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**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**

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CHAPTER 1  
INTRODUCTION



# INTRODUCTION

## ***A. The Scope and Objectives of the Report***

1. Human mobility has been an inherent human condition throughout the history of humanity. From earliest human history, people have migrated in search of a better life, to populate other places on the planet, or to escape and survive human-made or natural dangers. Although human mobility has been a constant throughout all periods of human history, it was the creation of the nation-state –which can be traced to the Treaties of Westphalia of 1648- that introduced the phenomenon now known as international migration. The reorganization of the international community into a set of territorial states with established geographic boundaries enabled states to exercise authority over persons who settled within their borders and those attempting to cross them.
2. For the purposes of this report, the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission”, “Commission” or “IACHR”) should make clear that migration encompasses both the international and internal migration. International migration is when a person or group of persons crosses one of their countries’ internationally recognized borders with the intention of settling down, either temporarily or permanently, in another country of which they are not nationals; on the other hand, internal migration happens when an individual or group of individuals migrates from one place to another within the country of which they are nationals, to settle there either temporarily or permanently.
3. Human mobility, whether it is international or internal, migration is a multi-causal phenomenon that is either voluntary or forced. In the first case, the individual is migrating of his or her own volition, without any form of coercion. Forced migration, on the other hand, encompasses all those situations in which the individual has been compelled to migrate because his or her life, safety or liberty is in jeopardy, whether because of various forms of persecution based on race, religion, nationality, membership in a given social group or political opinion, armed conflict, generalized violence or human rights violations, or because of other circumstances that have seriously disrupted public order, like disasters - natural and human-made- and other factors. Also, it may imply situations where individuals are physically transported across borders without their consent, as in the case of trafficking.
4. Human mobility as a multi-causal phenomenon implies that people are migrating for a variety of reasons, which may be economic, social, political or environmental. Having monitored the human rights situation in the countries of the Americas, the

Inter-American Commission has found that individuals migrate from the places where they were living because of the violence generated by State and non-State actors, armed conflicts, inequality, poverty, a lack of protection of economic, social and cultural rights, political instability, corruption, insecurity, various forms of discrimination, natural disasters and the impact of climate change. The Commission has also observed that the factors that draw the migrant population are predominantly the prospect of better security, improved employment or educational opportunities, better access to services, more favourable climatic conditions, and others. As a multi-causal phenomenon, migration tends to be the result of a combination of what are known as the push-pull factors of the kind mentioned above.

5. In the case of international migration, the Commission has identified how, based on State sovereignty, many States have regulated migration through policies, laws, judgments and practices that directly violate the human rights of migrants and their families. At the same time, States have developed standards and mechanisms at the international, regional, bilateral and unilateral levels to regulate the flow of persons between States. The many laws, rules and regulations, fora and institutions through which States control international migration, either unilaterally or bilaterally for the most part, have resulted in a lack of consistency in global, regional and national governance of international migration that poses a challenge for the universal and regional codes developed for the protection of human rights.
6. In this regard, the Commission deems it important to point out that when referring to the power of States to determine their migration policies the inter-American System has consistently held that while states have the right to control their borders, define the requirements for admission, stay and expulsion of aliens in its territory and, in general, to establish their immigration policies; policies, laws and practices implemented on migration must respect and ensure the human rights of all migrants, which are rights and liberties that derive from human dignity and have been widely recognized by States from the international obligations they have undertaken on human rights.<sup>1</sup> Furthermore, States should respect interna-

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<sup>1</sup> See IACHR, [Refugees and Migrants in the United States: Families and Unaccompanied Children](#). OEA/Ser.L/V/II.155 Doc. 16, July 24, 2015 (hereinafter “*Refugees and Migrants in the United States: Families and Unaccompanied Children*”), para. 39; IACHR, [Human Rights of Migrants and Others in the Context of Human Mobility in Mexico](#). OEA/Ser.L/V/II. Doc. 48/13, December 30, 2013 (hereinafter “*Human Rights of Migrants and Others in the Context of Human Mobility in Mexico*”), para. 327 and 580; [Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status](#). OEA/Ser.L/V/II.106 doc.40 rev., February 28, 2000 (hereinafter “*Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status*”), para. 166; IACHR, [Annual Report of the Inter-American Commission on Human Rights 2000: Second Progress Report of the Special Rapporteur on Migrant Workers and Their Families](#). OEA/Ser.L/V/II.111 Doc. 20 rev., April 16, 2000 (hereinafter “*Second Progress Report of the Special Rapporteur on Migrant Workers and Their Families*”), para. 6; IACHR, [Report on Terrorism and Human Rights](#). OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002 (hereinafter “*Report on Terrorism and Human Rights*”), para. 377; IACHR, [Report on Immigration in the United States: Detention and Due Process](#). OEA/Ser.L/V/II. Doc. 78/10, December 30, 2010 (hereinafter “*Report on Immigration in the United States: Detention and Due Process*”), para. 32; IACHR, Application to the Inter-American Court of Human Rights, Case No. 12,688, Nadege Dorzema and others: Slaughter of Guayubín (Dominican Republic). February 11, 2011, para. 208. In the same vein, see I/A Court H.R., Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection. Advisory

tional obligations related to the rights of refugees, stateless persons and international humanitarian law instruments.

7. While migration comprises multiple benefits, such as promoting multiculturalism of societies and boost economic growth of states, migration also poses great challenges in terms of human rights of migrants. A number of international human rights organizations have pointed out that it is precisely because these individuals are migrants that they tend to fall victim to multiple human rights violations during the migration process. Many violations of migrants' human rights have a direct impact on their family members.
8. One of the main human rights challenges the Commission has identified with regard to persons in the context of migration within the region is the persistence of State policies, laws and practices persist that do not recognize persons in the context of migration as subjects of law, and subsequently violate their human rights<sup>2</sup>, a problem exacerbated by the actions and omissions of non-State actors and individuals. With regard to the various situations of vulnerability in which migrants frequently find themselves, the Commission has held:

Thus it becomes clear that immigrants and migrant workers find themselves in a vulnerable position. Often they are not familiar with the law and do not speak the language. At times they meet with outright hostility on the part of the local population, including authorities. Undocumented migrant workers find themselves in an especially difficult situation and even more exposed to abuse. In fact, the specific circumstances facing migrant workers show that they face a situation of structural vulnerability. [45] Migrants constantly run up against roadblocks, including arbitrary arrest and the lack of due process, collective deportation, discrimination in the granting of citizenship or in acceding to social services that foreigners have a right to by law, inhumane detention conditions, harassment on the part of authorities, including police and immigration officers, and the inability to defend themselves when exploited by unscrupulous employers. These problems become even more acute for women

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Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 39; I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 169; I/A Court H.R., Case Pacheco Tineo family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272, para. 129; I/A Court H.R., Case and others v. Nadege Dorzema Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, para. 154; I/A Court HR., Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, paras. 97 and 169; I/A Court H.R., Haitian Affairs and Dominicans of Haitian origin in the Dominican Republic regarding the Dominican Republic. Provisional measures requested by the Inter-American Commission on Human Rights concerning the Dominican Republic. Resolution of the Inter-American Court of Human Rights of August 18, 2000, Considering No. 4.

<sup>2</sup> The I/A Court H.R., has held that the immigration policy of a state is constituted by any act, measure or omission institutional (laws, decrees, resolutions, guidelines, administrative acts, etc.) that refers to the entry, stay or exit of national population or alien its territory. See Court., Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of 17 September 2003, Series A, No. 18, para. 163.



and children migrants, who must also deal with sexual harassment, beatings and below-standard working conditions.<sup>3</sup>

9. Commonly, migrants often face interrelated forms of discrimination, based on which they are discriminated against, not only because of their national origin or more broadly, because of being foreign, but also because of factors such as age, gender, sexual orientation, gender identity, ethnic-racial, disability status, poverty or extreme poverty, among others.<sup>4</sup> In addition, the vulnerability of migrants is compounded when they are in an irregular situation. Secrecy in daily living leads to more vulnerability of being victims to crimes and violations of their human rights by authorities and individuals through the different stages of the migration process. This is added to the fear of migrants to turn to the authorities, because of the consequences it could trigger; mainly being arrested and subsequently deported. Vulnerability situations described above lead to migrants suffering from various forms of discrimination, which at the same time give a lead to an intersectional discrimination. Referring to the situation of vulnerability to subject migrants, the Court stated that:

Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.<sup>5</sup>

10. Given this situation, an ever-present challenge the Commission has identified in the case of persons in the context of migration are the serious obstacles to access justice and thereby avail themselves of a suitable remedy for human rights violations. This is evidenced by the considerable discretion that many authorities exercise when deciding cases involving these individuals or their family members, the failure to observe the guarantees of due process in proceedings involving these individuals, and the little or lack of judicial protection they are afforded when their human rights are violated, with the result that such violations go unpunished. The Global Commission on International Migration has written that “there is an urgent need to fill the gap that currently exists between the principles found in the legal and normative framework affecting international migrants and the way in which

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<sup>3</sup> IACHR. *Second Progress Report of the Special Rapporteurship on Migrant Workers and their families in the hemisphere*, para. 64.

<sup>4</sup> IACHR. *Human Rights of Migrants and others in the Context of Human Mobility in Mexico*, para. 83

<sup>5</sup> 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. 112.

legislation, policies and practices are interpreted and implemented at the national level.”<sup>6</sup>

11. In response to these situations, through their case law and writings international and regional human rights bodies have been defining the scope and content of the rights that individuals in the context of migration enjoy. Throughout the almost six decades that have passed since its creation in 1959, the Inter-American Commission has monitored a number of situations involving individuals in the context of migration. It has done this through on-site visits to countries, thematic studies and country reports, requests for information, hearings and working meetings, petitions, cases and precautionary measures.
12. In order to ensure that persons in the context of migration are recognized as subjects of law who are able to enjoy their rights effectively, over the course of the years the IACHR has focused part of its activities on efforts to ensure that victims of human rights violations are able to have equal access to international justice, through the Commission’s individual case system and the precautionary measures allowed under the Inter-American Human Rights System. One of the principal means by which the Commission and its Rapporteurship on the Rights of Migrants have addressed the human rights violations and the gaps in protection that persons in the context of migration experience has been to establish standards on the subject through reports on petitions and cases, precautionary measures, country reports and thematic reports. The IACHR has also been instrumental in developing the case law and advisory opinions that the Inter-American Court of Human Rights has adopted with respect to these individuals. The Inter-American Court, for its part, has developed a significant body of case law in the form of the standards it has established in its judgments, provisional measures and advisory opinions.
13. Accordingly, in this report, the Inter-American Commission’s purpose is to lay out the legal standards developed by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (hereinafter the “Inter-American Court”, “Court” or “I/A Court H.R.”) regarding the scope and content of the human rights of individuals within the context of migration, based on the obligations the States have undertaken with the inter-American instruments, in particular the American Convention on Human Rights (hereinafter “the American Convention” or the “Convention”), the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”), and other relevant inter-American and international instruments.
14. This report becomes particularly relevant at a time when the immigration policies of some states in the region are more focused on addressing the migration from the perspective of national security and control of migration flows than from a human rights perspective. In recent years, the Commission has noted with concern how some States have tightened their immigration policies, by the increase of

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<sup>6</sup> Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*. Geneva, 2005, p. 58, para. 24.

measures such as: a) outsourcing of migration controls<sup>7</sup>; b) securitization of borders; c) the criminalization of migrants, in particular irregular migrants through the widespread use of immigration detention and summary deportation<sup>8</sup>; d) limit access to procedures for international protection, in particular the procedure for the recognition of refugee status.<sup>9</sup>

15. The Inter-American Commission and the Inter-American Court have adopted an evolutive interpretation when developing their principles *vis-à-vis* the human rights of individuals in the context of migration.<sup>10</sup> In this regard, the Court has written that the interpretation “must consider the changes over time and present-day conditions”.<sup>11</sup> It has also observed that the interpretation of other international norms cannot be used to restrict the enjoyment and exercise of a right; furthermore, the interpretation must contribute to the most favourable application of the provision whose interpretation is sought.<sup>12</sup> To that end, the inter-American system has relied on the general provisions of interpretation set forth in the Vienna Convention on the Law of Treaties, in particular the principle of good faith, to ensure that a provision is in keeping with the American Convention’s object and purpose.<sup>13</sup>

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<sup>7</sup> See IACHR, *Refugees and Migrants in the United States: Families and unaccompanied children*, paras. 113 et seq. and footnote No. 141. Also see IACHR, *Hearing on Human Rights and Interception of People Eligible for International Protection*. 156<sup>th</sup> Regular Session, October 22, 2015.

<sup>8</sup> See IACHR, *Refugees and Migrants in the United States: Families and unaccompanied children*, paras. 57-83 and 119-160; IACHR, *Human Rights of Migrants and Others in the Context of Human Mobility in Mexico*, paras. 410-577; and IACHR, *Report on Immigration in the United States: Detention and Due Process*, paras. 33 et seq. See also, IACHR, *Hearing on Immigration Detention and alternative measures in the Americas*. 153rd Session, October 30, 2014; IACHR, *Hearing on the Situation of Human Rights of Children and Migrants and Refugees in the Americas Families*. 153rd Session, October 30, 2014; Commission; *Hearing on the Situation of the Rights of Children in the Context of Migration in the Americas*. 147th Session, March 12, 2013.

<sup>9</sup> See, inter alia, IACHR, *Hearing on Human Rights and Interception of People Eligible for International Protection*. 156<sup>th</sup> Regular Session, October 22, 2015; IACHR, *Hearing on the Situation of Human Rights of Refugees and Asylum Seekers in America* in the 30th Anniversary of the Declaration of Cartagena. 153<sup>rd</sup> Regular Session, October 27, 2014; IACHR, *Hearing on the Situation of Human Rights of Refugees in the Americas*. 149th Session, October 31, 2013.

<sup>10</sup> In this regard, see Cantor, David J., y Barichello, Stefania, “Protection of asylum seekers under the Inter-American Human Rights System”, en Abass, Ademola e Ippolito, Francesca (Eds.), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*. Surrey: Ashgate, pp. 265-294; Ceriani Cernadas, Pablo, Fava, Ricardo y Morales, Diego, “Políticas migratorias, el derecho a la igualdad y no discriminación: Una aproximación desde el Sistema Interamericano de Derechos Humanos”, en Ceriani Cernadas, Pablo y Fava, Ricardo (Eds.), *Políticas migratorias y derechos humanos*. Remedios de Escalada: Universidad Nacional de Lanús, 2009, pp. 117-171.

<sup>11</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, paras. 113-114.

<sup>12</sup> The Commission recognizes that there might be situations in which the overall levels of violence and abuse related to the prohibition on migration are so extreme that the legitimacy of the prohibition on migration itself might be subject to question based on international human rights norms.

<sup>13</sup> I/A Court. *Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 49.

## **B. Migration in the Americas**

16. Over the years, the Commission has identified policies, laws, rulings and practices that pose serious challenges with regard to the human rights of migrants in the Americas. The mere fact of being a migrant often means that the individual will suffer multiple forms of discrimination and violence in his or her countries of origin, transit, destination and return. At the same time, the Commission has learned of the abuses to which migrants are subjected to in the countries of transit and destination and of the obstacles they grapple with in their countries of origin before their departure or upon their return.
17. In the recent decades, there has been a gradual increase in either in the form of human mobility. A number of factors suggest that the rise in migration will continue in this hemisphere, among them the following: 1) the growing socio-economic disparities, particularly in terms of inequality, poverty and unmet basic needs; 2) the increasing flexible workforce and the gradual loss of labor rights and guarantees, mainly among workers from low-skilled sectors of the economy; 3) the increase in criminal violence in some countries of the hemisphere and the resulting gradual erosion of human security; 4) the deteriorating economic, social and political situation of different countries; 5) the impact generated by the violence generated by wars, armed conflicts and terrorism 6) the fragile nature of and/or corruption within political institutions in some countries of the region; 7) the necessities of family reunification; 8) the impact of the activity of national and transnational business; 9) climate change and natural disasters, and 10) increased urbanization with the improved living conditions in the cities.
18. Over the years, the Inter-American Commission has observed how the causes and dynamics of migration have changed in the countries of the region. In recent years, the region has seen a steady increase in the mixed migration movements, which includes a significant number of individuals who require not just protection of their human rights but also international protection. In the countries of the Americas, forced migration, both internal and international, has been one of the main consequences and strategies of dictatorial regimes, of internal armed conflict and the violence perpetrated by State and non-State actors.
19. Although the factors causing individuals to migrate are numerous, the activities of organized crime are becoming one of the prime movers of forced migration in a number of countries of the region.<sup>14</sup> Furthermore, social, economic and demographic inequalities between developed and developing countries, whether in the form of opportunities, resources, education or human rights, are another fundamental cause of international and internal migration.<sup>15</sup> The Commission also knows of situations in which large-scale development projects, commonly referred to as megaprojects, mining and agricultural industries and non-traditional

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<sup>14</sup> See, IACHR. *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 75.

<sup>15</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 73 et seq.

extractive economies have triggered forced migration. Climate change and natural disasters are other factors that leave people with no other option but to move away from their places of origin. These are, for the most part, individuals who already find themselves in a vulnerable situation for many reasons: they generally live in poverty and their economic, social and cultural rights are not protected. These are the individuals who tend to be forced to migrate.

20. In addition to the foregoing, the low birth rate in the developed countries and its downward trend mean that the working-age population is shrinking and the overall population is rapidly aging.<sup>16</sup> The Commission observes in this regard that international migration can play an important role in offsetting the decrease in the population, the contraction of the working-age population and the aging of the overall population, especially in countries with low birth rates. However, international migration cannot by itself reverse these trends. Migration is an ever more important factor in population dynamics and will continue to have an impact on the growth of the developing and developed countries.
21. By the end of 2015, the number of international migrants was estimated at 244 million worldwide<sup>17</sup>, which represented 3.3% of the world's population, a figure expected to increase in the coming decades.<sup>18</sup> International migrants as a percentage of the total world population has remained steady in recent decades, at around 3%. The figure for 2015 is the highest when compared to the figures for the number of international migrants in 1990, 2000 and 2010, which were 154 million, 175 million and 214 million, respectively. This shows a gradual increase in international migration.<sup>19</sup>
22. Of the total number of international migrants worldwide, the Americas account for close to 63 million. Some 54 million are in North America, mainly the United States at 47 million. In Latin America and the Caribbean there are 9 million of international migrants.<sup>20</sup> In percentage terms, 26% of the international migrants worldwide are in the Americas.<sup>21</sup>

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<sup>16</sup> In 2011, the world population reached 7 billion and is expected to exceed 9 billion by 2050. The bulk of the anticipated future population increase will be in the developing countries and will be concentrated in the least developed countries. It is in these countries where the challenges of development will be most severe, under the pressure of high unemployment, poverty, low levels of schooling and high demographic growth rates. On the other hand, the population in the more developed regions is expected to change only slightly, from 1.2 billion in 2011 to 1.3 billion in 2050.

<sup>17</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*.

<sup>18</sup> According to the International Organization for Migration (IOM) the number of international migrants could climb to 405 million by 2015. See, IOM, *World Migration Report 2010*, p. 3.

<sup>19</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 1.

<sup>20</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 1.

<sup>21</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 1.

23. Broken down by age bracket, 72% of international migrants are between ages 20 and 64, 15% are between 0 and 19, and the remaining 12% are 65 or older.<sup>22</sup> The median age of international migrants tends to be older than the median age of the overall population. The median age of migrants is 39.
24. Some 15% of all international migrants are under the age of 20. In 2014, more than 25,300 applications for individual asylum were received from unaccompanied or separated children in 77 countries around the world.<sup>23</sup> The information received by the Commission in recent years also points to a significant increase in the number of child migrants.<sup>24</sup>
25. The migration of children and adolescents is a regional phenomenon that affects children and their families in the countries of origin, transit, destination and return. The factors causing children and adolescents to migrate -both those who do so unaccompanied and those who migrate with their families- reveal various structural problems in the countries of the region, as well as structural problems that are regional in scope. These problems also demonstrate the complexity and seriousness of the situation, how deeply rooted the underlying causes of migration are within the region, and the need to take suitable, prompt and effective action to address these issues. The Commission would point out that this is a scenario in which millions of children and adolescents are not being guaranteed their basic rights and needs.<sup>25</sup>
26. The Commission observes that the factors triggering migration among children and adolescents are varied. Chief among them are the following: the search for better opportunities in life, family reunification, a search for international protection from a milieu in which they are victims of persecution, violence and exploitation, and the consequences of natural disasters. Other factors are the abuse and abandonment that children and adolescents suffer in their countries of origin, persecution by organized crime like *maras*, gangs or drug cartels, and the spread of transnational networks engaged in human trafficking.<sup>26</sup>
27. Over the course of the years, the Inter-American Commission has witnessed first-hand the extreme vulnerability in which migrant children in the region find themselves. That vulnerability is the consequence of a combination of multiple factors like age, the fact that they are not nationals of the State in which they find

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<sup>22</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 2.

<sup>23</sup> UNHCR, *UNHCR Global Trends 2013: War's Human Cost*. June 20, 2014, p. 2.

<sup>24</sup> See, IACHR, Press Release No. 67/14, *IACHR Expresses Deep Concern over the Situation of Child Migrants Arriving in the United States*. June 20, 2014. See also, IACHR, *Hearing on the Situation of the Rights of Children in the Context of Migration in the Americas*. 147<sup>th</sup> Regular Session, March 12, 2013; and *Hearing on the Human Rights Situation of Migrant and Refugee Children and Families in the Americas*. 153<sup>rd</sup> Regular Session, October 30, 2014.

<sup>25</sup> IACHR, *Hearing on the Human Rights Situation of Migrant and Refugee Children and Families in the Americas*, 153<sup>rd</sup> Session of the IACHR, October 30, 2014.

<sup>26</sup> See, IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 215.



themselves and, in the case of girls, their gender.<sup>27</sup> The result of this is that migrant children are victims of multiple forms of discrimination and violations of their human rights.<sup>28</sup> The abuse and mistreatment to which migrants in general are subjected have much more perverse effects where migrant children are concerned who, because of their age and physical and psychological immaturity, are incapable of putting up any type of resistance. Thus, the children's immaturity and vulnerability necessitate special protection that ensures the exercise of their rights within the family, society and *vis-à-vis* the State.<sup>29</sup>

28. Since they are so vulnerable, migrant children have a greater need for State protection and for special measures of protection than do children who are nationals of the State in question and who, in addition to the State's protection, can rely on their families and communities for support.<sup>30</sup> Here, the Commission observes that the lack of protection of migrant children's rights is widespread in the region, in particular the protection they require against the abuses and human rights violations that happen throughout the migration process, i.e. the protection required from the time children and adolescents embark upon the journey that takes them out of their country of origin, carries them through the countries of transit, brings them to their country of destination and then takes them back to their country of origin. As a general rule, the authorities who cross paths with migrant children and adolescents do not take any formal steps to determine the best interests of the child, with the result that the decisions taken by the authorities with respect to migrant children do not take their best interests into account or take special measures for the children's protection and welfare.
29. Broken down by sex, 52% of international migrants are men and 48% women.<sup>31</sup> Since the 1990s, women have accounted for an ever increasing percentage of international migrants in all regions of the world, with the exception of Africa and Asia. The percentage of women migrants is highest in Europe with 52.4%, while Latin America and the Caribbean welcome almost the same percentage of men and women migrants.<sup>32</sup>

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<sup>27</sup> On the subject of forms of inter-sectoral discrimination, IACHR. *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 83; IACHR, [Access to Justice for Women Victims of Sexual Violence in Mesoamerica](#). OEA/Ser.L/V/II.Doc. 63. December 9, 2011 (hereinafter "Access to Justice for Women Victims of Sexual Violence in Mesoamerica"), para. 308; IACHR, [Violence and Discrimination against Women in the Armed Conflict in Colombia](#), OEA/Ser.L/V/II., Doc. 67, October 18, 2006 (hereinafter "Violence and Discrimination against Women in the Armed Conflict in Colombia"), paras. 107 et seq.

<sup>28</sup> IACHR, *Observations on the Advisory Opinion before the Inter-American Court of Human Rights: Migrant Children and Adolescents*, February 17, 2012, para. 15 (available only in Spanish).

<sup>29</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 93.

<sup>30</sup> OPESKIN, Brian, PERRUCHOUD, Richard, and REDPATH-CROSS, Jillyanne (Eds.), *Foundations of International Migration Law*. Cambridge: Cambridge University Press 2012, p. 211.

<sup>31</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 2.

<sup>32</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 2.

30. The fact that millions of women have joined international migration has not only increased the total number of migrants but has radically transformed this social phenomenon.<sup>33</sup> Many women who migrate today do so by themselves, and not as members of a family of other migrants. The increase in the number of women migrants is in response to the increased demand for domestic labor, as women in the more developed countries have joined the workforce, and the welfare state's services and social benefits are in decline. The increase in the number of women among international migrants has been referred to as the "feminization" of migration.
31. Nowadays, the main factors associated with women's migration are socioeconomic in nature, work-related, family-related, and/or the consequences of various forms of violence. The gender-based division of labor has meant that women's migration has been mainly to engage in domestic work and in services involving the care of persons, especially children, seniors, and disabled and/or sick persons; the migration of and trafficking in women for the sex industry, forced prostitution, migration for forced marriages, and other forms of exploitation. These migration factors do not preclude the other forms of female migration that occur when women migrate with the idea of being reunited with their families. The Commission observes in this regard that migrant women's involvement in the global care chains keeps intact the image of women as caretakers, homemakers, and persons responsible for domestic matters.<sup>34</sup>
32. The changes that the migration of women and girls has brought about are reflected in the problems unleashed as a consequence of structural and cultural patterns of discrimination that still persist in the Americas against women.<sup>35</sup> In this regard, the Commission has previously expressed its concern regarding the grave situation that migrant women face. As a group, women are particularly at risk of having their human rights violated because of the discrimination and violence that women have historically endured by virtue of their gender.<sup>36</sup> Furthermore, it is a recognized fact that being a migrant, refugee or displaced woman can exacerbate women's vulnerability.<sup>37</sup> The Commission has observed in this regard that the violence and discrimination that migrant women experience have historically not figured on the public agenda and within the judicial systems of the various countries of the hemisphere.<sup>38</sup>
33. Migrant women and girls often have to contend with other forms of gender-based violence and discrimination that, among others, include being victims of human

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<sup>33</sup> IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, para. 43.

<sup>34</sup> See, IACHR, *Hearing on the Human Rights Situation of Migrant Women in the Andean Region*, 141<sup>st</sup> Regular Session of the IACHR. March 25, 2011.

<sup>35</sup> IACHR, *Observations on the Advisory Opinion before the Inter-American Court of Human Rights: Migrant Children and Adolescents*, February 17, 2012, para. 18 (available only in Spanish).

<sup>36</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 352.

<sup>37</sup> See, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará", Article 9; International Labour Organisation, *Convention on Domestic Workers*, 2011 (No. 189), Preamble.

<sup>38</sup> IACHR, *Report on Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, para. 307.

trafficking for purposes of sexual exploitation or forced labor, and of various forms of psychological and sexual violence during the various stages of their migration experience.<sup>39</sup> Here the Commission has observed that effective protection of women migrants calls for a comprehensive approach from the perspective of gender and migrants' rights. In the case of migrant girls, priority consideration must be given to the specific rights and obligations that follow from their status as children.<sup>40</sup>

34. In this same vein, groups such as LGBT people are also extremely vulnerable to violence and discrimination. In many cases, discrimination and violence that LGBT people face because of their sexual orientation and gender identity is forcing them to migrate, which in turn can lead to various forms of discrimination against them in countries of transit and destination.<sup>41</sup> In many areas of the world, including America, LGBT people experience serious human rights abuses and other forms of persecution because of their sexual orientation and/or gender identity, actual or perceived.<sup>42</sup>
35. Globally, the United States is the main country of destination for international migrants. In 2015, the United States had close to 47 million migrants, making it the country of destination for 20% of all international migrants.<sup>43</sup> Of the total number of international migrants in the United States in 2014, an estimated 11.3 million had an irregular immigration status.<sup>44</sup> Canada was estimated to account for close to 8 million international migrants in 2015, nearly 22% of the country's total population.<sup>45</sup>
36. On the other hand, Mexico is second largest country of emigration worldwide, with an estimated 13 million international émigrés, which means that more than 10% of the country's total population lives outside Mexican territory.<sup>46</sup> The region also has

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<sup>39</sup> See also, the Committee on the Elimination of Discrimination against Women (hereinafter "CEDAW") has observed that women face dangers associated with their sex, gender and immigration status. See, Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 26 on Women Migrant Workers*. CEDAW/C/2009/WP.1/R, December 5, 2008, para. 15. The Commission notes that there is a high number of applicants for refugee status from countries of America, including the Caribbean. See, for example, Washington Post: Jamaica's gays finding refuge by applying for asylum U.S., article by Shankar Vedantam, February 11, 2011.

<sup>40</sup> IACHR, *Observations on the Advisory Opinion before the Inter-American Court of Human Rights: Migrant Children and Adolescents*, February 17, 2012, para. 18 (available only in Spanish). On forms of intersectional discrimination, see IACHR, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, paras. 107 et seq.; IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OEA/Ser.L/V/II. Doc. 36, November 12, 2015 (hereinafter "Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas"), para. 262 ss.

<sup>41</sup> IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Association in Latin America*, para. 285.

<sup>42</sup> IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Association in Latin America*, para. 285.

<sup>43</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 1

<sup>44</sup> Pew Research Center, *Unauthorized immigrant population stable for half a decade*. July 22, 2015.

<sup>45</sup> UN, *International Migration Report 2015: Highlights*. p. 32.

<sup>46</sup> See, IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, paras. 56 et seq.; United Nations (Department of Economic and Social Affairs: Population Division), *International Migration Wallchart 2013*. 2013.

the most heavily travelled migration corridor in the world, which is between the United States and Mexico. Every year, hundreds of thousands of irregular migrants travel through Mexico to reach the United States. Most come from Central America, South America and the Caribbean, although some are from Africa and Asia as well.<sup>47</sup>

37. In addition to the Asian diaspora, those from Latin America and the Caribbean who live outside their countries of origin represent one of the world's largest diasporas, with 37 million people born in Latin America and the Caribbean.<sup>48</sup> On the other hand, in percentage terms the migrant stock in the Latin American and Caribbean countries is the lowest in the world, at an average of 1.5% for Latin America and 3.2% for the Caribbean.<sup>49</sup>
38. In recent years, the American hemisphere has seen an increase in the number of migrants arriving from outside the hemisphere, especially from Africa and Asia; in the wake of the world economic crisis of 2008, the migrant stock from Europe also increased. The arrival of these persons has exposed the fact that, in many cases, the authorities of the countries of the region do not have suitable mechanisms to address the influx of the migrant and refugee stock arriving from outside the hemisphere. Cases of discrimination and xenophobia are frequently reported, with the attendant difficulties *vis-à-vis* access to judicial remedies and basic services, a lack of due process guarantees in immigration proceedings and in the proceedings conducted to decide whether refugee status will be granted.<sup>50</sup>

## 1. Forced Migration in the Americas: Refugees, Asylum Seekers, Internally Displaced Persons and Victims of Human Trafficking

39. While migration is a structural characteristic of humanity, in the countries of destination recent decades have seen an almost across-the-board shift toward more restrictive immigration policies, laws and practices. In many cases, they no longer focus solely on controlling immigration flows but on stopping them altogether through externalization of borders, stepped up security along borders and the criminalization of migration, particularly in the case of irregular migrants, through generalized implementation of policies that focus on immigration detention and deportation. These trends have been spreading globally, precisely when hundreds of thousands of people find themselves without the legal and safe channels they need to be able to migrate and the countries of transit and of destination have taken measures to reduce international protection.

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<sup>47</sup> IACHR, *Human rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 54.

<sup>48</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*, p. 3.

<sup>49</sup> United Nations (Department of Economic and Social Affairs: Population Division), *Trends in International Migration 2015*.

<sup>50</sup> IACHR, *Thematic Hearing on the Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Regular Session of the IACHR.

40. The Inter-American Commission has observed how the confluence of the aforementioned trends has only made worse the already very serious situation of migrants. Nevertheless, the establishment of containment borders, boundaries, walls and increasingly tougher immigration checkpoints have not stopped human beings from continuing to move elsewhere. Thanks to that drive, the human species has been able to settle elsewhere on the planet or flee natural or human-made threats. The figures on international migration are eloquent testimony to this fact.
41. Millions of people have also migrated internally within their own countries, in many cases by force, i.e., as internally displaced persons. According to the United Nations Development Programme, by a conservative estimate there were approximately 740 million internal migrants in 2009, which was nearly 11% of the world's population. A large percentage of these people have migrated from rural areas to cities.<sup>51</sup> Internal migration has played a role in transforming societies and is expected to continue to do so in the future.
42. In late 2014, the Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR") estimated that there were some 19.5 million refugees worldwide.<sup>52</sup> The developing countries account for most of the world's refugees. Estimates are that 86% -almost nine out of every ten refugees- lived in the southern hemisphere by 2013.<sup>53</sup> Children accounted for 50% of the refugee population in 2013, the highest figure in the last ten years.<sup>54</sup>
43. In the case of the OAS member states, as of late 2014, they were hosting 509,291 refugees, 259,712 and persons in refugee-like situations; 237,052 asylum seekers had cases pending at some stage of the asylum process.<sup>55</sup> As of that date, 209,678 refugees, 258,148 persons in refugee-like situations and 104,820 asylum seekers came from OAS Member States.<sup>56</sup>
44. The mixed migration flows in many countries of the region pose major challenges in terms of the states' ability to identify persons in need of international protection. However, it is important to bear in mind that individuals who seek international protection when applying for refugee status tend to be in a particularly vulnerable situation, usually associated with the reasons why they fled their countries.<sup>57</sup> Because of this, in order for the procedure of refugee status determination to effectively achieve the essential purpose of protection, the design

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<sup>51</sup> UNDP, *Human Development Report 2009. Overcoming Barriers: human mobility and development*. 2009, p. 18.

<sup>52</sup> UNHCR, *UNHCR Global Trends 2014: World at War*, June 18, 2015, p. 28.

<sup>53</sup> UN (Department of Economic and Social Affairs: Population Division), *The number of international migrants worldwide reaches 232 million*. 2013.

<sup>54</sup> UNHCR, *UNHCR Global Trends 2013: War's Human Cost*. June 20, 2014, p. 3.

<sup>55</sup> UNHCR, *UNHCR Global Trends 2013: War's Human Cost*. June 20, 2014, p. 27.

<sup>56</sup> UNHCR, *UNHCR Global Trends 2014: World at War*, June 18, 2015, p. 53.

<sup>57</sup> See, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*. Geneva, 1992, para. 190.

and implementation of this procedure must be based on the fundamental premise that its purpose is to protect life, integrity and freedom of persons.<sup>58</sup>

45. Nowadays, the new dynamics of violence generated by organized crime in Central America and Mexico has a serious impact on humanitarian space in the region. Organized crime violence is one of the major causes of displacement within the population, and breeds serious human rights violations in countries like Colombia, Mexico and the Central American countries, particularly the countries of the so-called Northern Triangle—El Salvador, Guatemala and Honduras. These countries of the region have high levels of violence, persecution and drug-trafficking problems, all of which obstruct access to justice, forcing their populations to flee their homes in search of safety. These countries in the region have high levels of violence and various forms of persecution, which are compounded from the violence generated by non-state actors such as criminal organizations engaged in drug trafficking, gangs and *maras*, which has caused significant proportions people in these countries have been forced to flee their homes in search of safety, as well as the obstacles they face to access effective protection and on access to justice.<sup>59</sup>
46. One of the characteristics of the forced migration caused by violence perpetrated by groups involved in transnational organized crime is its invisibility. However, the increased number of applications for refugee status filed in recent years by individuals from the countries in the Northern Triangle and Mexico has exposed the new dynamics of forced migration in the region and the need to protect these individuals through effective application of mechanisms of international protection.<sup>60</sup> The IACHR has information from various sources about the significant presence of organized crime in these countries.
47. Globally, over 1.66 million persons had applied for asylum by the end of 2014. In the case of the OAS member states, by late 2014 there were 237,052 asylum applications pending. Of these, the United States, Canada and Ecuador had the highest percentage of pending cases, at 79%, 7% and 4%, respectively.<sup>61</sup>
48. Despite the forced migration of hundreds of thousands of persons, the Commission observes that rather than develop effective policies to protect these persons, many of the measures the States of the region have adopted have focused on immigration control. The widespread use of immigration detention and summary deportation proceedings have been intended to deter other migrants. Even so, there is no real evidence that these measures have had their intended effect.<sup>62</sup> These measures

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<sup>58</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 545.

<sup>59</sup> IACHR, *Thematic Hearing on the Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Regular Session of the IACHR.

<sup>60</sup> IACHR, *Thematic Hearing on the Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Regular Session of the IACHR.

<sup>61</sup> UNHCR, *UNHCR Global Trends 2014: World at War*, June 18, 2015, p. 49.

<sup>62</sup> IACHR, *Thematic Hearing on the Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Regular Session of the IACHR.



affect migrants as well as asylum seekers and refugees, but hit the latter the hardest because of their need for international protection.<sup>63</sup> In its country visits, the Commission has repeatedly received plenty of information about situations in which asylum seekers and refugees are rejected or deported at ports of entry, such as land borders or international areas of airports or while traveling in boats in the sea, despite having submitted an application for asylum.

49. The Commission has observed with concern how in several countries of Latin America, migrants, asylum seekers and refugees are often placed automatically in immigration detention, without any individual analysis regarding the need for the implementation of this measure. In the region, there is no adequate systematic approach of alternative measures to apply to asylum seekers in order to avoid detention.<sup>64</sup> The lack of a legal framework that explicitly bans the detention of asylum seekers and refugees, the lack of alternatives or timely and appropriate measures for release, and inappropriate, inadequate or no access to detention centers for monitoring identification of asylum seekers in the region is highlighted in this context.<sup>65</sup> Automatic and generalized use of immigration detention of persons under international protection means that asylum seekers do not have the trust and confidence necessary to appeal to the state and ask for international protection they deserve.<sup>66</sup>
50. The increase of the use of immigration detention has caused situations of overcrowding in the detention centers, as well as hygiene and salubrity conditions for migrants. Also, immigration detention often occurs in conditions of various human rights violations: minimum guarantees of due process, legal assistance and access to justice for detained migrants. In the absence of free legal advice and representation for people in immigration detention, the work of NGOs is the only option to receive legal advice during immigration procedures and the procedure for determining refugee status in various countries of the region. Along with these problems, regular immigration detention centers impose limitations on contact of the detainee with any external actor, which negatively affects the proper exercise of the right to legal representation, and impedes the realization of an effective and independent monitoring of the conditions of detention in these centers.
51. The many persons requiring international protection and/or having been internally displaced are a clear indication of the enormous impact that the various forms of migration have had in the Americas, and illustrate how important it is that inter-American public policy respect and guarantee the human rights of individuals in the context of migration. Because of their immigration status, these

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<sup>63</sup> IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, para. 63.

<sup>64</sup> IACHR, *Hearing on Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Session of the IACHR.

<sup>65</sup> IACHR. *Hearing on the Situation of Human Rights of Refugees in the Americas*. October 31, 2013.

<sup>66</sup> IACHR. *Thematic Hearing on the Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Regular Session of the IACHR.

individuals tend to be in a particularly vulnerable situation and often the victims of various forms of abuse and discrimination.

52. The causes of forced migration and the immigration policies that the States adopt have unquestionably become one of the challenges on the public agenda of the States in the region. The Commission is therefore urging the States to adopt the policies, laws and measures needed to address the problem from the standpoint of human rights, so that the humanitarian crisis that forced migration creates can be addressed effectively and in accordance with the international human rights standards established for the protection of migrants, asylum seekers, refugees, victims of human trafficking and internally displaced persons.

## 2. Stateless Persons

53. By the end of 2014, the UNHCR estimated the number of stateless persons worldwide at close to 3.5 million, although it believes that the real figure is much higher, possibly as many as 10 million stateless persons across the globe.<sup>67</sup> Currently, 17 OAS member states are party to the 1954 Convention to Reduce Statelessness and 12 are party to the 1961 Convention to Reduce the Number of Cases of Statelessness.<sup>68</sup> Within the region, the Dominican Republic accounts for 99% of the cases of statelessness, with an estimate of 210,000 registered cases by the end of 2014.<sup>69</sup>
54. Stateless persons are particularly vulnerable because they do not enjoy the protection of any State that recognizes them as citizens, and thereby ensures them effective exercise of their rights and freedoms. The UNHCR estimates that one third of all stateless persons worldwide are children; the stigma of statelessness will likely follow them to the day they die, and may be passed on to their descendants, who are at risk of becoming stateless as well.<sup>70</sup>
55. In some Latin American and Caribbean countries, the phenomenon of migration - forced in many cases- has meant that thousands of persons, especially minors, do not have any record of their birth, and run the risk of becoming stateless persons.<sup>71</sup> According to the UNHCR, in the last five years, 20% of refugees resettled by the UNHCR were also stateless persons.<sup>72</sup> Their geographic location exposes the Caribbean countries to mixed migration flows that involve individuals who may be in need of international protection. Among the cases of statelessness in this region are children of foreign-born nationals.

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<sup>67</sup> UNHCR, *UNHCR Global Trends 2013: War's Human Cost*. June 20, 2014, p. 2.

<sup>68</sup> OAS, *Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas*, AG/RES. 2826 (XLIV-O/14).

<sup>69</sup> UNHCR, *UNHCR Global Trends 2014: World at War*, June 18, 2015, p. 44.

<sup>70</sup> UNHCR, *Ending Statelessness within 10 Years*. Special Report, 2014.

<sup>71</sup> Brazil Plan of Action. "A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity", Brasilia, December 3, 2014.

<sup>72</sup> UNHCR, *Ending Statelessness within 10 Years*. Special Report, 2014.

56. The Commission notes that situations of statelessness in the Americas are exceptional thanks to the combined application of the principles of *jus soli* and *jus sanguinis* in most Member States of the OAS.<sup>73</sup> However, it has also been observed that there are still legislative gaps and omissions in State practice at the regional level to prevent statelessness.<sup>74</sup> Also, the lack of procedures for determining statelessness in member states of the OAS also represents an obstacle to the protection of human rights of stateless people.
57. Another challenge identified in the region is related to the existence of a legal framework under which women are not men's equals in conferring nationality to their children. These types of laws are still in force in two Caribbean countries: the Bahamas<sup>75</sup> and Barbados<sup>76</sup>, and become one of the causes of statelessness in the region since mothers are not allowed to confer nationality on the same terms as men. These situations, when combined with the States' failure to address the problem of statelessness, affect the ability of stateless persons to demand and exercise their human rights.

### 3. Internal Migrants and Internally Displaced Persons

58. Internal migration also has great impact worldwide. Estimates are that nearly 740 million individuals throughout the world are migrants within their own countries.<sup>77</sup> In the decades ahead, demographics, globalization and climate change will combine to increase the migratory pressures at both the domestic and international levels. One particularly important group within the internal migration phenomenon are persons who have been forced or obliged to escape or flee their homes or places of habitual residence in their own countries, as in the case of internally displaced persons. According to the UNHCR, by the end of 2014 conflict and violence had uprooted some 38.2 million internally displaced persons across the globe.<sup>78</sup> Within this hemisphere, estimates are that as of the close of 2014, there were at least 7 million internally displaced persons in the OAS member states.<sup>79</sup>
59. Because they have had to flee their homes or habitual places of residence, the problems that internally displaced persons face are many. They are especially vulnerable when they escape into their countries' hinterland in search of safety and protection from armed conflict, widespread violence, human rights violations

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<sup>73</sup> I/A Court H.R., *Case Dominican and Haitian deportees v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, p. 99, footnote No. 329.

<sup>74</sup> Brazil Action Plan. "A common roadmap to Strengthen Protection and Promoting Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a framework of cooperation and solidarity", Brasilia, December 3, 2014.

<sup>75</sup> Bahamas Immigration Act, 2014.

<sup>76</sup> Barbados Immigration regulations, 1979.

<sup>77</sup> IOM, *Global Migration Trends: An Overview*. December 2014. p. 3.

<sup>78</sup> UNHCR, *UNHCR Global Trends 2014: World at War*, June 18, 2015, p. 23.

<sup>79</sup> Internal Displacement Monitoring Centre (IDMC). *Global Overview 2015: people internally displaced by conflict and violence*. May 2015, p. 16.

or natural or human-made disasters. Ultimately, they end up under the protection of the very State that forced their flight. Unlike refugees, who cross borders and can claim international protection, internally displaced persons are under the jurisdiction of the State of which they are nationals or habitual residents. Refugees, because they enjoy international protection, have special status that gives them greater protection and visibility.

60. With internally displaced persons, on the other hand, it is their own State that has the obligation to provide them with protection, a State that frequently has been to blame for their forced displacement. This can render internally displaced persons all the more vulnerable and invisible. The Inter-American Court has written the following in this regard:

[i]n view of the complexity of the phenomenon of internal displacement and of the broad range of human rights affected or endangered by it, and bearing in mind said circumstances of special weakness, vulnerability, and defencelessness in which the displaced population generally finds itself, as subjects of human rights, their situation can be understood as an individual *de facto* situation of lack of protection with regard to the rest of those who are in similar situations.<sup>80</sup>

61. Within the region, Colombia has the highest number of internally displaced persons, at 6,044,200 as of the end of 2014.<sup>81</sup> However, the problem of internal displacement is not unique to Colombia; in 2014, displacement occurred in other countries of the region, like Mexico, Honduras, Guatemala and Peru, which also have significant numbers of internally displaced persons.<sup>82</sup>
62. The underlying causes of internal displacement in the countries of the hemisphere vary, the main one being the Colombian armed conflict and the violence it has produced.<sup>83</sup> However, organized crime can also cause internal displacement, as it has in Mexico and the countries of Central America's Northern Triangle, where in recent years cartels and gangs have displaced around 281,400 Mexicans, 248,500 Guatemalans, 288,900 Salvadorans and 29,400 Hondurans from their habitual places of residence.<sup>84</sup> Other factors that trigger internal displacements within the countries of the region are associated with large-scale development projects, commonly known as megaprojects, which mainly affect indigenous peoples, Afro-

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<sup>80</sup> I/A Court H.R., *Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No.134, para. 177; *Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 210.

<sup>81</sup> Internal Displacement Monitoring Centre (IDMC). *Global Overview 2015: people internally displaced by conflict and violence*, note 81, p. 16.

<sup>82</sup> Internal Displacement Monitoring Centre (IDMC). *Global Overview 2015: people internally displaced by conflict and violence*, note 81, p. 16.

<sup>83</sup> IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*. OEA/Ser.L/V/II. Doc. 49/13, December 31, 2013 (hereinafter "*Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*"), paras. 533 et seq.

<sup>84</sup> Internal Displacement Monitoring Centre (IDMC). *Global Overview 2015: people internally displaced by conflict and violence*. note 81, p. 16.

descendent communities and rural farm communities. Other factors in internal displacement include the effects of climate change and natural disasters.

63. Climate change and, in particular, a number of natural disasters have also set off internal displacement and international migration within the region.<sup>85</sup> In recent years, the countries of Central America and the Caribbean have been hit by a string of natural disasters, including hurricanes, torrential rains, fires, floods and droughts, which have become increasingly important “push” factors in driving many people to migrate from the region.<sup>86</sup> The lack of adequate services and sustainable development policies leave populations defenceless, without the means to cope with natural disasters. As a result, people in a number of countries in the region have been forced to move internally and even leave their homeland in search of protection.<sup>87</sup>
64. Overall, the Commission notes that Member States of the OAS have not taken measures to address the situation and the need for protection of people have been forced to migrate, either internally or internationally, because of the effects climate change or natural disasters. However, the figures available reveal a growing number of internally displaced because of natural disasters in the region. An important development has to do with the recognition made by the Latin American and the Caribbean in the 2014 Declaration of Brazil in relation to the challenges posed by climate change and natural disasters, and displacement of people these phenomena generated in the region.<sup>88</sup>
65. The Commission recalls that in addition to affecting the right to freedom of movement and residence, natural phenomena of this kind also have an obvious impact on a number of human rights, such as the right to life, the right to health, food, property, housing, work, and others. Vulnerable groups within society, like women, children, seniors, the disabled and persons living in poverty, are those hardest hit by phenomena of this type and, at the same time, are those least able to adapt to the challenges that such disasters pose.<sup>89</sup>

#### 4. Victims of Trafficking in Persons

66. In the context of migration, victims of trafficking in persons represent another extremely vulnerable group. Gender discrimination and *machismo* present in many countries of the region explain the disproportionate impact that trafficking in

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<sup>85</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 76.

<sup>86</sup> See IACHR, *Hearing on Protection of Human Rights in Natural Disasters*, held at headquarters on March 3, 2006 during the 124<sup>th</sup> Regular Session of the IACHR.

<sup>87</sup> IACHR, *Thematic Hearing on the Human Rights Situation of Refugees and Asylum Seekers in the Americas - 30th Anniversary of the Cartagena Declaration*, held at headquarters on October 27, 2014, during the 153<sup>rd</sup> Regular Session of the IACHR.

<sup>88</sup> Declaration of Brazil: A Framework for Regional Cooperation and Solidarity to Strengthen International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean. Brasilia, December 3, 2014, p. 3.

<sup>89</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 76.

persons has on the victimization of women. However, men, too, may become victims of various forms of trafficking in persons. Within the region, persons who already find themselves in vulnerable situations tend to be deceived by promises of better prospects in life. Their displacement is a function of a combination of coercion, physical or mental violence, abuse and exploitation of any kind. This means that in the case of victims of trafficking in persons the change of place of residence is not voluntary; instead it is done by coercion and often times also involves violence and various forms of physical, mental and sexual abuse. Human trafficking thrives mainly where there is extreme poverty, in countries where there is no hope of social or economic progress and where many expect life abroad will bring better opportunities.

67. Given its characteristics, trafficking in persons is one of the least reported crimes. One of the main constraints that make it difficult to tackle trafficking in persons today is the lack of information painting a profile of the perpetrators and the victims themselves. In the Americas, cases of trafficking for purposes of forced labor are reported with about the same frequency as cases of trafficking for sexual exploitation. In North America, Central America and the Caribbean, more than 50% of the victims identified have been exploited in forced labor, while in South America that figure is around 40%.<sup>90</sup>
68. The Inter-American Commission has maintained that migrant women, especially girls and adolescent girls, are more likely to become victims of trafficking in persons for purposes of sexual exploitation or forced prostitution.<sup>91</sup> The data compiled by the United Nations Office on Drugs and Crime (UNODC) reveal the heavy impact that human trafficking has on migrants. Most of the women migrants who were victimized were sexually exploited forced into prostitution or required to work as domestics for no pay and for long hours.<sup>92</sup>
69. The data compiled from the profiles of victims indicate that between 2010 and 2012, children represented 30% of the victims of human trafficking in the region, whereas adults accounted for the remaining 70% of the victims. The majority of the identified victims who were minors were girls; in fact, two out of every three victims were girls. Women were the majority of adult victims; of the 70% of victims who were adults, women represented 50% of the total number of victims – adults and children combined.<sup>93</sup>
70. Nevertheless, the IACHR is compelled to point out that migrant women are not the only victims of human trafficking. The Commission has received information to the effect that migrant men in the Americas are being forced to work, in various ways, for organized crime groups while being held captive. For example, they are enlisted to engage in criminal activities, like contract killings, the murder of other

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<sup>90</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014*. United Nations publication, Sales No. E.14.V.10, p. 34.

<sup>91</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 138.

<sup>92</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons*. World Report on Human Trafficking. New York, 2009, p. 54.

<sup>93</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014*. United Nations publication, Sales No. E.14.V.10, p. 71.

migrants or drug trafficking. Migrant boys and adolescents are also being forced to work as lookouts for organized crime groups operating in the region.<sup>94</sup>

71. Various forms of human trafficking exist within the region. While exploitation for forced labor, domestic servitude, farming or mining, begging or child soldiers are all forms of human trafficking that occur within the victim's own country or neighbouring countries, sexual exploitation for the tourism industry, production of child pornography, illegal adoptions and organ sales have a transnational and transcontinental dimension.
72. The majority of the countries within the region have a specific law to prevent and punish human trafficking. In some countries, however, the legislation is partial.<sup>95</sup> The Commission notes with concern that within the region, no significant increases are apparent in the number of investigations and convictions won in cases involving trafficking in persons. When the figures on the number of cases reported and the suspects in those cases are compared with the number of convictions, the convictions represent just 10% of the cases.<sup>96</sup> As for those cases in which penalties were ordered, 80% of the perpetrators convicted in the Americas are persons who traffic in citizens of their own country and have been prosecuted by their own State. Some 17% of the perpetrators are nationals of other countries in the region, and only 3% are nationals of countries outside the region.<sup>97</sup>
73. The Commission is troubled by the fact that the porous borders in the countries of the region make it easy to move trafficking victims from one country to the next. It is also troubled to observe that corruption and organized crime have infiltrated high levels of government, thereby undermining the State's ability to fight trafficking. A small civil society operating on a limited budget will be hard-pressed to effectively compensate for State inaction.

### ***C. The Inter-American Commission on Human Rights and Its Rapporteurship on the Rights of Migrants***

74. The Inter-American Commission on Human Rights is a principal organ of the Organization of American States (hereinafter "the OAS") charged with promoting the observance and defence of human rights in the Americas.<sup>98</sup> In keeping with its mandate and its functions, as described in greater detail in its Statute and Rules of

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<sup>94</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, 2013.

<sup>95</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014*. United Nations publication, Sales No. E.14.V.10, p. 75.

<sup>96</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014*. United Nations publication, Sales No. E.14.V.10, p. 77.

<sup>97</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014*. United Nations publication, Sales No. E.14.V.10, p. 70.

<sup>98</sup> The Charter of the Organization of American States, signed in Bogota on April 30, 1949 and amended by the Protocol of Buenos Aires in 1967, the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992 and the Protocol of Managua in 1993, articles 53 (e) and 106.



Procedure, the Commission monitors the evolution of human rights in each OAS member State and from time to time finds it useful to prepare reports on issues related to its mandate.<sup>99</sup>

75. Since the IACHR's early years, one of the focuses of its work has been the protection of the human rights of those who find themselves caught up in the context of mobility, in particular situations involving migrants and their families, asylum seekers, refugees, stateless persons, the internally displaced and victims of human trafficking.<sup>100</sup> Given the particular vulnerability of migrants and their families, who are often forced to abandon their communities in search of better opportunities in life or to escape poverty, the ever more frequent displays of racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants and their families in various parts of the world, the assimilation-related problems that migrants have to contend with in their countries of destination and the implications that migration has for the breakup of the family, the OAS General Assembly has consistently urged the IACHR to step up its efforts with a view to improving the situation of migrant workers and their families in the hemisphere.<sup>101</sup>
76. Thus, in response to mandates from the OAS General Assembly, given in resolutions AG/RES. 1404 (XXVI-O/96) and AG/RES 1480 (XXVII-O/97), at its 91<sup>st</sup> Session the Inter-American Commission decided to begin to examine the situation of migrants workers and their families in the hemisphere. This led to the establishment, in 1996, of the Rapporteurship on Migrant Workers and Members of Their Families (now called "the Rapporteurship on the Rights of Migrants," hereinafter "the Rapporteurship"). The creation of this Rapporteurship was a reflection of the OAS member states' concern to focus particular attention on a group characterized by its extreme vulnerability and, thus, its exposure to human rights violations.
77. Also in 1996, in response to the serious predicament facing internally displaced persons in a number of countries of the hemisphere, the IACHR decided to create the Rapporteurship on Internally Displaced Persons. While creating these rapporteurships in the Commission helped provide greater attention to human rights of migrant workers and their families, as well as internally displaced persons, protection and promotion of human rights of other groups of people at

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<sup>99</sup> Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 137<sup>th</sup> Regular Session, held October 28 to November 13, 2009, and amended on September 2, 2011 at its 147<sup>th</sup> Regular Session, held March 8 and 22, 2013, for entry into force on August 1, 2013, Article 58.

<sup>100</sup> The Inter-American Commission on Human Rights has been following the situation of refugees since 1963. See in this regard, IACHR, *Report of the Work Accomplished during its Seventh Session*, held October 7 to 25, 1963 – Chapter VI. Situation of Political Refugees in America. OEA/Ser.L/V/II.8 Doc. 35, February 5, 1964. In the reports on its eighth, ninth, tenth, twelfth, sixteenth, eighteenth, twenty-second sessions and others, the Commission continued to devote attention to the situation of refugees.

<sup>101</sup> See in this regard, *inter alia*, the following resolutions of the OAS General Assembly: AG/RES. 1404 (XXVI-O/96), AG/RES. 1480 (XXVII-O/97), AG/RES. 1717 (XXX-O/00), AG/RES. 1775 (XXXI-O/01), AG/RES. 1898 (XXXII-O/02), AG/RES. 1928 (XXXIII-O/03), AG/RES. 2027 (XXXIV-O/04), AG/RES. 2130 (XXXV-O/05), AG/RES. 2141 XXXV-O/05, AG/RES. 2224 (XXXVI-O/06), AG/RES. 2289 (XXXVII-O/07), AG/RES. 2502 (XXXIX-O/09), AG/RES. 2593 (XL-O/10), AG/RES. 2669 (XLI-O/11), AG/RES. 2729 (XLII-O/12) and AG/RES. 2790 (XLIII-O/13). Available at: <http://www.oas.org/en/iachr/migrants/default.asp>.

vulnerability in the context of migration has also been one of its main focuses of work since its inception.<sup>102</sup> This, in response to the forced migration of hundreds of thousands of people who had to flee or abandon their homes as a result of the dictatorships and armed conflicts in the region in the twentieth century.

78. In 2012, the IACHR decided to change the mandate of the Rapporteurship on the Rights of Migrant Workers and Members of their Families (now the Rapporteurship on the Rights of Migrants) in order to be responsive to the many challenges that migration poses within the region, whether in the form of international migration or forced or voluntary displacement, and in order to institutionalize what had become tacit practice in the Rapporteurship in recent years. Thus, on March 30, 2012, during its 144th Session, the Inter-American Commission on Human Rights decided to expand the mandate of the Rapporteurship on the Rights of Migrants. The mandate the Commission approved in 2012 focuses on observance and protection of the rights of migrants and their families, asylum seekers, refugees, stateless persons, victims of human trafficking, internally displaced persons, and other vulnerable groups in the context of migration.

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<sup>102</sup> Since its early years, the Inter-American Commission on Human Rights has monitored the situation of refugees in the Americas. In this sense, see, inter alia, IACHR, *Report on the Work during its Seventh Session*, held from 7 to 25 October 1963. OEA/Ser.L/V/II.8 Doc. 35, February 5 1964; IACHR, *The Situation of Political Refugees in America. Report prepared by the Executive Secretariat of the Inter-American Commission on Human Rights*. OEA/Ser.L/V/II.11 Doc. 7, November 2, 1965.

CHAPTER 2  
SOURCES OF LAW



## SOURCES OF LAW

79. The emergence of the International Law of Human Rights at the end of the first half of the twentieth century has had a profound impact on international migration law. After World War II, various international human rights instruments of universal and regional levels, established that states have the obligation to respect and ensure the rights and freedoms recognized in those instruments to all persons subject to their jurisdiction, without discrimination. This implies that States are obliged to ensure these rights to all people regardless of their nationality, immigration situation or stateless condition. The importance of migration a right has been materialized in the recognition of what has been termed the human right of all people to migrate, both domestically and internationally, as well as the right not to migrate forcibly.<sup>103</sup>
80. The founding principle of the International Law of Human Rights is that human rights are not derived from being a national of a certain state, but are based upon attributes of the human person.<sup>104</sup> In this vein, people in the context of migration, whether they are not nationals of the State in which they are, are entitled to respect and guarantee human rights. Except for the right to enter, move and reside in a country, which is restricted to those who have the legal authority to do so<sup>105</sup>, and certain restricted political rights to citizens<sup>106</sup>, migrants have the right to be respected and guarantee the other rights recognized in the American Convention and other inter-American instruments on equal terms with others.
81. The development of international law has taken into account the multiple causes that lead to the migration of people, situations of vulnerability in which they are typically found as well as their protection needs. In an effort to properly respond to the general and particular circumstances that have triggered international or internal migration, the international community has developed various normative

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<sup>103</sup> See, among others, American Declaration of the Rights and Duties of Man, adopted in April 1948, Arts. VIII and XXVII; Universal Declaration of Human Rights, adopted on December 10, 1948, Arts. 9, 13 and 14; Protocol No. 4 to the European Convention on Human Rights, adopted on November 16, 1963, Arts. 2, 3 and 4; International Covenant on Civil and Political Rights, adopted on December 16, 1966, Arts. 12 and 13; American Convention on Human Rights, signed on November 22, 1969, Art. 22; African Charter on Human and Peoples' Rights, adopted on July 27, 1981, Art. 12; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted on 18 December 1990, Article 8; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted on October 22, 2009, Articles 3.1.a, 4.1, 4.4, 4.5, 7.5.a and 7.5.d.

<sup>104</sup> See American Declaration of the Rights and Duties of Man, Recitals; and American Convention on Human Rights, Preamble.

<sup>105</sup> See American Declaration of the Rights and Duties of Man, Article 8, and American Convention on Human Rights, Article 22.1

<sup>106</sup> American Convention on Human Rights, Article 23.1.

systems and instruments to regulate the treatment of these populations, according to the type of group. In turn, the universal and regional instruments that have been developed have brought the recognition of rights for people in the context of migration, through the rights granted to these people for various branches of international law, such as international human rights law, international refugee law, international law of stateless persons, international humanitarian law or international labor law. The development of a body of rules governing the migration is what has become known as the international law of migration.

82. The protection of the rights of persons in the context of migration may be classified into two main categories: on the one hand, international human rights law, and on the other specific regimes to protect refugees, stateless persons, victims of human trafficking, internally displaced persons, and others. The IACHR believes it is important to regard these two main categories as mutually complementary, with the *pro persona* principle as the guiding rule of interpretation. In this report the Commission highlights those instruments of inter-American system and the universal system, which were most relevant to the Commission and the Court to establish standards concerning the scope and content of the human rights of migrants, asylum seekers and refugees, stateless persons, victims of trafficking and IDPs.

## A. *Inter-American Human Rights Instruments*

83. Since the time the OAS was established, its member states have crafted and adopted 11 international instruments that have become the normative framework of the regional system for the promotion and protection of human rights. In those instruments, the States recognize these rights, establish their own obligations in promoting and protecting those rights, and create organs to oversee observance of the rights and compliance with the obligations they have undertaken. Whether the content of these instruments is directly linked to migration issues or not, all the guarantees stipulated in them are applicable to persons in the context of migration.

### Inter-American instruments on human rights

No.	NAME	DATE OF ADOPTION
1.	American Declaration of the Rights and Duties of Man	May 2, 1948
2.	American Convention on Human Rights	November 22, 1969
3.	Inter-American Convention to Prevent and Punish Torture	December 9, 1985
4.	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"	November 17, 1988

No.	NAME	DATE OF ADOPTION
5.	Protocol to the American Convention on Human Rights to Abolish the Death Penalty	June 8, 1990
6.	Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará"	June 9, 1994
7.	American Convention on Forced Disappearance of Persons	June 9, 1994
8.	Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities	June 7, 1999
9.	American Convention against Racism, Racial Discrimination and Related Intolerance	June 5, 2013
10.	American Convention against All Forms of Discrimination and Intolerance	June 5, 2013
11.	Inter-American Convention on the Protection of Human Rights of Older Persons	June 15, 2015

## 1. The American Declaration of the Rights and Duties of Man

84. The American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”) is the first general international human rights instrument<sup>107</sup>. As for the rights recognized therein, the American Declaration provides in its preamble that “the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality.”
85. Both the Inter-American Commission and the Inter-American Court have held that although adopted as a declaration and not as a treaty, the American Declaration is today a source of international obligations binding upon the OAS member states.<sup>108</sup> The member states have agreed that the human rights to which the Charter refers are contained and defined in the American Declaration.<sup>109</sup> A number of key

<sup>107</sup> Adopted by the representatives of the member States of the Organization of American States at the Ninth International Conference of American States in April 1948. Thereafter, on December 10, 1948, the United Nations approved the Universal Declaration of Human Rights.

<sup>108</sup> See, IACHR, Resolution No. 3/87, *Case 9647, James Terry Roach and Jay Pinkerton (United States)*, *Annual Report 1986-87*, September 22, 1987, paras. 46-49; IACHR, Report No. 51/01, *Case 9,903, Rafael Ferrer-Mazorra (United States)*, *Annual Report 2000*, April 4, 2001; I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, paras. 35-45. See, also, Article 20 of the Commission’s Statute.

<sup>109</sup> IACHR, Report No. 75/02, *Case 11,140, Mary and Carrie Dann (United States)*, December 27, 2002, para. 163. OAS General Assembly resolution AG/RES. 371/78 (VIII-O/78), July 1, 1978 (concerning the member States’ international commitments to respect the rights recognized in the Declaration).



provisions in the Declaration are also binding by virtue of international custom<sup>110</sup>. The American Declaration is a source of legal obligations binding upon the member states of the Organization of American States, which flow from the human rights obligations undertaken in the OAS Charter (Article 3). Several general provisions of the Declaration are also mandatory in international custom.<sup>111</sup>

86. The IACHR has previously established that for Member States that have not yet ratified the American Convention, its obligations in the field of human rights are reflected in the American Declaration; concordantly, those obligations have been interpreted in relation to the Charter of the OAS in general and the American Declaration more specifically. In this vein, the American Declaration was the instrument on which the Commission relied to analyze a large number of cases and situations of violations of human rights of individuals in the context of migration, who for the moment the occurrence of the events under the jurisdiction of States that had not ratified the American Convention on Human Rights. A significant number of cases and situations analyzed by the Inter-American Commission in relation to migrants and refugees have to do with states of North America, mainly the United States, reflecting the situation of these countries as the main destination for migrants and refugees.
87. The Inter-American Commission has also written that the relevant provisions of the American Declaration can be interpreted and applied in light of the current developments in international human rights law, as evidenced in treaties, custom and other pertinent sources of international law. It wrote the following in this regard:

[...] the international law of human rights is a dynamic body of norms evolving to meet the challenge of ensuring that all persons may fully exercise their fundamental rights and freedoms. In this regard, as the International Covenants elaborate on the basic principles expressed in the Universal Declaration of Human Rights, so too does the American Convention represent, in many instances, an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration.<sup>112</sup>

<sup>110</sup> IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann* (United States), December 27, 2002, para. 163; IACHR, Report 19/02, Case 12.379, *Lares-Reyes et al.* (United States), February 27, 2002, para. 46.

<sup>111</sup> IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann* (United States), December 27, 2002, para. 163. IACHR, Report 19/02, *Case 12.379, Lares-Reyes et al* (United States), February 27, 2002, para. 46.

<sup>112</sup> See, inter alia, IACHR, Report No. 78/11, Case 12,586, *John Doe et al* (Canada), July 21, 2011, para. 71; IACHR, Report No. 44/14, *Case 12,873, background, Edgar Tamayo Arias, United States*, July 17, 2014, para. 214; IACHR, Report No. 113/14, *Case 11.661, Manickavasagam Suresh* (Canada), November 7, 2014, para. 51. Also see IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, para. 37; IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 30; IACHR, *Report on the Situation of Human Rights of Asylum Seekers under the Canadian System for Determining Refugee Status*, para. 38.

88. The American Declaration contains evolving standards that must be interpreted “in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states”.<sup>113</sup> Therefore, the IACHR interprets and applies the relevant provisions of the American Declaration “in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law”<sup>114</sup>, including the American Convention on Human Rights, “which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration”<sup>115</sup>.

## 2. The American Convention on Human Rights

89. The American Convention on Human Rights is not a multilateral treaty of the traditional type, concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Instead, its object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States.<sup>116</sup>
90. In its first section, the American Convention establishes the duties of the States and the rights protected under the Convention. With regard to people in the context of migration, especially those who are not citizens or who are stateless, Article 1.1 is particularly important since it establishes the obligation of States parties to respect and ensure the rights and freedoms recognized in the Convention to all persons subject to their jurisdiction are without discrimination as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In turn, Article 24 of the American Convention stipulates that “all people” are equal before the law. Consequently, they are entitled without any discrimination to equal protection of the law.

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<sup>113</sup> IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann* (United States), December 27, 2002, para. 96. IACHR, Report No. 40/04, Case 12.053, *Mayan Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, para. 86. I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 37. I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, para. 114. IACHR, Report No. 52/02, Case 11.753, Ramón Martínez Villarreal (United States).

<sup>114</sup> IACHR, Report No. 40/04, Case 12.053, *Mayan Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, para. 88. IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann* (United States), December 27, 2002, para. 96.

<sup>115</sup> IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann* (United States), December 27, 2002, paras. 97, 124. IACHR, Report No. 40/04, Case 12.053, *Mayan Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, para. 87. IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, para. 38. IACHR, Report No. 52/01, *Case 12.243, Juan Raúl Garza* (United States), April 4, 2001, paras. 88-89.

<sup>116</sup> I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29.

91. In turn, Article 22 of the American Convention is of particular relevance for the purposes of this report, as it sets the scope and content of the right of movement and residence, either to be exercised within the territory of which a person is a national or to be exercised in the context of international migration. In this regard, the Commission considers important to note that although Article 22 of the Convention has been called “Freedom of Movement and Residence”, this article contains 9 numerals containing rights and obligations of States beyond which strictly speaking is called “Freedom of Movement and Residence”. In Article 22 also it provides, among others, the prohibition of expulsion of nationals and their right not to be deprived of the right to enter the territory of which he/she is national (Article 22.5); the right to seek and enjoy asylum (Article 22.7); the principle of non-refoulement (non-refoulement) (Article 22.8); and the absolute prohibition of collective expulsion of aliens (Article 22.9). Article 22 of the American Convention provides that:

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

92. In its second part, the American Convention establishes the means of protection: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which it declares are the competent organs “with respect to matters relating to the fulfilment of the commitments made by the States Parties to this

Convention.” As of the date of approval of this report, 23 member states of the OAS are party to the American Convention.<sup>117</sup>

## ***B. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families***

93. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted on November 18, 1990, through Resolution 45/158 of the United Nations General Assembly. It entered into force on July 1, 2003 and currently 38 States are signatories and 48 States party. The Convention is open to signature by all the States, subject to ratification.<sup>118</sup>
94. As its name suggests, this Convention seeks to protect the rights of migrants and members of their families by establishing a minimum legal framework for the working conditions to which they are subject, and establishing measures to eradicate clandestine migratory movements. In general, the Convention provides a more precise interpretation of the migrant worker’s human rights. While most of these rights had been recognized in previous conventions, their application to non-nationals was not, generally speaking, made specific. In effect, despite the fact that all the treaties, conventions and declarations stated that the rights recognized therein applied to “all persons” it was not obvious to the States or to international organizations that every human being –national or foreign- was protected under the provisions of those instruments.
95. The Convention is comprehensive, as its provisions address every stage of the migrant workers’ labor cycle, from the recruitment process up through the migrants’ rights once in the country of destination. Among the most important aspects of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is that it seeks to expand the mechanisms of protection for migrant workers and members of their families, especially with regard to the following: exploitation and discrimination; control of illicit movements and migrant smuggling, and the establishment of clear guidelines regarding the social benefits to which these persons are entitled.

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<sup>117</sup> The 23 OAS member States that have ratified the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Trinidad and Tobago and Venezuela also ratified the American Convention but later denounced having effects such complaints in 1999 and 2013 respectively. For more information on the ratification of the instruments of the Inter-American System of Human Rights, see IACHR, *Considerations for Universal Ratification of the American Convention and Other Inter-American Treaties on Human Rights*. OEA/Ser.L/V/II.152 Doc.21, August 14, 2014.

<sup>118</sup> UN, Databases, United Nations Treaty Collection, [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#).

OAS MEMBER STATE	DATE OF RATIFICATION OR ACCESSION
<b>Antigua and Barbuda</b>	/
<b>Argentina</b>	February 23, 2007
<b>Bahamas (Commonwealth of the)</b>	/
<b>Barbados</b>	/
<b>Belize</b>	November 14, 2001
<b>Bolivia</b>	October 16, 2000
<b>Brazil</b>	/
<b>Canada</b>	/
<b>Chile</b>	March 21, 2005
<b>Colombia</b>	May 24, 1995
<b>Costa Rica</b>	/
<b>Dominica (Commonwealth of)</b>	/
<b>Dominican Republic</b>	/
<b>Ecuador</b>	February 5, 2002
<b>El Salvador</b>	March 14, 2003
<b>Grenada</b>	/
<b>Guatemala</b>	March 14, 2003
<b>Guyana</b>	July 7, 2010
<b>Haiti</b>	* Signed on December 5, 2013, but has not yet ratified the Convention.
<b>Honduras</b>	August 9, 2005
<b>Jamaica</b>	September 25, 2008
<b>Mexico</b>	March 8, 1999
<b>Nicaragua</b>	October 26, 2005
<b>Panama</b>	/
<b>Paraguay</b>	September 23, 2008
<b>Peru</b>	September 14, 2005
<b>Saint Kitts and Nevis</b>	/
<b>Saint Vincent and the Grenadines</b>	October 29, 2010
<b>Saint Lucia</b>	/
<b>Suriname</b>	/
<b>Trinidad and Tobago</b>	/
<b>United States</b>	/
<b>Uruguay</b>	February 15, 2001
<b>Venezuela (Bolivarian Republic of)</b>	* Signed on October 4, 2011, but has not yet ratified the Convention.

## C. *The Instruments of International Refugee Law*

### 1. The Convention Relating to the Status of Refugees

96. The Convention Relating to the Status of Refugees was adopted by the United Nations in Geneva on July 28, 1951 at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. It entered into force on April 22, 1954 and currently has 19 signatories and 145 States parties<sup>119</sup>. This convention has been ratified by 31 member states of the OAS.

OAS MEMBER STATE	DATE OF RATIFICATION OR ACCESSION
Antigua and Barbuda	September 7, 1995
Argentina	November 15, 1961
Bahamas (Commonwealth of the)	September 15, 1993
Barbados	/
Belize	June 27, 1990
Bolivia	February 9, 1982
Brazil	November 16, 1960
Canada	June 4, 1969
Chile	January 28, 1972
Colombia	October 10, 1961
Costa Rica	March 28, 1978
Dominica (Commonwealth of)	February 17, 1994
Dominican Republic	August 17, 1955
Ecuador	April 28, 1983
El Salvador	/
Grenada	*October 25, 1956
Guatemala	September 22, 1983
Guyana	/
Haiti	September 25, 1984
Honduras	March 23, 1992
Jamaica	July 30, 1964
Mexico	June 7, 2000
Nicaragua	March 28, 1980
Panama	August 2, 1978
Paraguay	April 1, 1970

<sup>119</sup> UN, Databases, Treaty Collection, [Convention Relating to the Status of Refugees](#).

OAS MEMBER STATE	DATE OF RATIFICATION OR ACCESSION
<b>Peru</b>	December 21, 1964
<b>Saint Kitts and Nevis</b>	January 4, 1978
<b>Saint Vincent and the Grenadines</b>	February 1, 2002
<b>Saint Lucia</b>	November 3, 1993
<b>Suriname</b>	* September 4, 1968
<b>Trinidad and Tobago</b>	November 29, 1978
<b>United States</b>	November 10, 2000
<b>Uruguay</b>	September 22, 1970
<b>Venezuela (Bolivarian Republic of)</b>	/

97. The 1951 Convention relating to the Status of Refugees recognizes the international scope of the problem of refugees, and the need for international cooperation for their solution, stressing the importance of sharing responsibility between states.<sup>120</sup> This instrument is the cornerstone of international refugee law. The Convention adopts a definition of refugees, which is defined as any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>121</sup>

98. The Convention relating to the Status of Refugees of 1951 recognizes the right to protection to persons whose circumstances fit the definition of Article 1 A (b). They also recognized a series of rights linked to their personal status, documentation, freedom of movement, education, health, employment, access to justice, property rights and association, as well as establishing obligations for States Parties. The Convention also sets the standard of international law for the protection of the rights of refugees, which deals with legal treatment equivalent to that enjoyed by foreigners legally established in that country. In some cases, the rights of refugees must be protected at the same level as the nationals of that State.
99. Additionally, the 1951 Convention enshrines the principle of fundamental protection of the International Law of Human Rights, the non- refoulement, in the following lines: "No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a

<sup>120</sup> General Assembly of the United Nations Convention relating to the Status of Refugees. Resolution 429(V) of 14 December 1950. Article 1A(2).

<sup>121</sup> General Assembly of the United Nations, Convention relating to the Status of Refugees. Resolution 429(V) of 14 December 1950. Article 1A.



particular social group or political opinion”<sup>122</sup>. Likewise, this instrument highlights basic principles for the protection of refugees, including a ban on punishment for illegal entry, non-discrimination and family unity.

## 2. The Protocol Relating to the Status of Refugees

100. Having been developed after the Second World War, the 1951 Convention sought to respond exclusively to the humanitarian situation faced by those who suffered the consequences of this conflict in Europe. That is why the Convention refugee definition has focused on people who are outside the country of his nationality and who are refugees as a result of events occurring before 1 January 1951 in Europe. Given the new refugee situations that occurred in the late fifties and early sixties in the Americas, Africa and Asia, it was necessary to extend the temporal and geographical scope of the Convention. Therefore, in 1967 he was drafted and the Protocol to the 1951 Convention so that the international protection afforded to refugees, under the terms established in the Convention, became a duty of universal scope, without distinction of time or space.
101. Thus, the General Assembly of the United Nations, by Resolution 2198 (XXI) of 16 December 1966, took note of the Protocol and requested the Secretary-General to transmit the Protocol to the States mentioned in Article V thereof, with the so that they can accede to the Protocol. The Protocol entered into force on 4 October 1967<sup>123</sup>. The Protocol removed geographical and temporal restrictions set out in the 1951 Convention relating to European refugees after World War II, to expand the scope of this Convention, and eliminating temporal and geographical limitations of the refugee definition set out in the 1951 Convention.

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
<b>Antigua and Barbuda</b>	September 7, 1995
<b>Argentina</b>	December 6, 1967
<b>Bahamas (Commonwealth of the)</b>	September 15, 1993
<b>Barbados</b>	/
<b>Belize</b>	June 27, 1990
<b>Bolivia</b>	February 9, 1982
<b>Brazil</b>	April 7, 1972
<b>Canada</b>	June 4, 1969
<b>Chile</b>	April 27, 1972
<b>Colombia</b>	March 4, 1980

<sup>122</sup> General Assembly of the United Nations Convention relating to the Status of Refugees. Resolution 429(V) of 14 December 1950. Article 33.

<sup>123</sup> UN Database, Collection of Treaties, [Protocol Relating to the Status of Refugees](#).

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
<b>Costa Rica</b>	March 28, 1978
<b>Dominica</b> (Commonwealth of)	February 17, 1994
<b>Dominican Republic</b>	March 6, 1969
<b>Ecuador</b>	April 28, 1983
<b>El Salvador</b>	November 1, 1968
<b>Grenada</b>	/
<b>Guatemala</b>	September 22, 1983
<b>Guyana</b>	/
<b>Haiti</b>	September 25, 1984
<b>Honduras</b>	March 23, 1992
<b>Jamaica</b>	October 30, 1980
<b>Mexico</b>	June 7, 2000
<b>Nicaragua</b>	March 28, 1980
<b>Panama</b>	August 2, 1978
<b>Paraguay</b>	April 1, 1970
<b>Peru</b>	September 15, 1983
<b>Saint Kitts and Nevis</b>	January 4, 1978
<b>Saint Vincent and the Grenadines</b>	/
<b>Saint Lucia</b>	November 3, 2003
<b>Suriname</b>	*September 4, 1968
<b>Trinidad and Tobago</b>	November 29, 1978
<b>United States</b>	November 10, 2000
<b>Uruguay</b>	September 22, 1970
<b>Venezuela</b> (Bolivarian Republic of)	September 19, 1986

### 3. The Cartagena Declaration on Refugees

102. Another instrument of paramount importance to the inter-American framework in relation to the protection of refugees is the Cartagena Declaration on Refugees. From 19 to 22 November 1984 in Cartagena, Colombia, the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, where Latin American government representatives and law specialists discussed the challenges in international refugee protection it was made Central and adopted the Cartagena Declaration on Refugees.

103. Taking into account the experience gained by the massive influx of Central American refugees, the Cartagena Declaration recommended that Latin American states extend the definition of refugee contained in the Convention relating to the Status of Refugees and its 1967 Protocol, in order to respond to other pressing protection situations in Latin America.<sup>124</sup> Beyond the traditional 5 causes that had been established in the Convention relating to the Status of Refugees (persecution for reasons of race, religion, nationality, membership to a particular social group or political opinion), the expanded refugee definition of the Declaration Cartagena adds other situations that could motivate the forced crossing of an international border by an individual. Thus, generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order are enshrined in this declaration as grounds for persecution that can generate lack of protection. Specifically, the Cartagena Declaration on Refugees:

Reiterates that, in view of the experience gained in connection with the massive influx of refugees in Central America, it is necessary to consider enlarging the concept of refugee, taking into account, where relevant, and within the characteristics of the situation in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Thus, the definition or concept of refugee recommended for use in the region is that in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their countries because their life, 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.<sup>125</sup>

104. The work of the Inter-American Commission on Human Rights was crucial for an expanded definition of refugees at the regional level, which would end embodied in the Cartagena Declaration of 1984. According to the Commission, it revealed that violence was adopted in a large number of countries in Latin America and the Caribbean as a result of military regimes and internal armed conflicts in the 1970s and in the early 1980s had an alarming side effect: the massive displacement of people<sup>126</sup>. In order to respond to the dynamics of forced migration that were evident during those years, in its annual reports of 1981-1982, the Commission recommended that Member States of the OAS to adopt a broader regional refugee definition to include "persons who have left their country because their lives have been threatened by violence, aggression and foreign occupation, massive

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<sup>124</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2004: Sixth Progress Report of the Special Rapporteur on Migrant Workers and Their Families in the Hemisphere*. OEA/Ser.L/V/II.122, Doc. 5 rev. 1 February 23, 2005, para. 36.

<sup>125</sup> *Cartagena Declaration on Refugees*. Adopted by the "Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Juridical and Humanitarian Problems" held in Cartagena, Colombia, from 19 to 22 November 1984, Conclusion #3.

<sup>126</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights from 1980 to 1981*. OEA/Ser.L/II.54 Doc.9 rev.1, October 16, 1981, Chapter V.

violations of human rights and other circumstances that destroy the public order and for which there are no internal resources"<sup>127</sup> Subsequently, the Cartagena Declaration was based on the definition that was proposed by the Commission for the expanded refugee definition set in that instrument. The same Declaration of Cartagena, in Conclusion III recognizes the doctrine employed in the reports of the Inter-American Commission on Human Rights as one of the sources of the expanded refugee definition.<sup>128</sup>

105. Additionally, the Cartagena Declaration insists on the need for recognition and protection of the rights of refugees, highlighting the importance of respecting the principle of non-refoulement, economic and social rights and family reunification of refugees as well as voluntary repatriation. The Cartagena Declaration on Refugees also promotes the use of the mechanisms of the inter-American System (particularly the Commission) as an opportunity to complement the quality of the protection offered to asylum seekers and refugees.<sup>129</sup> The internal regulations of 16 States in the region includes the expanded refugee definition recommended by the Cartagena Declaration on Refugees.<sup>130</sup>

STATE	LEGISLATION	APPROVED ON
<b>Argentina</b>	Law N° 26.165. Law on Refugee Protection and Recognition	November 8, 2006
<b>Belize</b>	Refugees Act	August 16, 1991
<b>Bolivia</b>	Supreme decree N° 19.640. Refugee definition.	July 4, 1983
<b>Brazil</b>	Law N° 9.474, defining implementing mechanisms for the implementation of the refugee statute, creating the "Comitê Nacional para os Refugiados"	July 22, 1997
<b>Chile</b>	Law N° 20.430 on refugee protection	April 8, 2010

<sup>127</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 1981-1982*. OEA/Ser.L/V/II.57 Doc. 6 rev.1, September 20, 1982, Chapter VI, Section B, Refugees and inter-para. 11.d. See also Conclusions and Recommendations Colloquium on Asylum and International Protection of Refugees in Latin America, held in Tlatelolco, Mexico City, from 11 to 15 May 1981.

<sup>128</sup> See Murillo Gonzalez, Juan Carlos, *The Inter-American System for the Protection of Human Rights and its relevance for the protection of refugees and others in need of protection in the Americas*. Course XXXIV, 2002, pp. 441 and 448.

<sup>129</sup> *The Cartagena Declaration on Refugees*. Adopted by the "Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Juridical and Humanitarian Problems" held in Cartagena, Colombia, from 19 to 22 November 1984. Fifteenth Clause. "To promote the use, with greater intensity, of the competent bodies of the inter-American system, especially the Inter-American Commission on Human Rights in order to complement the international protection of asylum seekers and refugees. Of course, for the fulfillment of these functions the Colloquium believes it would be advisable to emphasize the close coordination and cooperation between the Commission and UNHCR.

<sup>130</sup> UNHCR. *Refugee Protection in Latin America: Good Legislative Practices*. 2014; Regional Legal Unit of the UNHCR Office for the Americas, *Protection of Refugees in Latin America: Good Legislative Practices*. 2014.

STATE	LEGISLATION	APPROVED ON
<b>Colombia</b>	Decree N° 2840. Refugee Determination Procedure	December 6, 2013
<b>Costa Rica</b>	Administrative Court Judgment	November 28, 2014
<b>Ecuador</b>	Decree N° 3.293. Rules for the application of norms from the 1951 and its 1967 Protocol (Abrogated) Decree N° 1.182 – Rules for the application of Refugee Law. Judgment N° 002-14-SIN-CC – Constitutional review on Executive Decree N° 1182	September 29, 1987, May 30, 2012 and 17 September, 2014
<b>El Salvador</b>	Decree No. 918	August 22, 2002
<b>Guatemala</b>	Governmental agreement N°383-2001. Rules for the protection and refugee status determination in Guatemala	September 14, 2001
<b>Honduras</b>	Decree No. 208-2003. Immigration Law	March 3, 2004
<b>Mexico</b>	Population's General Law: Rules on Refugees and Complementaty Protection	January 7, 1974, reformed on 1990
<b>Nicaragua</b>	Law N° 655 on Refugee Protection	June 26, 2008
<b>Paraguay</b>	Law N° 1.938 – General Law on Refugees	July 9, 2002
<b>Peru</b>	Law N° 27.891 – Refugee Law	December 20, 2002
<b>Uruguay</b>	Law N° 18.076 relating to the refugee status	November 14, 2006

#### ***D. The Instruments of International Law on Statelessness***

106. At the international level, the right to nationality has been widely acknowledged to be one of the basic human rights. In addition to being recognized within the Inter-American Human Rights System's main instruments, the right to nationality is also widely recognized as a human right in other regional juridical instruments as well. The international community has acknowledged that protection of the right to nationality is a matter of direct importance to international law, and its violation compromises a State's international responsibility. The foregoing is amply

demonstrated by the fact that the right to nationality is recognized in a number of international<sup>131</sup> and regional<sup>132</sup> legal instruments.

107. At the international level, two conventions refer specifically to the topic of statelessness: the 1954 United Nations Convention relating to the Status of Stateless Persons and the 1961 United Nations Convention on the Reduction of Statelessness.

## 1. The Convention relating to the Status of Stateless Persons

108. The 1954 Convention relating to the Status of Stateless Persons was drafted to address the situation that became apparent in the wake of the Second World War, when many people were left stateless or had no way to acquire some nationality. Without any nationality, these individuals could not claim the protection of any State and were thus in an extremely vulnerable situation. The Convention relating to the Status of Stateless Persons applies to individuals who are not considered a national by any State under the operation of its law.
109. The purpose of the Convention relating to the Status of Stateless Persons is to ensure that stateless persons are able to enjoy their fundamental rights and live in dignity. To that end, the 1954 Convention relating to the Status of Stateless Persons requires the States Parties to accord to stateless persons legally within their territory at least the same treatment as that accorded to aliens generally.<sup>133</sup> Furthermore, the States Parties are required to issue identity papers and a travel document to any stateless person within their territory, which shall show that they are stateless.
110. This Convention establishes the standards for the treatment of stateless persons living within the territory of a State Party, to guarantee them adequate protection. It provides a definition of statelessness, recognizes the rights of stateless persons and spells out the States parties' obligations *vis-à-vis* stateless persons. The

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<sup>131</sup> The following are among the international legal instruments that recognize the right to nationality: the Universal Declaration of Human Rights, Article 15; the International Convention on the Elimination of All Forms of Racial Discrimination, whose Article 5 (initial para. and para. d) provides that the States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of, among others, the right to nationality; the International Covenant on Civil and Political Rights, Article 24, para. 3; the Convention on the Rights of the Child, articles 7 and 8; the Convention on the Elimination of All Forms of Discrimination against Women, Article 9; the Convention on the Nationality of Married Women, which establishes similar guarantees of the nationality of married women; the Convention on the Rights of Persons with Disabilities, Article 18; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29.

<sup>132</sup> See, African Charter on the Rights and Welfare of the Child, Article 6; the Arab Charter on Human Rights, Article 29; the Covenant on the Rights of the Child in Islam, Article 7; the European Convention on Nationality, Article 4; and the Convention of the Community of Independent States on Human Rights and Fundamental Freedoms, Article 24.

<sup>133</sup> United Nations Convention relating to the Status of Stateless Persons, 1954. Article 7, para. 1.

Convention contains provisions on the following: legal status, civil rights, access to work, education and housing, assimilation and naturalization of stateless persons.

111. The Convention relating to the Status of Stateless Persons was adopted on September 28, 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526A (XVII) of April 26, 1954, and held at United Nations headquarters from September 13 to 23, 1954. The Convention entered into force on June 6, 1990 and at present has 23 signatory states and 86 states party.<sup>134</sup> In addition to defining statelessness, the Convention recognizes a number of inalienable rights enjoyed by all persons, regardless of their status or condition.

## 2. Convention on the Reduction of Statelessness

112. On August 30, 1961, the Convention on the Reduction of Statelessness was adopted and opened for signature by the United Nations Conference on the Elimination or Reduction of Future Statelessness, convened by the Secretary-General of the United Nations, first in Geneva in 1959 and then again in New York in 1961, pursuant to General Assembly resolution 896 (IX) of December 4, 1954. The Convention entered into force on December 13, 1975, in accordance with its Article 18.<sup>135</sup>
113. The main objective of this convention is to reduce the number of future cases of statelessness by addressing the problem at its root. Accordingly, this Convention establishes norms for States party to grant nationality to those persons who would otherwise be considered stateless. The 1961 Convention has multiple objectives, among them the following: to eliminate cases of statelessness resulting from a change of civil status, residence or a person's voluntary renunciation of nationality in those cases in which there is a risk that the person might be left stateless, so as to reduce the incidence of statelessness over the course of time.<sup>136</sup>

OAS MEMBER STATES	DATE OF RATIFICATION OF OR ACCESSION TO THE 1954 CONVENTION	DATE OF RATIFICATION OF OR ACCESSION TO THE 1961 CONVENTION
<b>Antigua and Barbuda</b>	25 October 1988	/
<b>Argentina</b>	1 June 1972	/
<b>Bahamas</b> (Commonwealth of the)	/	/
<b>Barbados</b>	6 March 1972	* 29 March 1966
<b>Belize</b>	14 September e 2006	/
<b>Bolivia</b>	6 October 1983	6 October 1983

<sup>134</sup> UN, Databases, Treaty Collection, [Convention relating to the Status of Stateless Persons](#).

<sup>135</sup> UN, Databases, Treaty Collection, [Convention on the Reduction of Statelessness](#).

<sup>136</sup> UNHCR, *Guidelines on Statelessness No. 1*, Feb. 2012, p. 2, footnote 1.



OAS MEMBER STATES	DATE OF RATIFICATION OF OR ACCESSION TO THE 1954 CONVENTION	DATE OF RATIFICATION OF OR ACCESSION TO THE 1961 CONVENTION
<b>Brazil</b>	13 August 1996	25 October 2007
<b>Canada</b>	/	17 July 1978
<b>Chile</b>	/	/
<b>Colombia</b>	*Signed December 30, 1954; has not yet ratified.	/
<b>Costa Rica</b>	2 November 1977	2 November 1977
<b>Dominica</b> (Commonwealth of)	/	/
<b>Dominican Republic</b>	/	*Signed December 5, 1961; has not yet ratified.
<b>Ecuador</b>	2 October 1970	24 September 2012
<b>El Salvador</b>	*Signed September 28, 1954; has not yet ratified	/
<b>United States</b>	/	/
<b>Grenada</b>	/	* 29 March 1966
<b>Guatemala</b>	28 November 2000	19 July 2001
<b>Guyana</b>	/	/
<b>Haiti</b>	/	/
<b>Honduras</b>	1 October 2012	18 December 2012
<b>Jamaica</b>	/	9 January 2013
<b>Mexico</b>	7 January 2000	/
<b>Nicaragua</b>	/	/
<b>Panama</b>	2 June 2011	2 June 2011
<b>Paraguay</b>	/	6 June 2012
<b>Peru</b>	/	/
<b>Saint Kitts and Nevis</b>	/	* 29 March 1966
<b>Saint Vincent and the Grenadines</b>	27 April 1999	* 29 March 1966
<b>Saint Lucia</b>	/	* 29 March 1966
<b>Suriname</b>	/	/
<b>Trinidad and Tobago</b>	11 April 1966	/
<b>United States</b>	/	/
<b>Uruguay</b>	2 April 2004	21 September 2001
<b>Venezuela</b> (Bolivarian Republic of)	/	/

## ***E. The International Instruments on the Subject of Human Trafficking and Migrant Smuggling***

### **1. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime “Protocol to Prevent Human Trafficking”**

114. The Protocol to Prevent Human Trafficking came about because while a wide variety of international legal instruments contained standards and practical measures to combat the exploitation of persons, no universal instrument was in place to address issues of human trafficking. The purpose of the Protocol is to prevent the crime, punish the traffickers and protect the victims, focusing in particular on their internationally recognized rights; it also establishes the first internationally binding definition of human trafficking.
115. The Protocol was adopted on November 15, 2000, during the United Nations General Assembly’s fifty-fifth session, through resolution A/RES/55/25. Article 18 provides that the Protocol is opened for signature by all the States and regional economic integration organizations, provided at least one member state of those organizations has signed the Protocol. The latter entered into force on December 25, 2003, and at present has 117 signatory States and 166 States parties<sup>137</sup>. The Protocol has been ratified by 32 OAS member States.

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
Antigua and Barbuda	17 February 2010
Argentina	19 November 2002
Bahamas (Commonwealth of the)	26 September 2008
Barbados	*Signed September 26, 2001; has not yet ratified.
Belize	26 September 2003
Bolivia	18 May 2006
Brazil	29 January 2004
Canada	13 May 2002
Chile	29 November 2004
Colombia	4 August 2004
Costa Rica	9 September 2003
Dominica (Commonwealth of)	/

<sup>137</sup> UN, Databases, Treaty Collection, [Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime](#).

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
<b>Dominican Republic</b>	17 May 2013
<b>Ecuador</b>	5 February 2008
<b>El Salvador</b>	17 September 2002
<b>Grenada</b>	18 March 2004
<b>Guatemala</b>	21 May 2004
<b>Guyana</b>	1 April 2004
<b>Haiti</b>	14 September 2004
<b>Honduras</b>	19 April 2011
<b>Jamaica</b>	1 April 2008
<b>Mexico</b>	29 September 2003
<b>Nicaragua</b>	4 March 2003
<b>Panama</b>	12 October 2004
<b>Paraguay</b>	18 August 2004
<b>Peru</b>	22 September 2004
<b>Saint Kitts and Nevis</b>	23 January 2002
<b>Saint Vincent and the Grenadines</b>	21 May 2004
<b>Saint Lucia</b>	29 October 2010
<b>Suriname</b>	/
<b>Trinidad and Tobago</b>	25 May 2007
<b>United States</b>	6 November 2007
<b>Uruguay</b>	3 November 2005
<b>Venezuela (Bolivarian Republic of)</b>	4 March 2005

## 2. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, “Protocol against the Smuggling of Migrants”

116. The Protocol against the Smuggling of Migrants is a response to the growing problem of organized crime groups engaged in facilitating the illegal entry of migrants into a receiving State, migrants who for one reason or another do not meet the receiving State’s entry requirements. These criminal groups make enormous profits from this activity and, in most cases, put the migrants’ lives in danger. Thus, the purpose of this Protocol is to prevent and combat the illicit

smuggling of migrants and to promote cooperation among the States Parties to that end, while at the same time protecting the rights of smuggled migrants.<sup>138</sup>

117. The Protocol was adopted on November 15, 2000, during the fifty-fifth session of the United Nations General Assembly, through resolution A/RES/55/25. Its Article 21 provides that the Convention shall be open to all States for signature, and to regional economic integration organizations as well, provided at least one of the member states of those organizations has signed the Protocol. The Protocol entered into force on January 28, 2004, and currently has 112 signatory States, and 141 States parties.<sup>139</sup> Among the OAS member States, 30 have ratified this Protocol.

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
<b>Antigua and Barbuda</b>	17 February 2010
<b>Argentina</b>	19 November 2002
<b>Bahamas</b> (Commonwealth of the)	26 September 2008
<b>Barbados</b>	* Signed September 26, 2001; has not yet ratified.
<b>Belize</b>	14 September 2006
<b>Bolivia</b>	*Signed on November 12, 2000; has not yet ratified
<b>Brazil</b>	29 January 2004
<b>Canada</b>	13 May 2002
<b>Chile</b>	29 November 2004
<b>Colombia</b>	/
<b>Costa Rica</b>	7 August 2003
<b>Dominica</b> (Commonwealth of)	17 May 2013
<b>Dominican Republic</b>	10 December 2007
<b>Ecuador</b>	17 September 2002
<b>El Salvador</b>	18 March 2004
<b>Grenada</b>	21 May 2004
<b>Guatemala</b>	1 April 2004
<b>Guyana</b>	16 April 2008
<b>Haiti</b>	19 April 2011
<b>Honduras</b>	18 November 2008
<b>Jamaica</b>	29 September 2003

<sup>138</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the United Nations Convention against Transnational Organized Crime; IOM, UNICEF., Preamble, *Trata de personas y tráfico ilícito de migrantes en México y América Central: Guía normativa*. 2007, p. 199.

<sup>139</sup> UN, Databases, Treaty Collection, *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the United Nations Convention against Transnational Organized Crime.

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
<b>Mexico</b>	4 March 2003
<b>Nicaragua</b>	15 February 2006
<b>Panama</b>	18 August 2004
<b>Paraguay</b>	23 September 2008
<b>Peru</b>	23 January 2002
<b>Saint Kitts and Nevis</b>	21 May 2004
<b>Saint Vincent and the Grenadines</b>	29 October 2010
<b>Saint Lucia</b>	/
<b>Suriname</b>	25 May 2007
<b>Trinidad and Tobago</b>	6 November 2007
<b>United States</b>	3 November 2005
<b>Uruguay</b>	4 March 2005
<b>Venezuela (Bolivarian Republic of)</b>	19 April 2005

## ***F. The Guiding Principles on Internal Displacement***

118. The Guiding Principles on Internal Displacement were presented to the United Nations Commission on Human Rights on February 11, 1998, by Mr. Francis Deng, the Representative of the Secretary-General on Internally Displaced Persons.<sup>140</sup> Thereafter, the Heads of State and Government assembled in New York for the September 2005 World Summit unanimously recognized them as an “important international framework for the protection of internally displaced persons.” (UN General Assembly Resolution A/60/L.1 para. 132).<sup>141</sup>
119. The purpose of the Guiding Principles is to provide governments, regional organizations and all other appropriate actors with an international norm to follow in providing assistance and protection to the internally displaced. In turn, the Principles set forth the rights and guarantees relevant to the protection of IDPs in all phases of displacement. In accordance with the Principles, States have four main duties: (i) the obligation to prevent displacement; (ii) the obligation to protect and assist displaced during displacement; (iii) the obligation to provide and facilitate humanitarian assistance; and (iv) the obligation to facilitate the return, resettlement and reintegration of internally displaced persons in safety.<sup>142</sup>

<sup>140</sup> UN, Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to resolution 1997/39 of the Commission on Human Rights. Human Rights, Mass Exoduses and Displaced Persons*. E/CN.4/1998/53/Add.2, February 11, 1998.

<sup>141</sup> UN General Assembly, Final Document of the 2005 World Summit Resolution adopted by the General Assembly on 16 September 2005. A/RES/60/1, 24 October 2005.

<sup>142</sup> See IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, para. 537.

120. Although this is not a binding instrument, the Principles constitute a subsidiary source of international law, since they can be understood as part of the doctrine of publicists in the field. In some cases, some principles can be binding to reflect customary law on IDPs. In this regard, both the Commission and the Court considered that the Guiding Principles on Internal Displacement, which are based on international human rights and international humanitarian law, are of particular relevance in determining the scope and content of the Article 22.1 of the American Convention in the context of internal displacement.<sup>143</sup>

## ***G. Other Relevant International Instruments***

### **1. Vienna Convention on Consular Relations**

121. The Vienna Convention on Consular Relations sets out the procedural rights and duties that come into play when any foreign national is arrested or committed to prison or to custody pending trial or is detained in any other manner by a State Party to the Convention. Specifically, Article 36(1)(b) of the Convention requires that if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner; any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay.
122. The United Nations Conference on Consular Relations, held in Vienna, Austria from March 4 to April 22, 1963, adopted the Convention on April 22, 1963. It entered into force on March 19, 1967. All the OAS member states are parties to this Convention<sup>144</sup>.

OAS MEMBER STATES	DATE OF RATIFICATION OR ACCESSION
<b>Antigua and Barbuda</b>	25 October 1988
<b>Argentina</b>	7 March 1967
<b>Bahamas</b> (Commonwealth of the)	17 March 1977
<b>Barbados</b>	11 May 1992
<b>Belize</b>	30 November 2000
<b>Bolivia</b>	22 September 1970
<b>Brazil</b>	11 May 1967
<b>Canada</b>	18 July 1974

<sup>143</sup> See IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, para. 536.

<sup>144</sup> UN, Databases, Treaty Collection, *Vienna Convention on Consular Relations*.

<b>OAS MEMBER STATES</b>	<b>DATE OF RATIFICATION OR ACCESSION</b>
<b>Chile</b>	9 January 1968
<b>Colombia</b>	6 September 1972
<b>Costa Rica</b>	29 December 1966
<b>Dominica</b> (Commonwealth of)	15 October 1965
<b>Dominican Republic</b>	24 November 1987
<b>Ecuador</b>	4 March 1964
<b>El Salvador</b>	11 March 1965
<b>Grenada</b>	19 January 1973
<b>Guatemala</b>	2 September 1992
<b>Guyana</b>	9 February 1973
<b>Haiti</b>	13 September 1973
<b>Honduras</b>	2 February 1978
<b>Jamaica</b>	13 February 1968
<b>Mexico</b>	9 February 1976
<b>Nicaragua</b>	16 June 1965
<b>Panama</b>	31 October 1975
<b>Paraguay</b>	28 August 1967
<b>Peru</b>	23 December 1969
<b>Saint Kitts and Nevis</b>	17 February 1978
<b>Saint Vincent and the Grenadines</b>	4 March 1964
<b>Saint Lucia</b>	6 July 2010
<b>Suriname</b>	27 April 1999
<b>Trinidad and Tobago</b>	27 August 1986
<b>United States</b>	11 September 1980
<b>Uruguay</b>	19 October 1965
<b>Venezuela</b> (Bolivarian Republic of)	24 November 1969

# CHAPTER 3

## DEFINITIONS





## DEFINITIONS

123. In order to be clear about the terms used in this report, in this section the Commission will define the various categories of persons in the context of migration. Those definitions are taken from the principal sources of law mentioned above, but do not pretend to be exhaustive definitions of each term.

### A. *Migrant*

124. At the international level, there is no universally accepted definition of the term “migrant”. The Commission will use the expression “international migrant” to refer to any person outside the territory of the State of which he or she is a national; “stateless migrant” to refer to any person who is outside his or her State of birth or habitual residence; and “internal migrant” to refer to any person inside the territory of the State of which he or she is a national but away from his or her place of birth or habitual residence.
125. Throughout this report, the Commission will use the expression “migrant in an irregular situation” to refer 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 they were authorized to stay. Here, the Commission recommends that OAS member states avoid the use of expressions “illegal” and “illegal migrant” to refer to migrants whose immigration status is irregular. The use of the expressions “illegal” and “illegal migrant” reinforces the criminalization of migrants and the false and negative stereotype that migrants are criminals for the simple fact of being in an irregular situation.
126. Furthermore, the Commission is reminded that the irregular entry or stay of a person in a State is not a criminal offense; instead, it is an administrative misdemeanour. In addition to the above, “legal” or “illegal” are not qualities that can be ascribed to human beings. For the sake of clarity, the actions of human beings can be described as “legal” or “illegal”, but not the persons per se. A person’s immigration status may not comply with what a given State’s legal system requires, but one cannot extrapolate from that the ‘legality’ or ‘illegality’ of that person’s actions. A person’s migrant status cannot be used to deny that person the basic protections that he or she has under international human rights law.<sup>145</sup>

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<sup>145</sup> 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.

## B. Refugee

127. According to Article 1 of the Convention relating to the Status of Refugees of 1951, as amended by the Protocol Relating to the Status of Refugees of 1967, the term "refugee" makes reference to a person who owing to well-founded fear of it 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 habitual residence, is unable or, owing to such fear, is unwilling to return to it.<sup>146</sup>
128. Taking into account the particularities of the region, the Cartagena Declaration on Refugees of 1984 expanded the definition of refugee contained in the Convention relating to the Status of Refugees of 1951. In this sense, the Cartagena Declaration states: "(...) in view of the experience gained in connection with the massive influx of refugees in Central America, it is necessary to consider enlarging the concept of refugee, taking into account, where relevant, and within the characteristics of the situation in the region, the precedent of the OAU Convention (Article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Thus, the definition or concept of refugee recommended for use in the region is that in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their countries because their life, 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".<sup>147</sup>
129. In this regard, the Inter-American Court has held that in response to the progressive development of international law, the obligations under the right to seek and receive asylum are operative with respect to those components that meet the expanded definition of the Cartagena Declaration on Refugees of 1984, which responds not only to the dynamics of forced displacement that originated, but also meets the challenges of protection derived from other movement patterns happening today. This approach reflects a trend in the region to consolidate a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need of international protection is obvious.<sup>148</sup>
130. In this vein, the Inter-American System of Human Rights agreed that the term "refugee" makes relationship to the person who owing to 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

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<sup>146</sup> Convention relating to the Status of Refugees, adopted on 28 July 1951, entered into force on 22 April 1954 as amended by the Protocol Relating to the Status of Refugees of 1967, Article 1.

<sup>147</sup> *Cartagena Declaration on Refugees*. Cartagena de Indias, November 22, 1984, p. 3. The expanded refugee definition contained in the Cartagena Declaration on Refugees has been incorporated into the domestic legislation of 15 countries in the Americas.

<sup>148</sup> 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. 79.

and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or having a nationality and being a result of such events outside the country of his former habitual residence, is unable or, owing to such fear, unwilling to return to it. The term "refugee (a)" also applies to those who have fled their countries of origin 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.<sup>149</sup>

131. The Commission deems it necessary to reiterate that a person is a refugee as soon as he/she meets the requirements set out in the definition, which necessarily occurs before being formally granted with refugee status. Hence, recognition of refugee status is not constitutive but declarative character. This means that refugee status is not acquired because of recognition, but recognized because of the virtue of being a refugee.<sup>150</sup>

### **C. Asylum Seeker**

132. The expression "asylum seeker" shall be understood to refer to a person who has requested recognition of his or her refugee status or condition and whose petition has not yet been decided.<sup>151</sup>

### **D. Complementary Protection**

133. Complementary protection, also referred to as subsidiary protection, are the legal mechanisms used to protect and grant status to persons in need of international protection but who do not meet the established requirements to be granted refugee status. The measures of complementary protection make it possible to regularize the stay of persons who are not recognized as refugees but whose return would be contrary to the general obligations of *non-refoulement*, contained in various human rights instruments.<sup>152</sup>

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<sup>149</sup> See IACHR, *Annual Report of the Inter-American Commission on Human Rights 1981-1982*. OEA/Ser.L/V/II.57 Doc. 6 rev.1, September 20, 1982, Chapter VI, Section B, Refugees and inter-para. 11.d; I/A Court HR, *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. 49.m.

<sup>150</sup> UNHCR. *Handbook on Procedures and Guidelines and Criteria for Determining Refugee Status*. 1979, para. 28.  
<sup>151</sup> I/A Court HR, *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. 49.l.

<sup>152</sup> UNHCR, *Protección de Refugiados en América Latina: Buenas Prácticas Legislativas: 28. Buena práctica: Protección complementaria y visas humanitarias* (available in Spanish).

## ***E. Stateless Persons***

134. According to Article 1 of the Convention relating to the Status of Stateless Persons a stateless person is a person who is not considered as a national by any State under the operation of its law.<sup>153</sup>

## ***F. Smuggling of Migrants***

135. The Protocol against the Smuggling of Migrants by Land, Sea and Air defines “smuggling of migrants” as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident<sup>154</sup>.

## ***G. Trafficking in Persons***

136. Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children” defines trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

## ***H. Unaccompanied Child or Adolescent***

137. An “unaccompanied child or adolescent” will refer to any child or adolescent who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.<sup>155</sup>

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<sup>153</sup> *Convention on the Status of Stateless Persons*, adopted September 28, 1954; it entered into force on June 6, 1960, Article 1. In resolution 2665 (XLI-O/11), the OAS General Assembly reaffirmed the importance of the United Nations Convention’s concept of the status of stateless persons.

<sup>154</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, Article 3.

<sup>155</sup> See, Committee on the Rights of the Child, General Comment No. 6, *Treatment of unaccompanied and separated children outside their country of origin*, CRC/ GC/2005/6, September 1, 2005, para. 7.

## ***I. Separated Child***

138. The expression “separated child or adolescent” will refer to any child or adolescent separated from both parents or his or her legal or habitual guardians, but not necessarily from other relatives. Thus, this term may refer to minors accompanied by other adult family members.<sup>156</sup>

## ***J. Mixed Migration Flow***

139. Mixed migration flows have been defined as complex migratory population movements involving people on the move for different reasons, some to escape political persecution or violence (asylum seekers and refugees), some for economic reasons (economic migrants) and other migrants. These flows tend to be composed of various groups of persons caught up in international migration: migrants for economic or environmental reasons, 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.<sup>157</sup>

## ***K. The Internally Displaced Person***

140. In the Guiding Principles of Internal Displacement, the internally displaced are defined as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.<sup>158</sup>
141. Within the definition of IDPs given the Guiding Principles, the use of the expression “in particular” means that it is not an exhaustive list, but there can also be other possible causes of internal displacement, as can be development projects on a large scale that are not justified by compelling and overriding public interest.<sup>159</sup>

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<sup>156</sup> See, Committee on the Rights of the Child, General Comment No. 6, *Treatment of unaccompanied and separated children outside their country of origin*, CRC/ GC/2005/6, September 1, 2005, para. 8.

<sup>157</sup> IACHR, *Human Rights of Migrants and Others in the Context of Human Mobility in Mexico*, para. 55.

<sup>158</sup> UN Report of the Representative of the Secretary General on Internally Displaced Persons, Francis M. Deng, submitted pursuant to resolution 1997/39 of the Commission on Human Rights, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 of 11 February 1998, Introduction: Scope and Purpose.

<sup>159</sup> Development projects scale mentioned in Rector 6 on cases of arbitrary displacement principle. See United Nations Commission on Human Rights, Report of the Representative of the Secretary General, Mr. Francis M.

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Deng, submitted pursuant to resolution 1997/39 with. Addendum: Guiding Principles on Internal Displacement. February 11, 1998, E/CN.4/1998/53/Add.2, Principle 6. In this regard, see also, IACHR, *Human Rights of Migrants and Others in the Context of Human Mobility in Mexico*, para. 71.

CHAPTER 4  
GENERAL OBLIGATIONS  
VIS-À-VIS PERSONS IN THE  
CONTEXT OF MIGRATION





## GENERAL OBLIGATIONS VIS-À-VIS PERSONS IN THE CONTEXT OF MIGRATION

### ***A. General Observations: The Spatial Dimension of the Concept of Jurisdiction under International Human Rights Law***

142. Because of the dynamic nature of migration, especially international migration, the Commission has stressed the fact that the human rights recognized in the inter-American instruments cover all those persons under the authority and control of the State. This consideration takes on particular importance because of the growing tendency on the part of some countries of the region to push out their borders and conduct immigration control operations outside their own territory.
143. On this regard, the Commission deems it relevant to point out that: Article 1(1) of the American Convention provides that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”
144. The historical background of the American Convention drafting process do not indicate that the parties had intended to give the term ‘jurisdiction’ a special meaning. The preparatory work of the Convention shows that the initial text of Article 1.1 provided that:
- States Parties undertake to respect the rights and freedoms recognized in this Convention and to ensure the free and full exercise to all persons within its territory and subject to their jurisdiction, without discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>160</sup> (emphasis added).
145. At the time of adopting of the American Convention, the Inter-American Specialized Conference on Human Rights chose to omit the reference to ‘territory’ and establish the obligation of the State parties to the Convention to respect and

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IACHR, Report No. 112/10, Interstate Petition PI-02, *Franklin Aisalla Guillermo Molina, Ecuador-Colombia*. October 21, 2010, para. 89., citing the *American Specialized Conference on Human Rights, San José, Costa Rica, November 7-22, 1969, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 14.

guarantee the rights recognized therein to all persons subject to their jurisdiction. In this way, the range of protection for the rights recognized in the American Convention was widened, to the extent that the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory, but also for those acts and omissions committed wherever they exercise jurisdiction.<sup>161</sup>

146. In international law, the basis of jurisdiction are not only territorial but can be exercised on other grounds as well. In this regard, the Commission has established that "under certain circumstances, exercise its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the relevant standards.<sup>162</sup> "Thus, although jurisdiction usually refers to authority over people who are within the territory of a state, human rights are inherent to all human beings and not based on nationality or location. Within the Inter-American System of Human Rights, every State must accordingly respect the rights of all people within its territory of those present in the territory of another state but under the control of its agents<sup>163</sup>, as well as those that are offshore but they are subject to control by its agents.<sup>164</sup> The Commission observed the following in this regard:

It is evident that these basic human rights protections under the Declaration, as with international human rights protections generally, constitute obligations that states of the Americas [...] must guarantee to all persons within their authority and control and are not dependent for their application upon such factors as a person's citizenship, nationality or any other factor, including immigration status. It is notable in this regard that one of the objectives in formulating the Declaration was to assure as fundamental the "equal protection of the law to nationals and aliens alike in respect to the rights set forth in the Declaration".<sup>165</sup>

147. On the subject of a State's territorial jurisdiction in relation to migrants, the Inter-American Court has emphatically held that "States must respect and ensure human rights in light of the general basic principle of equality and non-discrimination. Any discriminatory treatment with regard to the protection and exercise of human

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<sup>161</sup> IACHR, Report No. 112/10, Inter-State Petition II-02, *Franklin Guillermo Aisalla Molina, Ecuador-Colombia*. 21 October 2010, para. 90.

<sup>162</sup> IACHR, Report No. 109/99, Case 10,951, *Coard et al.* (United States), September 29, 1999, para. 37; IACHR, Report No. 86/99, Case 11,589, *Armando Alejandro Jr. and others* (Cuba), April 13, 1999.

<sup>163</sup> IACHR, Report No. 86/99, Case 11,589, *Armando Alejandro Jr. and others* (Cuba), April 13, 1999; IACHR, Report No. 109/99, Case 10,951, *Coard et al.* (United States), September 29, 1999, para. 37; IACHR, Report No. 14/94, Petition 10.951, *Callistus Bernard et al* (United States). February 7, 1994, paras. 6 and 8; IACHR, Report No. 31/93 case 10.573, *Salas* (United States), October 14, 1993, para. 6.

<sup>164</sup> See IACHR, Admissibility Report No. 28/93, Case 10.675, *Haitian Boat People* (United States), October 13, 1993; IACHR, Merits Report No. 51/96, Case 10.675, *Haitian Boat People* (United States), March 13, 1997.

<sup>165</sup> IACHR, Report on Admissibility and Merits No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001, para. 179.

rights entails the international responsibility of the State”.<sup>166</sup> The Court has written the following in this regard:

the motive, cause or reason why the person is in the State’s territory has no relevance as regards the State’s obligation to respect and to ensure that her or his human rights are respected. In particular, it has no significance whatsoever in this regard whether or not the entry of that person into the State’s territory was in keeping with the provisions of its laws. The respective State must, in all circumstances, respect the said rights, because they are based, precisely, on the attributes of the human personality; in other words, regardless of whether the person is a national or resident of its territory or whether the person is there temporarily, in transit, legally, or in an irregular migratory situation.<sup>167</sup>

148. The Commission must point out that while the receiving State bears the main responsibility in the case of international migrants like refugees, asylum seekers, victims of trafficking and others, this does not relieve their State of origin of any and all responsibility in the matter, especially given its obligations *vis-à-vis* personal jurisdiction. Thus, States have a duty to fulfil general obligations in the matter, and specifically a duty to prevent, which requires that States create and secure conditions for their nationals so that they are not forced to migrate, and address the root causes of migration flows.<sup>168</sup>
149. As the Inter-American Court has already established, when it comes to the protection of individuals in the context of migration, the term ‘jurisdiction’ used in Article 1(1) of the Convention, concerning the States Parties’ obligation to respect and ensure the human rights recognized therein, refers to any person with respect to whom the State exercises its territorial jurisdiction, personal jurisdiction and even its jurisdiction with respect to public services.<sup>169</sup>
150. As for the duty to respect and ensure the principle of equality before the law and non-discrimination, the Court has held that these obligations are independent of an individual’s immigration status in a State. Ultimately, States have the obligation to guarantee this fundamental right to their citizens and to any foreign person within their territory or under their jurisdiction, without any discrimination based on regular or irregular status, nationality, race, gender, or any other factor.<sup>170</sup>

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<sup>166</sup> 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. 96.

<sup>167</sup> 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. 62

<sup>168</sup> 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. 64.

<sup>169</sup> 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. 61.

<sup>170</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 155, para. 155.

## ***B. The Obligations to Respect and Ensure the Exercise of Human Rights***

151. Under Article 1(1) of the American Convention, the States' first obligation is to respect the rights and freedoms recognized therein. The obligation to respect human rights implies the States' obligation not to violate, either by action or omission, the rights recognized in the American Convention and in other relevant instruments. The Court has written in this regard that "[w]henever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention".<sup>171</sup>
152. The Court has also held that "[t]he exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State."<sup>172</sup> It has also written that "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power".<sup>173</sup>
153. In addition to the duty to respect the rights recognized in the American Convention and in other relevant inter-American instruments, States have a duty to ensure. Here, the Court has written that States should not merely abstain from violating rights, but must adopt positive measures to be determined based on the specific needs of protection of the subject of law, either because of his or her personal situation or because of the specific circumstances in which he or she finds himself or herself.<sup>174</sup>
154. The obligation to ensure requires that States organize the entire government apparatus and, in general, all the structures through which public authority is exercised, so that they are able to ensure by law the free and full exercise of human rights to all persons subject to their jurisdiction.<sup>175</sup> Based on international case law, States have an obligation to act with due diligence to protect human rights.

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<sup>171</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No 4, para. 169.

<sup>172</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No 4, para. 165.

<sup>173</sup> I/A Court H.R., *The word "laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21.

<sup>174</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 243. Citing, I/A Court H.R., *Case of Baldeón García v. Peru*. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, para. 81; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 154; and *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 111.

<sup>175</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Preliminary Objections. Judgment of June 26, 1987. Series C No 1 para. 173; and *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 236.

This obligation involves four basic duties: to prevent, to investigate, to punish and to make reparations for human rights violations.<sup>176</sup>

## 1. The Duty to Prevent

155. With regard to the duty to prevent, the Court has established that it encompasses all those measures of a legal, political, administrative and cultural nature that ensure the protection of human rights, and that any possible violation of these rights is considered and treated as an unlawful act which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences. It is also clear that the obligation to prevent is one of means or conduct, and failure to comply with it is not proved merely because the right has been violated.<sup>177</sup>
156. The Court has held that the State or its agents have an obligation to adopt prevention and protection measures for individuals in their relationships with each other whenever they learn of a situation of real and imminent danger for a specific individual or group of individuals and have reasonable possibilities of preventing or avoiding that danger.<sup>178</sup> Hence, a State cannot be held responsible for every human rights violation committed between private individuals within its jurisdiction.<sup>179</sup> The State may be found responsible for acts committed by private individuals when, through the actions or omissions of its agents, the State fails to perform this function of protection, but only in the particular circumstance when the State agents were considered to be performing the functions of guarantors *vis-à-vis* private individuals.<sup>180</sup>

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<sup>176</sup> See I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No. 4. Some of the instruments of the Inter-American Human Rights System also expressly provide for the State's obligation to act with due diligence to protect human rights, such as Article 6 of the Inter-American Convention to Prevent and Punish Torture and Article 7(b) of the Convention of Belém do Pará.

<sup>177</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 252. Citing I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 149; and I/A Court H.R., *Case of Anzualdo Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 63.

<sup>178</sup> I/A Court H.R., *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 140, para. 123; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs. Judgment of March 29, 2006. Series C. No. 146, para. 155; *Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs. Judgment of November 27, 2008, Series C No. 192, para. 78. See also, ECtHR, *Case of Kiliç v. Turkey*, Judgment of March 28, 2000, paras. 62-63, and ECtHR, *Case of Osman v. United Kingdom*, Judgment of October 28, 1998, paras. 115-116.

<sup>179</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 280.

<sup>180</sup> I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Preliminary Objections. Judgment of March 7, 2005. Series C, No. 134, para. 111; *the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C, No. 124, para. 211; *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C, No. 114; *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C, No. 110, para. 91; *Case of the 19 Tradesmen v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C, No. 109, para. 183; *Case of Maritza Urrutia v. Guatemala*. Merits, Reparations and

157. The Commission, for its part, must underscore the fact that as guarantors of human rights, States have a legal obligation regarding persons subject to their jurisdiction, to prevent violation of their human rights from becoming inevitable. When the State fails in that obligation and that failing leads to human rights violations that might otherwise have been prevented, it has neglected its responsibility as guarantor.<sup>181</sup>
158. One case that demonstrates the obligation to prevent is the *Case of Fleury et al. v. Haiti*, a case in which Mr. Fleury and his family had to go into exile and apply for refugee status in the United States because they feared for their safety in Haiti. The background of the case indicates that the attempts made on Mr. Fleury's life and personal safety were because he was a human rights defender. In its judgment on this case, the Inter-American Court reaffirmed that States have positive obligations to prevent attempts to violate freedom of association, to protect those who exercise it and to investigate violations of that right. The Court accepted as proven that the officials who detained Mr. Fleury subjected him to particularly severe torture and mistreatment, alluding to his status as a human rights defender, and that Mr. Fleury was forced to go into hiding and then exile for fear of reprisals from his aggressors, after he reported them and identified them. The State, the Court held, thus failed in its duty to prevent and punish torture within its jurisdiction and failed to take effective measures "to prevent and punish [...] torture and other cruel, inhuman or degrading treatment or punishment".<sup>182</sup> The Court therefore declared the Haitian State's responsibility due to having failed in its duty to prevent, forcing Mr. Fleury to seek asylum in the United States because of well-founded fears that his life and personal safety were in jeopardy in his country of origin.
159. In the case of *Manuel Cepeda Vargas v. Colombia*, the Court also extended the State's duty to prevent to include the victim's next of kin and ordered that the State "must guarantee the safety of the next of kin of Senator Cepeda Vargas and ensure that they do not have to relocate or leave the country again, as a result of any possible threats, harassment or persecution against them following notification of this judgment".<sup>183</sup> Summarizing, the obligation to prevent requires that States take all appropriate measures to protect and preserve the rights of all persons under their jurisdiction (positive obligation), pursuant to their obligation to ensure the free and full exercise of those rights.<sup>184</sup>
160. When referring to the situation of migrants and others in the context of migration in Mexico, the Commission noted that in order to effectively fulfil the duty to

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Costs. Judgment of November 27, 2003. Series C, No. 103, para. 71; *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C, No. 100, para. 111; and *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C, No. 99, para. 81.

<sup>181</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 356.

<sup>182</sup> I/A Court H.R., *Case of Fleury et al. v. Haiti*. Merits and Reparations. Judgment of November 23, 2011. Series C No. 236, paras. 105 et seq.

<sup>183</sup> I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 218.

<sup>184</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 236.

prevent situations of systematic discrimination and violence that imperil the effective exercise of rights, it is imperative that the State adopt and implement two types of measures: 1) general measures and 2) specific measures.<sup>185</sup>

161. For instance, in situations where the State has knowledge of generalized discrimination and violence against a specific group such as migrants and other persons in the context of migration, because of its duty to prevent, the State must have a comprehensive prevention strategy aimed at avoiding the risk factors and at strengthening the institutions capable of mounting an effective response to cases of discrimination and violence affecting a specific group of persons. General measures of prevention include all those of a legal, political, administrative and cultural nature that serve to safeguard human rights, such as a suitable legal framework of protection, the measures necessary to ensure effective enforcement of that legal framework and prevention policies, as well as awareness campaigns. In cases in which it is obvious that certain persons are facing some real and immediate risk of becoming victims of violence or discrimination, the State has an obligation to take specific measures with respect to those persons, to prevent that violence or discrimination from materializing.<sup>186</sup>

## 2. The duty to Investigate, Prosecute and Punish

162. The *Case of the Barrios Family v. Venezuela* is a relevant one on the subject of the obligation to investigate.<sup>187</sup> In that case, because of the widespread practice of extrajudicial executions, the Barrios Family was forced to move from their residence because of strong-arm tactics by the police in the Venezuelan state of Aragua. The violations committed against the Barrios Family included the following: a number of family members were killed, others were detained and forced to move from their place of residence. When the violations went unpunished at the domestic level, the family turned to the Inter-American Human Rights System. In its judgment the Court wrote the following concerning the obligation to investigate:

The obligation to investigate human rights violations is among the positive measures that States must adopt to guarantee the rights recognized in the Convention. The Court has held that, in order to comply with the obligation of guarantee, the States must not merely prevent, but also investigate violations of the human rights recognized in this instrument, such as those alleged in this case and, in addition, ensure the re-establishment, if possible, of the violated

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<sup>185</sup> IACHR, *Human Rights of Migrants and other Persons in the Context of Human Mobility in Mexico*, para. 376.

<sup>186</sup> ECtHR, *Case v. Rantsev Cyprus and Russia*, Application no. 25965/04, January 7, 2010, para. 286. Citing mutatis mutandis, ECtHR, *Case of Osman v. United Kingdom*, Judgment of October 28, 1998, paras. 116-117, and ECtHR *Case Mahmut Kaya v. Turkey*, Application no. 22535/93, 28 March 2000, paras. 115-116.

<sup>187</sup> I/A Court H.R., *Case of the Barrios Family v. Venezuela*. Merits, Reparations and Costs. Judgment of November 24, 2011, Series C No. 237.



rights and, as appropriate, the reparation of the damage caused by the human rights violations.<sup>188</sup>

163. The Court observed that for an investigation by the State to accomplish its purpose, “it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government”.<sup>189</sup> Instead, according to the Court, “the duty to investigate is an obligation of means and not results” and must be diligently pursued “in order to prevent impunity and the repetition of this type of facts”.<sup>190</sup> Here, the Court recalls that impunity fosters a repetition of human rights violations.<sup>191</sup>
164. When the nature and seriousness of the events so dictate, especially in a context of systematic human rights violations, States have an obligation to use all means within their reach to conduct a serious, impartial and effective investigation that meets the requirements of due process. In such circumstances, a State’s international responsibility is engaged when it fails to comply with this obligation. Through investigation, prosecution and judicial punishment of crimes, States make progress toward ensuring that such events will not recur and also guarantee protection of substantive rights, such as the right to life, the right to humane treatment, the prohibition against trafficking in persons or the right to personal liberty. It also enhances protection of the guarantees of due process and the right to judicial protection.
165. The Court has also held that the duty to investigate remains “whatsoever the agent to which the violation may eventually be attributed, even individuals, because if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State’s international responsibility”.<sup>192</sup> To determine the extent of the State’s responsibility for crimes

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<sup>188</sup> I/A Court H.R., *Case of the Barrios Family v. Venezuela*. Merits, Reparations and Costs. Judgment of November 24, 2011, Series C No. 237, para. 174 (Citing I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No 4, para. paras. 166 and 176), and I/A Court H.R., *Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23th, 2009. Series, No. 203, para. 112.

<sup>189</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No 4, para, para. 177, and I/A Court H.R., *Torres Millacura et al v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 26th, 2011. Series C 229, para. 112.

<sup>190</sup> I/A Court H.R., *Case of the Barrios Family v. Venezuela*. Merits, Reparations and Costs. Judgment of November 24, 2011, Series C No. 237, para. 175.

<sup>191</sup> I/A Court. *Ituango Massacres v. Colombia*. Preliminary Objections, Merits, Reparations and Costs Judgment of July 1, 2006. Series C No. 148, para. 319, and *Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23th, 2009. Series, No. 203, para. 141.

<sup>192</sup> I/A Court H.R., *Case of González et al. (“Cotton Field”) v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 291. Citing I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 140, para. 145; and *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 78.

alleged to have been committed by private persons, the situation of particular victims and what the State knew of the situation have to be evaluated.

166. More specifically, the Court has understood that the obligation to investigate cases of violations of the rights to life, personal integrity, personal liberty and the prohibition of slavery, servitude and trafficking in persons arises from the general obligation to guarantee, in other words, from Article 1(1) of the Convention, together with the substantive right that must be protected or ensured.<sup>193</sup>
167. As for the obligation to investigate cases of human trafficking that have cross-border consequences, the Commission shares the European Court's finding to the effect that in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, States are also subject to a duty in cross-border trafficking cases. This duty comprises to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories, particularly when one or more of events in the chain leading to human trafficking have taken place in their territory or to one of its nationals, precisely because this is a problem not strictly confined to the territory of any one State.<sup>194</sup>
168. In relation to the effective investigation on the international human trafficking, in which the national borders of the trafficked victims are crossed, the Commission believes that apart from the States' obligation to investigate any human trafficking crime committed within their jurisdiction, they also have an obligation to cooperate with the States of origin, transit and destination since the activities involved in international human trafficking, such as abducting, transporting, moving and receiving the trafficking victims, necessarily take place in two or more countries.<sup>195</sup>
169. As for the obligation to prosecute and punish those responsible for violations of the human rights of migrants and members of their families, asylum seekers, refugees, stateless persons, victims of human trafficking, other persons in need of international protection, internally displaced persons and other vulnerable groups in the context of migration, the Inter-American Commission recalls that when its agents are accused of abuses of any kind, the State has an obligation to conduct a serious, independent, impartial and effective investigation to shed light on the facts and punish any violation of human rights. Since many acts of violence and discrimination committed against migrants are perpetrated by third parties or private individuals, such as organized crime groups or common criminals, it is critical to point out that the State's international responsibility can also be triggered when acts committed by third parties or private individuals that violate

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<sup>193</sup> I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 140, para. 142; *Case of Heljiodoro Portugal v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 115, and *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 298.

<sup>194</sup> ECtHR, *Case of Rantsev v. Cyprus and Russia*, Application No. 25965/04, January 7, 2010, para. 289.

<sup>195</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 390.

human rights are attributed to the State, because of the State's obligations to ensure that those rights are respected among individuals.<sup>196</sup>

170. In this regard, in its report titled *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, the Commission observed that “[t]he lack of due diligence to investigate, prosecute and punish these crimes [committed against migrants] and prevent their repetition is a reflection of the fact that they are not considered a serious problem.” Hence, “[a]llowing these crimes to go unpunished sends the message that violence is tolerated, which only serves to perpetuate it.”<sup>197</sup> In a similar vein, in the report following up on the recommendations made to Colombia in the report “Truth, Justice and Reparation,” the Commission observed that one problem not yet addressed was the investigation and punishment of those behind the forced displacements with a view to dealing with the threat of re-victimization to which victims of forced displacement are exposed in the return process if those responsible for their forced displacement have not been brought to trial.<sup>198</sup>
171. Inter-American case law has developed standards to establish and guarantee the right of victims or their family members to participate in the criminal proceedings conducted into the events of which they were victims. The Inter-American Court has been clear in stating that an effective search for the truth is the responsibility of the State and does not depend upon the procedural initiative of the victim or the victim's family or their offer of proof.
172. The Inter-American Court has written in this regard that in cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory. Therefore, the State should guarantee that the victims or their family members are able to participate in every stage of the proceedings, present their concerns and evidence, and that these be completely and seriously analyzed by the authorities before determining the facts, blame, penalties, and reparations.<sup>199</sup>

### **a. The Obligations with Respect to Chain of Custody as Part of the Duty to Investigate Human Rights Violations**

173. The Commission has addressed the absolute need to maintain the chain of custody, especially in cases involving migrants killed while crossing the territory of one country en route to another. For example, the IACHR has found that many of the people crossing Mexico toward the United States or Canada have appeared in mass

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<sup>196</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 334.

<sup>197</sup> IACHR, *Human Rights of Migrants and other Persons in the Context of Human Mobility in Mexico*, para. 247.

<sup>198</sup> IACHR, *Annual Report 2014*, Chapter V: Follow-up of the recommendations issued by the IACHR in its country or thematic reports, para. 145.

<sup>199</sup> I/A Court H.R., *Rochela Massacre v. Colombia*. Judgment of May 11, 2007. Series C. No. 163, para. 195.

graves or places near migratory routes by which they move locations. In addition, the journey itself is inhospitable, which leads to many other migrant deaths along migratory routes. The confluence of these factors has caused the bodies or remains of an unknown number of migrants to lie buried as unidentified in unmarked graves or mass graves exist along migration routes.<sup>200</sup>

174. In this context, the importance of identifying the unidentified deceased migrants stems from widely recognized standards in international law of human rights, such as the duty to treat the dead with respect and dignity, the right of families to know the fate of their missing relatives, the right of family members to, in cases where possible, they return the body of their loved one and bury it according to their traditions. Besides the importance that implies for relatives of migrants to learn the fate of their loved one, the identification of an unidentified deceased migrant also has other practical purposes as obtaining a death certificate, necessary to clarify issues related to inheritance, marriage or property rights.<sup>201</sup>
175. The chain of custody is a fundamental process in the investigation and forensic work, which has multiple purposes: 1) to ensure the strict record of evidence obtained from their location and recovery; 2) to preserve and safeguard the immutability of the test and its main package Shuttle - where appropriate- so until further evaluation, extending even beyond that obligation trial and conviction of the author; 3) reflect any change in its register, or damage occurring on the evidence and its main wrapper Shuttle establishing the nature of change/s, when it occurred, how it occurred and in whose custody occurred; and 4) facilitate the identification of bodies or remains unidentified to ensure the safekeeping of the test.<sup>202</sup>
176. The Commission considers that maintaining the chain of custody is a fundamental principle in conducting an exhaustive, serious and impartial investigation into human rights violations and humanitarian crises. A failure to maintain the chain of custody according to the minimum standards for preserving evidence obtained in an investigation could compromise the States' international responsibility since they have an obligation to investigate, with due diligence, any violation of human rights.<sup>203</sup> If such facts are not seriously investigated, the authorities themselves would somehow be complicit, which would compromise the State's international responsibility.<sup>204</sup>

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<sup>200</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 372.

<sup>201</sup> In this regard, see GRANT, Stephanie, "Migration and frontier Deaths: a right to identity" in Dembour, Marie-Bénédicte and KELLY, Tobias (Ed.), *Are Human Rights for Migrants?: Critical Reflections on the Status of irregular Migrants in Europe and the United States*. Abingdon: Routledge, 2011, pp. 48 et seq.

<sup>202</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 370.

<sup>203</sup> I/A Court H.R., *González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 288. Citing: I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No 4, para. 176, and *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 76.

<sup>204</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 288. Citing I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C

177. In effect, the Inter-American Court has held that irregularities in the form of a failure to properly identify and tag the evidence compiled and thus help to preserve and protect that evidence, constitute mishandling of the evidence gathered and thus a lack of due diligence, because of a failure to preserve the chain of custody.<sup>205</sup> Furthermore, the lack of rigor and alteration of material and nonmaterial elements in the collection of evidence is a risk that must be guarded against when the human rights violations under investigation may have happened with the participation, collaboration or acquiescence of state agents.
178. The Commission believes it is essential that the standards used to conduct an investigation are consistent with the obligations established under the American Convention.<sup>206</sup> Given the lack of uniformity observed in some countries on the question of chain of custody, standards commonly accepted by the international community and consistent with the American Convention and other international human rights instruments have to be identified. These standards, which must be applied in practice for proper observance of the chain of custody, are not an exhaustive list; they are the minimum guidelines that States must follow. The Commission therefore recommends the following:

Keep a numbered or codified, written, and visual record of all the evidence, whether it be: material items, documents, photographs, protocols, tests, expert analyses, investigative reports, biological and non-biological samples and their derivatives. There should also be a record of the location of any collection of evidence gathered at the crime scene and the date and time it was gathered.

A record must be kept of the personal particulars of those persons involved in the handling of the evidence, from the time that evidence was compiled to its analysis and storage. That record must therefore identify where, how and when the evidence was handled or examined and by whom, indicating the person's name, position, dates and places, place where the individual took custody of the evidence, and other specifics.

The evidence that has to be collected for analysis should be packaged, sealed and labelled, and put in an appropriately safe place to prevent contamination and loss<sup>207</sup>; this will guarantee that the samples are properly preserved such that when material is

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No. 140, para. 145, and *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 78.

<sup>205</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 304.

<sup>206</sup> IACHR, *Human rights of migrants and other persons in the context of human mobility in Mexico*, para. 374.

<sup>207</sup> United Nations Office in Vienna, Centre for Social Development and Humanitarian Affairs, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, United Nations, New York, 1991. Model Protocol for a Legal Investigation of Extra-legal, Arbitrary or Summary Executions, Chapter III, section C.

retrieved it has not undergone any fortuitous or unintended alteration or manipulation.<sup>208</sup>

The material must leave the scene of its discovery in proper containers, labelled, pre-sealed, and with the proper documentation attached, showing clearly the name and signature of the authority responsible for transporting it. The transport should be by suitable means, so as not to cause any damage or alteration to the evidence gathered.<sup>209</sup>

The persons who receive the material (in the laboratory or autopsy room) must check that sealing placed on the bags or boxes containing the evidence when they left the scene of their discovery, to make certain that it is still entirely intact.<sup>210</sup>

Once the evidence has been analyzed, the chain of custody must extend beyond the author's trial and conviction, since old evidence, if properly preserved, can still be used to reverse a guilty verdict against someone who was mistakenly convicted<sup>211</sup> or for the future identification of remains still unidentified even after a judgment. Therefore, there must be a record of who had custody of the evidence and for how long, and where the evidence was stored. For these purposes, the numbering should be consistent and easy to understand. This will make it easier to locate the evidence in the future, when the investigations are underway.

Cremation of unidentified remains should be avoided, and remains should be buried in such a way that the remains and evidence are kept intact. Unidentified bodies or remains should be buried in individual tombs that are marked, and an updated and precise record must be kept to simplify the search for the remains.

A national database should be established that centralizes all the information on unidentified remains and disappeared or missing persons.

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<sup>208</sup> Office of the United Nations High Commissioner for Human Rights, *Protocolo Modelo para la investigación forense de muertes sospechosas de haberse producido por violación de los derechos humanos* [Model Protocol for forensic investigation of deaths suspected of having been caused by human rights violations]. First Phase of the Technical Cooperation Program for Mexico. Mexico, p. 30. Available in Spanish at: <http://www.pgjdf.gob.mx/temas/4-6-1/fuentes/11-A-8.pdf>.

<sup>209</sup> Office of the United Nations High Commissioner for Human Rights, *Protocolo Modelo para la investigación forense de muertes sospechosas de haberse producido por violación de los derechos humanos* [Model Protocol for forensic investigation of deaths suspected of having been caused by human rights violations]. First Phase of the Technical Cooperation Program for Mexico. Mexico, p. 72.

<sup>210</sup> Office of the United Nations High Commissioner for Human Rights, *Protocolo Modelo para la investigación forense de muertes sospechosas de haberse producido por violación de los derechos humanos* [Model Protocol for forensic investigation of deaths suspected of having been caused by human rights violations]. First Phase of the Technical Cooperation Program for Mexico. Mexico, p. 72.

<sup>211</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 305.

At the regional level, an international database should be established in which deaths are recorded and information on unidentified remains and disappeared persons is centralized; family members should have access to this database.<sup>212</sup>

### C. *The Duty to Adopt Domestic Legal Provisions*

179. Article 2 of the American Convention establishes the duty to adopt domestic legal provisions, stipulating that “the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”. The States’ obligation under Article 2 of the Convention to adapt their domestic laws to the provisions of the Convention involves the States’ adoption of measures of two kinds: 1) to eliminate laws and practices of any kind that somehow violate the guarantees provided under the Convention, and ii) the issuance of laws and the development of practices conducive to the effective observance of those guarantees.<sup>213</sup>
180. As the IACHR observed in its report titled *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, the principal objectives of the Inter-American Human Rights System and the principle of efficacy demand that the rights and freedoms recognized in the American Convention are observed and are practiced. Therefore, when the exercise of any of the rights recognized in the American Convention are not yet guaranteed *de jure* and *de facto* within their jurisdiction, States parties have an obligation, under Article 2 of the Convention, to adopt the legislative or other measures necessary to give effect to those rights or freedoms.
181. Under the American Convention, the domestic system must provide judicial remedies that are both effective and accessible to persons alleging violations of their rights under domestic law or the Convention.
182. In the case of Nelson Iván Serrano Sáenz, the IACHR concluded that by unlawfully arresting him and deporting him out of his own country to the United States, where he would likely face the death penalty, the Ecuadorian State had not complied with its duty to guarantee Mr. Serrano Sáenz free and full exercise of his Convention-protected rights. Specifically, the Commission held that domestic law “grants powers to police authorities to order the detention of persons and subject them to a trial of minimal duration and with the consequence of their expulsion from the country” and that “in the case of Mr. Serrano Sáenz, these provisions may be interpreted as not having an effective judicial control to determine the rights of

<sup>212</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 375.

<sup>213</sup> I/A Court H.R., *Case of the Massacres of El Mozote and nearby places v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012 Series C No. 252, para. 296; *Case of Castillo Petruzzi et al. v. Peru*. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 207; and *Case of Forneron and daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 242, para. 131



a person, with special gravity for the victim in this case that led him to a procedure in which he was sentenced to death in another country”.<sup>214</sup>

183. The IACHR therefore concluded that Ecuador had failed to comply with its duty to adjust its domestic laws to conform to its international obligations, especially with reference to the procedure of arresting persons for purposes of deportation. As a result, it found that the State must adopt the necessary measures to review and modify the provisions whereby a police process can be used to detain and deport persons without court oversight.<sup>215</sup>

## ***D. The Right of Equal Protection and Non-Discrimination***

184. The American Convention on Human Rights and other international instruments<sup>216</sup> recognize every person’s right to equal protection and non-discrimination. Articles 1(1) and 24 of the American Convention read as follows:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law, and have the rights and duties recognized in this Declaration, without distinction of race, sex, language, creed or any other condition.

185. On the other hand, Articles 1.1. and 24 of the American Convention state:

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

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

### **Article 24. Right to Equal Protection**

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

186. Both the Commission and the Court have observed that the right to equal protection and non-discrimination is the “central, basic axis of the inter-American

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<sup>214</sup> IACHR, Report on the Merits No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador), August 6, 2009, para. 77

<sup>215</sup> IACHR, Report on the Merits No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador), August 6, 2009, para. 78.

<sup>216</sup> See, *inter alia*, American Declaration of the Rights and Duties of Man, Article II; Universal Declaration of Human Rights, Article 7; International Covenant on Civil and Political Rights, Article 26; Convention on the Rights of the Child, Article 2(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 7.



human rights system".<sup>217</sup> The right to equality before the law and the obligation not to discriminate against any person constitute the basic foundation of the Inter-American system of human rights. The American Declaration states in its preamble that "all men are born free and equal in dignity and rights are endowed by nature with reason and conscience and should behave towards one another". The same instrument provides in Article II that "all persons are equal before the law and have the rights and duties in this Declaration, without distinction of race, sex, language, creed or any other condition." Furthermore, Article 3 of the OAS Charter includes among the principles reaffirmed by the American States the proclamation of "the fundamental rights of the human person without distinction of race, nationality, creed or sex".<sup>218</sup>

187. Furthermore, the Commission has also articulated two concepts of the right to equal protection and non-discrimination: 1) one related to the prohibition of arbitrarily different treatment – with different treatment understood as meaning distinction, exclusion, restriction, or preference;<sup>219</sup> and 2) the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination.<sup>220</sup>
188. For its part, the Inter-American Court has held that "The notion of equality 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. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character".<sup>221</sup>
189. Referring to the legal status and rights of irregular migrants, in its Advisory Opinion 18/03, the Court reaffirmed the principle of equality and non-discrimination in relation to migrants. The Court held that "the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because, as mentioned above, this

<sup>217</sup> See, *inter alia*, IACHR, Report No. 64/12, Case 12.271, *Benito Tide Méndez et al. v. Dominican Republic*, Report on the Merits, March 29, 2012, para. 226 (Citing, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters against the State of Chile*, September 17, 2010, para. 74.

<sup>218</sup> IACHR, Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barbería Miranda (Chile)*, March 18th, 2010, para. 28.

<sup>219</sup> See, *inter alia*, UN, General Comment No. 18, Compilation of General Comments adopted by the Human Rights Committee, Non-discrimination, 37th Session, U.N. Doc. HRI/GEN/1/Rev.7 at 147 (1989), para. 7; I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 92; IACHR, *Fourth Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, Annual Report of the IACHR, 2002, March 7, 2003, para. 87.

<sup>220</sup> See, *inter alia*, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters against the State of Chile*, September 17, 2010, para. 80.

<sup>221</sup> I/A Court. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984, No. 4, para. 5.

principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory".<sup>222</sup> The Court added the following:

The principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, since it rests on the whole legal structure of national and international public order and is a fundamental principle that permeates all laws. Today no legal act in conflict with this fundamental principle is supported, non-discriminatory treatment allowed the detriment of any person, gender, race, color, language, religion or belief, political or otherwise, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. This principle (equality and non-discrimination) is part of general international law. At the present stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens.<sup>223</sup>

190. Through OC-18/03, the Court ruled that states cannot discriminate based on immigration status of a person, but could apply different treatment between nationals and foreigners, or between people in different immigration categories, provided that the objectives and treatments meet certain standards. The Court reiterated that not all differences in legal treatment necessarily constitute discrimination, since there are certain inequalities which can become unequal legal treatment. In more detail, the Court held that:

However, when considering the implications of the differential treatment that some rules can give their recipients, it is important to refer to what is stated by the Court in the sense that "not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity".<sup>224</sup> In this sense, the European Court of Human Rights, based on "the principles that can be deduced from the legal practice of a large number of democratic States", warned that it is only discriminatory distinction when "no objective and reasonable justification".<sup>225</sup> Distinctions based inequalities that constitute an instrument for the protection of those who should be protected can be established, considering the situation of greater or lesser

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<sup>222</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 118.

<sup>223</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101.

<sup>224</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 46.

<sup>225</sup> Eur. Court H.R., *Case of Willis v. The United Kingdom*, Judgment of 11 June, 2002, para. 39; Eur. Court H.R., *Case of Wessels-Bergervoet v. The Netherlands*, Judgment of 4th June, 2002, para. 46; Eur. Court H.R., *Case of Petrovic v. Austria*, Judgment of 27th of March, 1998, Reports 1998-II, para. 30; Eur. Court H.R., *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Judgment of 23rd July 1968, Series A 1968, para. 10.

weakness or helplessness its beneficiaries are in.<sup>226</sup> For example, an inequality sanctioned by law is reflected in the fact that minors who are detained in a prison cannot be held in conjunction with the seniors who are also detained. Another example of these inequalities is the limitation on the exercise of certain political rights owing to nationality or citizenship.<sup>227</sup>

## 1. Implementation of Discriminatory Policies, Laws and Practices

191. As the Commission explained in its *Report on Immigration in the United States: Detention and Due Process*, international human rights law prohibits deliberately discriminatory policies and practices, and those that have a discriminatory effect against a certain category of person, even when the discriminatory intent cannot be proved.<sup>228</sup>
192. By way of example, in the case of *Rafael Ferrer-Mazorra et al. v. United States*, the Commission held that the United States had violated the principle of equal protection, to the detriment of migrants. The case involved 355 Cubans who were part of the Mariel “Freedom Flotilla” that sailed to the United States in 1980. Once detained in the United State because of their illegal entry into the country, later, in 1987, they filed a complaint with the IACHR. They alleged, among other violations, the violation of the right to equal protection with reference to the length of time the petitioners were held in United States custody and the nonexistence of adequate mechanisms to review the lawfulness of their detention.<sup>229</sup> In particular, the Commission set forth that:

Further, Article II,<sup>230</sup> while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.

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<sup>226</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 46.

<sup>227</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 89.

<sup>228</sup> IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 95; IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 358.

<sup>229</sup> IACHR, Report No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al.* (United States), Report on Admissibility and Merits, April 4, 2001, para. 2.

<sup>230</sup> American Declaration of the Rights and Duties of Man.

In the immigration context in particular, the Commission recognizes that it is generally regarded in democratic societies as appropriate for states to afford aliens treatment that is distinct from that enjoyed by others within the State's jurisdiction to, for example, control aliens' entry into and residence in their territory. Consistent with the principles underlying Article II of the Declaration, however, any such distinctions must be shown by the State to be reasonable and proportionate to the objective sought in the circumstances. Regard should also be given to the fact that one of the objectives in formulating the Declaration was to assure as fundamental the "equal protection of the law to nationals and aliens alike in respect to the rights set forth in the Declaration."<sup>231</sup>

193. Applying the standard cited above, based upon the record in the case, the Commission found that the victims' treatment had not been shown to be either reasonable or proportionate. Specifically, it did accept the bases for the State's explanation as to why the petitioners had been subjected to a legal and procedural regime in relation to their deprivations of liberty that was fundamentally distinct from that applicable to other individuals falling within the State's authority and control.<sup>232</sup> Similarly, the Commission was not convinced that the petitioners' detention had been proportional to the State's objective in imposing that distinction:

The Commission fully appreciates the State's prerogative in regulating access to its territory by aliens, and recognizes that this may necessitate the imposition of controls over the physical freedom of movement of individuals seeking such access in accordance with the State's laws.

[T]he Declaration permits deprivations of the right to liberty, potentially on an extended basis, subject to the requirement that such deprivations are not arbitrary and are subject to immediate and regular review in accordance with the requirements under Article XXV of the Declaration. Further, the State has offered no clear justification as to why the circumstances of the petitioners cannot be accommodated within this regime, but rather must be deprived of their right to liberty under law in its entirety and subjected to the largely unfettered discretion of the Executive respecting the duration of their detention.<sup>233</sup>

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<sup>231</sup> IACHR, Report No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al.* (United States), Report on Admissibility and Merits, April 4, 2001, paras. 238-39.

<sup>232</sup> IACHR, Report No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al.* (United States), Report on Admissibility and Merits, April 4, 2001, para. 240.

<sup>233</sup> IACHR, Report No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al.* (United States), Report on Admissibility and Merits, April 4, 2001, para. 242.

194. Nonetheless, the Commission has observed that not every distinction of treatment is prohibited, but any distinction must have an objective and reasonable justification aimed at achieving a legitimate objective:

While the doctrine of the inter-American human rights system, like that of other human rights regimes, does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.<sup>234</sup> Distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction.<sup>235</sup>

195. The Inter-American Commission has also analyzed the right to equal protection of the law within the framework of a fair trial against a foreign person in the case of *Roberto Moreno Ramos v. U.S.* This case refers to the failures that occurred in the criminal proceedings against Mr. Roberto Moreno Ramos, a Mexican national, who was sentenced to death in the State of Texas on 23 March 1993 for the murder of his wife and two of their children. These shortcomings Mr. Moreno Ramos were the one who was not notified of his rights to notification and access to consular authorities at the time of his arrest; he was not given appropriate legal assistance; and that the prosecution made discriminatory remarks to the jury during the trial stage of sentencing, noting that Mr. Moreno Ramos was a national of a foreign country.<sup>236</sup>
196. With regard to the right to equality before the law in the context of a fair trial, the Commission held that a requirement that is required in an impartial court and equal protection of the law without discrimination of any kind. In systems that use a jury system these requirements apply to judges and juries. In this respect the Commission recognized that the international standard on the issue of "impartiality of the judge and jury" uses an objective test based on "rationality and the appearance of impartiality."<sup>237</sup> Under this rule, must be determined whether there is a real danger that the jury feed bias.<sup>238</sup> When this bias can be linked with a scope of prohibited discrimination, such as race, language, religion or national or

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<sup>234</sup> See, *inter alia*, IACHR, Report No. 51/01, Case 9,903, *Ferrer-Mazorra et al.* (United States), Annual Report of the IACHR 2000, OEA/Ser./L/V/II.111, doc. 20, rev., April 16, 2001, para. 238.

<sup>235</sup> See, *inter alia*, IACHR, *Report on Terrorism and Human Rights*, para. 338, citing, *inter alia*: *Repetto, Inés*, Supreme Court of Justice (Argentina), November 8, 1988, Justices Petracchi and Baqué, para. 6; *Loving v. Virginia*, 388 US 1, 87 (1967), ECtHR, *Abdulaziz v. United Kingdom*, Judgment of May 28, 1985, Series A No. 94, para. 79.

<sup>236</sup> IACHR, Report No. 1/05, Case 12.430, *Roberto Moreno Ramos* (United States), January 28, 2005.

<sup>237</sup> IACHR, Report No. 1/05, *Case 12.430, Roberto Moreno Ramos* (United States), January 28, 2005, para. 66. Citing IACHR, No. 57/96, *William Andrews* (United States), December 6<sup>th</sup> 1996., para. 159. Also, see ETHR, *Remli v. France*, April 23<sup>rd</sup>, 1996. R.J.D. 1996-11, No. 8, paras 43-48.

<sup>238</sup> IACHR, Report No. 1/05, *Case 12.430, Roberto Moreno Ramos* (United States), January 28, 2005, para. 66.

social origin, it may also involve a violation of the principle of equality and non-discrimination.<sup>239</sup>

197. After carefully reviewing the allegations and information submitted by the parties on this issue, the Commission considered that, examined objectively and in the context of the circumstances of the offense charged against Mr. Moreno Ramos and, more broadly, the object of the determination hearing sentencing, there was grave danger that the nationality of Mr. Moreno Ramos had been considered by the jury in determining the punishment.<sup>240</sup>
198. The Commission also held that in the context of the case, the nationality of Mr. Moreno Ramos lacked any relevance to the issues being considered in the procedural stage of sentencing followed that person, and lacked any connection with them, creating the special danger that such evidence could be taken into account in determining the appropriate sentence. In this regard, the Commission held that neither the presiding judge in the trial or other organs had taken any steps to clarify that the jury should not consider Mr. Moreno Ramos nationality as an element of judgment to determine the rightful penalty. Together, all these factors examined objectively, gave rise to a real possibility that jurors considered the quality of Mr. Moreno Ramos being a national of a foreign state, to determine whether he should be executed for the crime he had committed, and therefore did not recognize his right to be tried by an impartial tribunal, nor his right to equal protection of the law without discrimination. Consequently, the Commission concluded that the State was responsible for violations of the obligations under Articles XVIII and XXVI of the American Declaration, along with a violation of Article II of the Declaration, conclusion based on the statements made by the prosecutor during hearing sentencing to be imposed to Mr. Moreno Ramos, related to the fact that he was a national of Mexico.<sup>241</sup>
199. With regard to rules or laws with discriminatory effects against persons of foreign origin, the case of *Cecilia Margarita Barberia Miranda v. Chile* examined the situation of Mrs. Margarita Barberia, a Cuban national, who after making his law studies in Chile, was prevented from exercising the legal profession, solely because of being foreign. By the time that the facts of this case occurred, Article 526 of the Organic Code of Courts stated that "only Chileans may practice as a lawyer, without prejudice to existing international treaties".<sup>242</sup>
200. In its analysis of this case, the Commission argued that international human rights law prohibits both direct and indirect discrimination, such as discriminatory effects. In this vein, Article 526 of the Organic Code of Courts had discriminatory effects and did not allow the practice of law to foreigners, unless their country had an agreement with Chile or that the person had dual nationality and one of them it

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<sup>239</sup> IACHR, Report No. 1/05, *Case 12.430, Roberto Moreno Ramos* (United States), January 28, 2005, para. 66.

<sup>240</sup> IACHR, Report No. 1/05, *Case 12.430, Roberto Moreno Ramos* (United States), January 28, 2005, para. 68.

<sup>241</sup> IACHR, Report No. 1/05, *Case 12.430, Roberto Moreno Ramos* (United States), January 28, 2005, para. 70.

<sup>242</sup> IACHR. Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barberia Miranda (Chile)*, March 18th, 2010, para. 21-26.

was Chilean.<sup>243</sup> In addition, the Commission held that the nationality is expressly referred to in Article 1 of the American Convention as one of the factors by which states cannot discriminate in the exercise of rights. In addition to this, the American Convention includes equal protection before the law recognized in Article 24.<sup>244</sup>

201. In this regard, the Commission also stated that in accordance with international law of human rights, not every distinction is considered discriminatory. If the distinction reflects a legitimate aim, and the measure is applied in proportion to that end, we cannot speak of discrimination. Whenever nationality is one of the criteria prohibited by Article 1 of the American Convention, the State must explain the legitimate purpose, and base it on a pressing social need that justifies it. As for proportionality, the State must use the least restrictive means possible to achieve the purpose concerned. Meanwhile, in the present case, the Chilean State referred to Article 62 of the 4409 Law on the Bar Association, which was immediate predecessor of Article 526 of the Organic Code of Courts, and was adopted for the following reasons of national interest: repression and punishment of illegal practice of the profession, improving professional practice and prevent Chilean lawyers suffer from competition with foreigners.<sup>245</sup>
202. With regard to the first part of the defence of the State, the Commission considered that less onerous and discriminatory methods such as revalidation of studies or the practice of a knowledge test could be applied. In this way, only lawyers who had a comprehensive knowledge of the Chilean legal system could practice law in Chile, irrespective of their nationality. Under this line, it was not fitting that a Chilean who had studied law abroad, with a different legislation, would be allowed to exercise their profession in Chile, while foreigners who had studied in the country were not allowed to do so. In the case of Mrs. Barberia, she proved to have the necessary knowledge to practice law because she completed her law degree at a university recognized by the State. With regard to the improvement of the exercise of the legal profession, the Commission did not find that this principle could be applied to the case of the petitioner, because she attended the same schools than any other lawyer in Chile, and would be, in principle, in terms of suitability at least equal to any other Chilean lawyer who had completed the same curriculum. On the other hand, though Mrs. Barberia Miranda was in competition with their Chilean colleagues, the Commission considered that this was not a legitimate basis to be discriminated against because of their nationality. The parameters of respect for the right to equality before the law and prohibition of discrimination require that such restrictive measures obey a pressing social need,

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<sup>243</sup> IACHR. Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barbería Miranda (Chile)*, March 18th, 2010, para. 33

<sup>244</sup> IACHR. Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barbería Miranda (Chile)*, March 18th, 2010, para. 40.

<sup>245</sup> IACHR. Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barbería Miranda (Chile)*, March 18th, 2010, para. 42.



which clearly did not happen in the situation to protect Chilean lawyers competition of their foreign colleagues.<sup>246</sup>

203. In this vein, the Commission determined that the Chilean government had not justified a legitimate purpose for such a measure, much less proportionality. In addition, the Commission held that in this case there was no evidence which could establish a balance between the legitimate interest of Chilean lawyers to keep their jobs and the right of foreign lawyers to practice in that country, provided they meet reasonable requirements. According to this, the Commission concluded that as a result of the application of the discriminatory rule in Article 526 of the Organic Code of Court, the Chilean State had violated the right to equality before the law of Mrs. Margarita Barberia Miranda, and had not met their obligation to respect and guarantee the rights of the Convention, respectively provided in Articles 24 and 1 (1) of the American Convention.<sup>247</sup>

## 2. The Use of Racial Profiling in Immigration Control Operations

204. The Commission has defined the use of racial profiling as a repressive measure purportedly used for reasons of public safety or protection and is based on stereotypes of race, color, ethnicity, language, descent, religion, nationality, place of birth or a combination of these factors, and not on objective suspicions.<sup>248</sup> The IACHR therefore considers that this practice violates the principle of equal protection recognized in Article 24 of the American Convention.<sup>249</sup> With greater detail, in the cases of *Nadege Dorzema et al.*<sup>250</sup> and *Benito Tide Méndez et al.*,<sup>251</sup> both against the Dominican Republic, the Commission stated that:

[I]n the enforcement of immigration laws, the basic right to equal protection before the law and non-discrimination requires that States ensure that their immigration law enforcement policies and practices do not unfairly target certain persons based solely on ethnic or racial characteristics, such as skin color, accent, ethnicity,

<sup>246</sup> IACHR. Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barbería Miranda (Chile)*, March 18th, 2010, para. 42.

<sup>247</sup> IACHR. Report No. 56/10, Case 12.469, Merits, *Margarita Cecilia Barbería Miranda (Chile)*, March 18th, 2010, paras.43-44. During the proceedings before the Commission, the State of Chile enacted Law 20.211 of September 5, 2007, by which it allows foreigners who have studied law in Chile, to practice law in that country. Also, the recommendations made to the State by the Commission allowed Mrs. Barbería to practice law in Chile, on equal terms with the other lawyers in the country. On May 16, 2008, Mrs. Barberia was sworn before the Supreme Court of Chile, with which she was fully qualified for the exercise of the legal profession in that country.

<sup>248</sup> IACHR, Report No. 26/09 (Admissibility and Merits), Case No.12.440, *Wallace de Almeida (Brazil)*, March 20, 2009, para. 143.

<sup>249</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 485.

<sup>250</sup> IACHR, Application before the Inter-American Court of Human Rights, Case No. 12.688, *Nadege Dorzema et al.: Guayubín Massacre* (Dominican Republic). February 11, 2011, para. 205.

<sup>251</sup> IACHR, Report No. 64/12, Case 12.271, *Benito Tide Méndez et al. v. Dominican Republic*, Report on the Merits, March 29, 2012,, paras. 261-274.



or a residential area known to be populated by a particular ethnic group.

205. The use of restrictions based on race in immigration control operations is prohibited by the standards of the Inter-American System since such a restriction cannot be suitably justified. In order to be justified, the restriction would have to be based on very compelling reasons and the burden of proof rests with the State. Hence, when a restriction is premised on a “suspect category,” the Commission accepts the “reversal of the burden of proof” and the “presumption of invalidity”.<sup>252</sup> The “suspect categories” include the distinctions “explicitly enumerated under pertinent articles of international human rights instruments” such as sex, race, and national origin, and are “subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction.”<sup>253</sup>
206. Strict scrutiny is called for in the case of distinctions based on “suspect categories” in order to ensure that the distinction is not one based on “the prejudices and/or stereotypes that generally surround suspect categories of distinction.”<sup>254</sup> As the IACHR wrote in the case of *Benito Tide Méndez et al.*:

in order for a restriction based on race or national origin to be justified, it must be based on very compelling reasons and the burden of proof rests with the State [...] In practical terms, this means that when a situation of this nature presents itself, the burden of proof is on the State and the general criteria are evaluated carefully. Thus, it is not sufficient for a State to argue the existence of some legitimate end; instead the purpose that is served by making the distinction must be some overriding or imperative public interest.<sup>255</sup> It is not sufficient that the measure be suitable or that some logical relationship of causality exists between the measure and the end being sought, in the sense that there is no other less restrictive measure.<sup>256</sup> To meet the proportionality test,

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<sup>252</sup> IACHR, Report No. 64/12, Case 12.271, *Benito Tide Méndez et al. v. Dominican Republic*, Report on the Merits, March 29, 2012, para. 228.

<sup>253</sup> See, *inter alia*, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, para. 87.

<sup>254</sup> IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters against the State of Chile*, September 17, 2010, para. 88.

<sup>255</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, paras. 80 and 83; IACHR, *Report on Terrorism and Human Rights*, para. 338; IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, para. 36; IACHR, *Annual Report 1999, Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination*, Chapter VI; ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, para. 29; *Belgian Linguistics (Merits)*, Judgment of July 23, 1968, p. 34; *Lustig-Prean and Beckett v. United Kingdom*, Applications Nos. 31417/96 and 32377/96, September 27, 1999, para. 80; *Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, September 27, 1999, para. 87.

<sup>256</sup> IACHR, Report No. 38/96, *X and Y* (Argentina), October 15, 1996, para. 74; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, para. 83. See also, ECtHR, *Karner v. Austria*, Application No. 40016/98, 24 July 2003, para. 41; *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, 21 December 1999, para. 29; *Belgian Linguistics (Merits)*, Judgment of July 23, 1968, p. 34.

the State must be able to show that a proper balance of interests has been struck between what has been sacrificed and what has been gained.<sup>257</sup>

207. In the case of *Benito Tide Méndez et al. v. Dominican Republic*, for example, the IACHR concluded that the State had violated the right to nationality and the right to legal personality in relation to the right to equal protection and non-discrimination by denying citizenship to Dominicans of Haitian descent, Citing its laws and “widespread” practices, the Commission wrote that the State’s actions (both the refusal to issue Dominican identification documents and the destruction of those documents) were targeted specifically at “persons of Haitian origin or descent and persons whose skin color is darker.”<sup>258</sup> Specifically, the Commission observed that the immigration control operations or sweeps that lead to the detention and subsequent deportation of Haitians and Dominicans of Haitian descent in the Dominican Republic are discriminatory, “based on the darker skin color, the physical features or the command of the language of the persons being detained”.<sup>259</sup>
208. The IACHR also observed that the practice of sweeps and the policy of repatriations “are not used in the case of all undocumented immigrants or all persons within Dominican territory unlawfully; instead they are specifically targeted at Haitians, persons of Haitian descent or persons regarded ‘as Haitians’.”<sup>260</sup> The Commission found that the facts established in the case revealed a pattern of discrimination<sup>261</sup> that led to violations of the human rights of persons of Haitian descent in the Dominican Republic. In finding the State responsible for the violation, the IACHR reiterated that race is a suspect category of distinction, and noted that the State failed to meet its burden of proof (explained previously), which would have been an opportunity to present evidence to refute or disprove the practice.<sup>262</sup>
209. For its part, once in its discussion of the case of *Expelled Dominicans and Haitians v. Dominican Republic*, the Court alluded to those events in the following terms:

It is obvious that the way in which the presumed victims were deprived of their liberty by the State agents indicates that this was due to racial profiling related to the fact that they apparently

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<sup>257</sup> IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters against the State of Chile*, September 17, 2010, para. 89; IACHR, Report No. 64/12, Case 12.271, *Benito Tide Méndez et al. v. Dominican Republic*, Report on the Merits, March 29, 2012, paras. 228-229.

<sup>258</sup> IACHR, Report No. 64/12, Case 12.271, *Benito Tide Méndez et al. (Dominican Republic)*, Report on the Merits, March 29, 2012, para. 248.

<sup>259</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al. (Dominican Republic)*, March 29, 2012, para. 267.

<sup>260</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al. (Dominican Republic)*, March 29, 2012, para. 268.

<sup>261</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al. (Dominican Republic)*, March 29, 2012, para. 269.

<sup>262</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al. (Dominican Republic)*, March 29, 2012, para. 249.

belonged to the group of Haitians or Dominicans of Haitian origin or descent [...], which is evidently unreasonable and therefore arbitrary.<sup>263</sup>

## ***E. Use of Force in Immigration Operations***

210. The *Nadege Dorzema* case is important in terms of development of human rights standards on permissible and legal use of force in immigration operations.<sup>264</sup> On the question of the use of force, the Court has held that States have the right and the obligation to ensure security and keep public order, using force if necessary.<sup>265</sup> In that regard, the IACHR recalled that “the functions of the armed forces [...] are limited to defending national sovereignty.”<sup>266</sup> Therefore, the IACHR considers that States have the power to defend their borders, and to do so, they could, under certain circumstances, rely on the armed forces as long as the use remains within the established limits and follows the procedures that help preserve both citizen security and the fundamental rights of every human being.”<sup>267</sup>
211. Following the jurisprudence of the Inter-American Court, although government agents may legitimately use lethal force in the performance of their duties, its use should be the exception and it should be planned and limited by authorities in proportion to the threat, in order that “force or coercive tactics are used only after all other means of control have been exhausted or failed.<sup>268</sup> The exceptions that define the circumstances under which the use of force is considered legitimate should be established by law and should be strictly interpreted in order to always minimize its use, and should never exceed “what is absolutely necessary.”<sup>269</sup> Whenever excessive force is used, all resulting deprivation of life is arbitrary.<sup>270</sup>

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<sup>263</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 368.

<sup>264</sup> I/A Court H.R., *Case of Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, para. 154.

<sup>265</sup> I/A Court H.R., *Case of Servellón-García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150.

<sup>266</sup> IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II. Doc. 57, December 31, 2009 (hereinafter “*Report on Citizen Security and Human Rights*”), para. 105.

<sup>267</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al. (Dominican Republic)*, November 12, 2010, para. 107 (citing I/A Court H.R., *Case of Bulacio*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100).

<sup>268</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al. (Dominican Republic)*, November 12, 2010, para. 108; (I/A Court H.R., *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 83; and I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)* Judgment of July 5, 2006. Series C No. 150, para. 67. See also, ECtHR, *Case of Nachova and others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgment of 6 July, 2005, para. 94).

<sup>269</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al. (Dominican Republic)*, November 12, 2010, para. 109 (citing I/A Court H.R., *Case of Montero Aranguren et al (Detention Center of Catia)*, Judgment of July 5, 2006. Series C No. 150, para. 68. In a similar sense, see: ECtHR, *Huohvanainen v. Finland*, 13 March 2007, no. 57389/00, §§ 93-94; ECtHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92,

212. In that regard, in its “Report on Terrorism and Human Rights,” the IACHR has posited that States agents may use lethal force “in cases where it is inevitable in order to protect themselves or others from an imminent threat of death or serious injury, or when it is impossible to maintain law and order by any other means and it is strictly necessary.”<sup>271</sup> The use of force, including lethal force, will only be lawful when nonviolent means are manifestly incapable of protecting the threatened rights.<sup>272</sup>
213. For its part, the European Court of Human Rights has applied a stricter and more convincing test of necessity than that applicable when determining whether States action is necessary in a democratic society. Consequently, the degree of force used must be “absolutely necessary” and strictly proportional in order to achieve the objective allowed.<sup>273</sup>
214. In the same vein, Article 3 of the United Nations Code of Conduct for Law Enforcement Officials provides that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,” while provision 4 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials States: “Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”<sup>274</sup>
215. Consequently, the law must define when States security agents may use lethal force and interpret its use restrictively. Ultimately, “States agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former.”<sup>275</sup> Given that excessive or disproportionate use of force by law

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§ 67; ECtHR, *Kakoulli v. Turkey*, 22 November 2005, no. 38595/97, §§ 107-108; ECtHR, *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A no. 324, paras. 148-150, 194, and Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly, resolution 34/169 of 17 December 1979, Article 3).

<sup>270</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 109 (citing I/A Court H.R., Case of *Montero Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006. Series C No. 150, para. 68. In the same sense, see also Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 9. Also see, IACHR, *Report on Citizen Security and Human Rights*, para. 107).

<sup>271</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 110 (citing its *Report on Terrorism and Human Rights*, para. 87. IACHR, *Report on Citizen Security and Human Rights*, para. 113).

<sup>272</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 110 (citing its *Report on Citizen Security and Human Rights*, para. 117).

<sup>273</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 111 (citing ECtHR, Case of *Isayeva, Yusupova and Bazayeva v. Russia*, Applications nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February, 2005, para. 169).

<sup>274</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 113 (citing UN Doc. A/34/46 (1979), A.G. res. 34/169. The Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

<sup>275</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 114 (citing I/A Court H.R., Case of *Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and

enforcement officials that causes loss of life may amount to arbitrary deprivation of life, the Commission recalls that once the States learns that its security forces have used firearms and that, as a result, a person has lost his life, the State authorities are obligated to initiate, of its own initiative and without delay, a serious, independent, impartial and effective investigation.<sup>276</sup> This derives from the obligation of States to “see that their security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction.”<sup>277</sup>

216. In its analysis of use of force in immigration operations, the Court examined the principles of legality, absolute necessity, and proportionality. The Court defined these principles as follows:

1. **Legality:** [T]he use of force must be addressed at achieving a legitimate goal. [...]The law and training should established how to act in this situation.
2. **Absolute necessity:** [I]t must be verified whether other means are available to protect the life and safety of the person or situation that it is sought to protect, in keeping with the circumstances of the case.

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Costs. Judgment of July 4, 2007. Series C No. 166, paras. 84-85; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)*, Judgment of July 5, 2006. Series C No. 150, para. 68. In that regard, see also ECtHR, *Huohvanainen v. Finland*, 13 March 2007, no. 57389/00, §§ 93-94, ECtHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92, § 67; ECtHR, *Kakoulli v. Turkey*, 22 November 2005, no. 38595/97, §§ 107-108; ECtHR, *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A no. 324, paras. 148 -150, 194, and Code of Conduct for Law Enforcement Officials adopted by the United Nations General Assembly resolution 34/169, 17 December 1979, Article 3; in accordance with provision 11 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, 27 August to 7 September 1990, [r]ules and regulations on the use of firearms by law enforcement officials should include guidelines that: (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted; (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm; (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk; (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them; (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged; (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty).

<sup>276</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 115 (citing I/A Court H.R., *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, paras. 85 and 88, I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment dated June 7, 2003. Series C No. 99, para. 112. See also *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 256, and I/A Court H.R., *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, para. 77. In a similar sense, see also ECtHR, *Erdogan and Others v. Turkey*, 25 April 2006, no. 19807/92, §§ 122-123, and ECtHR, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 111-112, 6 July 2005. Also see, IACHR, *Report on Citizen Security and Human Rights*, para. 120).

<sup>277</sup> IACHR, Report on Merits No. 174/10, Case 12.688, *Nadege Dorzema et al.* (Dominican Republic), November 12, 2010, para. 115 (citing I/A Court H.R., *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 81; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 66. See also I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 238, and I/A Court H.R., *Case of Servellón-García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 105.

3. Proportionality: The level of force used must be in keeping with the level of resistance offered. Thus, agents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.<sup>278</sup>
217. After examining the facts in the case of *Nadege Dorzema et al. v. Dominican Republic*, the Court found that the States failed to abide by those three principles when its border control agents fired on a vehicle carrying migrants that had not stopped at a border control post, killing and wounding several passengers. Specifically, the Court found the absence of clear regulations and a public policy concerning prevention of the use of force; that the migrants did not pose a real threat or danger and, therefore, the use of lethal force was not absolutely necessary; and that the States could have established less extreme measures to achieve the same end and that, consequently, proportionality was lacking.<sup>279</sup>

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<sup>278</sup> 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. 85.

<sup>279</sup> 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, paras. 85-91.



CHAPTER 5  
THE PROHIBITION OF SLAVERY,  
SERVITUDE AND HUMAN  
TRAFFICKING





## THE PROHIBITION OF SLAVERY, SERVITUDE AND HUMAN TRAFFICKING

### A. *Scope and Content*

218. Article 6 of the American Convention establishes an absolute and non-derogable prohibition of slavery, servitude, trafficking in women and slaves in all its forms. Under Article 6(2) of the Convention, no one shall be required to perform forced or compulsory labor. Convention Article 27(2) includes the prohibition of slavery, servitude and human trafficking among the basic rights that States cannot suspend “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party.”<sup>280</sup>
219. The prohibition of slavery and similar practices, such as the trafficking, are part of customary international law and *jus cogens*<sup>281</sup>. Protection against slavery is an obligation *erga omnes* and binding on the States, emanating from international human rights standards.<sup>282</sup> Likewise, slavery and forced labor committed by public officials or private individuals, against any person, constitutes not only a violation of human rights but also represents an international criminal offense regardless of whether a State has ratified international conventions prohibiting these practices.<sup>283</sup>
220. In order to establish the extent of human trafficking under the Inter-American System, the Commission deems it appropriate to consider the definition in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000, also known as “Palermo Protocol”. The definition of trafficking of the Palermo Protocol comprises three elements: 1) acts, 2) commissive acts and 3) further purposes. The Palermo Protocol defines trafficking as the recruitment, transportation, transfer, harboring or receipt of persons (acts), by means of threat or use of force or other forms of coercion, of abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another

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<sup>280</sup> IACHR, *Report on Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Chaco of Bolivia*. OEA/Ser.L/V/II. Doc. 58, 2009 (hereinafter “*Report on Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Chaco of Bolivia*”), para. 282.

<sup>281</sup> IACHR, *Report on Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Chaco of Bolivia*, para. 54.

<sup>282</sup> International Court of Justice, *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, failure of February 5, 1971, ICJ Reports, 1970, para. 3.4.

<sup>283</sup> IACHR, *Report on Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Chaco of Bolivia*, para. 54.

(commisive means) for exploitation (ulterior motives) which includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>284</sup>

221. The Palermo Protocol provides that the consent of a victim of trafficking to any form of exploitation described in Article 3 shall not be taken into account when it was referred to any of the means set forth in that Article. With regard to trafficking in children and adolescents, the Protocol provides that the recruitment, transportation, transfer, harboring or receipt of a child for exploitation is considered "trafficking in persons" even if it does not involve any of the means set forth in paragraph a) of Article 3. In consideration of the foregoing, the Commission considers that the provisions of Article 6 of the Convention should be read in conjunction with the definition of trafficking, which It is contained in Article 3 (a) of the Palermo Protocol.
222. The Commission has argued that human trafficking and slavery-like practices, represent a violation of multiple or continuous character, that character is maintained until the victim is released. The means by which perpetrates human trafficking placed the victim in a state of utter helplessness, which leads to other related violations. This is particularly serious when trafficking occurs within a systematic pattern or an applied or tolerated by the state or its agents practice. In this sense, the Palermo Protocol underlines the need for a comprehensive approach to combating trafficking in persons, including measures to prevent trafficking and protect victims and survivors, in addition to measures to punish traffickers.<sup>285</sup>
223. In its report on *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, the Commission wrote that servitude and forced labor often entail violations of other fundamental human rights under the American Convention, the Convention of Belém do Pará and other instruments of the universal system of human rights. These fundamental rights include the right to life, the right to humane treatment, the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and personal security, protection of one's honour and dignity, freedom of expression, the rights of the child, the right of women to a life free of violence, the right to private property, equal protection and access to justice.<sup>286</sup>
224. In that report the IACHR states that the Bolivian Chaco is home to approximately 600 families who live in what amounts to contemporary forms of slavery. During its June 2008 visit, the Commission established that "members of the Guaraní indigenous people are kept in a situation of servitude whose origins date back over

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<sup>284</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 348, citing the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Article 3.a.

<sup>285</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 351.

<sup>286</sup> See: IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, para. 58; IACHR, *Human Rights of Migrants and other Persons in the Context of Human Mobility in Mexico*, para. 350.

a century, and which has been perpetrated in the face of the passivity of the national and international community.” The Commission found that “[t]he problem of bondage and forced labor in the Bolivian Chaco has its origins in the dispossession of their territory suffered by the Guaraní indigenous people over more than a century, which resulted in the subjugation of its members to conditions of slavery, bondage, and forced labor. The solution to this problem lies not only in the elimination of contemporary forms of slavery on the estates of the Chaco, but also in measures of reparation including the restitution of the ancestral territory of the Guaraní people and integral measures that solve their needs in health, housing, education, and technical training that would arise after the “emancipation” of the Guaraní captive communities.”<sup>287</sup>

225. As for the different forms of trafficking in persons, in its report on *Human Rights of Migrants and Other Persons in the Context of Migration in Mexico*, the Commission wrote that migrant women are not the only victims of human trafficking in Mexico. During its visit to Mexico, the Commission received information about migrant men forced to work in various capacities for organized crime groups, as gunmen, to murder other migrants, or to move drugs toward the border with the United States. Migrant boys and adolescent males are forced to work as lookouts for organized crime groups, and are also called *halcones* [falcons].<sup>288</sup>
226. On March 6, 2015, the Commission filed an application with the Court in the case of the *Fazenda Brasil Verde Workers*, brought against the Federative Republic of Brazil. The case concerns forced labor and debt bondage on the *Fazenda Brasil Verde*, located in the northern sector of the state of Pará. The facts of the case are set against a backdrop in which tens of thousands of workers are subjected to slave labor every year, a practice whose roots can be traced to discrimination and a history of exclusion.<sup>289</sup> In that report, the IACHR underscored the fact that:

the contemporary concept of slavery includes debt bondage as a practice analogous to slavery. The relevant international instruments and case law single out at least the following elements: i) a person pledges to provide his services as security for repayment of a debt but the services are not applied toward repayment of the debt; ii) the time of service is open-ended; iii) the nature of the services are not specified; iv) the person subjected to debt bondage lives on the property where he or she works; v) his or her movements are controlled; vi) measures are taken to prevent his or her escape; vii) methods of psychological control are used; viii) the

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<sup>287</sup> IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, paras. 213 and 216.

<sup>288</sup> IACHR, *Human rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 141.

<sup>289</sup> IACHR, Report on Mertis No. 169/11, Case 12,066, *Fazenda Brasil Verde Workers* (Brazil), November 3, 2011. Date of referral to the Court: March 6, 2015. See IACHR, Press Release No. 45/15, “IACHR Takes Case Involving Brazil to the Inter-American Court”, May 7, 2015.

individual cannot change his or her condition; and ix) he or she is subjected to cruel treatment and abuse.<sup>290</sup>

227. In the case of the *Fazenda Brasil Verde Workers*, the Commission found that the owner of the estate and foremen had used the laborers as if they were their property. It noted that “the workers are recruited with false promises and signed blank contracts and IOUs that allowed the owner and his foremen to do whatever they wanted with them.”<sup>291</sup> The IACHR would highlight the fact that because the workers’ movements are controlled and their freedom of movement denied, the legal concept of forced labor, as the ILO has observed, is closely related to other abusive practices including human trafficking, slavery and slavery-like practices, debt bondage or bonded labor, and labor exploitation.<sup>292</sup>

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<sup>290</sup> IACHR, Report on Merits No. 169/11, Case 12,066, *Fazenda Brasil Verde Workers* (Brazil), November 3, 2011, para. 139.

<sup>291</sup> IACHR, Report on Merits No. 169/11, Case 12,066, *Fazenda Brasil Verde Workers* (Brazil) November 3, 2011, para. 140.

<sup>292</sup> ILO, Report of the Director-General. The Cost of Coercion. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. International Labour Conference, 98<sup>th</sup> session, 2009. Report I(B), Geneva.

CHAPTER 6  
FREEDOM OF MOVEMENT  
AND RESIDENCE



## FREEDOM OF MOVEMENT AND RESIDENCE

### A. *Scope and Content*

228. The right of movement and residence is recognized in various international instruments.<sup>293</sup> Among the instruments of the Inter-American system, this right is enshrined in Article VIII of the American Declaration and the American Convention in paragraphs 1, 2, 3, 4, 5 and 6 of Article 22. In this regard, Article VIII of the American Declaration states:

Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

229. With regard to various rights and obligations of States regarding the right of movement and residence, Article 22 of the American Convention in numerals 1, 2, 3, 4, 5 and 6 provide that:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

[...]

<sup>293</sup>

See, *inter alia*, the American Declaration of the Rights and Duties of Man, Article VIII; the Universal Declaration of Human Rights, Article 13; the International Covenant on Civil and Political Rights, Article 12; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 39.



230. As defined by the Court, the right of movement and residence is an indispensable condition for the free development of the individual<sup>294</sup> and includes, among others, the right of those lawfully within a State to move freely in it; choose their place of residence; and enter, remain in, and leave the territory without unlawful interference.<sup>295</sup> The Court has also held that the enjoyment of this right does not depend on any particular purpose or reason of the individual who wants to move or to stay in one place.<sup>296</sup>
231. As noted by the Court, the right to freedom of movement and residence can be violated by *de facto* restrictions if the State has not established the conditions or provided the means to allow that right to be exercised.<sup>297</sup> In this regard, the right to freedom of movement and residence may be affected when a person is the victim of threats or harassment and the State does not provide the guarantees necessary to allow him/her to move freely and reside in the territory in question, even when those threats and harassments are carried out by non-State actors.<sup>298</sup>

## ***B. The Right Not to Be Internally Displaced***

232. Article 22(1) of the American Convention also protects the right to live in a place of one's choosing with the territory of a State, which includes protection against any form of forced internal displacement. In their case law and writings, the organs of the Inter-American Human Rights System have interpreted freedom of movement and residence, recognized in Article 22(1) of the American Convention, as also obligating the State not to take any measures that would necessitate a person's internal displacement and to refrain from assisting third parties in the commission of acts that cause internal displacement.<sup>299</sup>

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<sup>294</sup> I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras. 119 and 120, and I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 197.

<sup>295</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 115; I/A Court H.R., *Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs. Judgment of November 27, 2008, Series C No. 192, para. 138.

<sup>296</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 115. and I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 197.

<sup>297</sup> I/A Court H.R., *Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C, No. 124, paras. 119-120; I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 197.

<sup>298</sup> I/A Court H.R., *Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs. Judgment of November 27, 2008, Series C No. 192, para. 139.

<sup>299</sup> See, I/A Court H.R., *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits y Reparations. Judgment of November 30, 2012, Series C No. 259, para. 255; *Case of Vélez Restrepo and Family Members v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 3, 2012, Series C No. 248, para. 220; *Case of Valle Jaramillo v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008, Series C No. 192, para. 138; *Case of the Ituango Massacres v. Colombia*.

233. Although internally displaced persons are often forced to flee their homes for the same reasons that refugees do, the fact that they remain within the national territory means that they cannot apply for refugee status or benefit from the international protection established for refugees under the international law on refugees.<sup>300</sup> The presence of internally displaced persons within the national territory means that the State itself bears primary responsibility for respecting and guaranteeing their human rights without distinction for race, color, sex, language, religion or belief, political or any other opinion, national, ethnic or social origin, legal or social status, age, disability, economic position, birth or any other such criterion.
234. According to the American Convention on Human Rights and other international and domestic norms, displaced persons are entitled to freely exercise the same rights and freedoms that the rest of the citizenry enjoys.<sup>301</sup> However, in practice, they are seldom able to do so, because the displacement in itself is antithetical to the effective enjoyment of human rights. One of the principal characteristics of forced displacement is that its victims have been forced to flee their homes or habitual places of residence, which means they are forced to abandon their life plans; in most cases, they lose land, housing and other property they own. Various rights are affected in the process of being uprooted and displaced.
235. As the Commission has already observed, forced internal displacement entails multiple violations of its victims' human rights.<sup>302</sup> Some of the rights affected by internal displacement are as follows: i) the right not to be internally displaced; ii) the right to move freely within the territory of the State; iii) the right to choose one's place of residence; iv) the right to personal integrity; v) the right to private and family life; vi) the right to property, and vii) the right to work. In the case of children, specific rights are also the right not to be separated from the family, the right to special protection and care, and the right to education. In the case of women, the right to the adoption of measures against the vulnerability to violence that comes from the condition of displaced.<sup>303</sup> In the case of indigenous and afro descendant communities, the right to their ancestral lands and traditional territories and the right to their culture.

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Judgment of July 1, 2006, Series C No. 148, para. 206; and *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005, Series C No. 134, para. 168. I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012, Series C No. 248, para. 172; *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 188; and *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 139.

<sup>300</sup> IACHR, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, para. 539.

<sup>301</sup> IACHR, *Third Report on the Situation of Human Rights in Colombia* (1999), Chapter VI, Internal Forced Displacement, para. 1, Section C, para.; and IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*. OEA/Ser.L/V/II. Doc. 67, October 18, 2006, para. 85.

<sup>302</sup> IACHR, *Third Report on the Situation of Human Rights in Colombia* (1999), Chapter VI, Internal Forced Displacement, para. 1, Section C, para.; and IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*. OEA/Ser.L/V/II. Doc. 67, October 18, 2006, para. 85.

<sup>303</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará"*, Article 9.

236. In the *Case of Marino López et al. (Operation Genesis) v. Colombia*, the IACHR concluded that because of the internal displacement to which the petitioners were subjected, their rights to personal integrity, freedom from arbitrary or abusive interference in one's family life, and property, the State's obligation to protect and respect rights without discrimination were violated, in connection with the right to freedom of movement and residence.<sup>304</sup>

237. The Inter-American Court has written the following in this regard:

[i]n view of the complexity of the phenomenon of internal displacement and of the broad range of human rights affected or endangered by it, and bearing in mind said circumstances of special weakness, vulnerability, and defencelessness in which the displaced population generally finds itself, as subjects of human rights, their situation can be understood as an individual *de facto* situation of lack of protection with regard to the rest of those who are in similar situations.<sup>305</sup>

238. The Inter-American Court has also held that “[u]nder the terms of the American Convention, the differentiated situation of displaced persons places States under the obligation to give them preferential treatment and to take positive steps to reverse the effects of said condition of weakness, vulnerability, and defencelessness, including those *vis-à-vis* actions and practices of private third parties”.<sup>306</sup>

239. On a number of occasions, the Court has stated that internal displacement has a complex nature, not just because of the factors that cause it and the wide range of human rights it affects or jeopardizes, but also because of the particular vulnerability and defencelessness that so often characterizes displaced persons. The situation of the internally displaced can be understood as a *de facto* lack of protection.<sup>307</sup> On the vulnerability of displaced persons, the Inter American Court highlighted what was established by the Colombian Constitutional Court:

[...] Owing to the circumstances that surround internal displacement, the persons [...] who are obliged “suddenly to abandon their place of residence and their usual economic activities, being forced to migrate to another place within national territory” to escape from the violence caused by the internal armed conflict and the systematic disregard for human rights or international

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<sup>304</sup> IACHR, Report No 64/11. Case 12.573. *Case of Marino López et al. (Operation Genesis) (Colombia)*. Report on the Merits, para. 277.

<sup>305</sup> See, I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 177. See, also, I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006 Series C No. 148, para. 210.

<sup>306</sup> I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 179.

<sup>307</sup> I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 177, and *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 141.

humanitarian law, are exposed to a much higher level of vulnerability, which entails a grave, massive and systematic violation of their fundamental rights and, thus, merits that the authorities should grant them special care and attention. Those displaced due the violence are in a state of vulnerability that makes them deserve special treatment by the State.<sup>308</sup>

240. According to the American Convention, this lack of protection requires States to adopt positive measures to reverse the effects of the aforementioned condition of weakness, vulnerability, and helplessness, even those that result from acts and practices of private third parties.<sup>309</sup>
241. On internal displacement caused as a result of an armed conflict, the IACHR's Special Report on the Human Rights Situation of the so-called "Communities of Peoples in Resistance" in Guatemala is worth mentioning. That report examined the situation of the communities uprooted by Guatemala's internal conflict, who isolated themselves in the jungles of Ixcán and in the mountains in the early 1980s and resurfaced in 1991, calling themselves the "Communities of Peoples in Resistance" (CPR). The report looks at the problems that emerged in the 1980s when the Army installed or induced families from other areas to settle on land that had previously been owned or occupied by CPRs or displaced persons. In that report, the Commission concluded that "[f]irst among the emerging problems requiring an immediate solution is that of the families brought by the army to settle on land previously occupied or owned by CPR communities and now being reclaimed." It went on to observe that the State is "responsible for finding solutions for these families, not just to keep the peace, but also because it was the State itself that led them to settle on potentially conflictive land".<sup>310</sup>
242. The *Case of the Moiwana Community v. Suriname* involved events that occurred on November 29, 1986, when members of Suriname's armed forces attacked the N'djuka Maroon community of Moiwana. The soldiers massacred over 40 men, women and children and razed the community. Those who managed to escape presumably fled into the surrounding forests and were later exiled or internally displaced.
243. In that case, the Inter-American Court underscored how the Guiding Principles issued in 1998 by the Representative of the United Nations Secretary-General on

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<sup>308</sup> Judgment T025 of the Third Review Chamber of the Constitutional Court of Colombia, dated January 22, 2005 (file of annexes to the reply to the complaint, Volume III, annex 30, pages 4363 to 4747hh). Cited in I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 211; and I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 316.

<sup>309</sup> I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 179; *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 141 and *Case of Displaced Afro-descendant communities of the Cacarica River Basin (Operation Genesis) v. Colombia*. Judgment of Preliminary Objections, Merits, Reparations and Costs of November 20, 2013. Series C No. 270, para. 315.

<sup>310</sup> IACHR, *Special Report on the Human Rights Situation in the so-called "Communities of Peoples in Resistance" in Guatemala*. OEA/Ser.L/V/II.86. Doc. 5 rev. 1, June 16, 1994.

the question of internally displaced persons were particularly relevant.<sup>311</sup> The Court wrote that:

many of these guidelines illuminate the reach and content of Article 22 of the Convention in the context of forced displacement. For the purposes [...] the Tribunal emphasizes the following Principles:

- 1(1). Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
5. All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.
8. Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.
9. States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.
- 14(1). Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
- 28(1). Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.<sup>312</sup>

244. The Court's ruling in that case was that Suriname had violated Article 22 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the members of the Moiwana Community, because the State had failed to establish the conditions and provide the means that would enable members of the community to return voluntarily, in safety and with dignity, to their traditional lands, in

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<sup>311</sup> UN, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 of February 11, 1998.

<sup>312</sup> I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 111.

relation to which they had a special dependency and attachment. By failing to afford them any guarantee that their human rights would be respected - particularly their rights to life and to personal integrity and, above all, their right to an effective criminal investigation to bring to justice those responsible for the 1986 attack-, Suriname had failed to guarantee to the members of the community their right to freedom of movement and residence.<sup>313</sup>

245. Likewise, the Commission and the Court have also had addressed internal displacements caused by armed conflict, as in the case of Colombia. In such cases, they have spelled out the general and special obligations that States have to protect the civilian population within their jurisdictions, based on international humanitarian law.<sup>314</sup> Particularly relevant are the standards on displacement contained in Protocol II Additional to the 1949 Geneva Conventions,<sup>315</sup> specifically Article 17 of Protocol II which prohibits the ordering of the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; in the latter case, “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”.<sup>316</sup>
246. The cases and situations analyzed by the Inter-American System have paid special attention to the performance of States in terms of: 1) the occurrence of internal displacement, 2) protection of the displaced during displacement, 3) establishing conditions to ensure safety and dignity to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.
247. In the *Case of the Barrios Family v. Venezuela*, for example, the Court found that the State had violated the right to freedom of movement for members of the Barrios family by not taking measures to prevent its movement as well as for failing to take measures to ensure their safe return to the place habitually resided in. In its judgment, the Court found that:

[t]he Court considers that Venezuela has not formally restricted the freedom of movement and residence of the members of the Barrios family. Nevertheless, it finds that, in this case, this freedom has been limited by serious *de facto* restrictions arising from the threats, harassment and other violent acts that have led to the departure of several of its members from Guanayén and their reticence to return, owing to the well-founded fear that their own life or safety, or that of their next of kin, could be in danger owing to the violent events

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<sup>313</sup> I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 120 and 121.

<sup>314</sup> See, I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 114. As for the Commission’s reports, see, IACHR, Report on Merits No. 64/11, Case 12.573, *Marino López et al. (Operation Genesis)*, Colombia, March 31, 2011, para. 215; and Report No. 86/10, Case 12.649, Merits, *Case of the Río Negro Massacre*, Guatemala, July 14, 2010, para. 228.

<sup>315</sup> I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006 Series C No. 148, para. 209.

<sup>316</sup> Protocol II to the 1948 Geneva Conventions, Article 17.

that took place and the lack of security, added to the failure to investigate and prosecute those responsible for the facts. Indeed, *the State is responsible* for the conduct of its agents that caused the displacements and *for not having established the conditions or provided the means to allow the members of the Barrios family to return safely*. As this Court has previously established, the absence of an effective investigation of violent acts can lead to or perpetuate exile or forced displacement.<sup>317</sup> (emphasis added)

248. After doing the same analysis with respect to the other family members involved in the case, the Court held that Venezuela had violated the right to freedom of movement and residence contained in Article 22(1) of the American Convention, in relation to Article 1(1) thereof.
249. The Court has also held that the lack of an effective investigation into violent acts can lead to or perpetuate an exile or forced displacement.<sup>318</sup> In the *Case of Human Rights Defender et al. v. Guatemala*, the Court found that following the death of Mr. A.A., the State did not provide adequate measures of protection to guarantee that the members of family A would not be forced to move elsewhere in Guatemala or to Mexico. The Court concluded that:

The lack of evidence to dispute the ineffectiveness of the State's alleged offer of measures of security and protection, together with B.A.'s statement and the absence of information by the State, allow the Court conclude that the State did not adopt sufficient and effective measures to guarantee the members of family A, who were forcibly displaced, a safe and dignified return to their usual places of residence or voluntary resettlement in another part of the country, ensuring their full participation in the planning and management of a process of return or reinsertion.<sup>319</sup>

250. The *Case of the Río Negro Massacres v. Guatemala* is a good example of the application of these principles. In this case, following the massacres perpetrated against the community of Río Negro<sup>320</sup> in 1980 and 1982 and in order to escape the systematic persecution by State agents calculated to exterminate them, the survivors sought refuge in the surrounding mountains, where they lived under

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<sup>317</sup> I/A Court H.R., *Case of the Barrios Family v. Venezuela*. Merits, Reparations and Costs. Judgment of November 24, 2011, Series C No. 237, para. 165 (Citing I/A Court H.R., *Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C, No. 124, para. 120, and I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 201.

<sup>318</sup> I/A Court H.R., *Case of Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para. 166.

<sup>319</sup> I/A Court H.R., *Case of Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para. 177.

<sup>320</sup> The Court described this community as "indigenous in nature". I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012, Series C No. 248, para. 168.



very precarious conditions.<sup>321</sup> In 1983, some of the survivors were relocated to another settlement in Guatemala (called Pacux), where they were subjected to threats, torture, forced labor, and other violations of their human rights.<sup>322</sup> As to the specific measures taken by the Guatemalan State, the Court wrote the following in the *Case of the Río Negro Massacres*:

[...] living conditions in Pacux have not allowed its inhabitants to return to their traditional economic activities. Instead, they have had to participate in economic activities that have not provided them with a stable income, and this has also contributed to the disintegration of the social structure and the cultural and spiritual life of the community. In addition, the facts of the case have proved that the inhabitants of Pacux live in very precarious conditions, and that their basic needs in the areas of health, education, electricity and water are not being fully met (*supra* paragraphs 85 and 86). Therefore, although Guatemala has made efforts to resettle the survivors of the massacres of the Río Negro community, *it has not created the conditions or provided the means that are essential for repairing or mitigating the effects of its displacement, which was caused by the State itself.*<sup>323</sup> (emphasis added)

251. The Court thus found the Guatemalan State responsible for violation of the rights recognized in Article 22(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the survivors of the Río Negro massacres who lived in the Pacux settlement.<sup>324</sup>
252. Another example is the *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* where, in the wake of a counter-insurgency operation conducted by Colombian armed forces in late February 1997, the communities from the Cacarica River basin were forced to move to escape the violence and threats to which they were subjected. As the IACHR alleged and as the State itself confirmed, around 3,500 people were displaced; of these, approximately 2,300 temporarily settled in the municipality of Turbo and in Bocas de Atrato, both in the department of Antioquia; another 200

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<sup>321</sup> I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012, Series C No. 248, para. 179.

<sup>322</sup> I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012, Series C No. 248, para. 179.

<sup>323</sup> I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012, Series C No. 248, para. 183.

<sup>324</sup> I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012, Series C No. 248, para. 184.



crossed the border into Panama,<sup>325</sup> while the remainder moved elsewhere in Colombia<sup>326</sup>.

253. According to the facts as recounted in the judgment, the conditions under which the displaced persons lived at the resettlement sites were poor. In Turbo, for example, the living conditions of the displaced persons were characterized by: a) the absence of Government attention; b) overcrowding; c) poor sleeping conditions; d) a lack of privacy; e) food that was either insufficient and/or imbalanced, and f) water that was either insufficient or of poor quality.<sup>327</sup> The Court also observed that the small amount of water provided had an impact on hygiene and on digestive functions, which affected: 1) the physical and mental health of the displaced persons, a problem that the State did little or nothing to address; 2) the structure of the family, and 3) the children's education.<sup>328</sup>
254. Apart from the conditions they had to endure at the places where they resettled, the displaced continued to be the target of harassment, threats and violence by paramilitary groups for the duration of their four-year displacement.<sup>329</sup> Because of the insecurity and unmet needs, some of the communities displaced from Cacarica declared themselves to be a "Peace Community" titled "*Comunidad de Autodeterminación, Vida y Dignidad*" or "CAVIDA" [Self-determination, Life and Dignity Community] and asked the Government to provide adequate safety and the socio-economic conditions necessary for their return.<sup>330</sup> Even so, the factors that caused their displacement in 1997 persisted. Therefore, with the help of the State and the international community, CAVIDA determined to stop armed agents from

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<sup>325</sup> Shortly after arriving in Panama, the displaced were informed that they could not remain in that country, which is why they moved to Bahía Cupica, in the department of Chocó, Colombia. I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 120.

<sup>326</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 111 (Citing Ombudsman's Office. Decision No. 025 of the Ombudsman on the massive human rights violations and forced displacement in the Bajo Atrato region of Chocó, October 2002).

<sup>327</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 118.

<sup>328</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 118.

<sup>329</sup> Between 1996 and 2002, several people were murdered or disappeared and the State was aware of the danger as early as 1997. I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, paras. 121 and 125.

<sup>330</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 123.

entering the areas that they lived in and cultivated, which were classified as humanitarian zones.<sup>331</sup>

255. Although the Court acknowledged that the State had provided help to the displaced, it described that help as “limited.” When all the circumstances of the displacement were considered in combination with the lack of protection for a safe return, the Court found that the Colombian State was responsible for violation of Article 22(1), in relation to Articles 5(1) and 1(1) of the American Convention.<sup>332</sup> The Court stated the following:

The measures of basic assistance provided by the State during the period of displacement were insufficient, because the physical and mental conditions that those displaced had to face for almost four years were not in keeping with the minimum standards required in such cases. The overcrowding, the food, the supply and management of water, as well as the failure to adopt measures with regard to health care, reveal non-compliance with the State’s obligation to provide protection following the displacement, with the direct result of the violation of the right to personal integrity of those who suffered the forced displacement.<sup>333</sup>

### **C. The Right to Leave any Country Freely, Including One’s Own**

256. In its Article 22(2) the American Convention recognizes every person’s right to leave any country freely, including his own. The Court has agreed with the UN Human Rights Committee’s observation to the effect that:

Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee.<sup>334</sup>

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<sup>331</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 125.

<sup>332</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 325.

<sup>333</sup> I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 323.

<sup>334</sup> UN, Human Rights Committee, *General Comment No. 27, Freedom of movement (Art.12)*, (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 8.

257. The right to leave any country freely, including one's own, is not absolute. Under Articles 22(3) and 30 of the American Convention, the exercise of this right may be subject to restrictions provided they are: 1) expressly established by law, and 2) intended to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others, to the extent necessary in a democratic society.
258. To determine whether a state has complied with its obligations under the American Convention, the Court examined the three requirements inferred from Article 22(3)—legality, necessity and proportionality—in order for restrictions to apply to the extent necessary in a democratic society.<sup>335</sup>
259. As for the legality required for restrictions on freedom of movement and residence and the right to leave the country, the Court cited the UN Human Rights Committee which observed that the law itself has to establish the conditions under which those rights may be limited. Restrictions not provided for in the law or not in conformity with the requirements of Article 12, paragraph 3, of the International Covenant on Civil and Political Rights would violate those rights. According to the Committee, in adopting laws providing for permissible restrictions, States should always be guided by the principle that the restrictions must not impair the essence of the right; laws authorizing restrictions should use precise criteria and may not confer unfettered discretion on those charged with their enforcement.<sup>336</sup>
260. The Inter-American Court, for its part, has emphasized the importance of enforcement of the principle of legality when, in a democratic society, a restriction is established on the right to leave a country, given the considerable impact such a restriction has on the exercise of the right to personal liberty. The Court has found that the State must:
1. Spell out, by law and in clear and unambiguous language, the supposed exceptions under which a measure such as a restriction on the right to leave the country would be permissible;<sup>337</sup> and
  2. Ensure that when a restriction is established by law, its regulation has no ambiguities, so as not to leave any room for doubt among those charged with enforcing the restriction, since such ambiguity might allow for abuse or discretion, enabling them to interpret the restriction broadly, which would be particularly undesirable in the

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<sup>335</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 123.

<sup>336</sup> UN, Human Rights Committee, *Freedom of movement (Art.12)*, (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), paras. 12 and 13.

<sup>337</sup> The lack of legal regulation prevents such restrictions from being applied, because neither their purpose nor the specific circumstances under which it is necessary to apply the restriction to comply with some of the objectives indicated in Article 22(3) of the Convention has been defined. *See*, I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 129.

case of measures that severely affect fundamental rights, such as liberty.<sup>338</sup>

261. To meet the second requirement—necessity—the State must be able to offer sufficient evidence to show that the restriction on the right to personal liberty and freedom of movement is reasonable.<sup>339</sup> For example, in order to apply precautionary measures during a criminal proceeding, the State must produce sufficient evidence for one to reasonably suppose the guilt of the defendant and the presence of one of the following situations: a danger that the defendant might abscond; a danger that the defendant might obstruct the investigation; and a danger that the defendant might commit an offense.<sup>340</sup> It should be noted in this regard that the Court has specifically stated that precautionary measures cannot be substitutes for a penalty of imprisonment or serve the purposes of a penalty, as can happen if they continue to be applied when they have ceased to fulfil the functions mentioned above. Otherwise, the application of a precautionary measure affecting a defendant’s personal liberty and freedom of movement would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.<sup>341</sup>
262. As for the third requirement—proportionality—the Court found General Comment No. 27 of the UN Human Rights Committee to be especially relevant, and cited the following:
14. [...] Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.
15. [...] The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.<sup>342</sup>
263. For its part, the Court has written that any restriction on the right to leave the country should be proportionate to the legitimate end sought, so that it is only

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<sup>338</sup> I/A Court H.R., *Baena Ricardo et a v. Panama*. Judgment of February 2, 2001, Series C No. 72. paras. 108 and 115; *Case of Cantoral Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 157; and *Case of Castillo Petruzzi et al.* Judgment of May 30, 1999. Series C No. 52, para. 121.

<sup>339</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 129.

<sup>340</sup> This last requirement is currently in question. I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 129.

<sup>341</sup> I/A Court H.R., *Case of Suárez Rosero*. Judgment of November 12, 1997. Series C No. 35, para. 77.

<sup>342</sup> UN, Human Rights Committee, General Comment No. 27, *Freedom of movement (Art.12)*, (Sixty-seventh session, 1999), *U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999)*, paras. 14 and 15.

enforced when no less restrictive measure is available and for the time strictly necessary to serve its purpose.<sup>343</sup>

264. As for the first dimension of freedom of movement and of residence provided for in Article 22.1, the Commission has addressed the restrictions that prevent the full exercise of this right of every person to reside freely within the territory of Cuba, particularly in Havana city.<sup>344</sup> As of Decree 217 of 1997<sup>345</sup> on internal migration regulations for Havana, restrictions were established to reside freely in that city for people who come from other parts of the country, might try to settle, reside or live permanently in a house located in Havana, or those who come from other municipalities, might try to settle, permanently reside or live in a house located in the municipalities of La Habana Vieja, Centro Habana, Cerro and Diez de Octubre and required them to seek permission to administrative to reside in the capital authorities. The decree in question imposed fines and the obligation to return to the place of origin for those who contravene its provisions.
265. Therefore, those interested in residing in the City of Havana had to apply for permission to permanently reside there. Doing so in violation of the internal rules, exposed Cuban people to fines and deportation to their village. Although not a crime to be in Havana, the implementation of Decree 217 has led the police to arrest and deport Cubans who fail to meet the provisions of the Decree to their cities of origin. If deportation proceeds against a person who has already been deported, it could lead to the application of pre-criminal security measures.
266. In this vein, since its 2012 Annual Report, the Commission has been asking the Cuban government to repeal Decree 217 of 1997 and its complementary provisions, and take all the necessary measures to ensure rights to all persons freely determine their place of residence and freedom of movement within Cuba<sup>346</sup>. In November 2011, in the Official Gazette of Cuba, Decree No. 293 was published, amending the Decree No. 217 "Internal Immigration Regulations for the City of Havana and misdemeanors", whereby the Cuban government partially repeals provisions regarding restrictions to establish residence in Havana.<sup>347</sup>
267. In the *Case of Ricardo Canese v. Paraguay*, the Court had an opportunity to examine the three requirements to determine whether the precautionary measure ordered for the petitioner in the case was in compliance with the American Convention.

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<sup>343</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 133 (with emphasis on the situation of the petitioner in the case, who was subject to a precautionary measure during criminal proceedings against him).

<sup>344</sup> See IACHR, *Annual Report 2012*, Chapter IV, Cuba.

<sup>345</sup> Cabinet Council, *Decree No. 217 of 1997*, April 22nd, 1997.

<sup>346</sup> See IACHR, *Annual Report 2012*, Chapter IV: Human rights development in the region: Cuba, para. 100; IACHR, *Annual Report 2013*, Chapter IV: Human rights development in the region: Cuba, para. 165; IACHR, *Annual Report 2014*, Chapter IV: Human rights development in the region: Cuba, para. 208.

<sup>347</sup> Cabinet Council, *Decree No. 293, repealing Art. 5 of Decree 217*, November 16, 2011. "Article 5. Permanent transfers from people from other provinces to Havana may not be formalized without meeting the requirements stipulated in Article 2 of this decree. This shall not apply to: a) The spouse, children, parents, grandparents, grandchildren and siblings of the holder. b) The minor children of the spouse does not hold. c) Persons declared legally incompetent. d) The household of the person who is assigned a property by state or social interest".

That precautionary measure barred the petitioner from leaving the country and was in effect for over eight years, even though the maximum sentence for the crime with which the defendant was charged was 22 months in prison and a fine of up to two thousand Paraguayan pesos.

268. As for the legality requirement, the Court concluded that no provision in Paraguayan law allowed for this precautionary measure. It concluded, therefore, that the measure did not meet the legality test required for the measure to be compatible with Article 22(3) of the Convention.<sup>348</sup> As for the necessity requirement, the Court did not accept the State's claim that Mr. Canese posed a flight risk because of his defiant behaviour; in fact, Mr. Canese had been permitted to leave the country eight times and had always returned, notifying the court authorities of that fact in writing. The Inter-American Court was of the view that Mr. Canese's actions had indicated that he would not have evaded his criminal liability had the sentence been carried out. Based on these considerations, the Court concluded that the restriction preventing Mr. Canese from leaving the country did not comply with the requirement of necessity in a democratic society, in violation of the provisions of Article 22(3) of the Convention.<sup>349</sup> Nor did the Court agree with the case the State made for the third requirement of proportionality. As the Court wrote, if the sentence against Mr. Canese had been executed, which did not happen because he filed several appeals and was acquitted on December 11, 2002, he would have had to serve a sentence of two months' imprisonment. Regarding the sanction of payment of a fine, Mr. Canese offered personal surety and material surety and provided evidence of his domicile in Paraguay. Therefore, the Court found that the restriction of the right to leave the country and the time during which it was applied were disproportionate to the objective sought.<sup>350</sup> Because the three requirements were not met, the Court concluded that Paraguay had violated Articles 22(2) and 22(3) of the American Convention, to the detriment of Mr. Canese.<sup>351</sup>
269. When analyzing a case concerning an Uruguayan national, the Commission determined that it was in violation of Article VIII of the American Declaration of the Rights and Duties of Man when a State refuses to extend, renew or extend their national valid passport when requested to travel except a judgment or court order prevents it, or to put such conditions or obstacles that actually occur in the mind of the person determining waive the exercise of their right by excessive cost, moral or pecuniary, which would impose the fact pursued by legitimate means passport required to move from one country to another. Currently, the passport is the

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<sup>348</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 128.

<sup>349</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, paras. 130-131.

<sup>350</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 134.

<sup>351</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 135.

quintessential identity when traveling to countries other than the State is national, and in the majority of cases also when he/she returns.<sup>352</sup>

## ***D. The Prohibition against Expelling Nationals and Denying Them Their Right of Return***

270. Article 22(5) of the American Convention provides that “No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.”
271. The first time the Commission addressed exile as a violation of every person’s right to establish his or her residence in the territory of the State of which he or she is a national, to travel freely within it and not to leave that State except of his or her own volition (Article VIII of the American Declaration) was Case 2088, Resolution No. 18/78, *Hipólito Solari Yrigoyen v. Argentina*, approved by the IACHR on November 18, 1978. This case concerned the arbitrary and unlawful detention of Mr. Hipólito Solari Yrigoyen, a former senator and defender of political prisoners during Argentina’s military dictatorship, who was arrested in a military operation conducted on August 17, 1976, then tortured while in custody. He was then exiled from Argentina and denied the right to return. The Commission concluded that because Dr. Solari Yrigoyen was not afforded guarantees for his personal safety, he was obliged to abandon Argentina and was prohibited from returning. The Commission found that these events constituted, *inter alia*, a violation of his right of residence and travel, recognized in Article VIII of the American Declaration.
272. In the ten years that followed Resolution No. 18/78, the Commission decided at least 42 cases similar to that of Dr. Yrigoyen,<sup>353</sup> involving Chile, Argentina, Bolivia, Paraguay, Panama, Guatemala, Uruguay and Haiti (see Table X). In these cases, the Commission found that the State had violated the right to freedom of movement and residence by having forced the victims into exile and having prohibited their return to their countries, or both. Ultimately, the Commission concluded that the victims could not be expelled from their native countries, and rejected the arguments made by the States in question, which in most case were based on supposed national security and/or political grounds. It decided that the victims should be given the permission necessary to return to their countries within the time period set in each case.

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<sup>352</sup> IACHR, Resolution No. 18/83, Case 2711, Juan Raul Ferreira (Uruguay), June 30, 1983, para. 4

<sup>353</sup> In all, the Commission has decided around 40 cases in which it found a violation of the right to freedom of movement and residence as a result of the victims having been forced into exile or being denied their right to return to their countries or both.



### Violations of the right of residence and freedom of movement, 1978-1989

COUNTRY	CASES DECIDED BY THE IACHR	NO. OF CASES	TYPE OF VIOLATION
<b>Argentina</b>	<ol style="list-style-type: none"> <li>1. Resolution No. 18/78, Case 2.088, Hipólito Solari Yrigoyen (Argentina), November 18, 1978.</li> <li>2. Case 2.291, Esteban Cabrera, Eduardo Sotero Franco Venegas and Lidia Esther Cabrera De Franco (Argentina), March 5, 1979.</li> </ol>	2	<p>1 - Forced into exile and prohibited from returning</p> <p>1 - Another situation</p>
<b>Bolivia</b>	<ol style="list-style-type: none"> <li>1. Case 2.760, Vladimir Sattori Benquique (Bolivia), March 7, 1979.</li> <li>2. Case 2.756, Abel Ayoroa Argandoña (Bolivia), March 7, 1979.</li> <li>3. Case 2723, Nicanor Cuchallo Orellana (Bolivia), March 6, 1979</li> <li>4. Case 2.719, Ramón Claire Calvi (Bolivia), March 6, 1979.</li> <li>5. Resolution No. 33/82, Case 7.824, Diego Morales Barrera (Bolivia), March 8, 1982.</li> <li>6. Resolution No. 32/82, Case 7.823, Juan Antonio Solano (Bolivia), March 8, 1982.</li> </ol>	6	<p>4 - Forced into exile</p> <p>2 - Forced into exile and prohibited from returning</p> <p>forced into exile</p>
<b>Chile</b>	<ol style="list-style-type: none"> <li>1. Resolution No. 10/85, Case 8.095, Edgardo Condeza Vaccaro (Chile), March 5, 1985.</li> <li>2. Resolution No. 24/82, Exiles (Chile), March 8, 1982.</li> <li>3. Resolution No. 57/81, Case 4.662, Evelyn Krotoschiner Kleman (Chile), October 16, 1981.</li> </ol> <p style="text-align: center;">↓</p>	25	<p>22 - Prohibited from returning</p> <p>3 - Forced into exile and prohibited from returning</p>



4. Resolution No. 56/81, Case 5.713, Alberto Texier and María Luz Lemus Aranguiz de Texier (Chile), October 16, 1981.
  5. Resolution No. 55/81, Case 4.288, Eugenio Velasco L (Chile), October 16, 1981.
  6. Case 3.548, Armín Sergio Luhr Vicencio (Chile), March 6, 1979.
  7. Case 3.498, Víctor J. Soto Alvarez (Chile), March 6, 1979.
  8. Case 3.446, Inés Carmona Calé (Chile), March 6, 1979.
  9. Case 3.444, Sergio Insunza Becker (Chile), March 6, 1979.
  10. Case 3.443, Inés Conejo C (Chile), March 6, 1979.
  11. Case 3.442, Samuel Riquelme Cruz (Chile), March 6, 1979.
  12. Case 3.441, Carlos Andrade v. (Chile), March 6, 1979.
  13. Case 3.440, Héctor Valeria Labrana (Chile), March 6, 1979.
  14. Case 3.436, Claudio Pedraza and Rosa Amelia Ferrada Díaz (Chile), March 6, 1979.
  15. Case 3.435, Marya Lazo B (Chile), March 6, 1979.
  16. Case 3434, Omar Leal Oyarzún (Chile), March 6, 1979.
  17. Case 3.428, Benjamín Teplizky Lijavetzky (Chile), March 6, 1979.
  18. Case 3.419, Carlos Vassallo Rojas (Chile), March 6, 1979.
  19. Case 3.418, Mireya Baltra (Chile), March 6, 1979.
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	<ol style="list-style-type: none"> <li>20. Case 3.416, Guillermo Torres Gaona (Chile), March 6, 1979.</li> <li>21. Case 3.415, Silvia Angela Costa Espinoza (Chile), March 6, 1979.</li> <li>22. Case 3.414, Régulo Rosson Del Pino (Chile), March 6, 1979.</li> <li>23. Case 3.413, Pedro Rojas Jorquera (Chile), March 6, 1979.</li> <li>24. Case 3.412, Antonio Arévalo Sagredo (Chile), March 6, 1979.</li> <li>25. Case 3.411, Manuel Fernando Ostornol Fernández (Chile), March 6, 1979.</li> </ol>		
<b>Guatemala</b>	<ol style="list-style-type: none"> <li>1. Resolution No. 16/82, Case 7.778, Juan Gerardi (Guatemala), March 9, 1982.</li> <li>2. Resolution No. 30/81, Case 7.378, Carlos Stetter (Guatemala), June 25, 1981.</li> </ol>	2	<p>1 - Forced into exile</p> <p>1 - Prohibited from returning</p>
<b>Haiti</b>	<ol style="list-style-type: none"> <li>1. Resolution No. 20/88, Case 9.855, Nicolás Estiverne (Haiti), March 24, 1988.</li> </ol>	1	<p>1 - Forced into exile and prohibited from returning</p>
<b>Panama</b>	<ol style="list-style-type: none"> <li>1. Resolution No. 40/79, Case 2.777, Thelma King (Panama), March 7, 1979.</li> <li>2. Resolution No. 38/79, Case 2.509, Carlos Ernesto González de la Lastra (Panama), March 7, 1979.</li> </ol>	2	<p>1 - Forced into exile</p> <p>1 - Prohibited from returning</p>
<b>Paraguay</b>	<ol style="list-style-type: none"> <li>1. Resolution No. 5/84, Case 8.027, Augusto Roa Bastos (Paraguay), May 17, 1984.</li> <li>2. Resolution No. 4/84, Case 7.848, Luis Alfonso Resck (Paraguay), May 17, 1984.</li> </ol> <p style="text-align: center;">↓</p>	3	<p>3 - Forced into exile</p>

	3. Resolution No. 3/84, Case 4.563, Domingo Laíno (Paraguay), May 17, 1984.		
<b>Uruguay</b>	1. Resolution No. 18/83, Case 2.711, Juan Raúl Ferreira (Uruguay), June 30, 1983.	1	1 – prohibited from returning
<b>TOTAL</b>	<b>42 cases</b> 9 – Forced into exile 25 – Prohibited from returning 7 – Forced into exile and prohibited from returning 1 – Another situation		

273. In addition to the cases in which exile was either directly ordered or provoked by the State on alleged political or national security grounds, like the cases already noted, it is worth mentioning that exile can also be caused by the actions of non-state actors and by a state’s failure to stop such actions or its complicity. Although the Court has decided such cases on the grounds of Article 22(1) rather than 22(5) of the American Convention, they deserve some discussion in this section.

274. Two cases in particular are illustrative of the phenomenon of expulsion caused by non-state actors –*the Case of Manuel Cepeda Vargas v. Colombia* and the *Case of Valle Jaramillo et al. v. Colombia*.<sup>354</sup> Both cases were brought against the same country and involved extrajudicial executions by non-state actors in connivance with state officials in Colombia, where the victims’ family members ultimately had to go into exile because of the risks to which they were exposed. In both cases, the Court concluded that the Colombian State had violated the right protected under Article 22(1) of the Convention because it had failed to provide the petitioners with the guarantees they needed in order to be able to freely travel and live in their places of origin. The pertinent parts of the cases read as follows:

**a. Case of Manuel Cepeda Vargas**

[I]t is important to underline that, in the context of danger for the safety of Iván Cepeda and Claudia Girón, *the absence of an effective investigation of the extrajudicial execution may contribute to or perpetuate an exile or forced displacement*.<sup>355</sup> In the instant case, the lack of an effective investigation and the identification and prosecution of all the authors of Senator Cepeda’s execution and, in particular, the impunity of the facts, not only undermined the

<sup>354</sup> I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213; *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192.

<sup>355</sup> I/A Court H.R., *Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C, No. 124, para. 120, and I/A Court H.R., *Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No.134, para. 170.

confidence of the next of kin in the Colombian system of justice, but also contributed to the lack of security.

Based on the above, the Court finds that the justified fear for their own safety, linked to the execution of Senator Cepeda Vargas and the failure to identify all those responsible for this act, added to the threats they had received, caused Iván Cepeda Castro and Claudia Girón to go into exile for four years, which constituted a failure to guarantee the right to freedom of movement and residence together with a *de facto* restriction of this right in violation of Article 22 of the Convention, in relation to Article 1(1) thereof, to the detriment of both of them.<sup>356</sup> (emphasis added)

### **b. Valle Jaramillo Case**

Finding themselves away from their own country, without being able or wanting to return home owing to a well-founded fear of persecution arising from the facts of the instant case, Carlos Fernando Jaramillo Correa and his direct nuclear family became refugees. The Court observes that Carlos Fernando Jaramillo Correa and his direct nuclear family found themselves in a vulnerable situation that prevented them from freely exercising their right to freedom of movement and residence, partly because the State did not offer them the guarantees necessary to enable them to move freely and reside in Colombian territory. Furthermore, their status as refugees has ruptured the social fabric that united their family, obliging them to lose contact not only with their country, but also with their affective ties within it. Based on the foregoing, the Court declares that the State is responsible for the violation of the right to freedom of movement and residence established in Article 22(1) of the Convention, in relation to Article 1(1) thereof [...].<sup>357</sup>

275. The Commission has also addressed the prohibition against the expulsion of nationals in cases of individuals with dual citizenship. In its report on the merits in the case of Nelson Iván Serrano Sáenz (Ecuador), an Ecuadorian national was summarily deported to the United States, a country in which he also had citizenship. It stated the following:

Although the Ecuadorian State had alleged in this case that it did not attempt to deprive Mr. Serrano Sáenz of his nationality, the facts demonstrate the contrary. The actions of all the authorities intervening in the detention and summary deportation of Mr. Serrano Sáenz deprived him of an elemental right inherent to nationality: the right to remain in it and not be deported. The

<sup>356</sup> I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, paras. 201-202.

<sup>357</sup> I/A Court H.R., *Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs. Judgment of November 27, 2008, Series C No. 192. paras. 140-141, 144.

arbitrary nature of the authorities to the detriment of the victim is clearly evident, as an Ecuadorian could not be deported and the extradition procedures to be applied to a foreign citizen in the circumstances of this case were not followed. Definitively, a process was applied, which was completely alien to the constitution, the extradition treaty in force between Ecuador and United States, and relevant domestic legislation.<sup>358</sup>

276. In general, the IACHR has concluded that “[t]he liberty of persons includes the liberty of remaining in the country of which the person is a citizen and which constitutes the centre of his professional, family and social life. The expulsion of a citizen by his government, under normal circumstances, is totally excluded by current human rights norms”.<sup>359</sup> Thus, the expulsion of nationals, not as matter of choice, as provided for in some legislations, but imposed on the subject by force, as an act against which there is no recourse whatever, is a violation of the right to residence and movement established in Article VIII of the American Declaration”.<sup>360</sup>

## ***E. The Prohibition against the Collective Expulsion of Aliens***

277. This prohibition appears in subparagraph 9 of Article 22 of the American Convention. The Court has observed that a number of international human rights treaties prohibit the collective expulsion of aliens in terms similar to that of the American Convention.<sup>361</sup>
278. Within the Inter-American Human Rights System, the Court has held that the “collective” nature of an expulsion implies a decision not to undertake an objective analysis of each alien’s individual circumstances and thus becomes an arbitrary decision. The Commission has also observed that collective expulsions are

<sup>358</sup> IACHR, Report No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador), August 6, 2009, paras. 65-68.

<sup>359</sup> IACHR, Resolution No. 3/84, Case 4563, *Domingo Laíno* (Paraguay), May 17, 1984, consideranda 5.

<sup>360</sup> IACHR, Resolution No. 24/82, *Exiles* (Chile), March 8, 1982, para. 5 (background).

<sup>361</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4: “Collective expulsion of aliens is prohibited”; African Charter on Human and Peoples’ Rights, Article 12.5 “*The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups*”; Arab Charter on Human Rights, Article 26.2: “[...] Collective expulsion is prohibited under all circumstances”; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 22.1: “Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.” See also United Nations Human Rights Committee, General Comment No. 15, para. 10: “Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. [...] On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions”; Committee on the Elimination of Racial Discrimination, Concluding Observations on the Dominican Republic, UN DOC. CERD/C/DOM/CO/12, May 16, 2008, para. 13: “The Committee is concerned at information received according to which migrants of Haitian origin, whether documented or undocumented, are allegedly detained and subject to collective deportations (“repatriations”) to Haiti without any guarantee of due process (arts. 5 (a) and 6).”

manifestly contrary to international law<sup>362</sup>. The Rapporteurship on the Rights of Migrant Workers and Their Families has written in this regard that although the international instruments do not contain a specific definition of ‘collective expulsion’, expulsions become collective when the decision to expel is not based on individual cases but on group considerations, even if the group in question is not large. Therefore, given the prohibition established in Article 22(9) of the American Convention, States have an obligation to examine, justify and decide each expulsion or deportation on an individual, case-by-case basis.<sup>363</sup>

279. Since 1991, the IACHR has been following the serious violations of the human rights of Haitian migrants in Dominican territory, specifically on the basis of complaints the Commission received concerning mass expulsions of Haitians or persons considered as such, even though they may have been born on Dominican soil.<sup>364</sup> A delegation from the Commission that visited the Dominican Republic in 1997 pointed out that the human rights violations committed against Haitian migrants continued, specifically in the context of the mass expulsions of Haitians and Dominican-Haitians. In its report, it wrote the following:

The Commission also expresses its concern over the massive expulsions of Haitian workers. Collective expulsions are a flagrant violation of international law that shocks the conscience of all humankind. Individual expulsions should be carried out in accordance with procedures that offer a means of defence that is in line with the minimal rules of justice, and that prevent errors and abuses.<sup>365</sup>

280. In 2012, in the *Case of Nadege Dorzema et al. v. Dominican Republic*, the Court established that a proceeding that may result in expulsion or deportation of an alien, must be individual, so as to evaluate the personal circumstances of each subject and comply with the prohibition of collective expulsions.<sup>366</sup> The Court also held that “the sheer number of aliens subject to expulsion decisions is not the essential criterion for characterizing an expulsion as collective”.<sup>367</sup> The *Case of Nadege Dorzema et al. v. Dominican Republic* concerned a group of 30 Haitian migrants who crossed the border with the Dominican Republic in June 2000. Because the pickup carrying them did not stop at a border checkpoint, the authorities went in pursuit and fired shots at the truck, killing some of the

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<sup>362</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of Their Families in the Hemisphere*, para. 97.5.

<sup>363</sup> IACHR, Report on the Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic). March 29, 2012, para. 253.

<sup>364</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights*, 1991. OEA/Ser.L/V/II.81 Doc. 6 rev. 1, February 14, 1992. Chapter V: Situation of Haitians in the Dominican Republic.

<sup>365</sup> IACHR, *Report on the Situation of Human Rights in the Dominican Republic*. OEA/Ser.L/V/II.104 Doc. 49 rev. 1, October 7, 1999, para. 366.

<sup>366</sup> I/A Court HR., *Case of Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, para. 175.

<sup>367</sup> I/A Court HR., *Case of Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, (citing *Hirsi Jamaa v. Italy* No. 27765/09. February 23<sup>rd</sup>, 2012, para. 184).

migrants and injuring others. Later, the Dominican State collectively deported nine of the survivors. State agents took them to the border and left them at the border town called Ouanaminthe in Haiti.

281. In its judgment, the Court found that the State did not prove that there were reasons to expel the Haitian migrants from Dominican territory without a formal procedure that observed the individual guarantees of each of these persons.<sup>368</sup> The Court therefore concluded that the Dominican Republic did not observe “the requirements established in both Dominican law and the Protocol of Understanding between Haiti and the Dominican Republic, as well as in international law” regarding the individualization of the deportation proceeding.
282. The Court therefore held that the State treated the migrants as a group, without individualizing them or providing them with differential treatment as human beings and taking into consideration their eventual needs for protection. For the Court, this was a collective expulsion in violation of Article 22(9) of the American Convention on Human Rights, in relation to the obligation to respect rights established in Article 1(1) thereof.<sup>369</sup>
283. Similarly, in 2014, in the *Case of Expelled Dominicans and Haitians v. Dominican Republic*, the Court reiterated this finding where it noted “the existence in the Dominican Republic [...] of a systematic pattern of expulsions of Haitians and persons of Haitian descent, including through collective actions or procedures that did not involve an individualized analysis, that were based on a discriminatory concept”.<sup>370</sup>

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<sup>368</sup> I/A Court HR., *Case of Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, para. 151.

<sup>369</sup> I/A Court HR., *Case of Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C, No. 251, para. 178.

<sup>370</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 171.

CHAPTER 7  
THE RIGHT TO A FAIR TRIAL IN  
DEPORTATION OR EXTRADITION  
PROCEEDINGS





## THE RIGHT TO A FAIR TRIAL IN DEPORTATION OR EXTRADITION PROCEEDINGS

284. All judicial or administrative proceedings that may affect a person's rights must observe the guarantees of due process, to enable an adequate defense against any decision emanating from the States.<sup>371</sup> Inter-American case law has emphatically stated that immigration proceedings must be conducted in accordance with fair-trial guarantees,<sup>372</sup> regardless of whether the status of the migrants concerned is regular or irregular.
285. The various scenarios that international migration entails place migrants in different judicial and administrative processes that have direct implications for the guarantee and exercise of their human rights. The Commission has noted that such processes go from immigration procedures upon entering a country, upon applying for residence or regularization and, in particular, in expulsion or deportation proceedings, to those designed to settle disputes over labor and social security rights,<sup>373</sup> or that have to do with access to economic, social, and cultural rights. Likewise, there are criminal proceedings in which migrants may appear as victims, witnesses, or defendants, or those that may result in their extradition to another country.
286. A frequent characteristic of such proceedings is a high degree of arbitrariness on the part of the States, against which migrants have only a minimal response capacity, if at all. Often these procedures have many obstacles, of both the *de jure* and the *de facto* variety, which prevent migrants from exercising their rights on the same footing as nationals. In turn, those obstacles lay bare the real inequality that migrants encounter.

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<sup>371</sup> See, *inter alia*, I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27; and I/A Court H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 69.

<sup>372</sup> See, *inter alia*, IACHR, Report on Merits No. 78/11, Caso 12.586, *John Doe et al.* (Canada). July 21, 2011, para. 116; IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, paras. 5 and 63; IACHR, Report on Merits No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador). August 6, 2009, para. 61; IACHR, Report on the Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States). July 25, 2008, paras. 78 and 83; IACHR, Report on Admissibility No. 64/08, Case 11.691 *Raghda Habbal and son* (Argentina). July 25, 2008, para. 54; IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 56 and 58; IACHR, *Report on Terrorism and Human Rights*, para. 401. Within the case-law of the Inter-American Court, see: I/A Court H.R., *Case of Vélez Loo v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, paras. 141 and 142.

<sup>373</sup> See, in that regard, IACHR, Report on Admissibility No. 134/11, Petition 1190-06, *Undocumented Migrant Workers* (United States). October 20, 2011.

## A. *General Guarantees*

287. The American Convention recognizes the guarantees of due process at Article 8 (1) and (2). According to those provisions:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
  - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;
  - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
  - e. the inalienable right to be assisted by counsel provided by the States, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
  - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
  - g. the right not to be compelled to be a witness against himself or to plead guilty; and
  - h. the right to appeal the judgment to a higher court.

288. The Commission and the Court have developed a rich body of case-law regarding the scope of the guarantees of due process. The following are a number of principles developed by those organs that are relevant with respect to migrants. To begin with, the Commission believes it important to recall what the Inter-American Court said in its Advisory Opinion OC-18/03 on the “Juridical Condition and Rights of the Undocumented Migrants” regarding the relationship between the

right to equality and nondiscrimination and due process for migrants in an irregular situation:

[...] for “the due process of law” a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. 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.<sup>374</sup>

289. Thus, Article 8 of the American Convention enshrines the general guidelines of due process or the right to mount a defense.<sup>375</sup> Both the Commission and the Inter-American Court have been emphatic that the guarantees of due process apply to all situations in which a determination is made on a person’s rights,<sup>376</sup> including migrants, irrespective of their immigration status.<sup>377</sup>

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<sup>374</sup> 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. 121.

<sup>375</sup> I/A Court H.R., *Genie Lacayo Case v. Nicaragua*. Judgment of January 29, 1997. Series C No. 30, para. 74.

<sup>376</sup> See, *inter alia*, I/A Court H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 68; I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72; I/A Court H.R., *Ivcher Bronstein Case v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74; I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005. Series C No. 125, para. 62; I/A Court H.R., *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C No. 146, para. 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, paras. 108 and 142-143.

<sup>377</sup> 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. 127 and 129; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paras. 121 and 122; and *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010, Series C No. 218, para. 143. As regards the Commission, see IACHR, Report on Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II. Doc. 78/10. December 30, 2010, para. 58. Citing IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 90. In that same regard, see IACHR, Report on Merits No. 78/11, Caso 12.586, *John Doe et al.* (Canada). July 21, 2011, para. 116; IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, paras. 51; IACHR, Report on Merits No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador). August 6, 2009, para. 61; IACHR, Report on the Admissibility and Merits No. 63/08. Case 12.534, *Andrea Mortlock* (United States). July 25, 2008, paras. 78 and 83; IACHR, Report on Admissibility No. 64/08, Case 11.691 *Raghda Habbal and son* (Argentina). July 25, 2008, para. 54; IACHR, Report on Merits No. 49/99,

290. The Court's interpretation of the above provision has meant that those guarantees are not restricted only to judicial remedies, but apply also to all decisions by any public authority, whether administrative, legislative, or judicial, that might have an impact on a person's human rights.<sup>378</sup> The relevance of the above to immigration proceedings increased following the judgment of the Inter-American Court in the *Case of Vélez Loor v. Panamá*, in which it held that “the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. This implies that the States must ensure every foreign person, even when said person is a migrant in an irregular situation, may exercise his or her rights and defend his or her interests effectively and in full procedural equality with other triable individuals”.<sup>379</sup>
291. In the *Case of Expelled Dominicans and Haitians v. Dominican Republic*, which concerns the arbitrary detention and summary expulsion from the Dominican Republic of the alleged victims—who were Haitians and Dominicans of Haitian descent, including children—without following the expulsion procedure established by domestic law, the Inter-American Court ruled once more on standards connected with expulsion proceedings.
292. In first place, the Court recalled in relation to immigration matters that in the exercise of [their] authority to establish immigration policies, States may establish mechanisms to control the entry into and departure from [their] territory of non-nationals, provided that these policies are compatible with the norms for the protection of the human rights established in the American Convention.<sup>380</sup> In other words, even though States have a margin of discretion when determining their immigration policies, the objectives sought by such policies must respect the human rights of migrants.<sup>381</sup>
293. In that regard, it should be noted that international human rights protection standards and organs all envisage minimum guarantees applicable to proceedings of this type. Thus, for example, in the universal system for protection of human

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Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 46.

<sup>378</sup> See I/A Court H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 71; I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72, para. 127; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C No. 146, para. 82; and I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005. Series C No. 125, para. 62.

<sup>379</sup> 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.

<sup>380</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 350; *Juridical Condition and Rights of the Undocumented Migrants*. OC-18/03, para. 163, and 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.

<sup>381</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 350; *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 168; 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, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 39.

rights, Article 13 of the International Covenant on Civil and Political Rights provides that:

An alien lawfully in the territory of a States Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

294. For its part, the United Nations Human Rights Committee, upon interpreting that provision, determined that “[t]he particular rights of Article 13 only protect those aliens who are lawfully in the territory of a States party. [...] However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13”.<sup>382</sup>
295. As regards proceedings and measures that affect fundamental rights, such as personal liberty, and that may result in expulsion or deportation, the Court has held that “the States cannot issue administrative orders or adopt judicial decisions without respecting specific basic guarantees, the content of which is substantially the same as those established in paragraph 2 of Article 8 of the Convention.”<sup>383</sup>
296. In turn, it is worth recalling what the Court held in its Advisory Opinion on the Juridical Condition and Human Rights of the Child, where it held that

[t]he guarantees set forth in Articles 8 and 25 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in Article 19, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.<sup>384</sup>

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<sup>382</sup> UN Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant. Adopted at the Twenty-seventh session of the Human Rights Committee, on 11 April 1986 9.

<sup>383</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, para. 132. See also, 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. 157, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 112; I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 358.

<sup>384</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 95.

297. In keeping with the above, the Court has held that to accomplish its objectives:

the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. 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.<sup>385</sup>

298. In the case of children, exercise of those procedural rights and corollary guarantees requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.<sup>386</sup> This is especially relevant in proceedings that involve child migrants, such as those of detention, expulsion, or determination of refugee status, or due to their condition as victims of trafficking in persons, among others. In order to provide effective protection for the rights of child migrants in immigration proceedings the guarantees of due process should combine the specific standards for protection of migrants with the special measures of protection that children require.

299. A harmonious interpretation of the right of child migrants to due process guarantees requires that the children be protected, taking into account their inherent dignity as human beings and their level of maturity and vulnerability, for which purpose special measures of protection must be adopted. As the Court has held, the adoption of special measures of protection “enables adequate development of due process, reduces and adequately limits its discretion, in accordance with criteria of relevance and rationality.” This added obligation to provide protection<sup>387</sup> and these special duties should be regarded as determinable based on the needs of the child as a person with rights.<sup>388</sup> As a corollary of the above, all immigration proceedings in which a child migrant or one of their parents is caught up should seek to safeguard the principle of the best interests of the child and that of family unity, on the understanding that the decision adopted should never be punitive in nature. Throughout the procedure, the child must be assisted by advocates specialized in childhood.

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<sup>385</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 119.

<sup>386</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 98.

<sup>387</sup> I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.) v. Guatemala*. Judgment of November 19, 1999. Series C No. 63, paras. 146 and 191; I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18 2003. Series C No. 100, paras. 126 and 134; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*. Judgment of July 8, 2004. Series C No. 110, paras. 124, 163-164 and 171; I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Judgment of September 2, 2004. Series C No. 112, para. 160; and I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005. Series C No. 125, para. 172. In that regard, see I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

<sup>388</sup> I/A Court H.R., *Case of the Indigenous Community Sawhoyamaya v. Paraguay*. Judgment of March 29, 2006, para. 154.



## B. *Minimum due Process Guarantees in Immigration Proceedings*

300. Aside from the general guarantees applicable to all proceedings, Article 8(2) of the American Convention affords a series of minimum fair trial guarantees. Although the provision recognizes these minimum guarantees as applying to criminal proceedings, in an evolutive interpretation, the Inter-American Court, has widened its scope of application to proceedings outside the criminal sphere that concern the determination of rights and obligations of a civil, labor, fiscal or any other nature.<sup>389</sup>
301. Since its *Advisory Opinion on Exceptions to the Exhaustion of Domestic Remedies*, the Court has held that the minimum guarantees established in Article 8(2) of the Convention also apply to matters that concern the determination of a person's rights and obligations of a civil, labor, fiscal, or any other nature,<sup>390</sup> particularly those of a punitive character,<sup>391</sup> a category into which proceedings to establish a person's migratory status clearly fall.<sup>392</sup> The Commission has written that in proceedings that may result in a person's expulsion or deportation, fundamental rights are at stake, which necessitates the most expansive interpretation possible of the right to due process.<sup>393</sup>
302. As regards immigration proceedings, the Commission has examined situations and cases in which migrants have been reported without being given a hearing, notice of the charges on which they were being deported, or the opportunity to contest them. In other instances, deportations had been carried out in the context of summary criminal or administrative proceedings, which prevented the migrants from having access to an effective judicial remedy to determine whether or not

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<sup>389</sup> See, *inter alia*, I/A Court H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 70; I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72, para. 125; I/A Court H.R., *Ivcher Bronstein Case v. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 103; and 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.

<sup>390</sup> I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28.

<sup>391</sup> IACHR, Application to the Inter-American Court of Human Rights, Case 12.581, *Jesús Tranquilino Vélez Loor* (Republic of Panama). October 8, 2009, para. 73; and I/A Court H.R., *Ivcher Bronstein Case v. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 103.

<sup>392</sup> IACHR, Report on Merits No. 78/11, *Caso 12.586, John Doe et al.* (Canada). July 21, 2011, para. 116; IACHR, Report on Merits No. 81/10, *Case 12.562, Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, paras. 5 and 63; IACHR, Report on Merits No. 84/09, *Case 12.525, Nelson Iván Serrano Sáenz* (Ecuador). August 6, 2009, para. 61; IACHR, Report on the Admissibility and Merits No. 63/08, *Case 12.534, Andrea Mortlock* (United States). July 25, 2008, paras. 78 and 83; IACHR, Report on Admissibility No. 64/08, *Case 11.691 Raghda Habbal and son* (Argentina). July 25, 2008, para. 54; IACHR, Report on Merits No. 49/99, *Case 11.610, Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 56 and 58; IACHR, *Report on Terrorism and Human Rights*, para. 401. Within the case-law of the Inter-American Court, see I/A Court H.R., *Case of Vélez Loor v. Panama*. Judgment of November 23, 2010, Series C No. 218, paras. 141 and 142.

<sup>393</sup> IACHR, Report No. 49/99, *Case 11.610. Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, para. 70.



they had a right to stay in the country. The Commission has held that such situations constitute a violation of Articles 8 and 25 of the American Convention insofar as they entail a violation of the standards of legal due process.<sup>394</sup>

303. In that regard, the Commission agrees with the United Nations Working Group on Arbitrary Detentions, which has established that “in cases where individuals have been detained, expelled or returned without having been afforded judicial guarantees, their detention and later expulsion shall be considered arbitrary”.<sup>395</sup> In addition, the African Commission on Human and Peoples’ Rights has consistently maintained that the due process guarantees must be observed in proceedings that may result in the deportation of migrants and refugees.<sup>396</sup>
304. For its part, in its *Draft article on the protection of the human rights of persons who have been or are being expelled*, the International Law Commission has stated that such persons must receive the following procedural guarantees: (a) basic detention conditions during the proceedings; (b) the right to receive notice of the expulsion decision; (c) the right to challenge the expulsion decision; (d) the right to be heard by a competent authority; (e) the right to be represented before the competent authority; (f) the right to have the free assistance of an interpreter, and (g) the right to consular assistance.<sup>397</sup>
305. In addition to the above, the *Report on Immigration in the United States: Detention and Due Process* summarizes the other due-process guarantees that in the Commission’s view should be a part of all immigration proceedings. Regarding this matter, the Commission considers that:

[d]uring any proceeding that can result in a penalty of any kind, all persons are equally entitled to the following minimum guarantees: the right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal; prior notification in detail to the accused of the charges against him; the right not to be compelled to be a witness against oneself or to plead guilty; the right of the accused to be assisted without charge by a translator or interpreter; the right of the accused to be assisted by

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<sup>394</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 46-82.

<sup>395</sup> Working Group on Arbitrary Detention. Conclusions and Recommendations, E/CN.4/2004/3, 15 December 2003, para. 86.

<sup>396</sup> For more information see, *inter alia*, African Commission on Human and Peoples’ Rights, Comunicación 313/05 – *Kenneth Good v. Republic of Botswana*, 47th regular session, May 12 to 26, 2010, paras. 160-180; and African Commission on Human and Peoples’ Rights Communications 27/89, 46/91, 49/91, 99/93 - *Organisation Mondiale Contre La Torture and Association Internationale des Juristes Democrates*), *Commission Internationale des Juristes (CIJ)*, *Union Interafricaine des Droits de l’Homme v. Rwanda*, 20th regular session, October 1996, p. 4.

<sup>397</sup> International Law Commission. Expulsion of aliens: Text and titles of draft articles 1 to 32 provisionally adopted on first reading by the Drafting Committee at the sixty-fourth session, A/CN.4/L.797, 24 May 2012, Articles 19 and 26. See, 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. 163; I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013.

legal counsel of his own choosing, and to communicate freely and privately with his counsel; the right of the defense to examine witnesses present in the court and to obtain their appearance as witnesses, experts or other persons who may throw light on the facts; and the right to appeal the judgment to a higher court. While many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences.<sup>398</sup>

306. Based on the above standards and the obligations associated with the right to a fair trial in the framework of immigration proceedings that may result in an expulsion or deportation, in the *Case of Expelled Dominicans and Haitians v. Dominican Republic*, the Inter-American Court considered that:

proceedings that may result in the expulsion of an alien must be individualized, in order to evaluate the personal circumstances of each individual and to comply with the prohibition of collective expulsions. Also, these proceedings must not discriminate for reasons of nationality, color, race, sex, language, religion, political opinion, social origin, or other condition, and the persons subject to them must have the following basic guarantees: (a) to be informed expressly and formally of the charges against them and the reasons for the expulsion or deportation. This notice must include information on their rights, such as: (i) the possibility of explaining their reasons and contesting the charges against them, and (ii) the possibility of requesting and receiving consular assistance, legal advice and, if appropriate, translation or interpretation services; (b) if an unfavorable decision is taken, the right to request a review of their case before the competent authority and to appear before this authority in that regard, and (c) to receive formal legal notice of the eventual expulsion decision, which must be duly reasoned pursuant to the law.<sup>399</sup>

307. An analysis of inter-American jurisprudence and the thematic reports prepared by the Commission in this area leads to the conclusion that immigration proceedings should offer, *inter alia*, the following minimum procedural guarantees:
1. The right to prior notification in detail of the procedure for determining their legal status and, in the case of anyone who is detained, to be informed of the reasons for their detention and to be promptly notified of the charge or charges against them.

<sup>398</sup> IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 57.

<sup>399</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 356.

308. With regard to this guarantee, the Commission has concluded that the failure to notify a migrant of the existence of an administrative proceeding against them could result in a violation of the guarantees of due process.<sup>400</sup> The Commission has held that any deprivation of an individual's liberty must be informed by the norms prescribed under Article XXV of the Declaration and, *mutatis mutandis*, Article 7 of the American Convention.<sup>401</sup>
2. The right of any person detained to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to a trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. Their release may be subject to guarantees to assure his appearance for trial.
309. In *Vélez Loor v. Panama*, which makes reference to the detention of the victim for entering the country irregularly, the Court found that "in order to satisfy the requirement of Article 7(5) of "being brought" without delay before a judge or other officer authorized by law to carry out the judicial functions, the competent authority must hear the detained person personally and evaluate all the explanations that the latter provides, in order to decide whether to proceed to release him or to maintain the deprivation of liberty".<sup>402</sup>
3. The right to a hearing without delay, to adequate time and means for the preparation of their defense, and to meet freely and privately with their counsel.
310. This obligation requires that the States treat the person at all times as a true party to the proceeding, in the broadest sense of this concept, and not simply as an object thereof.<sup>403</sup> In general, migrants must have and be able effectively to exercise the right to be heard in order to present such arguments as they deem appropriate and so defend their rights in proceedings of a punitive nature, such as those that may result in their expulsion or deportation.<sup>404</sup> In that connection, the Commission has held that the right to submit arguments against deportation is even prior to the right to have a decision revised; for that reason, the person concerned must be given a chance to cull evidence or other material with which to substantiate his case before the authority that deprived him of his liberty, or at the start of the proceedings.<sup>405</sup> Based on the foregoing, summary deportation proceedings or so-

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<sup>400</sup> In that connection, see IACHR, Report on Admissibility No. 09/05, Petition 1/03, *Elias Gattas Sahih* (Ecuador), February 2, 2005.

<sup>401</sup> IACHR, Report on Admissibility and Merits No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001, para. 210.

<sup>402</sup> 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. 109.

<sup>403</sup> 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. 145. Citing I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 29.

<sup>404</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 99B.

<sup>405</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 55; IACHR, Report on Admissibility No. 68/05, Case 11.495, *Juan Chamorro Quiroz* (Costa Rica). October 5, 2000, paras. 32-36.

called direct-back policies run counter to the guarantees of due process as they deprive migrants, asylum seekers, or refugees the right to a hearing,<sup>406</sup> to defend their rights adequately, and to challenge their expulsion.<sup>407</sup>

311. The Commission has referred to the need to ensure that persons are able to prepare their defense, present arguments, and offer pertinent evidence, which guarantees are impossible to exercise when the government's decision is carried out in an unreasonably short time.<sup>408</sup> In turn, this right includes the right of the defense to examine witnesses and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.
312. In the case of child migrants, and particularly in the case of those who are unaccompanied or separated from their family, the right to be heard is especially relevant. Furthermore, any statement by a child must be subject to the corresponding procedural measures of protection, including the possibility of not making a statement, the assistance of legal counsel, and making the statement before the authority legally authorized to receive it.<sup>409</sup> In this regard, in order to ensure the right to be heard, States must guarantee that the proceedings are conducted in an environment that is not intimidating, hostile, insensitive, or inappropriate to the child's age, and that the staff responsible for receiving the declaration are appropriately trained,<sup>410</sup> so that the child feels respected and safe when expressing her or his views in an appropriate physical, mental, and emotional environment.<sup>411</sup>
4. The right that immigration proceedings are conducted by a competent, independent, and impartial adjudicator.
313. Decisions in the area of migration cannot be left to non-specialized administrative or police officials. Administrative or judicial officials responsible for such decisions must be accountable before the law, to superiors and to any horizontal control bodies charged with reviewing decisions. The process of appointing an adjudicator and the status of the office within the administrative structure of the States must guarantee impartiality and protection against any possible pressure or influence,

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<sup>406</sup> In this regard, see IACHR, Report on Merits No. 78/11, Caso 12.586, *John Doe et al.* (Canada). July 21, 2011, para. 116.

<sup>407</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction* (United States), March 13, 1997, para. 180.

<sup>408</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 60; IACHR, Report on Merits No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador). August 6, 2009, paras. 61 and 62.

<sup>409</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 129.

<sup>410</sup> Committee on the Rights of the Child, General Comment No. 12: *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 34.

<sup>411</sup> 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. 123.

and they must act strictly in accordance with the law<sup>412</sup>. The Inter-American Court has ruled that:

when the Convention refers to the right of everyone to be heard by a competent judge or court to “determine his rights”, this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations. For that reason, this Court considers that any States organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.<sup>413</sup>

314. In its Advisory Opinion OC-21/14 the Court stated that:

“[i]n the case of child migrants, this extends to every kind of procedure that involves them. For this reason, trained personnel are needed to communicate [to] the child, according to her or his cognitive development, that her or his case is being subjected to administrative or judicial determination. This will ensure that the child can exercise the right to defense; in the sense that the child can understand the proceedings taking place and can contribute with her or his opinions as deemed pertinent”.<sup>414</sup>

5. The right to be assisted without charge by a translator or interpreter.

315. An immigrant, whatever his legal status, must be able to understand the proceedings he is involved in and all the procedural rights he is entitled to. Thus, translation and interpretation in his language must be made available as necessary.<sup>415</sup> For its part, the Court considers that:

To be able to guarantee the right to be heard, States must ensure that every child may be assisted by a translator or interpreter if she or he does not understand or does not speak the language of the decision-maker. In this regard, the assistance of a translator or interpreter shall be considered a basic and essential procedural guarantee in order to comply with the child’s right to be heard and

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<sup>412</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 99.

<sup>413</sup> I/A Court H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 104.

<sup>414</sup> 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. 117.

<sup>415</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 99.C.

to ensure that its best interest constitutes a paramount consideration. To the contrary, the child's effective participation in the proceedings becomes illusory.<sup>416</sup>

6. The right to be assisted by legal counsel.

316. Migrants in immigration proceedings must have the opportunity to be represented by an attorney of their choosing or other qualified persons. Furthermore, some form of specialized advice on migrants' rights should be available to all the interested parties.<sup>417</sup> With respect to cases concerning non-criminal procedures, the Tribunal has previously established that "the circumstances of a particular case or proceeding—its significance, its legal character, and its context in a particular legal system—are among the factors that bear on the determination of whether legal representation is or is not necessary for due process".<sup>418</sup> The Court has also held that the right to a fair trial and judicial protection is violated when migrants are denied the services of a public defender free of charge, which prevents them from asserting their rights in question.<sup>419</sup>
317. In Advisory opinion OC-21/14, the Court stipulated that this type of legal assistance must be specialized, as regards both the rights of the migrant and,<sup>420</sup> specifically, as regards age, in order to guarantee true access to justice to the child migrant and to ensure that the child's best interest prevails in every decision that concerns the child.<sup>421</sup>

7. The right that the decision adopted is duly reasoned.

318. The organs of the Inter-American System have long emphasized that the duty to state reasons for its decisions is part of the right to a hearing "with due

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<sup>416</sup> 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. 124.

<sup>417</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 99.D.

<sup>418</sup> 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. 145. *Cf. Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28.

<sup>419</sup> I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 126.

<sup>420</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 99.d.

<sup>421</sup> 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. 131.

guarantees.” In that regard, the Court has found that cause is “the reasoned justification that permits a conclusion to be made”.<sup>422</sup> In the words of the Court:

The obligation to provide cause in the resolutions is a guarantee associated with the proper administration of justice, which protects the right of citizens to be tried for the reasons that the law provides, and grants credibility to the legal decisions within the framework of a democratic society.<sup>423</sup> Therefore, decisions adopted by domestic bodies that could affect human rights should be properly grounded, otherwise they would be arbitrary decisions.<sup>424</sup> In that sense, the justification for a ruling and certain administrative decisions should disclose the facts, reasons and standards on which the authority for the decision was based, in order to rule out any suggestion of arbitrariness.<sup>425</sup> Moreover, it must also show that it has duly taken into account the arguments of the parties and that the evidence has been analyzed. Therefore, the duty to provide cause is one of the “due guarantees” included in Article 8(1) to safeguard the right to a fair trial.<sup>426</sup>

319. Consequently, and particularly in the case of children, the decision must explain in detail the way in which the opinions expressed by the child were taken into account and also the way in which her or his best interest was assessed.<sup>427</sup>

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<sup>422</sup> I/A Court H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 141; *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 6, 2009. Series C No. 200, para. 208; and I/A Court H.R., *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 118.

<sup>423</sup> I/A Court H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 141. Citing *Cf. I/A Court H.R., Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 77. The European Court of Human Rights found as much in the case of *Case of Suominen v. Finland*, where it held that “according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately State the reasons on which they are based.” *Cf. European Court of Human Rights. Suominen v. Finland* Application no. 37801/97, 1 July 2003, § 34.

<sup>424</sup> I/A Court H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 141. Citing I/A Court H.R., *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, paras. 152 and 153. Likewise, the European Court has held that judges should State the reasons on which their decisions are based with sufficient clarity. *Cf. European Court of Human Rights, Hadjianastassiou v. Greece*. Judgment of 16 December 1992, Series A no. 252, § 23.

<sup>425</sup> I/A Court H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 141. Citing I/A Court H.R., *Case of Claude-Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 122.

<sup>426</sup> I/A Court H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 141.

<sup>427</sup> 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. 139.



8. The right to be notified of the decision adopted in the proceeding.
320. In *Vélez Loor v. Panama*, the Inter American Court stressed the importance of the decision's notification for exercising the right to the guarantees of due process. In that regard, the Court found that “the lack of notification constitute[d], *per se*, a violation of Article 8 of the Convention, given that it placed Mr. Vélez Loor in a situation of uncertainty regarding his legal situation and made the exercise of the right to appeal a judgment unfeasible”.<sup>428</sup>
9. The right to appeal the decision before a higher court, with suspensive effect.
321. Both the Commission and the Inter-American Court have recognized the scope of the right to appeal all decisions of a punitive nature, as those that are adopted in the context of immigration proceedings usually are.<sup>429</sup> In that connection, the Commission has stated that the effectiveness of the remedy is closely tied to the scope of the review.
322. Upon analyzing the right to judicial protection, the Commission has been emphatic that this right is not limited to persons accused of crimes. More specifically, the Commission has indicated that the summary interdiction and repatriation of migrants and asylum seekers on the high seas or, in general, where the authorities of another States exercise jurisdiction, violate the rights of those persons to have recourse to the courts in order to protect their rights, given that such operations deprive migrants and asylum seekers the possibility of upholding and defending their rights in a court of justice.<sup>430</sup> For its part, the Court has deemed that “review by a judge or court is a fundamental requirement to guarantee an adequate control and scrutiny of the administrative acts that affect fundamental rights”.<sup>431</sup>
323. The Commission considers it relevant to note that in order to ensure that the right to file an appeal with a judicial authority and to judicial protection are effective, the judicial remedy by which a migratory decision is contested must have suspensive effect, so that if a deportation order is involved, this must be suspended until the court with which the appeal was filed has issued a judicial ruling.<sup>432</sup> Only in this way can the rights of migrants be truly protected. In most cases, once deportation

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<sup>428</sup> 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. 180.

<sup>429</sup> In this regard, see IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 81-82; IACHR, Report No. 84/09; Case 12.525, Nelson Iván Serrano Sáenz (Ecuador), August 6, 2009, para. 61. As regards the Court, see 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.

<sup>430</sup> IACHR, Report on Merits No. 51/96, Case 10.675 – *Haitian Interdiction* (United States), March 13, 1997, para. 180.

<sup>431</sup> 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. 126.

<sup>432</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012; IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia), October 31, 2011; European Court of Human Rights. *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 293.



has taken place, the migrants' lack of economic resources or legal assistance are insurmountable obstacles against their access to justice.

324. For its part, the Court has underscored that this right has special relevance in cases in which children consider that they have not been duly heard or that their views have not been taken into consideration. Thus, the review body must permit, among other matters, ascertaining whether the decision gave due weight to the principle of the best interest of the child.<sup>433</sup>

10. The right to information and effective access to consular assistance.

325. In addition to the above minimum guarantees of due process recognized in Articles 8(1) and 8(2) of the Convention, the case law of the inter-American human rights system considers that foreign nationals are entitled during criminal and administrative proceedings to communicate without delay with their consular representative in accordance with the provisions set down in Article 36 of the Vienna Convention on Consular Relations.<sup>434</sup> The reason for this is that consular assistance is a means for the defense of the accused that has repercussions—sometimes decisive repercussions—on enforcement of the accused's other procedural rights. This right is particularly important for migrants who are in detention, whether pending criminal or immigration proceedings.

326. The Commission considers that compliance with the rights of a foreign national under the Vienna Convention on Consular Relations is particularly relevant to determining whether a States has complied with the provisions of the American Declaration and the American Convention pertaining to the right to due process and to a fair trial as they apply to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that States.<sup>435</sup>

327. The Commission considers that these protections, in turn, are of such a nature that, in the absence of access to consular assistance, a foreign national may be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a States. This could arise, for example, by virtue of the foreign national's inability to speak the language of the States, a lack of familiarity with its legal system, or an inability to gather relevant information, such as mitigating evidence, from his or her home country. Disadvantages of this nature could in turn undermine the effectiveness of the foreign national's due process rights to, for example, understand the charges against him and to adequately prepare his or her defense. It is also apparent that access to consular assistance could potentially mitigate such disadvantages by such means as the provision of linguistic and legal

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<sup>433</sup> 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. 141.

<sup>434</sup> 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.

<sup>435</sup> IACHR, Report on Merits No. 52/02, Case 11.753, *Ramón Martínez Villareal* (United States), October 10, 2002, para. 62.

assistance as well as the identification and collection of pertinent information from the defendant's States of nationality.<sup>436</sup>

328. The Commission has decided multiple cases in which it concluded that it was appropriate to examine compliance by a States party to the Vienna Convention on Consular Relations with the requirements under Article 36 of that treaty upon interpreting and applying the provisions of the American Declaration to a foreign citizen arrested, committed to prison or custody pending trial, or detained in any other way by that States, and particularly seriously in relation to those sentenced to capital punishment. In such cases, which have mostly been against the United States, the Commission determined that the States' obligation under Article 36(1) of the Vienna Convention on Consular Relations to inform the petitioners of their right to consular notification and assistance constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration. Therefore, the States' failure to respect and ensure this obligation deprived them of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.<sup>437</sup>
329. In its Advisory Opinion OC-16/99 on the right to information on consular assistance in the framework of the guarantees of due process, the Court held that the right to consular protection materializes in four different forms:
- a. consular information, understood as “[t]he right *of a national of the sending States* who is arrested or committed to prison or to custody pending trial or is detained in any other manner, to be informed “without delay” that he has the following rights: the right to have the consular post informed, and the right to have any communication addressed to the consular post forwarded without delay (Article 36(1)(b) of the Vienna Convention on Consular Relations);
  - b. the right to consular notification, understood as “the right *of the national of the sending States* to request and obtain that the competent authorities of the host States notify the consular post of the sending States, without delay, of his arrest, imprisonment, custody or detention”;
  - c. the right of consular assistance, understood as “[t]he right *of the consular authorities of the sending States* to provide assistance to their nationals (articles 5 and 36(1)(c) of the Vienna Convention on Consular Relations”); and
  - d. the right of consular communication, understood as “[t]he right *of the consular authorities and nationals of the sending States* to communicate with

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<sup>436</sup> IACHR, Report on Merits No. 52/02, Case 11.753, *Ramón Martínez Villareal* (United States), October 10, 2002, para. 64.

<sup>437</sup> IACHR, Report No. 90/09, Case 12.644, *Medellín, Ramírez Cárdenas and García Leal* (United States), August 7, 2009, para. 132; IACHR, Report No. 91/05, Case 12.421, *Javier Suárez Medina* (United States), October 24, 2005; IACHR, Report No. 1/05, Case 12.430, *Roberto Moreno Ramos* (United States), January 28, 2005; IACHR, Report on Admissibility and Merits Fondo No. 99/03, Case 11.331, *César Fierro* (United States), December 29, 2003.

each other (articles 5, 36(1)(a) and 36(1)(c) of the Vienna Convention on Consular Relations).<sup>438</sup>

330. The Court's interpretation is that notification must be made at the time the migrant is deprived of his freedom, or at least before he makes his first statement before the authorities.<sup>439</sup> All migrants must have effective access to communicate with consular authorities, which should be granted without delay, in order to provide for an effective defense.

331. In the specific case of foreign nationals detained on capital charges, the Court has concluded that failure to comply with Article 36 of the Vienna Convention on Consular Relations would constitute an arbitrary deprivation of life in accordance with internationally recognized human rights principles. According to the Court:

Non observance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (e.g. the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the States and the duty to make reparations.<sup>440</sup>

332. Due to their particular vulnerability when away from their country of origin, especially, of those who are unaccompanied or separated, the Court found that access to communication with consular authorities and to consular assistance becomes a right that has particular relevance and that must be guaranteed and implemented on a priority basis by all States. Especially, because of its possible implications on the process of gathering information and documentation in the country of origin, as well as to ensure that voluntary repatriation is only ordered if it is recommended as the result of proceedings held with due guarantees to determine the best interest of the child, and once it has been verified that this can be carried out in safe conditions, so that the child will receive care and attention on her or his return.<sup>441</sup>

333. Additionally, in the case of children who are unaccompanied or separated from their family, the Court considers that there is an obligation to appoint a

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<sup>438</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 5.

<sup>439</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 106.

<sup>440</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 134.

<sup>441</sup> 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. 128.

guardian.<sup>442</sup> In that regard, the Court has held that administrative or judicial proceedings involving children who are unaccompanied or separated from their family may not be undertaken until a guardian has been appointed.<sup>443</sup> Specifically, in order to guarantee the right to personal liberty, free and prompt access to legal and other assistance, as well as to defend their interests and ensure their well-being.<sup>444</sup> Indeed, States have the duty to appoint a guardian for children who are identified as being unaccompanied or separated from their family, even in border areas, as promptly as possible. States also have a duty to maintain such guardianship arrangements until they reach the age of majority, which is usually at 18 years of age; until they permanently leave the territory or jurisdiction of the States.<sup>445</sup>

334. The Commission considers it pertinent to point out that the above-described procedural guarantees represent the minimum guarantees that an immigration proceeding should afford in order to ensure justice and limit discretion and arbitrariness on the part of the authorities, along with those that are applicable for challenging and reviewing decisions that might entail restrictions or possible deprivations of liberty of children for migratory reasons or in the framework of immigration proceedings. As minimum guarantees, therefore, they do not represent an exhaustive list.

### C. Extradition Proceedings

335. One of the procedures for removing aliens from the territory of a State is extradition. The Court has identified precise obligations under international law with regards to cooperation among States in the investigation and, as appropriate, extradition of persons suspected of gross human rights violations. In that regard, in the *Case of Goiburú et al. v. Paraguay*, bearing in mind the broad scope of *erga omnes* international obligations in relation to impunity for serious human rights violations, the Inter-American Court held that:

The full exercise of justice in this type of case imposed on Paraguay the compulsory obligation to have requested the extradition of the accused promptly and with due diligence. Consequently, according to the general obligation [to ensure rights] established in Article 1(1) of the American Convention, Paraguay should adopt the necessary measures, of a diplomatic and judicial nature, to prosecute and punish all those responsible for the violations committed, which includes furthering the corresponding extradition

<sup>442</sup> 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. 132.

<sup>443</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, September 1<sup>st</sup>, 2005, para. 21.

<sup>444</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, September 1<sup>st</sup>, 2005, para. 33.

<sup>445</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* CRC/GC/2005/6, September 1<sup>st</sup>, 2005., para. 33.

requests by all possible means. The [absence] of extradition treaties does not constitute [grounds] or justification for failing to institute a request of this type.<sup>446</sup>

336. The Court concluded:

Hence, extradition is an important instrument to this end. The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a States cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory.<sup>447</sup>

337. The Commission has determined that the standards of due process must be observed in extradition proceedings.<sup>448</sup> The Inter-American Court shared that opinion when it granted Mr. Wong Ho Wing provisional measures at the request of the Inter-American Commission in view of the *prima facie* threat of a risk inherent in the extradition of a person, which alleged possible flaws in due process, because the said extradition could lead to the application of the death penalty in a State outside the inter-American system.<sup>449</sup>

338. In the judgment on the merits of the case against Peru Wong Ho Wing, additionally, the Inter-American Court of Human Rights warned that the obligation to guarantee the rights to life and personal integrity, and the principle of non-refoulement to the risk of torture and other forms of cruel, inhuman or degrading treatment or a risk to the right to life "applies to all forms of returning a person to another State, even for extradition."<sup>450</sup> In this decision, the Court refers to the ends of General Comment No. 31 of the Human Rights Committee of the UN, when referring to that "under the obligation to guarantee the right to life, States have abolished the death penalty cannot expose a person within its jurisdiction to a real and foreseeable risk

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<sup>446</sup> I/A Court H.R., *Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 130.

<sup>447</sup> I/A Court H.R., *Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 132.

<sup>448</sup> IACHR, Report No. 78/13 Case 12.794, Merits, *Wong Ho Wing* (Peru). Date of referral to the Court: October 30, 2013.

<sup>449</sup> I/A Court H.R., Matter of Wong Ho Wing, Order of the Inter-American Court of Human Rights, June 26, 2012, para. 21.

<sup>450</sup> I/A Court H.R., Matter of Wong Ho Wing, Order of the Inter-American Court of Human Rights, June 26, 2012, para. 133.

of your application, which cannot expel, by deportation or extradition, individuals under its jurisdiction who are in a real risk expected to be sentenced to death, or application of the same offenses that are not punishable with the same penalty within its jurisdiction, without requiring the necessary and sufficient guarantees that the death penalty not applied.<sup>451</sup>

339. The Court also stated that "the obligation to guarantee the right to personal integrity, together with the principle of non-refoulement enshrined in Article 13 (paragraph 4) of the Inter-American Convention to Prevent and Punish Torture, imposes States the obligation not to expel, by way of extradition, any person under its jurisdiction where there are substantial grounds for believing that he would face a real, foreseeable and personal risk of treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatment."<sup>452</sup>

340. In this vein, the Commission deemed it appropriate to refer to the practice of disguised extradition, which is identified as the decision of a State to deport or expel an individual from its territory by means of immigration proceedings, in order to avoid the stricter procedures of extradition to a country that wishes to prosecute and/or punish that person. With regard to those processes, the European Committee on Crime Problems and the Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters of the Council of Europe issued a "Note on the relationship between extradition and deportation/expulsion (disguised extradition),"<sup>453</sup> in which it was underlined that:

according to the case law of the ECtHR, the decision of a States to bypass the more stringent procedures of extradition by expelling a person to a country that wishes to prosecute and/or punish that person (disguised extradition) does not constitute, as such, a violation of the European Convention on Human Rights (ECHR). The States may choose to extradite or to deport/expel. In both cases it is essential that the procedure applied has a legal basis in law and that the decision does not infringe any specific rights of the person concerned laid down in the Convention.

341. In the *Case of Nelson Iván Serrano Sáenz* (Ecuador), in which Mr. Serrano Sáenz, a person who held the dual nationality of Ecuador and the United States, was summarily deported to the United States, which had issued an order for his detention, the Commission observed that:

The actions of all the authorities intervening in the detention and summary deportation of Mr. Serrano Sáenz deprived him of an elemental right inherent to nationality: the right to remain in it and

<sup>451</sup> UN, General Comment No. 31. *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13. May 26<sup>th</sup>, 2004, para. 12.

<sup>452</sup> I/A Court H.R., *Case of Wong Ho Wing*. Merits, Reparations and Costs. *Judgment of June 26, 2012*. Series C No. 297, para. 135.

<sup>453</sup> European Committee on Crime Problems and Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters of the Council of Europe, *Note on the relationship between extradition and deportation/expulsion (disguised extradition)*. November 2012.

not be deported. The arbitrary way in which the authorities acted to the detriment of the victim is clear, given that they could not deport an Ecuadorian; however, nor did they follow the extradition procedure that would have applied to a foreign citizen in the circumstances of this case. Ultimately, the procedure they adopted was completely alien to the Constitution, the extradition treaty in force between Ecuador and United States, and relevant domestic laws.<sup>454</sup> (emphasis added)

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<sup>454</sup> IACHR, Report No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador), August 6, 2009, paras. 65-68.

CHAPTER 8  
THE RIGHT TO FAMILY LIFE IN  
IMMIGRATION PROCEEDINGS





## THE RIGHT TO FAMILY LIFE IN IMMIGRATION PROCEEDINGS

### A. *Scope and Content*

342. At the international level there is consensus that family is the natural and fundamental group unit of society and as such, it should be protected by society and the State. The right of family members to family life is largely protected by international human rights law<sup>455</sup>, international refugee law and international humanitarian law. The right to protection of the family and the prohibition on family life to be subjected to arbitrary or abusive interference are widely protected both the American Convention, in Articles 17.1 and 11.2, as in the American Declaration, Articles V and VI.

343. Article 11.2 of the American Convention on the prohibition of arbitrary or abusive interference with family life establishes:

No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

344. For its part, Article 17 of the Convention on the protection of the family provides that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

345. In addition to the above, the Convention on the Rights of the Child states, in Article 9, that measures involving the separation of parents and children should be extremely exceptional and be subject to judicial review.<sup>456</sup>

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<sup>455</sup> The right to protection of the family and the prohibition to arbitrary interference on family life are recognized at the level of the Inter-American System in Articles 11.2 and 17 of the American Convention and in Articles v. and VI of the American Declaration; the Universal Human Rights System in Articles 17 and 23 of the International Covenant on Civil and Political Rights, Articles 14 and 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and Articles 9, 10 and 16 of the Convention on the Rights of the Child; the African System in Article 18 of the African Charter on Human and Peoples' Rights; the European System Article 8 of the European Convention for the Protection of Human Rights and Fundamental and the Arab System in Article 33 of the Arab Charter on Human Rights Freedoms.

<sup>456</sup> The Convention on the Rights of the Child, states in its Article 9:

346. In the context of international migration, the practice of expulsions or deportations of people with family ties in the country of destination is one of the situations that most clearly exposes the tension between the sovereign power to determine who can enter or stay in its territory, and the obligations of States to protect the family and children. Protecting the right to family life and the best interests of the child require the States to carry out a balance between the exercise of the above powers with the right to respect and protect family life, particularly in situations where removal proceedings or deportation may represent an arbitrary interference to respect for family life and the best interests of the child. Any procedure causing the result of family separation, should be eminently exceptional.
347. Since the principle of *jus soli* prevails in most states of the Americas, the situation of children who are nationals of a State and are separated from their families as a result of the deportation of one or both parents or other close relatives, occurs with increasing frequency. The implementation of such measures by the States is generating more children left behind or they are forced to leave the country of nationality as a result of the deportation of their family or relatives. In the past the Commission drew attention to the problem of *de facto* or indirect deportation arguing that

A state cannot impede its own citizens from exiting, entering or remaining in its territory. In this regard, the practice of requiring citizens to obtain an exit visa, separate from the requirement that they obtain a passport (or in the case of minors, that they have due authorization from their parents), constitutes a violation of the right to freedom of movement and residence enshrined in Article 22 of the American Convention on Human Rights. Close study of *de facto* deportation of a country's own nationals is needed, especially in the case of minors deported or expelled along with alien parents.<sup>457</sup> (emphasis added)

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1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

<sup>457</sup> IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 97.1

348. As noted above, the Commission recognizes that as part of its sovereign powers states have, first, the power to determine its immigration policy and define the requirements for entry, stay and expulsion of non-nationals of their territory; However, that power is limited by the principles of respect and guarantee human rights.<sup>458</sup> According to international law, the Commission has determined that in this area nor the scope of the State nor the rights of a person who is not a national are absolute.<sup>459</sup> Instead, the Commission has coincided with other international bodies that there should be a trial weighting, under which it must balance the legitimate interest of the State to protect and promote the general welfare *vis-a-vis* the fundamental rights of people not national, such as the right to family life. It is recalled what was said by the Commission in relation to that "immigration policy should guarantee an individual decision with all the guarantees of due process; You must respect the right to life, to physical and mental integrity, family and the right of children to obtain special means of protection".<sup>460</sup>
349. For its part, the Court has held that the right to family life of the child or the child per se does not exceed the sovereign power of States Parties to implement their own migration policies consistent with human rights.<sup>461</sup> In this regard, it should be noted that the very Convention on the Rights of the Child also contemplates the possibility of family separation following the deportation of one or both parents.<sup>462</sup> However, this option must be an absolutely exceptional measure, as provided by Article 9 of the Convention on the Rights of the Child.
350. Whereas there is no unanimous definition at the international level about what *family*<sup>463</sup> means, according to the principle of equality and non-discrimination,

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<sup>458</sup> IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status*, para. 166; IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, para. 6; IACHR, *Report on Terrorism and Human Rights*, para. 377; IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 32; IACHR, Application to the Inter-American Court of Human Rights, Case No. 12,688, *Nadege Dorzema and others: Slaughter of Guayubín (Dominican Republic)*. February 11, 2011, para. 208. I/A Court HR., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, paras. 97 and 169.

<sup>459</sup> IACHR, Report No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 51.

<sup>460</sup> IACHR, Report No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 50; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status*.

<sup>461</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 417.

<sup>462</sup> Article 9.4 indicates that: Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned. 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, para. 274.

<sup>463</sup> For example, on the scope that has the notion of "family" in the context of indigenous peoples, the Inter-American Court has stated that "the special significance of family life in the context of [the] families [indigenous], the which is not limited to the household but includes different generations that compose and

jurisprudence of the organs of protection of human rights have been recognizing a wide range of family forms.<sup>464</sup> Given the variety of families, the existence of a family relationship is a question of fact, which must be analyzed on a case by case basis by the competent authorities in the framework of the procedures that may affect it, as are the procedures that lead to the expulsion or deportation.

351. In addressing the right of States to expel aliens, the Commission has considered that its exercise must take into account certain protections that enshrine fundamental values of democratic societies.<sup>465</sup> Since its Report on the Situation of Human Rights of Asylum Seekers within the Canadian System Determining Refugee Status, the Commission has argued that:

while the state undoubtedly has the right and duty to maintain public order through the control of entry, residence and expulsion of removable aliens, that right must be balanced against the harm that may result to the rights of the individuals concerned in the particular case. In this regard, the Commission has also received submissions alleging that the right to family life is not sufficiently taken into account in removal proceedings, particularly where the removal of long term permanent residents is at issue. Given the nature of Articles V, VI and VII of the American Declaration, interpreted in relation to Canada's obligations under the Convention on the Rights of the Child, where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicates that this balancing must be made on a

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even the community of which it is part." See I/A Court HR. *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 159.

<sup>464</sup> With regard to the concept of family, the European Court of Human Rights has given a wide scope to it, because of the way that social attitudes have evolved regarding the notion of family, recognizing as family life, for example, in the case of *Schalk and Kopf v. Austria*, which victims claimed to have been discriminated against based on their sexual orientation, as being partners of the same sex, were denied the possibility of marrying or having its recognized relationship otherwise by law. In this case the European Court held that the relationship of cohabitation between same-sex couples living in a *de facto* stable cohabitation would fall under the notion of family life, as would happen in the case of a couple of different sex in the same situation. The European Court considered that "it is artificial to maintain the view that, in contrast to a different-sex couple, a same sex cannot enjoy "family life" for the purposes of Article 8. Consequently, the ratio of the petitioners, a same-sex cohabiting in a society stable fact falls within the notion of "family life" and the relationship of a couple of different sex in the same situation. "To reach this conclusion, the Court made an evolutionary interpretation about how since 2001 there had been a rapid evolution of social attitudes in a number of states of the Council of Europe with regard to same-sex couples has left open the door for recognition of new types family and their subsequent protection as equals by the society and the state" ECHR. *Schalk y Kopf v. Austria*, No. 30141/04, June 24th, 2010, para. 94.

<sup>465</sup> IACHR, Report on the Admissibility and Merits No. 63/08. Case 12.534, *Andrea Mortlock* (United States). July 25, 2008, para. 78.

case by case basis, and that the reasons justifying interference with family life must be very serious indeed.<sup>466</sup>

352. According to the provisions of Article 17 of the American Convention, the Convention on the Rights of the Child states in Article 9 that measures involving the separation of parents and children should be extremely exceptional and be subject to judicial review.<sup>467</sup>
353. The European Tribunal has established that any decision concerning the separation of children from their families must be justified by the interest of the child<sup>468</sup>. Furthermore, the Court has held that the mutual enjoyment of coexistence between parents and children is a fundamental element of family life<sup>469</sup> and that, even when parents are separated from their children, family life must be guaranteed.<sup>470</sup> Measures to prevent that enjoyment constitute an interference in the right protected in Article 8 of the European Convention.<sup>471</sup> The same court

<sup>466</sup> IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status*. OEA/Ser.L/V/II.106 doc.40 rev., February 28, 2000, para.166, Citing Eur.Ct.H.R., *Berrehab v. the Netherlands*, Ser. A No. 138, 11 E.H.R.R. 322 (1988) (finding that enforcement of national immigration policy is not sufficient to override the need for contact between parent and child); *Moustaquim v. Belgium*, Ser. A No. 193, 13 E.H.R.R. 802 (1991) (holding that the need to protect public security in light of criminal acts committed when applicant was a minor did not override the fact that applicant had resided for almost the entirety of his life in France, and that all of his immediate family were there); see also *Nasri v. France*, Ser. A No. 322-B (1995); *Beldjoudi v. France*, Ser. A No. 234-A (1992); *Chahal v. the United Kingdom*, Reports 1996-V p. 1831 (1996).

<sup>467</sup> The Convention on the Rights of the Child, states in its Article 9:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

<sup>468</sup> Eur. Court H.R., *Case of T and K v. Finland*, Judgment of 12 July 2001, para. 168; Eur. Court H.R., *Case of Scozzari and Giunta v. Italy*, Judgment of 11 July 2000, para. 148; y Eur. Court H.R., *Case of Olsson v. Sweden* (no. 1), Judgment of 24 March 1988, Series A no. 130, para. 72.

<sup>469</sup> Eur. Court H.R., *Case of T and K v. Finland*, Judgment of 12 July 2001, para. 168; Eur. Court H.R., *Case of Scozzari and Giunta v. Italy*, Judgment of 11 July 2000, para. 148; y Eur. Court H.R., *Case of Olsson v. Sweden* (no. 1), Judgment of 24 March 1988, Series A no. 130, para. 72.

<sup>470</sup> Eur. Court H.R., *Case of Ahmut v. the Netherlands*, Judgment of 27 November 1996, Reports 1996-VI, para. 60; Eur. Court H.R., *Case of Gül v. Switzerland*, Judgment of 19 February 1996, Reports 1996-I, para. 32; y Eur. Court H.R., *Case of Berrehab v. the Netherlands*, Judgment of 21 June 1988, Series A no. 138, para. 21.

<sup>471</sup> Inter alia, Eur. Court H.R., *Case of Buchberger v. Austria*, Judgment of 20 November 2001, para. 35; Eur. Court H.R., *Case of Elsholz v. Germany*, Judgment of 13 July 2000, para. 43; Eur. Court H.R., *Case Bronda v.*

noted that the substance of this provision is to protect the individual against arbitrary action by public authorities. One of the most serious is the interference which results in the division of a family.

354. In the Report on *Immigration in the United States: Detention and Due Process*, the Commission linked the rights to family life and private life with the inviolability of the home (Articles V and IX, respectively, of the American Declaration) and considered that these rights have important implications for "permissible" enforcement of immigration laws.<sup>472</sup> One of these implications is the situation when a parent or migrant, documented or undocumented mother is arrested for immigration violations. The Commission held that such detention cannot, under any circumstances, be used as a factor in the legal custody of their children.
355. Other implications treat the process before taking any decision regarding the detention or deportation. The Commission has established that the best interests of the child of a migrant child should be taken into account before such decisions be adopted. It also requires that the parent receives proper due process before such a decision is executed to determine your custody regarding their son or daughter citizen of the country in which they are.<sup>473</sup>
356. In this vein, the Commission, like other organs of protection of human rights, have pushed the threshold of the principle and right of non-refoulement, applying it not only to asylum seekers and refugees but anyone in a similar situation of refugees, such as in the case of foreigners who require additional protection. In doing so, the Commission has considered that the deportation of a foreigner could constitute a violation of other rights of the person, such as the prohibition to be subjected to cruel, inhuman or degrading treatment; the protection of family life; among others.<sup>474</sup>
357. Furthermore, the Commission has considered that while deportation directly affects the individual, it also has consequences for family life.<sup>475</sup> In the case of *Wayne Smith and Hugo Armendariz et al (United States)*, the Commission referred in depth about the effects deportations on family life. Smith and Armendáriz were permanent residents in the United States; both had entered the country as children and at the time when their deportation proceedings were initiated were married to US citizens, with whom had sons and daughters also nationals of that country. As part of their deportation proceedings, Mr. Smith and Mr. Armendariz were not allowed to present a reasonable defense before administrative and judicial bodies. There were not taken into account humanitarian considerations, such as the time

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Italy, Judgment of 9 June 1998, Reports 1998-IV, para. 51; y Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-III, para. 52.

<sup>472</sup> As the main objective of these rights is to protect people from arbitrary or unnecessary interference by the State. IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 97.

<sup>473</sup> IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 98.

<sup>474</sup> See Cantor, David J., y Barichello, Stefania, "Protection of asylum seekers under the Inter-American Human Rights System", in Abass, Ademola e Ippolito, Francesca (Eds.), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*. Ashgate: Surrey, p. 282; Hathaway, James C., "Leveraging Asylum", in: *Texas International Law Journal* Vol. 45, 2010, p. 503.

<sup>475</sup> IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al. (United States)*. July 12, 2010, para. 48.

they had legally resided in the United States; family ties in that country; the potential damage that would be generated for their families because of the separation that would be caused as a result of his deportation; nor his lack of ties in their countries of origin, among other circumstances.

358. For its part, the State argued that the prohibition of abusive attacks on family life and the right to protection of the family only corresponded to State actions that were addressed directly to harm family life and not to “secondary consequences”.<sup>476</sup> In this regard, the Commission concluded that given the fact that the State had not heard humanitarian defense of Smith and Armendáriz gentlemen, nor have due regard to the right to family life and the best interests of their children on an individualized basis in their expulsion procedures, the State had violated their rights to protection against arbitrary family life, protection of the family and protection of children interference.
359. Consequently, the Commission considered that, by not hearing their defense and not properly considering their right to family life and the best interests of their children on an individualized basis in their expulsion proceedings, the State has violated the rights of Mr. Smith and Armendáriz, recognized in Articles V, VI, and VII of the American Declaration.
360. In the case of *Expelled Dominicans and Haitians v. Dominican Republic*, the Court found that the State violated the right to family protection, recognized in Article 17.1 of the Convention, concerning breach of the obligation to respect rights without discrimination under Article 1.1 of the Convention, because:

Mr. Gelin’s deprivation of liberty and expulsion were actions taken in non-compliance with the State’s obligation to respect the treaty-based rights without discrimination; they were not carried out within the framework of immigration proceedings under domestic law, the basic procedural guarantees required by domestic law were not followed, nor were the international obligations of the State (supra paras. 213, 405 and 407). Consequently, the measure did not seek a lawful purpose and it was not in keeping with the legal requirements, hence it is not necessary to weight the protection of the family against the measure, and converts the separation of Bersson Gelin from his son, William Gelin, into an unjustified family separation.<sup>477</sup>

361. For its part, the European Court has recognized that the expulsion or deportation of a person from a country where they reside with their close relatives can be a violation of the right to family life, as it is guaranteed by Article 8 the European Convention. The European Court has noted that to the extent that deportation could interfere with the right to family life, the measure must be necessary in a

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<sup>476</sup> IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 48.

<sup>477</sup> I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 418.



democratic society, that is, justified by an enormous social need and proportional to the legitimate aim pursued.<sup>478</sup>

362. In this vein, the first thing to look at is the existence of family life. The family life of a person presupposes the existence of a family. The European Court analysis has focused on determining the existence and nature of family life of the person immersed in the process of expulsion or deportation. Then proceeds to determine whether the deportation represents an interference with family life in accordance with the requirements of Article 8.2 of the Convention, namely that: i) the measure is provided by law; ii) pursue any of the envisaged legitimate purposes (national security, public safety, economic welfare of the country, defense of order and prevention of crime, for the protection of health or morals, or the protection of rights and freedoms of others); and iii) be necessary in a democratic society. Only when the measure fulfills all these requirements will be understood that it is legal and not arbitrary and, therefore, is in accordance with the provisions of Article 8.2 of the Convention.<sup>479</sup>
363. In this regard, the Human Rights Committee has held that in accordance with international law, a State has the power to expel a non-national resident, based on a legitimate interest; however, this power must be balanced in the light of due consideration of deportation proceedings regarding family connections deported and hardship that deportation may cause in the family.<sup>480</sup>
364. Some of the elements considered by the European Court and the Human Rights Committee of the UN when weighing the right of a person to remain in a State of which he/she is not a national with the right of a State to expel, are the following: the age of the foreign immigrant when he arrived to the recipient State; the residence time in that foreign country; the family ties of the foreign national in the receiving state; the extent of the hardship is the deportation of non-national for his family in the receiving state; social contributions; the extent of the links of the foreign person in their country of origin; the person's capacity to speak the main languages of their country of origin; the nature and severity of the crime (s) committed (s) by the foreign person; his/her age at the time he committed the crime; the period since the last criminal activity; evidence of rehabilitation of the

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<sup>478</sup> European Court of Human Rights, *C. v. Belgium*. June 24, 1996, No. 35/1995/541/627, para. 31; *Beldjoudi v. France*. March 26, 1992, No. 12083/86, para. 74; *Nasri v. France*, July 13, 1995, No. 19465/92, para. 41; *Boughanemi v. France*, April 24, 1996, No. 22070/93, Rep. 1996-II, Fasc. 8, para. 41; *Bouchelkia v. France*, January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28, para. 48; *Boudjaidii v. France*, September 26, 1997, Rep. 1997-VI, fasc. 51, para. 39; *Boujlifa v. France*, October 21, 1997, 122/1996/741/940, Rep. 1997-VI, fasc. 54, para. 42. See IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 54.

<sup>479</sup> European Court of Human Rights, *C. v. Belgium*. June 24, 1996, No. 35/1995/541/627, para. 31; *Beldjoudi v. France*. March 26, 1992, No. 12083/86, para. 74; *Nasri v. France*, July 13, 1995, No. 19465/92, para. 41; *Boughanemi v. France*, April 24, 1996, No. 22070/93, Rep. 1996-II, Fasc. 8, para. 41; *Bouchelkia v. France*, January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28, para. 48; *Boudjaidii v. France*, September 26, 1997, Rep. 1997-VI, fasc. 51, para. 39; *Boujlifa v. France*, October 21, 1997, 122/1996/741/940, Rep. 1997-VI, fasc. 54, para. 42. See IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 54.

<sup>480</sup> Human Rights Committee, *Stewart v. Canada*. December, 1996. No. 538/1993, para. 12.10.

foreign person regarding his criminal activity; and the efforts of the non-national to obtain citizenship in the receiving State.<sup>481</sup>

365. In this respect, the Commission has pointed out that “these elements are not an exhaustive list or a rigid set of considerations to be addressed in every case. The balancing test must be flexible to the specific facts of each individual case.<sup>482</sup>” In addition to these factors, the Commission has highlighted the obligation to take into consideration the best interests of the child during the expulsion procedures of the parents.<sup>483</sup>
366. The situation of children whose parents are under deportation proceedings was an aspect to which the Commission devoted special attention to in the decision of the case of *Wayne Smith and Hugo Armendariz and others*. In this regard the Commission noted that:

the best interest of minor child must be taken into consideration in a parent’s removal proceeding. Article VII of the American Declaration states, “all children have the right to special protection, care and aid.” As a component of this special protection afforded children, in the context of legal proceedings that may impact a child’s right to family life, “special protection” requires that the proceedings duly consider the best interests of the child.<sup>484</sup>

367. As it has been sustained in several reports, the Commission emphasizes that, in accordance with its international obligations on human rights, States have an obligation to ensure that the procedures of expulsion of non-nationals consider the best interests of their children, and the rights of the person to family life. The Commission considers that States must establish procedural opportunities to avoid expulsion in cases where removal would seriously damage family life of the person to be expelled, as well as family members, especially if between these are minor children.

<sup>481</sup> The Commission notes that all these factors are present in this case have been considered by the European Court of Human Rights (in the context of its Article 8, considerations of the right to family) and the Human Rights Committee in its deliberations on similar cases. See European Court of Human Rights, *Berrehab v. Netherlands*, Judgment of June 21, 1988, No. 10730/84, para. 2. 3; *Moustaquim v. Belgium*, Judgment of February 19, 1991, No. 12313/86; *Beldjoudi v. France*, judgment of 26 March 1992, No. 12083/86; *Nasri v. France*, judgment of 13 July 1995, No. 19465/92; *Boughanemi v. France*, judgment of 24 April 1996, No. 22070/93, Rep. 1996-II, FASC. 8, para. 32; *C. v. Belgium*, June 24, 1996, No. 35/1995/541/627; *Bouchelkia v. France*, Judgment of January 1, 1997, No. 230078/93, Rep. 1997-I, fasc. 28; *Boudjaidii v. France*, Judgment of September 26, 1997, Rep. 1997-VI, fasc. 51; *Boujlifa v. France*, judgment of 21 October 1997, 122/1996/741/940, Rep. 1997-VI, fasc. 54; *Mehemi v. France* (no. 2), Judgment of April 10, 2003, No. 53470/99 (sect. 3) (bil.), ECtHR 2003-IV; United Nations Human Rights Committee, *Stewart v. Canada*, December 1996 Judgment, No. 538/1993, para. 12.10; United Nations Human Rights Committee, *Winata v. Australia*, August 16, 2001, No. 930/2000.

<sup>482</sup> IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 55.

<sup>483</sup> IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 56.

<sup>484</sup> IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para. 56 Citing Inter-Am. Ct. H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Series A No. 17, paras. 62-77, 92-103 (August 28, 2002).

368. Both the Inter-American Commission and the European Court have recognized that under international law, any expulsion proceedings, consider the best interests of the children of the person who is undergoing deportation proceedings. Repeatedly, the European Court has indicated that the best interests and welfare of minor children of a non-national must be taken into consideration in the procedure of expulsion.<sup>485</sup>
369. As stated by the Commission in its *Report on Immigration in the United States: Detention and Due Process*, "the best interests of a migrant parent's children must be factored into any removal decision, and if ordered removed the parent must receive adequate due process to make custody determinations regarding his or her U.S. citizen children before removal is executed".<sup>486</sup> The Commission considers that a judgment of weighting is the only mechanism that can be used to achieve a just decision that considers both human rights of the individual as the requirements set by the State.<sup>487</sup>
370. The Court reiterated that removal proceedings that involve children the State must observe not only the guarantees offered to any person, but other aimed at protecting the interests of the children, understanding that this interest is directly related to their right to protection of the family and, in particular, to the enjoyment of family life while maintaining the family unit as much as possible. In this sense, any decision of a judicial or administrative body that should decide about family separation, because of the immigration status of one or both parents, must consider the particular circumstances of the case, thus ensuring an individual decision must pursue a legitimate aim under the Convention, be appropriate, necessary and proportionate.<sup>488</sup>
371. In this vein, the Court has considered that states should analyze the particular circumstances of each case, concerning: (a) the immigration history, the duration of the stay, and the extent of the ties of the parent and/or the family to the host country; (b) consideration of the nationality, custody and residence of the children of the person to be expelled; (c) scope of the harm caused by the rupture of the family owing to the expulsion, including the persons with whom the child lives, as well as the time that the child has been living in this family unit, and (d) scope of the disruption of the daily life of the child if her or his family situation changes owing to a measure of expulsion of a person in charge of the child, so as to weigh all these circumstances rigorously in light of the best interest of the child in relation to the essential public interest that should be protected.<sup>489</sup>

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<sup>485</sup> See, for example, European Court of Human Rights, *Maslow v. Austria*, Judgment of June 23, 2008, No. 1638-1603, para. 82, citing European Court of Human Rights, *Üner v. Netherlands*, Judgment of 18 October 2006, No. 46410/99, para. 58.

<sup>486</sup> IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 98.

<sup>487</sup> IACHR, Report on Merits No. 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz et al.* (United States). July 12, 2010, para.48-60.

<sup>488</sup> I/A Court H.R., *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, paras.53,275,281.

<sup>489</sup> I/A Court H.R., *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 279 and I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican*

372. The international obligations of States were highlighted by the Commission in the case *Benito Tide Méndez et al v. Dominican Republic*: taking the measures necessary to take the best interests of the child into account, to ensure their right to be heard, to protect their right to identity and failing to ensure that the children within its territory are protected. The State also failed to provide these children with an environment that would protect them from violence and abuse and did not afford them access to essential goods and services to the point that its failing adversely affected the full development of their personality and their life plan.<sup>490</sup>
373. In the case of Pacheco Tineo family, the Commission also stated that Article 19 of the American Convention should be understood as an additional and complementary right established to provide special protection for those in need in their physical and emotional development. Therefore, children are holders of human rights that apply to all persons as well as those derived from their special status, which correspond specific duties of the family, society and the State.<sup>491</sup>
374. Linking the entitlement of children to special measures, the Commission also reiterated that as a corollary of this analysis: "any procedure which may lead to the expulsion of a child from the country in which he/she is to their country of origin, or to a third country, should be aimed at safeguarding the interests of the child"<sup>492</sup> In the case of *Pacheco Tineo family*, the Commission concluded that the Bolivian State had not complied with these rules - it was "obvious" that the special situation of children was not considered in the framework of determinations - hence violated Article 19 to their detriment.<sup>493</sup>
375. In this regard, the characteristics of the collective expulsions, such as the indiscriminate expulsions and summarily features that were carried out, represent an impediment for State authorities to consider the special needs of protection of children. Therefore, when conducting collective expulsions involves the expulsion of children, also a violation of the obligations under Article 19 of the American Convention on Human Rights is generated.

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*Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 357.

<sup>490</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 321.

<sup>491</sup> IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia), October 31, 2011, para. 173.

<sup>492</sup> IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia), October 31, 2011, para. 174.

<sup>493</sup> IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia). October 31, 2011, para. 175 (Referring to the factual description of the case and the actions taken by the Bolivian authorities - among other humiliating practices, insults and physical violence that the parents were subjected to in front of their three minor children, the violent treatment against the whole family, and the lack of consideration of the children themselves as subjects of the right).



CHAPTER 9  
THE RIGHT NOT TO BE  
SUBJECTED TO CRUEL, INHUMAN  
OR DEGRADING PUNISHMENT OR  
TREATMENT AS A RESULT OF  
DEPORTATION



## THE RIGHT NOT TO BE SUBJECTED TO CRUEL, INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT AS A RESULT OF DEPORTATION

### A. *Scope and Content*

376. In 2008, the Inter-American Commission pronounced on the case of Andrea Mortlock, which had to do with the deportation of a Jamaican citizen and United States permanent resident who had HIV/AIDS. According to the diagnosis provided by the petitioners, the denial of Ms. Mortlock's medication would result in her certain death. Furthermore, the Commission concluded that if Mrs. Mortlock had been deported to Jamaica, she would not receive the specialized treatment that she needed to stay alive. The Commission also found that she would be without any support networks because she and her family had lived in the United States for nearly 30 years, and would suffer discrimination.<sup>494</sup>
377. While recognizing that under international law, member States have the right to control the entry, residence, and expulsion of aliens, the IACHR reiterated the obligation that, in exercising the right to expel aliens, member States must have regard to certain protections that enshrine fundamental values of democratic societies.<sup>495</sup> Continuing, the IACHR reaffirmed that the immigration policy of a member States should contain the following guarantees: an individual decision; guarantees of due process; respect for the rights to life, to respect for physical and mental integrity, and of the family; special means of protection for minors; and that the execution of the deportation not "give rise to cruel, degrading and inhumane treatment".<sup>496</sup> Accordingly, in its final legal determination, the IACHR centered on a factual analysis as to whether or not there was a real risk that the applicant's removal might infringe her right to due process of law and the preservation of her health in light of the most up-to-date information on Ms. Mortlock's state of health, the medical treatment available in Jamaica, and the Ms. Mortlock's family situation in Jamaica.<sup>497</sup>

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<sup>494</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, paras. 21 and 74.

<sup>495</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 78.

<sup>496</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 78.

<sup>497</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 79.



378. Although the case concerned important health issues, insofar as she was not denied access to medical care in the United States, the Commission found no violation of the right to health.<sup>498</sup> However, since it regards deportation as an administrative procedure governed by due-process protections, the IACHR again determined that Article XXVI (right to due process of law that contains the guarantee not to receive cruel, infamous or unusual punishment) applies to all proceedings.<sup>499</sup> Therefore, the IACHR concluded that deporting the petitioner would violate that right: “Knowingly sending [Andrea Mortlock] to Jamaica with the knowledge of her current health care regime and the country’s sub-standard access to comparable health care for those with HIV/AIDS would violate [her] rights, and would constitute a de facto sentence to protracted suffering and an unnecessarily premature death”.<sup>500</sup>
379. It is worth mentioning that in cases where an individual’s right to health may be violated by their expulsion, the European Court uses the test of “exceptionality” in assessing the factual circumstances of each case. The test relies on three key factors: (1) the appellant’s present medical condition (advanced or terminal stage); (2) the availability of support in the country of return (presence of family or friends); and (3) the availability of medical care in that country.<sup>501</sup> Speaking to the considerable discomfort with the notion that States could have to provide indefinite healthcare to individuals such as Andrea Mortlock,<sup>502</sup> because the circumstances of healthcare elsewhere are of a lesser standard, the IACHR cited the European Court, which has consistently held that “the fact that the applicant’s circumstances would be less favorable than those he enjoys in the expelling States cannot be regarded as decisive from the point of view of Article 3 of the European

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<sup>498</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 95.

<sup>499</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 83 (citing its *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr. (2002), para. 401). According to the IACHR, “to deny an alleged victim the protection afforded by Article XXVI simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the individuals under the State’s jurisdiction are established.”

<sup>500</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 74.

<sup>501</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 87. For the circumstances to be “very exceptional,” it would need to be shown that the applicant’s medical condition had reached such a critical stage that there are compelling humanitarian grounds for not removing him or her to a place which lacks the medical and social services which he would need to prevent acute suffering while he is dying. See *Amegnigan v. The Netherlands* (dec.), no. 25629/04, ECtHR 2004; *Ndangoya v. Sweden* (dec.), no. 1786/03, ECtHR 2004; *Henao v. The Netherlands* (dec.), no. 13669/03, ECtHR 2003; *Bensaid v. United Kingdom*, no. 44599/98, ECtHR 2001.

<sup>502</sup> She was convicted in the United States for the criminal sale of a controlled substance (cocaine) and later for petit larceny. See IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 39.

Convention.”<sup>503</sup> In considering the application of that test to the case in hand, the Commission reasoned:

Notwithstanding such challenges, an “exceptional” test must be employed to evaluate the consequences faced by a deportee in these circumstances, in light of the protections established by Article XXVI of the American Declaration. Rather than seek to establish a strict legal test for the applicability of Article XI [Right to the preservation of health and to well-being] – when Andrea Mortlock, in any case, legally lost the right to stay in the States – the Inter-American Commission believes that the application of Article XXVI should be emphasized. Consideration of whether a violation of Article XXVI has occurred permits the Commission to identify whether unusual punishment will result from the States’s measures. This is consistent with the need to establish “exceptional circumstances” before the implementation of the decision to remove the applicant could be considered a violation of Article XXVI, given compelling humanitarian grounds.<sup>504</sup>

380. The Commission concluded that Ms. Mortlock consciously send to Jamaica, knowing your current health care system and inadequate access in the host country to similar health services for people living with HIV/AIDS, it would violate their rights and constitute a judgment de facto prolonged suffering and premature death<sup>505</sup>. Following the above grounds, the Commission recommended that the United States refrain from deporting the petitioner, Andrea Mortlock, to Jamaica<sup>506</sup>.

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<sup>503</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 88. Article 3 of the European Convention on Human Rights provides, “No one shall be subjected to torture to cruel, inhuman, or degrading punishment or treatment.”

<sup>504</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 89.

<sup>505</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 94.

<sup>506</sup> IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, para. 102.1



CHAPTER 10  
THE RIGHT TO PERSONAL  
LIBERTY AND PROCEDURAL  
GUARANTEES IN IMMIGRATION  
DETENTION



## THE RIGHT TO PERSONAL LIBERTY AND PROCEDURAL GUARANTEES IN IMMIGRATION DETENTION

### A. *Procedural Guarantees in Immigration Detention*

381. As a preliminary consideration, the Commission emphasizes that irregular migrants are not criminals. The fact that a migrant is in a country irregularly (either because they entered without the requisite documentation, evading the authorized ports of entry; they entered with false documents; or they entered with the proper documents but stayed beyond the authorized time) harms no fundamental legal interests that warrant the protection of the State's punitive authority, as might be the case with an attempt on someone's life or physical well-being or the theft of States property.
382. In the context of international migration there are various situations in which migrants, whether regular or irregular, are deprived of their liberty. However, it is important to underscore the fact that a violation of immigration laws can never be equated to a violation of criminal laws, such as to warrant detention as the State's initial response. In essence, irregular migration is an administrative violation that should not be regarded as a criminal offense.
383. Based on the principle of exceptionality, in exercising its punitive authority, the States should only apply measures that entail deprivation of liberty to situations that violate fundamental legal interests. The multiple effects that deprivation of liberty can have on the rights of persons explain why States should only use such measures as a last resort. However, as the IACHR Rapporteurship on the Rights of Migrants pointed out, the main recourse used by transit and destination countries—including highly developed ones—to deter irregular migrants is detention<sup>507</sup>, which amounts to a form of criminalization of migrants.
384. When the administrative detention of a migrant is ordered in the framework of an immigration proceeding, either because of their irregular status or for violating the terms by which they enjoyed legal residence, their situation is very often worse than that of persons deprived of their liberty for committing a criminal offense. The above is reflected by the fact that apart from being deprived of their liberty for infringing an administrative rule, something which in the opinion of the

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<sup>507</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2000, Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*. OEA/Ser./L/V/II.111 doc. 20 rev., April 16, 2000, para. 106.

Commission is not a fundamental legal interest that warrants per se deprivation of liberty, many of the migrant holding facilities where they are detained lack the basic conditions that a place of detention should have. This is made even worse by the fact that in many cases immigration procedures are largely at the discretion of the States authorities. Indeed, in spite of having committed no criminal offense, in many cases migrants are not even afforded basic guarantees of due process to protect their rights from arbitrary decisions made by the authorities.

385. Immigration detention has received many appeals including housing, internment, holding and shelter, among others. In this regard, the Commission has defined deprivation of liberty in the following terms:

[a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, Stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.<sup>508</sup>

386. Regardless of the name by which immigration detention may be called, any measure that impedes a migrant from freely exercising their freedom of movement amounts to a detention and, therefore, must respect the guarantees that derive from the right to personal liberty recognized at Article 7 of the American Convention and Articles I and XXV of the American Declaration.

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<sup>508</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. General Provision. The Commission stipulated that “given the breadth of the aforementioned concept, the following principles and best practices shall be invoked, according to each case, depending on whether the persons are deprived of liberty as a result of the perpetration of crimes or violations of the law, or for humanitarian and protective reasons.”

387. Article 7 of the American Convention, which recognizes the right to personal liberty,<sup>509</sup> provides that:

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

[...]

388. The right to personal liberty and protection against arbitrary detention had previously been recognized at Articles I and XXV of the American Declaration of the Rights and Duties of Man. Article I provides that:

Every human being has the right to life, liberty and the security of his person.

389. For its part, Article XXV of the American Declaration States that

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for non-fulfillment of obligations of a purely civil nature.

<sup>509</sup>

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families enshrines the rights to liberty of the person and protection against unlawful and arbitrary detention at articles 16 (1) and (4).



Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

390. The Commission ruled on the use of immigration detention in the *Case of Rafael Ferrer-Mazorra et al. v. United States*, concerning the excessive duration of detention and absence of adequate mechanisms to review the legality of the detention of 335 individuals, of the approximately 3,000 Cubans who were estimated to have been detained for having entered the United States irregularly as part of the "Freedom Flotilla" from Mariel, which arrived off the coast of the United States from Cuba in 1980. In that case, the victims were placed in administrative detention by reason of their immigration status as "excludable aliens," which stemmed from the fact that practically all of the Mariel Cubans lacked the appropriate documents to reside in the United States. Some were detained for years in spite of suffering from serious mental problems.
391. Whereas in normal circumstances "excludable aliens" would be sent back to their country of origin, that was not possible given the refusal of the Government of Cuba to take any of the Mariel Cubans back. In the above case the Inter-American Commission developed the principle of exceptionality of immigration detention by arguing that the fact that the domestic law did not recognize any right to liberty on the part of the petitioners violated Article I of the American Declaration, which recognizes the right to liberty of every human being. In conclusion, the Commission held that the States should have acted based on a presumption of liberty, not a presumption of detention, in which immigration detention is the exception and justified only when lawful and not arbitrary.<sup>510</sup> *Inter alia*, the Commission found as follows:

The Commission considers that the domestic law upon which the petitioners' detention was based, as described above, is fundamentally antithetical to the protections prescribed under Articles I and XXV of the Declaration, because it fails to recognize any right to liberty on the part of the petitioners notwithstanding their physical presence within the States's territory; indeed, it prescribes a presumption of detention rather than a presumption of liberty and is therefore incompatible with the object and purpose of Articles I and XXV of the Declaration, namely to secure the liberty of the individual save in exceptional circumstances justified by the States as lawful and non-arbitrary. Consequently the Commission considers that the treatment of the petitioners in this manner under domestic law is *per se* inconsistent with their right to liberty under

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<sup>510</sup> IACHR, Report on Admissibility and Merits No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001, paras. 216-219.

Article I of the Declaration as well as the right not to be arbitrarily deprived of liberty under Article XXV of the Declaration.<sup>511</sup>

392. Likewise, in its *Report on Immigration in the United States: Detention and Due Process*, the Commission determined that:

In effect, to be in compliance with the guarantees protected in Articles I and XXV of the American Declaration, member States must enact immigration laws and establish immigration policies that are premised on a presumption of liberty—the right of the immigrant to remain at liberty while his or her immigration proceedings are pending—and not on a presumption of detention. Detention is only permissible when a case-specific evaluation concludes that the measure is essential in order to serve a legitimate interest of the States and to ensure that the subject reports for the proceeding to determine his or her immigration status and possible removal. The argument that the person in question poses a threat to public safety is only acceptable in exceptional circumstances in which there are certain indicia of the risk that the person represents. The existence of a criminal record is not sufficient to justify the detention of an immigrant once he or she has served his or her criminal sentence. Whatever the case, the particular reasons why the immigrant is considered to pose a risk have to be explained. The arguments in support of the appropriateness of detention must be set out clearly in the corresponding decision.<sup>512</sup>

393. The case law of the Inter-American Court, following the precedent established in the *Case of Vélez Loor v. Panama*, has also emphasized that immigration detention should never be punitive in nature. In that connection, the Court ruled that:

In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks that may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the States. Similarly, the Working Group on Arbitrary Detention sustained that right to personal liberty “requires that hat States

<sup>511</sup> IACHR, Report on Admissibility and Merits No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001, para. 219.

<sup>512</sup> IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 39. Citing, IACHR, Report on Admissibility and Merits No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001, paras. 219, 221 and 242; see also, IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document approved by the Commission at its 131st session, March 3 to 14, 2008, Principle III (2) (2008). Principle III of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas provides the following as the underlying premise: “The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments.” Principle III also establishes that “[p]reventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society.”

should have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need.”<sup>513</sup>

394. In keeping with Court's position set out above, for the deprivation of liberty of migrants not to be considered arbitrary, the detention must meet the requirements that it is prescribed by law, has a legitimate purpose, and is suitable, necessary, and proportionate. Going into greater detail, the Court held that:

without prejudice to the lawfulness of the detention, it is necessary to assess, in each case, the compatibility of the legislation with the Convention, understanding that such law and its application must respect the requirements listed below, in order to ensure that this measure is not arbitrary: i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention; ii) that the measures adopted are appropriate to achieve the sought-after purpose; iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional; and, iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought. Any restriction of liberty that is not based on a justification that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and will thus violate Article 7(3) of the Convention.<sup>514</sup>

395. For its part, the Committee on the Elimination of Racial Discrimination (CERD) has emphasized that that detention of irregular migrants and asylum-seekers should be a last resort, and it has invited States parties to adopt alternatives to detention for these persons.<sup>515</sup> In that same connection, the Working Group on Arbitrary Detention has held that while immigration detention is not, in itself, arbitrary, such as in cases where migrants attempt to enter illegally or where the need for the competent authorities to conduct identity checks and initial immigration screening may justify temporary detention of unlawful non-citizens, particularly if they are unwilling to cooperate with the authorities and if they are likely to abscond. But any deprivation of liberty must be proportionate to the aims pursued and a fair balance shall be struck between the conflicting interests: the interest of the States to implement its immigration policy and to protect the community against illegal

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<sup>513</sup> I/A Court H.R., *Case of Vélez Loo v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 170.

<sup>514</sup> I/A Court H.R., *Case of Vélez Loo v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 166.

<sup>515</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination, *Bahamas*. CERD/C/64/CO/1, 28 April 2004, para. 17.

immigration, on the one hand, and the fundamental right to liberty of the unlawful entrants, on the other hand.<sup>516</sup>

396. On another point, the lack of a legal status or documentation in many cases leads States to detain Stateless persons indefinitely. Both de jure and de facto Stateless persons are usually detained until their legal status is determined, a situation that is especially significant where children are concerned, given their greater vulnerability. The detention of Stateless persons is a contravention of international law. It is important to keep in mind what the UNHCR has said in this regard: “[b]eing Stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be an obstacle for freedom.”<sup>517</sup> Furthermore, invoking lack of nationality as an automatic ground for detention would be against the principles of nondiscrimination.
397. Another form of immigration detention that the Commission has categorically rejected is the detention imposed in certain countries in the region on migrants upon being deported or repatriated to their country, either because the authorities lack information about the criminal background of the deported persons and, therefore, detain them on suspicion that they might devote themselves to crime,<sup>518</sup> or because the country's criminal laws provide that anyone who leaves their country, or takes steps with the intention of leaving it, without meeting the legal requirements will be punished with imprisonment upon returning to the country.<sup>519</sup> The Commission has determined that detentions of that nature are unacceptable and incompatible with the freedom of all individuals to leave their country recognized in Article 22(5) of the American Convention and Article VIII of the American Declaration. As a rule, detentions of this type are subject to a high level of discretionality on the part of the authorities, while individuals have not recourse to challenge or seek a review of the detention.
398. In the Commission's view, the detention of asylum seekers, refugees, applicants for and beneficiaries of additional protection and Stateless persons must be an exceptional measure of last resort, that the authorities can only use in the cases

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<sup>516</sup> United Nations, ECOSOC, Commission on Human Rights, *Report of the Working Group on Arbitrary Detention, Addendum, Visit To Australia* UN Doc. E/CN.4/2003/8/Add.2, 24 October 2002, para. 12.

<sup>517</sup> UNHCR, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, Guideline 9*.

<sup>518</sup> See, *inter alia*, IACHR, *Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community*. OEA/Ser/L/V/II.123, Doc.6 rev. 1, October 26, 2005, paras. 211-214.

<sup>519</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2010 Chapter IV. Cuba*. OEA.Ser.L/V/II. Doc. 5 corr. 1, March 7, 2011, paras. 369 and 366-374. In Cuba the right to residence and movement does not enjoy constitutional protection, which is incompatible with the guarantees of the regional human rights system. Moreover, under article 216(1) of the Criminal Code of Cuba, anyone who leaves the national territory or performs acts aimed at leaving the territory without complying with the appropriate legal formalities is liable to a penalty of deprivation of liberty for one to three years or a fine of 300 to 1,000 quotas. Article 216 of the Criminal Code of Cuba, Chapter XI, Second Section, Subsection 2 of the same article indicates: “If violence or intimidation of persons or force is used to carry out the act referred to in the previous section, the penalty is deprivation of liberty for three to eight years.” Subsection 3 establishes: “The offenses envisaged in the foregoing sections shall be punished regardless of whether they are committed in order to carry it out or in connection therewith.”

prescribed by domestic law, which must be compatible with the norms and principles of international human rights law. Because it is an exceptional measure, the authorities may only resort to it once they have determined that this measure meets the following tests: (1) necessity, (2) reasonability, and (3) proportionality. This means that immigration detention must be necessary in a given case, that its use must be reasonable, and that it has to be proportionate to achieve the ends being sought. If detention is deemed necessary, it must not be discriminatory and should be for as short a period of time as possible.<sup>520</sup>

399. Furthermore, under Article 7(4) of the American Convention on Human Rights, and as the Commission has previously Stated, the States has an obligation to advise a detainee of the grounds or reasons for his or her detention.<sup>521</sup> Regarding Article 7(4) of the Convention, the Court has considered that “the facts must be analyzed under domestic law and the provisions of the Convention, because information on the ‘reasons and grounds’ for the detention must be provided ‘when this occurs’ and because the right contained in this article entails two obligations: (a) oral or written information on the reasons for the detention, and (b) notification in writing of the charges.”<sup>522</sup>
400. As to the scope and content of this obligation in the context of immigration detention, the Commission believes that States must take the measures necessary to ensure that detained migrants have sufficient information regarding the nature of their detention, the reasons for it, the procedural guarantees that protect them, and the remedies available to appeal or challenge a detention. Since in some cases migrants do not speak the language of the States in which they are detained, it is vital that they fully comprehend the information concerning the motives or reasons for their detention, which means the information must be in a language they understand. Their level of education must also be considered as must the fact that they may require legal counsel to fully understand their situation.<sup>523</sup>
401. The Inter-American Court has concluded that the failure to inform an immigrant of his right to communicate with the consulate of his country of origin and the lack of effective access to consular assistance as a component of the right to defense and due process, are contrary to Articles 7(4), 8(1), and 8(2)(d) of the American Convention, in relation to Article 1(1) thereof.<sup>524</sup>

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<sup>520</sup> UNHCR, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*. 26 February 1999, Guideline 3.

<sup>521</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999, para. 39; and IACHR, Report on Merits No. 84/09, Case 12.525, *Nelson Iván Serrano Sáenz* (Ecuador), August 6, 2009, paras. 46-47.

<sup>522</sup> 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. 132. Also, cfr. U.N., Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173, of December 9, 1988, Principle 10.

<sup>523</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 449.

<sup>524</sup> 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. 160.

402. For its part, the right recognized in Article 7(5) of the American Convention means that States parties have an obligation to ensure that any migrant detained is “brought promptly” before a judge or other officer authorized by law to exercise judicial control over the detention. Here the Inter-American Court has held that to satisfy the requirement spelled out in Article 7(5), i.e., “being brought” without delay before a judge or other officer authorized by law to carry out the judicial functions, the competent authority must hear the detained person personally and evaluate all the explanations that the latter provides, in order to decide whether to proceed to release him or to maintain the deprivation of liberty.<sup>525</sup>
403. As for the right to challenge or appeal the lawfulness of a detention recognized at Article 7(6) of the Convention, the Commission has written that the fact that a foreign national is detained and deported without being guaranteed his or her right of recourse to a competent court in order for that court to decide without delay on the lawfulness of the detention is a violation of the right to personal liberty.<sup>526</sup>
404. Because immigration detention is an exceptional measure, the duration of the detention must be the minimum necessary period.<sup>527</sup> The Commission concurs with the concern expressed by the Committee against Torture over the failure to limit the length of administrative detention of foreign nationals, which it said should in no circumstance be indefinite.<sup>528</sup> Because of the effects that deprivation of liberty can have on detainees’ personal integrity, the Commission believes that an excessively prolonged or indefinite detention affects personal integrity and may even constitute cruel, inhuman or degrading treatment<sup>529</sup>.
405. In summary, based on the case law and decisions of the organs of the Inter-American system concerning the right to personal liberty, the following standards apply in cases of immigration detention: (i) immigration detention must be the exception and not the rule; (ii) therefore, the fact that an immigrant’s status is irregular is not, by itself, sufficient grounds to order his or her immigration detention on the assumption that the person will not comply with the legitimate ends that an immigration proceeding serves; (iii) the legitimate and permissible ends of immigration detention must be procedural in nature, such as ensuring the immigrant’s appearance for the proceeding at which his or her immigration status will be determined or to ensure enforcement of a deportation order; (iv) even when there are procedural ends to be served, immigration detention must be

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<sup>525</sup> 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. 109.

<sup>526</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999, para. 40; IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 449.

<sup>527</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document approved by the Inter-American Commission on Human Rights at its 131st Regular Session, held from March 3 to 14, 2008, Principle III.1.

<sup>528</sup> See, Concluding observations of the Committee against Torture. Costa Rica. CAT/C/CRI/CO/2, 7 July 2008, para. 10; Concluding observations of the Committee against Torture: Sweden. CAT/C/SWE/CO/5, 4 June 2008, para. 12.

<sup>529</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 454.

absolutely necessary and proportional, in the sense that there must exist no less burdensome means of achieving the procedural end being sought and it must not disproportionately affect the right of personal liberty; (v) all the foregoing elements require case-by-case motives based on fact not assumptions; (vi) immigration detention must be ordered for the time strictly necessary to achieve the procedural end, which also means periodic review of the factors that prompted the detention; and (vii) immigration detention for an unreasonable period of time is arbitrary and abusive.<sup>530</sup>

## ***B. Principle of Non-Detention of Migrant Children***

406. With respect to the principle of non-detention, the Commission shares the position that various international organizations have taken to the effect that migrant children –whether accompanied by their families, unaccompanied or separated from their families- should not, as a general rule, be detained.<sup>531</sup> Where detention is exceptionally justified, it shall never be solely on the basis of the child being unaccompanied or separated, or on his/her migratory or residence status, or lack thereof.<sup>532</sup>

407. For its part, the Committee on the Rights of the Child has determined that under Article 37 of the Convention on the Rights of the Child and the principle of the best interests of the child,<sup>533</sup> unaccompanied or separated children should not be deprived of liberty for reasons to do with migration.<sup>534</sup> In a similar vein, the United Nations Special Rapporteur on the human rights of migrants has held that

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<sup>530</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 458.

<sup>531</sup> See IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, para. 74.

<sup>532</sup> UN, Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 1 September 2005, para. 61. Report of the Working Group on Arbitrary Detention, Addendum, Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, E/CN.4/1999/63/Add. 3, p. 37.

<sup>533</sup> Article 37 of the Convention on the Rights of the Child provides:

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

<sup>534</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*. UN Doc. CRC/GC/2005/6, 1 September 2005, para. 61.



detention of children will never be in their best interests.<sup>535</sup> The Special Rapporteur also said that States have the obligation to adopt alternative measures to detention and express the priority of these measures over detention in their legislation.<sup>536</sup> The foregoing implies that the institutionalization, internment, or detention of child migrants owing to their migratory status should be the last resort for States and used only when absolutely necessary and for as short a time as possible after all other less onerous measures have been exhausted.

408. In its Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, the Inter-American Court established and developed the principle of non-immigration detention of girls and children. In this regard, the Court held that the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime, and in recalling the different procedural purposes between migration and criminal proceedings. The Court also considers that the principle of ultima ratio of the imprisonment of children is not applicable in the arena of immigration proceedings.<sup>537</sup>
409. According to the Court, States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority.<sup>538</sup>

### **C. Detention Conditions**

410. In the course of its country visits, the IACHR Rapporteurship on the Rights of Migrant Workers has noted with concern that, broadly speaking, migrant holding facilities and the treatment of the persons detained there fall short of international standards in that area. For example, migrants' quarters are not properly ventilated; instead of windows, they have narrow openings that obstructed the natural light and they have bars of the kind one would find in a prison to divide the

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<sup>535</sup> United Nations, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*. A/HRC/11/7, 14 May 2009, para. 62.

<sup>536</sup> United Nations, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*. A/HRC/11/7, 14 May 2009, para. 60-61.

<sup>537</sup> 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. 150.

<sup>538</sup> 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, paras. 156-160.



living areas. The Rapporteurship also noted practices such as placing the immigrants in lockdown at night and the use of punishment cells in some cases.<sup>539</sup>

411. As noted previously, the detention of migrants should be an exceptional measure. However, in exceptional cases where it is not possible to adopt a noncustodial alternative, migrants may be placed in detention facilities, provided that it is for the shortest appropriate period of time, as a last resort, and with the aim of providing them with care and accommodation in a manner consistent with the notion of comprehensive protection.<sup>540</sup>
412. Referring to the conditions of detention to which Mr. Jesús Vélez Loor was subjected as the result of an immigration infringement in Panama, the Inter-American Court has concluded that states have the obligation to "adopt certain positive, specific, and oriented measures in order not only to guarantee the enjoyment and exercise of those rights the restriction of which is not a collateral effect of the situation of imprisonment, but also to ensure that such deprivation of liberty does not entail a higher risk to the infringement of the rights, the integrity, and personal and family welfare of migrants."<sup>541</sup>
413. On February 13, 2015, the Commission decided to request the adoption of precautionary measures in favor of the persons in immigration detention at Carmichael Road Detention Center, in The Bahamas. The request for precautionary measures alleges that the beneficiaries are at risk because they are allegedly in inhumane conditions of detention, with extreme overcrowding and lack of appropriate medical attention that could affect their right to life and physical integrity. After analyzing the allegations of fact and law, the Commission believes that the information presented shows, *prima facie*, that the beneficiaries are in a serious and urgent situation that places their lives and physical integrity at risk.<sup>542</sup>
414. Consequently, in accordance with Article 25 of its Rules of Procedures, the Commission requested the State of The Bahamas to adopt the necessary measures to ensure the life and physical integrity of persons in immigration detention at Carmichael Road Detention Center. This includes to provide hygienic conditions and adequate medical treatment to the persons in the facility, according to their respective medical conditions. The IACHR also requested the State to adopt the necessary measures to address the special situation of unaccompanied children, according to international standards; to implement measures to ensure that legal

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<sup>539</sup> See, for example, IACHR, *Preliminary Observations of the Rapporteurship on the Rights of Migrant Workers on its visit to Mexico*. Appended to Press Release 82/11, p. 6.

<sup>540</sup> The Commission has held that the Convention on the Rights of the Child implies a substantial change in the manner in which the topic of children is addressed. This change involves replacing the "Irregular Situation Doctrine" with the "Comprehensive Protection Doctrine"; in other words, it means moving away from the concept of 'minors' as objects of protection in favor of a concept in which children are the subjects of their rights. IACHR, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter VII, para. 11.

<sup>541</sup> 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. 209.

<sup>542</sup> IACHR, PM 535/14 - Persons in Immigration Detention at Carmichael Road Detention Center, The Bahamas February 13, 2015.

assistance is available to all of the beneficiaries; and to take immediate action to substantially reduce overcrowding within Carmichael Road Detention Center. In addition, the Commission requested the investigation of the facts that gave rise to the adoption of these precautionary measures in order to avoid their repetition; and to ensure that civil society organizations and relevant international organizations have access to the Carmichael Road Detention Center for the purpose of monitoring detention conditions.<sup>543</sup>

415. In its Advisory Opinion on the Rights and guarantees of children in the context of migration and/or in need of international protection, the Inter-American Court established that if States resort to such measures as placing children in a shelter or accommodation, either for a short period or for as long as necessary to resolve the immigration status, the Court recalled the need to separate migrants in custody from persons who have been accused or convicted of criminal offenses, requiring that centers to accommodate migrants must be specifically intended for this purpose.<sup>544</sup>
416. The places for accommodating children should respect the principle of separation and the right to family unity, so that, in the case of unaccompanied or separated children, they should be lodged in places other than those that correspond to adults and, in the case of accompanied children, they should be lodged with their family members, unless separating them is more appropriate in application of the principle of the best interest of the child; in addition, secure material conditions and an adequate regime that ensure the comprehensive protection of rights in a non-custodial environment.

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<sup>543</sup> IACHR, PM 535/14 - Persons in Immigration Detention at Carmichael Road Detention Center, The Bahamas February 13, 2015.

<sup>544</sup> I/A Court H.R., *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 150.



CHAPTER 11  
THE RIGHT TO SEEK AND  
RECEIVE ASYLUM



## THE RIGHT TO SEEK AND RECEIVE ASYLUM

### A. *Scope and Content*

417. The right of asylum was specifically codified in regional treaties, starting with the 1889 Montevideo Treaty on International Criminal Law and up until the adoption of the Convention on Territorial Asylum and the Convention on Diplomatic Asylum, both in 1954.<sup>545</sup> The adoption of a series of treaties related to territorial and diplomatic asylum and non-extradition on political grounds led to what has usually been called as “the Latin American asylum tradition.”<sup>546</sup>
418. In the region, the traditional concept of asylum evolved with the normative development of the inter-American human rights system. Thus, the American Declaration of the Rights and Duties of Man (1948) recognizes the right of asylum at Article XXVII,<sup>547</sup> which entailed the recognition of an individual right to seek and receive asylum in the Americas. This evolution was followed at the universal level by the adoption, in 1948, of the Universal Declaration of Human Rights, Article 14 of which explicitly recognized “the right to seek and to enjoy asylum in other countries.” As of that time, asylum began to be codified in human rights instruments and not only in inter-States treaties.
419. The 1951 Convention relating to the Status of Refugees (hereinafter “the 1951 Convention”) was subsequently approved to deal with situations involving refugees resulting from the Second World War and, therefore, places great emphasis on the prohibition of refoulement and the right to assimilation.<sup>548</sup> Its 1967 Protocol expanded the applicability of the 1951 Convention by eliminating the geographical and temporal limitations that had restricted its application to those displaced in the said context.
420. Both treaties are important because they were the first international instruments that specifically regulated the treatment that should be given to those who are

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<sup>545</sup> Up until the Convention on Territorial Asylum and the Convention on Diplomatic Asylum, both of 1954, the word “asylum” was used exclusively to refer to the specific mechanism of “political” or “diplomatic” asylum (in diplomatic legations abroad), while the expression “refugee status” referred to the protection granted in the territory of the State; this partly explains the dichotomy “asylees-refugees” and its implications for the protection of refugees.

<sup>546</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 137. (Citing the written version of the expert opinion of Juan Carlos Murillo presented on March 29, 2013).

<sup>547</sup> “Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.”

<sup>548</sup> Cf. Convention relating to the Status of Refugees, adopted on July 28, 1951, by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

forced to abandon their homes owing to a rupture with their country of origin. Even if the 1951 Convention does not explicitly establish the right to asylum as a right, it is considered to be implicitly incorporated into its text, which mentions the definition of refugee, the protection against the principle of *non-refoulement*, and a list of rights to which refugees have access. In other words, these treaties establish the basic principles on which the international protection of refugees is based,<sup>549</sup> their legal status, and their rights and duties in the country that grants them asylum, as well as matters relating to the implementation of the respective instruments.<sup>550</sup>

421. Under Article 1 of the 1951 Convention, as amended by the 1967 Protocol, a refugee is a person who:

1. owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;
2. is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
3. 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.

422. Thereafter, in 1969, the right of everyone to seek and be granted asylum was recognized in Article 22(7) of the American Convention, which provides:

Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the States and international conventions, in the event he is being pursued for political offenses or related common crimes.

423. In light of the abovementioned instruments and in accordance with Article 29(b) of the American Convention, in interpreting and more specifically applying the Convention's provisions for determining the scope of States' obligations, the Commission and the Court have taken into account the important evolution of the rules and principles of international refugee law, as well as relying on guidelines, principles, and other official pronouncements put forth by bodies such as the UNHCR.

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<sup>549</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 139. (Citing the written version of the expert opinion of Juan Carlos Murillo presented on March 29, 2013).

<sup>550</sup> Cf. Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reedited, Geneva, 1992), pp. 4-5.

## **B. *The Right to Enter and Apply for Refugee Status***

424. The Commission has determined that Article XXVII of the American Declaration (right of asylum) contains two cumulative criteria that must be satisfied.<sup>551</sup> The first criterion is that the right to seek and receive asylum on foreign territory must be in "accordance with the laws of each country" [where asylum is sought]. The second criterion is that the right to seek asylum in foreign territory must be "in accordance with international agreements."<sup>552</sup> As regards "international agreements," the Commission indicated the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. In relation to those treaties, the Commission noted that the 1951 Refugee Convention defined certain criteria by which an individual qualified as a "refugee" and that international law had developed to a level at which there was recognition of a right of a person seeking refuge to a hearing in order to determine whether that person met the criteria in the Convention.<sup>553</sup>
425. The first matter that the Commission examined in this area—Haitian Political Refugees (Dominican Republic)—dates from 1967 and consisted of two cases that were conjoined, as both petitioners were Haitian political refugees who had been detained in the Dominican Republic.<sup>554</sup> Following a series of communications and exchanges of correspondence between the Commission and the Dominican State without a positive result, the Commission decided to set the case aside after the UNHCR brought to the attention that, according to information in that office as of April 1970 showed the following: (1) the competent authorities of the Dominican Republic had released the Haitian political refugees in its territory, without requiring that they leave the country; (2) Haitian refugees in the Dominican Republic who wished to emigrate could so request freely before the Office of the High Commission; and (3) the only cases of Haitians arrested in that country would be for common crimes.<sup>555</sup>
426. Also in this connection, the Commission notes the landmark case of the Haitian Interdiction v. United States (also known as the Case of the "Haitian Boat People"). In that case, 43 Haitian nationals were sent back to Haiti in May 1990 after their vessel was interdicted on the high seas by the United States Coast Guard. Many of those individuals claimed that they feared that they would be persecuted by the

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<sup>551</sup> "The Commission observes that Article 22(7) of the American Convention on Human Rights, which was adopted twenty one years after the American Declaration, has a formulation similar to Article XXVII of the American Declaration. Article 22(7) provides: "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the States and international conventions, in the event he is being pursued for political offenses or related common crimes." IACHR, Report on Merits No. 51/96, Case 10.675, Haitian Interdiction – Haitian Boat People (United States), March 13, 1997, para. 154.

<sup>552</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 153.

<sup>553</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 155.

<sup>554</sup> IACHR, Communications 1526 and 1545, Haitian Political Refugees (Dominican Republic), April 15 and July 27, 1967.

<sup>555</sup> IACHR, Communications 1526 and 1545, Haitian Political Refugees (Dominican Republic), April 15 and July 27, 1967.



government if they were made to go back. Despite promises made by the Haitian Government (in a diplomatic exchange of letters) that returnees would not be punished for leaving Haiti, such persons were routinely detained upon their return to Haiti.<sup>556</sup> The Haitian Boat People case eventually reached the United States Supreme Court, which ruled that “Haitians interdicted by the United States at sea are not entitled to enter the United States or to avoid repatriation to Haiti, even if they are refugees under the standards of the 1951 Refugee Convention or the standards of U.S. law.”<sup>557</sup> The Supreme Court further found that under the United States domestic law, Haitians and other refugees who have made it to the United States shores are entitled to seek asylum in accordance with United States law, whereas there is no obligation of the State to grant it.<sup>558</sup>

427. The petitioners in the case stated before the Commission that the authority of the President of the United States to send aliens back from the immigration ports did not imply the right to intercept and summarily return refugees away from the US territory, and who are not necessarily to it.. They argued that the United States interdiction program had the effect of prohibiting Haitians from gaining entry into The Bahamas, Jamaica, Cuba, Mexico, and the Cayman Islands, among other countries. Their statement was neither disputed nor challenged by the United States Government. Furthermore, the Commission noted that during the interdiction period, Haitian refugees did enjoy of their right to seek and receive asylum in other foreign territories, such as the Dominican Republic, Jamaica, Bahamas, Cuba (which granted asylum to 3,851 Haitians during 1992), Venezuela, Suriname, Honduras, the Turks and Caicos Islands and other Latin American countries.<sup>559</sup>
428. Based on the above, the Commission found that the United States had summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as "refugees." The Commission also found that the dual criteria test of the right to "seek" and "receive" asylum in "foreign territory" recognized by Article XXVII of the American Declaration has been satisfied and that,<sup>560</sup> therefore, the United States had breached that provision when it summarily interdicted and repatriated the individuals and prevented them from exercising their right to seek and receive asylum in foreign territory.<sup>561</sup>

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<sup>556</sup> IACHR, Report on Admissibility No. 28/93, Case 10.675, *Haitian Interdiction - Haitian Boat People* (United States), October 13, 1993, para. 3.

<sup>557</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 159 (citing Sale, Acting Commissioner, Immigration and Naturalization Service, Et. Al. v. Haitian Centers Council, INC., Et. Haitian Centers Council, INC., Et. Al., No. 92-344, decided June 21, 1993).

<sup>558</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 159.

<sup>559</sup> IACHR, Report on Admissibility No. 28/93, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), October 13, 1993.

<sup>560</sup> In accordance with the laws of each country and with international agreements.

<sup>561</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 163.

### C. *Due Process Guarantees in Proceedings to Determine Refugee Status*

429. The *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia* is particularly important in relation to fair trial guarantees in proceedings to determine refugee status. The case concerns the *refoulement* to Peru of the Pacheco Tineo family on February 24, 2001, after their application for refugee status in Bolivia was denied. The facts indicate that the Pacheco Tineo family, consisting of Rumaldo Juan Pacheco Osco; his wife, Fredesvinda Tineo Godos, and their three children, entered Bolivia on February 19, 2001. The immigration authorities were made aware of their irregular status and took steps to expel them to Peru, the family's country of nationality. Rumaldo Juan Pacheco Osco applied to the Bolivian State for refugee status arguing that, if they were sent back to Peru their lives would be at risk. His application was denied in a couple of hours. The CONARE took note of and processed, in a meeting, the communication of CEB-UNHCR as a 'request for asylum' without granting a hearing to the members of the Pacheco Tineo family. Furthermore, there is no record that they received due notification of this decision.<sup>562</sup> In this regard, the Commission stated in its report on merits that:

According to the consistent caselaw of the organs of the inter-American system, fair trial guarantees are not limited to judicial remedies, but apply to all procedural instances, including[...]proceedings for the determination of refugee status and any proceeding that might culminate with an individual's expulsion or deportation. From that perspective, the object and purpose of the protections recognized in articles 22(7) and 22(8) of the American Convention, introduces certain specific aspects in satisfying the right to fair trial guarantees in the framework of proceedings to do with the scope of those provisions.<sup>563</sup>

430. The *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia* was the first such matter to come before the Court. The position held by the Commission was also adopted by the Court which stated in its judgment:

The right to seek and to receive asylum established in Article 22(7) of the American Convention, read in conjunction with Articles 8 and 25 of this instrument, ensures that the person applying for refugee status must be heard by the States to which he applies, with due guarantees and in the corresponding proceeding.<sup>564</sup>

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<sup>562</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 166.

<sup>563</sup> IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia). October 31, 2011, para. 133.

<sup>564</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational States of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 154.

431. The Court also held that the right to seek and to receive asylum and not to be returned in such circumstances, established in Articles 22(7) and (8) of the American Convention, read in conjunction with Articles 8 and 25 thereof, ensures that the person applying for refugee status must be heard by the State, with the basic guarantees of due process, which must be observed in immigration proceedings, in proceedings relating to a request for recognition of refugee status or, if appropriate, in proceedings that may lead to the expulsion or deportation of an applicant for this status or of a refugee.<sup>565</sup>
432. Accordingly, the Court ruled in the Case of the Pacheco Tineo Family v. Plurinational States of Bolivia that, in accordance with the guarantees established in Articles 8, 22(7), 22(8) and 25 of the Convention, and taking into account the UNHCR guidelines and criteria, asylum seekers must have access to proceedings to determine this status that permit a proper examination of their request in keeping with the guarantees contained in the American Convention and other applicable international instruments<sup>566</sup>. Specifically, the Court found that States have the following obligations<sup>567</sup>:
1. They must guarantee the applicant some necessary conditions,<sup>568</sup> including the services of a competent interpreter,<sup>569</sup> as well as, if appropriate, access to legal assistance and representation<sup>570</sup> for submitting the application to the authorities. Thus, the applicant must receive the necessary guidance concerning the procedure to be followed,<sup>571</sup> in words and in a way that he can understand and, if appropriate, he should be given the opportunity to contact a UNHCR representative<sup>572</sup>;

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<sup>565</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 155.

<sup>566</sup> *Cf., mutatis mutandi Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs, paras. 126 and 127, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 175.

<sup>567</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational States of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 159.

<sup>568</sup> *Cf. mutatis mutandi, Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 154; and *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 117. See also: United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A non-exhaustive overview of applicable international standards*, September 2, 2005, p. 3.

<sup>569</sup> *Cf., mutatis mutandi, Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010, Series C No. 215, para. 195. See also: United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A non-exhaustive overview of applicable international standards*, September 2, 2005, p. 3.

<sup>570</sup> *Cf., mutatis mutandi, Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 62, and *Case of Cabrera García and Montiel Flores v. Mexico*, para. 155. See also: United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A non-exhaustive overview of applicable international standards*, September 2, 2005, p. 3.

<sup>571</sup> *Cf. Executive Committee of the United Nations High Commissioner for Refugees, Determination of Refugee Status*, No. 8 (XXVIII) (1977), para. e.ii.

<sup>572</sup> *Cf. Executive Committee of the United Nations High Commissioner for Refugees, Determination of Refugee Status*, No. 8 (XXVIII) (1977), para. e.iv.

2. The request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority<sup>573</sup>, and requires a personal interview<sup>574</sup>;
3. The decisions adopted by the competent organs must be duly and expressly founded<sup>575</sup>;
4. In order to protect the rights of applicants who may be in danger, all stages of the asylum procedure must respect the protection of the applicant's personal information and the asylum application, and the principle of confidentiality<sup>576</sup>;
5. If the applicant is denied refugee status, he should be provided with information on how to file an appeal under the prevailing system and

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<sup>573</sup> Cf., *mutatis mutandi*, *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, para. 77; and *Case of Almonacid-Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 130. See also Executive Committee of the United Nations High Commissioner for Refugees, *Determination of Refugee Status*, No. 8 (XXVIII) (1977), para. e.ii In this regard, the comment of expert witness Ceriani is relevant that "asylum seekers may be subject simultaneously to proceedings relating to both their application for refugee status and their migratory situation. On numerous occasions, the rights of [...] asylum seekers and, consequently, their adequate protection, are determined by immigration procedures and decisions. In addition, the categorization of a person as a migrant, asylum seeker, or refugee, may depend, on the one hand, on the scope and interpretation of the international norms under the laws and practice of each country and, on the other, the circumstances of each case may make the formal distinctions between one or other category both blurred and inadequate. Similarly, in the practice, immigration and asylum procedures may be closely related [...], which may lead [...] to the increase of the dangers resulting from rejection at the border or a deportation measure. But also because, on many occasions, the denial of a request for asylum is based on an irregular migratory situation, which leads to an immigration proceeding (for residence or, according to the law and practice of each country, for deportation). In any case, the application of the criteria that provides the greatest protection to the migrant should prevail, in keeping with the *pro persona* principle." Expert opinion provided on March 12, 2013, by Pablo Ceriani (evidence file, folios 1275 and 1276).

<sup>574</sup> Cf. United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A non-exhaustive overview of applicable international standards*, September 2, 2005, paras. 4, and 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, reedited, Geneva, December 2011, paras. 196 to 199 and 205.b.i.

<sup>575</sup> Cf. *mutatis mutandi*, *Case of Chocrón Chocrón v. Venezuela*, para. 118; and *Case of López Mendoza v. Venezuela*, para. 141. See also: 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, reedited, Geneva, December 2011, paras. 29, 203 and 204; United Nations High Commissioner for Refugees, *Improving asylum procedures: Comparative Analysis and Recommendations for Law and Practice – Main conclusions and recommendations*. A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, March 2010, p. 18, para. 30; and United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A non-exhaustive overview of applicable international standards*, September 2, 2005, paras. 8 and 9.

<sup>576</sup> Cf. UNHCR. Asylum Processes (Fair and efficient asylum procedures). Global consultations on international protection. EC/GC/01/12. 31 May 2001, para. 50.M. See also, Guidelines on international protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, para. 5.

granted a reasonable period for this, so that the decision adopted can be formally adopted<sup>577</sup>; and

6. The appeal for review must have suspensive effects and must allow the applicant to remain in the country until the competent authority has adopted the required decision, and even while the decision is being appealed, unless it can be shown that the request is manifestly unfounded.<sup>578</sup>

433. The Court also held in the *Caso of the Pacheco Tineo Family* that States may establish “accelerated procedures<sup>579</sup> to decide requests that are “manifestly unfounded and abusive,”<sup>580</sup> regarding which there is no need for international protection. However, given the potentially serious consequences of a wrong decision for the applicant, even in accelerated procedures, the Court, adopting the standards issued by the Executive Committee of the United Nations High Commissioner for Refugees, listed a number of basic guarantees that officials should observe where applications of this nature are concerned:

1. the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status;
2. the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status, and
3. the possibility of having a negative decision reviewed, even by a more simplified procedure, before rejection at the frontier or forcible removal from the territory.<sup>581</sup>

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<sup>577</sup> Cf. *Case of Vélez Loo v. Panama*, para. 179, and *Case of Mohamed v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2012 Series C No. 255, para. 98. See also: Executive Committee of the United Nations High Commissioner for Refugees, Determination of Refugee Status, No. 8 (XXVIII) (1977), para. e.vi: “If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.” Similarly: United Nations High Commissioner for Refugees, *Improving asylum procedures: Comparative Analysis and Recommendations for Law and Practice* – Main conclusions and recommendations. A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, March 2010, p. 89.

<sup>578</sup> Cf. Executive Committee of the United Nations High Commissioner for Refugees, Determination of Refugee Status, No. 8 (XXVIII) (1977), para. e.vii.

<sup>579</sup> Cf. United Nations High Commissioner for Refugees. Asylum Processes (Fair and efficient asylum procedures). Global consultations on international protection, 31 May 2001, para. 30.

<sup>580</sup> Defined as “those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum.” Executive Committee of the United Nations High Commissioner for Refugees, *The problem of manifestly unfounded or abusive applications for refugee status or asylum*, No. 30 (XXXIV) (1983) para. d.

<sup>581</sup> Executive Committee of the United Nations High Commissioner for Refugees, *The problem of manifestly unfounded or abusive applications for refugee status or asylum*, No. 30 (XXXIV) (1983) para. e.

434. In the aforementioned case, the competent authority did not deny refugee status because the request was “manifestly unfounded,” and did not record the reasons why it had reached its conclusions. Therefore, the Court rejected the States’s defense because the authority did not make the above-mentioned determination upon taking its decision.<sup>582</sup>
435. The Court also established the content of this right in Advisory Opinion OC-21/14, stating that in view of the fact that children are entitled to seek and receive asylum,<sup>583</sup> and may, in consequence, submit applications for recognition of refugee status in their own capacity, whether or not they are accompanied, the elements of the definition of refugee should be interpreted by taking into account the specific forms that child persecution may adopt. In that regard, it has stated that:<sup>584</sup>

In the terms of Articles 1(1)<sup>585</sup> and 2<sup>586</sup> of the American Convention, this right to seek and receive asylum entails certain specific obligations on the part of the host State, which include: (i) to allow children to request asylum or refugee status, which consequently means they may not be rejected at the border without an adequate and individualized analysis of their requests with due guarantees by the respective procedure; (ii) not to return children to a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the States where they suffer this risk; and (iii) to grant international protection when children qualify for this and to grant the benefit of this recognition to other members of the family, based on the principle of family unity.<sup>587</sup> All the above signifies, as the Court has

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<sup>582</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 172.

<sup>583</sup> According to UNHCR, even at a young age, a child may be considered the principal asylum applicant. *Cf.* United Nations High Commissioner for Refugees (UNHCR), *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, UN Doc. HCR/GIP/09/08, para. 8.

<sup>584</sup> 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. 80

<sup>585</sup> In light of Article 1(1) of the American Convention, States Parties are obliged to respect and ensure the rights and freedoms recognized therein and to ensure the free and full exercise to all persons subject to their jurisdiction, without discrimination. That is, this is also applicable to all children, whether asylum seekers, refugees and migrants, regardless of their nationality or Statelessness, and regardless of whether they are unaccompanied or separated from family, or of their immigration status or that of their family. *Cf.* N Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6.

<sup>586</sup> In turn, Article 2 of the Convention requires States Parties the general obligation to adapt its domestic law to the provisions of the Convention itself, to guarantee the rights recognized therein. The provisions of national law which serve this purpose must be effective (principle of *effet utile*), which means that the State must take all necessary measures to ensure that the provisions of the Convention is truly fulfilled. *Cf. Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile, February 5, 2001, Series C, No. 73 (2001), para. 87, and Case of Heliodoro Portugal v. Panama, Series C, No. 186 August 12, 2008, para. 179.*

<sup>587</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 225. See, generally, United Nations High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*, and United Nations High Commissioner for Refugees (UNHCR), *Guidelines on*

previously underlined, the corresponding right of those seeking asylum to be ensured a proper assessment by the national authorities of their requests and of the risk that they may suffer in case of return to the country of origin.<sup>588</sup>

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<sup>588</sup> *international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, UN Doc. HCR/GIP/09/08, paras. 8 and 9. I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 139, citing ECtHR, *Case of Jabari v. Turkey*, No. 40035/98. Judgment of 11 July 2000, §§ 48 to 50.

CHAPTER 12  
THE PRINCIPLE OF  
*NON-REFOULEMENT*





## THE PRINCIPLE OF *NON-REFOULEMENT*

### A. *Scope and Content*

436. The principle of *non-refoulement* is recognized in Article 22(8) of the American Convention, which provides: “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, Article 33(1) of the 1951 Refugee Convention provides that “[n]o Contracting States 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”.
437. The two provisions, read together, imply that no one may be turned away at the border or expelled from another country without an adequate analysis of their petition on an individualized basis<sup>589</sup>. Furthermore, before returning anyone, States must ensure that the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings in the country to which they would be expelling him<sup>590</sup>. States are also obliged, *inter alia*, not to hand over those concerned to the control of a States where they would be at risk of persecution or from which they would be returned to another country where such a risk exists.
438. The principle of *non-refoulement* has been called the “cornerstone of the protection of refugees,”<sup>591</sup> which is applicable, even if the latter have been legally admitted in the receiving States, and independently of having arrived individually or massively. By virtue of the complementarity between international refugee law and international human rights law, the principle of *non-refoulement* has a broader scope.<sup>592</sup> It is not only the “cornerstone of protection” but also a non derogable

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<sup>589</sup> Cf. IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, para. 111.

<sup>590</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 153.

<sup>591</sup> Non-refoulement has also been characterized by the Executive Committee of the United Nations High Commissioner for Refugees as a “cardinal principle” of refugee protection that “encourages States to intensify their efforts to protect the rights of refugees.” See *Conclusions Adopted by the Executive Committee on International Protection of Refugees*. No. 65 (XLII) General (1991), para. c.

<sup>592</sup> Apart from Article 22(8) of the Convention, the principle of *non-refoulement* is also reinforced and protected by Article 5(2) (right not to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment) of the same treaty.

norm of customary international law,<sup>593</sup> in keeping with the standards of the inter-American system and the interpretation of that principle adopted by the system's organs.

439. In its *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, the Inter-American Commission found that: "The obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal. This necessarily means that such persons may not be rejected at the border or expelled without an adequate and individualized analysis of their requests."<sup>594</sup>
440. The Commission has determined that the principle of non-refoulement applies extraterritorially. Although the American Declaration does not contain a specific provision on non-refoulement, the Commission has found on several occasions that other fundamental rights prohibit refoulement or expulsion where that might lead to a violation of those rights. In the Haitian Interdiction case (United States) the Commission concluded that the United States had violated the principle of *non-refoulement*,<sup>595</sup> having based itself on the second part of Article XXVII. (Right of asylum) of the American Declaration ("... in accordance with[...]international agreements"). In its analysis the Commission began by pointing out that Article 22(7) of the American Convention on Human Rights, which was adopted 21 years after the American Declaration, had a formulation similar to Article XXVII of the latter treaty. The Commission then made references to the pertinent international agreements, to wit, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. United States is only a party to the Protocol;<sup>596</sup> however, the Protocol ratifies the provisions contained in Articles 2 to 34 of the Convention and eliminates the dateline of January 1, 1951, that had been legislated for.<sup>597</sup> Within the 1951 Convention and in accordance with the foregoing, Article 33(1) enshrines the principle of *non-refoulement*.
441. The Commission found that the immigration laws of the United States did not contravene the principles set forth in international agreements; however, their summary enforcement without an individual assessment was where it committed the violation by obstructing the petitioners from exercising their right to seek and receive asylum "in foreign territory."<sup>598</sup> The return of the petitioners to Haiti

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<sup>593</sup> Paragraph 4 of the Declaration of the States parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees indicates: "Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."

<sup>594</sup> IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, para. 25.

<sup>595</sup> IACHR, Report on Merits No. 51/96, Case 10.675, Haitian Interdiction – Haitian Boat People (United States), March 13, 1997.

<sup>596</sup> UNHCR, [States Parties to the Convention relating to the Status of Refugees and its 1967 Protocol](#).

<sup>597</sup> See Protocol relating to the Status of Refugees (1967 Protocol), Introduction and Article 1.

<sup>598</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 163.

entailed the violation of other human rights of the petitioners, such as the right to life and personal security. With regard to the right to life, the Commission found:

The Commission has noted the petitioners' argument that by exposing the Haitian refugees to the genuine and foreseeable risk of death, the United States Government's policy of interdiction and repatriation clearly violated their right to life protected by Article I. The Commission has also noted the international case law which provides that if a States party extradites a person within its jurisdiction in circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction; the States party itself may be in violation of the Covenant.<sup>599</sup>

442. For its part, the right to personal security includes "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."<sup>600</sup> In its report on merits of the aforementioned case, the IACHR found that the petitioners' evidence was "compelling" and "establishe[d] that the security of the persons of both named and unnamed Haitians who were repatriated to Haiti against their will were violated upon their return to Haiti."<sup>601</sup> With respect to the violation of that right, the Commission concluded that the United States Government's act of "interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters" constituted a breach of the right to security of the Haitian refugees.<sup>602</sup>
443. Another important case in this area is that of *John Doe et al. v. Canada*, which concerned changes implemented to an immigration policy, known as the "direct-back policy", under which refugee claimants arriving to Canada through a border entry with the United States were directed back to the United States if Canada

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<sup>599</sup> See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser.A) (1989). The European Court was construing Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provided that: "No one shall be subjected to torture or inhuman or degrading treatment or punishment." The Court held that "Contracting Parties [are not absolved] from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction. Id. at para. 83, 86 (emphasis added). See also *N.G. v. Canada*, U.N. Human Rights Committee, 1994, at 203, where the Committee followed the reasoning in the *Soering* case, in construing Article 7 of the United Nations Covenant on Civil and Political Rights. In both of these cases extradition was sought by the demanding States, where the defendants were subject to the death penalty for murder crimes. In *Soering* the European Court concluded that the "death row phenomenon" in the United States was violative of Article 3, and in *N.G.'s* case, death by gas asphyxiation would be violative of Article 7 of the Covenant on Civil and Political Rights which is similar to Article 3.

<sup>600</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 170 (citing Black's Law Dictionary, 1523. See also 1 Bl.Comm.129 *Sanderson v. Hunt*, 7 S.W. 179, 25 Ky.L.Rep. 626).

<sup>601</sup> IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 170.

<sup>602</sup> The Commission found that the right to security of the person was violated in the case of most of the victims, but not all. IACHR, Report on Merits No. 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People* (United States), March 13, 1997, para. 171.

could not process their claims and without any immediate consideration of their claims.

444. Based on the evidence presented by both parties, the Inter-American Commission determined that the direct back policy had the effect of expelling the John Does without providing basic due process to challenge their expulsion, as required by Article XVIII of the American Declaration. The direct refoulements were designed to postpone the John Does' due process with the added component of expelling them from Canada for the interim period. As the State gained no assurance that the John Does would be permitted to return for their due process, their expulsion had the effect of denying the John Does the opportunity to any process to be heard and defend their continued presence in Canada.<sup>603</sup>
445. For its part, in the Case of Pacheco Tineo Family, the Court also underscored the obligation of States with respect to indirect non-refoulement; in other words, they must not hand over the person concerned to the control of a State where they would be at risk of persecution or from which they might be returned to another country where such a risk exists.<sup>604</sup>
446. As the Court held in this case, "regardless of the unfavorable decision on the asylum request in Bolivia," the immigration authority that decided to expel the family had the obligation to provide a reasoned assessment of the admissibility of the cause for expulsion and of the country to which the family should be transferred, in keeping with the particular characteristics of the case.<sup>605</sup> Ultimately, the Court concluded that given the manner and terms in which it was decided and carried out, the deportation of the members of the Pacheco Tineo family to their country of origin "was incompatible with the right to seek and to receive asylum, and with the principle of non-refoulement," recognized in Articles 22(7) and 22(8) of the American Convention.<sup>606</sup>

## ***B. Diplomatic Assurances in Extradition Proceedings***

447. Within the inter-American system there is only one precedent specifically related to the receiving and weighing of diplomatic or other assurances that the death penalty, torture or cruel, inhuman or degrading treatment will not be applied. This is the *Case of Wong Ho Wing v. Peru*, referred by the IACHR to the Court on October 30, 2013, alleging that the State of Peru had violated rights recognized in the American Convention in the context of the detention in Peru since October 2008 and the extradition proceeding in response to a request from the People's Republic of China.

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<sup>603</sup> IACHR, Report on Merits No. 78/11, Case 12.586, John Doe (Canada), July 21, 2011, para. 116.

<sup>604</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 153.

<sup>605</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 183.

<sup>606</sup> I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 189.

448. In the case of *Wong Ho Wing*, the Inter-American Commission said that it understood that the various types of assurances could differ in terms of their features, or that the elements used to measure the adequacy of those assurances could vary, because it was one thing to give assurances regarding a practice that was legal in the States requesting extradition (the death penalty), but another thing to give assurances with respect to a practice that was prohibited by international consensus and that was not legal in the requesting State (torture or cruel, inhuman or degrading treatment).<sup>607</sup>

449. That distinction was drawn by the Supreme Court of Canada in the case of *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* in the following terms:

A distinction may be drawn between assurances given by a State that it will not apply the death penalty (through a legal process) and assurances by a State that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a State that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the States in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.<sup>608</sup>

450. The Commission agrees, in principle, with this distinction. However, the distinction notwithstanding, the assurances that the death penalty will not be applied must still be analyzed on a case-by-case basis and must meet certain specific criteria to be deemed reliable. In cases such as the one at hand, in which arguments have been made concerning the use of summary, secret and arbitrary execution, with no access to information or any real prospects of monitoring in the requesting States, and on the use of torture and cruel, inhuman and degrading treatment, the Commission is of the view that the analysis done must take account of the standards that other international courts and bodies have established as being relevant in such cases. Those standards are summarized below.

451. In its judgment on *Wong Ho Wing v. Peru*, the Inter-American Court addressed the issue of diplomatic assurances<sup>609</sup>, by referring to the case law of the European Tribunal of Human Rights when considering

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<sup>607</sup> IACHR, Report No. 78/13 Case 12.794, Merits, *Wong Ho Wing* (Peru). Date of referral to the Court: October 30, 2013.

<sup>608</sup> Supreme Court of Canada. *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* (*Suresh v. Canada*), 2002, SCC 1. File No. 27790, January 11, 2002, para. 124.

<sup>609</sup> I/A Court H.R., *Case of Wong Ho Wing v. Peru*. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2015, para. 180.

When evaluating diplomatic assurances, their quality and reliability must be assessed. In the *Othman (Abu Qatada) vs. the United Kingdom*, the European Tribunal systematized some of the relevant factors when evaluating the quality and reliability of diplomatic assurances:

- i. Whether the terms of the assurances have been disclosed to the Court.
- ii. Whether the assurances are specific or are general and vague.
- iii. Who has given the assurances and whether that person can bind the receiving State.
- iv. If the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them.
- v. Whether the assurances concerns treatment which is legal or illegal in the receiving State.
- vi. Whether they have been given by a Contracting State.
- vii. The length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances.
- viii. Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers.
- ix. whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible.
- x. Whether the applicant has previously been ill-treated in the receiving State.
- xi. Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State<sup>610</sup>.

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<sup>610</sup> I/A Court H.R., Matter of Wong Ho Wing Order of the Inter-American Court of Human Rights, June 26, 2012, para. 180.

452. Citing the ECHR in the case of *Nizomkhon Dzhurayev v. Rusia*, No. 31890/11, the Court highlighted that “in a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.”<sup>611</sup>
453. On the issue of the assurances that the death penalty will not be applied, in the case of *Harkins and Edwards v. the United Kingdom*, the European Court reiterated the standard which holds that the diplomatic assurances must be clear, sufficient and unequivocal to remove any threat that the petitioners might be sentenced to death if extradited. The European Court declared this particular case inadmissible because it found that the assurances given by the United States met those requirements. The European Court wrote that the United States has a long history of respect for democracy, human rights and the rule of law.<sup>612</sup> In the words of the European Court, in this case, citing *Ahmad and others v. United Kingdom*:

the Court recalls its finding in *Ahmad and others v. the United Kingdom* [...] that, in extradition matters, Diplomatic Notes are a standard means for the requesting State to provide any assurances which the requested State considers necessary for its consent to extradition. In *Ahmad and others*, the Court also recognized that, in international relations, Diplomatic Notes carry a presumption of good faith and that, in extradition cases, it was appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States.<sup>613</sup> The Court also recalls the particular importance it has previously attached to prosecutorial assurances in respect of the death penalty.<sup>614</sup>

For these reasons, the Court considers that the assurances provided by the Government of the United States, the prosecution in Florida and Judge [...] are clear and unequivocal.<sup>615</sup>

454. The question of diplomatic or other assurances has been addressed at greater length in cases related to the non-application of torture or cruel, inhuman or degrading treatment. Thus, while in *Saadi v. Italy*, the European Court did not delve into the issue of diplomatic assurances, it did address issues related to the determination of the risk as the first step in analysis, the burden of proof in this

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<sup>611</sup> I/A Court H.R., *Matter of Wong Ho Wing* Order of the Inter-American Court of Human Rights, June 26, 2012, para. 178.

<sup>612</sup> ECtHR, *Harkins and Edwards v. United Kingdom*. Judgment 17 January 2012.

<sup>613</sup> ECtHR, *Harkins and Edwards v. United Kingdom*. Judgment 17 January 2012, para. 85.

<sup>614</sup> ECtHR, *Harkins and Edwards v. United Kingdom*. Judgment 17 January 2012, para. 85. Citing (*Nivette v. France* (dec.), no. 44190/08, 14 December 2000).

<sup>615</sup> ECtHR, *Harkins and Edwards v. United Kingdom*. Judgment 17 January 2012, para. 86.



regard, and a case-by-case determination. The European Court also established important guidelines for evaluating the situation in a country, including the type of evidence to be considered.

455. Thus, in this case the European Court wrote that “[i]t is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3.”<sup>616</sup> Where such evidence is adduced, it is for the Government to dispel any doubts about it.<sup>617</sup>
456. With specific reference to the situation in the receiving State, the European Court, citing its precedent in *Vilvarajah and Others v. the United Kingdom*, wrote that “in order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).”<sup>618</sup> As for the documentation that is relevant in making this determination, in *Saadi v. Italy* the European Court summarized its findings in earlier cases, as follows:

[...] as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the US Department of State (see, for example, *Chahal*, cited above, §§ 99-100; *Muslim v. Turkey*, no. 053566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345.02, § 54, ECHR 2005-VI; and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatqan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant’s specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Muslim*, cited above, § 68).<sup>619</sup>

457. As regards the time when the assessment must be done to determine whether or not a real risk exists, in *Chahal v. the United Kingdom* and *Venkadajalararma v. the Netherlands* the European Court held that “the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting States at the time of the expulsion.” However, if [the individual] has not yet been expelled, the relevant time was that of the

<sup>616</sup> ECtHR, *Saadi v. Italy*, 28 February 2008, para. 129. Citing *N. v. Finland*, no. 38885/02, § 167, 26 July 2005.

<sup>617</sup> ECtHR, *Saadi v. Italy*, 28 February 2008, para. 129.

<sup>618</sup> ECtHR, *Saadi v. Italy*, 28 February 2008, para. 130.

<sup>619</sup> ECtHR, *Saadi v. Italy*, 28 February 2008, para. 130.

proceedings before the Court.<sup>620</sup> In *Mamatkulov and Askarov v. Turkey*, the Court wrote that “[t]his situation typically arises when deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court. Therefore, while it is true that historical facts are of interest to the extent that they shed light on the current situation or the manner in which that situation is likely unfolding, the present circumstances are decisive.”<sup>621</sup>

458. As previously noted, in *Saadi v. Italy*, the European Court did not elaborate on how the diplomatic assurances should be assessed, as it has in so many other cases cited below. In *Saadi v. Italy*, the Court repeated what it had said in *Chahal v. the United Kingdom*, to the effect that what has to be examined is whether such assurances provide, “in their practical application, a sufficient guarantee.”<sup>622</sup> The basic point that the European Court established in this case is that “[t]he weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”<sup>623</sup>
459. Based on the foregoing, the Commission therefore determined in the case of *Wong Ho Wing* that “the risk in the receiving or requesting States must be assessed, including the scope and practical application of the assurances offered, on a case-by-case basis.”<sup>624</sup>
460. The European Court has held that in determining what the practical application of the assurances will be and the weight they should be assigned, the first question that has to be answered is whether the general human rights situation in the receiving States precludes the acceptance of assurances, no matter what the circumstances. However, only in exceptional cases can the general situation in a country be the only reason for refusing to assign any weight to the assurances offered.<sup>625</sup>
461. The analysis that the European Court usually does is based on two main elements: the quality of the assurances offered and the determination of whether, given the practices in the receiving State, those assurances can be deemed reliable. This Court has taken up a considerable number of cases that have enabled it to develop a series of factors that are relevant when examining these two main elements. The European Court recently summarized those factors in *Othman (Abu Qatada) v. the*

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<sup>620</sup> ECtHR, *Chahal v. United Kingdom*, para. 85 and 86; and *Venkadajalasarma v. the Netherlands*. 17 February 2004, para. 63.

<sup>621</sup> ECtHR, *Matatkulov y Askarov v. Turkey*, para. 69.

<sup>622</sup> ECtHR, *Saadi v. Italy*. 28 February 2008, para. 148. Citing *Chahal v. United Kingdom*, para. 105.

<sup>623</sup> ECtHR, *Saadi v. Italy*. 28 February 2008, para. 148. Citing *Chahal v. United Kingdom*, para. 105.

<sup>624</sup> IACHR, Report No. 78/13 Case 12.794, Merits, *Wong Ho Wing (Peru)*. Date of referral to the Court: October 30, 2013, para. 246.

<sup>625</sup> ECHR. *Gafarov v. Russia*, Application No. 25404/09, para. 138, 21 October 2010; *Sultanov v. Russia*, Application No. 15303/09, para. 73, 4 November 2010; *Yuldashev v. Russia*, Application No. 1248/09, para. 85, 8 July 2010.

*United Kingdom*.<sup>626</sup> Of the factors cited, the Commission would single out the following, with their respective case history:

- i. Whether the terms of the assurances have been disclosed to the Court.<sup>627</sup>
- ii. Whether the assurances are specific or are general and vague.<sup>628</sup>
- iii. Who has given the assurances and whether that person can bind the receiving State.<sup>629</sup>
- iv. If the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them.<sup>630</sup>
- v. Whether the assurances concern treatment which is legal or illegal in the receiving States.<sup>631</sup>
- vi. Whether they have been given by a Contracting State.<sup>632</sup>
- vii. The length and strength of bilateral relations between the sending and receiving State, including the receiving State's record in abiding by similar assurances.<sup>633</sup>

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<sup>626</sup> ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>627</sup> ECtHR, *Ryabikin v. Russia*, no. 8320/04, p. 119, 19 June 2008; *Case of Muminov v. Russia*, no. 42502/06, p. 97, 11 December 2008). Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>628</sup> ECtHR, *Klein v. Russia*, no. 24268/08, p. 55, 1 April 2010; *Khaydarov v. Russia*, no. 21055/09, P. 111, 20 May 2010. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>629</sup> ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, p. 344; *Abu Salem v. Portugal*, no. 26844/04, 9 May 2006; *Garayev v. Azerbaijan*, no. 53688/08, p. 74, 10 June 2010; *Baysakov and Others v. Ukraine*, no. 54131/08, p. 51, 18 February 2010; *Soldatenko v. Ukraine*, no. 2440/07, p. 73, 23 October 2008. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>630</sup> ECtHR, *Chahal*. p. 105-107. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>631</sup> ECtHR, *Cipriani v. Italy*. 221142/07, 30 March 2010; *Youb Saoudi v. Spain*, no. 22871/06, 18 September 2006; *Ismaili v. Germany*, no. 58128/00, 15 March 2001; *Nivette v. France*, no. 44190/98. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>632</sup> ECtHR, *Chentiev and Ibragimov v. Slovakia*, nos. 21022/08 and 51946/08, 14 September 2010; *Gasayev v. Spain* (no. 48514/06, 17 February 2009). Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>633</sup> ECtHR, *Others*, p. 107 and 108; *Al-Moayad v. Germany*, no. 35865/03, p. 68, 20 February 2007. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

- viii. Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers.<sup>634</sup>
  - ix. Whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible.<sup>635</sup>
  - x. Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting States.<sup>636</sup>
462. As for the consideration given to context and the weight that must be assigned to it even if assurances have been offered, in *Agiza v. Sweden* the United Nations Committee against Torture wrote that the rendition of the petitioner from Sweden upon the written assurances presented by the Egyptian Government representative was in violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The assurances in that case stated that the petitioner would not be subjected to torture or any other inhuman treatment, that he would not be sentenced to death or executed, and that the Swedish Embassy could monitor his trial and visit him before and after his conviction. Nevertheless, the Committee learned that the Swedish authorities knew or should have known the risk of torture facing the petitioner in Egypt. The Committee pointed out that “[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”<sup>637</sup>
463. Comparative law offers important precedents regarding the assessment of diplomatic assurances. Thus, for example in the case of *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada*, previously cited, the Canadian Supreme Court wrote the following:

In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government

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<sup>634</sup> ECtHR, *Chentiev and Ibragimov v. Slovakia*, nos. 21022/08 and 51946/08, 14 September 2010; *Gasayev v. Spain* (no. 48514/06, 17 February 2009). Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>635</sup> ECtHR, *Koktysh v. Ukraine*, no. 43707/07, p. 63, 10 December 2009. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>636</sup> ECtHR, *Al-Moayad v. Germany*, no. 35865/03, p. 66-69, 20 February 2007. Cited in: ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*. Application no. 8139/09. Judgment of 17 January 2012. Final 9 May 2012, para. 189.

<sup>637</sup> Committee Against Torture, *Algiza v. Sweden*.

to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces [...].<sup>638</sup>

The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual [...] will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. [...] In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion [...].<sup>639</sup>

464. In conclusion, the Commission determined that these standards regarding the characteristics, scope and content of the diplomatic or other assurances to ensure that the death penalty or torture or cruel, inhuman or degrading treatment would be neither imposed nor applied were the framework that must be used to determine whether a State complied with its obligation to request assurances and then properly assess those assurances for their sufficiency, clarity and reliability. In that analysis, it is necessary to examine, in addition to the State's assurances, the conduct of the State under whose jurisdiction the person sought in the request is found and then assess those assurances.<sup>640</sup>
465. The Commission concludes that the Peruvian State had processed an extradition request without taking into consideration that the requesting State committed serious omissions and irregularities in its original request; and had an international reputation for application of the death penalty and complaints of the use of torture. Therefore, without asserting that it is per se impossible to grant extradition under those circumstances, the Commission noted that the Peruvian State had an obligation to be especially diligent and serious in processing the request, so as to clear up any questions that these special circumstances could create and thereby comply with its duty to protect the life and personal integrity of a person under its jurisdiction.<sup>641</sup>

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<sup>638</sup> Supreme Court of Canada. *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002, para. 125.

<sup>639</sup> Supreme Court of Canada. *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002, para. 126.

<sup>640</sup> IACHR, Report No. 78/13 Case 12.794, Merits, Wong Ho Wing (Peru). Date of referral to the Court: October 30, 2013, para. 251.

<sup>641</sup> IACHR, Report No. 78/13 Case 12.794, Merits, Wong Ho Wing (Peru). Date of referral to the Court: October 30, 2013, para. 290.

CHAPTER 13  
THE RIGHT TO NATIONALITY



# THE RIGHT TO NATIONALITY

## A. *Scope and Content*

466. The American Convention and other international instruments recognize the right of every person to a nationality.<sup>642</sup> In that regard Article 20 of the American Convention provides that:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

467. Under Article 20 of the American Convention, everyone has the right to acquire a nationality, to keep it, and to change it. The right of all persons to keep their nationality is the obligation that arises from the absolute prohibition against arbitrary deprivation of nationality.<sup>643</sup> The importance of the right to nationality in the American Convention is underscored by its nature as a non-derogable right, since it is one of the rights that may not be suspended in time of war, public danger, or other emergency that threatens the independence or security of a States Party, in accordance with Article 27(2) of the that treaty.<sup>644</sup>

468. The Inter-American Court found that nationality is the legal bond that exists between an individual and a particular State that assures the individual a

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<sup>642</sup> See, *inter alia*, American Declaration of the Rights and Duties of Man, Article XIX; Universal Declaration of Human Rights, Article 15; International Covenant on Civil and Political Rights, Article 24.3; Convention on the Rights of the Child, Article 7(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 29; and Convention on the Reduction of Statelessness, Article 1.1.

<sup>643</sup> The United Nations General Assembly, in resolution 50/152, also recognized the fundamental nature of the prohibition against arbitrary deprivation of nationality. For its part, the Human Rights Council, in resolution 10/13, considered that that arbitrary deprivation of nationality, especially on discriminatory grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms.

<sup>644</sup> Cf. *Case of the Yean and Bosico Children v. Dominican Republic*, para. 136. On this issue, the Court has recognized the rights that cannot be suspended as a non-derogable nucleus of rights; in this respect, Cf. *Case of the Pueblo Bello Massacres v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 119, and *Case of González et al. ("Cotton Field")*, para. 244. In this regard, Cf. *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 23.



minimum of protection in their overall relations<sup>645</sup> and that the exercise of other political and civil rights depend on it.<sup>646</sup> The right to nationality is a critical component of the system for protection of human rights and, therefore, is one of the rights that may not be suspended under the Convention.<sup>647</sup> The Inter-American Court has also held that nationality, “as the political and legal bond that connects a person to a specific State,[...]allows the individual to acquire and exercise rights and obligations [that accrue to] membership [of] a political community. As such, nationality is a [prerequisite] for the exercise of [certain] rights.”<sup>648</sup>

469. There are two aspects to this right under the American Convention: first, the right to nationality provides the individual with a minimal measure of legal protection in his overall relations by establishing a link between him and a given State; and, second, it protects the individual from arbitrary deprivation of his nationality, without which he would be deprived of all of his political rights as well as of those civil rights that are founded on the individual’s nationality.<sup>649</sup> It should be mentioned that a State’s decision to attribute nationality should not be taken arbitrarily. To that end, the Inter-American Court has held that:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual’s legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the State in that area, and that the manners in which State regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights.<sup>650</sup>

470. In turn, the international recognition of the right to nationality as a universal human right imposes on States the obligation to prevent and reduce Statelessness,<sup>651</sup> the legal position in which all those who are not recognized as

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<sup>645</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 139.

<sup>646</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 136.

<sup>647</sup> Article 27, para. 2.

<sup>648</sup> *Cf. Case of the Yean and Bosico Children v. Dominican Republic*, para. 137.

<sup>649</sup> *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 34; *Case of Gelman v. Uruguay. Merits and Reparations*. Judgment of February 24, 2011, Series C No. 221, para. 128; *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 28, 2014. Series C No. 282, para. 254.

<sup>650</sup> *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. OC-4/84, para. 32. See also, Inter-American Court of Human Rights, *Ivcher Bronstein Case*. Judgment of February 6, 2001, para. 88; *Castillo Petruzzi et al. Case*. op. cit., para. 101.

<sup>651</sup> VAN WASS, Laura, *Nationality Matters: Statelessness under International Law*. Intersentia, 2008, p. 40.

nationals of any State find themselves.<sup>652</sup> Statelessness has various causes and most of them are linked to migratory phenomena. In that regard, doctrine has identified the following causes: (a) States succession, (b) poor birth and marriage registration, (c) refugee or irregular migrant status, (d) trafficking in persons, and (e), arbitrary deprivation of nationality.<sup>653</sup> The last of these can come about in two situations: the first is denial of access to nationality, either at birth or through naturalization; the second involves subjecting someone to a process of denationalization by depriving them of an acquired nationality.<sup>654</sup>

471. The obligations of States under international human rights law and the conventions on Statelessness require them to refrain from adopting laws or practices that have the effect of denying persons access to any nationality.<sup>655</sup> In that connection, the American Convention provides, "Every person has the right to the nationality of the States in whose territory he was born if he does not have the right to any other nationality."<sup>656</sup> In keeping with the above, the Inter-American Court has held that, a person facing the risk of Statelessness need only prove that they were born in the territory of a given State to acquire the nationality of that State.<sup>657</sup>
472. States have the power to regulate the scope and application of rights, including the right to nationality. Nevertheless, the restrictions or requirements established to obtain nationality must be governed by strict principles such as necessity and proportionality; in other words, the restrictions must be calculated to serve a compelling public interest and must be proportional to the interest that necessitates them. These restrictions must also be prescribed by law, are not to be discriminatory and must serve some legitimate end. They cannot result in an arbitrary deprivation of nationality.<sup>658</sup>
473. Thus, in accordance with current trends in international human rights law, the Inter-American Court has decided that, when regulating the granting of nationality States must take into account: (a) their obligation to prevent, to avoid and to reduce Statelessness, and (b) their obligation to provide each individual with the equal and effective protection of the law without discrimination.<sup>659</sup> The obligation to provide every individual with the equal and effective protection of the law without discrimination establishes a limit to the State's authority to determine

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<sup>652</sup> Article 1 of the 1954 Convention relating to the Status of Stateless Persons. "The definition [of Statelessness] is part of is part of customary international law." UNHCR, *Guidelines on Statelessness NO.1*, 20 February 2012, p. 2.

<sup>653</sup> See, Van Wass, Laura, *Nationality Matters: Statelessness under International Law*. Intersentia, 2008, pp. 194-197.

<sup>654</sup> VAN WASS, Laura, *Nationality Matters: Statelessness under International Law*. Intersentia, 2008, p. 99.

<sup>655</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 142.

<sup>656</sup> American Convention on Human Rights, Article 20(2).

<sup>657</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 156.

<sup>658</sup> IACHR, Application filed with the Inter-American Court of Human Rights, *Case of Dilcia Yean and Violeta Bosico Cofi v. Dominican Republic*, June 11, 2003, para. 51.

<sup>659</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*, para. 140.

those who are its nationals. In that regard, since its judgment in *Yean and Bosico Children v. Dominican Republic*, the Inter-American Court has held that:

- a. a person's immigration status cannot be a condition for the State to grant nationality, because immigration status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;<sup>660</sup>
- b. a person's immigration status is not transmitted to the children, and
- c. the fact that a person was born in the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.

474. In *Yean and Bosico Children v. Dominican Republic*, the Inter-American Court Statesd that the rights to nationality<sup>661</sup> and equal protection [of the law],<sup>662</sup> bar the State from adopting rules that discriminate in granting nationality or that have a discriminatory effect, despite the neutrality of their language.<sup>663</sup> Indeed, the power of each State to determine who its nationals are is limited by its duty to respect and ensure the human rights of all persons subject to its jurisdiction, without any discrimination for reasons of race, color, sex, language, and other social conditions.<sup>664</sup> Furthermore, the Court has written that States should not adopt practices or legislation that might foster an increase in the number of Stateless persons.<sup>665</sup> Lastly, the judgment noted that in cases involving minors, the States has the additional duty to take the best interests of the child into account.<sup>666</sup>

475. The Inter-American Court has held that it is discriminatory to take the migratory status of a person into consideration when granting nationality,<sup>667</sup> since the right to equal protection applies to everyone within the territory of a States, regardless of

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<sup>660</sup> Cf. *Juridical Condition and Rights of the Undocumented Migrants*, para. 134.

<sup>661</sup> American Convention on Human Rights, Article 20(1).

<sup>662</sup> American Convention on Human Rights, Article 24.

<sup>663</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 140.

<sup>664</sup> American Convention on Human Rights, Article 1, para. 1.

<sup>665</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 142.

<sup>666</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 134.

<sup>667</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 156.

any other social condition.<sup>668</sup> Specifically, the Court has determined that a person's immigration status is not transmitted to their children.<sup>669</sup>

476. As regards acquisition of nationality, the Commission has held that there is no uniform rule in practice or in domestic law on the acquisition of nationality by birth; however, two principles are applied and nationality is conferred by birth, on the basis, either of being born within the territory of a State (*jus soli*) or of being descended from one of its nationals (*jus sanguinis*).<sup>670</sup> In that regard, the Commission notes that the majority of States in the region use a mixed system, by which nationality is granted based on a combination of the principles of *jus soli* for children born within their territories and *jus sanguinis* for those born in another country. This tradition, applied by most States in the Americas, has been a significant factor in preventing and reducing Statelessness in the region.

## ***B. Due-Process Guarantees in Proceedings for Granting Nationality***

477. The fact that arbitrary deprivation of nationality is regarded as a human rights violation implies that the relevant procedure must be carried out in accordance to law and be subject to review.<sup>671</sup> In addition, the system for protection of human rights affords the person concerned recourse to a remedy for such a violation.<sup>672</sup> As regards the right to the guarantees of due process, the American Convention establishes, as a general clause, that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. It follows, therefore, that any administrative proceeding that may have an impact on a person's right to nationality is governed by the basic fair-trial guarantees recognized in Article 8 of the American Convention.
478. Furthermore, the organs of the inter-American human rights system have unequivocally recognized that the guarantees of due process of law are applicable in the administrative sphere. Thus, the Commission has established the obligation for States to have clear rules governing the behavior of their agents in order to avoid inappropriate levels of discretionality in the administrative sphere that

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<sup>668</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 155.

<sup>669</sup> I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 156.

<sup>670</sup> IACHR, Application to the Inter-American Court of Human Rights, Case 12,189 *Girls Dilcia Yean and Violeta Bosico* (Dominican Republic). July 11, 2003, para. 49.

<sup>671</sup> Van Wass, Laura, *Nationality Matters: Statelessness under International Law*. Intersentia, 2008, p. 114.

<sup>672</sup> International Covenant on Civil and Political Rights, Article 2(3); Universal Declaration of Human Rights, Article 8; American Convention on Human Rights, Article 25.

might encourage arbitrary or discriminatory practices.<sup>673</sup> For its part, the Inter-American Court has held that:

[t]he right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons.<sup>674</sup>

479. On interpreting the provisions of the American Convention, the organs of the inter-American system have identified certain minimum standards of legal due process that should govern administrative proceedings, and any other proceeding with the potential to affect the rights to nationality or juridical personality. Some of those procedural guarantees are: (1) Prior notice of the proceeding; (2) the right to a hearing for a determination of the rights at stake; (3) the right to be assisted by legal counsel; (4) the rights to mount a defense and to have a reasonable time to prepare arguments, formally present them, and submit the corresponding evidence; (5) the right to a written record of the proceedings and decisions in the process; (6) the proceedings should be conducted within a reasonable time; (7) the right to effective judicial review of administrative decisions; (8) a reasoned decision; and (9) disclosure of the actions of the administration, among others.<sup>675</sup>
480. Additionally, where a person is subject to loss or deprivation of nationality and a review process is available, lodging an appeal should suspend the effects of the decision, such that the individual continues to enjoy nationality—and related rights—until such time as the appeal has been settled. In addition to providing for the possibility to appeal and related due process guarantees, States should ensure that there is an effective remedy available where a decision on nationality is found to be unlawful or arbitrary. This must include the possibility of restoration of nationality. States should also provide adequate reparation for all related violations of the rights of the person concerned.<sup>676</sup>
481. Thus, in the case of *Ivcher Bronstein v. Peru*, the Inter-American Court found that the fair trial guarantees recognized at Article 8 of the American Convention also

<sup>673</sup> IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, para. 97.

<sup>674</sup> I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72, para. 127; I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 129.

<sup>675</sup> IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, para. 97; IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OEA/Ser.L/V/II. Doc. 63, December 9, 2011. See also United Nations, *Human rights and arbitrary deprivation of nationality*, A/HRC/13/34, para. 43.

<sup>676</sup> See United Nations, *Human rights and arbitrary deprivation of nationality*, A/HRC/13/34, para. 46, and Convention on the Rights of the Child, Article 8. Note that where a person's dependents are also affected by the loss or deprivation of nationality, the restoration of nationality must similarly be extended to them.

apply to administrative proceedings concerning the determination of such rights as the right to nationality.<sup>677</sup>

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<sup>677</sup> I/A Court H.R., *Ivcher Bronstein Case v. Peru*, Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 105.



CHAPTER 14  
THE RIGHT TO PROPERTY





## THE RIGHT TO PROPERTY

### A. *Scope and Content*

482. Within the inter-American system, the right to property is recognized in Article 21 of the American Convention and Article XXIII of the American Declaration. In this regard, Article 21 of the American Convention provides that:

Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

[...]

483. Likewise, Article XXII of the American Declaration enshrines the right to property in the following terms:

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

484. The concept of "property" enjoys a broad scope in the inter-American system, not only in terms of its object, but also regarding the subjects to whom the right is recognized. In regard to the object, the Inter-American system has recognized the right to property over "material objects that may be appropriated, and also any right that may form part of a person's patrimony," "works resulting from the intellectual creation of a person," and an acquired property right, such as a pension.<sup>678</sup> As regards the "subjects" of property, the inter-American system has recognized the collective right to property, even when its holders lack a license or formal deed of ownership thereto, on the basis that it is a core part of the culture, religion, economy, integrity, and spiritual life of indigenous communities and tribal peoples.<sup>679</sup>

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<sup>678</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Judgment of February 6, 2001; *Case of Palamara-Iribarne v. Chile*. Judgment of November 22, 2005; I/A Court H.R., *Case of the "Five Pensioners" v. Peru*. Judgment of February 28, 2003.

<sup>679</sup> I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005; I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005; I/A Court H.R., *Case of Saramaka People v. Suriname*. Judgment of November 28, 2007; I/A Court H.R., *Case of the Sawhoyamaya*

485. In its report on the merits of the *Case of Benito Tide Méndez et al. v. Dominican Republic*, the Commission considered that like the other fundamental rights, effective protection of the right to property requires ensuring that the right to the use and enjoyment of property is guaranteed in law and other instruments, and that there is a simple and rapid recourse to a competent court for protection against acts that violate that right.<sup>680</sup> According to the Commission and the Court: (1) While the use and enjoyment of property can be subordinated to the general welfare, any measure of that kind must be adopted by law and dictated by necessity[...][and] must be determined by the just demands of the general welfare and the advancement of democracy;<sup>681</sup> and (2) while persons may be deprived of the property by the State, [that] can only be done for reasons of public utility or social interest and according to the cases and in the manner prescribed by law, and upon payment of just compensation.<sup>682</sup>
486. The Court has held that in order to restrict or deny the right to property, the law must not only specify every cause but its enforcement must be respectful of the essential content of the right to property. This right implies that any curtailment must be the exception. From the principle of exception, it follows that any restrictive measure must be necessary to achieve a legitimate objective in a democratic society, consistent with the object and purpose of the American Convention.<sup>683</sup>

## ***B. The Right to Property of Internally Displaced People***

487. The inter-American system has a long-standing tradition of protecting the right to property, starting with cases concerning the rights of indigenous peoples and internal displacement. In 1970, in its first case relating to such matters—that of the Guahibos in Colombia—the Commission addressed the obligation of the State to protect indigenous lands.<sup>684</sup> The petitioners in that case denounced acts of

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*Indigenous Community v. Paraguay*. Judgment of March 29, 2006; I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Judgment of March 29, 2006).

<sup>680</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 326 (citing I/A Court H.R., *Case of Awas Tingni v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 111-115).

<sup>681</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 326 (citing I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 44).

<sup>682</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 326 (citing I/A Court H.R., *Case of Awas Tingni v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 143).

<sup>683</sup> I/A Court H.R., *Case of Chaparro-Álvarez and Lapo-Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21<sup>st</sup>, 2007. Series C No. 170, para. 93. See also, *The Term “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 28; *Case of Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179, para. 65.

<sup>684</sup> IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*. OEA/Ser.L/V/II.108, Doc. 62, October 20th, 2000. Chapter III, para. 2

persecution and torture allegedly committed against the Guahibo indigenous people with the intention of dispossessing them of their ancestral lands. The Commission found that the Colombian State violated the collective rights of the community.<sup>685</sup>

488. The Commission would again address this issue in the case of the Yanomami of northwest Brazil in 1985.<sup>686</sup> The alleged facts were said to have occurred in the context of a plan of exploitation of the natural resources and the development of the Amazon region approved by the Brazilian Government in the 1960s. In 1973 construction began on a highway BR-210, which, when it passed through the territory of the Yanomami, compelled the community of 12,000 inhabitants to abandon their habitat and seek refuge in other places.<sup>687</sup> Subsequently, rich mineral deposits were discovered in other territories of the Yanomamis, which attracted mining companies and independent prospectors, thus aggravating the displacement of the indigenous people.<sup>688</sup> In March 1982, after an intensive campaign of protest by national and international human rights and indigenous defense organizations, the Government of Brazil, by ministerial decree GM/No. 025, established the interdiction (absolute reservation) of a continuous territory of 7,000,000 hectares in the Federal Territory of Roraima and the State of Amazonas for the Yanomami indigenous and assigned to a government agency the responsibility for taking several measures for protection of the Yanomami indigenous people.<sup>689</sup>
489. In its resolution (12/85), the IACHR determined that the Government of Brazil was responsible for violation of the following rights recognized in the American Declaration: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI). Although it did not find the State responsible for violating the right to property (Article XXIII), in spite of having admitted the allegation in that regard for examination in the merits stage, the IACHR recommended that the State, in conformity with Decree GM/No. 025 set and demarcate the boundaries of the Yanomami Park. The Resolution also referred to aspects of education and social integration. As the IACHR would later note, “the significance of that resolution was twofold,” first because “it confirmed that the system was capable of processing violations of collective rights, as in the case of the property, life, health, and well-being of the Yanomami people”; and second, because it was “the first time that an inter-governmental organization had issued a resolution requesting such demarcation”<sup>690</sup>.

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<sup>685</sup> IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, OEA/Ser.L/VII.108, Doc. 62, October 20, 2000, Chapter III, para. 2

<sup>686</sup> IACHR, Case No. 7615 (Brazil) Resolution 12/85, March 5, 1985.

<sup>687</sup> IACHR, Case No. 7615 (Brazil) Resolution 12/85, March 5, 1985m para. 2(e).

<sup>688</sup> IACHR, Case No. 7615 (Brazil) Resolution 12/85, March 5, 1985m para. 2(f).

<sup>689</sup> IACHR, Case No. 7615 (Brazil) Resolution 12/85, March 5, 1985m para. 2(h).

<sup>690</sup> IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, OEA/Ser.L/VII.108, Doc. 62, October 20, 2000, Ch. III: Doctrine and Jurisprudence of the IACHR on Indigenous Rights (1970-1999), Section 2.

490. One of the most notable cases of indigenous communities being stripped of ownership of their lands was that of the Community of San Vicente Los Cimientos (Guatemala).<sup>691</sup> In that case the community alleged that the Army had expelled them from their lands and given those lands to another community for political motives.<sup>692</sup> To reach a friendly settlement, the parties requested an expert's opinion on the conflicting titles of the two communities to the same property (the lands in question) and the respective compensation arrangements.<sup>693</sup>

491. In a more recent internal displacement case, Marino López et al. (Operation Genesis) (Colombia), the Commission reached the factual determination that the displaced persons, who were members of Afro-descendent communities composed of tribal peoples, were victims of Operation Genesis, which led to paramilitary incursions on their ancestral lands. The exercise of their right to property was violated by bombardments and ransacking of their communities.<sup>694</sup> In its analysis, the IACHR recalled that the Committee on the Elimination of Racial Discrimination (CERD) had said that displaced persons had have the right freely to return to their homes of origin under conditions of safety, and that States parties were obliged to ensure that the return of such refugees and displaced persons was voluntary. The IACHR also noted that the CERD had stated that

displaced persons had, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that could not be restored to them.<sup>695</sup>

492. The IACHR also recalled that based on Article 1(1) of the Convention, the Inter-American Court has established that members of tribal peoples “require various special measures to guarantee the full exercise of their rights, in particular with respect to the enjoyment of their rights to property,” in order to guarantee their physical and cultural survival.<sup>696</sup> By failing to guarantee that special protection or establish security measures that would have allowed the communities to return to the full exercise of their right to property, the Commission concluded that the

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<sup>691</sup> IACHR, Report No. 68/03, Petition 11.197, *Community of San Vicente Los Cimientos* (Guatemala). Friendly Settlement, October 10, 2003.

<sup>692</sup> IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, OEA/Ser.L/VII.108, Doc. 62, October 20, 2000, Ch. III: Doctrine and Jurisprudence of the IACHR on Indigenous Rights (1970-1999), Section 2.

<sup>693</sup> IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, OEA/Ser.L/VII.108, Doc. 62, October 20, 2000, Ch. III: Doctrine and Jurisprudence of the IACHR on Indigenous Rights (1970-1999), Section 2.

<sup>694</sup> IACHR, Report on Merits No. 64/11. Case 12.573. *Case of Marino López et al. (Operation Genesis)* (Colombia), para. 347.

<sup>695</sup> IACHR, Report on Merits No. 64/11. Case 12.573. *Case of Marino López et al. (Operation Genesis)* (Colombia), para. 350.

<sup>696</sup> IACHR, Report on Merits No. 64/11. Case 12.573. *Case of Marino López et al. (Operation Genesis)* (Colombia), para. 351.

Colombian State was responsible for violation of the right to property.<sup>697</sup> In conclusion, the IACHR found:

During the period of displacement until their return to their lands, the displaced persons did not enjoy access to, and use of, personal and community property, lands and natural resources found there. For its part, their right to property was also affected due to the neglect and deterioration of their lands and both their moveable and immoveable, community and individual property. Similarly, the forced displacement also disadvantaged them in the possibility for work, which, in turn, caused them loss of earnings. The displaced persons found their right to property affected whenever during the time of the displacement they could not access the right to the use and enjoyment of the natural resources on their traditional lands—such as wood—among other resources traditionally used by members of the Cacarica communities.<sup>698</sup>

493. In sum, for the IACHR it was important to underscore that the violation of the right to property was committed not only by the obstruction of access to the property, but also by the prevention of its use and enjoyment, leading to its neglect and deterioration, as well as the implications that the denial of access, use, and enjoyment of the property had on the petitioners' possibilities of working, given that those possibilities were closely bound up with the property and, in particular, the natural resources that the petitioners owned.

### ***C. The Right to Property of Persons in the Context of Migration***

494. The *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz v. México* is the principal case in which the IACHR considered at the merits stage the right to property of persons in the context of migration.<sup>699</sup> In that case, three foreign priests in Mexico were arrested without a judicial order and expelled shortly afterwards following a summary proceeding that violated their human rights. However, the IACHR did not look in depth at the facts that gave rise to a potential violation of the right property in itself, nor, indeed, did it conclude that the State had violated the right to property; rather, it briefly discussed and included the right to property in its analysis of the right to privacy:

In addition to the harm done to the priests by deporting them summarily—***without even giving them time to collect their***

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<sup>697</sup> IACHR, Report on Merits No. 64/11. Case 12.573. *Case of Marino López et al. (Operation Genesis)* (Colombia), paras. 352-53.

<sup>698</sup> IACHR, Report on Merits No. 64/11. Case 12.573. *Case of Marino López et al. (Operation Genesis)* (Colombia), para. 348.

<sup>699</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999.

**personal belongings**, much less to defend themselves—is the campaign to discredit them orchestrated by the State. The petitioners consider that one of the objectives of that campaign was to provide political justification—the IACHR considers a legal justification impossible—for the decision to deport the priests and forbid their return to Mexico, despite the fact that they had resided there legally for many years.

In analyzing above the priests' right to judicial protection, we noted the Mexican courts' reaction to the government's behavior: denying civil rights [*amparo*] and federal protection to the complainants and exonerating all the government officials accused. In light of the preceding analysis, the Commission concludes that the Mexican State violated the right—guaranteed under Article 11 of the American Convention—to protection of the honor and dignity of Fathers Riebe Star, Barón Guttlein, and Izal Elorz<sup>700</sup> (emphasis added).

495. In essence, the fact that the priests were summarily expelled and did not even have time to gather their personal effects, coupled with the campaign to discredit them, were what led the Commission to determine that the priests' right to privacy had been violated.
496. The case of *Tibi v. Ecuador*<sup>701</sup> is significant with respect to the scope and content of the right to property. Daniel Tibi was a French gem trader. At the time of the events he was living in Quito, Ecuador, but he did not have a license to engage in business, namely a "general certificate of alienage."<sup>702</sup> Mr. Tibi was detained on September 27, 1995, by agents of the State who suspected him of links to drug trafficking. The arrest was made without a court order and the arresting police officers did not notify him at the time of the arrest of the charges against him, but informed him that it was for "migration control."<sup>703</sup> They then proceeded to seize his belongings.<sup>704</sup> Following a judicial proceeding plagued with violations of his due process guarantees, among other rights, Mr. Tibi was held in pre-trial detention for 28 months during which time he claimed to have been tortured by agents of the State.
497. Both the Commission and the Court found that the right to property was violated when the victim's belongings were seized at the time of his arrest and not

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<sup>700</sup> IACHR, Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico). April 13, 1999, paras. 96-97.

<sup>701</sup> I/A Court H.R., *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004.

<sup>702</sup> Also known as a "certificate of registration in the Foreign Alien Registry." See *Case of Tibi v. Ecuador*, footnote 30.

<sup>703</sup> I/A Court H.R., *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004, para. 90.11.

<sup>704</sup> I/A Court H.R., *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004, para. 90.12.

subsequently returned in spite of a judicial order to that effect.<sup>705</sup> The Court ruled on the matter, finding the State of Ecuador responsible for violation of Mr. Tibi's right to property. The Court dismissed the argument of the State that Mr. Tibi had not presented sufficient documents attesting to ownership of the seized property, considering that:

In the instant case, Mr. Tibi was in undisputed possession of the goods at the time of his detention.

It is widely admitted that possession in itself establishes the presumption of ownership in favor of the possessor, and in the case of movable property, it serves as entitlement. This Court deems that Article 21 of the Convention protects the right to property in a sense that includes, among other things, the possession of goods.

[W]hile it is a movable good that can be registered, this registration is only necessary to object to claims by a third party alleging a right over the good. In the instant case there is no record of anyone having claimed ownership of [the property] that was in Mr. Tibi's possession, for which reason it was not appropriate to presume that said good did not belong to him. Therefore, it was in order to respect the possession that he exercised.

In brief, Mr. Tibi was using and enjoying the goods seized from him when he was detained. Not returning them to him deprived him of his right to property. Mr. Tibi was not under the obligation to demonstrate pre-existence or [ownership] of the goods seized for them to be returned to him.<sup>706</sup>

498. Based on the foregoing, it may be surmised that, for the inter-American system, in the absence of title or other evidence of lawful possession of goods, the elements by which it a person may be presumed the legitimate owner include undisputed possession of the goods and/or that the individual concerned is using and enjoying the goods. This interpretation of the right to property is not only flexible but also acknowledges the difficulties that a person might have for lack of some official paper or document, which can be especially significant in the case of people on the move outside their place or country of origin.
499. As the Court found in Advisory Opinion 18 concerning the rights and legal status of migrants, "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights,"<sup>707</sup> which includes, perforce, the right to property. Advisory Opinion OC-18/03 also underscores the

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<sup>705</sup> I/A Court H.R., *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004, para. 206.

<sup>706</sup> I/A Court H.R., *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004, paras. 217-221.

<sup>707</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 134.



right of migrant workers who have been hired in another country to be paid their salary, which is recognized as property in the inter-American system:

[T]he State [...] violates the human rights of the workers directly[...] when it denies the right to a pension to a migrant worker who has made the necessary contributions and fulfilled all the conditions that were legally required of workers.<sup>708</sup>

500. Another case in which the Commission addressed the rights to property was that of *Benito Tide Méndez et al. v. Dominican Republic*. In that case, the petitioners claimed that the alleged victims were detained and, within less than 24 hours, arbitrarily expelled from the Dominican Republic to Haiti without any prior notice, a hearing, or the opportunity to collect their personal effects or contact family members.<sup>709</sup> The Commission concluded that the State was responsible for violation of their right to property, taken in conjunction with Article 1(1) of the Convention, inasmuch as it found that “the victims’ expulsion meant the automatic and de facto loss of all those personal effects that were left behind in Dominican territory, which [was] an unlawful deprivation of their property,” for which, it noted, they did not receive adequate compensation.<sup>710</sup>
501. Thus, the three elements established as violating the right to property, which were also found in the case of *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz v. Mexico*, were: (1) loss or deprivation of property, (2) that such loss or deprivation occurs *de facto*, or without the opportunity to seek or claim belongings, and (3) the lack of adequate compensation to the owner. Furthermore, in the *Case of Benito Tide Méndez*, the State failed to argue that the deprivation of the victims’ property was based on any public interest envisaged in the law of the Dominican Republic; to the contrary, under the country’s domestic laws, the victims should have had an opportunity to retrieve their belongings,<sup>711</sup> an obligation that was not observed in that case.

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<sup>708</sup> 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. 127.

<sup>709</sup> The victims had resided in the Dominican Republic for many years and it was where their home and businesses were located. At the time of their expulsion, the victims had “household furnishings, personal effects, clothing, livestock, savings in cash, and unpaid wages.” See IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 329.

<sup>710</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 331.

<sup>711</sup> IACHR, Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, 2012, para. 330.