

Gonzalo Belano and 807 Other Wairan Persons

Victims

v.

Republic of Arcadia

State

MEMORIAL FOR THE REPRESENTATIVES OF THE VICTIMS

LIST OF ABBREVIATIONS

§ Paragraph(s)

1951 Refugee Convention 1951 Convention Relating to the Status of Refugees

ACHR American Convention on Human Rights

Cartagena Declaration Cartagena Declaration on Refugees

GIA General Immigration Act

IACHR Inter-American Commission on Human Rights

IACrHR Inter-American Court of Human Rights

ISHR Inter-American System of Human Rights

LRCP Law on Refugees and Complementary Protection

p. or pp. Page(s)

Tlaxcochitlán United States of Tlaxcochitlán

UN United Nations

UNHCR United Nations High Commissioner for Refugees

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STATEMENT OF FACTS

The Republic of Puerto Waira

1. The Republic of Puerto Waira is a Central American country, bordered on the north by the United States of Tlaxcochitlán, with a geographical area of 21,410 km², and a population of 6.4 million people.¹ As of 2010, the monetary poverty rate in Puerto Waira was 46.9% with 18% of the population living in extreme poverty.²
2. Puerto Waira experiences problems of insecurity and violence due to gang activity.³ Regular practices by gangs include threats, extortion, recruitment of children, torture, rape, murder, and forced disappearances.⁴ The gangs in Puerto Waira recruit minors from territories under their control.⁵ According to the Ministry of Interior and Police, the gangs significantly outnumber the national police force.⁶ In 2014, Puerto Waira was the most violent country in the Western Hemisphere.⁷
3. In response to this violence, the authorities have resorted to heavy handed policies and the use of military forces.⁸ Simultaneously, “clean up” groups, consisting of police and military members, have emerged and attempted to kill gang members anonymously.⁹

¹ Hypothetical § 1.

² Hypothetical § 3.

³ Hypothetical § 4.

⁴ Hypothetical § 4.

⁵ Hypothetical § 5.

⁶ Hypothetical § 4.

⁷ Hypothetical § 4.

⁸ Hypothetical § 6.

⁹ Hypothetical § 6.

4. Impunity is an endemic problem in Puerto Waira with up to 90% of violent crimes going unpunished.¹⁰ Gang violence extends to virtually the entire territory rendering opportunities for domestic relocation limited.¹¹ The climate of violence, impunity, high poverty rates and inequality are push factors for emigration from Puerto Waira.¹² The primary destination of these migrants is Arcadia.¹³ In 2012, there were 5500 refugees from Puerto Waira to Arcadia, while at the end of 2015, there were 18000 refugees.¹⁴

The Republic of Arcadia

5. Arcadia is a developed country with a strong system of public institutions and a strong economy.¹⁵ In 2014, Arcadia's GDP was US\$325 billion.¹⁶ Arcadia has developed integration policies for refugees outlined in its Constitution and in the LRCP.¹⁷ The Constitution recognizes the right to seek and be granted asylum.¹⁸ Article 40 of the LRCP outlines the exceptions upon which refugee status will not be granted,¹⁹ referring to the 1951 Refugee Convention.²⁰ Section 111 of the GIA outlines requirements to ensure the lawfulness of detention of immigrants.²¹

¹⁰ Hypothetical § 7.

¹¹ Hypothetical § 7.

¹² Hypothetical § 7.

¹³ Hypothetical § 7.

¹⁴ Clarification Question 43.

¹⁵ Hypothetical § 8.

¹⁶ Clarification Question 7.

¹⁷ Hypothetical § 11, 12.

¹⁸ Hypothetical § 11.

¹⁹ Hypothetical § 13.

²⁰ Clarification Question 36.

²¹ Clarification Question 11.

Facts of the Case.

6. A caravan of 7000 people, composed of hundreds of families, children and adolescents, journeyed from Puerto Waira through Tlaxcochitlán to the southern border of Arcadia.²²
7. On August 20, 2014, the president of Arcadia announced that Arcadia would: (1) open its borders for the orderly and safe entry of people from Puerto Waira and (2) recognize all these people as *prima facie* refugees.²³ These measures would be consistent with the Constitution and the LRCP.²⁴ Therefore, the only exceptions provided would be those falling within any of the cases covered by Article 40 of the latter.²⁵
8. Arcadia announced that to obtain *prima facie* refugee status, an applicant was required to submit an application, undergo a brief interview and obtain a refugee document and work permit within no more than 24 hours.²⁶ Following the completion of this process, the Arcadian authorities would utilize the services of the Ministry of Foreign Affairs and the Intelligence Service of the Ministry of the Interior to determine whether the person has a criminal record.²⁷ If so, the person would be held in custody pending a decision on his or her immigration status.²⁸
9. Arcadia identified 808 individuals with criminal records, all of whom had served their sentences.²⁹ They were arrested, brought before the administrative authority and detained.³⁰ Of these individuals, 490 were detained in an immigration detention centre with a capacity of

²² Hypothetical § 14, 15.

²³ Hypothetical § 18.

²⁴ Hypothetical § 18.

²⁵ Hypothetical § 18.

²⁶ Hypothetical § 20.

²⁷ Hypothetical § 21.

²⁸ Hypothetical § 21.

²⁹ Clarification Question 33.

³⁰ Clarification Question 50.

400.³¹ The remaining 318 were detained in separate penitentiary units.³² The Arcadian authorities informed the detainees of their rights,³³ that they would not be eligible for prima facie refugee status,³⁴ and their ability to request legal assistance and representation.³⁵ However, the listed civil society organisations and legal clinics did not have the capacity to provide assistance to all of the Wairans.³⁶ The remedies available to the excluded Wairans were administrative motions, constitutional actions as well as proceedings for reparations.³⁷

10. Within 45 business days, Arcadia determined that, in 729 of the 808 cases, the individuals would face a “high risk” of torture or danger to their lives if they were returned to Puerto Waira; the remaining 79 cases had a “reasonable likelihood” of the same.³⁸ This was assessed on an individual basis, considering the allegations of persecution faced by each individual and the context of Puerto Waira.³⁹ Despite the determination that these individuals had a well-founded fear of persecution, they were denied protection.⁴⁰
11. At the same time, there was growing public pressures in Arcadia for the deportation of the 808 individuals.⁴¹ This included marches for at least 5 days, and public condemnations from the media.⁴² False news reports about Wairans were common and media outlets referred to Wairans as “cockroaches”, “scum”, “gang members”, “criminals” and “illegals”.⁴³ In

³¹ Hypothetical § 22.

³² Hypothetical § 22.

³³ Clarification Question 9, 47.

³⁴ Clarification Question 50.

³⁵ Clarification Question 9, 47.

³⁶ Clarification Question 9, 47.

³⁷ Clarification Question 10.

³⁸ Hypothetical § 23.

³⁹ Clarification Question 69.

⁴⁰ Hypothetical § 23.

⁴¹ Hypothetical § 25.

⁴² Hypothetical § 25.

⁴³ Hypothetical § 24.

response, Arcadian authorities launched awareness-raising campaigns to prevent racism and xenophobia directed at those who were already recognized as refugees.⁴⁴

12. The culmination of these events led Arcadia to publish an Executive decree declaring that they lacked the capacity and resources to accommodate the 808 individuals with criminal records.⁴⁵ Arcadia acknowledged that these individuals would be at risk if returned to Puerto Waira and called upon the international community to admit them to their countries.⁴⁶
13. In the absence of any response from other states by the deadline March 2, 2015, Arcadia formed an agreement with Tlaxcochitlán, which was known for human rights violations with respect to migrants,⁴⁷ to return the 808 individuals to Tlaxcochitlán.⁴⁸ On March 16, 2015, Arcadia expelled 591 of the individuals who had not filed any judicial or administrative appeal.⁴⁹
14. On February 10, 2015, 217 people filed a writ of *amparo* to stop the deportation, alleging that their lives would be in danger if they were returned.⁵⁰ On February 20, 2015, the deportation was suspended until the merits of the case were adjudicated.⁵¹ Subsequently, on March 22, 2015, the court denied protection.⁵² The people filed a motion for reconsideration of the decision which was denied, and the deportation orders were affirmed on April 30, 2015.⁵³ On May 5, 2015, Arcadia returned the 217 remaining individuals to the Tlaxcochitlán.⁵⁴

⁴⁴ Hypothetical § 25.

⁴⁵ Hypothetical § 26.

⁴⁶ Hypothetical § 26.

⁴⁷ Hypothetical § 14.

⁴⁸ Hypothetical § 27.

⁴⁹ Hypothetical § 27.

⁵⁰ Hypothetical § 28.

⁵¹ Hypothetical § 28.

⁵² Hypothetical § 28.

⁵³ Hypothetical § 28.

⁵⁴ Hypothetical § 28.

15. The detention and expulsion of the 808 victims resulted in some families being separated, to the extent that one of the parents or persons responsible for the care of children was deported to Tlaxcochitlán.⁵⁵ These children were placed in the custody of the state or in Child Protection Centres.⁵⁶
16. Upon arrival in the Tlaxcochitlán, all 808 individuals were detained until June 15, 2015 and then deported to Puerto Waira.⁵⁷
17. On June 28, 2015, Gonzalo Belano, who faced a “reasonable likelihood” of being subjected to torture,⁵⁸ was murdered outside his family’s home a few days after being deported.⁵⁹ He had been forcibly recruited by a gang at the age of 14 years and served time in prison for extortion from ages 18 to 21.⁶⁰ Upon release from prison, to prevent his having to return to the gang, he joined the caravan to Arcadia.⁶¹ The circumstances of the other 807 deported Wairans were similar to those of Belano.⁶²
18. The family members of Gonzalo Belano sought advice from the Legal Clinic for Displaced Persons, Migrants and Refugees of the National University of Puerto Waira.⁶³ The Legal Clinic documented 29 other cases of deportees who were killed within two months of their return to the Tlaxcochitlán, as well as 7 cases of disappeared persons.⁶⁴
19. The Legal Clinic brought an action before the Arcadian consulate alleging administrative irregularities and seeking comprehensive reparation of the harm in Arcadia.⁶⁵ They alleged

⁵⁵ Clarification Question 21.

⁵⁶ Clarification Question 21.

⁵⁷ Hypothetical § 29.

⁵⁸ Clarification Question 22.

⁵⁹ Hypothetical § 30.

⁶⁰ Hypothetical § 30.

⁶¹ Hypothetical § 30.

⁶² Clarification Question 26.

⁶³ Hypothetical § 30.

⁶⁴ Hypothetical § 31.

⁶⁵ Hypothetical § 32.

violations of the principle of non-refoulement and of the rights to life, a fair trial, and judicial protection, to the detriment of the 808 individuals.⁶⁶ The claim was dismissed on the basis that it was not filed before a court with competent jurisdiction.⁶⁷

Proceedings before the Inter-American Human Rights System.

20. On January 20, 2016, the Legal Clinic filed a petition with the IACHR on behalf of the 808 deportees.⁶⁸ At the admissibility stage, Arcadia alleged the failure to exhaust domestic remedies and non-compliance with the domestic legal requirements.⁶⁹ On November 30, 2017, the IACHR declared the petition admissible.⁷⁰
21. On August 1, 2018, the IACHR issued its Report on the Merits No. 24/18, approved pursuant to Article 50 of the ACHR, which was served on the parties on August 6, 2018.⁷¹ In its merits report, the IACHR attributed international responsibility to the State of Arcadia for the violation of the rights to life (Article 4), personal liberty (Article 7), a fair trial (Article 8), to seek and be granted asylum (Article 22.7), non-refoulement (Article 22.8), family unity (Article 17), the best interests of the child (Article 19), equal protection (Article 24), and judicial protection (Article 25) of the ACHR, all in relation to Article 1.1 thereof, to the detriment of Gonzalo Belano and 807 other Wairans.⁷²

⁶⁶ Hypothetical § 32.

⁶⁷ Hypothetical § 33.

⁶⁸ Hypothetical § 34.

⁶⁹ Hypothetical § 35.

⁷⁰ Hypothetical § 35.

⁷¹ Hypothetical § 36.

⁷² Hypothetical § 36.

22. Arcadia failed to comply with the recommendations made by the IACHR.⁷³ The case was then submitted to the jurisdiction of the IACrHR on November 5, 2018, alleging the violation of the same Articles established in the IACHR's report on the merits.⁷⁴

LEGAL ANALYSIS

1. The Republic of Arcadia violated Article 4 of the ACHR, in relation to Article 1.1 thereof, to the detriment of Gonzalo Belano and 807 others.

1.1 Arcadia violated the positive obligation under the right to life.

23. Article 4 (1) of the ACHR states, "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."⁷⁵
24. Article 4 of the ACHR encompasses a negative obligation which assumes that no one shall be deprived of his life arbitrarily and a positive obligation which places a duty on States to guarantee the free and full exercise of human rights, requiring they adopt the appropriate measures to protect and preserve the right to life.⁷⁶ As such, States are required to protect an individual or group in cases where the State is aware of an imminently dangerous situation.⁷⁷ Furthermore, when removing a refugee to a third party country, States are obligated to carry

⁷³ Hypothetical § 37.

⁷⁴ Hypothetical § 37.

⁷⁵ Organization of American States (OAS), American Convention on Human Rights (ACHR), "Pact of San Jose", Costa Rica, 22 November 1969, Article 4.

⁷⁶ *Case of Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs, IACrHR, Series C No. 192, 27 November 2008, § 78; *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, IACrHR, Series C No. 140, 15 September 2005, § 123.

⁷⁷ *María Isabel Véliz Franco v. Guatemala*, Merits, Reparations and Costs, IACrHR, Series C No. 277, 19 May 2014, § 137.

out a reliable assessment of the risk of chain refoulement in that country.⁷⁸ Failure to uphold this obligation amounts to neglect of the state's responsibility as guarantor.⁷⁹

25. Arcadia formed an agreement with Tlaxcochitlán for the removal of the victims, without assessing the risk that the victims would be returned to Puerto Waira.⁸⁰ Arcadian authorities had conducted an individual examination of each asylum claim,⁸¹ and recognized that 729 of the applicants faced a high risk of torture and 79 faced a reasonable likelihood of the same.⁸² Each of them had a well-founded fear of persecution.⁸³ Aware of this imminently dangerous situation, Arcadia failed to adopt measures to prevent the return of the applicants to Puerto Waira where their lives were endangered.⁸⁴
26. Therefore, Arcadia failed to uphold its positive obligations under Article 4 of the ACHR.

1.2 Arcadia violated the right to life, by deporting the victims to circumstances in which their lives were threatened.

27. In determining a breach of Article 4, the IACrHR implements a two-part test.⁸⁵ First, the court must assess whether the authorities knew of the existence of a circumstance that was an immediate and definite risk to life of an individual or of a group.⁸⁶ Second, they must decide whether the necessary measures, within the scope of the authority of the State, were adopted which could have been reasonably expected to prevent such a risk.⁸⁷

⁷⁸ *John Doe* (Canada), IACHR, Report No. 78/11 (Merits), Case 12.586, 21 July 2011, § 107.

⁷⁹ Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, IACHR, OEA/Ser.L/V/II. Doc. 48/13, 30 December 2013, § 364-365.

⁸⁰ Hypothetical § 27.

⁸¹ Hypothetical § 20, 22.

⁸² Hypothetical § 23.

⁸³ Hypothetical § 23.

⁸⁴ *Ibid.*

⁸⁵ *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, IACrHR, Series C No. 146, 29 March 2006, § 155.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

28. Within Puerto Waira, there is a state of insecurity and generalized violence from gangs,⁸⁸ which outnumber the police force.⁸⁹ The emergence of “clean up” groups,⁹⁰ the implementation of heavy-handed policies by the government and the use of military forces,⁹¹ all created an imminently dangerous situation which threatened the lives of the applicants. Mr. Belano travelled to Arcadia to flee the gang⁹² and faced a reasonable likelihood of torture or threat to his life in context of his former gang membership.⁹³
29. Arcadia was aware of the existence of this imminently dangerous situation in Puerto Waira.⁹⁴ As such, Arcadia ought to have taken steps within the scope of its authority to ensure that the applicants were not returned. The failure to take the relevant measures to protect the lives of the victims led to their return to Puerto Waira and the death of 30 of the victims.⁹⁵

1.3 Arcadia violated the right of the victims not to be returned to a country where his or her life is at risk.

30. Attached to the right to life, the Inter-American system recognizes the right of any alien, to not be returned when his or her life, integrity or freedom are at risk of being violated.⁹⁶ This obligates a state not to expel a refugee to a country of persecution indirectly through third country.⁹⁷

⁸⁸ Hypothetical § 4.

⁸⁹ *Ibid.*

⁹⁰ Hypothetical § 6.

⁹¹ Hypothetical § 4.

⁹² Hypothetical § 30.

⁹³ Clarification Question 22.

⁹⁴ Hypothetical § 23.

⁹⁵ Hypothetical § 31.

⁹⁶ *Pacheco Tineo Family v. State of Bolivia*, Preliminary Objections, Merits, Reparations and Costs, IACrtHR, Series C No.272, 25 November 2013, § 135.

⁹⁷ *John Doe* (Canada), (n 78), § 103.

31. Arcadia expelled the victims to Tlaxcochitlán, a country renowned for human rights abuses against migrants,⁹⁸ where they were returned to Puerto Waira, despite the potential threat to their lives.⁹⁹ Arcadia disregarded the risk of violation of the applicants' rights,¹⁰⁰ and deported them.¹⁰¹ This failure resulted in the death of 30 of the applicants.
32. As such, Arcadia violated its obligation under Article 4 of the ACHR, resulting in the death of 30 of the victims and 7 disappearances.¹⁰²

2. The Republic of Arcadia violated Article 7 of the ACHR, in accordance with Article 1.1, to the detriment of Gonzalo Belano and 807 other Wairan Persons.

33. Article 7 of the ACHR provides for the right to personal liberty and security and to be free from arbitrary arrest or detention.¹⁰³ The IACrTHR recognizes that the specific regulations under Article 7 are guaranteed in all detentions, including immigration proceedings.¹⁰⁴ Failure to respect these guarantees leads to the lack of protection of one's right to liberty.¹⁰⁵
34. Arcadia violated Article 7 of the ACHR, through the unlawful and arbitrary detention of the victims.

2.1 Arcadia violated the right of the victims not to be subject to unlawful detention.

35. Article 7 states that, "No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State party concerned or by a law established pursuant thereto".¹⁰⁶ The IACrTHR can verify whether State

⁹⁸ Hypothetical § 14.

⁹⁹ Hypothetical § 29.

¹⁰⁰ Hypothetical § 23.

¹⁰¹ Hypothetical § 26.

¹⁰² Hypothetical § 31.

¹⁰³ Report on Terrorism and Human Rights, IACHR, OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002, §118.

¹⁰⁴ *Ibid.*, §125.

¹⁰⁵ *Yvon Neptune v Haiti*, Merits, Reparations and Costs, IACrTHR, Series C No.180, 6 May 2008, § 90, 91.

¹⁰⁶ *ACHR*, (n 75), Article 7(2).

authorities have respected their national constitution or relevant legislation when detaining a person.¹⁰⁷ The IACrtHR has identified two aspects in the determination of unlawfulness of detention, a material aspect and a formal aspect.¹⁰⁸ The material aspect addresses the legal exception, that is, “no person may be deprived of his or her personal freedom except for reasons expressly defined by law,” while the formal aspect requires strict adherence to the procedures objectively set forth in the law.¹⁰⁹ Furthermore, detention of asylum seekers should only be on grounds prescribed by law¹¹⁰ and the occupation of an institution over its maximum capacity is prohibited.¹¹¹

36. Arcadia deprived the victims of their liberty by placing 490 of the victims in facilities with insufficient capacity and 318 in penitentiary units.¹¹² Although section 111 of the GIA permits the detention of immigrants until determination of immigration status,¹¹³ it does not encompass detention in inhumane conditions nor the detainment of individuals alongside criminals in penitentiary units. Migrants in detention are to be provided treatment in line with their status and kept separate from imprisoned persons,¹¹⁴ not incarcerated alongside them. As such, incarceration, violated the formal aspect of Article 7 of the ACHR through the deprivation of the victims’ personal freedom.

¹⁰⁷ *Chaparro Alvarez Iniguez v Ecuador*, Preliminary objections, Merits, Reparations and Costs, IACrtHR, Series C No.170, 21 November 2007, § 57.

¹⁰⁸ *Gangaram Panday v Suriname*, Merits, Reparations and Costs, IACrtHR, Series C No.16, 21 January 1994, §47.

¹⁰⁹ *Ibid.*

¹¹⁰ Report on Immigration in the United States: Detention and Due Process, IACHR, OEA/Ser.L/V/II. Doc. 78/10, 30 December 2010, § 45.

¹¹¹ *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, IACHR, Resolution 1/08, 13 March 2008, Principle XVII.

¹¹² Hypothetical § 23.

¹¹³ Clarification Question 11.

¹¹⁴ *UN’s Body of Principles for the Protection of All People Submitted to Any Form of Detention or Imprisonment*, General Assembly Resolution 43/173, 9 December 1988, Principle 8.

37. Although Article 30 of the LRCP allows the Ministry of Interior to establish guidelines to be followed in the case of a massive influx of refugees,¹¹⁵ such guidelines must be limited to the procedure by which the victims may attain refugee status as permitted under section 111(3) of the GIA.¹¹⁶ Contravening the material aspect of Article 7 of the ACHR,¹¹⁷ the Ministry of Interior extended the procedures objectively set forth in Arcadian law to encompass the detention of the applicants pending a decision on their refugee status before the courts.¹¹⁸
38. This detention continued until the merits of the case were heard before Arcadian domestic courts.¹¹⁹ Section 111(2) of the GIA permits the detention of the immigrants after assessing the appropriateness and proportionality of detention.¹²⁰ However, while Arcadia claimed that the detention was to guarantee national security and to preserve public order,¹²¹ the State did not assess the potential threat posed by the victims. Thus, Arcadia failed to comply with Section 111, and thereby violated the formal and material aspect of Article 7.
39. Accordingly, the detention of the 808 victims breached their rights protected by the ACHR, violating Article 7 of the ACHR.

2.2 Arcadia violated Article 7 through the arbitrary arrest and imprisonment of the victims.

40. Article further 7 states that “no one shall be subject to arbitrary arrest or imprisonment”.¹²² The IACHR has stated that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, are incompatible with the respect for the

¹¹⁵ Hypothetical § 13.

¹¹⁶ Clarification Question 11.

¹¹⁷ *ACHR*, (n 75), Article 7(2).

¹¹⁸ Hypothetical § 21.

¹¹⁹ Hypothetical § 28.

¹²⁰ Clarification Question 11.

¹²¹ Hypothetical §, 21.

¹²² *ACHR*, (n 75), Article 7(3).

fundamental rights of the individual as they are unreasonable, unforeseeable or lacking in proportionality.¹²³ The IACrtHR identified four requirements that must be assessed to ensure that detention is not arbitrary.¹²⁴ Firstly, the purpose of the measures restricting liberty must be compatible with the ACHR and its legitimate purpose.¹²⁵ Secondly, the measures adopted must be appropriate to achieve the purposes sought.¹²⁶ Next, the measures must be necessary, in the sense that they are absolutely essential to achieve this purpose. Lastly, the measures must be strictly proportionate.¹²⁷

41. The detention of the victims was excessive in relation to the nature and purpose for which it was claimed.¹²⁸ While the applicants had access to food, health services, education, recreational activities and communication,¹²⁹ they were placed in cramped conditions. Moreover, the detention was wholly disproportionate to the purpose of guaranteeing national security and preserving public order.¹³⁰ Hence, Arcadia violated Article 7 of the ACHR through the arbitrary detention of the applicants.
42. Therefore, Arcadia, through the unnecessary, disproportional and inappropriate detention of the victims violated Article 7 of the ACHR.

¹²³ *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, UNHCR, 2012, Guideline 4.6.

¹²⁴ *Chaparro Alvarez Iniguez v Ecuador*, (n 107), § 93.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Chaparro Alvarez Iniguez v Ecuador*, (n 107), § 93.

¹²⁸ Hypothetical § 21.

¹²⁹ Clarification Question 18.

¹³⁰ Hypothetical §, 21.

3. The Republic of Arcadia violated Articles 8 and 25 of the ACHR in relation to Article 1.1, to the detriment of the victims.

3.1 Arcadia failed to provide recourse to an impartial court within a reasonable time.

43. Article 8 of the ACHR provides for the right to a fair trial, within a reasonable time by a competent and impartial tribunal. The guarantees in Article 8 are applicable to administrative as well as judicial procedures.¹³¹
44. Furthermore, Article 8(1) of the ACHR articulates the requirements that all procedural bodies must observe so a person may defend himself adequately against an act of the state that affects his rights.¹³² The IACrHR has established the basic principle of the independence of judiciary, whereby every person has a right to be heard by regular courts, in accordance with procedures previously established by law.¹³³ This principle, constitutes one of the basic pillars of the guarantees of the due process.¹³⁴
45. Additionally, the IACrHR has declared that a judge or court hearing a case must do so “based on the utmost objectivity.”¹³⁵ The impartiality of a court implies that its members have no pre-established viewpoint, or preference for one of the parties.¹³⁶ Hence, the lack of an impartial court leads to the deprivation of due process guaranteed under Article 8 of the ACHR.
46. Before the *amparo* was heard in the domestic courts of Arcadia, there was rising tension and civil unrest in the Arcadian population for the deportation of the victims.¹³⁷ Moreover, Arcadia

¹³¹ *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz v. Mexico*, IACHR, Report N. 49/99, Case 11.610, 13 April 1999, § 46.

¹³² *Yatama v Nicaragua*, Merits, Reparations and Costs, IACrHR, Series C No. 127, 23 June 2005, § 147.

¹³³ *Case of Castillo-Petruzzi et al. v. Perú*, Merits, Reparations and Costs, IACrHR, Series C No.52, 30 May 1999, §129.

¹³⁴ *Revveron Trujillo v Venezuela*, Preliminary objections, Merits, Reparations and Costs, IACrHR, Series C No.197, 30 June 2009 § 68.

¹³⁵ *Case of Castillo-Petruzzi et al. v. Perú*, (n 133), § 129.

¹³⁶ *Ibid.*

¹³⁷ Hypothetical § 24, 25.

had recently made an agreement with Tlaxcochitlán for the return of 591 of the victims.¹³⁸ Thus, there was insistence by both the population and government of Arcadia that the applicants be deported.¹³⁹ Hence, given the duration of time for the proceedings and appeal to be heard and dismissed,¹⁴⁰ as well as the rising pressure upon the judges to determine that the applicants ought to be deported,¹⁴¹ the domestic courts of Arcadia were not independent and impartial.

47. Article 8(1) further requires that cases be brought within a reasonable time. In determining a reasonable time, the IACrHR assesses: (i) the complexity of the matter,¹⁴² (ii) the judicial activity of the interested party,¹⁴³ (iii) the behavior of the judicial authorities¹⁴⁴ and (iv) the adverse effect of the duration of the proceedings on the judicial situation of the person involved.¹⁴⁵
48. Only 217 victims filed a writ of *amparo*¹⁴⁶ which was heard before the domestic courts of Arcadia.¹⁴⁷ The matter before the courts concerned the violation of fundamental rights. The victims were forced to wait an unreasonable period of time,¹⁴⁸ in inhumane conditions¹⁴⁹, torn from their families¹⁵⁰ until the matter was adjudicated.
49. Therefore, Arcadia's failure to provide recourse to an impartial tribunal within a reasonable time constituted a violation of due process and Article 8 of the ACHR.

¹³⁸ Hypothetical § 27.

¹³⁹ Hypothetical § 24, 25, 27.

¹⁴⁰ Hypothetical § 28

¹⁴¹ Hypothetical § 24, 25, 27.

¹⁴² *Genie Lacayo v Nicaragua*, Merits, Reparations, Costs, IACrHR, Series C No.30, 29 January 1997, §77.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Hypothetical § 28.

¹⁴⁷ *Ibid.*

¹⁴⁸ Hypothetical § 24.

¹⁴⁹ Hypothetical § 22.

¹⁵⁰ Clarification Question 3.

3.2 Arcadia violated the right to due process under Article 8 and 25 of the ACHR through the denial of legal representation.

50. The right to a fair trial contained in Article 8(1) includes the concept of due process of law.

The refers to the prerequisites necessary to ensure the adequate protection of persons whose rights and obligations are pending judicial determination and applies to all judicial guarantees in the ACHR.¹⁵¹

51. The principle of equality of arms is guaranteed under the ACHR.¹⁵² Thus, a requirement of due process of law is the ability of a defendant to exercise his rights and defend his interests effectively and in full procedural equality with other defendants.¹⁵³ Additionally, remedies under Article 25 must be substantiated in accordance with the rules of due process of law.¹⁵⁴

52. Although Arcadia made legal assistance available,¹⁵⁵ it was inadequate to provide every victim with legal representation. According to the IACHR, all claimants should have the option to be represented by legal counsel to pursue their actions.¹⁵⁶ Where legal assistance is inadequate, the availability must be increased to facilitate every claimant who requires access to judicial protection to vindicate a protected right.¹⁵⁷ Arcadia failed to ensure the adequate legal representation of every individual as stipulated by the IACHR. Hence, the inability of Arcadia to provide each migrant with legal assistance¹⁵⁸ constitutes a violation of the right to a fair trial and to effective judicial protection under Articles 8 and 25 of the ACHR.

¹⁵¹ Judicial guarantees in State of Emergency Articles, 27(2), 25 and 8 ACHR, IACrHR, Advisory Opinion OC 9/87, Series A No.9, 6 October 1987, § 28, 29.

¹⁵² Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, IACHR, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, § 185-186.

¹⁵³ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, IACrHR, Advisory Opinion OC-16/99, Series No. 16, 1 October 1999, § 117 and 119.

¹⁵⁴ Judicial guarantees in State of Emergency Articles, (n 151), § 24.

¹⁵⁵ Clarification Question 47.

¹⁵⁶ Access to Justice as a Guarantee of Economic, Social and Cultural Rights. (n 152), § 56.

¹⁵⁷ Report on the Situation of Human Rights in Ecuador, IACHR, 24 April, 1997, (OEA/Ser.L/V/II.96), Chapter 3.

¹⁵⁸ Clarification Question 47.

53. Therefore, Arcadia violated the victims right to due process and consequently, Articles 8 and 25 of the ACHR.

3.3 Arcadia violated the applicants right to an effective judicial remedy, violating Article 25 of the ACHR.

54. Article 25 (1) of the ACHR gives expression to the procedural institution known as amparo which is a simple and prompt remedy, available to all persons, and designed for the protection of all the fundamental rights.¹⁵⁹ It also establishes the obligation of the States to provide to all persons within its jurisdiction an effective judicial remedy for violations of their fundamental rights.¹⁶⁰ Article 25 further provides for the guarantees in the ACHR as well as those within Constitutions and domestic laws.¹⁶¹
55. Such a remedy is not effective when it is “illusory”, excessively onerous for the victim, or when the State has not ensured its proper enforcement by the judicial authorities.¹⁶² Recourse is illusory where there is a lack judicial independence, an unjustified delay in the decision and when the alleged victim is impeded from having access to it.¹⁶³
56. Arcadia permitted the victims to file writs of amparo to challenge the executive decree ordering their deportation.¹⁶⁴ However, such relief was illusory. The judiciary of Arcadia lacked the necessary independence to render impartial decisions due to the rising domestic tension,¹⁶⁵ the matter was not heard in a reasonable time¹⁶⁶ and some victims were denied

¹⁵⁹ Judicial guarantees in State of Emergency Articles, (n 151).

¹⁶⁰ *Case of Castillo-Petruzzi et al. v. Peru*, (n 133), §129.

¹⁶¹ *Ibid.*

¹⁶² Access to Justice as a Guarantee of Economic, Social and Cultural Rights. (n.152) § 251.

¹⁶³ *Ivcher Bronstein v Peru*, Merits, Reparations and Costs, IACrTHR, Series C No.74, 6 February 2001, §137.

¹⁶⁴ Hypothetical § 28.

¹⁶⁵ Hypothetical § 24.

¹⁶⁶ Hypothetical § 28.

justice through Arcadia's failure to provide adequate legal representation.¹⁶⁷ Thus, the domestic courts of Arcadia failed to provide effective relief to the victims.

57. Hence, Arcadia violated Article 25 of the ACHR by failing to provide an adequate judicial remedy.

4. The Republic of Arcadia violated Article 24 of the ACHR, in relation to Article 1.1, to the detriment of the victims.

58. Article 24 of the ACHR states, "All persons are equal before the law. Consequently, they are entitled, without discrimination to equal protection before the law". The IACrHR stated that pursuant to Article 24 and 1(1) of the ACHR, the States must ensure on an equal basis, full exercise and enjoyment of the rights of these individuals who are subject to its jurisdiction.¹⁶⁸

4.1 Arcadia derogated from the principles of equality and non-discrimination violating Article 24 of the ACHR.

59. The principle of equality before the law and non-discrimination permeates every act of the powers of the state, relating to respecting and ensuring human rights.¹⁶⁹ A state, internationally, domestically and through the acts of third parties cannot derogate from the principles of equality and non-discrimination, to the detriment of a determined group of persons.¹⁷⁰ Hence, observance of the principle of equality before the law and non-discrimination by states must take precedence over achieving their public policy goals.¹⁷¹

¹⁶⁷ Clarification Question 47.

¹⁶⁸ *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, IACrHR, Series C No.125, 17 June 2005, §51.

¹⁶⁹ Juridical Condition and Rights of Undocumented Migrants, IACrHR, Advisory Opinion OC-18/03, Series A No.18, 17 September 2003, § 100.

¹⁷⁰ Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internationally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, IACHR, OEA/Ser.L/V/II. Doc. 46/15, 31 December 2015, § 189.

¹⁷¹ Juridical Condition and Rights of Undocumented Migrants, (n 177), § 173.

60. The false news reports and references to the victims as “cockroaches”, “scum”¹⁷² among other derogatory terms, combined with several marches demanding their deportation¹⁷³ influenced the decision of President Valverde’s administration to deport asylum seekers with criminal records¹⁷⁴ to preserve support for the 2016 elections.¹⁷⁵
61. Consequently, through the issuing of an Executive Decree which targeted solely refugees with criminal records,¹⁷⁶ Arcadia effectively prevented the attainment of refugee status by the victims.
62. Furthermore, although the Arcadian government launched awareness-raising campaigns,¹⁷⁷ such campaigns were only directed at reducing discrimination at migrants who were already granted asylum and not the applicants whose lives were in danger if deported.¹⁷⁸ Arcadia’s refusal to grant asylum to the applicants with criminal records without evidence of them posing harm to the nation violates the right to have all laws applied equally to all people under their jurisdiction without discrimination.
63. Hence, the actions of Arcadia violated the victims’ right to equal protection and non-discrimination, placing Arcadia in breach of a *jus cogens* norm and its international obligations under Article 24 of the Convention.

¹⁷² Hypothetical § 24.

¹⁷³ Hypothetical § 25.

¹⁷⁴ Hypothetical § 26.

¹⁷⁵ Hypothetical § 24.

¹⁷⁶ Hypothetical § 26.

¹⁷⁷ Hypothetical § 25.

¹⁷⁸ *Ibid.*

4.2 Arcadia's failure to provide legal assistance amounted to the economic discrimination of the victims, violating Article 24 of the ACHR.

64. The principle of equality before the law and non-discrimination belongs to *jus cogens*.¹⁷⁹ No legal act that is in conflict with this fundamental principle is acceptable, and no discriminatory treatment of any person, owing to national ethnic or social origin, nationality, economic situation, civil status, birth or other status is acceptable.¹⁸⁰ Where a person, due to their economic status, is unable afford legal counsel to assert their rights and seek protection of the law, that person is being discriminated against by reason of his economic status and is not receiving equal protection before the law.¹⁸¹ The IACHR has identified the following factors for the purposes of such a determination: i) the resources available to the person concerned, ii) the complexity of the issues involved, and ii) the significance of the rights involved.¹⁸²
65. According to the 2010 government survey, Puerto Waira has a monetary poverty rate of 46.9% and 18% of the population lived in extreme poverty.¹⁸³ Since no later assessments have been made and the situation in Puerto Waira has since deteriorated,¹⁸⁴ it is likely that the economic situation is worse. Additionally, the applicants travelled on foot through a caravan to Arcadia.¹⁸⁵ It is unlikely that they possessed the required means to hire legal services. Considering these circumstances, Arcadia failed to provide each of the victims with the legal representation to which they were entitled.¹⁸⁶ The matter before the court concerned the

¹⁷⁹ The Inter-American Court of Human Rights: Case-Law and Commentary, Laurence Burgorgue-Larsen, Amaya Ubeda de Torres and Rosalind Greenstein, 1st edition, Oxford University Press, 26 May 2011.

¹⁸⁰ Juridical Condition and Rights of Undocumented Migrants, (n 169), § 101.

¹⁸¹ *Exceptions to the Exhaustion of Domestic Remedies Arts. 46(1), 46(2)(a) and 46(2)(b)*, ACHR, IACrHR, Advisory Opinion OC-11/90, Series A No. 11, 10 August 1990, §22.

¹⁸² Report on Terrorism and Human Rights, (n 103), §341.

¹⁸³ Hypothetical § 3.

¹⁸⁴ Hypothetical § 3.

¹⁸⁵ Hypothetical § 14, 15.

¹⁸⁶ Clarification Question 47.

refugee status of the applicants which was essential to their well-being.¹⁸⁷ It also considered the legitimacy of the Executive Decree which ordered their deportation and deprived them of their fundamental rights.¹⁸⁸ Thus, Arcadia should have provided each of the victims with legal representation bearing in mind their economic status. Arcadia's failure to comply with this obligation amounted to the economic discrimination of the migrants, thereby violating their right to equal protection and non-discrimination under Article 24 of the ACHR.

66. Ultimately, Arcadia violated the victims right to equal protection under Article 24 of the ACHR and the principle of non-discrimination through the failure to provide legal services and the deportation of solely refugee claimants with criminal records.

5. The Republic of Arcadia violated Article 22.7 of the ACHR, in relation to Article 1.1 thereof, to the detriment of Gonzalo Belano and 807 other Wairan persons.

5.1 The victims were deserving of refugee status under international law and the legislation of Arcadia.

67. Article 22.7 of the ACHR stipulates that, "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the States and international conventions, in the event he is being pursued for political offenses or related common crimes." The Inter-American system has outlined two requirements for the right of asylum to be satisfied, that is, "in accordance with international conventions," and "in accordance with the legislation of the States."¹⁸⁹
68. The 1951 Refugee Convention and its 1967 Protocol, accords refugee status to a person outside of his country of origin who is unable or unwilling to return to this country due to a

¹⁸⁷ Hypothetical § 28.

¹⁸⁸ Hypothetical § 28.

¹⁸⁹ *Haitian Interdiction (United States)*, IACHR, Report No. 51/96, Case 10.675, 13 March 1997, § 154-155.

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹⁹⁰ The legislation of Arcadia replicates this provision and further, in accordance with the Cartagena Declaration,¹⁹¹ includes a person fleeing his country of origin because his life, safety, or freedom has been threatened by generalized violence, internal conflicts, massive violation of human rights, or circumstances which have seriously disturbed public order.¹⁹² The 808 Wairans met the criteria for refugee status under both the 1951 Refugee Convention and the LRCP.¹⁹³ They were fleeing Puerto Waira with a well-founded fear for their lives, safety and freedom because of high crime rates and a situation of generalized violence, internal conflicts and insecurity.¹⁹⁴ The victims were poverty stricken, fleeing a situation of institutional weakness and economic crisis.¹⁹⁵

69. Furthermore, the victims were specifically susceptible to a massive violation of their human rights within Puerto Waira with the emergence of “clean-up groups.”¹⁹⁶ These consist of members of the police and army with the objective to kill gang members anonymously.¹⁹⁷ The victims all held criminal records and Gonzalo Belano was a former gang member.¹⁹⁸ Thus, the victims fled a situation where their right to life and security of their person were severely threatened. Notably, Arcadia recognized that the individuals had a well-founded fear of persecution.¹⁹⁹ Arcadia determined that 79 of the victims faced a reasonable likelihood of

¹⁹⁰ Article 1A (2) - UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

¹⁹¹ Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984; Right and Guarantees of Children in the Context of Migration and/or in Need of International Protection, IACrtHR, Advisory Opinion OC-21/14, Series A No.21, 19 August 2014, § 76.

¹⁹² Hypothetical § 12.

¹⁹³ *Ibid.*

¹⁹⁴ Hypothetical § 4, 7.

¹⁹⁵ Hypothetical § 3.

¹⁹⁶ Hypothetical § 6.

¹⁹⁷ *Ibid.*

¹⁹⁸ Hypothetical § 30.

¹⁹⁹ Hypothetical § 23.

torture or danger to their lives and 729 of them were exposed to a high risk of the same if they were returned to Puerto Waira.²⁰⁰ This determination was made on an individual basis, in the context of the disturbances within Puerto Waira, in accordance with national and international legal provisions.²⁰¹

70. Indubitably, the 808 applicants faced a well-founded fear of persecution. They were specifically vulnerable as former criminals. The victims satisfied the criteria to obtain refugee status and were deserving of international protection. Arcadia denied the victims such protection to their detriment, violating Article 22.7 of the ACHR.

5.2 Arcadia wrongfully excluded the victims from refugee status.

71. The ACHR grants refugee status in conformity with the legislation of States.²⁰² Articles 30 and 40 of the LRCP of the State of Arcadia is drafted after Article 1(F) of the 1951 Refugee Convention.²⁰³ Article 40 (2) of the LRCP, replicating Article 1 (F) (b) of the 1951 Refugee Convention,²⁰⁴ allows for the exclusion of a person from refugee status where “he has committed a serious non-political crime outside the country of refuge prior to his admission to that territory as a refugee.”²⁰⁵ The ISHR relies on guidelines and principles put forth by bodies such as the UNHCR in its application of international refugee law.²⁰⁶ The rationale for the creation of this exclusion clause, as justified by the UNCHR, is to deprive those who may have committed heinous acts of international refugee protection and to ensure that such

²⁰⁰ Hypothetical § 23.

²⁰¹ Clarification Question 69.

²⁰² *Haitian Interdiction (United States)*, (n 189), § 154-155.

²⁰³ 1951 Refugee Convention, (n 198), Article 1 (F).

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid*; Hypothetical § 13.

²⁰⁶ Human Rights of Migrants, Refugees, Stateless Persons, (n 170), § 423, p 196; *Pacheco Tineo Family v. State of Bolivia*, (n 96), §39.

persons do not abuse the institution of asylum to avoid being held accountable for their acts.²⁰⁷

Arcadia failed to apply this exclusion clause with caution, in light of both the rationale for exclusion, the grave consequences of expelling the victims and the degree of persecution feared by the victims. This failure is apparent as it resulted in the death of 30 of the victims and the disappearance of 7 others.²⁰⁸

72. In depriving the victims of their right to seek and be granted asylum, the interpretation of the exclusion clause must be restrictive.²⁰⁹ The State is required to conduct an individual assessment of the circumstances of each case before exclusion from refugee status.²¹⁰ The definition of a serious non-political crime must be construed²¹¹ and a balancing exercise must be performed weighing the persecution feared by the victim against the gravity of the crime committed.²¹² Arcadia deprived the victims of the right to asylum to their detriment without performing both these exercises.

73. The fact that the victims committed crimes considered to be serious and non-political under Arcadian domestic law²¹³ is not conclusive. International not local standards are relevant in its interpretation.²¹⁴ Arcadia had no regard for the characterization of the crimes committed

²⁰⁷ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05.

²⁰⁸ Hypothetical § 31.

²⁰⁹ Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, reedited Geneva 1992, 1979; UNCHR, *Guidelines on International Protection No. 5*, (n 215); *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*, IACrHR, Advisory Opinion OC-25/18, 30 May 2018, § 99.

²¹⁰ Cambridge University Press, *Summary Conclusions: Exclusion from Refugee Status*, June 2003, Adopted at the expert roundtable organized by the UNCHR, Lisbon, Portugal, 24 May 2001, § 26; UNHCR, *Guidelines on International Protection No. 5*: (n 215), § 2.

²¹¹ UNCHR *Guidelines on International Protection No. 5*, (n 207); Nadia Yakoob, *Political Offender or Serious Criminal? Challenging the Interpretation of 'Serious, Non- political Crimes' in INS v. Aguirre-Aguirre*, 14 GEO. IMMIGR. L.J. 545, (2000).

²¹² UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, (n 209), § 156.

²¹³ Clarification Question 2.

²¹⁴ UNCHR, *Guidelines on International Protection No. 5*, (n 207), § 14; Ned Djordjevic, *Exclusion under Article 1F(b) of the Refugee Convention*, 12 J. Int'l Crim. Just. 1057 (2014), p 1065.

under international standards and only determined that the person held a criminal record within Puerto Waira.²¹⁵ A serious non-political offence must be a very grave punishable act, not a minor offence with a moderate sentence.²¹⁶ Gonzalo Belano had served a moderate sentence of three years for extortion.²¹⁷ Additionally, interpreting an offence as serious and non-political requires consideration of the nature of the offence, the harm inflicted,²¹⁸ the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.²¹⁹ Gonzalo Belano committed his crime as a member of a gang he had been forcibly recruited to at the impressionable age of fourteen.²²⁰ Many of the other victims committed their offences under similar circumstances,²²¹ impoverished and indoctrinated into a life of crime at a vulnerable age.

74. Furthermore, in evaluating the nature of the crime presumed to have been committed, all mitigating circumstances must be considered, including whether the applicant has already served his sentence.²²² Arcadia did not consider that all the victims had already served their sentences.²²³ Furthermore, Gonzalo Belano was fleeing to avoid having to return to the gang.²²⁴
75. In order to exclude the applicants from attaining refugee status, Arcadia was required to balance the nature of the offence committed by the applicant against the degree of persecution

²¹⁵ Hypothetical § 21.

²¹⁶ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, (n 209), § 155.

²¹⁷ Hypothetical § 30.

²¹⁸ UNCHR, *Guidelines on International Protection No. 5*, (n 207).

²¹⁹ *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Union: Court of Justice of the European Union, 9 November 2010; Prosecutor v. Kupreskic, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-16, Trial Chamber Judgment, 14 January 2000.

²²⁰ Hypothetical § 30.

²²¹ Clarification Question 26.

²²² UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (n 209), § 155-158.

²²³ Clarification Question 33.

²²⁴ Hypothetical § 30.

feared.²²⁵ Thus, where a person has well-founded fear of very severe persecution, a crime must be very grave in order to exclude him.²²⁶ This balancing test has been applied and prevented expulsion of asylum seekers with criminal records in other jurisdictions, with relevant considerations by the Court being the indirect nature of participation in the crime and most decisively, the risk of torture upon return to his country of origin.²²⁷ The persecution endangering the lives of the victims is the preeminent consideration. Arcadia determined that 729 of the victims faced a high risk of torture or threat to their lives and 79 cases faced a reasonable likelihood of the same. Arcadia recognized Gonzalo Belano faced a reasonable likelihood of torture, in context of his former gang membership,²²⁸ a lower risk than most of the victims, yet Belano was killed merely a few days after being deported.²²⁹ Having already served a moderate sentence for his offence, and knowing he had a well-founded fear of persecution, Arcadia denied him refugee status. Arcadia's failure to perform this balancing test is evident in that it resulted in 29 other deaths and 7 disappearances.²³⁰

76. Therefore, Arcadia wrongfully excluded the victims, in breach of Article 22.7 of the ACHR.

²²⁵ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (n 209), § 156.

²²⁶ *Ibid*; Guy Goodwin- Gill, *The Refugee in International Law*, (Oxford: Clarendon Press, 2d. ed. 1996).

²²⁷ AH (Article 1F(b) – 'serious') Algeria v. The Secretary of State for the Home Department, [2013] UKUT 00382 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 5 August 2013.

²²⁸ Clarification Question 22.

²²⁹ Hypothetical § 30.

²³⁰ Hypothetical § 31.

6. The Republic of Arcadia violated Article 22.8 of the ACHR, in accordance with Article 1.1, to the detriment of Gonzalo Belano and 807 other Wairan Persons.

6.1 The Republic of Arcadia violated the obligation of non-refoulement to the detriment of the victims.

77. Article 22.8 grants the right of non-refoulement to refugees, that is, in no case may an alien be deported or returned 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. Non-refoulement is a core principle of customary international law and has been codified into the 1951 Refugee Convention.²³¹ It is the paramount obligation owed to refugees and has been considered a peremptory norm.²³² Arcadia breached the obligation of non-refoulement²³³ by expelling the refugees to Tlaxcochitlán where they were then returned to Puerto Waira.²³⁴
78. The Arcadian authorities recognized that most of the victims faced a “high risk” of torture or threat to their life if returned to Puerto Waira and the remainder faced a “reasonable likelihood” of the same.²³⁵ Thus, they were entitled to protection within Arcadia. In these circumstances, Arcadia formed an agreement with the United States of Tlaxcochitlán to return the victims to Puerto Waira.²³⁶ Arcadia was so aware of the danger they faced that they requested that they not be deported from Tlaxcochitlán to Puerto Waira, yet they expelled them regardless.²³⁷

²³¹ Human Rights of Migrants, Refugees, Stateless Persons (n 170); 1951 Refugee Convention, (n 190), Article 33.

²³² 1984 Cartagena Declaration, (n 199), Section 3(5); Guy Goodwin- Gill, *The Refugee in International Law*, (n 226) p 196.

²³³ *Pacheco Tineo Family v. State of Bolivia*, (n 96), § 134.

²³⁴ Hypothetical § 27, 29.

²³⁵ Hypothetical § 23.

²³⁶ Hypothetical § 27.

²³⁷ Clarification Question 66.

79. The obligation of non-refoulement applies regardless of whether the individual qualifies for asylum.²³⁸ It provides a safety-net of protection that prevents an individual from being returned to a situation where his life is in danger, even where his refugee status has been denied.²³⁹ An asylum-seeker may invoke “non-refoulement” to prevent their removal from the country of refugee.²⁴⁰ Thus, even where Arcadia wrongfully denied the right of the victims to seek and be granted asylum, the applicants were still entitled to international protection from the threat to their life and of torture that Arcadia recognized they faced. Arcadia violated international law and the protection granted to the victims to ensure that they were not returned to the situation where their lives were threatened. As a result, 30 of the victims were killed and 7 others disappeared.²⁴¹ Their expulsion was a violation of Article 22.8.

6.2 Arcadia violated the obligation of non-refoulement through indirect refoulement.

80. The obligation of non-refoulement extends to “indirect” refoulement whereby a state must prevent the return of a refugee to any country where he or she is likely to face persecution, other ill-treatment, or torture through a third-party country.²⁴² Arcadia expelled the applicants to Tlaxcochitlán from where they were eventually returned to Puerto Waira.²⁴³

81. To ensure that a refugee claimant’s right to seek asylum is preserved, before removing a claimant to a third country, a State must conduct an individualized assessment of a refugee claimant’s case in light of the third country’s refugee laws.²⁴⁴ If there is any doubt as to the

²³⁸ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 3(1); *John Doe* (Canada), (n 78), § 102.

²³⁹ Akbar Rasulov, *Criminals as Refugees: The Balancing Exercise and Article 1F(B) of the Refugee Convention*, 16 *Geo. Immigr. L.J.* 815 (2002), p 836.

²⁴⁰ *Pacheco Tineo Family v. State of Bolivia*, (n 96).

²⁴¹ Hypothetical § 31.

²⁴² Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America, IACHR, OAS/Ser.L/V/II. 155, Doc. 16, 24 July 2015.

²⁴³ Hypothetical § 29.

²⁴⁴ *John Doe* (Canada), (n 78), § 94.

refugee claimant's ability to seek asylum in the third country, then the State may not remove the refugee claimant to that third country.²⁴⁵ Arcadia sought no assurances on the possibility of the victims being granted asylum in Tlaxcochitlán. Rather, their agreement focused on increasing development cooperation between the two states.²⁴⁶ In Tlaxcochitlán, there were known to have been multiple and serious violations of the human rights of undocumented migrants.²⁴⁷ Yet, Arcadia expelled the victims to this third-party country where they were unjustly detained and subsequently returned to Puerto Waira. Therefore, Arcadia violated its obligations under Article 22.8 of the ACHR.

6.3 The victims do not fall into the exceptions to non-refoulement.

82. There are only two permissible exceptions to non-refoulement under the 1951 Refugee Convention.²⁴⁸ These include where there are reasonable grounds for regarding the refugee “as a danger to the security of the country” or “where the refugee has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of that country.”²⁴⁹ The two admissible exceptions to non-refoulement concern the future risk of the individual and do not apply. There was no credible evidence that the victims constituted a future risk to Arcadia as there is no mention of any crimes or offences committed within Arcadia. Rather, Gonzalo Belano fled to Arcadia to escape involvement in gang activities.²⁵⁰
83. The application of these exceptions is limited and where they infringe on human rights, must be interpreted with respect to proportionality.²⁵¹ This means that the expulsion of the refugee in question must be rationally linked to the elimination of danger in the society. The removal

²⁴⁵ *Ibid.*

²⁴⁶ Hypothetical § 27.

²⁴⁷ Hypothetical § 14.

²⁴⁸ 1951 Refugee Convention, (n 190), Article 33.

²⁴⁹ *Ibid.*

²⁵⁰ Hypothetical § 30.

²⁵¹ *Handyside v United Kingdom*, Merits, App No5493/72, A/24, [1976] ECHR 5.

of the 808 Wairan persons does not meet the requirement of proportionality because it was not directly linked to the removal of danger. There was no evidence that the 808 individuals would pose a danger to Arcadia and thus no rational, causal link between their removal and the removal of any danger.

84. In fact, the purpose stated by the Arcadian authorities for the deportation of the victims was limited resources.²⁵² This was not duly founded,²⁵³ given that the victims totalled less than 12% of the total group of migrants. Furthermore, Arcadia's economy is one of the most powerful in the region, fuelled by energy mega projects and fossil fuel extraction,²⁵⁴ with a GDP of US\$325 billion.²⁵⁵ With its capacity to admit more than 6000 refugees from that caravan alone, expelling 808 persons due to "limited resources" is unsubstantiated.²⁵⁶
85. Next, the refoulement must be the only possible means to alleviate the danger to the security of the country.²⁵⁷ Their expulsion was not implemented out of necessity. In fact, their risk of persecution far outweighed any danger they might pose as upon their return, 30 of them were murdered and 7 disappeared.²⁵⁸
86. Thus, Arcadia violated Article 22.8 of the ACHR, breaching the obligation of non-refoulement to the detriment of the refugees.

²⁵² Hypothetical § 26.

²⁵³ *López Mendoza v. Venezuela*, Merits, Reparations and Costs, IACrHR, Series C No. 233, 1 September 2011, § 117.

²⁵⁴ Hypothetical § 8.

²⁵⁵ Clarification Question 7.

²⁵⁶ Hypothetical § 26.

²⁵⁷ UNHCR, Guidance Note on Extradition and International Refugee Protection, April 2002.

²⁵⁸ Hypothetical § 31.

7. The Republic of Arcadia violated Article 17, in relation to Article 1.1, of the ACHR, to the detriment of the victims.

87. Article 17.1 of the ACHR stipulates that the family is the natural and fundamental group unit of society and is entitled to protection by the state. This provision extends to immigration proceedings where migrant parents may be detained or otherwise separated from their children.²⁵⁹ While a State has the right to determine its own procedures for determining refugee status, any such system must not derogate the right to family unity.²⁶⁰ Arcadia carried out mass deportation of the victims, interfering with their right to family unity.²⁶¹
88. The integrity of the family unit is a decisive consideration in immigration proceedings and is an aspect of due process.²⁶² Expulsion of refugees leading to the separation of the family must be carried out on an exceptional basis.²⁶³ Arcadia did not consider the existence of families prior to deportation. Thus, it was not done on an exceptional basis.²⁶⁴ The caravan of refugees, inclusive of the 808 victims, constituted hundreds of families.²⁶⁵ As a result of the deportation of the victims, children were separated from their parents or other persons or relatives responsible for their care.²⁶⁶
89. Arcadia did not balance the right of the victims to family unity with the general welfare of the state, and, had they done so, the need to prevent the separation of the family would have exceedingly outweighed any risk posed by the victims to the State. The IACHR has established that expulsion of migrants has led to the uprooting and breakdown of family

²⁵⁹ Immigration in the United States: Detention and Due Process, (n 110).

²⁶⁰ *Wayne Smith, Hugo Armendariz et al. (United States)*, IACHR, Report on Merits No. 81/10, Case 12.562 12 July 2010, § 5, 63.

²⁶¹ Hypothetical § 27, 28; Clarification Question 21.

²⁶² *Wayne Smith, Hugo Armendariz et al. (United States)*, (n 260).

²⁶³ Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children, (n 242), § 73, 74.

²⁶⁴ Human Rights of Migrants, Refugees, Stateless Persons (n. 170).

²⁶⁵ Hypothetical § 15.

²⁶⁶ Clarification Question 21.

structures and affected the normal development of familial relations.²⁶⁷ The IACHR emphasized that in some cases, where families are separated due to immigration proceedings, their separation may continue for several years and the family members remaining in the receiving country suffer a great deal not knowing the whereabouts of the family member who had been expelled.²⁶⁸ Furthermore, many of the victims were the heads of families and responsible for the care of children, a decisive factor in the assessment of their cases.

90. Where Arcadia separated families by expelling the victims, it contravened Article 17 of the ACHR.

8. The Republic of Arcadia violated Article 19, in accordance with Article 1.1, of the ACHR, to the detriment of Gonzalo Belano and 807 other Wairan persons.

91. Article 19 of the ACHR declares that every minor child has the right to measures of protection on the part of his family, society and the state, due to his condition as a minor. The IACrHR has established that children have special rights which give rise to specific obligations for the State and their status requires special protection that must be understood as complementary to all the other rights recognized by the ACHR.²⁶⁹ The best interests of the child must be understood as the need to satisfy all the rights of children and adolescents, which obligates the State and affects the interpretation of all the other rights of the ACHR when a case concerns minors.²⁷⁰ Thus, the principle of the best interests of the child is decisive in immigration proceedings,²⁷¹ where the deportation of a claimant has a direct effect on a minor. A major

²⁶⁷ *Benito Tide Méndez et al. v. Dominican Republic*, IACHR, Merits, Report No. 64/12, Case 12.271, 29 March 2012.

²⁶⁸ *Ibid.*

²⁶⁹ *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, IACrHR, Series C No. 205, 16 November 2009.

²⁷⁰ *Ibid.*

²⁷¹ Right and Guarantees of Children in the Context of Migration, (n 191), § 99.

aspect of the best interests of the child is the maintenance of family unity.²⁷² The expulsion of the applicants by Arcadia authorities resulted in the separation of many families and left children without an adult responsible for their care.²⁷³ Arcadia violated the principle of the best interests of the child by separating children from their families and not considering the best interests of the child in their determination on the applicant's case.²⁷⁴

92. Article 9 of The Convention on the Rights of the Child provides that states shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities, determine that such separation is necessary for the best interests of the child. The Convention does consider the separation of children from parents due to immigration proceedings. However, this is done on an exceptional basis, and is not common practice.²⁷⁵ Arcadia separated multiple families, leaving many children temporarily in the care of the State and without their parents or guardians.²⁷⁶ The IACrHR recognizes that such separation of children from their parents might jeopardize their survival and development.²⁷⁷
93. Where the State unduly separated any of the 808 victims from their children, Arcadia was in violation of the principle of the best interests of the child.²⁷⁸ It remains a paramount consideration even where the applicant for refugee status has a criminal record or cannot meet immigration criteria, as the expulsion of the migrant parent may result in hardship to the

²⁷² Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families, IACHR OEA/Ser.L/V/II.111, Doc. 20 rev, 16 April 2001.

²⁷³ Clarification Question 21.

²⁷⁴ Immigration in the United States: Detention and Due Process, (n 110).

²⁷⁵ Article 9, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

²⁷⁶ Clarification Question 22.

²⁷⁷ *Pacheco Tineo Family v. State of Bolivia*, (n 96), § 226.

²⁷⁸ Immigration in the United States: Detention and Due Process, (n 110).

child.²⁷⁹ Arcadia failed to consider this factor before expelling the victims and violated of Article 19 of the ACHR.

²⁷⁹ Minister of State for Immigration and Ethnic Affairs v Teoh [1995] 3 LRC 1.

REQUEST FOR RELIEF

Based on the foregoing submissions, the victims respectfully request that the Honourable Court adjudge and declare that:

- (i) The Republic of Arcadia violated the rights enshrined in Articles 4, 7, 8, 17,19, 22.7, 22,8, 24 and 25 of the American Convention on Human Rights.
- (ii) Arcadia must adopt measures of non-repetition, including training of officials in charge of immigration proceedings that could result in the detention of expulsion of migrants and training in procedures to determine refugee status. This training and the practice of internal authorities must be compatible with the standards of the ACHR and other international instruments, as described.
- (iii) Arcadia provide reparation in favour of the 808 Wairans for the declared human rights violations.