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

In addition, since April 2018, the violent repression of opposition protests by the Nicaraguan government has forced a large number of Nicaraguans to move within their own country or flee to other countries in search of protection. By the end of September, 40,386 people had expressed a need for international protection in Costa Rica. Of this number, 13,697 had formalized their asylum requests through an interview with immigration authorities between January and September.[2] There has also been a significant increase in departures to other countries and in asylum requests from Nicaraguans to other countries such as Panama, Mexico, the United States, and Spain.[3] With no prospects of a political solution in the short ter70.76(e)-7o(12((h)1(13 Tw 12 -0 0 12 3(t)6(e1)6(e1)6(eo)4(h)3.l)13(e

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

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

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

Finally, Haitian migration to other countries in the region, such as the Dominican Republic, Brazil, Chile, the United States, and Mexico, has not diminished. Although the 2010 earthquake was a 0(.34u)4(e)(D)

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

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

they were authorized to stay.[28]

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

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

6. Principle of non-refoulement

Within the inter-American system, this principle is regulated in Article 22.8 of the American Convention on Human Rights, in the following terms: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his

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

b)

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

2. Principle of equality and nondiscrimination, criminalization of migrants

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

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

The significance of the principle of equality and nondiscrimination lies in the fact that, in the words of the Court, it "springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to

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

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

- The increasing relevance of criminal law categories within immigration regulations. An example of this would be the rules establishing the loss of regular immigration status and/or residence for persons who commit a crime within the State in which they are located.
- The use of criminal standards, procedures, and offenses as a way of penalizing irregular migration. This section includes the criminalization of certain acts such as irregular entry into a country or "recidivism", the expiration of a residence permit, and the creation of rules that punish entering into marriage for the purpose of obtaining immigration benefits.

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

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

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

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

- Determine whether the measures taken by the State were sufficient to guarantee the right to equality and nondiscrimination of all persons coming from Puerto Waira (including those who were recognized as refugees as well as those excluded from such protection and subsequently deported to Tlaxcochitlán).
- Analyze whether the overall context in Arcadia is one that criminalizes migration, taking into account the following elements: (i) That the State does not penalize irregular entry into its territory (see paragraph 11 of the facts of the case); (ii) That immigration detention measures are used, with limited grounds for their admissibility (see clarification answer number 11); (iii) That a person's criminal record affects his or her immigration status, excluding him or her from refugee status; (iv) The type of measures taken by Arcadia to guarantee the right to

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

Right to seek and receive asylum

The possible violation of the right to seek and receive asylum, as well as of the principle of non-refoulement, are one of the central issues raised e 6jes2 o2p e oes poa8,(he)-nu9 Tc -0 234.c 0 Tw 3.71 0 Td1 0 Tw 9

Cartagena.[59]

a) Principle of non-refoulement

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

Article 22.

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

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

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

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

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

The principle of non-refoulement also includes the prohibition of indirect ret-3(ohe) .003 geredncalyR0(t)6(y)1(o)

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

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

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

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

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

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

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

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

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

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

b) Prima facie recognition of refugee status

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c) he has been guilty of acts contrary to the purposes and principles of the United Nation

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

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

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

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

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

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

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

[73] Guidelines on International Protection Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, p. 2.
[74] UNHCR. Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. 149.
[75] UNHCR. Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003. Available at:

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

> "The age of the claimant at the time of becoming involved with

State's punitive authority."[81]

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

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

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

With respect to the latter, the Court has stated that “legal aid must be provided by a legal professional to meet the requirements of a proced

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ensuring the rights of persons in its custody.

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

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

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

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

5. Trial rights in immigration and/or removal proceedings

This aspect is developed in paragraph 28 of the facts of the case and in the answers to clarification questions 24 and 50. The examination of these situations should take account of the fact that the Inter-T tthi43.9(n -34.48 -1.3 Td[(-)Tj/TT)5(t)2(on of)3(t)2(he)-n of o thsi(c),(r)-3(e)1(s)l-34.48 -1.3.08 thn of to ase

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

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

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

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

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

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

The Inter-American Commission has recommended the creation of national and regional mechanisms to facilitate the exchange of information on unidentified remains and missing persons in other countries; this mechanism should include the participation of civil society organizations.[120] An interesting example in the area of transnational justice is the Foreign Support Mechanism, which was

offer evidence, and access reparation mechanisms.[122]

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

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

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

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

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

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

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

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

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

following:

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

representative of the entity submitting the petition.

The sole exception to the requirement of identifying the victims in the case is regulated in Article 35.2 of the Rules of Procedure of the Inter-American Court which states that, when it has not been possible to identify one or more of the alleged victims referred to in the facts of the case because it concerns massive or collective violations, the Court will decide whether to consider those individuals victims. In order to effectively apply this exception, the Inter-American Court makes an assessment based on the particular characteristics of each case,[130]