

Case of Gonzalo Belano and 807 Other Wairan Persons

Victims

v.

Republic of Arcadia

Respondent

Representative of the Victims

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STATEMENT OF FACTS

1. Since 2000, Puerto Waira has faced acts of internal violence such as threats, extortions, recruitment of children, torture, rape, murder and enforced disappearances, committed by criminal gangs possessing territorial control. The state's inability to bring them to an end had resulted in the formation of "death squads"- comprising of police and army officials along with anonymous vigilante groups, who were in favour of awarding the criminals, the death penalty.
2. Over the years, Arcadia has seen an 800% increase in asylum seekers from Puerto Waira. The Arcadian Constitution confers "special protection" upon refugees and also allows provisions for granting refugee status to groups during exceptional circumstances, barring those individuals who have committed "serious crimes" or "crimes against peace, CAH, genocide and war crimes".
3. The caravan of Wairans entering Arcadia on August 15, 2014, comprised largely of families, children, adolescents, pregnant women and older adults- mostly of African descent. On account of the large influx, the Arcadian president announced provisions for grant of *prima facie* refugee status to the individuals except cases falling under Article 40 of their Refugee Laws.
4. The procedure would require applicants to visit the National Commission for Refugees, submit the application and undergo an interview- after which they would receive refugee documents and work permits within 24 hours. The applicant's criminal status would be ascertained and if they did possess a record, they would be held in custody on grounds of 'security and public order', pending decision.

5. 808 Wairans were identified of whom 490 were placed in immigration detention centres while 318 were kept in separate penitentiary units. Arcadia analysed these cases within 45 days and analysed that in 729 cases and 79 cases, there would be a “high risk” and a “reasonable likelihood” of loss of life or torture. Meanwhile, sections of Arcadians (including political parties and media houses) had resorted to instigating the general public to demand deportation of Wairans, based on their previous criminal records.
6. These incidents prompted the President to call for shared responsibility- to which there was no response for two months. This led to publishing of an executive order for deportation to be carried out within a month of such publication. Consequently, Arcadia returned 591 people with criminal records who had not applied for any appeals from the decision to deport.
7. On February 10, 2015, 217 people had filed a writ of *amparo* (a constitutional evoke), that was rejected by the Pima Immigration Court upon adjudication. Their petition for reconsideration was also denied and the State proceeded to deport them on May 5, 2015. These individuals were to be deported to Puerto Waira via United States of Tlaxcochitlan.
8. Of those deported, Gonzalo Belano was recruited at 14 years of age by the criminal gangs in Puerto Waira, and was incarcerated till the age of 21 years for extortion. He was murdered outside his family home on deportation. A legal clinic in the state had also documented 29 such other instances of murders and 7 instances of disappearances. Due to limited resources, the clinic filed a reparations claim with the Arcadian consulate which was dismissed by Arcadia (on forwarding), citing reasons that administrative matters had to be filed directly before the court of competent jurisdiction.

9. This led to the Clinic filing a petition with the IAComm.HR alleging violations of Articles 4, 7, 8, 22.7, 22.8, 17, 19, 24 and 25, to the detriment of Gonzalo Belano and 807 other Wairans, which was accepted and submitted to the IACtHR.

LEGAL ANALYSIS

A. ADMISSIBILITY

[1] Statement of Jurisdiction

As a member of the ‘Organization of American States’, the Republic of Arcadia has been a state party to the American Convention on Human Rights, 1969 (‘ACHR’) since 1971.¹ It has recognized the *contentious jurisdiction*² of the Inter-American Court of Human Rights (‘IACtHR’ or ‘Court’) in accordance with Article 62(1), ACHR, since 1971.

The Inter-American Commission (‘IAComm.HR’ or ‘Commission’) on Human Rights in accordance with Articles 61(1) and 61(2) of the ACHR, has submitted the present dispute before this Hon’ble Court under Article 62(3) of the ACHR.

[2] The Court has *Rationae Loci* competence over the matter

Since the acts in Puerto Waira arose out of the asylum-status determination and deportation procedures in Arcadia and the determination of such attribution corresponds to the merit of the case, it is not a matter for preliminary objection.³

[3] The present Petition is not barred by Time or non-exhaustion of Domestic Remedies

¹ Factsheet, ¶ 9.

² Article 62(3), ACHR, 1978.

³ IACtHR, November 25, 2013, Preliminary objections, merits, reparations and costs, *Pacheo Tineo Family v. Plurinational State of Bolivia*, Series C No. 272, ¶ 33.

The rule to exhaust remedies under domestic law,⁴ and the time bar⁵ for filing a petition is not absolute. This Court has ruled that it is not only sufficient for such domestic remedies to exist formally⁶ but also that they must be effective⁷. Exhaustion of Domestic remedies⁸ to file the petition⁹ need not be adhered to when the parties alleging violation of their rights have been denied access to the remedies under domestic law or have been prevented from exhausting them¹⁰ Rules pertaining to procedures must be applied based on a criterion of reasonability, otherwise, there would be an imbalance among the parties and realization of justice would be compromise.¹¹ Remedies, which are discretionary¹² and procedurally restrictive¹³ due to general conditions of a country or specific circumstances cannot be deemed effective.¹⁴ In previous case law, it has been held that where the procedures for conducting refugee-status determination are inadequate, it is not necessary to show exhaustion of domestic remedies.¹⁵

In the present case, the victims have been denied access to their rights since not only the refugee-determination procedures, but also the deportation proceedings were inadequate. Moreover,

⁴ Article 46(1) (a), ACHR; Article 31(1), Rules of Procedure of the Commission, 2013.

⁵ Article 46(1) (b); Article 32(1), Rules of Procedure of the Commission, 2013.

⁶ IACtHR, December 6, 2001, Merits, *Las Palmeras v. Colombia*, Series C No. 90, ¶ 58.

⁷ IACtHR, June 26, 1987, Preliminary Objections, *Velasquez Rodriguez v. Honduras*, Series C No. 1, ¶ 66; IACtHR, June 7, 2003, Preliminary Objections, Merits, Reparations & Costs, *Juan Humberto Sanchez v. Honduras*, Series C No. 99, ¶ 121.

⁸ Article 46(2) (b), ACHR; Article 31(2)(b), Rules of Procedure of the Commission, 2013.

⁹ Article 46(2), ACHR; Article 32(2), Rule of Procedure of the Commission, 2013.

¹⁰ IAComm.HR, September 25, 1998, *Haniff Hilaire v. Trinidad and Tobago*, Report No. 43/1998.

¹¹ IACtHR, November 25, 1996, Preliminary Objections, *Paniagua Morales et al. v. Guatemala*, Series C No. 23, ¶ 40.

¹² IAComm.HR, March 14, 2008, *Cesar Alberto Mendoza et al. v. Argentina*, Report No. 26/2008.

¹³ IAComm.HR, November 18, 1997, *Juan Carlos Abella v. Argentina*, Report No. 55/1997.

¹⁴ IACtHR, June 7, 2003, Preliminary Objections, Merits, Reparations and Costs, *Juan Humberto Sánchez v. Honduras*, Series C No. 99, ¶ 121; IACtHR, December 6, 2001, Merits, *Las Palmeras v. Colombia*, Series C No. 90, ¶ 58.

¹⁵ IAComm.HR, February 27, 2002, *120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas*, Case 12.071, Commission Report No 6/02, ¶ 50.

Arcadia's objections are intrinsically related to the allegations of violations of the ACHR (merits) and thus cannot be considered without previously analysing the merits of the case.¹⁶

[4] 'Iura Novit Curia' is applicable in the present case

The IACHR is empowered to examine the violation of the articles of the Convention that are not expressly invoked by the parties in their petition based on the principle of *iura novit curia*.¹⁷ It has also been supported by Article 28(6) of the Commission's Rules of Procedure which provides that the petitioner is not required to refer the specific articles of the Convention in the petition.

Further, no similar petition lies in another international proceeding for settlement under Article 46(c) of the ACHR. Therefore, the present Petition is admissible on behalf of the representatives of the victims.

¹⁶ IACtHR, August 6, 2008, Preliminary objections, Merits, Reparations, Costs, *Castañeda Gutman v. Mexico* Series C No. 184, ¶ 39; IACtHR, November 28, 2012, Preliminary objections, Merits, Reparations, Costs, *Artavia Murillo et al. v. Costa Rica*, Series C No. 257, ¶ 40.

¹⁷ IACtHR, July 5, 2011, Preliminary Objections, Merits, Reparations and Costs, *Mejia-Idrovo v. Ecuador*, Series C No. 228, ¶ 21; IACtHR, July 6, 2009, Preliminary Objections, Merits, Reparations and Costs, *Escher et al. v. Brazil*, Series C No. 199, ¶ 20; ECtHR, November 4, 1976, *Handyside v. UK*, Application No. 5493/72, ¶ 41.

B. MERITS

[1] ARCADIA HAS VIOLATED ARTICLES 4 AND 5 ALONG WITH ARTICLE 1(1) OF THE ACHR AND PRINCIPLES OF INTERNATIONAL REFUGEE LAW

The situation in Puerto Waira qualified as an NIAC where the government was engaged in protracted hostilities with “organized armed groups”¹⁸ such that it resorted to the use of military force and hardline policies, including “death squads”,¹⁹ instead of mere police forces.²⁰

The 1951 Convention implicitly grants the rights to seek and enjoy asylum once the conditions for refugee status are established and the individuals apply for it. Recognition as a ‘refugee’ is merely declaratory.²¹

The status of the Wairan population was lawful and regularised owing to them being subjected to a ‘temporary protection’ regime by according a *prima facie* status, while formal status

¹⁸ Clarification, question 57.

¹⁹ Factsheet, ¶ 4-7.

²⁰ ICTY, May 7, 1997, Judgment, *Prosecutor v. Tadic*, IT-94-1-T, ¶ 561-568; ICTY, November 30, 2005, Judgment, *Prosecutor v. Limaj*, IT-03-66-T, ¶ 135-170; D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 147.

²¹ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/1P/4/ENG/REV.3, December 2011, ¶ 28.

determination procedures were due.²² Again, those Wairans who had de facto²³ settled in the host state were also entitled to rights attaching at the third level, such as those relating to public assistance, social security, housing, association and profession.²⁴

[1.A] Arcadia has refoiled Wairans in violation of Articles 22.7 and 22.8 read with Articles 4 and 5 of the ACHR

While each State has the authority to establish the procedure that it finds most suitable, this discretion is not absolute and cannot go against the terms of the Convention itself or other international human rights obligations.²⁵ The principle of non-refoulement under the ACHR is broader than its counterpart under Article 33 of the 1951 Convention and makes no distinctions between asylees, asylum seekers and refugees.²⁶

Further, Arcadia's accession to other human-rights treaties including the Cartagena Declaration has also expanded the content regarding situations from which one may not be submitted, beyond

²² W. Kalin, "Temporary Protection in the EC: Refugee Law, Human Rights, and the Temptations of Pragmatism," (2001) 44 German Yearbook of International Law 221 (Kalin, "Temporary Protection"), at 221; Grahl-Madsen, Status of Refugees II, at 357.

²³ Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 17; Grahl-Madsen, Status of Refugees II, at 353–354.

²⁴ Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session," UN Doc. E/1850, Aug. 25, 1950 (Ad Hoc Committee, "Second Session Report"), at 12; "Report of the Style Committee," UN Doc. A/CONF.2/102, July 24, 1951.

²⁵ *Kaya v. Haringey London Borough Council*, [2001] EWCA Civ 677 (Eng. CA, May 1, 2001), at ¶ 31; UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, ¶ 4.

²⁶ IACtHR, Rights and guarantees of children in the context of Migration, advisory opinion no. 21, 14 Aug 2014, series A No. 21, ¶ 215; IACtHR, November 25, 2013, Preliminary objections, merits, reparations and costs, *Pacheco Tineo Family v. Plurinational State of Bolivia*, Series C No. 272, ¶ 151; E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of Non-Refoulement: Opinion', in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge, 2003), p.159; HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 304.

those with a well-founded fear of persecution.²⁷ The assessment for expulsion when complying under such provisions should be independent of the past activities of the applicants, however undesirable or dangerous.²⁸

Arcadia's act of excluding the claims and deporting those individuals, who it knew upon evidence of patterns of persecution and country conditions, to face 'high risk' or 'reasonable likelihood' of torture and danger to life²⁹, constituted non-refoulement. Moreover, the government's unwillingness and inability to protect the individuals was evident from the anti-gang opinions that the government servants bore, leading them to adopt regressive policies and social cleansing campaigns, along with the high levels of impunity.³⁰ The assessments here were also concurred with by international bodies, including the UNHCR.

There was no internal location alternative either, since the gang control virtually existed into the whole territory.³¹ It suffices if the individual would be subjected to gross violations of his rights

²⁷ Article 3(1) CAT; Article 7 ICCPR; A. Duffy, 'Expulsion to face torture? Non-Refoulement in International Law', *International Journal of Refugee Law*, 22 (2008), p. 382; Goodwin-Gill and Mc-Adam, *The Refugee in International Law*, p. 208, 311.

²⁸ A. Duffy, 'Expulsion to face torture? Non-Refoulement in International Law', *International Journal of Refugee Law*, 22 (2008), p. 380; ECtHR, November 15, 1996, Judgment, *Chahal v. UK*, Application No. 22414/93, ¶ 80.

²⁹ HRC, November 23, 2009, *Kwok Yin Fong v. Australia*, UN Doc. CCPR/C/97/D/1442/2005, ¶ 9.4, 9.7; ECtHR, March 2, 2010, Judgment, *Al-Saadoon v. UK*, Application No. 61498/08, ¶ 137.

³⁰ Factsheet, ¶ 6, 7; ECtHR, January 17, 2012, Judgment, *Othman (Abu Qatada) v. UK*, Application No. 8139/09, ¶ 258; HRC, August 10, 2006, Decision, *Dawood Khan v. Canada*, Communication No. 1302/2004, ¶ 5.6; ECtHR, May 23, 2007, Judgment, *Salah Sheekh v. The Netherlands*, Application No. 1948/04, ¶ 137; Washington Office on Latin America. Executive Summary: Transnational Youth Gangs in Central America, Mexico and the United States. Washington, D.C., 2007, http://www.wola.org/media/Gangs/executive_summary_gangs_study.pdf; Human Rights Program Harvard Law School. No Place to Hide: Gangs, State, and Clandestine Violence in El Salvador. (Harvard Law School: International Human Rights Clinic, 2007), 7, [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf); Elin Ranum, "Transnational Youth Gangs in Central America, Mexico and the United States," (2007), available at http://www.wola.org/media/Gangs/diagnostico_guatemala.pdf, 31-32; U.S. Department of State, Honduras: Human Rights Report 2006. <http://www.state.gov/g/drl/rls/hrrpt/2006/78896.htm>.

³¹ Factsheet, ¶ 7; UNHCR Guidelines on International Protection No. 12, ¶ 40-43; EU Qualification Directive, Article 8; ECtHR, May 23, 2007, Judgment, *Salah Sheekh v. The Netherlands*, Application No. 1948/04, ¶ 143.

and violations of IHL principles as civilians,³² or could be exposed to irreversible decline in health from previous serious illnesses.³³

[1.A.i] *Arcadian government failed to apply a due-process approach in the assessment of claims and deportation proceedings*

Absence of effective recourse to the legal system is a violation of Articles 4(1).³⁴ In spite of the ‘accelerated’ asylum-claims procedure, Gonzalo Belano and the other Wairans should have been afforded an opportunity of ascertaining the charges against them and of hearing and presenting evidence to determine whether they qualified for the ‘refugee’ criteria.³⁵

The blanket provision of domestic law requiring deportation of individuals with criminal records left no scope for individualised assessments.³⁶ Arcadian authorities should have considered the age of commission of crime, circumstances of forcible recruitments, and the individual’s willingness to escape the gangs.³⁷

[1.A.ii] *Mere effectuation of transfer agreements was not enough*

Arcadia cannot shrug its responsibility citing the agreement with Tlaxcochitlan since the situations of human rights violations were well-known and easy to verify, and thus the state would be liable for indirect refoulement.³⁸ This is further strengthened by the evidence that 29 deportees were

³² ECtHR, February 14, 2017, Judgment, *S. K. v. Russia*, Application No. 52722/15, ¶ 55-63.

³³ ECtHR, December 13, 2016, Judgment, *Paposhvili v. Belgium*, Application no. 41738/10, ¶ 183; ECtHR, May 27, 2008, Judgment, *N. v. UK*, Application No 26565/05, ¶ 42; IACtHR, August 19, 2004, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Ser. A, No. 21, ¶ 229.

³⁴ ECtHR, June 27, 2000, Judgment, *Salman v. Turkey*, Application No. 21986/93, ¶ 104-9.

³⁵ IAComm.HR, March 13, 1997, *Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, ¶ 155; IAComm.HR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia (OAS 2007) OEA/Ser.L/V/II.Doc 34, ¶ 410; IAComm.HR, July 25, 2008, *Andrea Mortlock v. USA*, Report No 63/08, ¶ 85-86; IAComm.HR, Report on Terrorism and Human Rights (OAS 2002) OEA/Ser.L/V/II.116/Doc.5 rev.1 corr., ¶ 403.

³⁶ ECtHR, March 10, 2011, *Kiyutin v. Russia*, Application No. 2700/10.

³⁷ IAComm.HR, July 12, 2010, *Wayne Smith et al v USA*, Report No 81/10, ¶ 54.

³⁸ ECtHR, February 23, 2012, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09.

killed within two months of their return while there were 7 cases of disappeared persons.³⁹ The state should have at least seen to specific assurances,⁴⁰ or implementation of transfer-monitoring mechanisms.

[1.A.iii] *Arcadia's act of non-refoulement cannot be on the basis of a mass-influx situation*

Even in situations of mass influx as in the cases of rapid arrivals, increasing population of refugee arrivals and inadequate response capacities of states,⁴¹ the principle has to be 'scrupulously observed'.⁴² In any event, Arcadia could have conferred a temporary protected status or subsidiary protection. The state could have sought help from other international bodies such as the UNHCR⁴³ or pressed other states to contribute to the costs of protection of these refugees.⁴⁴

[1.B] Arcadia has failed in its obligation under Article 24 ACHR and the guarantee of 'effet utile'

³⁹ Factsheet, ¶ 31.

⁴⁰ HRC, November 10, 2006, *Mohammed Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, ¶ 11.3–11.5; ECtHR, May 9, 2012, *Othman v. UK*, Application No. 8139/09, ¶ 189.

⁴¹ UNHCR Executive Committee Conclusion No. 100, October 8, 2004, Conclusion on International Protection and Burden and Responsibility Sharing in Mass Influx Situations, ¶ (a).

⁴² UNHCR Executive Committee Conclusion No. 22, October 21, 1981, Protection of Asylum-Seekers in Situations of Large-Scale Influx, ¶ II (A) (2).

⁴³ *Ibid*, ¶ IV (1).

⁴⁴ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009).

The rights to medical assistance and shelter, fundamentally linked to dignity, apply to all, including irregular migrants.⁴⁵ In the absence of State aid, physically vulnerable Wairans had to resort to sleeping on the streets and begging for money, and could only later turn to public health services.⁴⁶ Further, Arcadia should be held responsible for actions of private individuals in respect of which it has failed to take adequate measures to prevent or provide justice⁴⁷ or under circumstances when state institutions have failed to protect individuals' human rights.⁴⁸

The Puerto Wairans, comprising of a racial minority population (up to 95% African population while the rest comprised of mixed race and whites) were also subjected to appeasement policies of the state's "nationalist-oriented" parties and media outlets. Article 4 of CERD prohibits hate speech and obligates states to combat it irrespective of its source through investigation and punishment of offenders.⁴⁹ The mere launching of awareness-campaigns, in the absence of prior actions at curbing false news and racially motivated slurs,⁵⁰ is a breach of its obligations.

[1.C] Arcadia has violated Articles 17 and 19 of the ACHR

⁴⁵ ECSR, September 8, 2004, Merits, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003; ECSR, October 20, 2009, Merits, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008; HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 251.

⁴⁶ Factsheet, ¶ 16; IAComm.HR, April 13, 2016, Merits Report No. 2/16, Case 12.484, *Luis Rolando Cuscul Piraval et al.* (Guatemala).

⁴⁷ ICJ, May 24, 1980, Judgment, *USA v. Iran*; IACtHR, July 29, 1988, Merits, *Velasquez-Rodriguez v. Honduras*; ECtHR, May 10, 2001, Judgment, *Z v. UK*, Application No. 29392/95; Robert P. Barnidge "The Due Diligence Principle under International Law" 8 *International Community Law Review* 81-122 (2006), p. 104; CESCR/GC/16, ¶ 20.

⁴⁸ Rebecca Cook, "State Responsibility for Violation of Women's Rights" 7 *Harvard Human Rights Journal* 125-175 (1994), p. 132; CEDAW/GR/28, ¶ 39.

⁴⁹ United Nations, September 26, 2013, *International Convention on the Elimination of All forms of Racial Discrimination*, CERD/GC/35 ¶ 5, 7, 17.

⁵⁰ Factsheet, ¶ 24-25.

Arcadia's took to deporting families to the exclusion of children. The children were not allowed to be heard as part of the assessment of their "best interests".⁵¹ The developmental needs of these children, already vulnerable, and principles of family unification would have required the authorities to obtain all information to determine their migratory situation.⁵² There appears to be no such record in the decisions of the authorities here.

Arcadia would also have been under an obligation to identify children requiring international protection during their initial evaluation itself and establish procedures to identify their special needs.⁵³ As a corollary, the right to family unity would have required the protection of the child so as to ensure his or her stay with the family.⁵⁴ Arcadia in expelling one or both parents for their previous criminal offences has unreasonably sacrificed the child's rights to family life.⁵⁵

[2] ARCADIA HAS VIOLATED ARTICLE 7 AND 5 OF THE ACHR READ WITH ARTICLE 1(1) AND ARTICLE 3 OF THE ACHR TO THE DETRIMENT OF GONZALO BELANO AND 807 OTHER WAIRAN PERSONS

⁵¹ IACtHR, August 28, 2002, *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02, ¶ 99; IACtHR, August 31, 2012, Preliminary Objections, Merits, Reparations and Costs, *Furlan and family members v. Argentina*, ¶ 228.

⁵² IACtHR, November 25, 2013, Preliminary objections, Merits, Reparations, Costs, *Pacheo Tineo Family v. Plurinational State of Bolivia*, Series C No. 272, ¶ 228; IACtHR, November 24, 2009, Preliminary Objections, Merits, Reparations and Costs, *Las Dos Erres Massacre v Guatemala*, Series C No. 211, ¶ 17.

⁵³ CRC, General Comment No. 6, ¶ 31; UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, ¶ 5.8; UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, ¶ 34; IACtHR, Advisory Opinion OC-21/14 Rights and Guarantees of children in the context of migration and/or in need of International Protection, available at http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_21_eng.pdf, p.6

⁵⁴ IAComm.HR, July 12, 2010, *Wayne Smith et al v USA*, Report No 81/10, ¶ 56.

⁵⁵ IAComm.HR, December 30, 2010, Report on Immigration in the United States: Detention and Due Process (OAS 2010) OEA/Ser.L/II.Doc. 78/10, ¶ 98.

Article 7, ACHR enshrines the Right to Personal Liberty and Security⁵⁶ whereby no one shall be deprived of his liberty⁵⁷ except on such grounds and in accordance with such procedure as are established by law.⁵⁸ Protection of liberty safeguards ‘both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those detained of minimum legal protection’.⁵⁹ The HRC has stated that protection against arbitrary detention is applicable to all deprivations of liberty by detention, including immigration control.⁶⁰

[2.A] Arbitrary Detention⁶¹ of Gonzalo Belano and others violated their right to personal liberty under Article 7, ACHR

The UN Human Rights Committee has stated that the prohibition of arbitrary detention is not only a rule of General International Law, but a Peremptory Norm.⁶² The detention of refugees is governed by Article 31 of the 1951 Convention Relating to the Status of Refugees.

[2.A.i] The term “regularization” under Article 31(2) does not mean formal recognition

⁵⁶ Article 9, ICCPR, 1976.

⁵⁷ Principle 2, Body of Principles for the Protection of All Person under any Form of Detention or Imprisonment.

⁵⁸ HRC, *Quinteros v. Uruguay* (1983) UN Doc. CCPR/C/19/D/107/1981, ¶ 13; HRC, *Celis Laureano v. Peru* (1996) UN Doc. CCPR/C/56/D/540/1993, ¶ 8.6; HRC, *El Alwani v. Libya* (2007) UN Doc. CCPR/C/90/D/1295/2004, ¶ 6.4; HRC, *El Hassy v. Libya* (2007) UN Doc. CCPR/C/91/D/1422/2005, ¶ 6.5.

⁵⁹ IACtHR, July 8, 2004, Merits, Reparation and Costs, *Gomez-Paquiyaui Brothers v Peru*, Series C No. 110, ¶ 82; IACtHR, November 27, 2003, Merits, Reparations and Costs, *Maritza Urrutia v. Guatemala*, Series C No. 103, ¶ 65.

⁶⁰ UN Human Rights Committee, “General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)” (1982), UN Doc. HRI/GEN/1/Rev.1, at 8 (1994).

⁶¹ Article 9, UDHR, 1948.

⁶² ‘General Comment no. 29: State of Emergency (article 4)’ (2001), UN Doc. HRI/GEN/1/Rev.9 (Vol. 1) (2008), ¶ 11, 13(a) and (b).

Article 31(2) of the 1951 Convention Relating to the Status of Refugees provides that the Contracting State can impose restrictions on the movement of the refugees only till the time their status in the country is regularized.

The purpose and context of Article 31(2) suggests that “regularization” of status occurs when a refugee has met the host state’s requirements to have his or her entitlement to protection evaluated.⁶³ The object of Article 31 is to provide the refugees with an incentive to comply with the asylum laws of host states, rather than avoid contact with authorities.⁶⁴ This critical objective is achieved when the asylum-seeker submits to the laws of the host state, not simply when his or her claim is finally adjudicated.⁶⁵

Thus, when Gonzalo Belano and others formally lodged their refugee claim, they satisfied the condition provided under Article 31(2) and State’s act to detain them violated their right to personal liberty.

[2.A.ii] Article 31 has to be read in consonance with Article 26

Article 26 of the 1951 Convention Relating to the Status of Refugees provides for freedom of movement of refugees in the territory of the Contracting party.

An interpretation that equates “regularization” with a decision on refugee status would bring the two articles into conflict, as the termination point for Article 31(2) restrictions would be set at a higher level than that established for access to Article 26 rights.⁶⁶ The UNHRC held that

⁶³*R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002), at ¶ 34.

⁶⁴ Vienna Convention, article Art. 31(3) (c).

⁶⁵HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 417.

⁶⁶HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 417.

“regularization” occurs when the asylum seeker satisfies all legal formalities requisite to refugee-status verification.⁶⁷ Once the refugee voluntarily and without delay reports to authorities, and demonstrates that his or her unauthorized entry or presence was on account of a search for protection, Article 31(2) governs⁶⁸

In the present case, there was no lapse on part of the victims and the act of detaining them in penitentiary units⁶⁹ which are meant for criminals amounted to the violation of their rights envisaged by the American Convention.

[2.A.iii] *Denial of Recourse to Judicial Authority violates Article 7, ACHR*

Article 7(5), ACHR states that any person detained shall be brought promptly⁷⁰ before a judge or other officer authorized by law to exercise judicial power.⁷¹ Formal availability of a right to challenge the lawfulness of detention is insufficient, if in the circumstances of the case the procedure is not in fact accessible and effective.⁷² Article 7(5) was violated to the detriment of Gonzalo Belano and other detainees because they were not brought before a competent judicial authority.⁷³

[2.A.iv] *In the course of detention, Arcadia has subjected the Wairans to cruel, inhuman and degrading treatment*

⁶⁷ UN Human Rights Committee, “General Comment No. 27: Freedom of movement” (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, citing the decision in *Celepli v. Sweden*, UNHRC Comm. No. 456/1991, UN Doc. CCPR/C/51/D/456/1991, decided Mar. 19, 1993.

⁶⁸ HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 419.

⁶⁹ Factsheet, ¶ 21, 22.

⁷⁰ Article 9(3), ICCPR; HRC, General Comment no. 8, (1982) reproduced in UN Doc. HRI/GEN/1/REV.9 (Vol. 1) (2008), ¶ 2.

⁷¹ Principle 4, Body of Principles for the Protection of All Persons under Any Form of Detention; Article 5(3), European Convention for Protection of Human Rights; IACtHR, November 12, 1997, Merits, *Suarez Romero v. Ecuador*, Series C No. 35, ¶ 63.

⁷² ECtHR, May 12, 2005, *Ocalan v. Turkey*, Application no. 46221/99, ¶ 68, 70.

⁷³ IACtHR, November 12, 1997, Merits, *Suarez Romero v. Ecuador*, Series C No. 35, ¶ 53-56.

This court on a previous occasion, has upheld the need to separate migrants in custody from persons who have been accused or convicted of criminal offenses, requiring that centers to accommodate migrants must be specifically intended for this purpose.⁷⁴ Arcadia's act of placing the 318 detainees in penitentiary units, rather than detention centres,⁷⁵ subjected them to degrading treatment.

Again, overcrowding of detention centres has been held to constitute a severe form of ill-treatment,⁷⁶ inhuman or degrading treatment⁷⁷ and even torture⁷⁸ under certain circumstances. The material conditions⁷⁹ of stay can only aggravate the risk of ill-treatment.⁸⁰ The ECtHR in one case held that a detention centre having capacity of 100 when housed 140-190 people, created a condition of degrading and inhumane treatment.⁸¹ Further, overcrowding adds to serious breaches of the right to security of detainees.⁸²

[2.B] State is liable for the Forced Disappearances⁸³ of the 7 named disappeared persons.

⁷⁴IACtHR, Advisory Opinion OC-21/14 Rights and Guarantees of Children in the context of migration and/or in need of International protection; Guarantee 8, ¶ 69, Annual Report of the Working Group on Arbitrary Detention, 18 December 1998, U.N. Doc. E/CN.4/1999/63 and Principle 9, Deliberation No. 5, Annex II of the Annual Report of the Working Group on Arbitrary Detention, December 28, 1999, U.N. Doc. E/CN.4/2000/4.

⁷⁵ Factsheet, ¶ 22.

⁷⁶ United Nations, July 5, 2012, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/BRA/1, ¶ 75.

⁷⁷ Council of Europe, 2nd CPT Report, CPT/Inf (92) 3, ¶ 46, ECtHR, July 15, 2002, *Kalashnikov v. Russia*, Application No. 47095/99, ¶ 102; ECtHR, January 1, 2012, *Ananyev and Others v. Russia*, Application No. 42525/07.

⁷⁸United Nations, March 20, 2014, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/MLI/1, ¶ 49, and United Nations, December 23, 2003, Economic and Social Council, E/CN.4/2004/56, ¶ 49.

⁷⁹ Clarifications, Question 18.

⁸⁰ United Nations, February 26, 2009, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/MDV/1, ¶ 210.

⁸¹ ECtHR, July 20, 2010, *A.A. v. Greece* Application No. 12186/08, ¶ 11.

⁸² IACtHR, May 6, 2008, Merits, Reparations and Costs, *Neptune v. Haiti*, Serial C No. 445/05. See also Council of Europe document CPT/Inf (2014) 26, ¶ 110; United Nations, December 14, 2011, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/BGR/CO/4-5, ¶ 23.

⁸³ Article 7(2) (i), Rome Statute, 2002.

The 7 named disappeared persons were subjected to enforced disappearance when the Arcadian authorities decided to deport them to back to Puerto Waira through Tlaxcochitlán.⁸⁴ Article 2 of the Inter-American Convention on Forced Disappearance (‘IACFD’) defines it to be ‘the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state,’⁸⁵ followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees’.⁸⁶ The 7 Wairan Persons disappeared within two months of their return to Tlaxcochitlán and consequently, there was no information about their whereabouts,⁸⁷ making them victims of Forced Disappearance.

Forced Disappearance constitutes a grave and abominable offense against the inherent dignity of the human being,⁸⁸ and one that contradicts the principles and purposes enshrined in the Charter of the OAS.⁸⁹ The UN Working Group on Enforced or Involuntary Disappearances (‘WGEID’)⁹⁰ has stated that ‘the right to liberty and security of person is the principal human right denied by the very fact of Forced Disappearance’.⁹¹

⁸⁴ Factsheet, ¶ 31.

⁸⁵ Article 2, International Convention for the Protection of All Persons from Enforced Disappearance (‘ICPAPED’).

⁸⁶ Declaration on the Protection of All Persons from enforced Disappearance, 1992 (‘Declaration on Enforced Disappearance’).

⁸⁷ Factsheet, ¶ 31.

⁸⁸ Article 1(1), Declaration on Enforced Disappearance; IACtHR, November 23, 2004, Preliminary Objections, *Serrano Cruz Sisters v. El Salvador*, Series C No. 118, ¶ 100-6; IACtHR, July 3, 2004, Reparations, *Molina Theissen v. Guatemala*, Series C No. 108, ¶ 41.

⁸⁹ Preamble, Inter-American Convention on Forced disappearance of Persons, 1994.

⁹⁰ Res. 20 (XXXVI) (29 February 1980), Commission on Human Rights, Report, 36th Session, *ECSOR*, 1980, Supplement No. 3, Chapter XXVI.

⁹¹ UN Doc. E/CN.4/1435 (26 January 1981), ¶ 184; *Bleier v. Uruguay* (1982) UN Doc. CCPR/C/15/D/30/1978, ¶ 2.2-2.4.

[2.B.i] Violation of Right to Juridical Personality⁹² of the 7 disappeared persons.

Forced disappearance constitutes an illegal act that gives rise to multiple and continuing violation of several rights protected by the ACHR.⁹³ The 7 disappeared persons as victims of forced disappearance were deprived of their capacity to exercise entitlements under law and access to any possible remedy as a direct consequence of the actions of the state.⁹⁴

[2.B.ii] Enforced Disappearance is a continuing offence.⁹⁵

Article 3 of the 'IACFD' states that Forced Disappearance can be a continuing or permanent offence. The absence of information,⁹⁶ regarding the whereabouts of the disappeared persons, violated Article 7 as long as there was no determination of their fate.⁹⁷

[2.B.iii] Victimization of families of the detainees.⁹⁸

Article 24(1), 'ICPAPED' defines 'victim' to include not only the disappeared person, but also 'any individual who has suffered harm as a direct result' of the enforced disappearance. The hallmark of Forced Disappearance was a mystery for the family, the outside world, whereby a

⁹² Article 6, UDHR; Article 16, ICCPR; Article XVII, American Declaration of Rights and Duties of Man; IACtHR, September 22, 2009, Preliminary Objections, Merits, Reparations and Costs, *Anzualdo Castro v. Peru*, Series C No. 202, ¶ 101.

⁹³ Article 1(2), Declaration on the Protection of All Persons from Enforced Disappearance; IACtHR, September 22, 2006, Merits, Reparations and Costs, *Goiburú v. Paraguay*, Series C No. 153, ¶ 82.

⁹⁴ HRC, *Grioua v. Algeria* (2007) UN Doc. CCPR/C/90/D/1327/2004, ¶ 7.8-7.9; HRC, *Kimouche v. Algeria* (2007) UN Doc. CCPR/C/90/D/1328/2004, ¶ 7.8-7.9; HRC, *Madoui v. Algeria* (2008) UN Doc. CCPR/C/94/D/1495/2006, ¶ 7.7-7.8.

⁹⁵ Article 17(1), Declaration on Enforced Disappearance, 1992.

⁹⁶ Factsheet, ¶ 31.

⁹⁷ IACtHR, September 22, 2006, Merits, Reparations and Costs, *Goiburú v. Paraguay*, Series C No. 153, ¶ 86.

⁹⁸ IACtHR, January 24, 1998, Merits, *Blake v. Guatemala*, Series C No. 36, ¶ 114-16; IACtHR, August 12, 2008, Preliminary Objections, Merits, Reparations and Costs, *Heliodoro Portugal v. Panama*, Series C No. 186, ¶ 163.

nocturnal fog had engulfed the victim.⁹⁹The family members of the disappeared persons had a *right to the truth*¹⁰⁰ about the victims' fate, whereabouts and returns of the remains.¹⁰¹

[2.B.iv] *Forced Disappearance was a violation of Peremptory Norms.*

The prohibition of the Forced Disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.¹⁰²The Declaration on Enforced Disappearance¹⁰³ and ICPAPED¹⁰⁴ state that 'no special circumstances, armed conflict, state of emergency, situations of internal conflict or tension can justify enforced or involuntary disappearance.'¹⁰⁵

⁹⁹Scovazzi and Citroni, *The Struggle Against Enforced Disappearances and the 2007 United Nations Convention (2007)* at pg. 9; IACtHR, July 5, 2004, Merits, Reparations and Costs, *19 Tradesmen v. Colombia*, Series C No. 109, ¶ 72(g).

¹⁰⁰ Preamble, Article 24(2), International Convention for the Protection of All Persons from Enforced Disappearance; 'WGEID', E/CN.4/1435, January 22, 1981, ¶ 187; UN High Commissioner for Human Rights, E/CN.4/2006/91, February 8, 2006; HRC, October 10, 2012, A/HRC/RES/21/7.

¹⁰¹IACtHR, September 19, 1996, Reparations and Costs, *Neira Algeria et al. v. Peru*, Series C No. 29, ¶ 69; IACtHR, February 27, 2002, Reparations and Costs, *Trjillo-Orozo v. Bolivia*, Series C No. 92, ¶ 109-17.

¹⁰² IACtHR, September 22, 2006, Merits, Reparations and Costs, *Goiburú v. Paraguay*, Series C No. 153, ¶ 84; IACtHR, November 29, 2006, Reparations and Costs, *La Cantuta v. Peru*, Series C No 162, ¶ 157.

¹⁰³ Article 7, Declaration on Enforced Disappearance, 1992.

¹⁰⁴ Article 1(2), ICPAPED, 2010.

¹⁰⁵ UN Doc. E/CN.4/1984/211, ¶ 172.

[3] ARCADIA HAS VIOLATED ARTICLES 8 AND 25 OF THE ACHR READ WITH ARTICLE 1(1) OF THE ACHR WITH RESPECT TO GONZALO BELANO AND OTHERS

The Right to Fair Trial¹⁰⁶ enshrined in Article 10, UDHR and Article 14, ICCPR along with the Right to Judicial Protection¹⁰⁷ enshrined in Article 8, UDHR have an autonomous character.¹⁰⁸ Articles 8 and 25 of the ACHR are necessary to ensure free¹⁰⁹ and full¹¹⁰ exercise of the rights and freedoms protected therein.¹¹¹ The International Criminal Court (ICC) has held that fair trial¹¹² is the only means to justice and where it is not held, the object of judicial process is frustrated.¹¹³

[3.A] The state has violated its duty to provide administrative and legal assistance to the victims

A refugee has free access to the courts of the Contracting party¹¹⁴ and the State is duty bound to provide the assistance to the refugees¹¹⁵. While a government might validly delegate its duty to

¹⁰⁶ Article 8, ACHR; Article XVIII, American Declaration of the Rights and Duties of Man; Article 6, European Convention on Human Rights; Article 20(2), ICTR Statute; Article 21(2), ICTY Statute.

¹⁰⁷ Article 25, ACHR., 1978.

¹⁰⁸ IACtHR, July 4, 2007, Merits, Reparations and Costs, *Zambrano Velez et al. v. Ecuador*, Series C No. 166, Separate Opinion of Judge Ventura Robles; IACtHR, September 26, 2006, Merits, Reparations and Costs, *Almonacid Arellano et al. v. Chile*, Series C No. 154, ¶ 48.

¹⁰⁹ IACtHR, August 16, 2000, Merits, *Durand and Ugarte v. Peru*, Series C No. 68, ¶ 17.

¹¹⁰ IACtHR, August 18, 2000, Merits, *Cantoral Benavides v. Peru*, Series C No. 69, ¶ 171.

¹¹¹ IACtHR, June 26, 1986, Preliminary Objections, *Velasquez Rodriguez v. Honduras*, Series C No. 1, ¶ 91; IACtHR, May 11, 2007, Merits, Reparations and Costs, *La Rochela Massacre v. Colombia*, Series C No. 163, ¶ 145; IACtHR, May 14, 2013, Merits, Reparations and Costs, *Mendoza et al. v. Argentina*, Series C No. 260, ¶ 217.

¹¹² Article 64(2), Rome Statute, 2002.

¹¹³ *The Prosecutor v. Thomas Lubanga Dyilo*, October 21, 2008, ICC-01/04-01/06-1486, ¶ 50.

¹¹⁴ Article 16, 1951 Convention Relating to the Status of Refugees.

¹¹⁵ Article 25, 1951 Convention Relating to the Status of Refugees.

provide administrative assistance to a willing international agency, the government ultimately remains responsible to ensure that refugees actually receive the assistance they require.¹¹⁶ A state party may not validly limit respect for refugee rights to only such refugees as are somehow able to advance those rights independently, Governments have an affirmative responsibility under Article 25(1) to establish a mechanism by which refugees may benefit in practice from their legal entitlements.¹¹⁷

In the present case, the State tried to relegate its duties by simply providing the contact information of civil society organizations and legal clinics.¹¹⁸ The entity charged with assisting refugees should be genuinely in a position to act authoritatively.¹¹⁹ The fact that the civil society organizations and legal clinics did not have the capacity to provide assistance to all the Warians,¹²⁰ clearly establishes that the State failed in its duty and thereby violated the rights of the victims.

[3.B] Incompetency of Courts and Lack of State Action violated the rights of victims

Article 25(1), ACHR provides that everyone has the right to an effective recourse¹²¹ by a competent court for acts violating the fundamental rights recognized by the ACHR,¹²² so that, inter alia, those responsible for the violations be prosecuted, impunity¹²³ prevented and reparations

¹¹⁶ HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 636.

¹¹⁷ *Ibid.*

¹¹⁸ Clarifications, Question 9.

¹¹⁹ HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 637; Secretary-General, “Memorandum,” at 43–44. See also Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 12.

¹²⁰ Clarifications, Question 9.

¹²¹ Article 8, UDHR, 1948.

¹²² IACtHR, January 25, 1996, Preliminary Objections, *Paniagua Morales et al. v. Guatemala*, Series C No. 23, ¶ 164; IACtHR, August 16, 2000, Merits, *Durand and Ugarte v. Peru*, Series C No. 68, ¶ 103.

¹²³ IACtHR, November 27, 1998, Reparations and Costs, *Loayza-Tamayo v. Peru*, Series C No. 42, ¶ 170.

obtained for the damages suffered.¹²⁴ The legitimacy of the judgment rests upon the legitimacy of the process.¹²⁵

In the present case, the writ of Amparo¹²⁶ which is a petition for constitutional remedy was adjudicated by the Pima Immigration Court which was a clear violation of the Arcadian Law which provides that such a writ could have been filed before any court, but the same should be referred to the competent Amparo judge.¹²⁷

[3.C] Even if, the Pima is held to be a competent court, the victims were not provided with the right to appeal

The right of access to the courts under Article 16(1) of the Refugee Convention requires that all refugees be able to pursue any remedies that are within the usual subject-matter jurisdiction of the courts.¹²⁸ The act of the State to deny access to their courts to victims to seek the appeal of the negative assessment of refugee status by the Pima Immigration Court amounts to a violation of Article 16(1) of the Refugee Convention and Article 8(2) (h) of the ACHR.¹²⁹

¹²⁴ Ibid. ¶ 168.

¹²⁵ IACtHR, May 30, 1999, Merits, Reparations and Costs, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, ¶ 219.

¹²⁶ Factsheet, ¶ 28.

¹²⁷ Clarifications, question 10.

¹²⁸ HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 252

¹²⁹ HATHAWAY, J. C. (2005). *The rights of refugees under international law*. Cambridge [England], Cambridge University Press, 645.

REQUEST FOR RELIEF

Based on the foregoing submissions, the Representatives for the victims respectfully request this Court to find that the State of Arcadia has violated Articles 4, 5, 7, 8, 17, 19, 22.7, 22.8, 24 and 25 read with Articles 1(1) and 2 of the ACHR along with the violations of several other human rights conventions and treaties.

In finding the violation of the aforementioned articles, the representatives of the victims request this Court to order the State that:-

1. The State shall make a formal acknowledgement of the breach of its duty and tender such apology to the population and ensure its non-repetition;
2. The State shall adopt measures of non-repetition, including permanent education and training of its officials and immigration authorities where proceedings may lead to deportation of migrants and those to determine refugee status;
3. The State shall implement laws and practices that ensure non-citizen's rights to family life and the best interests of the child, and see to the protection of due process on a case-by-case basis;
4. The State shall order an investigation to determine the persons responsible and punish them for the human rights violations alleged within the submissions;

5. The State shall pay the amounts it deems fit (salaries along with other benefits that by law corresponded to the victims) along with adequate compensation; and the reimbursement of costs and expenses incurred by the victims or their beneficiaries because of the requirements for the processing of the case judicially before both, the internal and the international jurisdiction; and
6. Decide that it will monitor that its judgement is complied with and only then close the case.