2019 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Case of Gonzalo Belano and 807 Other Wairan Persons v. Republic of Arcadia

BENCH MEMORANDUM

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I. Context of mass migrations in the Americas

During the last few years, migration in the American hemisphere and worldwide has tended to be mixed in nature and in many cases massive in scale. In this context, it is becoming increasingly difficult to distinguish among the different groups of people who make up what are known as mixed migratory movements. Migration as a multi-causal phenomenon means that people migrate, voluntarily or forcibly, in response to different economic, social, political, or environmental reasons or the convergence of several such reasons.

Over the years, factors such as violence generated by State and non-State actors, massive human rights violations, armed conflicts, organized crime, inequality, poverty, the failure to guarantee economic, social, and cultural rights, political instability, corruption, as well as insecurity, conflicts over land and natural resources, the actions of development companies and mega-projects, various forms of discrimination, natural disasters, and the effects of climate change have been major push factors in the migration of millions of people. At the same time, it is also clear that certain pull factors encourage migration, including the prospect of greater human security, less violence and crime, more political stability, family reunification, better access to employment, health, or education, improved access to services, and more favorable climatic conditions, among others.[1]

People who migrate for different reasons, and who may be subject to different legal frameworks under public international law, may converge on the same routes and even use the same means of transport, with the aim of reaching the same destination country. As a result of the tightening of migration and asylum policies, as well as the lack of regular and safe channels for migration, asylum seekers, refugees, and persons in need of complementary protection often use the same routes as migrant in an irregular situation. Because such routes are clandestine, these people are often exposed to abuses and violations of their human rights. They may be forced to resort to human smugglers and potentially fall victim to various forms of human trafficking throughout the different stages of the migration process.

In recent years, there has been an increase in forced migration due to violence and repression by State and non-State actors (such as paramilitary forces, vigilantes, and other groups), organized crime violence (gangs or *maras* and drug cartels), and lack of access to fundamental human rights in multiple countries and sub-regions of the Americas. These factors are often linked to other factors generating various forms of migration that have been present throughout the region's history, such as inequality, poverty, armed conflict, and large-scale development projects, as well as natural disasters and the effects of climate change.

One of the main challenges in the region continues to be the forced migration of people from the Northern Triangle of Central America and Mexico, mainly due to the violence of organized crime and

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[1] In this regard, see, Inter-American Commission on Human Rights (IACHR), Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. December 31, 2015, para. 4 *et seq*. See also, United Nations High Commissioner for Refugees (UNHCR), *Movimientos migratorios mixtos cambian el perfil del asilo en las Américas* [Mixed migratory movements change the profile of asylum in the Americas], November 9, 2010.

drug trafficking and, to a lesser extent, persecution by State actors or those linked to the State. In the final months of 2018 and the beginning of 2019, groups of people set out from mainly Honduras, but also El Salvador, Guatemala, and Nicaragua, in so-called "migrant caravans" headed for North American countries—principally the United States of America, but also Mexico to a large extent—bringing more media attention to the mixed migration that has been a constant feature of the region for several years now. A large number of caravan members have said that they left their countries due to fear of persecution by gangs and drug trafficking networks, thus expressing a possible need for international protection.

In addition, since April 2018, the violent repression of opposition protests by the Nicaraguan government has forced a large number of Nicaraguans to move within their own country or flee to other countries in search of protection. By the end of September, 40,386 people had expressed a need for international protection in Costa Rica. Of this number, 13,697 had formalized their asylum requests through an interview with immigration authorities between January and September.[2] There has also been a significant increase in departures to other countries and in asylum requests from Nicaraguans to other countries such as Panama, Mexico, the United States, and Spain.[3] With no prospects of a political solution in the short term, the forced displacement of Nicaraguans is likely to continue.[4]

In addition, since 2015 there has been a dramatic increase in the number of people of Venezuelan origin who have been forced to leave their country as a survival mechanism in light of the serious political, economic, and social crisis facing Venezuela, and in particular the effects of the shortage of food, medicines, and medical treatment. For these reasons, many Venezuelans have had to migrate to other countries in search of protection or to preserve their rights to life, health, and food, among others.

This situation has triggered the largest forced migration crisis in the recent history of the American hemisphere and one of the largest in the world today. According to estimates from the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) contained in the Regional Refugee and Migrant Response Plan for Refugees and Migrants from Venezuela (RMRP), the number of Venezuelan migrants and refugees rose from 123,406 at the end of 2015 to an estimated 3,314,195 by December 2018. Of these, 460,000 are children, and most of them need some form of assistance, with no foreseeable return in the short or medium term. Projections also indicate that by the end of 2019 another 2 million Venezuelans could leave their country, bringing the total number of displaced Venezuelans in the region to 5,384,876.[5] Additionally, according to UNHCR figures, 375,174 asylum applications were filed by Venezuelans from 2014 to

[2] IACHR, Preliminary observations on the working visit to monitor the situation of Nicaraguans forced to flee to Costa Rica, November 1, 2018.
[3] IACHR, IACHR expresses concern about the situation of Nicaraguan migrants and refugees and calls on the States of the region to adopt measures for their protection, August 15, 2018.
[4] See IACHR, Preliminary observations on the working visit to monitor the situation of Nicaraguans forced to flee to Costa Rica, November 1, 2018.
[5] Coordination Platform for Refugees and Migrants from Venezuela, Regional Refugee and Migrant Response Plan for Refugees and Migrants from Venezuela, December 14, 2018.

the end of November 2018, while 958,965 Venezuelans opted for other migratory alternatives to stay legally in other countries.[6] Most of the migrants and refugees from Venezuela have gone to Colombia. While many have stayed there, others have continued their journey, especially to Ecuador and Peru. Brazil has also become an important destination country.[7]

Other migratory movements involve Cuban nationals. It is important to mention that after remaining abroad for 24 months, a Cuban person runs the risk of being considered an emigrant. Therefore, the impossibility of returning to their country prevents Cuban people from enjoying an effective nationality, and places them in a vulnerable situation since they are neither lawfully in the country where they are located, nor are they able to return to their own country.[8] The "dry foot, wet foot" policy that allowed Cubans to stay and become permanent residents in the United States after one year if they arrived by land ended in 2017, and in 2016 Cuba agreed to accept the return of its citizens from Mexico if they met certain requirements.[9] In addition, a number of risks have been observed in the route they have to take, mainly in the municipality of Turbo, near the Darién Gap in Colombia,[10] as well as in their transit through Mexico, and the journeys they undertake by sea.

The OAS countries have responded to the challenges posed by the aforementioned migratory movements in a variety of ways. Some countries in the region have reacted to provide protection and assistance to Venezuelan migrants and refugees, despite the difficulties of managing a massive migratory flow. In particular, in 2018, significant progress was made in the development of regulatory frameworks aimed specifically at ensuring the regularization of Venezuelan migrants' status in their host countries. In February 2018, for instance, the Ministry of Foreign Affairs of Colombia extended the deadline for obtaining the Special Stay Permit (PEP), created in July 2017 for Venezuelan citizens who meet certain criteria.[11] Similarly, the Peruvian government introduced the Temporary Stay Permit (PTP) for Venezuelan citizens who entered the country before October 31, 2018.[12] Brazil, for its part, introduced a residence permit for migrants who are nationals of border countries that are not members of MERCOSUR—in practice aimed at Venezuelans. The Chilean State devised the concept of a Democratic Responsibility Visa for Venezuelan citizens. At the same time, the aforementioned countries have allocated tremendous economic resources to ensure that Venezuelan migrants and refugees present within their borders have access to humanitarian assistance and basic services. Similarly, the State of Costa Rica has maintained an open-door policy towards the thousands of Nicaraguans who have entered its territory fleeing political repression, coordinating with the UNHCR and the IOM in order to guarantee the human rights of persons in need of international protection, and working in alliance with civil society organizations and other international bodies to provide information to persons on international protection procedures and guidance on how to access health

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[6] UNHCR Operational Portal, Venezuela Situation.
[7] UNHCR & IOM, Emergency plan for refugees and migrants from Venezuela launched, December 14, 2018.
[8] IACHR, Annual Report 2017, Chapter IV.B Cuba, pp. 671, 672.
[9] IACHR, Annual Report 2017, Chapter IV.B Cuba, pp. 671, 672.
[10] IACHR, IACHR Deeply Concerned about the Situation of Migrants in Colombia Close to the Panama Border, August 8, 2016.
[11] Ministry of Foreign Affairs of Colombia, Resolution 0316 of 2018, February 8, 2018.
[12] Presidency of the Republic of Peru, Supreme Decree N. 001-2018-IN, January 2018.

and education services.[13]

However, migrants needing international protection (asylum seekers, refugees, persons in need of complementary protection, and stateless persons) also continue to be the victims of multiple human rights violations and face gaps in protection in different countries in the region. First, in the absence of legal, regular, and safe channels for migration, many people—including those who would meet the criteria for recognition as refugees—have no choice but to resort to the clandestine channels provided by irregular migration, through risky land and sea routes. In many cases, these people are also unaware of their rights as migrants or as people in need of international protection. In addition, many of the people who make up the region's migratory movements find themselves in situations of special vulnerability, which require a differentiated approach and the adoption of specific protection measures.

Several countries of the region have shown signs of tightening migration and asylum policies, such as the closure of borders to asylum seekers and persons with possible international protection needs, the creation and expansion of migration detention centers, the emphasis on expedited deportation proceedings with no due process guarantees or right to access to justice, as well as policies that lead to stigmatization, discrimination, and the criminalization of migrants or anyone perceived as a migrant, particularly Latinos and Muslims. These trends are very worrying and suggest the need to closely monitor the situation.

The continuing setbacks in the area of migration in the United States are of particular concern, given the country's historical position as the top receiving country for migrants and refugees in the world, and in view of the ripple effects that these changes have on other countries in the region. In the United States, various measures were taken in 2017 and 2018 aimed at increasing the detention and deportation of migrants, including children and adolescents, and there are new barriers to entering the country and to accessing its refugee status determination system. The "zero tolerance" policy toward irregular migration adopted on April 6, 2018[14] established that all persons crossing the border illegally would be prosecuted, meaning that thousands of children would be separated from their parents and held in detention pending a medium-term placement solution. Although the family separation policy was suspended, many children remain in detention without being reunited with their parents, who in some cases have been deported to their country of origin.[15]

While the "caravans" of migrants and asylum seekers were advancing along their route to the United States in October 2018, the U.S. Government announced that it would close its southern border to

[13] IACHR, Preliminary observations on the working visit to monitor the situation of Nicaraguans forced to flee to Costa Rica, November 1, 2018.
[14] United States Department of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry, April 6, 2018. See also IACHR, IACHR Expresses Concern over Recent Migration and Asylum Policies and Measures in the United States, June 18, 2018.
[15] The New York Times, More Than 450 Migrant Parents May Have Been Deported Without Their Children, July 25, 2018; La Opinión, *Aumentan pedidos de padres deportados por la salida voluntaria de niños inmigrantes* [Requests from Deported Parents for Voluntary Departure of Immigrant Children on the Rise], August 30, 2018.

prevent the group from entering.[16] The United States also sent more than 5,000 troops to the border,[17] on the grounds that the caravan posed a threat to sovereignty and national security. On November 26, U.S. Bureau of Customs and Border Protection agents tear gassed members of the caravans, including children, who were attempting to cross into the United States.[18]

On December 20, 2018, the U.S. announced the Migration Protection Protocols, under which individuals arriving in or entering the United States from Mexico—with regular or irregular status—may be returned to Mexico for the duration of their immigration proceedings.[19] This policy could result in violations of the principle of non-refoulement and expose asylum seekers to human rights abuses in Mexican territory by drug cartels and other criminal groups.

Along the same lines, the context of structural racial discrimination against people of Haitian descent in the Dominican Republic has had a particular impact on the recognition of nationality, and on deportations and removals, among other situations. The difficulties and obstacles faced by the children of Haitian migrants born in Dominican territory to be registered and to obtain documentation proving their Dominican nationality, in application of the principle of *jus soli*, were aggravated as a consequence of Decision TC/0168/13 of the Constitutional Court of the Dominican Republic. This decision resulted in the arbitrary deprivation of Dominican nationality for thousands of people, mostly of Haitian descent, rendering them stateless persons.

Finally, Haitian migration to other countries in the region, such as the Dominican Republic, Brazil, Chile, the United States, and Mexico, has not diminished. Although the 2010 earthquake was a watershed moment, the lack of significant improvement in living conditions and the country's recent political instability have resulted in migration that remains constant, and Haitians now also face restrictive migration policies that limit their movement in different countries of the region. The most important legal challenges affecting the Haitian diaspora today include: the implementation of Law 169-14[20] and the National Plan for the Regularization of Foreigners[21] in the Dominican Republic, created in response to the international pressure that arose after the issuance of Judgment 168-13 of the Dominican Constitutional Court to remedy the situation of persons deprived of their nationality; the decision of the Trump administration in the United States to terminate the Temporary Protected

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[16] El Espectador, *Trump amenazó con cerrar frontera sur con Mexico por caravana de migrantes* [Trump Threatens to Close Southern Border with Mexico over Migrant Caravan], October 18, 2018; ABC, *Trump amenaza con cerrar la frontera con Mexico para frenar la caravana de inmigrantes* [Trump Threatens to Close Mexico Border to Stop Immigrant Caravan], October 18, 2018.

[17] The New York Times, Trump sending 5,200 troops to the Border in an Election-Season Response to Migrants, October 29, 2018.

[18] The New York Times, Border Agents Shot Tear Gas Into Mexico. Was It Legal?, November 28, 2018.

[19] Department of Homeland Security, Press Release: Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, December 20, 2018; NBC News, DHS to begin returning asylum-seekers at border to Mexico to await decisions, December 20, 2018; Mexico News Daily, Mexico will take back migrants awaiting asylum after US changes policy, December 20, 2018.

[20] Presidency of the Dominican Republic, *Ley 169-14* [Law 169014]. For more details on progress in the implementation of Law 169-14, see Central Electoral Board, *Beneficiarios de la Ley 169-14* [Beneficiaries of Law 169-14].

[21]See Ministry of Interior and Police of the Dominican Republic, *Plan Nacional de Regularización de Extranjeros* [National Plan for the Regularization of Foreigners].

Status program for Haiti,[22] affecting some 60,000 persons; and the Humanitarian Plan for the Orderly Return of Foreign Citizens to their Country of Origin[23] recently adopted in Chile for the exclusive return of persons of Haitian origin currently in that country.

It should be noted that two critical processes were undertaken at the international level during 2018 in the area of human migration, related to the development of a Global Compact on Refugees and a Global Compact for Safe, Orderly and Regular Migration, respectively. The first agreement was adopted by the United Nations General Assembly on December 17, 2018, with the United States voting against it and the Dominican Republic abstaining. The Global Compact for Safe, Orderly and Regular Migration was adopted by the United Nations General Assembly on December 19, 2018. According to publicly available information, all OAS countries adopted this compact with the exception of the United States, Chile, and the Dominican Republic,[24] while Brazil's incoming administration announced its intent to pull out of the agreement upon taking office in January 2019.[25]

II. Definitions

1. International migrant

Although there is no definition of the term "international migrant" in international law, the Inter-American Commission on Human Rights (IACHR) has understood it to mean any person outside the State of which he or she is a national.[26] For its part, the International Organization for Migration (IOM), in addition to adhering to the above definition, adds that this status is acquired regardless of the person's legal status, whether the movement is voluntary or involuntary, what the causes for the movement are, or what the length of the stay is.[27]

2. Migrant in an irregular situation

"Migrant in an irregular situation" refers to those migrants who have entered the territory of a State of which they are not nationals without the necessary documentation or have stayed past the time that

[22] The Guardian, Flee or hide: Haitian immigrants face difficult decisions under Trump, October 30, 2018. For more information on the program and the timetable for its termination, see United States Citizen and Immigration Services, Temporary Protected Status Designated Country: Haiti.
[23] Ministry of the Interior and Public Security of Chile, *Plan Humanitario de Regreso Ordenado al país de origen de Ciudadanos Extranjeros* [Humanitarian Plan for the Orderly Return of Foreign Citizens to their Country of Origin], Resolution 5744 EXENTA, October 26, 2018.
[24] See, e.g., Univisión Noticias, *164 países adoptan en Marruecos, sin Estados Unidos, el primer Pacto mundial para la migración* [164 Countries Adopt First Global Compact on Migration in Morocco, without the United States], December 10, 2018; BBC, *Por qué Chile y República Dominicana rechazaron el pacto mundial sobre migración de la ONU* [Why Chile and the Dominican Republic Rejected the UN Global Compact on Migration], December 11, 2018.
[25] See, e.g., El Mundo, *Brasil abandonará el Pacto Mundial Para la Migración de la ONU en cuanto Bolsonaro asuma el gobierno* [Brazil Will Withdraw from UN Global Compact for Migration as Soon as Bolsonaro Takes Office], December 11, 2018.
[26] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc. 46/15, December 31, 2015, para. 124
[27] IOM. Who is a migrant? Web page available at: https://www.iom.int/who-is-a-migrant. Retrieved on February 22, 2019.

they were authorized to stay.[28]

The IACHR has recommended that OAS member states avoid the use of expressions "illegal" and "illegal migrant," because they reinforce the criminalization of migrants and the false and negative stereotype that migrants are criminals for the simple fact of being in an irregular situation.[29]

3. Mixed migration

This term refers to migratory movements that arise from a variety of causes and are characterized by complex cross-border population movements involving different groups of people, such as economic or environmental migrants, migrants in a regular or irregular situation, asylum seekers or refugees, victims of human trafficking, children and adolescents unaccompanied or separated from their families, and other persons in need of protection. In some cases, somewhere along the migration process, migrants from any of the various categories mentioned above end up becoming victims of crimes, like human trafficking for purposes of sexual exploitation, bondage or some other type of exploitation.[30]

4. Asylum seeker

This term is used to refer to a person who has requested recognition of his or her refugee status and whose the application has not yet been conclusively assessed in the host country.[31]

5. Refugee

The Convention relating to the Status of Refugees (1951), as amended by the Protocol relating to the Status of Refugees (1967), provided the first universal definition of the term. It is understood to refer to 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; 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.[32]

The Cartagena Declaration on Refugees (1984) broadened this definition in order to better adapt it to the challenges and particularities of the American hemisphere. The definition established in the Declaration is one which, in addition to containing the elements of the Convention and Protocol

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[28] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc. 46/15, December 31, 2015, para. 125

[29] IACHR, Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. December 31, 2015, para. 125.

[30] IACHR, Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. December 31, 2015, para. 139; IACHR. Human Rights of Migrants and Other Persons in the Context of Human Mobility In Mexico, OEA/Ser.L/V/II. Doc. 48/13, December 30, 2013, fn. 45.

[31] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc. 46/15, December 31, 2015, para. 132.

[32] IACHR. Annual Report of the Inter-American Commission on Human Rights: Fourth Progress Report of the Rapporteurship on Migrant Workers and Members of their Families. OEA/Ser.L/V/II.117 Doc. 1 rev. 1, March 7, 2003, para. 101.

relating to the Status of Refugees, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order.

The IACHR, consistent with the guidelines established by the UNHCR, has determined that a person is a refugee as soon as he or she meets the requirements set out in the traditional or expanded definition, which necessarily occurs before his or her status is formally determined. This means that it is possible to determine that refugee status is declarative rather than constitutive in nature. In other words, refugee status is not acquired by virtue of recognition, but is recognized as such by virtue of being a refugee.[33]

6. *Principle of non-refoulement*

Within the inter-American system, this principle is regulated in Article 22.8 of the American Convention on Human Rights, in the following terms: "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."

This means that the aim is to protect people from a situation of risk by prohibiting their removal to their country of origin or to a third country from which they may subsequently be returned.[34]

International human rights law and refugee law bodies agree that the principle of non-refoulement is the cornerstone of international refugee protection,[35] and the Inter-American Court has considered it a norm of *jus cogens.*[36]

7. *Procedure for recognition of refugee status*

This procedure is an examination carried out by the authorities empowered to determine whether a person who submitted an application for recognition of refugee status or in any way expressed a need for international protection can be considered a refugee. The analysis consists of verifying that their situation meets the criteria contained in the applicable definition of refugee.[37]

States usually establish domestic procedures for the recognition of refugee status through legislation, specifying the authorities in charge of administering those procedures, deadlines, aspects to be

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[33] IACHR, Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. December 31, 2015, para. 131; UNHCR. Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status. 1979, para. 28.

[34] I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 208

[35] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, para. 5; I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 209

[36] Under Article 53 of the Vienna Convention on the Law of Treaties, a norm of *jus cogens* is any "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[37] UNHCR, Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee, 1 September 2005, p. 10.

evaluated, appeals for challenging unfavorable decisions, the rights of applicants and refugees, and others aspects. In addition to following the provisions of domestic law, States must take account of the guidelines established by the UNHCR with regard to the obligations arising from the 1951 Convention.

Without prejudice to the above, States also have the option of delegating the power to determine refugee status within their territory to the UNHCR. These types of proceedings are governed by the *Procedural Standards for Refugee Status Determination under UNHCR's Mandate.*

8. *Prima facie recognition of refugee status*

While applications for recognition of refugee status are, as a general rule, governed by the procedure and deadlines established by the States or the UNHCR, there are exceptional situations in which entire groups have been displaced, where the need to provide assistance to such persons is extremely urgent and, due to the characteristics of the migratory movement, it is impossible to carry out an individual determination of refugee status for each member of the group.[38]

In this regard, the authorities tend to resort to the "group determination" of refugee status, which recognizes that, based on the obvious and objective circumstances of the country of origin, each member of the group could be individually recognized as a refugee and everyone is granted such status *prima facie* (or in principle). This determination allows for evidence to the contrary, i.e., suggesting that an individual should not be considered a refugee.[39]

Section III(3)(a) of this document will expand upon this point.

9. *Exclusion clauses*

These are cases set out in the Convention relating to the Status of Refugees (1951) or their equivalents in national laws, whereby States are entitled to deny the benefits of refugee status to persons who meet the elements of the refugee definition, but who are considered not to warrant international protection.

As established by the UNHCR in its *Guidelines on International Protection The application of exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,* "Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts."[40]

As mentioned in the above-cited UNHCR document, the regulation of exclusion clauses is provided for in Article 1F of the Convention relating to the Status of Refugees, which reads as follows:

> *"F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

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[38] UNHCR. Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, 24 June 2015, para. 4.

[39] UNHCR. Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, 24 June 2015, paras. 4 & 18.

[40] UNHCR. Guidelines on International Protection Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para. 2.

a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Their application, limits, and exceptions will be addressed in depth in *section III.3(d)* of this memorandum.

III. Core issues and standards relevant to the case analysis

1. Power of States to regulate immigration in their territory

There is no explicit reference in the facts of the case or evidence to suggest that any of the parties questioned the power of States to regulate immigration in their territory. However, it is important not to lose sight of this aspect, as it is the basis on which countries devise their migration policies.

In this regard, it is vitally important to remember that the bodies of the inter-American system have repeatedly recognized that States have the power to determine their migration policies, or mechanisms for controlling entry into their territory,[41] as well as the rules relating to the granting of citizenship.[42]

Notwithstanding the above, they have also indicated that such power is not entirely discretionary, but rather that it is limited by the need for "strict regard for the guarantees of due process and respect for human dignity, regardless of the migrant's legal status"[43] and moreover, in the case of nationality, by the duty of States "to provide individuals with the equal and effective protection of the law [as well as] by their obligation to prevent, avoid and reduce statelessness."[44]

It follows that States have an obligation to bring their migration policies into line with their international human rights obligations.[45] This obligation extends to cover the rights of asylum seekers and refugees, and means that States have an obligation to establish policies that include measures for identifying and recognizing the international protection needs of individuals.

On this point, the participating teams are expected to analyze or make the following points:

- That the power of the State to regulate migration in its territory is not absolute and is limited by respect for the human rights of asylum seekers and refugees.

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[41] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 97.

[42] I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 39.

[43] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 100.

[44] I/A Court H.R., Case of the Girls Yean and Bosico v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 140.

[45] International Commission of Jurists, Migration and International Human Rights Law. A Practitioner' Guide, No. 6, 2014, p. 50.

- Establish whether the immigration policy that Arcadia applied to the migrant caravan was consistent with the State's obligations under human rights and international refugee law.

2. Principle of equality and nondiscrimination, criminalization of migrants

Paragraphs 24 and 25 of the facts of the case establish that there were various racist and xenophobic displays against persons from Puerto Waira in Arcadia. Among others, these displays included: statements made by Arcadian political actors blaming Wairans for the shortage of jobs in that country, as well as for rising crime; the spread of fake news against refugees and the use of terms such as "gang members," "criminals," "illegals," "cockroaches," and "scum," and marches and public condemnations demanding the deportation of people who participated in or were part of gangs in Puerto Waira. It is noted that the State launched awareness-raising campaigns to prevent discrimination against persons who were recognized as refugees.

With regard to the prohibition of discrimination and its derivation from the principle of equality, it is important to remember that together they constitute one of the basic pillars of international human rights law. The Inter-American Court has considered the principle of equality and nondiscrimination a peremptory norm of international law or *jus cogens*[46] because "the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."[47]

The significance of the principle of equality and nondiscrimination lies in the fact that, in the words of the Court, it "springs 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 accorded to others not so classified."[48]

The Court has also found that there are differences between the concepts of discrimination and justified difference in treatment.

It considers discrimination to include "any distinction, exclusion, restriction or preference which is based on any ground such as race, color, 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."[49]

The Court also considers that there are cases in which differences in treatment do not necessarily entail discrimination. This is the case "when the classifications selected are based on substantial factual

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[46] See footnote 36.

[47] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 101.

[48] I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55.

[49] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 92.

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."[50] A good example of this is the treatment afforded to children and adolescents, where their interests are identified as an issue that takes precedence over any other consideration.

The bodies of the IAHRS have also established the inextricable relationship between the obligation to respect and guarantee human rights and the principle of equality and nondiscrimination.[51] This means that, in practice, States are obliged to respect and guarantee the human rights of all persons without discrimination of any kind, including on the grounds of immigration status. On this point, the Court has held that "This general obligation to respect and ensure the exercise of rights has an *erga omnes* character. The obligation is imposed on States to benefit the persons under their respective jurisdictions, irrespective of the migratory status of the protected persons. This obligation encompasses all the rights included in the American Convention and the International Covenant on Civil and Political Rights."

In order to comply with the above obligation, the Court identifies two behaviors that must be adopted by States:

- Abstaining from actions "that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination." According to the Court, this "translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons,"[52] such as the migratory status of persons.
- The obligation to take affirmative measures, "to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons."[53]

According to these standards, the criminalization of migrants constitutes a form of discrimination, insofar as it involves practices of exclusion toward a particular social group that contribute to an erroneous association between irregular migration and crime.[54]

From a theoretical point of view, the criminalization of migrants originates when a State begins to construct an interconnection between the practices, laws, and policies of criminal law and immigration

[50] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 91.
[51] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 95.
[52] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 103.
[53] I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 104.
[54] Report of the Special Rapporteur on the Human Rights of Migrants, Ms. Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002.

law.[55] This, in practice, leads to the persecution of irregular migrants through harsh and inflexible treatment in order to discourage their entry into a given country.

In principle, these linkages between criminal law and immigration law provisions can be implemented in two ways, which are not necessarily exclusive:

- The increasing relevance of criminal law categories within immigration regulations. An example of this would be the rules establishing the loss of regular immigration status and/or residence for persons who commit a crime within the State in which they are located.

- The use of criminal standards, procedures, and offenses as a way of penalizing irregular migration. This section includes the criminalization of certain acts such as irregular entry into a country or "recidivism", the expiration of a residence permit, and the creation of rules that punish entering into marriage for the purpose of obtaining immigration benefits.

Similarly, the Inter-American Commission on Human Rights has identified the widespread use of immigration detention and summary deportations as some of the measures adopted by States that criminalize irregular migrants,[56] and which are based mainly on national security arguments.

In this regard, special United Nations mechanisms have maintained that "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention."[57]

In order for a policy not to result in the criminalization of irregular migration, it should be based on a presumption of freedom, which entails unrestricted respect for the principle that detention is exceptional in nature and that immigration infractions are not regulated under criminal law.[58]

The participating teams are thus expected to present arguments or analyses on the following points:

- Determine whether the measures taken by the State were sufficient to guarantee the right to equality and nondiscrimination of all persons coming from Puerto Waira (including those who were recognized as refugees as well as those excluded from such protection and subsequently deported to Tlaxcochitlán).

- Analyze whether the overall context in Arcadia is one that criminalizes migration, taking into account the following elements: (i) That the State does not penalize irregular entry into its territory (see paragraph 11 of the facts of the case); (ii) That immigration detention measures are used, with limited grounds for their admissibility (see clarification answer number 11); (iii) That a person's criminal record affects his or her immigration status, excluding him or her from refugee status; (iv) The type of measures taken by Arcadia to guarantee the right to

[55] JOAO GUIA, Maria et. al, Social Control and Justice. Crimmigration in the Age of Fear, Eleven International Publishing, Netherlands, 2013, pp. 7-8.
[56] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc.46/15, December 31, 2015, p. 16.
[57] Report of the Special Rapporteur on the human rights of migrants, François Crépeau A/HRC/20/24, 2 April 2012.
[58] IACHR. Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, OEA/Ser.L/V/II.Doc.48/13, December 30, 2013, pp. 41-43.

equality and nondiscrimination of migrants (*prima facie* recognition of refugee status, awareness-raising campaigns, etc.).

Right to seek and receive asylum

The possible violation of the right to seek and receive asylum, as well as of the principle of non-refoulement, are one of the central issues raised in the hypothetical case.

Paragraph 14 of the facts of the case explains that Arcadia received a massive influx of migrants from the State of Puerto Waira. Faced with this situation, and in view of the context of violence in that country, the Arcadian authorities implemented a procedure for the *prima facie* recognition of refugee status; that is, all persons entering the territory with the migrant caravan would be recognized as refugees immediately. This was with the exception of cases where the person was found to have a criminal record, in which case a regular refugee status determination proceeding would be initiated to assess the appropriateness of an exclusion clause on an individual basis.

Thus, Arcadia identified 808 persons who had criminal records and opened regular proceedings for them. In its decisions, the State held that all of these individuals had a well-founded fear of persecution (i.e. they met the elements of the refugee definition), and that 729 of them would face a "high risk" of being subjected to torture and their lives would be in danger if deported to their country of origin, while the remaining 79 would face a "reasonable likelihood" of the same. Nonetheless, the State determined that it was appropriate to apply an exclusion clause denying international protection to these persons because of the crimes they committed.

Although they were not recognized as refugees, and based on the principles of shared responsibility and non-refoulement, the State called upon the countries of the region to admit those persons into their territories. None responded to the request, so Arcadia signed an agreement with the United States of Tlaxcochitlán in order to return the people to that country. From there, they were ultimately deported to Puerto Waira, where 29 were killed and 7 disappeared.

A proper examination of this issue requires an understanding of the essential content of the right of every person to seek and receive asylum, as well as some related procedures and concepts that are particularly relevant to the analysis of the facts of the case. Thus, it should be recalled that this right is explicitly recognized in Article 22.7 of the American Convention, which states that "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."

The Inter-American Court has held that the right to seek and receive asylum, within the framework of the inter-American system, is configured as an individual human right to seek and receive international protection in foreign territory, including refugee status under the relevant United Nations instruments or respective national laws, and asylum under the various inter-American conventions on the subject. Furthermore, in view of the progressive development of international law, the Court has considered that the obligations derived from the right to seek and receive asylum are applicable to those persons who meet the elements of the expanded definition contained in the Declaration of

Cartagena.[59]

a) Principle of non-refoulement

The principle of non-refoulement is enshrined in Article 22.8 of the American Convention on Human Rights ("ACHR"), as follows:

> *Article 22. Freedom of Movement and Residence*
>
> *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.*

For its part, the 1951 Convention relating to the Status of Refugees establishes:

> *Article 33. – Prohibition of expulsion or return ("refoulement") 1. 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. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

In addition, Article XXVI of the American Declaration of the Rights and Duties of Man, Article 5.2 of the ACHR and the final paragraph of Article 13.4 of the Inter-American Convention to Prevent and Punish Torture establish the prohibition of torture and cruel, inhuman, and degrading treatment as follows:

Article XXVI of the American Declaration of the Rights and Duties of Man

> *Every accused person is presumed to be innocent until proved guilty.*
>
> *Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.*

Article 5. of the ACHR, Right to Humane Treatment

> *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.*

Article 13.4 of the Inter-American Convention to Prevent and Punish Torture

> *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*

[59] I/A Court H.R. The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 132.

treatment, or that he will be tried by special or ad hoc courts in the requesting State.

Similarly, Article 3 of the Convention against Torture establishes that:

> *1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture..*
>
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

The inter-American human rights system has recognized that the principle and the right to non-refoulement is the cornerstone of the international protection of refugees and asylum seekers,[60] as well as a rule of customary international law; being an obligation derived from the prohibition against torture, the principle of non-refoulement in this area is absolute and also takes on the character of a rule of customary international law, that is, *ius cogens*, binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.[61]

The Inter-American Court has interpreted the right to non-refoulement as a right that is broader in content and scope than that which operates in the application of international refugee law. This is because Article 33.2 of the Convention relating to the Status of Refugees provides exceptions to the principle of non-refoulement, such as when the refugees pose a danger to the national security or have been convicted of a particularly serious crime. In contrast, the American Convention offers protection to any alien when their life, integrity, and/or freedom are endangered, or if they are at risk of torture or cruel, inhuman, or degrading treatment,[62] regardless of immigration status in the country in which they are located.[63]

The principle of non-refoulement also includes the prohibition of indirect return, which means that asylum seekers should not be returned or expelled where there is a possibility that they may be at risk of persecution, or sent to a State from which they may be returned to the country where they are at risk of persecution.[64]

The obligation of non-refoulement established in these provisions is absolute and also prohibits the

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[60] I/A Court H.R., Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 151, *citing* United Nations High Commissioner for Refugees (UNHCR), Executive Committee, General Conclusion on International Protection, UN Doc. 65 (XLII)-1991, published on 11 October 1991, para. c.

[61] I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 211; see also HATHAWAY James C., 'The Rights of Refugees under International Law' (Cambridge University Press, 2005), p. 363;

[62] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3. 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[63] I/A Court H.R., Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 135.

[64] I/A Court H.R., Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272, para. 153.

expulsion of any person, without exceptions of any kind,[65] including those in extradition proceedings, who have a well-founded presumption that they may be subjected to torture, cruel, inhuman, or degrading treatment, or that they may be tried by special *ad hoc* tribunals in the requesting State. The IACHR has additionally reiterated that, given the seriousness of the possible consequences of exclusion or denial of refugee status, any determination of refugee status should be made through fair and appropriate proceedings, in accordance with due process. The IACHR reiterated that these procedural requirements apply even in cases in which persons fall within one of the grounds for exclusion, such as the fact that the person may be considered a "danger to the security of the country."[66] Thus, the Inter-American Court has explained that "the principle of non-refoulement seeks, fundamentally, to ensure the effectiveness of the prohibition of torture in all circumstances and for all persons, without discrimination of any kind."[67]

In the *Case of the Pacheco Tineo Family*, the Inter-American Court established that asylum seekers have the right to have their applications and the risk they may face in the event of return properly assessed by the national authorities.[68] The IACHR has also stated that persons in situations of special vulnerability should be dealt with through a differentiated approach and the adoption of special protection measures.[69]

The Inter-American Court has held that Articles 5 of the ACHR and 13.4 of the Inter-American Convention to Prevent and Punish Torture broadens the protection against refoulement provided by Article 22.8 of the American Convention, by referring also to the situation of persons in extradition proceedings and by extending protection to those persons who have a well-founded presumption that they may be subjected to torture, cruel, inhuman, or degrading treatment, or that they will be tried by special *ad hoc* tribunals in the requesting State. Again, this rule entails an absolute prohibition of refoulement according to a broader set of eligibility criteria.[70] The Inter-American Court has made clear that "the principle of non-refoulement seeks, fundamentally, to ensure the effectiveness of the prohibition of torture in all circumstances and for all persons, without discrimination of any kind."[71]

[65] In this same regard, see IACHR, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr. (2002), para. 394.

[66] IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, October 22, 2002, para. 391.

[67] I/A Court H.R., Advisory Opinion OC-25/18: The institution of asylum, and its recognition as a human right under the Inter-American System of Protection, May 30, 2018, para. 122; Advisory Opinion OC-21/14 para. 226; Case of Wong Ho Wing v. Peru, para. 127.

[68] I/A Court H.R., Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 122.

[69] IACHR, Resolution 2/18 Forced Migration of Venezuelans, March 2, 2018.

[70] At the international level, the principle of *non-refoulement* is enshrined in Article 33 of the Convention Relating to the Status of Refugees and in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 3 of the CAT contains an absolute prohibition against the expulsion, return, or extradition of a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. For its part, the European Court of Human Rights, in the case of Soering v. United Kingdom, established that under Article 3 [Prohibition of Torture] there is an absolute prohibition on the return of a person to a State where there is a real risk that he or she may be subjected to such treatment.

[71] I/A Court H.R., Advisory Opinion OC-25/18: The institution of asylum, and its recognition as a human right under the Inter-American System of Protection, May 30, 2018, para. 122; Advisory Opinion OC-21/14 para. 226; Case of Wong Ho Wing v. Peru, para. 127.

b) *Prima facie* recognition of refugee status

Every *prima facie* refugee benefits from refugee status in the country where he or she is recognized as such, and enjoys the rights contained in the applicable convention/instrument. The *prima facie* recognition of refugee status should not be confused with an interim or provisional condition, pending subsequent confirmation. Moreover, once an individual is recognized as a *prima facie* refugee, this status must be maintained unless the cessation clauses apply, or his or her status is terminated or revoked.[72]

Refugees recognized by this means should be informed accordingly and should be issued a document certifying such status.

The *prima facie* approach, once put into practice, applies to all persons belonging to the beneficiary class, unless there is evidence to the contrary in the individual case. Evidence to the contrary is information relating to an individual that suggests that he or she should not be considered a refugee—either because he or she is not a member of the designated group or, despite being a member, should not be determined to be a refugee for other reasons (e.g., exclusion).

Evidence to the contrary includes, *inter alia*, information that the applicant:

- is not from the designated country of origin or former habitual residence or does not possess the shared characteristic underlying the designated group's constitution;
- did not flee during the designated time period;
- left for other, non-protection reasons unrelated to the situation/event in question and has no *sur place* claim;
- has/had taken up residence in the country of asylum and is recognized by the competent authorities as having the rights and obligations attached to the possession of nationality of that country (Article 1E, 1951 Convention)
- may fall within the exclusion clauses in Article1F of the 1951 Convention or of the relevant regional instrument

c) Application of exclusion clauses to refugee status

In the international sphere, so-called exclusion clauses are regulated in Article 1F of the Convention relating to the Status of Refugees (1951), which reads as follows:

> *"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> > *a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
> >
> > *b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*

[72] UNHCR. Guidelines on International Protection No. 11 " Prima Facie Recognition of Refugee Status", June 24, 2015, para. 7.

c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The logic of these clauses is based on the fact that certain crimes are so serious that they render their perpetrators unworthy of international protection as refugees, even though they meet the elements of the definition contained in Article 1(A) of the 1951 Convention.[73] Their purpose is to deprive those guilty of atrocities and serious crimes of the international protection accorded to refugees, thereby preventing such persons from abusing the institution of asylum to evade justice and subject the victims of these crimes to impunity.

Unlike subparagraphs (a) and (c) of the abovementioned article, the temporal scope of the exclusion clause contained in subparagraph (b) is limited. In other words, the offense in question must have been committed before admission to that country as a refugee.

The competence to determine whether any of these clauses is applicable rests with the State that may or may not grant refugee status, which must only have reasonable grounds to consider that the person has committed any of the acts described in that article. However, notwithstanding the presumption of the existence of such grounds, the exclusion clauses should be applied narrowly, as their potential effects on the fundamental rights of the applicant or refugee could be serious.[74]

In order to assess the application of an exclusion clause, the authority should take into account certain elements such as the common factor of the crime committed, the seriousness of the crime, the penalty that could be imposed for the commission of such an act, and the individual responsibility of the applicant for the acts attributed to him or her.

The latter assumes that the evaluated person has committed or substantially contributed to the commission of the criminal act, with the knowledge that his or her act or omission would facilitate the criminal conduct.

It should be recalled that the United Nations High Commissioner for Refugees has issued guidelines to assist States in the implementation of these provisions, which have referred in particular to establishing **individual responsibility**,[75] in the sense that three fundamental aspects should be taken into consideration:[76]

- **Knowledge of the circumstances and consequences of the acts being committed**. With regard to this element, the UNHCR considers that, in the case of acts committed by minors, two factors must be taken into account: the minimum age for criminal responsibility and the assessment of the minor's maturity, in order to determine whether he or she has the mental capacity required to attribute responsibility to him or her.

[73] Guidelines on International Protection Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, p. 2.

[74] UNHCR. Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. 149.

[75] UNHCR. Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003. Available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f5857d24&page=search

[76] UNHCR. Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, March 2010, para. 59 *et seq*. Available at: https://www.refworld.org/docid/4bb21fa02.html

In the case of persons accused of acts committed in connection with their participation in gangs, the UNHCR considers that this examination must take account of factors that existed at the time of the events, such as:

- *"The age of the claimant at the time of becoming involved with the armed group;*
- *The reasons for joining (was it voluntary or coerced or in defense of oneself or others?);*
- *The consequences of a refusal to join;*
- *The length of time as a member;*
- *The possibility of not participating in such acts or of escape;*
- *The forced use of drugs, alcohol, or medication (involuntary intoxication);*
- *Promotion within the ranks due to actions undertaken;*
- *The level of education and understanding of the events in question; and*
- *The trauma, abuse, or ill-treatment suffered by the child as a result of his or her participation."*[77]

- **The intent with which the act is carried out or its consequences are sought**. In order to analyze this element, we have to consider some of the factors that exclude criminal responsibility, such as self-defense or coercion. The UNHCR has considered that very strict conditions must be met for the latter to be admissible, i.e. the act must be the result of extremely serious threats such as those related to death or continuing or imminent bodily harm to oneself or others.[78]
- **The proportionality between the seriousness of the crime attributed and the fear of persecution**. The examination of proportionality in its application must *"weigh up the gravity of the offense for which the individual appears to be responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant."*[79]

For these reasons, and in light of the facts of the case, participating teams are expected to analyze and present arguments on the following points:

- Whether the existence of a criminal record is sufficient "evidence to the contrary" to deny the *prima facie* recognition of refugee status to a person.
- The admissibility of any of the exclusion clauses provided for in Article 1F of the Convention

[77] UNHCR. Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, p. 47. Available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f5857d24&page=search

[78] UNHCR. Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, p. 36. Available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f5857d24&page=search

[79] UNHCR. Guidelines on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, p. 40. Available at: https://www.refworld.org/docid/3f5857684.html

relating to the Status of Refugees, particularly that contained in subparagraph (b). They should also examine whether the exclusion proceeding was conducted in accordance with international human rights standards and international refugee law.

- It is expected in particular that the teams will present considerations related to the establishment of Gonzalo Belano's individual responsibility in the commission of the crimes for which the group of 808 Wairans was excluded. In this regard, it is important to consider the following aspects: (i) that Gonzalo Belano was a minor at the time of his gang involvement; (ii) that he was forcibly recruited by the gang; (iii) that he was convicted of the crime of extortion; (iv) an analysis of the proportionality between the crime committed and the consequences of exclusion which, according to paragraph 30 of the facts of the case, was his murder outside his family's house.
- Arcadia's possible violation of the principle of non-refoulement in that, in addition to not recognizing them as refugees, it also failed to offer complementary protection to Wairans with criminal records (despite their being identified as having a high and reasonably likely risk of being tortured or killed), resulting in the murder of 29 of them and the disappearance of 7 others.
- On this point, the teams can examine whether there are limits to the principle of non-refoulement; that is, they might question its character as a *jus cogens* norm. This would result in the need to determine whether the State was absolutely prohibited from deporting or expelling them from its territory or whether, on the contrary, such a measure is justified on the basis of the persons' criminal records.
- Finally, the teams could analyze whether Arcadia's agreement with Tlaxcochitlán constitutes an indirect return mechanism.

3. *Right to personal liberty and prohibition of arbitrary detention*

Paragraph 22 of the facts of the case addresses the issue of the detention of Wairans with criminal records, establishing that they were deprived of their liberty for the purpose of guaranteeing national security and preserving public order.

To this end, 490 of them were housed in a migration detention center and another 318 in separate prison units in the town of Pima due to insufficient capacity at the immigration facility.[80]

As established throughout the hypothetical case, these persons were in detention for 7 to 9 months, depending on whether they filed a judicial appeal against the deportation.

a) Legality, exceptionality, suitability, necessity, and proportionality

On this point, the first consideration to be made is that "irregular migrants are not criminals," as a person's irregular status "harms no fundamental legal interests that warrant the protection of the

[80] For more information on persons deprived of their liberty, conditions of detention, and the determination of where they should be held, see the answers to clarification questions 3, 17, and 18.

State's punitive authority."[81]

This is consistent with the case law of the Inter-American Court, in the sense that "in a democratic society punitive power is exercised only to the extent that is strictly necessary to protect fundamental legal rights from serious attacks that may impair or endanger them."[82] Accordingly, "detaining people for non-compliance with migration laws should never involve punitive purposes,"[83] and moreover, consistent with the principle of the **excepcionality** of detention,[84] it should be considered an *ultima ratio* measure.[85]

In addition to the principle of exceptionality, the Inter-American Court has ruled that custodial measures in general, and with respect to migrants in particular, "should only be applied when it is **necessary and proportionate** in the specific case," and only for the shortest possible time.[86] It has also underscored the need for States to have a range of alternative measures and concluded that "Migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary."[87]

It follows from the above that, in some cases, it may be considered that "the application of preventive custody may be suitable to regulate and control irregular immigration to ensure that the individual attends the immigration proceeding or to guarantee the application of a deportation order."[88]

Once a person has been taken into custody, he or she must be brought before a judicial authority for the purpose of examining the **legality** of the deprivation of liberty.[89]

b) Legal advice

In addition, the Inter-American Court has determined that throughout the course of immigration proceedings or detention, the migrant must have the opportunity to present arguments in his or her defense, as well as free legal advice if requested.

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[81] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc.46/15, December 31, 2015, para. 381.
[82] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 170.
[83] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 171.
[84] IACHR. Report on the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.Doc.46/13, December 30, 2013, paras. 20 & 21.
[85] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc.46/15, December 31, 2015, para. 383.
[86] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 171.
[87] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 171.
[88] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 169.
[89] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, paras. 124 & 126.

With respect to the latter, the Court has stated that "legal aid must be provided by a legal professional to meet the requirements of a procedural representation, through which the accused is advised, inter alia, about the possibility of filing appeals against acts affecting individual rights. If the right to defense exists from the moment that an investigation of the person is ordered, or the authority orders or executes actions that entail an infringement of rights, the person subjected to a punitive administrative proceeding must have access to procedural representation from that moment forward. To prevent the accused from being advised by counsel is to severely limit the right to defense, which leads to procedural imbalance and leaves the individual unprotected before the sanctioning authority."[90]

A lack of legal assistance during the proceedings often has an impact throughout the entire case,[91] and therefore "the provision of free public legal aid is necessary to avoid the violation of the right to due process."[92]

c) Consular assistance

In addition to the provisions on legal aid, the Inter-American Court has developed the obligations of States regarding the right to consular notification and assistance.

In Advisory Opinion No. 16, the Inter-American Court recognized that a detainee's right to consular assistance is an individual rights and a minimum guarantee within the IAHRS.[93] In addition, for purposes of enforcing this right, the Court established that it consists of three essential elements: "1) the right to be informed of his rights under the Vienna Convention; 2) the right to have effective access to communicate with the consular official, and 3) the right to the assistance itself."[94]

The second element has been developed to include the consideration that the detainee should be allowed to "1) freely communicate with consular officials and 2) be visited by consular officials. According to this treaty, "consular officers shall have the right to visit a national of the sending State [and] to arrange for his legal representation. That means the recipient State must not prevent the consular official from providing legal services to the detainee."[95]

d) Conditions of detention

Finally, with regard to the conditions of detention, the bodies of the System agree that "all persons deprived of liberty have the right to live in detention conditions compatible with their personal dignity."[96] In this regard, the State assumes the role of guarantor and is directly responsible for

[90] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 132.
[91] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 147.
[92] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 146.
[93] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, paras. 84 & 124.
[94] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 153.
[95] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 158.
[96] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 198.

ensuring the rights of persons in its custody.

One of the first considerations that States should take into account is that "migrants should be held in facilities specifically designed for that purpose, in accordance with the migrant's legal situation, and not in common prisons, the purpose of which is incompatible with the purpose of the possible detention of a person for his immigration status."[97]

As regards the guarantee of rights, and specifically the right to humane treatment, States have an obligation to "guarantee the health and welfare of inmates by providing them, inter alia, with the required medical care, and to ensure that the manner and method of any deprivation of liberty does not exceed the unavoidable level of suffering inherent in incarceration. Lack of compliance may constitute a violation of the absolute prohibition against torture and cruel, inhumane, or degrading punishment or treatment."[98]

On this subject, the teams are expected to formulate arguments on the following points:

- Analyze the legality, suitability, necessity, and proportionality of the deprivation of liberty in the case of Wairans with criminal records, as well as a consideration of the length of detention.
- Determine whether the conditions of detention described in clarification answer number 18 are consistent with human rights standards.
- Determine whether the detainees were guaranteed their rights to legal representation and consular assistance in accordance with clarification answer number 9.

5. *Trial rights in immigration and/or removal proceedings*

This aspect is developed in paragraph 28 of the facts of the case and in the answers to clarification questions 24 and 50. The examination of these situations should take account of the fact that the Inter-American Court understands expulsion as "any decision, order, procedure or proceeding by or before the competent administrative or judicial organ, irrespective of the name that it is given in national law, related to the obligatory departure of a person from the host State that results in the person abandoning the territory of this State or being transferred beyond its borders. In this manner, when referring to expulsion, the term also encompasses, in specific or internal state terminology, what could be described as a deportation."[99]

The inter-American system has also established standards that seek to protect the rights of migrants in expulsion or deportation proceedings.

With respect to the application of due process guarantees, the Inter-American Court has ruled that "these requirements do not only apply to judicial bodies, but that the provisions of Article 8(1) of the

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[97] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 208.
[98] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 198.
[99] I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 269.

Convention also apply to the decisions of administrative bodies,"[100] such as immigration authorities and proceedings.

In this regard, "any administrative, legislative or judicial authority whose decisions may affect the rights of persons, is required to take such decisions in strict compliance with the guarantees of due process of law."[101] In addition, due process of law must be guaranteed to all persons without prejudice to their immigration status,[102] as "the State must ensure that every foreigner, even, an immigrant in an irregular situation, has the opportunity to exercise his or her rights and defend his or her interests effectively and in full procedural equality with other individuals subject to prosecution."[103]

The Inter-American Commission, in detailing the guarantees that make up this right, has indicated the following general elements:[104]

- The right to receive a prior and detailed communication of the reasons or charges related to the proceeding in which the person is involved.
- The right to be brought promptly before a judge or official reviewing the lawfulness of detention.[105]
- The right of the person to be heard, with the appropriate guarantees, within a reasonable time by a competent, independent, and impartial judge or court.
- The right to be assisted by a translator or interpreter if they do not speak the language of the State in which they are located.
- Allocation of time and means for the preparation of his or her defense.
- Possibility of having defense counsel provided by the State in the event that the person is unable to defend him or herself or hire private counsel.[106]
- The right to examine witnesses in court and to present other persons or experts.
- The right against self-incrimination.

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[100] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 108.
[101] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 142.
[102] I/A Court H.R., Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 159.
[103] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 143.
[104] IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc.46/15, December 31, 2015, para. 287.
[105] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 124 y 126.
[106] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 132 a 136 y 146.

- The right to a properly substantiated and reasoned decision.[107]
- Right to be notified of the decision.
- The right to appeal the judgment to a higher court or judge.[108]

The Court has also addressed the prohibition of group expulsions, recalling that "the 'collective' nature of an expulsion involves a decision that does not make an objective analysis of the individual circumstances of each alien and, consequently, [is arbitrary]."[109] Therefore, any decision that results in the deportation or expulsion of a person must be assessed on an individual basis.

Accordingly, the participants are expected to present arguments on the following points:

- Ascertain whether the State's conduct observed due process guarantees, particularly with regard to persons being notified of the reasons for their detention, the opportunity to be assisted by lawyers provided by the State, whether the lawfulness of detention was reviewed by a competent judge, whether individuals were afforded the time and means to prepare their defense, and whether they were guaranteed the right to appeal unfavorable judgments to a higher court or judge.

6. The right to family unity and the principle of the best interests of children and adolescents

These two considerations were developed in clarification answer number 21, which explained that no child or adolescent was excluded from international protection, detained, or expelled from Arcadia. However, there was family separation, as the children of the deportees remained in Arcadia as refugees.

It should be noted that a crucial aspect to consider with regard to deportation or expulsion proceedings is the right to family unity and the principle of the best interests of the child. The Inter-American Court has established that "the State has the obligation to determine, in each case, the composition of the child's family unit."[110] The United Nations Committee on the Rights of Migrant Workers has stated that this determination should be made broadly, and include biological, adoptive, or foster parents and, where applicable, the members of the extended family or community as provided for by local custom.[111]

The Inter-American Court has additionally held that "any administrative or judicial organ that must

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[107] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 116.
[108] I/A Court H.R., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 179 y 183.
[109] I/A Court H.R., Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 159, para. 171
[110] I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 272.
[111] CMW. Joint general comment No. 4 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4, 16 November 2017.

decide on family separation owing to expulsion based on the migratory status of one or both parents must, when weighing all the factors, consider the particular circumstances of the specific case, and guarantee an individual decision […] evaluating and determining the child's best interest."[112] The State should also provide avenues for status regularization for migrants in an irregular situation residing with their children, particularly when a child has been born or has lived in the country of destination for an extended period of time, or when return to the parent's country of origin would be against the child's best interests.[113]

On this topic, it is expected that the arguments put forward by the participating teams will include the following points:

- Analysis of the violation of the principle of family unity. In particular, it should be explained whether it was appropriate to help the parents of minors to regularize their status, despite having a criminal record. To this end, the best interests of children and adolescents must be taken into consideration.
- Arguments may be made concerning the protection afforded to minors separated from their families in order to determine their suitability.

7. The right to access to justice

The factual information on this aspect is contained in paragraph 28 of the facts of the case, as well as in clarification answer number 10, which details the domestic remedies available in the State and which of them were exhausted by the Wairans prior to their expulsion from Arcadia.

Other paragraphs of particular relevance are paragraphs 32 and 33 of the facts, which detail the proceedings brought by the Legal Clinic for Displaced Persons, Migrants, and Refugees of the National University of Puerto Waira, to obtain transnational justice through the Arcadian consulate in that country.

Regarding the right to access to justice, the IACHR has understood this as *de jure* and *de facto* access to judicial bodies and judicial protection remedies. This means the right to an effective judicial remedy in the sense of affording every person access to a tribunal when any of his or her rights have been violated, to obtain a judicial investigation conducted by a competent, impartial, and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.[114]

The notion that the State is obligated to remove barriers that *de jure* or *de facto* prevent people from exercising their rights is particularly important in the case of migrants and asylum seekers. The situation of vulnerability in which they find themselves means that, for them, there are particularly

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112 I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 281.
113 CMW. Joint general comment No. 4 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4, 16 November 2017.
114 IACHR. Violence against LGBTI Persons, OEA/Ser.L/V/II.Rev.2.Doc.36, November 12, 2005, para. 458.

serious obstacles when it comes to accessing their rights. The IACHR has identified such barriers to include, *inter alia*, the fact that migrants are unaware of their rights, of the procedures they have to follow, and the authorities and agencies of the country of transit or destination; lack of time to present complaints or reports; and fear of being detained and deported when approaching any authority or of being subject to retaliation.[115]

These barriers arise from what the Inter-American Court has called real disadvantages, which involves recognizing the material differences derived from the personal and social context of an individual that keep that person from accessing his or her rights under equal circumstances with other persons or groups.

In Advisory Opinion No. 18, entitled "Juridical Condition and Rights of the Undocumented Migrants," the Inter-American Court found that:

"The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages."

This makes it clear that the duty of the authorities is to avoid contributing to the repetition, perpetuation, or aggravation of these disadvantages, as well as to combat them by taking the necessary legislative, regulatory, and other measures to ensure the effective enjoyment of rights.

a) The role of consulates and access to transnational justice

It is important to bear in mind that the migration issue involves at least two States. When a person decides to leave their home country, various violations of their human rights may occur in the countries of origin, transit, and destination. Because of this, the right to access to justice must be guaranteed regardless of the difficulties posed by the regional nature of migration and the human rights violations that may occur in different States. In this regard, in order to guarantee equal access to justice, "transnational or cross-border justice" must be guaranteed for human rights violations under fair, effective, and accessible conditions.[116]

The Inter-American Court has established the need for the right to justice to be not only a formality, but real. It has thus understood that the existence of real conditions of inequality requires the adoption of compensatory measures that help to remove obstacles and shortcomings that prevent or diminish an effective defense. In the absence of such means, it would be difficult to say that those who are disadvantaged enjoy genuine access to justice and benefit from due process of law on an equal footing with those who do not face such disadvantages.[117]

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[115] IACHR. Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, OEA/Ser.L/V/II.Doc.48/13, December 30, 2013, para. 236

[116] IACHR, Joint statement of UN and regional experts on migration in light of stocktaking meeting in Puerto Vallarta towards a human rights-based Global Compact for Safe, Orderly and Regular Migration, December 6, 2017.

[117] I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999, paras. 117, 119

Access to transnational justice becomes essential in migration cases, especially in cases involving disappearances, deaths, human remains in mass graves, and human trafficking. States are under the obligation to prevent actions that violate human rights and to ensure that migrants can access the justice system without fear of detection, detention, and deportation, as well as to conduct effective investigations, prosecute, and, where appropriate, punish the perpetrators of such violations. In addition, States must respond effectively to situations of mass deaths of migrants in transit and in border areas. This includes carrying out investigations into all cases of deaths and disappearances, as well as of migrant persons in mass graves, with the cooperation of the authorities of all States involved. Similarly, migrants should receive full justice and reparation for any harm caused.[118]

Often times, evidence or witnesses of human rights violations are found in different States, so it is essential to obtain cooperation in the place where the evidence is found through measures such as judicial requests for legal assistance, or requests for support through diplomatic channels, which may be done through consulates.

With regard to the trafficking of persons, the European Court of Human Rights has established that "In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination."[119]

The Inter-American Commission has recommended the creation of national and regional mechanisms to facilitate the exchange of information on unidentified remains and missing persons in other countries; this mechanism should include the participation of civil society organizations.[120] An interesting example in the area of transnational justice is the Foreign Support Mechanism, which was created with the aim of "facilitating access to justice for migrants and their families, conducting searches for missing migrants, investigating and prosecuting crimes committed by or against migrants, in strict compliance with applicable laws and other provisions, and directing, coordinating, and supervising the implementation of appropriate actions to redress harm to victims."[121] To this end, through the Attachés of the Office of the Attorney General of the Republic, migrant families and victims can access, from the country where they are located, Mexican State institutions involved in the investigation of crimes committed in Mexican territory against the migrant population, file complaints,

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[118] IACHR, Joint statement of UN and regional experts on migration in light of stocktaking meeting in Puerto Vallarta towards a human rights-based Global Compact for Safe, Orderly and Regular Migration, December 6, 2017.
[119] European Court of Human Rights (ECHR), Case of Ranstev v. Cyprus and Russia, 7 January 2010, para. 289.
[120] IACHR, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, December 30, 2013, para. 208.
[121] United Mexican States, Official Gazette of the Federation, *ACUERDO A/012/18 por el que se reforma el diverso A/117/15, por el que se crea la Unidad de Investigación de Delitos para Personas Migrantes y el Mecanismo de Apoyo Exterior de Búsqueda e Investigación y se establecen sus facultades* [ORDER A/012/18 amending Order A/117/15, establishing the Migrant Crime Investigation Unit and the Foreign Search and Investigation Support Mechanism and establishing their powers], February 16, 2018.

offer evidence, and access reparation mechanisms.[122]

On this subject, the teams could offer the following analyses or arguments:

- The relevance of creating transnational justice mechanisms to guarantee the right to access to justice for migrants. In particular, determining whether the State of Arcadia was obligated to process the complaint filed by the victims' representatives.

8. Rules of admissibility in the Inter-American Human Rights System

The proceedings before the inter-American human rights system in the hypothetical case are detailed starting from paragraph 34 of the facts. In particular, it is explained that the State of Arcadia made a preliminary objection to the failure to exhaust domestic remedies, on the grounds that 591 of the deportees did not bring any judicial actions to challenge the decision ordering their expulsion from Arcadia.

The State also maintained that 771 alleged victims referred to by the representatives were not individually identified and therefore should be excluded from the case.

On this point, and concerning the admissibility of petitions, Article 41(f) of the American Convention on Human Rights makes it clear that the Inter-American Commission on Human Rights is responsible for studying and processing petitions. This responsibility is also enshrined in Articles 26 and 27 of the Rules of Procedure of the Inter-American Commission. In the same regard, Articles 19, 23, and 24 of the Statute of the Inter-American Commission mandate the Commission to establish the procedures to be followed for the exercise of this function in the Rules of Procedure of the IACHR, based on the provisions of the American Convention.

Articles 44 to 51 of the American Convention establish the conditions for competence and the processing of petitions. Among them, Article 46 of the Convention clearly establishes the requirements for the admissibility of a petition before the inter-American human rights system:

- That the remedies under domestic law have been exhausted;
- That the petition is filed within 6 months of the date of notice of the final decision;
- That the subject of the petition is not pending in another international proceeding for settlement; and,
- That the petition contains the name, nationality, profession, domicile, and signature of the person or group of persons, or of the legal representative of the entity lodging the petition.

In addition to the above requirements, Article 28 of the IACHR's Rules of Procedure establish the

[122] United Mexican States, Head of the Migrant Crime Investigation Unit, *Lineamientos de operación del Mecanismo de Apoyo Exterior Mexicano de Búsqueda e Investigación* [Operating Guidelines for the Mexican Foreign Search and Investigation Support Mechanism], September 13, 2016.

following:

- The express mention of whether the petitioner wishes that his or her identity be withheld from the State, and the respective reasons;
- Email or postal address and phone number; an account of the fact or situation that is denounced, specifying the place and date of the alleged violations;
- If possible, the name of the victim and of any public authority who has taken cognizance of the case; and,
- The State the petitioner considers responsible, by act or omission.

Article 46 establishes the cases in which the exhaustion of domestic remedies and the six-month time limit may not be considered for the declaration of admissibility: the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. These same cases are also referred to in Article 31 of the IACHR's Rules of Procedure.

In any event, under Article 47 of the Convention, the petition will be inadmissible when: any of the requirements indicated in Article 46 has not been met; the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by the Convention;[123] the statements of the petitioner or of the State indicate that the petition or communication is manifestly groundless or obviously out of order; or the petition is substantially the same as one previously studied by the Commission or by another international organization. This is without prejudice to the fact that the Commission, in the exercise of the power conferred by Articles 26 and 29 of its Rules of Procedure, may ask the petitioners to complete the requirements for processing the petition.

It is also important to mention that Article 24 of the Rules of Procedure of the Inter-American Commission on Human Rights also establishes the Commission's authority to process, *motu propio*, a petition that meets the requirements for processing.

Finally, it should be stressed that arguments relating to admissibility requirements may be raised at the appropriate procedural time, which has been recognized by the Inter-American Court as during the

[123] It should be noted that under Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights, the petition must concern the alleged violation of a human right recognized, as the case may be, in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights "Pact of San José, Costa Rica", the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará", in accordance with their respective provisions, the Statute of the Inter-American Commission on Human Rights, and the Rules of Procedure of the Inter-American Commission on Human Rights.

admissibility stage of the case before the Commission.[124] In the Court's opinion, the arguments substantiating preliminary objections should also correspond to those that will subsequently be raised before the Court in the event that it takes cognizance of the petition.[125]

a) Rule of prior exhaustion of domestic remedies

Based on Article 46 of the American Convention on Human Rights, the requirements for a petition or communication to be admissible include, *inter alia*, the exhaustion of domestic remedies.

The jurisprudence of the inter-American system has considered that a preliminary objection based on the alleged failure to exhaust domestic remedies is a defense available to the State. The State may also waive this defense tacitly or expressly.[126]

In any case, arguments on the exhaustion of domestic remedies must be raised at the appropriate procedural time, whether invoked by the petitioner or the State. This is because, under Article 31 of the IACHR's Rules of Procedure, the burden of proving the exhaustion of remedies rests with the State, even if the allegation is raised by the petitioner. Accordingly, making this preliminary objection at the appropriate procedural time is the only way to ensure that the State can exercise its right to a defense. If the State chooses to exercise that right, it must specify which domestic remedies have not yet been exhausted and demonstrate that they are applicable and effective.[127]

As mentioned earlier, the Inter-American Court has held that the appropriate procedural time is during the admissibility stage before the Inter-American Commission. In addition, the Inter-American Court has established that Article 46 of the Convention should be interpreted as requiring the exhaustion of remedies at the admissibility determination stage and not when the petition is filed,[128] and therefore the Commission must have up-to-date, necessary, and sufficient information to carry out this admissibility examination,[129] which the parties to the case must submit to the IACHR.

b) Identification of victims in the case

Article 44 of the American Convention on Human Rights states that any person, group of persons, or legally recognized nongovernmental entity may file a petition containing complaints or denunciations of a violation of the Convention by a State party. This is also enshrined in Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights. Article 46 of the Convention subsequently establishes the requirement of identifying the person or persons or the legal

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[124] I/A Court H.R., Case of Herzog et al. v. Brazil, para. 51; Case of Gonzales Lluy et al. v. Ecuador, para. 28; Case of Favela Nova Brasília v. Brazil, para. 78.

[125] I/A Court H.R., Case of Herzog et al. v. Brazil, para. 51; Case of Reverón Trujillo v. Venezuela, para. 23; Case of Favela Nova Brasília v. Brazil, para. 78; Case of Furlan and Family v. Argentina, para. 29; Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama, para. 21.

[126] I/A Court H.R., Case of Herzog et al. v. Brazil, para. 49; Case of Velásquez Rodríguez v. Honduras. Preliminary Objections, para. 88; Case of Favela Nova Brasília v. Brazil, para. 76; Case of Castañeda Gutman v. Mexico, para. 30; Case of the Saramaka People v. Suriname, para. 43; Case of Salvador Chiriboga v. Ecuador, para. 40.

[127] I/A Court H.R., Case of Herzog et al. v. Brazil, para. 49; Case of Velásquez Rodríguez v. Honduras. Preliminary Objections, para. 88; Case of Favela Nova Brasília v. Brazil, para. 76; Case of Castañeda Gutman v. Mexico, para. 30; Case of the Saramaka People v. Suriname, para. 43; Case of Salvador Chiriboga v. Ecuador, para. 40.

[128] I/A Court H.R., Case of Amrhein et al. v. Costa Rica, para. 41; Case of Wong Ho Wing v. Peru, para. 25.

[129] I/A Court H.R., Case of Amrhein et al. v. Costa Rica, para. 41; Case of Duque v. Colombia, para. 42.

representative of the entity submitting the petition.

The sole exception to the requirement of identifying the victims in the case is regulated in Article 35.2 of the Rules of Procedure of the Inter-American Court which states that, when it has not been possible to identify one or more of the alleged victims referred to in the facts of the case because it concerns massive or collective violations, the Court will decide whether to consider those individuals victims. In order to effectively apply this exception, the Inter-American Court makes an assessment based on the particular characteristics of each case,[130] considering, for example, the complexity of mass or collective cases, as well as the difficulties in certain cases of gaining access to the area where the events occurred, the fact that people are not registered, and the use of similar names and surnames. Cases in which the Inter-American Court has applied Article 35.2 of its Rules of Procedure include the *Case of the Río Negro Massacres v. Guatemala*; the *Case of Nadege Dorzema et al. v. Dominican Republic*; the *Case of the Massacres of El Mozote and surrounding areas v. El Salvador*, and the *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*.

There is also IACHR precedent for the recognition of groups of persons as identifiable alleged victims in a case. One such case is the *Case of Four Million American Citizens Residents in Puerto Rico v. United States*,[131] in which the IACHR found that it was possible to identify the entire group of persons who did not have the right to vote, as well as those who did have the right to vote; it therefore proceeded to admit the petition, considering the entire resident population of Puerto Rico to be alleged victims.

On this topic, it is expected that the participating teams will analyze the following points:

- Determine whether there were any exceptions to the prior exhaustion of domestic remedies for the 591 persons who did not bring any judicial actions to challenge their expulsion from Arcadia.
- Argue whether the exception to the victim identification requirement is applicable in the case of the 771 persons who were not individually identified.

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130 I/A Court H.R., Case of Cuscul Pivaral et al. v. Guatemala, para. 28.
131 IACHR, Case of Four Million American Citizens Residents in Puerto Rico v. United States, Report on Admissibility No. 60/17, Petition P 776-06, OEA/Ser.L/V/II.162 Doc. 71. May 25, 2017.