

**2009 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**Rosalie Fournier and Bruno Tamba**

*Applicants*

**v**

**The Republic of Tynalandia**

*Respondent*

***MEMORIAL FOR THE COMMISSION***

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## **STATEMENT OF FACTS**

Tynalandia is a wealthy democratic republic whose official language is Spanish.<sup>1</sup> It is a member of the Organization of American States (OAS) and has ratified the main human rights conventions of the UN and the Inter-American System.<sup>2</sup> Evaristo is a small developing country, ravaged by natural disasters, political instability and economic crisis. Evaristo has a population in excess of nine million inhabitants, 75% of which lives in poverty.<sup>3</sup> Kreyòl, one of the country's official languages, is spoken by nearly all Evaristans.<sup>4</sup> Evaristans have migrated as laborers to Tynalandia from as early as the 1970s seeking better employment opportunities.<sup>5</sup>

Gender inequality is rampant in Evaristo.<sup>6</sup> Women face disproportionate family and household obligations, have limited educational opportunities and there is a lack of services to support their integration. As such 70% are part of the informal market, earning incomes much lower than Evaristan men.<sup>7</sup>

Rosalie Fournier was orphaned at the age of 17 after Hurricane Sandy ravaged Evaristo in 1981, killing both her parents.<sup>8</sup> The hurricane had devastating effects on the already struggling State, causing extensive damage to the country's economy and infrastructure.<sup>9</sup> Rosalie spent two and a half months in a shelter and made several unsuccessful attempts to find a job.<sup>10</sup>

A foreign couple visited the shelter and offered to take several young women including Rosalie to Tynalandia promising them better employment opportunities and work permits, and

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<sup>1</sup> Hypothetical, ¶¶ 7-8.

<sup>2</sup> Hypothetical, ¶ 8.

<sup>3</sup> Hypothetical, ¶¶ 2-3.

<sup>4</sup> Hypothetical, ¶ 2.

<sup>5</sup> Hypothetical, ¶ 10.

<sup>6</sup> Hypothetical, ¶ 5.

<sup>7</sup> *Id.*

<sup>8</sup> Hypothetical, ¶ 14.

<sup>9</sup> Hypothetical, ¶ 6.

<sup>10</sup> Hypothetical, ¶ 14.

Rosalie accepted.<sup>11</sup> Rosalie and ten other women arrived in Tynalandia on June 17, 1981, where they were forced to work under slavery-like conditions on a broccoli plantation in exchange for food and a place to sleep, without breaks or pay. Some workers had been there for several years.<sup>12</sup> Rosalie escaped on January 1, 1982. Unable to speak Spanish and with no other work experience, she resorted to work as a prostitute in a bar.<sup>13</sup> After a police raid at the bar, Rosalie was brought before a judge who released her with six months probation and a fine of \$500, having considered her lack of a criminal record and the short time she was engaged in prostitution. Rosalie duly paid her fine having found work at a poultry plant.<sup>14</sup>

Rosalie gave birth to her son Bruno Tamba in November 1989 and moved to a city on the coast in 1992 so her son could get a better education. Bruno's father lived two and a half hours away and hardly visited his son.<sup>15</sup> Rosalie maintained two jobs, always paid her taxes and had no trouble with the law. She also gave performances of traditional Evaristan dance in the town square with other Evaristan women, who practically became her family.<sup>16</sup>

Following a stock market crisis, the Tynalandian government began taking tougher measures toward immigration<sup>17</sup> including enacting Law 24.326, the "Immigration Legalization Act", in 1994, pursuant to which 1.1 million migrant laborers have been deported, 65% being Evaristans. The Law provides that migrants who commit or have committed aggravated offences are subject, without exception, to mandatory deportation and are prohibited from returning. It also classifies several offences as aggravated federal offences including prostitution and theft.<sup>18</sup>

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<sup>11</sup> Hypothetical, ¶ 15.

<sup>12</sup> Hypothetical, ¶ 16.

<sup>13</sup> Hypothetical, ¶ 17.

<sup>14</sup> Hypothetical, ¶ 18.

<sup>15</sup> Hypothetical, ¶ 19; Clarification Questions & Answers, ¶ 18.

<sup>16</sup> Hypothetical, ¶ 20.

<sup>17</sup> Hypothetical, ¶ 11.

<sup>18</sup> Hypothetical, ¶ 13.

On May 27 2003, when Rosalie arrived at the hotel for work, she was informed that the police were questioning employees in connection with the theft of two computers.<sup>19</sup> Rosalie observed that the persons being questioned, like her, were of African descent.<sup>20</sup> The police requested Rosalie's documents and asked if she had a criminal record. She produced her driver's license and told them of her prostitution charge at the age of 18.<sup>21</sup> When asked if she was a citizen of Tynalandia, she honestly answered that she was not.

She was immediately taken to the nearest police station where she was informed that she would be detained until the immigration authorities were able to determine whether there was any possibility of enforcing Law 24.326 in her case.<sup>22</sup> The following morning, Rosalie was further questioned by an immigration official who had no jurisdiction in the police station,<sup>23</sup> about her brief employment as a prostitute, her entry into the country and her current immigration status. There were, however, no questions relating to the theft. The interrogation was conducted in Spanish, although Rosalie had limited competence in the language.<sup>24</sup> There was no lawyer or interpreter present.<sup>25</sup> The official informed her that prostitution is classified as an aggravated offense under Law 24.326, and consequently she would be transferred that same night to the Gándara detention center, some 13 hours away from the city, to await a deportation hearing.<sup>26</sup> The authorities had gone ahead and located Bruno's father, who would have custody until Rosalie's case could be determined.<sup>27</sup> Her son and friends had no means to visit her and she

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<sup>19</sup> Hypothetical, ¶ 21.

<sup>20</sup> Hypothetical, ¶ 21, Clarification Questions & Answers, ¶ 22.

<sup>21</sup> Hypothetical, ¶ 21.

<sup>22</sup> Hypothetical, ¶ 22.

<sup>23</sup> Clarification Question & Answers, ¶ 27

<sup>24</sup> Hypothetical, ¶ 23.

<sup>25</sup> Clarification Questions & Answers, ¶ 25.

<sup>26</sup> Hypothetical, ¶ 24.

<sup>27</sup> Hypothetical, ¶ 23.

was allowed only three phone calls per week at the center which she used to speak with her son.<sup>28</sup>

Rosalie requested to speak with an attorney as soon as she arrived at the detention center and was informed by the authorities that Tynalandia would not be providing her with a court-appointed lawyer. She was, however, provided with a list of attorneys and organizations she could contact.<sup>29</sup> Rosalie was able to attain an attorney at no cost, who was unable to speak Kreyòl and so the initial interview was conducted in Spanish.<sup>30</sup> Rosalie stressed that she was in no way involved in the alleged computer theft and that she felt she had been discriminated against. At that point, she was informed by her attorney that her detention was not at all connected to the robbery but related to her immigration status.<sup>31</sup>

At her public hearing on November 28, 2003, Rosalie requested that she not be separated from Bruno and that they both not be forced to return to Evaristo where they would have to build a new life.<sup>32</sup> The judge strictly enforced Law 24.326 and ordered Rosalie's immediate deportation, giving no regard to the arguments raised in her defense and the peculiarities of her case.<sup>33</sup> The judgment placed Bruno in the custody of his father. Rosalie decided not to appeal considering that all cases involving the enforcement of Law 24.326 had been dismissed by the Courts of Appeals *in limine*.<sup>34</sup> Rosalie was deported on January 22, 2004, being denied the opportunity to say goodbye to her son. She approached the Tynalandian Embassy in Evaristo seeking advice on family reunification with her son and was told that such a case could not be opened as deportation under Law 24.326 was a permanent bar to returning to Tynalandia.

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<sup>28</sup> Hypothetical, ¶ 24.

<sup>29</sup> Hypothetical, ¶ 25.

<sup>30</sup> Hypothetical, ¶ 26.

<sup>31</sup> Hypothetical, ¶ 27.

<sup>32</sup> Hypothetical, ¶ 31.

<sup>33</sup> Hypothetical, ¶ 32.

<sup>34</sup> Hypothetical, ¶¶ 33-34.



On July 10, 2004, the non-governmental organization *Fronteras* filed a complaint before the Inter-American Commission on Human Rights, alleging the responsibility of Tynalandia for violations of Articles 7, 8, 9, 11, 17, 19, 22, 24 and 25 of the Convention, all in relation to articles 1.1 and 2, in the case of Rosalie Fournier and Bruno Tamba. The Commission, after declaring the case admissible, found violations of all the articles alleged. The case was then submitted to the Inter-American Court of Human Rights following Tynalandia's failure to comply with the recommendations of the Commission.<sup>35</sup>

## **LEGAL ANALYSIS**

### **I. STATEMENT OF JURISDICTION**

This Honorable Court has jurisdiction to hear this case. Tynalandia is a State-Party to the Organization of American States and ratified the American Convention on Human Rights. It also accepted the binding jurisdiction of the Court. This Court is authorized to adjudicate matters concerning application and interpretation of the American Convention pursuant to Article 61 and 62 of the Convention. Domestic remedies are deemed exhausted as any attempts at appeal would have been ineffective considering the consistent practice of the Courts of Appeal to dismiss *in limine* appeals involving Law 24.326.<sup>36</sup>

### **II. THE STATE OF TYNALANDIA VIOLATED ARTICLES 6 AND 24 OF THE AMERICAN CONVENTION BY VIRTUE OF THE SEMI-SLAVERY CONDITIONS TO WHICH ROSALIE FOURNIER WAS SUBJECTED ON THE BROCCOLI PLANTATION**

#### **A. There was a breach of Article 24 when Tynalandia failed to take appropriate measures to ensure to Rosalie full enjoyment of her right to equal protection.**

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<sup>35</sup> Hypothetical, ¶ 39.

<sup>36</sup> Velásquez-Rodríguez v Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 64-65 (July 29, 1988).

Article 24 of the American Convention provides that every person is equal before the law and is entitled, without discrimination, to equal protection of the law.<sup>37</sup> Article 24 is to be read in light of Articles 1 (1) and 2 of the Convention which impose a positive duty on the state to ensure the enjoyment of fundamental rights by taking all necessary steps to safeguard rights and to eliminate measures and practices that restrict or violate such rights.<sup>38</sup>

***i. The working conditions to which Rosalie was subjected on the broccoli plantation amount to discriminatory treatment contrary to Article 24***

This Court in its Advisory Opinion 18 has established that recognizing equality before the law prohibits all discriminatory treatment.<sup>39</sup> Discrimination includes “any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.”<sup>40</sup> The principles of equality before the law and non-discrimination are embodied in several international instruments binding on the State of Tynalandia.<sup>41</sup> Article 24 therefore reflects a universally accepted obligation of jus cogens character.<sup>42</sup> The principle of non-discrimination guarantees the enjoyment by all persons, on an equal footing, of all rights and freedoms.<sup>43</sup> As such labor rights are to be guaranteed to all workers whether citizens of Tynalandia or alien.<sup>44</sup>

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<sup>37</sup> Organization of American States, American Convention on Human Rights, Art. 24, Nov. 22, 1969, O.A.S.T.S. No. 36; see also Organization of American States, American Declaration on the Rights and Duties of Man, Art. II, April. 22, 1948, O.A.S. Res. XXX; Organisation of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention Belém Do Pará” Art. 4 (f), Nov. 22, 1969, O.A.S.T.S. No. 36.

<sup>38</sup> Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, Inter-Am. Ct.H.R. (ser. A) No 18, ¶¶ 78-81 (Sept. 17, 2003)

<sup>39</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 83.

<sup>40</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 84.

<sup>41</sup> American Declaration, supra note 37, Art. II; Charter of the Organization of American States, Art. 3 (1), Dec. 13, 1951, 119 U.N.T.S. 3; United Nations, International Covenant on Civil and Political Rights Art. 26, March 23, 1976, 999 U.N.T.S. 171; UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 18 (1), December 18, 1993, 2220 U.N.T.S. 93.

<sup>42</sup> Advisory Opinion OC-18/03, supra note 38, ¶¶ 86, 101.

<sup>43</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 92-94; see also United Nations Committee on Human Rights, General Comment 18 on Non-Discrimination, ¶ 7, CCPR/C/37 (Oct. 11, 1989).

<sup>44</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 148.

Rosalie was a member of a group of plantation workers subjected to semi-slavery working conditions.<sup>45</sup> There were severe restrictions on her freedom of movement as she was taken to and from work daily and forced to work under the supervision of guards.<sup>46</sup> She worked excessively long hours, received no pay and worked in exchange for food and shelter. Rosalie and the other workers were told that “this was the price they had to pay for having entered Tynalandia without visas, and to legalize their status there.” Rosalie and the other workers suffered these conditions solely on the basis of their irregular status, contrary to Article 24.

Rosalie was able to escape after almost seven months, however, at that time, many of the workers had been enduring these conditions for more than three years without receiving the papers promised to them.<sup>47</sup> This amounted to a systematic and continuing breach of Article 24.

***ii. The State of Tynalandia, by its omission, is internationally responsible for the violation of Rosalie’s right to non-discrimination under Article 24.***

Although the plantation workers were subjected to discrimination by private actors, Tynalandia has a positive duty pursuant to Article 1 (1) to ensure that their labor rights are respected.<sup>48</sup> The Court has established that a state may be responsible not only for violations by its organs but also for the act of private individuals.<sup>49</sup> This rule is applicable to the private employment relationship.<sup>50</sup> In this regard Tynalandia has two primary responsibilities: (i) to enact legislation regulating the employment relationship which safeguards the labor rights of workers irrespective of nationality, social, ethnic or racial origin and migratory status and (ii) to ensure strict compliance by all employers with such legislation and international standards.<sup>51</sup> The

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<sup>45</sup> Hypothetical, ¶16.

<sup>46</sup> Hypothetical, ¶¶ 16-17

<sup>47</sup> Hypothetical, ¶ 16.

<sup>48</sup> American Convention, supra note 37, Art. 1 (1).

<sup>49</sup> Velásquez-Rodríguez v Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

<sup>50</sup> Advisory Opinion OC-18/03, supra note 38, ¶¶ 146-147.

<sup>51</sup> Advisory Opinion OC-18/03, supra note 38, ¶¶ 149, 155.

State “is responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence” in violation of labor rights.<sup>52</sup>

In the present case, the Tynalandia failed to take necessary steps to ensure the protection of Rosalie’s labor rights. There was a consistent practice of flagrant human rights violations on the broccoli plantation for several years, which indicates the lack of due diligence on the part of the state to bring an end to the practice of discrimination. For this reason Tynalandia is responsible for the breach of Article 24 of the American Convention in relation to Rosalie.

**B. The State of Tynalandia violated Article 6 of the Convention when it failed to eradicate the semi-slavery conditions to which Rosalie was subjected.**

The Commission requests that this Honorable Court grant it leave to amend its pleadings pursuant to Article 40 of the Court’s Rules of Procedure, to include a violation of Article 6. The Court expressed in the *Aloeboetoe* Case that the Commission may be allowed to amend its pleadings provided the State is given an opportunity to comment on the matter.<sup>53</sup>

Article 6 (1) of the American Convention provides that no one shall be subjected to any form of slavery or involuntary servitude, and expressly prohibits the slave trade and traffic in women.<sup>54</sup> Further, sub-paragraph 2 guarantees to all persons the right not to be subjected to forced or compulsory labor.<sup>55</sup> Article 6 is to be read in light of Articles 1 (1) and 2 which impose a positive duty on the State to ensure full enjoyment of the rights enshrined in the Convention.<sup>56</sup>

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<sup>52</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 152.

<sup>53</sup> *Aloeboetoe et al. v Suriname*, 1993 Inter-Am Ct.H.R. (ser C) No. 15, ¶ 81 (Sept. 10, 1993); *Las Palmeras v Columbia*, 2001 Inter-Am Ct.H.R. (ser C) No. 90, ¶ 31 (Dec. 6, 2001); *The Factory of Chorzów (Merits)*, 1928 PCIJ (ser A) No. 17, ¶ 7 (Sept. 13, 1928); Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, p. 163 (Cambridge University Press 2003)

<sup>54</sup> American Convention, supra note 37, Art. 6 (1).

<sup>55</sup> American Convention, supra note 37, Art. 1 (2); see also *Convention on Migrant Workers and their Families*, supra note 41, Art 11 (2).

<sup>56</sup> Advisory Opinion OC-18/03, supra note 38, ¶¶ 78-81.

***i. The State of Tynalandia failed to take all necessary measures to ensure that Rosalie was not subject to trafficking contrary to Article 6 (1).***

Article 6 (1) of the American Convention,<sup>57</sup> as well as Convention of Belém Do Pará<sup>58</sup> prohibits trafficking in women, which has been defined as the recruitment, transfer or receipt of women for the purpose of exploitation.<sup>59</sup> This includes exploitation for forced labor or services.<sup>60</sup> Article 6 (1) imposes a positive duty on Tynalandia to ensure that no one in its jurisdiction is subject to trafficking. The State has a similar obligation under the Palermo Protocol,<sup>61</sup> which obliges the State to strengthen and regulate its border controls to prevent and detect trafficking in persons.<sup>62</sup> Rosalie was a victim of a recruitment process aimed solely at exploiting non-nationals for the purpose of forced labor. Tynalandia has an obligation to exercise due diligence in investigating and bringing to an end the practice of trafficking within its jurisdiction<sup>63</sup> Tynalandia failed therefore, to provide Rosalie with the protection prescribed by Article 6 (1).

***ii. The State of Tynalandia, by its omission, is internationally responsible for the violation of Rosalie's right under Article 6.***

The American Convention offers no definition of the term forced labor, and as such the Court may have regard to ILO Convention (No. 29) Concerning Forced or Compulsory Labor, in determining the scope of Article 6 (2),<sup>64</sup> which defines such labor as “work or service which is

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<sup>57</sup> American Convention, supra note 37, Art. 6 (1).

<sup>58</sup> Convention Belém Do Pará, supra note 37, Arts. 2 (b) and 6 (a).

<sup>59</sup> United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Art. 3 (a), U.N. Doc. A/RES/55/25 (Nov. 15, 2000) (hereinafter Palermo Protocol).

<sup>60</sup> *Id.*

<sup>61</sup> Palermo Protocol, supra note 59, Art. 9 (1).

<sup>62</sup> Palermo Protocol, supra note 59, Art. 11 (1)

<sup>63</sup> Advisory Opinion OC-18/03, supra note 38, ¶¶ 140-142; see also Velásquez-Rodríguez, supra note 49, ¶¶ 172-176; The 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C), No. 109 ¶ 140 (July 5, 2004); Mapiripán Massacre v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C), No. 134, ¶¶ 226, 246 (Sept. 15, 2005); Paniagua-Morales v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C), No. 37, ¶ 91 (March 8, 1998).

<sup>64</sup> International Labor Organization, Convention (No. 29) Concerning Forced or Compulsory Labor, May 1, 1932, 39 U.N.T.S. 55.

exacted from any person...for which the said person has not offered himself voluntarily.”<sup>65</sup> The European Court of Human Rights has ruled similarly.<sup>66</sup> ILO Convention No. 105 supplements Convention No. 29 by expressly prohibiting the imposition of forced labor “as a means of racial, social, national or religious discrimination.”<sup>67</sup> This interpretation can be applied to Article 6 (2). The Inter-American Commission has also condemned forced labor.<sup>68</sup>

Tynalandia has an absolute and positive duty to prevent forced or compulsory labor within its jurisdiction.<sup>69</sup> The European Court in the *Siliadin* Case has elaborated that this positive duty requires the State to enact legislation penalizing practices that amount to forced labor.<sup>70</sup> Tynalandia failed to fulfill its obligation of due diligence in order to prevent the conditions of forced labor on the broccoli plantation which amounts to a breach of Article 6 (2).<sup>71</sup>

### **III. THE REPUBLIC OF TYNALANDIA VIOLATED ARTICLE 7 OF THE CONVENTION IN THE CASE OF ROSALIE FOURNIER AND ARTICLES 11 AND 17 IN THE CASE OF ROSALIE FOURNIER AND BRUNO TAMBA BY THE ARREST AND DETENTION OF ROSALIE FOURNIER**

#### **A. There was a breach of Article 7 when Tynalandian officers arbitrarily detained Rosalie Fournier without giving legitimate reasons or laying any formal charges.**

Article 7 of the American Convention guarantees a general right to personal liberty and security as well as specific rights which provide for freedom from unlawful detention (Article 7

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<sup>65</sup> ILO Convention (No. 29), *supra* note 64, Art. 2.

<sup>66</sup> *Siliadin v France*, App. No. 73316/01 Eur. Ct. H.R., ¶ 91, 104-105 (July 26, 2005); see also *Van der Mussele v. Belgium*, Eur. Ct. H.R. (ser. A) No. 70, ¶ 16, 32 (Nov. 23, 1983).

<sup>67</sup> International Labor Organization, Convention (No. 105) on the Abolition of Forced Labor, Art 2 (e), Jan. 17, 1959, 320 U.N.T.S. 291.

<sup>68</sup> Report on the Situation of Human Rights in the Dominican Republic (1999), ¶ 336, OEA/Ser.L/V/II.104, doc.7 rev. 1, (Oct. 7, 1999); Annual Report of the Inter-American Commission on Human Rights (1991), Chap. V, OEA/Ser.L/V/II.81, doc.6 rev. 1, (Feb. 14, 1992)

<sup>69</sup> American Convention, *supra* note 37, Art 6(2); United Nations, Slavery Convention, Art. 5, May 22, 1926, U.N.T.S. 331.

<sup>70</sup> *Siliadin* Case, *supra* note 66, ¶¶ 89, 90; see also *M.C. v. Bulgaria* (No. 39272/98) 2003-XII Eur. Ct. H.R.

<sup>71</sup> *Velásquez-Rodríguez*, *supra* note 49, ¶¶ 172-176; *The 19 Tradesmen v. Colombia*, *supra* note 63, ¶ 140; *Mapiripán Massacre v. Colombia*, *supra* note 63, ¶¶ 226, 246 (Sept. 15, 2005); *Paniagua-Morales v. Guatemala*, *supra* note 63, ¶ 91.

(2)) and arbitrary arrest (Article 7(3)), the detainee being given reasons for his detention and notified of the charges against him (Article 7 (4)), judicial control of the deprivation of liberty (Article 7 (5)) and ability to challenge the detention (Article 7 (6)).<sup>72</sup>

***i. Rosalie's detention without arrest by Tynalandian officials is prima facie unlawful contrary to Article 7(2) of the American Convention.***

It is not sufficiently clear on the facts whether Rosalie was formerly arrested before being detained at the police station.<sup>73</sup> Article 7 (2) provides that no one shall be deprived of his liberty except by reason of law.<sup>74</sup> The Commission recognizes that detention without arrest is acceptable under the domestic laws of several democratic states but only in certain limited circumstances, for instance where there is need to prevent a continuing or apprehended breach of the peace<sup>75</sup> or there is reasonable suspicion that the person is committing, has committed or is about to commit a felony.<sup>76</sup> Also, the detention without formal arrest for one offence when the real intent is to question the person and conduct investigations about another offence has been condemned.<sup>77</sup>

In the present case, Rosalie was detained without cogent evidence as to her involvement in the computer theft. Her detention was therefore prima facie unlawful under international standards and contrary to Article 7 (2). The content of the domestic law of Tynalandia is not ascertainable from the facts, however, as a democratic state it is expected that Tynalandia would prohibit detention without arrest, except where the circumstances necessitate such action. On this

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<sup>72</sup> Yvon Neptune v Haiti, 2008 Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 89 (May 6, 2008); see also Chaparro Álvarez and Lapo Íñiguez v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 51 (Nov. 21, 2007).

<sup>73</sup> Hypothetical, ¶ 22.

<sup>74</sup> American Convention, supra note 37, Art. 7 (2).

<sup>75</sup> Albert v Lavin, [1982] AC 546 (UK).

<sup>76</sup> Arkansas Rules of Criminal Procedure 3.1; Timothy Dale Summers v State of Arkansas, CA CR 04-257 (Ark. 2005); Billy T Sims Jr. v State of Arkansas CR 03-63 (Ark. 2004).

<sup>77</sup> Law Reform Commission New South Wales, Report 66 (1990) Criminal Procedure: Police Powers of Detention and Investigation After Arrest, ¶ 3.24.

basis, the Commission submits that the burden now rests with the State to prove that Rosalie's detention was in conformity with its laws.<sup>78</sup>

***ii. Rosalie's arrest and detention by Tynalandian officials were arbitrary contrary to Article 7(3) of the American Convention.***

Lawful arrest and detention require that the deprivation of liberty be based on reasons clearly established in the domestic law of the state, whereas, arbitrariness is a wider notion which goes beyond legality.<sup>79</sup> Therefore, an arrest carried out in accordance with law may be challenged on the basis that the law itself or its application is unreasonable in the circumstances. This Court has established in *Chaparro Álvarez* Case that reasons or methods of arrest or imprisonment although classified as legal, could be deemed incompatible with the fundamental rights of the individual because they are unreasonable, unforeseeable or disproportionate.<sup>80</sup>

There is no evidence of the content of the domestic law of Tynalandia however, the actions of the officers in the present case, regardless of their legality, constitute a breach of Article 7 (3). In the *Yvon Neptune* Case this Court enumerated four characteristics of a measure that may be classified as "not arbitrary".<sup>81</sup> Firstly, the purpose of the measures that deprive liberty must be legitimate. The Court has recognized that ensuring that the accused does not impede development of the proceedings or evade the action of justice are legitimate purposes.<sup>82</sup>

The purpose of Rosalie's detention was to facilitate a determination by immigration authorities of the possible application of Law 24.326 in her case.<sup>83</sup> This reason does not satisfy

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<sup>78</sup> Velásquez-Rodríguez v Honduras supra note 49.

<sup>79</sup> Yvon Neptune v Haiti, supra note 72, ¶ 96; see also Chaparro Álvarez v. Ecuador, supra note 72, ¶ 57.

<sup>80</sup> Chaparro Álvarez v. Ecuador, supra note 72, ¶ 90; see also Yvon Neptune v Haiti, supra note 72, ¶ 97; Gangaram Panday v Suriname, 1994 Inter-Am. Ct. H.R. (ser. C) No. 16, ¶ 47 (Jan. 21, 1994); García Asto and Ramírez Rojas v Peru, 2005 Inter-Am. Ct. H.R. (ser. C) No. 137, ¶ 105 (Nov. 25, 2005); Servellón García et al. v Honduras, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 90 (Sept. 21, 2006).

<sup>81</sup> Yvon Neptune v Haiti, supra note 72, ¶ 98.

<sup>82</sup> Servellón García et al. v. Honduras, supra note 80, ¶ 90; see also Acosta Calderón v. Ecuador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 23 (Nov. 24, 2005)

<sup>83</sup> Hypothetical, ¶ 22.



the purposes enumerated by this Court, as there is no indication that Rosalie's release would have hindered investigations or that she would have fled the jurisdiction. The Human Rights Committee has established that in cases involving deprivation of liberty for the purpose of deportation, even if entry was illegal, there remains a need for factors such as the likelihood of absconding or lack of cooperation to justify pre-trial detention.<sup>84</sup>

The second and third requirements state that the measures adopted must be appropriate to achieve the intended objective and must be necessary, that is, absolutely essential to attain the desired objective. Rosalie's detention served no purpose in determining the applicability of Law 24.326 in her case. As such, the actions of the Tynalandian authorities were completely unnecessary. Consequently, the fourth criterion, that the measures be strictly proportionate, was also not met. The restriction of Rosalie's liberty did not include sufficient grounds to satisfy the conditions established by this Court and is therefore arbitrary and in violation of Article 7 (3).<sup>85</sup>

***iii. Tynalandia is obliged under Article 7(4) to inform Rosalie of the reasons for her detention and to promptly notify her of the charges against her.***

In the *Humberto Sánchez* Case the Court established that in the application of Article 7 (4), the motives and reasons for detention must be provided when detention takes place.<sup>86</sup> Secondly, prompt notification enables the detained individual to request a prompt decision on the lawfulness of his detention by a competent judiciary.<sup>87</sup> This proposition has been supported by the Human Rights Committee<sup>88</sup> and the European Court of Human Rights.<sup>89</sup>

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<sup>84</sup> A v Australia, Communication No. 560/1993, UN doc. GAOR A/52/40 (vol. II) ¶¶ 9.3 – 9.4.

<sup>85</sup> García Asto and Ramírez Rojas v Peru, supra note 80, ¶ 128.

<sup>86</sup> Juan Humberto Sánchez v. Honduras, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 82 (June 7, 2003); see also Chaparro Álvarez v. Ecuador, supra note 72, ¶ 70.

<sup>87</sup> Yvon Neptune v Haiti, supra note 72, ¶ 105

<sup>88</sup> P. Grant v Jamaica, Communication No. 597/1994, UN doc. GAOR A/51/40 (vol. II) ¶ 8.1; see also G. Campbell v Jamaica, Communication No. 248/1987, UN doc. GAOR ¶ 6.3.

<sup>89</sup> Van der Leer v Netherlands, 170 Eur. Ct. H.R. (ser. A), ¶ 27 (Jan. 22, 1990).

The state has an obligation to provide the detainee with information on the detention itself, and the detainee must understand that he is being detained.<sup>90</sup> Further, the agent carrying out the detention must inform the detainee in simple language, free of technicalities, of the essential facts and legal grounds on which his detention is based.<sup>91</sup> In the *Neptune* case, the Court emphasized that Article 7 (4) of the Convention will not be satisfied if only the legal grounds are mentioned. Furthermore, the detainee is “entitled to receive promptly in a language which he understands information regarding charges against him”.<sup>92</sup>

Rosalie was not informed of the reason for her arrest at the time it took place. Additionally, the reason given for her detention is not sufficient to conform to Article 7 (4) on the basis that no essential facts or legal grounds were given, but merely an indication as to possible enforcement of Law 24.326.<sup>93</sup> Rosalie was given the reasons for her detention during an interrogation conducted in Spanish, a language in which she had limited competence, without the presence of an interpreter.<sup>94</sup> This amounts to an unequivocal breach of Article 7 (4).

**B. Tynalandia violated Article 7 when it failed to present Rosalie Fournier promptly before a competent court to question the legality of her detention.**

***i. Tynalandia failed to secure Rosalie’s right under Article 7(5) as her first appearance before a court was five months after her detention.***

Article 7 (5) of the Convention provides that a detainee is to 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”.<sup>95</sup> The Court has established that the effect of this

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<sup>90</sup> Yvon Neptune v Haiti, supra note 72, ¶ 106

<sup>91</sup> Yvon Neptune v Haiti, supra note 72, ¶ 106; see also Chaparro Álvarez v. Ecuador, supra note 72, ¶ 71

<sup>92</sup> Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 14, UN G.A. Res. 43/173 (Dec. 9, 1988).

<sup>93</sup> Hypothetical, ¶ 22.

<sup>94</sup> Hypothetical, ¶ 23; Clarification Questions & Answers ¶¶ 24-25.

<sup>95</sup> American Convention, supra note 37, Art. 7 (5).

subparagraph is to bring the detention of an individual within the purview of the court whose duty it is to safeguard fundamental rights and freedoms.<sup>96</sup> In this regard, the Court has stipulated that there should be “immediate judicial control”.<sup>97</sup> Further, judicial review must be prompt in order “to constitute a real control mechanism”.<sup>98</sup> The European Court of Human Rights has ruled similarly and has equated the term “promptly” with the term “immediately”.<sup>99</sup>

Rosalie’s first appearance before a court took place five months after her detention.<sup>100</sup> In the *Bayarri* Case the Court stated that a delay of seven days constituted a breach of Article 7 (5). The state of affairs in Tynalandia, does not excuse the State’s delay in bringing Rosalie promptly before a court. The breach is inexcusable considering the ruling of the Court in the *Castillo-Petuzzi* Case, where even in a state of emergency, 36 days were deemed to be “excessive and contrary to the provisions of the Convention.”<sup>101</sup>

***ii. Tynalandia’s breach of Article 7 (4) rendered Rosalie’s right under subparagraph 6 ineffective.***

Article 7 (6) provides the detainee with a right to recourse to a competent court in order that the court may decide without delay on the lawfulness of his arrest or detention.<sup>102</sup> Although the writ of habeas corpus was available to Rosalie to challenge legality of her detention,<sup>103</sup> the Court has established that for such a remedy to truly exist “it is not sufficient that it be provided for by the Constitution or by law or that it is formally recognized, but rather it must be truly

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<sup>96</sup> *Yvon Neptune v Haiti*, supra note 72, ¶ 107.

<sup>97</sup> *Id.*

<sup>98</sup> *Bayarri v Argentina*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 67 (Oct. 30, 2008).

<sup>99</sup> *Brogan and Others v The United Kingdom*, 145 Eur. Ct. H.R. (ser. A) ¶ 59 (Nov. 29, 1988).

<sup>100</sup> Hypothetical, ¶ 28; Clarification Questions & Answers, ¶ 28.

<sup>101</sup> *Castillo-Petruzzi et al. v Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 110 (May. 30, 1999).

<sup>102</sup> American Convention, supra note 36, Art. 7 (6).

<sup>103</sup> Clarification Questions & Answers, ¶ 72.

effective in establishing whether there has been a violation of human rights and in providing redress.”<sup>104</sup>

Rosalie was not adequately provided with the reasons for her detention, which is a necessary pre-requisite for exercising her right under Article 7 (6). The European Court of Human Rights has ruled similarly, that where a person is entitled to take proceedings to have the lawfulness of his detention decided speedily, he cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty.<sup>105</sup>

**C. Rosalie Fournier and Bruno Tamba’s right to privacy and family were violated by Tynalandia by the arbitrary arrest and detention of Rosalie Fournier.**

Article 11 of the Convention guarantees every person the right his private and family life and prohibits a State Party from arbitrarily interfering with this right.<sup>106</sup> It also provides that everyone has the right to protection of the law against such interference.<sup>107</sup> Article 17 (1) of the Convention establishes that the family is the natural and fundamental unit of society and is entitled to protection by the society and the state.<sup>108</sup> This right is recognized under Article 27 (2) of the Convention as non-derogable.<sup>109</sup> Where the state derogates any right protected under the Convention, including Articles 11 and 17, it must do so only to the extent and for the period of time strictly required by the circumstances.<sup>110</sup>

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<sup>104</sup> Castillo-Petruzzi et al. v Peru, supra note 101, ¶ 184

<sup>105</sup> Van der Leer v Netherlands, supra note 89, ¶ 27.

<sup>106</sup> American Convention, supra note 37, Art. 11 (1) and (2); Kimel v Argentina, 2008 Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 55 (May 2, 2008), Ricardo Canese v Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 101 (Aug. 31, 2004)..

<sup>107</sup> American Convention, supra note 37, Art. 11 (3); see also United Nations, Convention on the Rights of the Child, Art. 16, Nov. 20, 1989, 1577 U.N.T.S. 3. American Declaration, supra note 37, Arts. IX and X; ICCPR, supra note 41, Art. 17.

<sup>108</sup> American Convention, supra note 37, Art. 17 (1); see also Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", Art. 15, O.A.S. Treaty Series No. 69 (1988), (Nov. 17, 1988); Convention on the Rights of the Child, supra note 107, Art. 8.

<sup>109</sup> American Convention, supra note 36, Art. 27 (2).

<sup>110</sup> American Convention, supra note 36, Art. 27 (1)

The arbitrary arrest and detention of Rosalie Fournier by Tynalandia severely affected the relationship between Rosalie and her son. During her detention, they were unable to see each other and Rosalie was only permitted to call him three times per week.<sup>111</sup> Her detention in the circumstances of the case was an unnecessary measure which amounts to an abusive interference in the private and family life of both Rosalie Fournier and her son, contrary to articles 11 and 17.<sup>112</sup>

**IV. STATE OF TYNALANDIA VIOLATED ARTICLES 8, 24 AND 25 OF THE CONVENTION BY DENYING ROSALIE FOURNIER BASIC JUDICIAL GUARANTEES AND A FAIR TRIAL.**

Article 8 (1) of the American Convention provides that “every person has the right to a hearing, with due guarantees”.<sup>113</sup> This Court has established that all persons subject to trial of any kind must have the guarantee that the adjudicating body is impartial and acts within the procedural scope prescribed.<sup>114</sup> The due process guarantees outlined in Article 8 (2) must be respected regardless of the subject matter being dealt with.<sup>115</sup> As such, it is immaterial that Rosalie was prosecuted and deported under administrative proceedings.<sup>116</sup> The Court has established that due process guarantees “must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons.”<sup>117</sup>

The Commission has stated that although Article 8 of the Convention is not mentioned in Article 27(2), states are not free to derogate from fundamental due process protections in Article

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<sup>111</sup> Hypothetical, ¶ 24.

<sup>112</sup> Convention on Migrant Workers and Their Families, *supra* note 41, Art 17(6).

<sup>113</sup> American Convention, *supra* note 36, Art. 8 (1).

<sup>114</sup> *La Cantuta v Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 140 (Nov. 29, 2006); see also *Almonacid Arellano et al. v Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 169 (Sept. 26, 2006), *Constitutional Court v Peru*, 2001. Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 77 (Jan. 31, 2001).

<sup>115</sup> *Baena-Ricardo et al. v Panama*, 2001 Inter-Am. Ct. H.R. (ser. C) No 72, ¶ 126 (Feb. 2, 2001); see also *Constitutional Court Case*, *supra* note 119, ¶ 69, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights) *Advisory Opinion OC-9/87*, Inter-Am Ct. H.R. (ser. A) No 9, ¶ 27 (Oct. 6, 1987); *Albert and Le Compte v Belgium*, Eur. Ct. H.R., (ser. A) Vol. 58 (Feb. 10, 1983).

<sup>116</sup> *Clarification Questions & Answers*, ¶¶ 54 -55.

<sup>117</sup> *Baena-Ricardo et al. v Panama*, *supra* note 109, ¶ 127.

8, Articles XVIII and XXVI of the American Declaration and comparable provisions of other international instruments such as Article 14 of the ICCPR, which are binding on Tynalandia.<sup>118</sup>

**A. There was a breach of Articles 8 and 24 when the State of Tynalandia failed to provide Rosalie Fournier with legal representation.**

***i. Tynalandia violated Rosalie’s rights under Article 8(2)(e) and (g) of the Convention***

Article 8 (2) (e) of the Convention guarantees the right to be assisted by counsel provided by the state, paid or not, if the accused does not defend himself personally or engage his own legal counsel.<sup>119</sup> Tynalandia is obligated to provide legal aid for deportation proceedings granting Rosalie access to state appointed counsel if she does not or is unable to acquire counsel of her own choosing. This obligation is heightened in cases involving the rights of an indigent such as Rosalie Fournier.<sup>120</sup> Both the Commission and this Court have observed that in proceedings concerning rights and obligations of any nature, an indigent has the right to legal counsel free of charge where such assistance is necessary for a fair hearing.<sup>121</sup>

In addition, Rosalie’s interrogation without a defense lawyer being present breached her right under Article 8.<sup>122</sup> Article 8 (2) (g) provides every person with “the right not to be compelled to be a witness against himself.” This provision, taken together with sub-section 2(e), has been interpreted “to include the right to have a lawyer present for all important stages of the

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<sup>118</sup> Inter-Am C. H.R Report on Terrorism and Human Rights, ¶ 245, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (Oct. 22, 2002).

<sup>119</sup> American Convention, supra note 37, Art. 8 (2) (e).

<sup>120</sup> Clarification Questions & Answers, ¶ 32.

<sup>121</sup> Exemptions to the Exhaustion of Domestic Remedies (Art. 46 (1), 46 (2) (a) and 46 (2) (b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am Ct. H.R. (ser. A) No 11, ¶¶ 24 -29, (Aug. 10, 1990); see also Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, 2001 Inter-Am. Ct. H.R. (ser. C) No. 80, ¶¶ 140, 148 (Sept. 1, 2001); Desmond McKenzie v Jamaica, Case 12.023, ¶¶ 311-316, Inter-Am C.H.R. Report No. 41/00; Michael Edwards et al v Bahamas, Case 12.067, ¶¶ 201-207, Inter-Am. C.H.R. Report No. 48/01, ; Report on the Situation of Human Rights in Guatemala, (1983), OEA/Ser.L/V/II.61, (Oct. 5, 1983), p. 95; Report on the Situation of Human Rights in Suriname (1983), OEA/Ser.L/V/II.61, doc.6 rev. 1, (Oct. 5, 1983), p. 68.

<sup>122</sup> Chaparro Álvarez v. Ecuador, supra note 72, ¶ 158.

proceedings, particularly where the defendant is held in detention . . . [or] when giving a statement or undergoing interrogation.”<sup>123</sup> In the *Chaparo Alvarez* Case the Court examined the Constitution of Ecuador which not only prohibits such interrogations but specifies that they are of no probative value.<sup>124</sup> As a democratic society it is expected that Tynalandia respects this principle in order to fulfill its international obligation to uphold and protect the fundamental human rights of the individual. Furthermore, Rosalie was interrogated by an immigration official who had no jurisdiction to do so at the police station.<sup>125</sup> This amounts to a breach of Article 8 (2) (e) and (g).

***ii. Tynalandia’s failure to provide Rosalie with counsel amounted to discrimination.***

Article 8 (2) provides that the right to counsel should be available to all persons “with full equality”. Tynalandia does not provide legal aid for deportation proceedings.<sup>126</sup> In so doing the State discriminates against defendants in deportation proceedings, and in the present case discriminated against Rosalie Fournier. This also amounts to a breach of Article 24 which guarantees all persons equal protection before the law,<sup>127</sup> and prohibits all discriminatory treatment.<sup>128</sup> Tynalandia is therefore obliged to respect the human rights of Rosalie Fournier, regardless of her migratory status.<sup>129</sup> As a consequence, Rosalie Fournier had to resort to a lawyer that was not proficient in her language which adversely affected her right to adequate means to prepare her defense, contrary to Article 8 (2) (c).<sup>130</sup>

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<sup>123</sup> Third Report on the Situation of Human Rights in Colombia, Inter-Am. C.H.R., Ch. V, ¶ 97, OEA/Ser.L/V/II/102, doc. 9 rev. 1 (1999); see also Report on Terrorism, supra note 118, ¶ 237

<sup>124</sup> *Id.*

<sup>125</sup> Clarification Questions & Answers, ¶ 27.

<sup>126</sup> Hypothetical, ¶ 25.

<sup>127</sup> American Convention, supra note 37, Art. 24.

<sup>128</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 83.

<sup>129</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 106.

<sup>130</sup> Report on Terrorism and Human Rights, supra note 118, ¶ 237.

**B. Rosalie Fournier’s right of appeal under Articles 8 and 25 was rendered ineffective because of the consistent practice of the Courts of Appeal to dismiss cases involving the enforcement of Law 24.326 *in limine*.**

Article 8 (2) (h) guarantees the right of an accused to appeal judgment to a higher court and Article 25 obliges State Parties to provide effective recourse to a competent court or tribunal.<sup>131</sup> The right to appeal under Article 8 (2) (h) must also be granted with the requisite due process guarantees that ensure fair trial and protection of the law.<sup>132</sup>

The Court has held that the right to appeal is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse.<sup>133</sup> Further, it is not enough for the remedies to exist formally, as they must yield positive results or responses to human rights violations, for them to be deemed effective.<sup>134</sup> The Court of Appeal of Tynalandia considers that once it is verified that an offense under Law 24.326 has been committed, the decision of the lower court cannot be questioned.<sup>135</sup> This renders Rosalie’s right of appeal ineffective in violation of Articles 8 and 25 of the Convention.

**V. ROSALIE FOURNIER’S PROSECUTION UNDER LAW 24.326 VIOLATED ARTICLES 8 AND 9 OF THE AMERICAN CONVENTION.**

**A. The application of Law 24.326 to Rosalie Fournier’s case and the imposition of the penalty prescribed therein is a violation of her right to be free from *ex post facto* laws.**

Article 9 of the Convention provides that “no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was

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<sup>131</sup> American Convention, *supra* note 37, Arts. 8 (2) (h) and 25 (1).

<sup>132</sup> American Convention, *supra* note, 37, Art. 8 (2) (h); see also Report on the Situation of Human Rights in Panama (1978), Ch. IV, p. 116, OEA/Ser.L/V/II.44, doc. 38, rev. 1, (June 22, 1978), ; Report on the Situation of Human Rights in Nicaragua (1981), doc. 25, p. 168 OEA/Ser.L/V/II.53, (June 30, 1981); The Secretary General, Report of the Secretary-General (1993), UN Doc. S/25704 and Add.1, 3 May 1993, ¶ 116.

<sup>133</sup> Castillo Petrucci et al. v Peru, *supra* note 101, ¶ 161.

<sup>134</sup> Juan Humberto Sánchez v Honduras, *supra* note 86, ¶ 121; see also Five Pensioners v Peru, 2003 Inter-Am. Ct. H.R. (ser. C) No 98, ¶ 126 (Feb. 28, 2003); Mayagna (Sumo) Awas Tingni Community v Nicaragua, 2000 Inter-Am. Ct. H.R. (ser. C) No 66, ¶ 112 (Feb. 1, 2000); Bámaca Velásquez v Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No 70, ¶ 191, (Nov. 25, 2000).

<sup>135</sup> Clarification Questions & Answers, ¶ 37.



committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed.”<sup>136</sup> Article 9 is non-derogable under the Convention<sup>137</sup> and therefore, Tynalandia violated Article 9 by applying Law 24.326 to Rosalie’s case and imposing the penalty of deportation prescribed therein.

Although Article 9 refers specifically to criminal offenses, this Court has ruled that it is equally applicable to administrative sanctions.<sup>138</sup> This principle governs the actions of all State bodies in their respective fields of competence, particularly in the exercise of punitive power.<sup>139</sup> Therefore the Immigration Judge of Tynalandia is obliged to respect the provisions of Article 9.

In assessing a violation of Article 9, “it is necessary to refer to ... non-retroactivity of the unfavorable norm”.<sup>140</sup> The application of Law 24.326 in Rosalie’s case violated this principle, which prevents a state from applying retroactively penal laws that increase sanctions, establish aggravating circumstances or create aggravated types of offenses.<sup>141</sup> Law 24.326 creates aggravated types of offenses including prostitution and imposes a more excessive sanction for that offense than is imposed under normal circumstances.<sup>142</sup> The Immigration Judge by sentencing Rosalie to deportation violated Article 9 of the Convention. It is immaterial that he was acting in accordance with the domestic law of Tynalandia.<sup>143</sup>

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<sup>136</sup> American Convention, *supra* note 37, Art. 9.

<sup>137</sup> American Convention, *supra* note 37, Art. 27 (2).

<sup>138</sup> Baena-Ricardo et al. v Panama, *supra* note 115, ¶ 106; see also Ricardo Canese v Paraguay, *supra* note 106, ¶ 176; Ezelin v France, Eur. Ct. H.R. (ser. A) No 202, ¶ 45 (April 26, 1991); Muller and others Judgment, Eur. Ct. H.R. (ser. A) No 133, ¶ 29, (May 24, 1988).

<sup>139</sup> Lori Berenson v Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119, ¶ 126 (Nov. 25, 2004); see also Ricardo Canese v Paraguay, *supra* note 106, ¶¶ 176- 177, Baena-Ricardo et al. v Panama, *supra* note 115, ¶ 107.

<sup>140</sup> Ricardo Canese v Paraguay, *supra* note 106, ¶ 173.

<sup>141</sup> García-Asto and Ramírez-Rojas v. Peru, *supra* note 80, ¶ 191; see also Ricardo Canese v Paraguay, *supra* note 106, ¶ 175.

<sup>142</sup> Clarification Questions & Answers, ¶ 50.

<sup>143</sup> International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94, Inter-Am Ct. H.R. (ser. A) No 14, ¶ 35 (Dec. 9, 1994); see also United Nations, Vienna Convention on the Law of Treaties, Art. 27, May 22, 1969, U.N.T.S. 331.

Further, Law 24.326 manifestly violates the rule against non-retroactivity in Article 9 and as such its promulgation constitutes a violation of the obligations assumed by Tynalandia upon its ratification of the Convention.<sup>144</sup>

**B. Rosalie Fournier’s conviction under Law 24.326 for the offense of prostitution, for which she had been previously convicted, is a breach of her fundamental rights under the Convention.**

Article 8 (4) of the Convention establishes the principle of *non bis in idem* which prohibits the State Party from subjecting an individual to double jeopardy,<sup>145</sup> protects individuals who have been tried for specific facts from being subjected to a new trial for the same cause.<sup>146</sup> The Court has also established that unlike the formula employed by other international human rights instruments, such as Art. 14 (7) of the ICCPR , which refers to the “same crime”, the American Convention uses the expression the “same cause” which is a much broader term in the victim’s favor.<sup>147</sup>

Although Article 8 (4) refers to ‘an accused person acquitted’, the Commission submits that the Court adopts a purposive approach to give the provision an interpretation akin to that of Article 4 (1) of Protocol No. 7 to the European Convention which provides that “no one shall be liable to be tried or punished again...under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted...”<sup>148</sup>

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<sup>144</sup> Advisory Opinion OC-14/94, supra note 143, ¶ 50.

<sup>145</sup> American Convention, supra note 37, Art. 8 (4); see also Loayza-Tamayo v Peru, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 66 (Sept. 17, 2004).

<sup>146</sup> Loayza-Tamayo v Peru, supra note 145, ¶ 66.

<sup>147</sup> *Id.*

<sup>148</sup> Protocol No. 7 to the 1950 European Convention on Human Rights, Art. 4, E.T.S. 117 (Nov. 1, 1988); see also Franz Fischer v Austria, 348 Eur. Ct. H.R. (2001); Ponsetti and Chesnel v France, Eur. Ct. H.R. Sept. 14, 1999.

Rosalie was tried and convicted and served her sentence for prostitution in 1982.<sup>149</sup> The State of Tynalandia violated the principle of *non bis in idem* when Rosalie was tried, convicted and punished under Law 24.326 for the same cause almost 22 years later.<sup>150</sup> Furthermore, the statute of limitation for the crime of prostitution in Tynalandia is 10 years, which has expired.<sup>151</sup>

**C. The absence of judicial discretion during the trial and the refusal of trial judge to accept any of the defenses raised by Rosalie Fournier's attorney or consider other peculiarities of her case violated Article 8 of the Convention.**

Article 8 (2)(d) of the Convention guarantees an accused individual the right to defend himself as a necessary feature of a fair trial. The Human Rights Committee has espoused that the principle of equality of arms is an essential component of a fair trial.<sup>152</sup> Therefore, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent.<sup>153</sup>

The Court has noted in reference to the jurisprudence of the African Commission, that it is within the sovereign authority of a state to take measures to protect its borders, including the deportation of illegal immigrants.<sup>154</sup> However, it is unacceptable to deport an individual without giving him the possibility to plead his case before the competent national court as this is contrary to international law.<sup>155</sup> Further, the Court stated that a defendant must be able to exercise his rights and defend his interest effectively and in full procedural equality with other defendants.<sup>156</sup>

The Immigration Judge found inadmissible all the defenses raised by Rosalie's attorney, and did not take into account that all of Rosalie's familial ties were in Tynalandia and that she

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<sup>149</sup> Hypothetical, ¶¶ 18, 21.

<sup>150</sup> Hypothetical, ¶¶ 28, 32.

<sup>151</sup> Clarification Questions & Answers, ¶ 50.

<sup>152</sup> J. Campbell v Jamaica, Communication No. 307/98, UN doc. GAOR ¶ 6.3.

<sup>153</sup> Bulut v Austria, Eur. Ct. H.R. (Feb. 22, 2001).

<sup>154</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 118.

<sup>155</sup> Advisory Opinion OC-18/03, supra note 38, ¶ 119.

<sup>156</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am Ct. H.R. (ser. A) No 16, ¶117 (Oct. 1, 1999)

had lived in that State for 22 years.<sup>157</sup> Law 24.326 by imposing a mandatory sentence of deportation removed the possibility for judicial discretion, rendering Rosalie's right to defend herself ineffective, in contravention of Article 8.

**VI. ROSALIE FOURNIER'S DEPORTATION FROM THE STATE OF TYNALANDIA VIOLATED ARTICLES 11 AND 17 IN THE CASE OF ROSALIE FOURNIER AND BRUNO TAMBA AS WELL AS ARTICLES 19 AND 22 OF THE CONVENTION.**

**A. Rosalie Fournier's deportation to Evaristo violated her and Bruno Tamba's rights to privacy and family under Article 11 and 17.**

Article 11 of the Convention prohibits arbitrary interference with private and family life and Article 17 (1) of the Convention guarantees the right to family.<sup>158</sup> The Inter-American Commission has recognized that these rights are to be considered in deportation cases and has noted that other international human rights bodies, most notably the European Court, have held that there can be situations in which the right to family outweighs a state's interest in deporting a non-citizen even when the non-citizen is considered a threat to society and public order.<sup>159</sup>

The European Court of Human Rights in cases involving the deportation of non-nationals has held that the rights of the individuals under Article 8 of the European Convention, which is similar to Article 11, may only be derogated from where the State can satisfy three criteria.<sup>160</sup> The State must establish that the deportation is in accordance with law, pursues a legitimate aim listed within the law and is necessary in a democratic society.<sup>161</sup>

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<sup>157</sup> Hypothetical, ¶ 32.

<sup>158</sup> American Convention, supra note 37, Arts. 11 and 17 (1).

<sup>159</sup> Hugo Armendariz v United States, Inter-Am C. H.R Report N° 57/06, ¶ 43, (Jul. 20, 2006); see also Wayne Smith v United States, Inter-Am C. H.R Report N° 56/06, ¶ 50, (Jul. 20, 2006), Mehemi v. France, ¶ 28, App. No. 25017/94, 30 Eur. H.R. Rep. 739, (1997); Beljoudi v France, ¶ 74, 14 Eur. H.R. Rep. Feb. 26, 1992; Bouchelkia v. France, App. No. 23018/93, 25 Eur. H.R. Rep. 686, (1997)

<sup>160</sup> Mehemi v France, supra note 159, ¶ 28; see also Beljoudi v France, supra note 159, ¶ 74; Bouchelkia v France, supra note 159, ¶ 42.

<sup>161</sup> *Id.*

Although Rosalie's deportation was in accordance with Law 24.326, enacted in response to the economic crisis and increase in illegal immigrants,<sup>162</sup> Tynalandia has not shown that the measure was necessary in the circumstances of the case. In the case of *Mehemi v France*, the European Court placed greater weight on the right to respect for private and family life than the prevention of disorder or crime in determining the deportation was unnecessary.<sup>163</sup> The economic situation has not changed significantly since the enactment of Law 24.326.<sup>164</sup>

The Immigration Judge ordered Rosalie's deportation without considering that she had lived in Tynalandia for 22 years, had developed strong ties with the Evaristan community there, and had absolutely no contact with anyone living in Evaristo.<sup>165</sup> Further, Rosalie's family unit consisted of Bruno and herself. Bruno was raised solely by his mother Rosalie and had no close relationship with his father. Therefore, Rosalie's deportation unnecessarily destroyed the family unit and violated Articles 11 and 17 in relation to Rosalie Fournier and Bruno Tamba.

**B. Rosalie Fournier's expulsion from the State of Tynalandia violated her right to freedom of movement and residence under Article 22.**

Article 22 of the American Convention provides that every person has the right to freedom of movement and residence and provides special protection for aliens and asylum seekers. Tynalandia as a State Party to the Convention is obliged to grant Rosalie Fournier, as a foreign national, the opportunity to seek and be granted asylum status.

***i. Tynalandia failed to protect Rosalie's right to seek and be granted asylum as guaranteed under Article 22 (7)***

Article 22 (7) of the American Convention provides that every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state

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<sup>162</sup> Hypothetical, ¶ 13.

<sup>163</sup> *Mehemi v France*, supra note 159, ¶ 35

<sup>164</sup> Clarification Questions & Answers, ¶ 45.

<sup>165</sup> Hypothetical, ¶¶ 22, 32; see also Clarification Questions & Answers, ¶ 41.

and international conventions.<sup>166</sup> Article 1 (1) imposes an obligation on Tynalandia to ensure to Rosalie full and free enjoyment of her right under Article 22 (7).<sup>167</sup> Persons convicted under Law 24.326 are subject to mandatory deportation<sup>168</sup> and as such are *prima facie* precluded from exercising their right to seek asylum as an alternative to being deported. Tynalandia in failing to protect Rosalie's right has violated its obligation under Article 22 (7) of the Convention.

***ii. Rosalie's deportation was contrary to the customary international law rule of non-refoulement and amounts to a breach of Article 22 (8)***

Article 22 (8) prohibits the deportation or return of an alien to a country, regardless of whether it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated.<sup>169</sup> This sub-section embodies the principle of non-refoulement which this Court, in the *Haitian and Haitian-Origin Dominican Persons Case*, recognized as a principle of customary law and *jus cogens* character.<sup>170</sup>

Rosalie faces flagrant violations of her rights under the American Convention and the Protocol of San Salvador and the Bélem Do Pará Convention in Evaristo, because of the persistent gender inequality, and limited access to educational programs and job opportunities in the formal market.<sup>171</sup> Tynalandia's deportation of Rosalie to Evaristo subjected her to a violation of her right to personal freedom and family, which is in contravention of the States obligation under Article 22 (8). Moreover, Tynalandia is to be considered responsible for the human rights

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<sup>166</sup> American Convention, *supra* note 37, Art. 22 (7).

<sup>167</sup> Velásquez-Rodríguez v Honduras *supra* note 49, ¶ 166.

<sup>168</sup> Clarification Questions & Answers, ¶ 59.

<sup>169</sup> American Convention, *supra* note 37, Art. 22 (8).

<sup>170</sup> Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic, Inter-Am Ct. H. R. Provisional Measure, (May 26, 2001).

<sup>171</sup> Hypothetical, ¶ 5; Clarification Questions & Answers, ¶¶ 43 -44.

violations Rosalie is likely to suffer in Evaristo, and is therefore in breach of its obligations under the American Convention.<sup>172</sup>

Rosalie's conviction of an aggravated offense is immaterial as Article 22 (8), by stating that in "no case may an alien be deported or returned", provides no exception to the application of the right. It may be distinguished from the 1951 Refugee Convention that limits the right in cases where the national security of the state is threatened or the person has been convicted of a serious crime.<sup>173</sup> Further, the obligation of non-return under Article 22 (8) is absolute and does not depend on Rosalie qualifying for refugee status.<sup>174</sup>

c. **The deportation of Rosalie and placing Bruno Tamba in the custody of his father in addition to the separation from his mother violated Article 19**

Article 19 of the Convention guarantees that every child has the right to the measures of protection required by his conditions as a minor.<sup>175</sup> Tynalandia also has a duty to ensure the special protection and care of the child, especially when separation of a child from his or her family is being analyzed. .<sup>176</sup> Under Article 19 the child has the right to live with his or her family, "which is responsible for satisfying his or her material, emotional, and psychological needs."<sup>177</sup>

Rosalie's deportation dispossessed Bruno of the right to live with his family and deprived him of the only source of emotional and psychological support that he knew. Further, Bruno was

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<sup>172</sup> Report on Terrorism and Human Rights, supra note 118, ¶ 395; see also Haitian Interdiction Case (United States), Case 10.675, ¶ 171, Inter-Am. C .H. R. Report No. 28/93.

<sup>173</sup> United Nations, Convention Relating to the Status of Refugees, Art.33 (3), July 28, 1951, 189 U.N.T.S. 150.

<sup>174</sup> Report on Terrorism and Human Rights, supra note 118, ¶¶ 392, 394.

<sup>175</sup> American Convention, supra note 37, Arts. 19; Convention on the Rights of the Child, supra note 107, Arts. 8, 9,16; American Declaration; supra note 37, Art. VII

<sup>176</sup> Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am Ct. H.R. (ser. A) No 17, ¶ 71 (Aug. 28, 2002)

<sup>177</sup> Advisory Opinion OC-17/2002, supra note 176, ¶ 71.

not given the opportunity to be heard during the proceedings<sup>178</sup>, contrary to Tynalandia's obligation under the Convention on the Rights of the Child.<sup>179</sup> These omissions on the part of the State of Tynalandia amounted to a breach of its obligations under Article 19.

## **VII. ROSALIE FOURNIER'S INABILITY TO PETITION FOR FAMILY REUNIFICATION VIOLATED ARTICLES 17, 19 AND 25 OF THE CONVENTION**

### **A. Tynalandia, by denying Rosalie Fourier any judicial avenue to open a family reunification case violated her and Bruno Tamba's right of the family under Article 17 and Bruno's Rights as a child under Article 19.**

The family is recognized as the fundamental unit of society deserving of adequate protection by the state.<sup>180</sup> This Court in the *Haitians and Dominicans of Haitian Origin* Case, recognized the importance of maintaining the family unit and ordered the Dominican State to refrain from deporting the petitioners and to "allow as soon as possible the family reunification" of the petitioners and their minor children.<sup>181</sup> Further, the Convention on the Rights of Migrant Workers and their Families imposes a duty on Tynalandia to facilitate family reunification especially where migrant workers are separated from minor dependent unmarried children<sup>182</sup>

The jurisprudence of the European Court of Human Rights has consistently recognized the importance of family reunification in the protection of the family unit, particularly where a member of the family group is already living in the foreign territory.<sup>183</sup> That Court has found that there is a strong case for family reunification where certain criteria are met, and these include

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<sup>178</sup> Clarification Questions & Answers, ¶¶ 33 – 34.

<sup>179</sup> Convention on the Rights of the Child, supra note 107, Art 12.

<sup>180</sup> American Convention, supra note 37, Art. 17 (1); Protocol of San Salvador supra note 108, Art 15 (3).

<sup>181</sup> Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic, supra note 170.

<sup>182</sup> Convention on Migrant Workers and Their Families, supra note 41.

<sup>183</sup> *Mehemi v France*, supra note 159, ¶ 37.



effective and strong links between the family members concerned and the host country, actual existence of ‘family life’, and the impossibility of reuniting the family elsewhere.<sup>184</sup>

Applying the test outlined by the European Court, there is a strong case for family reunification considering the present facts. Rosalie developed strong familial ties during her 22 years in Tynalandia, and she is the only emotional and psychological Bruno, who is a minor. It would be unreasonable to remove Bruno from his home and extremely difficult for them to establish a stable family life in Evaristo considering the gender discrimination Rosalie faces and the general state of economic instability in that country. For that reason, Tynalandia should provide recourse for the family to be reunited regardless of Rosalie’s conviction for an offense. Tynalandia’s failure to fulfill this obligation violated their right to family under Article 17 and Bruno’s right as a child under Article 19 of the Convention.

**B. Tynalandia, by denying Rosalie Fournier any judicial avenue to open a family reunification case, violated her right to judicial protection under Article 25.**

This Court has established that to ensure the protection of the rights of persons States must provide opportunities for persons to access competent courts.<sup>185</sup> Article 25 embodies the procedural institution of “amparo” which is designed to protect all the rights recognized by the Convention by ensuring simple and prompt recourse to competent courts.<sup>186</sup>

Rosalie Fournier and Bruno Tamba’s right to family under Article 17 and Bruno’s rights as a child under Article 19 were prejudiced by the separation. For that reason, Tynalandia was obligated to provide effective judicial avenues through which those rights could be safeguarded. The State’s absolute policy to deny persons deported in connection with an associated with an

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<sup>184</sup> *Id.*

<sup>185</sup> Baena-Ricardo et al. v Panama, supra note 115, ¶ 137; American Convention, supra note 36, Art. 25 (2).

<sup>186</sup> Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, Inter-Am Ct. H.R. (ser. A) No 8, ¶ 32 (Jan. 30, 1987).

aggravated offense the opportunity to access a competent court to open a reunification case, amounted to an unjustifiable breach of its obligation under Article 25 of the Convention.

### **REQUEST FOR RELIEF**

The Commission requests that the Court determine and declare that Tynalandia is responsible for violation of all the abovementioned Articles of the American Convention and that it has the obligation to ensure reparation to Rosalie Fournier and Bruno Tamba for the violation of their rights. In this regard, the Commission request that the Court order the Tynalandian State to:

- a. Expunge Rosalie Fournier's record and reunite her with her son Bruno Tamba in Tynalandia;
- b. Adopt the necessary measures to amend or repeal Law 24.326, in such a manner as to make it compatible with the American Convention on Human Rights.
- c. Pay compensation to Rosalie Fournier for loss of income suffered from the time of detention to present, in accordance with the Court's usual methods of computation.

Respectfully Submitted,

Agents for the Commission.