilians, this requires trial by regularly constituted courts that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training. While the UN Human

benefit thereby; (d) Anyone charged with an offence is presumed innocent until proved guilty according to law; (e) Anyone charged with an offence shall have the right to be tried in his presence; (f) No one shall be compelled to testify against himself or to confess guilt. (3) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. (4) The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. (5) At the end of hostilities, the authorities in power shall endeavour to grant the broadest poss ble amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." [emphasis added]

[132] *See, e.g.*, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (ICRC, 1987), at 879, 1397.

[133] See IACHR, Report on Terrorism and Human Rights, para. 261; Goldman Report, para. 44.

[134] See IACHR Report on Peru (2000), OEA/Ser.L/V/II.106, Doc. 59 rev., 2, June 2000, paras. 80, 168; I/A Court H.R., Castillo Petruzzi, Judgment of May 30, 1999, Sr. C No. 52, para. 121.

Rights Committee have suggested that the trial of civilians by military tribunals might in some circumstances be permissible,[135] the Inter-American Commission and Court have been more categorical in determining that such trials almost inevitably violate the fair trial requirements under Article 8 of the American Convention;[136]

(d) The right to due procedural guarantees, including the rights of an accused to defend himself or herself personally and to have adequate time and means to prepare his or her defense, which necessarily includes the right to be assisted by legal counsel of his or her choosing or, in the case of indigent defendants the right to legal counsel free of charge where such assistance is necessary for a fair hearing;[137]

(e) Particularly strict adherence to due process guarantees where the possible punishment for an offense includes the death penalty.[138]

Belor is also a party to several additional treaties that are potentially relevant to its efforts to prosecute the crimes alleged against Mr. Blanco. These include the Convention on the Prosecution and Punishment of Crimes against Internationally Protected Persons and International Convention for the Suppression of Terrorist Bombings, both of which are listed under Article 2 of the Inter-American Convention against Terrorism defining the "offenses" that are the subject of provisions under that Convention. In particular, Article 3 of the Inter-American Convention Against Terrorism provides that "[e]ach state party, in accordance with the provisions of its constitution, shall endeavor to become a party to the international instruments listed in Article 2 to which it is not yet a party and to adopt the necessary measures to effectively implement such instruments, including establishing, in its domestic legislation, penalties for the offenses described therein."

Further, Article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons defines "internationally protected person" as including "any representative or official of a State […] who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household", Article 2 of the Convention defines offenses for the purposes of the treaty as including "[t]he intentional commission of: a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;" and Article 3 requires states parties to take jurisdiction over crimes defined under Article 2 in the following terms:

Article 3

[135] *See, e.g.,* UNHRC, Fals Borda v. Colombia, Comm. Nº 46/1979, 27 July 1982; Eur. Court H.R., Case of Incal v. Turkey, 8 June 1998, Reports 1998-IV, para. 70.

[136] *See, e.g.,* IACHR, Report on the Situation of Human Rights in Chile, Doc. OEA/Ser.L/V/II.34, 25 October 1974; IACHR, Report on the Situation of Human Rights in Uruguay, Doc. OEA/Ser.L/V/II.43, 31 January 1978; Castillo Petruzzi *et al.* Case, *supra*, para. 129, citing Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Conference on the Prevention of Crime and Treatment of Offenders, held in Milan, August 26 to September 6, 1985, and confirmed by the UN General Assembly in it resolutions 40/32 of 29 November 1985 and 40.146 of 13 December 1985, Principle 4.

[137] *See* Castillo Petruzzi *et al.* Case, *supra* para. 139, citing UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (1990) Principle 8.

[138] I/A Court H.R., Advisory Opinion OC-3/83, 8 September 1983, "Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights)," Series A, para.. 55.

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:
    a. when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
    b. when the alleged offender is a national of that State;
    c. when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Similarly, Article 2 of the International Convention for the Suppression of Terrorist Bombings defines offenses as follows:

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
    a. With the intent to cause death or serious bodily injury; or
    b. With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
3. Any person also commits an offence if that person:
    a. Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
    b. Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
    c. In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned

Further, Article 4 of the Convention requires states parties to "adopt such measures as may be necessary: a. to establish as criminal offences under its domestic law the offences set forth in article 2 of this Convention; b. To make those offences punishable by appropriate penalties which take into account the grave nature of those offences."

It is also pertinent, however, that Article 15 of the Inter-American Convention against Terrorism requires that all of the measures carried out by the states parties under the Convention, presumably including those under Article 2, must accord with the state's human rights and other international commitments, in the following terms:

1. The measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.

2. Nothing in this Convention shall be interpreted as affecting other rights and obligations of states and individuals under international law, in particular the Charter

> of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.
>
> 3. Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including the enjoyment of all rights and guarantees in conformity with the law of the state in the territory of which that person is present and applicable provisions of international law.[139]

Consequently, while Belor might rely upon the provisions of other anti-terrorism treaties to justify the measures taken by it to prosecute Mr. Blanco for terrorist crimes that potentially fall under the terms of the Convention on the Prosecution and Punishment of Crimes against internationally Protected Persons and International Convention for the Suppression of Terrorist Bombings, Belor also remains bound by its human rights obligations, including those governing the right to due process and to a fair trial under the American Convention, in respect of the manner in which those offenses are prosecuted.

Arguments of the Commission

The criminal investigation and subsequent prosecution of Mr. Blanco failed to satisfy the fair trial standards under Article 8 of the Convention, as the investigation was undermined at various stages by other human rights violations and because the manner in which Mr. Blanco is proposed to be tried fails to satisfy the requirements of the Inter-American system.

First, Mr. Blanco was the victim of violations from the moment authorities began investigating him. His arrest was based upon information that may have been gathered in violation of fundamental rights, including the potential torture of a detainee Victor Gallagher at the Citadel, and Mr. Blanco himself was the victim of inhuman treatment at the time of his arrest. Further, as argued in the next section, the authorities located Mr. Blanco based upon personal information, namely congregation lists and registration information, that was gathered in violation of Mr. Blanco's right to privacy and non-discrimination. These violations should be considered to deprive Mr. Blanco's arrest any subsequent legal proceedings of their legitimacy.

In addition, the means by which Belor proposes to try Mr. Blanco fail to comply with the standards prescribed under the Convention. The tribunal itself and its procedures are not fair, as the tribunal was not established through regular laws passed by a democratically-elected legislature but through an Order issued by Belor's executive branch.[140] Further, Mr. Blanco is not entitled to independent counsel of his own choice, but rather is represented by lawyers falling under the command and control of Belor's military.

The crimes for which Mr. Blanco will be tried are also fundamentally flawed, as they were prescribed in legislation enacted after the New Atria Embassy bombings occurred and therefore do not respect Mr. Blanco's right to freedom from ex post facto laws. Further, the crime of

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[139] Article 9 of the Convention on the Prosecution and Punishment of Crimes against internationally Protected Persons similarly provides that "Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings", and Article 14 of the International Convention for the Suppression of Terrorist Bombings requires that "[a]ny person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights."

[140] See common Article 3 (prohbiting the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples).

"terrorism", as prescribed under the law, is vague and overbroad and therefore violates the principle of legality. Indeed, the law is very similar to one prescribed in Peru, which was found by the Commission and the Court to contravene Article 9 of the Convention.[141]

Arguments of the State

The procedures by which Mr. Blanco has been investigated and prosecuted for his role in the tragic embassy bombings satisfy the fair trial requirements under both international human rights and humanitarian law. As argued previously, the means by which Mr. Blanco was apprehended by Belor were fully in accordance with applicable international humanitarian law and were required by the exceptional nature of the situation, involving as it did a senior member of a dangerous international terrorist organization. The State notes in this respect that the treaties by which Belor is bound, including the Convention on the Prosecution and Punishment of Crimes against internationally Protected Persons and International Convention for the Suppression of Terrorist Bombings, require Belor to investigate, prosecute and punish the crimes prescribed under those treaties. Accordingly, when Belor received information of Mr. Blanco's potential involvement in the embassy bombings, it was required under its international legal obligations to take the actions that it did.

Further, as Mr. Blanco should be considered an unprivileged combatant owing to his role in the embassy bombings, it is open to Belor to try him by military tribunal if it so chooses.[142] In any event, according to pertinent precedents, including the views of the UN Human Rights Committee, it is permissible to use special tribunals to try civilians, provided that the minimum requirements of due process are guaranteed.[143] Such guarantees are fully provided by the special tribunal in the present case. The tribunal is comprised of civilian judges and Mr. Blanco is provided with the assistance of a fully qualified military attorney who is as capable as a civilian attorney to provide effective legal representation, and indeed who can provide exceptional support by, for example, having access to classified material by virtue of their security clearance to ensure the principle of equality of arms.. Further, Mr. Blanco has a full right of appeal to the High Court of Belor.

With regard to the Commission's arguments regarding the application of *ex post facto law*, Article 15(2) of the ICCPR expressly acknowledges that the principle does not apply to an "act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations," which should be considered to include war crimes and crimes against humanity. Further, the terrorism-related crimes for which Mr. Blanco has been indicated should be considered as falling under the same exception, to the extent that the crimes existed under treaties ratified by Belor years ago and prior to the events for which Mr. Blanco has been charged.

Finally, the crime of terrorism as defined in the in Order is sufficiently clear to satisfy the principle of legality, as the physical and mental elements of the crime are discernable.

C. Allegations concerning the members of the Gir Temple

1. Right to freedom of assembly, right to freedom of association, and right to freedom of conscience and religion

[141] See, e.g., IACHR Report on Peru (2000), OEA/Ser.L/V/II.106, Doc. 59 rev., 2, June 2000, paras. 80, 168.

[142] *See, e.g.,* I/A Court H.R., *Las Palmeras* Case, Judgment of December 6, 2001, Ser. C Nº 90, paras. 51-53 (finding that military courts can in principle constitute an independent and impartial tribunal for the purposes of trying members of the military for certain crimes truly related to military service and discipline and that, by their nature, harm the juridical interests of the military, provided that they do so with full respect for judicial guarantees).

[143] *See, e.g.,* UNHRC, Fals Borda v. Colombia, Comm. Nº 46/1979, 27 July 1982.

Pertinent facts

Sections 13 of the Defense of Freedom Act required members of the Gir Temple, as nationals of New Atria, a country listed in Schedule I to the Act, to provide records of fingerprint and photographic identification to the Department of Security and Immigration, as well as their ethnic and religious affiliation, addresses and, where applicable, employment in Belor.[144]

Further, Section 14 of the Defense of Freedom Act required the Gir Temple itself, as a religious establishment listed in Schedule III to the Act, to provide the Department of Security and Immigration with the names and addresses of all leaders, administrators and congregation members as well as its financial records for the previous five years.[145]

On October 1, 2001 the General Court granted an order pursuant to Section 32 of the Defense of Freedom Act permitting government authorities to monitor the financial accounts and transactions of all congregation members at the Gir Temple for a period of six months, as well as an order freezing the assets of the Temple itself pending an investigation into possible connections with the Scorpions and other terrorist groups.[146]

According to Section 32 of the Defense of Freedom Act, when an application is made to the General Court under that section, the Court "shall grant the order requested upon the presentation of a certificate by the Minister of Finance verifying the grounds upon which the order is requested."[147] No appeal is provided for from an order issued pursuant to Article 32.[148]

Shortly after the Orders were issued by the General Court, administrators at the Gir Temple announced that because of the lack of access to its bank accounts, the Temple would be forced to close. While some congregation members were able to attend another Corpion temple located on the opposite side of the city, other members were unable to commute because of their age or lack of available transportation and were therefore left without a sacred place to worship.[149]

Under section 4 of the Constitution of Belor, the exercise of the rights under subsections 3(b)-(j) of the Constitution, including the freedom of conscience and religious belief and observance and freedom of association and assembly, "shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals of the rights and freedoms of others."[150]

Applicable Law

The rights to freedom of freedom of assembly and association and freedom of conscience and religion are protected under Articles 12, 15 and 16 of the American Convention in the following terms:

[144] Hypothetical, para. 18.

[145] Hypothetical, para. 18.

[146] Hypothetical, para. 23.

[147] Hypothetical, para. 18.

[148] Response to request for clarification number 3.

[149] Hypothetical, para. 23.

[150] Response to request for clarification number 5.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. 3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. 3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

The rights and freedoms protected under these provisions are similar, in that they encompass a collective aspect involving the ability of persons to enjoy the right in association with others. Further, the rights have been identified as being among the foundations of a democratic society,[151] and their protection not only prohibits states from interfering arbitrarily with their exercise as between persons, but may require states to take positive measures to secure the ability of individuals to enjoy the right.[152] With respect to the right to freedom of conscience and religion in particular, the Inter-American Court has identified this right as one of the foundations of a democratic society and that "[i]n its religious dimension, it constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life."[153]

These rights are also similar in that they may be made the subject of limitations or restrictions by states in like terms, namely where necessary or in the interest of "national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others." Article 30 of the American Convention is also pertinent in this respect, in that it provides

[151] See, e.g., Rassemblement jurassien v. Switzerland, Application No. 8191/78 (10 October 1979) Decisions and Reports 17, p. 119, paras. 3 (stating that the right of peaceable assembly "is a fundamental right in a democratic society and, l ke the right to freedom of expression, is one of the foundations of such a society").

[152] See, e.g. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY (1993), at p. 370 (noting that "the democratic function of freedom of assembly means that States are under a stronger duty to ensure the right with positive measures that with civil rights, which are exclusively exercise for private interests."). See similarly *See, e.g.,* Eur. Court H.R., Plattform "Ärzte für das Leben" v. Austria, June 21, 1988, Series A Nº 139, at 12, para. 32 (holding that the right to freedom of assembly and of association may require a state to take positive measures, for example to protect participants in a demonstration from physical violence by individuals who may hold opposite views).

[153] I/A Court H.R., Olmedo Bustos *et. al* Case ("Last Temptation of Christ"), Judgment of February 5, 2001, Series C Nº 73, para. 79.

that "restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purposes for which such restrictions have been established."

It has been held within the Inter-American human rights system that several conditions must be satisfied in order for restrictions or limitations to be permissible, namely that any action that affects rights must be prescribed by law passed by democratically elected and constitutional legitimate bodies and in compliance with the internal legal order and cannot be subject to the discretion of a government or its officials,[154] that any restrictions must be necessary for the security of all and in accordance with the just demands of a democratic society, and that their application be proportionate and closely tailored to the legitimate objective necessitating them.[155]

In its Advisory Opinion OC-5-85[156] and other decisions,[157] the Inter-American Court indicated that both public order and general welfare may properly be considered in evaluating limitations upon rights of the above nature, but that when these concepts are invoked as grounds for limiting human rights, they must be subjected to an interpretation that is strictly limited to the just demands of a democratic society, which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.[158] Further, according to the Court, "public order" refers to "the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles", while the concept of "general welfare" within the framework of the American Convention refers to the "conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values."[159]

In the context of the right to freedom of association in particular, the Inter-American Court has previously made clear that the onus lies on the state to prove that restrictions on this right are permissible, which includes showing that the measures adopted by the state were necessary to safeguard the public order in the context of the events at issue and that they maintained a relationship to the principle of proportionality.[160]

With regard to the protection of the rights to freedom of freedom of assembly and association and freedom of conscience and religion in the context of anti-terrorism initiatives, the Inter-American Commission has emphasized that measures to prevent and punish terrorism must be carefully tailored to recognize and guarantee due respect for these rights. In the Commission's view, this would generally prohibit states from, for example, banning participation in certain groups, absent evidence that clearly raised a threat to public safety or security sufficient to justify an extreme measure of this nature.[161] Also according to the Commission

[154] Case 10.506, Report Nº 38/96, X & Y (Argentina), Annual Report of the IACHR 1996, paras. 61, 62.

[155] X & Y Case, *supra*, para. 71.

[156] I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), November 13, 1985, Ser. A Nº 5.

[157] *See, e.g.*, I/A Court H.R., Advisory Opinion OC-6/86, The Word "Laws" in Article 30 of the American Convention in Human Rights, May 9, 1986, Series A Nº 6, paras. 35, 37.

[158] *See*, *e.g.*, Advisory Opinion OC-5/85, *supra*, para. 67.

[159] *See, e.g.,* Advisory Opinion OC-5/85, *supra*, paras. 64-66.

[160] *See, e.g.,* I/A Court H.R., Baena Ricardo Case, Judgment of February 2, 2001, Ser. C No. 72 (2001), paras. 64-66.

[161] IACHR Report on Terrorism and Human Rights, para. 363.

> [t]hese protections similarly require states to ensure that laws or methods of investigation and prosecution are not purposefully designed or implemented in a way that distinguishes to their detriment members of a group based upon a prohibited ground of discrimination, such as religious beliefs, and to guarantee that methods of this nature are closely monitored and controlled to ensure against human rights infringements.[162]

Further the Commission has warned against the possibility that interference by the state and its institutions with the exercise by persons of their rights to freedom of assembly, association and conscience and religion, and its failure to protect against such interference by non-state actors, may give rise to a chilling effect by which individuals are discouraged from expressing or otherwise exercising their rights in these areas.[163]

Arguments of the Commission

It is clear that the State, through its extreme actions in relation to the Gir Temple and its members, limited the free exercise of the rights of the members of the Gir Temple to freedom of assembly, association and conscience and religion. Most seriously, the actions of the State in freezing the assets of the Gir Temple pursuant to an order obtained under section 32 of the Defense of Freedom Act were directly responsible for the closure of the Temple, which in turn left the members of the congregation with no proper venue within which to freely exercise their common religion as well as their right to assemble and associate. While other Corpion Temples are located in the city, some members of the Temple were unable to commute because of their age or lack of transportation and were therefore left without a sacred place to worship.

Moreover, the actions of the State in imposing reporting requirements on the congregation and its members through sections 13 and 14 of the Defense of Freedom Act can be considered to have had a "chilling effect" upon the exercise of the rights under these provisions, by suppressing the willingness of present and potential members of the Gir Temple, and New Atrians of Corpion faith residing in Belor more generally, to freely and openly meet and practice their religion.[164] This chilling effect would have been amplified by the brutal manner in which the State apprehended Ferris Blanco, as the President of the congregation at the Temple, in the presence of all of the congregation members. These acts would have been interpreted as implying that the same thing might happen to other congregation members whose detailed personal information was in the government's possession.

Although the rights to freedom of assembly, association and conscience and religion can be made the subject of limitations under Articles 12, 15 and 16 of the American Convention, in the present circumstances the limitations imposed by the government fail to comply with the requirements governing permissible restrictions under those provisions together with the terms of Article 30 of the Convention.

In particular, the provisions of Article 32 of the Defense of Freedom Act and the manner in which they were applied to the Gir Temple and its members have not been justified as necessary to address an urgent public need, such as national security, public safety or public order. The State has failed to produce sufficient or compelling evidence that all members of the Gir Temple, much less all New Atrians or all members of the Corpion religion, present a threat to Belor's security so as to justify the reporting requirements under Articles 13 and 14 of the Defense of Freedom Act or the application of an order under Article 32 of the Act. Nor has the State demonstrated that these measures are necessary to address such threats, for example that

[162] IACHR Report on Terrorism and Human Rights, para. 363, citing IACHR, Report on the Situation of Human Rights in Argentina (1980), OEA/Ser.L/V/II.49, doc. 19, 11 April 1980, at 251-254.

[163] IACHR Report on Terrorism and Human Rights, para. 364.

[164] *See similarly* Case 11.739, Report N° 50/99, Hector Felix Miranda (Mexico), Annual Report of the IACHR 1998.

they will advance investigations or deter terrorist acts. Further, the State has not established that the measures are proportionate to any public need that they are alleged to address. To the contrary, to the extent that the measures are intended to identify and suppress potential terrorist violence from members of the Scorpion group, the provisions of the Defense of Freedom Act are overbroad, in that they target all members of particular national, religious and ethnic groups rather than being more closely tailored to more specific characteristics of the terrorist organizations that they seek to impede.[165] Moreover, and as elaborated upon below, the measures are discriminatory, in that they create reporting requirements for New Atrian nationals and members of all religious establishments affiliated with the Corpions, without adequate justification.

Finally, the Commission submits that the provisions of Section 32 of the Defense of Freedom Act fail to provide for adequate or appropriate measures of judicial supervision, as they compel the courts to issue orders to monitor financial transactions and seize, freeze or forfeit financial assets based only upon a certificate by the Minister of Finance as to the grounds for the request.[166]

Arguments of the State

The measures taken by the State have not limited or restricted the free exercise of the rights of the members of the Gir Temple to freedom of freedom of assembly, association and conscience and religion. In particular, while the closure of the Gir Temple was an unfortunate consequence of the order obtained under section 32 of the Defense of Freedom Act, it is not apparent that the members of the Temple could not assemble and associate in another location, or that this would necessary have to take place in an establishment specifically affiliated with the Corpion religion. Further, there is no credible foundation for any allegation by the Commission that the reporting requirements under Articles 13 and 14 of the Defense of Freedom Act have a chilling effect on the Corpion's religious or other practices. Rather, it is likely that the requirements would have been supported by members of the Gir Temple as legitimate efforts to extricate members of their congregation who may be dangerous members of the Scorpions.

Even in the event that the Court finds that free exercise by the members of the Gir Temple of their rights to freedom of freedom of assembly, association and conscience and religion have been limited, through the reporting requirements or through the freezing of the Gir Temple's assets under the Defense of Freedom Act, such limitations are permitted and justified under the terms of Articles 12, 15 and 16 of the Convention.[167]

In this respect, as the best information available indicates that Scorpions are both New Atrian nationals and members of the Corpion ethnic and religious group in that state, it is clear that there is a direct connection between membership in these groups and the devastating terrorist attacks carried out by the Scorpions. Further, the statements provided by Victor Gallagher regarding the possible role of Ferris Blanco with the Scorpions, including his financial connections to the group, together with the blueprints of the Parliament buildings found at the administration office of the Gir Temple, provide compelling evidence of a direct connection between the Scorpions, their terrorist attacks, and the Scorpions and their members, and therefore a compelling interest in public security that justifies the provisions of the Defense of Freedom Act. Accordingly the reporting measures imposed by the State were in the interests of

[165] *See similarly* I/A Court H.R., Baena Ricardo Case, Judgment of February 2, 2001, Ser. C No. 72 (2001), paras. 64-66.

[166] *See, e.g.,* Eur. Court H.R. Case of United Communist Party of Turkey and others v. Turkey, App. C133/1996/752/951, Judgment of 30 January 1998.

[167] *See similarly* IACHR, Canada Report (2000), supra, para. 150 (indicating in respect of a certificate review process in the context of immigration and removal proceedings that "[w]hile the certificate review process provides an important judicial check on State action, it does not provide the simple, prompt access to judicial oversight with respect to the decision to detain required by Article XXV of the Declaration").

public security and necessary to address the real and unpredictable threat of terrorism. Further the requirements were imposed pursuant to legislation enacted by Belor's democratically-elected legislature.

Moreover, the measures taken are proportionate and non-discriminatory. The requirements under the Defense of Freedom Act apply not only to New Atrian nationals or the religious establishments associated with the Corpions, but also to nationals of other states and other religious establishments listed in Schedules I and III of the Act, based solely upon their potential ties with terrorist groups. Further, the financial assets of the Gir Temple were frozen based upon compelling evidence that its leader was tied to the Scorpions and to the New Atria embassy bombings, among other terrorist incidents, which suspicions were confirmed when blueprints of Belor's Parliament were found at the administration office of the Gir Temple. Accordingly, the provisions of the Defense of Freedom Act have been closely tailored to the legitimate objective necessitating them.

Finally, the State submits that Section 32 of the Defense of Freedom Act provides for an adequate degree of judicial supervision. A court order is necessary in order for the Minister to take the exceptional measures provided for under the provision. In addition, the Court must be provided by certified information by the Minister of Finance concerning the justification for the measures before an order will be issued. This process ensures that the process for monitoring financial transactions and impeding assets potentially connected with terrorism are expeditious and protect sensitive information, and at the same time are subject to review and confirmation by the judicial branch.

2. Right to equal protection of the law and non-discrimination

Pertinent facts

Section 13 of the Defense of Freedom Act required nationals of six countries listed in Schedule I to the Act, including all New Atrians, to provide records of fingerprint and photographic identification to the State as well as their ethnic and religious affiliation, addresses and employment, on or before September 1, 2001.[168]

Section 14 of the Defense of Freedom Act required 43 religious establishments listed in Schedule III to the Act, including the Corpions' Gir Temple, to provide authorities with the names and addresses of all leaders, administrators and congregation members as well as its financial records for the previous five years, also on or before September 1, 2001.[169]

All 93 of the New Atrian congregation members at the Gir Temple, including Mr. Blanco, provided the Department of Security and Immigration with the information required under section 13 of the Defense of Freedom Act prior to the September 1, 2001 deadline, and the Gir Temple likewise provided the information required under section 14 of the Act.[170]

On October 1, 2001 the General Court granted orders pursuant to Section 32 of the Defense of Freedom Act permitting the authorities to monitor the financial accounts and transactions of all congregation members at the Gir Temple for a period of six months, and freezing the assets of the Temple itself pending an investigation into possible connections with the Scorpions and other terrorist groups.[171]

[168] Hypothetical, paras. 18, 19.

[169] Hypothetical, paras. 18, 19.

[170] Hypothetical, paras. 21.

[171] Hypothetical, paras. 23.

Pertinent Law

The American Convention protects the right to equal protection of the law and the right to nondiscrimination in Articles 1(1) and 24:

> **Article 1. Obligation to Respect Rights**
>
> 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.
>
> **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.

The principle of non-discrimination is also expressly provided for in Article 27 of the American Convention, which limits the measures that states may take in derogating from rights that may properly be suspended in times of emergency by prohibiting any such measures that involve discrimination on such grounds as race, color, sex, language, religion, or social origin.

The UN Human Rights Committee has defined the term "discrimination" under the ICCPR as entailing

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[172]

For its part, the Inter-American Court has found the principle of equality and nondiscrimination to constitute a norm of *jus cogens*,[173] and has stated in respect of the right to non-discrimination under the American Convention that Articles 24 and 1(1) are conceptually distinct,[174] but at the same time that the notion of equality common to these provisions

> [s]prings directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are

[172] UN Human Rights Committee, General Comment Nº 18 (Non-Discrimination), Thirty-seventh session (1989), UN Doc. HRI/GEN/1/Rev.5, para. 7.

[173] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003). para. 101.

[174] The Inter-American Court has stated that "[a]lthough Articles 24 and 1(1) are conceptually not identical–the Court may perhaps have occasion at some future date to articulate the differences–Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it 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 from discriminatory regulations." I/A Court H.R., Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, January 19, 1984, Series A Nº 4, para. 54.

> accorded to others not so classified. It is impermissible to subject human beings to differences that are inconsistent with their unique and congenerous character.[175]

Further, both the Inter-American Court and the Inter-American Commission, like the supervisory bodies in other human rights systems, have recognized that while the American Convention and related instruments do not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it requires at base that any permissible distinctions respect the principles of legitimacy, proportionality and reasonableness. According to the Inter-American Court,

> 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.[176]

Relying in part on the jurisprudence of domestic courts on this point, the Inter-American Commission has held that distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction.[177] The European Court of Human Rights has suggested a similar approach, stating in respect of the right to freedom from discrimination on the basis of sex that

> the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the [European] Convention.)[178]

In the context of terrorism and anti-terrorist initiatives, international bodies, including the Inter-American Commission,[179] have observed that the principle of non-discrimination must inform the development and execution of all anti-terrorist initiatives undertaken by member states. It has been observed in this connection that the basic rules governing respect for fundamental human rights without discrimination may have implications for particular measures adopted by states in connection with terrorist threats, including methods of investigation employed by law enforcement authorities that use prohibited bases of discrimination as the grounds for selecting targets of investigation.[180] International human rights supervisory bodies have also observed that where there is a significant risk that investigative methods of this nature are on their face

[175] *Id*. *See also* Ferrer-Mazorra *et al.* Case, *supra*, para. 238.

[176] I/A Court H.R., Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, January 19, 1984, Series A Nº 4, para. 57. *See similarly* Case 9903, Report Nº 51/01, Ferrer-Mazorra *et al.* (United States), Annual Report of the IACHR 2000, para. 238.

[177] IACHR Report on Terrorism and Human Rights, para. 338, citing, inter alia, Repetto, Inés, Supreme Court of Justice (Argentina), November 8, 1988, Judges Petracchi and Bacqué, para. 6 Palmore v. Sidoti, 4666 US 429 (1984) Loving v. Virginia, 388 US 1, 87 (1967) Eur. Court H.R., Abdulaziz v. United Kingdom, Judgment of 28 May 1985, Ser. A Nº 94, para. 79. *See similarly* Goldman Report, para. 75.

[178] Eur. Court H.R., Abdulaziz v. United Kingdom, Judgment of 28 May 1985, Ser. A Nº 94, para. 79.

[179] See, e.g., IACHR Report on Terrorism and Human Rights, para. 351; Goldman Report, para. 73; Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Minister' Deputies, Guideline II.

[180] *See*, *e.g.*, Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination, Third Periodic reports of States parties due in 1999, Addendum, United States of America, UN Doc. CERD/C/351/Add.1 (10 October 2000), paras. 301-306 (referring to the use of "racial profiling" by law enforcement agencies in the United States); IACHR Report on Terrorism and Human Rights, para. 353; Goldman Report, para. 74.

discriminatory or may be utilized in a discriminatory manner, any use of these methods by a state must comply strictly with international principles governing necessity, proportionality and non-discrimination and must be subject to close judicial scrutiny.[181]

With respect to the investigation of individuals or groups of individuals who are connected with particular political, ideological or religious movements or particular states, the Inter-American Commission has recognized that

> the effective investigation of terrorist crimes may, owing to their ideological motivation and the collective means by which they are carried out, necessitate the investigation of individuals or groups who are connected with particular political, ideological or religious movements or, in the case of state-sponsored terrorism, the governments of certain states.[182]

At the same time, the Commission has emphasized that anti-terrorist initiatives that incorporate criteria of this nature, in order not to contravene the absolute prohibition against discrimination, must be based upon objective and reasonable justification, in that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought. According to the Commission

> This would require, for example, the existence of reasonable grounds connecting a particular group to terrorist activities before an individual's association with that group might properly provide a basis for investigating him or her for terrorist-related crimes. Even then, the extent to which and the manner in which investigative methods of this nature are undertaken and the resulting information is collected, shared and utilized must be regulated in accordance with the principles of reasonableness and proportionality, taking into account, *inter alia*, the significance of the objective sought and the degree to which the state's conduct may interfere with the person or persons concerned.[183]

Arguments of the Commission

Sections 13, 14 and 32 of the Defense of Freedom Act are, on their face, inconsistent with the requirement of nondiscrimination and equal treatment of the law under Articles 1(1) and 24 of the American Convention, and the manner in which they were applied to the congregation members at the Gir Temple violated, and continue to violate, these rights in respect of the alleged victims.

Human rights bodies inside and outside of the Inter-American system have recognized that in all of their activities, including the developments and application of anti-terrorism initiatives, States Parties to the American Convention are required to comply with the fundamental principle of non-discrimination.[184] Further, where a state purports to create distinction in their anti-terrorism

[181] See IACHR Report on Terrorism and Human Rights, para. 353. See similarly UN Committee on the Elimination of Racial Discrimination, sixtieth session, M4-22 March 2002, Statement, UN Doc. CERD/C/60/Misc.22/Rev.6 (8 March 2002) (requiring that "States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin" and that "the principle of non-discrimination must be observed in all areas, in particular in matters concerning liberty, security and dignity of the person, equality before tribunals and due process of law, as well as international cooperation in judicial and police matters in these fields").

[182] IACHR Report on Terrorism and Human Rights, para. 355.

[183] IACHR Report on Terrorism and Human Rights, para. 356. *See similarly* International Terrorism: Legal Challenges and Responses. A Report by the International Bar Association's Task Force on International Terrorism (Washington D.C. 2003), p. 65.

[184] See, e.g., IACHR Report on Terrorism and Human Rights, para. 351; Goldman Report, para. 73; Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Minister' Deputies, Guideline II.

measures based upon enumerated grounds of discrimination under the Convention, particularly strict scrutiny must be applied to ensure that they satisfy the requirements under the Convention.[185]

In the present case, section 13 of the Defense of Freedom creates reporting requirements for individuals based upon their membership in a particular national group, and section 14 creates similar reporting requirements for particular religious establishments that affect members of those establishments based upon their religious affiliation. Further, the provisions were applied to the congregation members at the Gir Temple based upon their nationality and religion, while members of other national or religious groups were not subjected to the same requirements. Accordingly, the Commission submits that these measures clearly contravene the State's obligation not to create distinctions based on any ground, including religion or national origin, which have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Further, the State has failed to satisfy the strict level of scrutiny required to justify these distinctions. In particular, the State has failed to show that the distinctions created in the Defense of Freedom Act are based on substantial factual differences between the members of the Gir Temple and others or that there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. It is simply overbroad and arbitrary for the State to create onerous legislation applicable to all New Atrian nationals and all religious establishments affiliated with the Corpions in Belor, in order to target the Scorpions, who only constitute a smaller component of these groups with additional distinct characteristics, such as their distinct political views and strong connections with the Roveen province in New Atria. Further, it is not even apparent that the reporting requirements imposed by the Belor Government will reasonably achieve the alleged objective of the legislation, as those New Atrians in Belor who are affiliated with the Scorpions may simply fail to report as required under the Act.

Arguments of the State

Sections 13, 14 and 34 of the Defense of Freedom Act do not infringe the principle of nondiscrimination and the right to equal protection of the law, either on their face or in the manner in which they were applied in the present circumstances.

In this respect, the State acknowledges that these provisions of the Defense of Freedom Act create distinctions based upon the nationality and religion of individuals, directly or though their application to particular religious establishments. As the Inter-American Court itself has acknowledged, however, the American Convention does not prohibit all distinctions, even those based upon grounds enumerated under Article 1(1) of the Convention. Rather, such distinctions are only prohibited when they are discriminatory, namely when they are not shown to further a legitimate objective in light of the principles that normally prevail in democratic societies and that the means are reasonable and proportionate to that objective.[186]

In the present circumstances, the distinctions created in the provisions of the Defense of Freedom Act, and their application to the congregation members at the Gir Temple, were necessary, rational and proportionate, having regard to democratic principles, and therefore non-discriminatory. In particular, the legislative measures were enacted by the democratically-elected legislation in Belor in order to assist law enforcement and other authorities to identify and prevent

[185] See IACHR Report on Terrorism and Human Rights, para. 353. See similarly UN Committee on the Elimination of Racial Discrimination, sixtieth session, M4-22 March 2002, Statement, UN Doc. CERD/C/60/Misc.22/Rev.6 (8 March 2002).

[186] See I/A Court H.R., Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, January 19, 1984, Series A Nº 4, para. 57.

members of a demonstrably dangerous terrorist group, the Scorpions, from perpetrating further attacks against Belor and its people and are therefore intended to further a legitimate objective.[187] In addition, the measures are rationally connected to that objective, as the facts show that individuals belonging to the Scorpions are New Arian nationals who subscribe to the Corpion religion, that the Scorpions have likely been operating in Belor, and that the Scorpions have vowed to bring their violence to Belor, declaring that "soon, the fires of the battle will burn in the homeland of Belor." Indeed, the seriousness of this threat was demonstrated by an explosion of a car bomb outside of the main stock exchange in Haladonia on June 1, 2001, which killed 9 people and injured 23 others.

Finally, the distinctions created are proportionate. In this regard the Court must take into account the fact that the methodology of terrorist groups such as the Scorpions includes operating in a clandestine manner – they take advantage of their ability to blend in with the general population, in order to perpetrate unpredictable and indiscriminate acts of violence and in turn generate an environment of fear and terror among the general population.[188] Accordingly, it is generally not possible to identify more specific characteristics that would permit authorities to distinguish potential terrorists from other members of the population. In the present case, Belor is only aware that members of the Scorpions are New Atrian nationals who ascribe to the Corpion religion, which therefore have served as Belor's parameters for investigation. It is also important to note that the monitoring measures under section 32 of the Act were only pursued against certain subgroups, namely the Gir Temple and its members, based upon information indicating the President of its congregation, and potentially others, may be involved in financing the Scorpion's activities. Further, the reporting requirements and monitoring mechanisms applicable to these groups are not onerous, and moreover, play an important role in protecting New Atrians and others from terrorist violence in Belor. Indeed, the rational and proportionate connection between the reporting requirements and the prevention of terrorist violence by the Scorpions has already been demonstrated through the capture of Ferris Blanco and the potential diversion of an attack against Belor's Parliament.

3. Right to privacy

Pertinent Facts

In addition to the facts set out in Part 2 above, the hypothetical includes the following facts pertinent to the analysis of the right to privacy.

The Regulations promulgated pursuant to the Defense of Freedom Act provided that fingerprint records would be taken through an electronic fingerprint scanner, and that the photographic record would be taken with a digital camera.[189] The explanatory notes published with the Regulations explained that recording the data electronically would permit authorities to compare the information against fingerprint and photographic data stored by the government in a separate anti-terrorism database, and would also permit rapid sharing of information between government departments and agencies and, where appropriate, with other governments.[190]

[187] See similarly Eur. Court H.R., Case of Gerger v. Turkey, Application No. 24919/94, Judgment of 8 July 1999, para. 69 (concluding that a Turkish anti-terrorism law that applied more stringent parole rules to persons convicted under the law was not discriminatory because the objective of the legislation was to penalize "people who commit terrorist offenses and that any one convicted under that law will be treated less favorably with regard to automatic parole than persons convicted under ordinary law [. . .] the distinction is made not between different groups of people, but between different types of offenses, according to the legislature view of their gravity").

[188] See IACHR Report on Terrorism and Human Rights, para. 17.

[189] Hypothetical, para. 19.

[190] Hypothetical, para. 19.

In the course of its investigations into possible connections between the financial activities of the Gir Temple and its members with the Scorpions in New Atria, Belor provided New Atria's intelligence service with the financial data collected pursuant to the General Court's order of October 21, 2001, as well as the records provided by the congregation and its members under sections 13 and 14 of the Defense of Freedom Act. In so doing, Belor invoked the provisions of the International Convention for the Suppression of the Financing of Terrorism, which both states had ratified in 2000 with an explicit understanding that they would respect the treaty's provisions prior to its entry into force.[191]

Pertinent Law

Article 11 of the American Convention provides for the right to privacy:

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.

In the words of one commentator, the right to privacy protects "that particular area of individual existence and autonomy that does not touch upon the sphere of liberty and privacy of others."[192] In this context, the right to privacy may extend to a variety of matters considered to be linked with the existence and autonomy of an individual, including identity, intimacy, and communication with others.[193] While the right to privacy, like other rights, is not absolute, any restrictions or limitations placed upon a person's enjoyment of his or her privacy must be prescribed by law passed by the legislature and necessary for the security of all and in accordance with the just demands of a democratic society, and their application must be proportionate and closely tailored to the legitimate objective necessitating them.[194]

International human rights bodies have recognized in this regard that individuals may have vital privacy interests in personal information gathered by the state concerning their status or activities.[195] Therefore, the Inter-American Commission, among other authorities, have held that States must conduct their activities in gathering and sharing personal information in a manner that complies with prevailing norms and principles governing the right to privacy.[196] According to the Commission, this encompasses

> ensuring that the collection and use of personal information, including any limitations upon the right of the person concerned to access that information, is clearly authorized by law so as to protect the person concerned against arbitrary or abusive interference with

[191] Hypothetical, para. 24.

[192] See, e.g. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY (1993), at p. 294.

[193] See, e.g. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY (1993), at pp. 294-299.

[194] See, e.g. Case 10.506, Report Nº 38/96, X & Y (Argentina), Annual Report of the IACHR 1996, para. 71.

[195] *See, e.g.,* Eur. Court H.R., Case of Gaskin v. United Kingdom, July 7, 1989, Ser. A Nº 162, at 20, para. 49.

[196] *See, e.g.,* IACHR Report on Terrorism and Human Rights, para. 371; Eur. Court H.R., Case of Klass and Others v. Germany, September 6, 1978, Ser. A Nº 28, paras. 50-60 (finding that while States may subject persons within their jurisdiction to secret surveillance, their ability to do so is not unlimited, but rather that "[t]he Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse.") See similarly Eur. Court H.R., Case of Malone v. United Kingdom, August 2, 1984, Ser. A Nº 82, pp. 31-33, paras. 66-68.

> privacy interests, and accordingly that judicial supervision is available to guard against abuses of these legal requirements.[197]

Similarly, the UN Human Rights Committee has opined that

> [t]he gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public [authorities] or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.[198]

Privacy concerns over the collection and use of personal information have extended to the sharing of such information with foreign governments where there are not adequate safeguards to prevent abuses of the information, for example if it is obtained by hostile parties or is used for inappropriate commercial or other purposes.[199]

It is also notable that Belor is a party to several additional terrorism-related treaties that are potentially relevant to the collection and use of financial information for anti-terrorism purposes. These include the Inter-American Convention against Terrorism and the International Convention for the Suppression of the Financing of Terrorism, both of which contain provisions requiring states parties to take various measures to prevent, combat and eradicate the financing of terrorism. In particular Article 4(b) and (c) of the Inter-American Convention against Terrorism requires states to detect and monitor the movement of financial assets and to take certain measures to facilitate the sharing of information among states parties:

> 1.Each state party, to the extent it has not already done so, shall institute a legal and regulatory regime to prevent, combat, and eradicate the financing of terrorism and for effective international cooperation with respect thereto, which shall include: b. Measures to detect and monitor movements across borders of cash, bearer negotiable instruments, and other appropriate movements of value. These measures shall be subject to safeguards to ensure proper use of information and should not impede legitimate capital movements. (c) Measures to ensure that the competent authorities dedicated to combating the offenses established in the international instruments listed in Article 2 have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed under its domestic law. To that end, each state party shall establish and maintain a financial intelligence unit to serve as a national center for the collection, analysis, and dissemination of pertinent money laundering and terrorist financing information. Each state party shall inform the Secretary General of the Organization of American States of the authority designated to be its financial intelligence unit.

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[197] IACHR Report on Terrorism and Human Rights, para. 371. See similarly Goldman Report, para. 66.

[198] Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), para. 10.

[199] See, e.g., European Union Data Protection Directive 95/46/EC (25 October 1995) (preventing, inter alia, the transfer of personal data to a third country outside of the European Union unless the third country in question ensures an adequate level of protection and the member country laws implementing other provisions of the Directive are respected prior to the transfer).

Article 8 of the International Convention for the Suppression of the Financing of Terrorism, which is also included under Article 2 of the Inter-American Convention against Terrorism, similarly requires states parties to take measures to detect and obstruct financial assets connected with the terrorism financing offenses set out in Article 2 of the same Convention:

> 1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture. 2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences. 3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article. 4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph *(*a) or *(*b), or their families. 5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

As noted in Part V(B)(2) above, however, Article 15 of the Inter-American Convention against Terrorism requires that all of the measures carried out by the states parties under the Convention, presumably including those under Article 4, must take place "with full respect for the rules of law, human rights, and fundamental freedoms." Consequently, while Belor may rely upon the provisions of other anti-terrorism treaties to justify certain measures that may affect the privacy of individuals, it remains bound by its human rights obligations, including those governing the right to privacy under the American Convention, in respect of the manner in which those measures are developed and applied.

Arguments of the Commission

Belor has violated the privacy rights of the rights of the congregation members at the Gir Temple, by gathering an overbroad range of personal information from them, in part through secret surveillance, and subsequently sharing that information with a foreign government, without ensuring adequate mechanisms to guard against arbitrary or abusive interference with the interests of the congregation members in that information.

In particular, the personal information demanded by the government of Belor under section 13 and 14 of the Defense of Freedom Act entails a broad number of details intimately connected with the victims' identify and autonomy, including their fingerprints, photographic images, religious beliefs, and financial situation and practices. Belor has failed to justify the need for this wide range of information, much less demonstrate that the need for this information is proportionate to the considerable degree of interference in the private lives of the congregation members.

With regard to the secret surveillance of the congregation's financial transactions in particular, the only apparent basis for this exceptional measure is the statement given by Victor Gallagher to interrogators at the Citadel which, as argued previously, should not be considered reliable as it was possibly gathered through acts of torture.

Further, Belor has failed to provide adequate mechanisms of judicial or other supervision to protect against improper uses of the personal information. Section 13, 14 and 32 of the Defense of Freedom Act do not contain any provisions limiting the manner in which the government may use information gathered under these sections nor do they provide any

mechanism for the persons concerned to access or otherwise control the use of the information.[200] With respect to the information on financial transactions, the General Court was compelled under section 32 to issue the order requested by the Minister of Finance based only upon the presentation of a certificate, and the congregations members at the Gir Temple had no opportunity to challenge or otherwise participate in the process that led to this serious intervention into their privacy. Further, Belor's decision to share the personal information with New Atria's intelligence services had grave consequences for some congregation members, including the arrest and deportation of Laura Gray and Robert Suarez, with no effective opportunity on the part of congregation members to challenge the accuracy or use of that information.

Arguments of the State

The privacy rights of the congregation members at Gir Temple have been fully respected within the parameters under Article 11 of the Convention. First, much of the information gathered by the State, including the photographs and residential and employment addresses, have likely already been gathered and published in public directories and therefore should be considered to have a limited privacy interest.

Further, to the extent that the collection of the information at issue is considered to limit the privacy interests of the congregation members at the Gir Temple, it is apparent that these measures were objectively and reasonably justified. The information requested under sections 13 and 14 of the Act was necessary in order to identify and locate persons who presented a real and imminent threat of terrorist violence to Belor and its citizens but who operate clandestinely, often disguise themselves in otherwise legitimate religious and other organizations. The financial information gathered pursuant to section 32 of the Act was directed specifically at the members of the Gir Temple, based upon information from a senior member of the Scorpions indicating that the President of its congregation, Ferris Blanco, may have provided financial support to that terrorist organization. Indeed, the identification and apprehension of Mr. Blanco constitutes compelling evidence that the government's decision to gather this information was fully justified in the furtherance of a legitimate objective.

In addition, the collection of this information is subject to appropriate and effective mechanisms to guard against abuses of that information. The Defense of Freedom Act itself was enacted by the democratically-elected legislature of Belor, which, in approving the legislation, made a legitimate decision as to the proper balance between privacy and security. Any suggestion by the Commission that the information gathered under sections 13 or 14 of the Act may be misused or inaccurate have not been substantiated, particularly in light of the fact that the information is collected directly from the individuals concerned who are best placed to ensure the accuracy of the information and who consequently know precisely what information has been provided to the government.

Insofar as the State has been empowered to gather information through secret surveillance under section 32 of the Act and to share that information with foreign governments, these measures are both justified and subject to proper supervision. In particular, it has been widely recognized by the UN, the OAS, and other authorities that a successful campaign against terrorism requires states to take measures to prevent, combat and eradicate the financing of terrorism. Moreover, Belor's treaty obligations, including those under section 4 of the Inter-American Convention against Terrorism and Article 8 of the International Convention for the Suppression of the Financing of Terrorism, oblige it to take measures to identify funds that may be used or allocated in connection with terrorism-related offenses and to share that information with other state parties. In order to be effective, measures to identify financial transactions of this

[200] *See, e.g.,* IACHR Report on Terrorism and Human Rights, para. 371; Eur. Court H.R., Case of Klass and Others v. Germany, September 6, 1978, Ser. A Nº 28, paras. 50-60; Eur. Court H.R., Case of Malone v. United Kingdom, August 2, 1984, Ser. A Nº 82, pp. 31-33, paras. 66-68.

nature must be confidential so as not to come to the knowledge of the party or parties involved. Further, measures under section 32 of the Defense of Freedom Act can only be taken upon the issuance of an order by a judge of the General Court of Belor, and the government must provide the Court with adequate justification for the order through a certificate from the Minister of Finance verifying the grounds for the request. The State therefore submits that these measures are subjected to sufficient judicial supervision to guard against any potential abuses.

4. Right to property

Pertinent Facts

See facts in Parts V(C)(2) and (3) above.

Applicable Law

The right to property is prescribed under Article 21 of the American Convention in the following terms:

Article 21. Right to Property

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law

"Property" under this provision has been defined by the Inter-American Court as encompassing

> those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.[201]

As with other fundamental rights, effective protection of the right to property requires states to ensure that the right to use and enjoy property is given effect through legislative and other means, and that simple and prompt recourse is available to a competent court or tribunal for protection against acts that violate this right.[202] While the use and enjoyment of property may be subordinated to the interest of society, any measures of this nature may only be taken by law, and the propriety of such measures must, as with all rights protected in the Hemisphere, be guided by the just demands of the general welfare and the advancement of democracy.[203]

In the context of effort by states to prevent, suppress, and eradicate terrorism, numerous international authorities, including the UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism, the Committee of Ministers of the Council of Europe, and the Inter-American Commission, have recognized that identifying and freezing assets of persons and groups involved in terrorism are appropriate and necessary measures to

[201] I/A Court H.R., Mayagna (Sumo) Awas Tingni Community Case, August 31, 2001, Ser. C Nº 79, para. 144, citing I/A Court H.R., Ivcher Bronstein Case, Judgment of February 6, 2001, Series C Nº 74, para. 122.

[202] Awas Tingni Case, *supra*, at 675, paras. 111-115.

[203] See I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), November 13, 1985, Ser. A Nº 5, para. 44.

combat terrorism.[204] Indeed, as noted in the previous section, numerous international treaties, including the Inter-American Convention against Terrorism and the International Convention for the Suppression of the Financing of Terrorism oblige states to take measures to identify, detect and freeze or seize any funds used or allocated to terrorism-related activities and offenses.[205] In this connection, Article 5 of the Inter-American Convention against Terrorism specifically provides as follows:

> **Article 5. Seizure and confiscation of funds or other assets**
>
> 1. Each state party shall, in accordance with the procedures established in its domestic law, take such measures as may be necessary to provide for the identification, freezing or seizure for the purposes of possible forfeiture, and confiscation or forfeiture, of any funds or other assets constituting the proceeds of, used to facilitate, or used or intended to finance, the commission of any of the offenses established in the international instruments listed in Article 2 of this Convention.
>
> 2. The measures referred to in paragraph 1 shall apply to offenses committed both within and outside the jurisdiction of the state party.

To the extent that actions such as freezing assets and monitoring asset transfers affect the property rights of individuals, however, it has been emphasized that they must be prescribed by law, have an objective and reasonable basis in fact or evidence, and be executed under judicial supervision, which may in turn require measures to ensure that persons affected by the freezing and orders have access to information to challenge the state's action.[206] Further, according to the Inter-American Commission, proper controls are particularly important in circumstances where criminal charges, extradition, or other serious consequences for the individual concerned may arise out of property-related investigations.[207] Also pertinent in this regard is Article 15 of the Inter-American Convention against Terrorism, which provides that the measures carried out by states parties under the Convention, including those pertaining to the financing of terrorism, "shall take place with full respect for the rule of law, human rights, and fundamental freedoms."

Arguments of the Commission

By requiring the Gir Temple and other religious establishments to provide financial records pursuant to section 14 of the Defense of Freedom Act, and by permitting the Minister of Finance to monitor the financial transactions of the congregation members at the Gir Temple and,

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[204] See, e.g., UN Security Council Resolution 1373 of September 18, 2001, U.N. Doc. S/RES/1373 (2001) (recognizing the "need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism").

[205] See Inter-American Convention against Terrorism, supra, Article 4(1)(b); International Convention for the Suppression of the Financing of Terrorism, supra, Article 8(1) (providing: "1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of poss ble forfeiture").

[206] See Goldman Report, para. 65, citing Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Minister' Deputies, Guideline XIV; International Terrorism: Legal Challenges and Responses, A Report by the International Bar Association's Task Force on International Terrorism (Washington D.C., 2003), p. 126 (observing in respect of the use of international freezing lists that "states that introduce these measures often protect the secrecy of the information they possess. The opportunity to challenge the state's action is therefore restricted as persons affected by freezing orders and the like simply have no information as to the basis of the order, and are thus disadvantaged in any challenge they may make to the orders affecting them.").

[207] IACHR Report on Terrorism and Human Rights, para. 370.

ultimately, to freeze the assets of the Temple, Belor violated the right to property of the congregation members under Article 21 of the Convention.

In particular, the financial assets of the congregation members and the Gir Temple clearly fall within the definition of property under Article 21 of the Convention. Further, by demanding the provision of financial records under Article 14 of the Act, and by monitoring the financial transactions of the congregation members and freezing the financial assets of the Gir Temple under section 32 of the Act, the State has interfered with the individual and collective property rights of the congregation at the Gir Temple. Further, those measures were neither necessary nor proportionate, whether under international anti-terrorism conventions or otherwise.[208] Belor has not produced compelling evidence indicating that a single congregation member, much less the entire congregation, may have been engaged in financial or other transactions connected to terrorism. Despite the absence of proper grounds, the State took several measures having a disproportionately injurious effect on the Temple and its members. By being placed on the list of establishments under Schedule III to the Act, the Temple and its members have been stigmatized as having possible connections to terrorism and exposed to potentially serious measures under international terrorism treaties.[209] Moreover, some members of the congregation, including Laura Gray and Robert Suarez, have suffered serious immigration and criminal proceeding as a consequence of the state's measures, and the Gir Temple was forced to close. The Commission notes that even to the extent that Belor may invoke the Inter-American Convention against Terrorism and related anti-terrorism treaties to justify its actions, Article 15 of the Inter-American Convention against Terrorism still requires those measures to comply with Belor's international human rights obligations.

Moreover, inadequate supervisory mechanisms are available to guard against these abusive infringements upon the right to property. Congregation members have no right to information concerning whether or how Belor might share their financial information with domestic and foreign authorities, nor do they have the ability to challenge such uses of their financial information or their inclusion in Schedule III to the Act.[210] Further, the monitoring and freezing orders under Article 32 of the Act were issued by the General Court in the absence of any representation by the Gir Temple or its congregation members and based upon information that was only available to the Minister of Finance and the judge, and there is no mechanism for the Temple or its members to challenge the orders, despite their devastating impact.

Arguments of the State

The measures implemented by the State to identify, monitor and freeze financial assets pertaining to the Gir Temple and members of its congregation were taken pursuant to provisions properly prescribed by law, were necessary, reasonable, and proportionate, and did not contravene Article 21 of the American Convention.

To the extent that the State's actions related to the financial assets of the Gir Temple, it is not clear whether or to what extent individual members of the congregation had property interests in those assets. Absent evidence on this point, it is not apparent that the Commission's allegations pertaining to the Gir Temple's assets fall within the competence of the Court, as they

[208] See I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), November 13, 1985, Ser. A Nº 5, para. 44.

[209] IACHR Report on Terrorism and Human Rights, para. 370.

[210] See Goldman Report, para. 65, citing Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, Guideline XIV; International Terrorism: Legal Challenges and Responses, A Report by the International Bar Association's Task Force on International Terrorism (Washington D.C., 2003), p. 126.

do not relate to the property rights of a natural person as required under Article 1(2) of the Convention.

Even accepting that the members of the congregation at the Gir Temple may have a property interest in the financial assets of the Temple, the measures taken by the State relating to these assets and to those of the individual congregation members were consistent with the requirements of Article 21 of the Convention. The request for the financial records of the Gir Temple, the monitoring of the congregation members' financial transactions, and the freezing of the financial assets of the Gir Temple were all authorized under a law passed by the democratically-elected legislature in Belor, and the latter two measures were authorized by a judge of the General Court of Belor.

In addition, the measures were necessary in order to effectively prevent the funding of terrorist activities by the Scorpions in Belor, and were proportionate to that objective. In this respect, information provided by a senior member of the Scorpions identified the President of the Gir Temple, Ferris Blanco, as a possible source of financial support for the Scorpions. The possible ties between Mr. Blanco and the Gir Temple were further reinforced when blueprints of Belor's Parliament were found in the main administrations office of the Temple during Mr. Blanco's apprehension. In the face of this information, it was reasonable and appropriate to monitor on a secret basis the financial transactions of Temple members, to share this information as well as the Temple's financial records with New Atria, and, ultimately, to freeze the Temple's accounts. Further, Belor was obliged to take these measures pursuant to its obligations under the Inter-American Convention against Terrorism and the International Convention for the Suppression of the Financing of Terrorism and relevant UN Security Council Resolutions.[211]

Finally, the measures taken by Belor were subjected to appropriate judicial supervision. In particular, the measures under section 32 of the Defense of Freedom Act could only be taken upon the issuance of an order by a judge of the General Court of Belor, and the government was required to provide the Court with adequate justification for the order through a certificate from the Minister of Finance verifying the grounds for the request. While the members of the congregation did not participate in the court proceeding, the fact that the judge has access to the information provided by the Minister is a sufficient control over potential abuse, given the degree of secrecy necessary for measures of these nature to be effective.

D. Allegations relating to Laura Gray and Robert Suarez

1. Right to personal liberty, right to seek asylum, right to a fair trial, and right to judicial protection

Pertinent facts

In the course of its investigations into possible connections between the financial activities of the Gir Temple and its members with the Scorpions in New Atria, Belor provided New Atria's intelligence service with the financial data collected pursuant to the General Court's order of October 21, 2001, as well as the records provided by the congregation and its members under sections 13 and 14 of the Defense of Freedom Act. In so doing, Belor invoked the provisions of the International Convention for the Suppression of the Financing of Terrorism, which both states had ratified in 2000 with an explicit understanding that they would respect the treaty's provisions

[211] See, e.g., UN Security Council Resolution 1373 of September 18, 2001, U.N. Doc. S/RES/1373 (2001), para. 2(d) (deciding that all States shall "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens").

prior to its entry into force.[212]

After analyzing the information, New Atria informed Belor by way of a diplomatic note dated November 2, 2001 that two New Atrian members of the Gir congregation, Laura Gray and Robert Suarez, had been indicted by the New Atrian courts for the crime of hostage-taking in connection with the abduction of a business leader in New Atria in 1997. The indictment alleged that Ms. Gray and Mr. Suarez had committed the hostage-taking as members of the Scorpions.[213]

Following the receipt of New Atria's diplomatic note, Beloran authorities discovered that both Ms. Gray and Mr. Suarez had overstayed 6-month visitors' visas that had been issued to them in October of the previous year. On November 15, 2001, officials with the Department of Security and Immigration obtained arrest and deportation orders against Ms. Gray and Mr. Suarez from the General Court pursuant to section 17 of the Defense of Freedom Act. The judge who issued the orders did not require Ms. Gray and Mr. Suarez to be brought before the Court prior to their deportation, explaining in his reasons that both individuals had been in the country for over one year, had voluntarily overstayed their visas, and were therefore clearly ineligible to remain in the country.[214]

On November 16, 2001, immigration officers arrested Ms. Gray and Mr. Suarez who, upon learning of their pending deportations, claimed that the criminal proceedings against them in New Atria were politically motivated. Ms. Gray and Mr. Suarez were then escorted to the national airport and placed on a flight to New Atria. Both individuals were arrested upon their arrival at the national airport in Kawori and transferred to the Citadel to await their trials.[215]

On December 10, 2001, Rights International filed an action with the General Court in Belor challenging the arrest and deportation of Laura Gray and Robert Suarez pursuant to their constitutional rights to liberty and security of the person and their right to due process of law, as well as their right to seek and receive asylum under the U.N. Convention relating to the Status of Refugees. In a judgment issued on March 13, 2002, the General Court dismissed the action after concluding that the arrest and deportation of Laura Gray and Robert Suarez were authorized by law and executed pursuant to an order of the General Court. The Court also found that there were reasonable grounds to believe that Ms. Gray and Mr. Suarez were associated with a terrorist organization and had committed terrorist crimes and therefore would not be entitled to receive asylum under the international agreements to which Belor was a party.[216]

The U.N. Human Rights Committee, in its comments on New Atria's 2002 report submitted pursuant to Article 40 of the International Covenant on Civil and Political Rights, expressed deep concern about the administration of justice in New Atria. In particular, the Committee noted that judges continue to be appointed and promoted directly by the executive branch and that this has led to serious threats of political interference in the work of the judiciary as well as the appointment and promotion of a disproportionate number of Drunes in the court system. The Committee noted that this development has exacerbated perceptions on the part of Corpions that they have been excluded from participating effectively in the conduct of public

[212] Hypothetical, para. 24.

[213] Hypothetical, para. 24; Response to request for clarification number 2.

[214] Hypothetical, para. 25.

[215] Hypothetical, para. 25.

[216] Hypothetical, para. 30.

affairs in their country and cannot expect equal and impartial treatment in the judicial system.[217]

Pertinent Law

International human rights bodies and other experts, including the Inter-American Commission, have emphasized the fact that foreign nationals within a country are particularly susceptible to human rights abuses in the face of state responses to terrorist violence, owning to their particularly vulnerable position.[218]

These concerns extend to a broad range of fundamental rights, including the right not to be arbitrarily deprived of liberty, the right to a fair trial, the right to seek and receive asylum and the right to judicial protection. In the present hypothetical, the protection of these rights in relation to Laura Gray and Robert Suarez are interconnected and are therefore most effectively analyzed in conjunction with one another. In addition, they should be analyzed in light of other treaties to which Belor is a party and that contain provisions relevant to the situation of non-nationals, including the Inter-American Convention against Terrorism and the UN Convention on the Status of Refugees and its 1967 Additional Protocol. As a general matter, Article 15(2) of the Inter-American Convention against Terrorism preserves the commitments of state parties under international refugee law, providing that

> [n]othing in this Convention shall be interpreted as affecting other rights and obligations of states and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.

With respect to the right to liberty, it has been recognized that circumstances of lawful detention under international human rights law may encompass individuals detained in the context of controlling the entry and residence of non-nationals in a state's territory.[219] At the same time, the Inter-American Commission and other human rights bodies have emphasized that any such detention must in all circumstances comply with the requirements of preexisting domestic and international law. These include the requirement that the detention be based on the grounds and procedures clearly set forth in the constitution or other law and that it be demonstrably necessary, fair and non-arbitrary. Detention in such circumstances must also be subject to supervisory judicial control without delay and, in instances when the state has justified continuing detention, at reasonable intervals.[220]

Further, with respect to the situation of refugees in particular, Article 26 of the UN Convention on the Status of Refugees permits the detention or other restrictions on the movement of asylum seekers only as exceptions, stating:

> Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances".[221]

[217] Hypothetical, para. 5.

[218] See, e.g. IACHR Report on Terrorism and Human Rights, para. 375; Goldman Report, para. 71.

[219] See, e.g., Case 9903, Report Nº 51/01, Ferrer-Mazorra *et al.* (United States), Annual Report of the IACHR 2000, para. 210; 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; Eur. Court H.R., Amuur v. France (1996) E.H.R.R. 553, para. 53.

[220] Ferrer-Mazorra *et al.* Case, *supra* para. 212. *See similarly* UNHRC, A. v. Australia, Communication Nº 560/1993, CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4.

[221] UN Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Article 26.

Concerning the right to seek asylum and the right to humane treatment, Article 22(7) and (8) of the American Convention and Article 13(4) of the Inter-American Torture Convention are particular relevant in the present context as they provide for the right of non-return as follows:

> American Convention
>
> Article 22 (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.
>
> Inter-American Torture Convention
>
> 13(4) Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

These provisions in turn have been interpreted in the inter-American human rights system principally in conjunction with corresponding provisions of the UN Convention on the Status of Refugees and its Additional Protocol governing refugees under international law.[222] These instruments define a refugee as a refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,

- is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
- or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.[223]

For individuals who are found to satisfy these criteria, the paramount obligation of States Parties in respect of those qualifying for refugee status is that of non-return *(non-refoulement)* set forth in Article 33(1) of the 1951 Convention:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[224]

Also according to these treaties, there are three basic categories of persons who, while otherwise meeting the foregoing criteria, are excluded from refugee status: persons already subject to UN protection or assistance; persons not considered in need of international protection due to having been accorded treatment equivalent to that of nationals by the country of

[222] See, e.g., Case 10.675, Report 51/96, Haitian Interdiction Case (United States), Annual Report of the IACHR (1993).

[223] IACHR, Report on Canada (2000), supra, para 22.

[224] IACHR, Report on Canada (2000), supra, para. 24. *See also* Haitian Interdiction Case, *supra*, paras. 154-155.

residence; and persons deemed undeserving of international protection. The latter group includes persons with respect to whom there are "serious reasons for considering" that they have committed "a crime against peace, a war crime, or a crime against humanity," a "serious non-political crime outside the country of refuge prior to admission," or "acts contrary to the purposes and principles of the United Nations." [225]

Further, Articles 12 and 13 of the Inter-American Convention Against Terrorism specify that these exclusions from the granting of refugee status or asylum should apply to persons suspected of offenses established in the instruments under Article 2 of the Convention:

> Article 12
>
> Denial of refugee status
>
> Each state party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention.
>
> Article 13
>
> Denial of asylum
>
> Each state party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that asylum is not granted to any person in respect of whom there are reasonable grounds to believe that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention.

However, even in respect of individuals falling within these exclusions, those persons may not be removed to another country if in that state his or her life or personal freedom is in danger of being violated because of his or her race, nationality, religion, social status, or political opinions or where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.[226] As the Inter-American Commission has noted, the obligation of non-return under this provision as well as that under Article 22(8) of the American Convention is absolute and does not depend upon a claimant's status as a refugee.[227]

In light of the serious consequence that flow from the granting or denial or of exclusion from refugee status, the Inter-American Commission has held that persons who may face a risk of torture cannot be rejected at the border or expelled without an adequate, individualized examination of their circumstances even if they do not qualify as refugees.[228] The Inter-American Commission has specifically stated in this regard that

> the nature of the rights potentially at issue – for example, to life and to be free from torture – requires the strictest adherence to all applicable safeguards. Those safeguards include the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent. The status of refugee is one which derives from the circumstances of the person; it is recognized by the State rather than conferred by it. The purpose of the applicable procedures is to

[225] IACHR, Report on Canada (2000), supra, para. 23.

[226] American Convention on Human Rights, Article 22(8); Inter-American Torture Convention, Art. 13(4). See similarly UN Torture Convention, Article 3.

[227] IACHR Repot on Terrorism and Human Rights, para. 394.

[228] IACHR, Report on Canada (2000), *supra* note 338, para. 25.

> ensure that it is recognized in every case where that is justified.[229]

Accordingly, the Commission has held that states must afford asylum-seekers a fair hearing to determine whether they satisfy the Convention refugee criteria, particularly where the non-refoulement provisions of the Refugee Convention, the American Convention, or the Inter-American Torture Convention may be implicated.[230]

Moreover, both the Inter-American Commission and the European Court have endorsed this approach specifically in the context of individuals suspected of terrorism, with the European Court observing that while States necessarily face "immense difficulties" in protecting the public from terrorism, even under those circumstances the prohibition against returning a person to torture remains absolute, "irrespective of the victim's conduct."[231] The UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism has similarly stated that transfers of terrorist suspects that occur outside of legally recognized extradition, expulsion or deportation procedures, that ignore or do not take into account the risk to the physical integrity of the person in the receiving State, and/or do not afford the person any legal redress are "incompatible with States' obligations under human rights law and. thus, should not be undertaken."[232]

With respect to the right to judicial protection under Article 25 of the American Convention together with the obligation respect and ensure rights under Article 1(1) of the Convention, the Inter-American Commission, through its Special Rapporteur on Migrant Workers, has observed that as with other individuals within the jurisdiction a state, governments are obliged to organize their apparatus and all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of those human rights and freedoms to non-nationals[233] Therefore, according to the Commission, OAS Member States must

> afford non-nationals a remedy for any violations of the several due process, non-discrimination and other rights and freedoms mentioned above. Where non-nationals are the subject of judicial, administrative or other proceedings, judicial review must always be provide for, either through appeal in administrative law or by recourse to *amparo* or *habeas corpus*. Judges should maintain at least baseline oversight of the legality and reasonableness of administrative law decisions in order to comply with the guarantees provided for Articles 1(1) and 25 of the American Convention.[234]

Finally, the International Convention against the Taking of Hostages, to which both Belor and New Atria are parties, is potentially relevant to the immigration issues raised in the present case insofar as Ms. Gray and Mr. Suarez have been indicted in New Atria on charges of hostage-taking. In particular, Article 6 of the Hostages Convention provides detailed requirements concerning the detention in one state of a person alleged to have committed a crime under the treaty in another state:

> **Article 6**

[229] IACHR, Report on Canada (2000), para. 70.

[230] IACHR, Report on Canada (2000), para. 24; Haitian Interdiction Case, para. 155.

[231] IACHR, Report on Canada (2000), para. 154; Eur. Court H.R, Chahal v. United Kingdom, 15 November 1996, 1996-V Nº 22 (1996), at 1831.

[232] Goldman Report, para. 55.

[233] See Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report of the IACHR 2000, para. 99.

[234] IACHR Report on Terrorism and Human Rights, para. 413.

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts.
2. The custody or other measures referred to in paragraph 1 of this article shall be notified without delay directly or through the Secretary-General of the United Nations to:
    a. the State where the offence was committed;
    b. the State against which compulsion has been directed or attempted;
    c. the State of which the natural or juridical person against whom compulsion has been directed or attempted is a national;
    d. the State of which the hostage is a national or in the territory of which he has his habitual residence;
    e. the State of which the alleged offender is a national or, if he is a stateless person, in the territory of which he has his habitual residence;
    f. the international intergovernmental organization against which compulsion has been directed or attempted;
    g. all other States concerned.
3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:
    a. to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;
    b. to be visited by a representative of that State.
4. The rights referred to in paragraph 3 of this article shall be exercised in conformity with the laws and regulations of the State in the territory of which the alleged offender is present subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 of this article are intended.
5. The provisions of paragraphs 3 and 4 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with paragraph 1(b) of article 5 to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.
6. The State which makes the preliminary inquiry contemplated in paragraph 1 of this article shall promptly report its findings to the States or organization referred to in paragraph 2 of this article and indicate whether it intends to exercise jurisdiction.

Arguments of the Commission

In the present case, the manner in which Belor detained and removed Laura Gray and Robert Suarez from Belor violated several interconnected and fundamental rights to which they were entitled under the American Convention and related instruments, including the right under Article 7 of the Convention not to be arbitrarily detained, the right to seek asylum and corresponding due process protections under Articles 22 and 8 of the Convention interpreted in light of the provisions of the UN Convention on the Status of Refugees and its 1967 Additional Protocol, and the right to judicial protection under Article 25 of the Convention, all together with violations of the State's obligations under Article 1(1) of the Convention.

Belor purported to arrest Laura Gray and Robert Suarez for having to overstayed their 6-month visitors' visas, and obtained arrest and deportation orders pursuant to section 17 of the Defense of Freedom Act on this premise. While it is true that Ms. Gray and Mr. Suarez had overstayed their visas, the true motivation for Belor's actions was the information presented by New Atria on November 2, 2001 that both individuals had been indicted in New Atria in connection with a hostage-taking that had taken place in New Atria in 1997. This is reinforced by the fact that Belor had previously failed to enforce the visa requirements despite the fact that Ms. Gray and Mr. Suarez's visa had expired over 6 months earlier. As such, it was improper and irregular for Belor to arrest and remove Ms. Gray and Mr. Suarez through section 17 of the Defense of Freedom Act, but rather the State should have followed proper extradition procedures as contemplated under Article 6 of the Hostages Convention. This in turn would have provided Ms. Gray and Mr. Suarez with an opportunity to challenge the propriety of the charges against

them and, as argued below, would have afforded them an opportunity to pursue proper asylum claims.[235] At a minimum, the judge who issued the arrest and deportation order should have provided them with an opportunity to be heard under section 17(2) of the Act. In light of these serious procedural defects, the arrest and detention of Ms. Gray and Mr. Suarez should be considered unlawful and therefore arbitrary contrary to Article 7 of the Convention.

Further, Belor failed to afford Ms. Gray and Mr. Suarez a fair and proper opportunity to seek asylum contrary to Articles 22 and 8 of the American Convention, interpreted in light of the State's obligations under the UN Refugee Convention and its Additional Protocol. In particular, it was clear from the pleas made by Ms. Gray and Mr. Suarez upon their arrest that they feared persecution through politically-motivated prosecutions in New Atria, a claim that was reinforced by findings by the UN Human Rights Committee that serious threats of political interference in the work of judiciary existed in New Atria. Further, in light of the alleged ties between Ms. Gray and Mr. Suarez and terrorist groups, there was a possibility that they could be detained at the Citadel upon their return to New Atria. Given the use at the Citadel of interrogation techniques that, as previously argued, amount to torture or other cruel, inhuman or degrading treatment or punishment, Ms. Gray and Mr. Suarez should also have had an opportunity to invoke the non-refoulement provisions of the American Convention and the Inter-American Torture Convention to prevent their removal from Belor notwithstanding any allegations that they may have committed serious crimes prior to their arrival in Belor.[236] It is well-recognized that the requirement of nonrefoulement applies even in relation to persons accused of crimes related to terrorism.[237]

Also in this connection, Ms Gray and Mr. Suarez were not provided with adequate recourse to the courts in Belor for protection against violations of their right to liberty, to seek and receive asylum, and not to be subjected to torture or other inhuman treatment. While section 17(2) of the Defense of Freedom Act provides a judge considering an application under section 17(1)(b) of the Act with some discretion to require the persons concerned to be brought before the court prior to his or her deportation, this is not sufficient to satisfy the requirement that foreign nationals be guaranteed a fair hearing to determine whether they satisfy the Convention refugee criteria, particularly where the non-refoulement provisions of the Refugee Convention, the American Convention, or the Inter-American Torture Convention may be implicated.[238]

Further, the manner in which the provision was applied to Ms. Gray and Mr. Suarez was inadequate to safeguard judicial protection of their rights. The judge declined to provide Ms. Gray and Mr. Suarez with an opportunity to be heard, based solely upon his view that the expiration of their visas clearly rendered them ineligible to remain in the country, without giving any consideration to the possible exercise of their right to claim asylum.

Arguments of the State

The arrest, detention and removal of Laura Gray and Robert Suarez were undertaken fully in accordance with domestic and international law, including the protections under Articles 7, 8, 22 and 25 of the Convention, and therefore Belor has complied with its obligations under

[235] In this regard, Article 9(1)(a) of the Hostages Convention provides: "A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing: (a) that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion;"

[236] See,.e.g., American Convention, Art. 22(8).

[237] IACHR, Report on Canada (2000), supra, para. 154; Eur. Court H.R, Chahal v. United Kingdom, 15 November 1996, 1996-V Nº 22 (1996), at 1831.

[238] IACHR, Report on Canada (2000), supra, para. 24; Haitian Interdiction Case, supra, para. 155.

Article 1(1) of the Convention.

In particular, Ms. Gray and Mr. Suarez were arrest, detained and deported pursuant to an order of a judge of the General Court issued pursuant to preexisting law. The Commission has not disputed that Ms. Gray and Mr. Suarez had overstayed their visitors' visas, nor have they denied the fact that they have been indicted by the courts in New Atria in connection with a serious hostage-taking incident in that country in 1997 where the indictment alleges their participation in this crime as members of the Scorpions. Accordingly, the requirements for issuing arrest and deportation ordered under section 17 of the Defense of Freedom Act were satisfied and Ms. Gray and Mr. Suarez were lawfully arrested, detained and deported. Belor denies that its actions were taken in order to facilitate New Atria's prosecution of the charges against Ms. Gray and Mr. Suarez and does not consider that the terms of the UN Convention against the taking of Hostages has been invoked or apply in this case, in the absence of an extradition request from New Atria. In this regard, Article 10 of the Hostages Convention provides that "[t]he offences set forth in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them."

Further, the Commission has failed to establish that Belor did not comply with its obligations respecting asylum and judicial protection in the circumstances of the present case. In particular, the Defense of Freedom Act provides an avenue through which individuals may raise asylum claims, namely through the exercise of a judge's discretion under section 17(2) of the Act to require the person in respect of whom an arrest and deportation order has been requested brought before the court prior to his or her deportation. Further, the manner in which the discretion was exercised in the present case did not contravene any right that Ms. Gray and Mr. Suarez may have had to raise a legitimate claim of asylum or nonrefoulement. Rather, it was indisputable from the information considered by the judge that Ms. Gray and Mr. Suarez were removable from Belor and, as the General Court subsequently determined on the habeas corpus petition, the fact that New Atria had issued indictments against both individuals for a serious non-political crime clearly excluded Ms. Gray and Mr. Suarez from claiming refugee status, such that any claims that they would be persecuted in New Atria were irrelevant. In any event, the well-foundedness of any claims for refugee status made by Ms. Gray and Mr. Suarez are highly questionable in light of the fact that they remained in Belor for over one-year without raising a claim with authorities. While the Commission now argues that Ms. Gray and Mr. Suarez could have raised claims of potential torture should they be returned to New Atria, this is based upon speculation as to whether they might be held at the Citadel, as well as unreliable allegations made by released detainees regarding interrogation techniques that, even if true, would not constitute torture or other inhuman treatment (see Part IV(A)(2)).

Finally, the right of Ms. Gray and Mr. Suarez to judicial protection was fully respected by Belor, not only through the legal proceedings invoked under section 17 of the Defense of Freedom Act, but also through the habeas corpus petition that was subsequently pursued on their behalf by Rights International, which was considered not only by the General Court of Belor, but also, on appeal, by the Supreme Court of Belor.

VI. REPARATIONS

Pertinent Law

Article 63(1) of the American Convention provides for a ruling by the Court on reparations in the following terms:

> 63.1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences

> of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

In interpreting and applying this provision, the Inter-American Court has observed that, under general principles of international law, the violation of international norms binding on a State gives rise to the international responsibility of that State, and, consequently, the duty to make reparation, and accordingly law that "any violation of an international obligation that has produced damage entails the obligation to make adequate reparation."[239] Measures of reparation are meant to provide those harmed by a violation with an effective remedy. The essential objective is to provide, to the extent possible, "full restitution for the injury suffered."[240] The Court has also recognized that reparations play a role in fulfilling the State's legal duty to take reasonable steps to prevent human rights violations. [241]

In applying these principles in the various cases before it, the Court has considered a broad variety of measures to constitute appropriate reparations for human rights violations, including the issuance of the judgment itself,[242] the payment of compensation,[243] the requirement to investigate and to identify, prosecute and punish those responsible for the violations,[244] the re-trial[245] or release[246] of individuals who have been the victims of unfair trials, and legislative amendments.[247]

Arguments of the Commission

In accordance with the established jurisprudence of the Court, the essential objective of reparations order in this case, as in others, must be to provide, to the extent possible, "full restitution for the injury suffered"[248] as well as to prevent similar violations in the future.

In the circumstances of the present case, appropriate measures to restore, to the extent possible, the *status quo ante* for each of the victims and to deter future like violations require that the Republic of Belor be ordered to:

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[239] See I/A Court H.R., Villagrán Morales et al. Case (The "Street Children" Case), Reparations, Judgment of May 26, 2001, Ser. C No. 77 (2001), para. 59.

[240] I/A Court H.R., Velásquez Rodríguez Case, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, Ser. C No. 9, para. 27.

[241] See, e.g., I/A Court H.R., Paniagua Morales et al. Case, Judgment of March 8, 1998. Series C No. 37, para. 178 and op. para. 6.

[242] See, e.g., I/A Court H.R., El Amparo Case, Reparations (Art. 63(1) American Convention of Human Rights), Judgment of September 14, 1996, Ser. C No. 28, para. 62.

[243] See, e.g., I/A Court H.R., Aloeboetoe et al. Case, Reparations (Art. 63(1) American Convention of Human Rights), Ser. C No. 15.

[244] See, e.g., I/A Court H.R., Garrido and Baigorria Case, Reparations (art. 63(1) American Convention on Human Rights), Judgment of August 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39 (1998), paras. 73, 74.

[245] See, e.g., I/A Court H.R., Hilaire, Constantine and Benjamin et al. Case, Judgment of June 21, 2002, Ser. C No. 94, para. 214.

[246] See, e.g., I/A Court H.R., Loayza Tamayo Case, Judgment of September 17, 1997, Ser. C No. 33, op. para. 5.

[247] See, e.g., I/A Court H.R., I/A Court H.R., *Case* of "The Last Temptation of Christ" vs. Chile (Olmedo-Bustos et al.). Judgment of February 5, 2001, Ser. C No. 73, para. 103(4).

[248] I/A Court H.R., Velásquez Rodríguez Case, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, Ser. C No. 9, para. 27.

1. release the unnamed detainees at the Citadel as well as Ferris Blanco, in light of the length of time for which they have been held unlawfully and the absence of any lawful basis for their continued detention;
2. request New Atria to return Laura Gray and Robert Suarez to Belor;
3. request the General Court to rescind the order freezing the financial assets of the Gir Temple;
4. amend the Defense of Freedom Act and other pertinent legislation to comply with the standards under the American Convention and other applicable treaties;
5. revise its procedures for interrogating individuals suspected of terrorism-related crimes to comply with the standards of humane treatment prescribed under Article 5 of the American Convention;
6. pay appropriate compensation to each of the victims.

Arguments of the State

Any reparations granted in the present case should be framed in a way that they will not undermine efforts by Belor to prevent punish and eliminate terrorism, including efforts to ensure individual accountability for the commission of the New Atria Embassy Bombings and other egregious terrorist acts.

From this perspective, reparations in the present case should be limited to the issuance of the judgment itself, which, as the Court has recognized on many occasions, can constitute adequate reparation.[249]

In the alternative, the State submits that any further reparations should be limited to the payment of compensation to the victims.

In the further alternative, the State submits that any specific form of reparation ordered in respect of each victim should be limited to requiring Belor to:

1. provide the detainees at the Citadel with access to a competent tribunal to determine their legal status;[250]
2. amend the procedures of the special tribunal at the Citadel in order to address any deficiencies identified by the Court;
3. request assurances from New Atria that Laura Gray and Robert Suarez will not be subjected to torture or other inhumane treatment;
4. pay compensation for any financial loss that flows from the freezing of the Gir Temple's asset, in the event that the State's investigations do not reveal connections between the Temple and terrorist groups, and arrange transportation for those congregation members who have difficulties attending another Corpion temples.

[249] See, e.g., I/A Court H.R., El Amparo Case, Reparations (Art. 63(1) American Convention of Human Rights), Judgment of September 14, 1996, Ser. C No. 28, para. 62.

[250] *See e.g.* IACHR, Precautionary Measures adopted in respect of the detainees in Guantanamo Bay (March 12, 2002).