IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

GONZALO BELANO

AND 807 OTHER WAIRAN PERSONS

Petitioners

v.

REPUBLIC OF ARCADIA

Respondent

MEMORIAL FOR THE STATE

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II STATEMENT OF FACTS

The Republic of Arcadia

1. The Republic of Arcadia ("Arcadia") is an established democratic nation who holds human rights in high regard. Since Arcadia gained independence in 1825, human rights have been a guiding principle in its development.[1] This emphasis resulted in a sound democracy, politically stable system and dependable public institutions in Arcadia today. Believing strongly in the importance of human rights, Arcadia has supported the development of international human rights by ratifying all the core international human rights instruments and their monitoring bodies, and the main instruments of the Inter-American Human Rights System.[2]

2. Holding refugee rights in high regard, Arcadia constantly strives to provide a safe haven to protect them from the dangers they face. Other than ratifying the main instruments relating to the rights of refugees,[3] Arcadia has elevated the right to seek and receive asylum to a

[1] Hypothetical, ¶8
[2] Hypothetical, ¶9
[3] *Ibid*

constitutional right.[4] The Law on Refugees and Complementary Protection[5] and the General Immigration Act[6] were also enacted to ensure that refugee's rights are protected. The National Migration Institute[7] ("NMI") and National Commission for Refugees[8] ("CONARE") were further instituted to oversee the implementation of refugee rights. Beyond legal measures, Arcadia has also implemented social policies to better integrate migrants and refugees.[9]

3. Refugees across the region have therefore preferred to seek asylum in Arcadia, despite the long and arduous journey,[10] in recognition of its extensive protection of refugees.[11]

[4] Hypothetical ¶11
[5] Hypothetical ¶12
[6] Clarification Q11
[7] Hypothetical ¶10
[8] Hypothetical ¶20
[9] Hypothetical ¶10
[10] Hypothetical ¶15
[11] Hypothetical ¶10

The Wairan Refugee Crisis

4. In August 2014, 7,000 Wairans arrived in the United States of Tlaxcochitlan ("UST"), and waited at the Arcadia-Tlaxcochitlan border to seek refuge in Arcadia.[12] The sheer magnitude of Wairan refugees led UST authorities to require assistance from civil society organizations and international agencies to set up refugee camps[13]. Arcadia also sent personnel reinforcement to assist NMI officials in processing the asylum claims. Arcadians and organizations in the border villages and towns also offered humanitarian assistance in the form of food, clothing, shelter and even health brigades for the Wairans.[14]

5. Despite multiple forms of supplementary assistance, it was still insufficient to meet the needs of the Wairans. As a result, many of the Wairans had to resort to begging for money and sleeping in the streets of the border towns and villages. A majority of the Wairans who required medical attention turned to the local public health services in the border towns and villages. [15]

6. The 800% increase in Wairans seeking refuge was unprecedented,[16] and entirely eclipsed the 5,500 refugees Arcadia received for the entire year of 2012.[17] Recognizing that even collective efforts were inadequate, Arcadia held an extraordinary meeting with intra-national and international stakeholders in order to resolve the refugee crisis.[18]

[12] Hypothetical ¶15
[13] *ibid*
[14] Hypothetical, ¶16
[15] Hypothetical, ¶15
[16] Hypothetical, ¶10
[17] Clarification Q43
[18] Hypothetical, ¶17

Response to the Mass Exodus

Arcadia opened its borders to the 7,000 Wairans within a week of their arrival.[19] Javier Valverde, the president of Arcadia, publicly announced that in accordance with its domestic and international obligations, Arcadia would recognize them as *prima facie* refugees.[20] An easy and expeditious process was instituted for obtaining *prima facie* refugee status, entailing an application and a brief interview at the offices of the CONARE. The applicant would receive a refugee document and work permit within 24 hours. More than 6,000 Wairans were granted refugee status at the conclusion of this process.[21]

7. To guarantee national security and preserve public order, Arcadia separated Wairans who were potentially excludable from refugee status under Article 40 of the Law on Refugees and Complementary Protection.[22] These 808 Wairans in question had committed serious non-political crimes, such as kidnapping, extortion, murder, sexual violence, drug trafficking, human trafficking, and forcible recruitment.[23]

8. Arcadia conducted a further individualized assessment whereby it was decided that it was necessary to hold the 808 Wairans in custody to ensure their appearance for immigration proceedings, as well as their potential excludability from refugee status.[24] Prior to being detained, the 808 Wairans were immediately brought before an administrative authority for a review of the decision to detain them.

[19] Hypothetical, ¶18
[20] *Ibid*
[21] Hypothetical, ¶20
[22] Hypothetical, ¶22
[23] Clarification, Q2
[24] Clarification, Q15

9. Due to the massive influx of Wairans, there was insufficient capacity to host all of the 808 Wairans in the immigration detention centers.[25] Hence, women were given the priority to remain at the immigration detention centre while the remaining 318 Wairans were housed in penitentiary units, where Arcadia took care to separate them from those who were detained on criminal charges.[26]

10. Prior to their detention, Arcadia ensured that the 808 Wairans were thoroughly informed. They were notified both verbally and in writing that they were detained for ordinary asylum proceedings in accordance with the Law on Refugees and Complementary Protection because of their criminal records. Arcadian authorities further explained to the 808 Wairans their rights during detention and asylum proceedings, highlighting that they could request free legal assistance or contact their consulate if they wished. Arcadian authorities also explained the remedies available to challenge their detention.[27]

11. After an individualized examination of the 808 Wairans within the 45 business day period established by law, Arcadia determined that although they had a well-founded fear of persecution, they were excluded from refugee status in accordance with the Law on Refugees and Complementary Protection and the 1951 Convention Relating to the Status of Refugees.[28] None of the 808 Wairans appealed the determination despite having been informed of their rights and remedies and the existence of free legal assistance to appeal the decision.

[25] Hypothetical, ¶22
[26] Clarification, Q3
[27] Clarification, Q50
[28] Hypothetical, ¶23

Appeal for Responsibility Sharing and International Cooperation

12. The mass exodus of Wairans into Arcadia also caused societal tensions, as the local sentiment was that Wairans were responsible for taking jobs away from Arcadians and for increasing crime rates, leading to increasing discontent against them.[29] The presence of the 808 Wairans was particularly taxing on social cohesion, especially when news about the status of their refugee status proceedings was made public.[30] It caused such an upheaval in Arcadia that multiple marches were held across Arcadia demanding for their deportation, and these events dominated the headlines for almost a week.[31] Accounts detailing the egregious and heinous crimes the 808 Wairans were responsible for fostered further hostility and distrust against Wairan refugees.

13. Acknowledging the importance of safeguarding over 6,000 Wairans recognized as refugees and to fortify social integration efforts,[32] Arcadia assiduously launched public awareness and training campaigns to combat discrimination and xenophobia.[33] Nevertheless, the 808's presence in Arcadia indubitably weakened Arcadia's social fabric and endangered efforts to integrate the 6,000 over Wairans into Arcadian society.[34].

14. Arcadia regrettably conceded that it did not have the capacity to allow the 808 Wairans to remain as a result of the state of turmoil caused compounded with Arcadia's already

[29] Hypothetical, ¶24
[30] Hypothetical, ¶25
[31] *Ibid*
[32] *Ibid*
[33] *Ibid*
[34] Hypothetical, ¶26

overburdened resources.[35] Recognizing that the lives of the 808 Wairans would be in danger if returned to Puerto Waira,[36] Arcadia beseeched other countries in the region to admit the 808 Wairans in accordance with the principles of shared responsibility and international cooperation.[37]

Responsibility Sharing with UST

15. Despite President Javier Valverde issuing an Executive Decree further imploring the other States for their support,[38] Arcadia received no response even after three months had lapsed.[39] Arcadia therefore had no choice but to convene a meeting with UST to discuss their role in sharing the responsibility of the 808 Wairans.[40] Acting in accordance with the prohibition against non-refoulement, Arcadia emphasised to UST the importance of not deporting the 808 Wairans back to Puerto Waira.[41] An agreement was reached to transfer the 808 Wairans to UST[42] on the condition that they would not be returned to Puerto Waira.[43] For this purpose, Arcadia provided financial assistance to support UST's management of asylum seekers and development cooperation.[44]

16. It was only on February 10, 2015, that 217 of the 808 Wairans filed a writ of *amparo*. The Pima Immigration Court ("PIC") ordered that their deportation be suspended until the

[35] *Ibid*
[36] Hypothetical, ¶23
[37] Hypothetical, ¶26
[38] *Ibid*
[39] Hypothetical, ¶27
[40] *Ibid*
[41] Clarifications, Q66
[42] Hypothetical, ¶27
[43] Clarifications, Q66
[44] Hypothetical, ¶27

merits of their case were adjudicated.[45] In an individualized assessment of the 217 Wairan's claim, the PIC took into account their allegations of persecution[46] and available information on Puerto Waira, taking into account its international obligations.[47]

17. On March 22, 2015, the PIC concluded that all 217 of the claims were unmeritorious. The 217 Wairans' motion to appeal the PIC's decision was unsuccessful, and the PIC affirmed the transfer to UST on April 30, 2015.[48]

Deportation by UST

18. The 591 Wairans who did not apply for *amparo* were first transferred to the capital of UST[49], and were joined by the 217 Wairans after their final appeal.[50] In UST, the 808 Wairans were detained in the Ocampo Immigration Facility.[51] In breach of the agreement and their obligation of non-refoulement, UST's immigration authorities suddenly and unexpectedly deported the 808 Wairans to Puerto Wairo on June 15, 2015. Appalled by UST's blatant disregard of the rights of the 808 Wairans Arcadia entrusted them with, and the flagrant breach of a condition of the agreement and Arcadia's financial assistance, Arcadia suspended further payments under the agreement.[52]

[45] Hypothetical, ¶28
[46] Clarifications, Q69
[47] *Ibid*
[48] Hypothetical Case, ¶27
[49] *Ibid*
[50] Hypothetical Case, ¶28
[51] Hypothetical Case, ¶29
[52] Clarifications, Q66

Procedural History

19. Gonzalo Belano, one of the 808 Wairans deported by UST, was unfortunately murdered on June 28, 2015. His family sought legal advice from the Legal Clinic for Displaced Persons, Migrants, and Refugees of the National University of Puerto Waira ("Legal Clinic"). [53]

20. Anomalously, the Legal Clinic decided to bring a legal action against Arcadia for Gonzalo Belano, 29 murder victims, 7 disappeared persons and the 771 other Wairans despite UST being the country responsible for the deportation.[54]

21. As the complaint was filed with the Arcadian Consulate and not with a court of competent jurisdiction as required under Arcadian law, it was dismissed.[55] The Legal Clinic subsequently filed a petition with the Inter-American Commission on Human Rights (IACHR).[56] Arcadia objected to the petition since its inception as there was a failure to individually identify 771 of the alleged victims and exhaust domestic remedies at every instance.[57] On November 30, 2017, the IACHR nevertheless declared the petition admissible without giving reasons.

[53] Hypothetical Case, ¶30
[54] Hypothetical Case, ¶32
[55] Hypothetical Case, ¶33
[56] Hypothetical Case, ¶34
[57] Hypothetical Case, ¶35

22. On August 1, 2018, the IACHR found Arcadia responsible for violations of its obligations under the Convention.[58] Arcadia objects to the IACHR's decision, which forms the subject of the dispute currently before this Honourable Court for adjudication.

III LEGAL ANALYSIS

A. ADMISSIBILITY

1. The Court has jurisdiction to hear this case

23. Arcadia accepted the jurisdiction of the Inter-American Court when it deposited the ratification instrument in 1971[59]. The Court therefore has jurisdiction to hear this case under Article 62(1) of the American Convention on Human Rights.[60]

2. The Court lacks *ratione materiae* competence as the 771 Wairans are neither identified nor identifiable

24. The claims of the 771 Wairans should be considered inadmissible as the petitioner failed to identify them as required by Article 46(1)(d).[61] Identification of the 771 Wairans is indispensable as it would not be feasible to order restitution in vacuo.[62] The petitioner has not even satisfied the lower standard that the victims be "*identifiable*",[63] as no information

[58] Hypothetical Case, ¶36
[59] Clarification, Q65
[60] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, (the "*Convention*")
[61] Convention
[62] *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic, Provisional Measures, Order of the Court*, Inter-Am. Ct. H.R. (ser. E) (Aug. 18, 2000)
[63] *Victims of Anti-Immigrant Vigilantes v. United States*, Report, Case No. 478-05, Report No. 78/08, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009) (IACmHR, Aug. 05, 2009)

about the names of the victims or their geographical location has been proffered to minimally show that they are "*identifiable*".[64]

25. In the absence of identifiable victims, the Legal Clinic's claim should be rejected as it is an *actio popularis* which has been consistently rejected in the jurisprudence of the Inter-American system.[65]

3. The claims are inadmissible for failing to pursue and exhaust domestic remedies

26. The petitioner's claims are inadmissible as they have failed to pursue and exhaust domestic remedies before turning to this Court for relief.[66] It is a fundamental principle of international law that States must be given the opportunity to resolve the case domestically prior to appearing before international courts.[67]

27. Thus, the Commission's decision to admit the claim is erroneous and should be overruled. Although the Commission declared the petition admissible, this Court is not precluded from reviewing the procedural and material aspects of that decision.[68] Arcadia has satisfied the procedural requirements by raising the defence of non-exhaustion at the admissibility

[64] *Tibu Massacres v Colombia*, Report No. 51/10, Petition 1166-05 (IACHR, Mar 18, 2010)
[65] *Ferry Echaverry v. Nicaragua*, Petition 11.878, Inter-Am. C.H.R., Report No. 1/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007), ¶31; *Parque Metropolitano v. Panama*, Petition 11.533, Inter-Am. C.H.R., Report No. 88/03, Ser.L/V/II.118, doc. 5, rev. 2, ¶34; *Janet Espinoza Feria et al. Peru, Case 12.404, Inter-Am. C.H.R., Report No. 51/02 of October 10, 2002*, ¶34
[66] Art 46(1)(a), Convention
[67] Ian Brownlie, *Principles of Public International Law* (7th ed), 492; *Acevedo Jaramillo et al. v. Peru*, (Interpretation of Judgment on Preliminary Objections, Merits, Reparations, and Costs), IACtHR, 24 November 2006, Ser. C, No. 157, ¶66; *Velásquez Rodriguez v Honduras* (Merits), IACtHR, 29 July 1988 Ser. C, No. 4, (*Velásquez*), ¶61
[68] *Case of Escher et al. v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), *IACtHR, 6 July 2009*, ¶28

stage before the Commission in a timely manner.[69] Despite this, the Commission erred in admitting the petition in the absence of justifications for the non-exhaustion of remedies, and failed to give substantive reasons for its decision.

28. Here, Arcadia has discharged its burden[70] by demonstrating that domestic remedies are available as well as adequate, appropriate and effective to remedy the type of violation alleged.[71] Thus, the petitioners are obliged to explain their failure to exhaust such remedies.[72]

29. The administrative and constitutional remedies were *available* to the petitioners. The remedy of *amparo* clearly existed[73] at the time the petition was filed with the Commission[74], as evidenced by the fact that the 217 Wairans had pursued such remedies.[75] Moreover, it was open to the Legal Clinic to commence proceedings for reparations provided by the State for the alleged administrative irregularities.[76] Yet, none of these remedies were taken up.

[69] Hypothetical, ¶35; *Herrera Ulloa v. Costa Rica* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, 2 July 2004, Ser. C, No. 107, ¶81; *Apitz Barbera et al. (First Court of Administrative Disputes) v. Venezuela* (Preliminary Objection, Merits, Reparations, and Costs), IACtHR, 5 August 2008, Ser. C, No. 182, ¶24.
[70] *Loayza Tamayo v Peru* (Preliminary Objections), IACtHR, 31 January 1996, Ser. C, No. 25, ¶40
[71] *Garibaldi v Brazil* (Preliminary Objections Merits, Reparations, and Costs), IACtHR, 23 September 2009, Ser. C, No 203, ¶36; *Chitay Nech et al. v. Guatemala* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, 25 May 2010, Ser. C, No 212, ¶31
[72] Art 28(h), *Rules of Procedure of the Inter-American Commission on Human Rights*, entered into force 31 December 2009, approved by the Commission at its 137th regular period of sessions held from October 28 to November 13, 2009, and modified on September 2nd, 2011
[73] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*
[74] Clarification, Q10
[75] Hypothetical, ¶28
[76] Hypothetical, ¶32

30. Arcadia has further ensured that the remedies were accessible. The Inter-American Court has stated that remedies are not available if they were inaccessible.[77] States therefore have an obligation to provide free legal assistance to indigents.[78] Recognising that the asylum seekers were mainly living in poverty[79], Arcadia informed the 808 Wairans of the availability of such free legal assistance.[80] Nonetheless, the 591 Wairans chose not to request for it. Therefore, they cannot now claim that their indigence prevented them from accessing domestic remedies[81].

31. Arcadia could not have reasonably provided free legal assistance to the Legal Clinic. It is recognized that the petitioner has a duty to bring its indigence to the attention of the state before it may rely on its economic difficulties as an exception for failing to exhaust domestic remedies.[82] The Legal Clinic never notified Arcadia of its limited resources, and cannot for that reason avoid its duty to exhaust domestic remedies.

32. Secondly, the available remedies were *adequate, appropriate and effective* to remedy the violation alleged. It is trite that the remedy need not produce a result favorable to the petitioner to meet these requirements. It only needs to be suitable to address the infringement[83] and capable of producing the anticipated result.[84]

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[77] IACtHR, Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/90, 10 August 1990 ("*OC-11/90*")
[78] *OC-11/90* ¶31
[79] Hypothetical, ¶14
[80] Clarification, Q50
[81] IACHR, *Jorge Portilla Ponce v. Ecuador*, Report No. 106/09, petition 12.323, 2009, ¶25
[82] IACHR, Maria Mercedes Zapata Parra v Peru, Report No. 45/09, petition 12.079, 2009, ¶34
[83] *Caso Godinez Cruz v. Honduras (Merits)*, IACtHR, 20 January 1989, Ser. C, No. 5, ¶67
[84] *Las Palmeras v. Colombia (No. 90, 2001)*, ¶58

33. The remedies available to the 591 Wairans were directly targeted at redressing the alleged breach of constitutional and administrative rights.[85] Similarly, there are domestic proceedings to obtain compensation for direct harm as a result of the State's irregular administrative activity.[86] Additionally, the order by the Pima Immigration Court suspending the deportation orders demonstrated the Court's readiness to award the remedy in a meritorious case,[87] which the Wairans failed to prove.

34. The Petitioners should therefore not be rewarded by allowing their claim to be heard despite their failure at every instance to avail themselves of domestic remedies.

B. MERITS

1. Arcadia complied with its obligations under article 7 when holding the Wairans in custody

35. Arcadia's detention of the Wairans was in accordance with its obligations under Article 7 of the Convention.[88] Although Article 7 provides that "*every person has the right to personal liberty and security*", it is not an absolute right, and states are entitled to reasonably detain individuals to control the entry of aliens into their territories.[89] Article 7 allows for the detention of asylum seekers where the need for it is substantively established

[85] Clarification, Q10
[86] Clarification, Q10
[87] Hypothetical, ¶28
[88] Article 7, Convention
[89] *Amuur v. France*, Application no 19776/92, ECtHR, 25 June 1996, ¶53; IACHR Report on Immigration in the United states: Detention and Due Process, ¶39; *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218 ("*Vélez Loor*"), ¶166

with the requirements in domestic law,[90] and in conformity with the procedural safeguards under the Convention.[91]

36. Arcadia lawfully detained the 808 Wairans in accordance with its domestic law, specifically Section 111 of the General Immigration Act ("GIA").[92] Firstly, it was necessary to hold them in custody to determine their immigration status and preserve the possibility of expulsion.[93] Furthermore, it was imperative for Arcadia to separate and detain potentially excludable persons[94] in a mass influx situation[95] in order to avoid potentially disastrous consequences. For example, in the Great Lakes refugee crisis, the UNHCR's failure to separate and detain potentially excludable applicants compromised the safety of *bona fide* refugees and led to the refugee camps being used to finish the genocide.[96]

37. Moreover, Arcadia abided by the procedural safeguards required by Article 7 when holding the 808 Wairans in custody. Firstly, they were only detained after an individualized assessment determined it to be appropriate[97] and proportionate to the objective sought

[90]Article 7(2), Convention
[91] Articles 7(4), 7(5) and 7(6), Convention
[92] Clarification, Q11
[93] Section 111(1), General Immigration Act ("*GIA*")
[94] Art 40.II, Law on Refugees and Complementary Protection; Art 1F(b), UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1F(b), United Nations, Treaty Series, vol. 189, p. 137 ("*Refugee Convention*")
[95] UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention, ¶56
[96] Todd Howland, *Refoulement of Rwandan Refugees: The UNHCR's Lost Opportunity to Ground Temporary Refuge in Human Rights Law* (1998), 4 U.C. Davis J. Int'l L & Pol'y 73, 85;
[97] Clarification, Q15

under Section 111(1) of the GIA.[98] Additionally, these Wairans were only detained for the duration necessary to determine their status and to expel them as determined by law,[99] within an established timeline.[100] The detention was for less than 9 months, far below the 3 years in the *Case of Rafael Ferrer-Maorra et. Al. v. United States,*[101] which was held to be disproportionate to the objective of determining the applicant's refugee status.

38. Arcadia have exceeded its obligations under Article 7 to ensure more than adequate procedural safeguards for the 808 Wairans. Other than informing[102] them that they were detained for ordinary asylum proceedings due to their criminal records,[103] they were also "immediately brought before the administrative authority" for consideration before they were held in custody.[104] Further, they were informed of the rights and the remedies available to them, as well as given the means of contacting legal aid.[105]

39. Therefore, Arcadia urges this Court to find that the detention of the 808 Wairans was lawful and in accordance with its obligations under Article 7.

[98] S 111(2), GIA; *Vélez Loor,* ¶166; IACtHR, *Advisory Opinion OC-17/2002, "Juridical Condition and Human Rights of the Child"*, OC-17/2002, Inter-American Court of Human Rights (IACrtHR), 28 August 2002, ¶47; *Golder v UK* (1975), Ser A, No 18, 1 EHRR 524
[99] Within the 45-business day period established by law in Hypothetical ¶23
[100] After two months without reply from States and one month of the Executive Decree at ¶26-27
[101] *Case of Rafael Ferrer-Maorra et. Al. v. United States,* Report No. 51/01 - Case 9.903, Inter-American Commission on Human Rights (IACHR), 4 April 2001
[102] Article 7(4), Convention
[103] Clarification, Q50
[104] Article 7(5), Convention
[105] Clarification, Q24

2. Arcadia rightfully excluded the 808 Wairans

40. Arcadia decision to exclude the 808 Wairans from refugee status did not violate its obligations under the right to seek and receive asylum.[106] Article 22(7) of the Convention does not impose a duty on Arcadia to grant refugee status, but simply that it ensures a proper consideration of an asylum seeker's claim[107] in accordance with domestic and international law, protected with the necessary procedural safeguards.

a. Arcadia complied with its substantive obligations under the right to seek and receive asylum in excluding the 808 Wairans

i. Arcadia's determination of the 808 Wairan's refugee status complied with domestic legislation and international conventions

41. Article 22(7)[108] provides that a State owes no obligation to asylum seekers unless the obligation set out in international law has been accepted by the State under its domestic legislation.[109] In this respect, Arcadia enacted the *Law on Refugees and Complementary Protection* to define its asylum obligations. Arcadia's exclusion of the 808 Wairans was in accordance with Article 40.II of this legislation (hereinafter the "exclusionary provision"). The exclusionary provision explicitly states that *refugee status shall not be granted* to any person who has "*committed a serious non-political crime outside the national territory prior to his admission to that territory*".

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[106] Art 22(7), Convention
[107] *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96. IACHR, OEA/Ser. L/v/ii.95 DOC. 7 REV AT 550 (1997) ("*Haitian Interdiction Case*"); Commission IACHR. Report on the human rights situation of asylum seekers under the system Canadian Refugee Status Determination, OEA / Ser.L / V / II.106, Doc. 40 rev., February 28, 2000, ¶60
[108] Convention
[109] *Haitian Interdiction Case*, ¶152-154

42. The exclusionary provision reflects the language of Article 1F of the *Refugee Convention*[110] and is echoed in the domestic legislation of most States.[111] The exclusionary provision diverges from the *Refugee Convention* only in relation to the standard of proof required.[112] The exclusionary provision only requires "*reasonable grounds*" as opposed to "*serious reasons*" required by the *Refugee Convention* to exclude an applicant from refugee status.

43. Here, Arcadia's individual assessment of the 808 Wairans[113] revealed that they had been convicted of "serious non-political crimes".[114] The very existence of their conviction under the standard required in criminal law satisfies not just the standard of "reasonable grounds" but of "serious reasons" as well.[115]

44. Further, on the jurisprudence, it is clear that the crimes the 808 Wairans had committed would be considered serious non-political crimes. The crimes enumerated have been

[110] Clarification, Q15; *Refugee Convention*
[111] Article 12, European Council Directive 2004/83/EC ("*EC Directive*"); S 98, Immigration and Refugee protection Act, S.C. 2001, c. 27 ("*Canadian Act*"); §1158(b)(2)(A)(ii), 8 U.S. Code ("*US Code*"); S 5H(2)(b), Australian Migration Act 1958, No. 62 ("*Australian Act*"); s 198(1)(c)(ii), New Zealand Immigration Act 2009, No. 51 ("*NZ Act*")
[112] *Al-Sirri and another v Secretary of State for the Home department* [2012] UKSC 54 affirming the view of the UNHCR at ¶75
[113] Hypothetical, ¶23, Clarification, Q69
[114] Clarification, Q2
[115] *KK v. Secretary of State for the Home Department*, ¶79

explicitly considered to be serious non-political crimes by courts across jurisdictions[116] as well as under numerous international instruments.[117]

45. Arcadia is also not required to carry out any further assessment to ensure that the exclusion clauses are applied in a manner proportionate to their objective. The argument made by the UNHCR that the gravity of the offence should be weighed against the consequences of exclusion in its Guidelines[118] is entirely unsubstantiated and must be rejected.

46. As a preliminary matter, States are not bound by the UNHCR Guidelines.[119] They are fundamentally *recommendations* that serves as interpretative guidance.[120] Furthermore, the exclusionary provision does not provide any grounds for an interpretation of a *further* proportionality assessment. This is recognized by the UNHCR itself, [121] as proportionality

[116] *AH (Algeria) v. Secretary of State for the Home Department v. UNHCR*, [2015] EWCA Civ 1003, United Kingdom: High Court (England and Wales), 14 October 2015 ("*AH (Algeria*)"), ¶34; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, ("*Febles*"), ¶62; Ra 2017/19/0531, ECLI:AT:VWGH:2018:RA2017190531.L00, Austria: Supreme Administrative Court (Verwaltungsherichtshof), 5 April 2018

[117] UN High Commissioner for Refugees (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; 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; *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199; UN General Assembly, *International Convention against the Taking of Hostages*, 17 November 1979, No. 21931; UN Economic and Social Council (ECOSOC), *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988; UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25

[118] UNHCR Background Note on the Application of the Exclusion Clauses- Article 1F of the 1951 Convention relating to the Status of Refugees ("*Guidelines*"), ¶77;

[119] *AH (Algeria)*, ¶13¶

[120] Article 35, Refugee Convention; Article II, UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

[121] *Guidelines*, ¶77

was neither expressly mentioned in the Refugee Convention or the *travaux preparatoire*[122] ("*travaux*"). The drafters therefore did not intend for the application of proportionality assessment, and signatory States, including Arcadia, never committed themselves to apply such a test. Requiring a proportionality assessment would be incorporating[123] terms into the provisions against the consent of sovereign states.[124]

47. Secondly, the application of the proportionality test in excluding asylum seekers is not established under customary international law either. Even though it has been applied in Switzerland[125] and Belgium,[126] state practice is hardly consistent enough to form a binding customary international rule.[127] Rather, preponderance of states have expressly rejected the proportionality test, recognizing that incorporating it would be unjustified and contrary to the purpose of the Refugee Convention.[128]

48. Lastly, the Wairans would have been excluded anyway on an application of the proportionality assessment. The US Supreme Court has rightly pointed out that a proportionality assessment is situated in the determination of whether a crime is sufficiently "serious" to exclude the asylum seeker from international protection.[129]

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[122] *Guidelines*, ¶77; Takkenberg/Tabhaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees*, Vol. III, The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 2 – 25 July 1951, Geneva, Switzerland, A/Conf.2/SR.29, p.19
[123] UNHCR's own words in *Guidelines*, ¶76
[124] Treaties may only be amended by agreement between parties, Article 39, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 ("*VCLT*");
[125] Decision No. 8, 1993, Swiss Asylum Appeals Commission
[126] Decision W4403, 9 March 1998, Belgium: Commission permanente de recours des réfugiés (Conseil du Contentieux des Etrangers)
[127] Guidelines, ¶76
[128] *Malouf v Canada* [1995] 1 F.C. 537 (C.A); *Aguirre-Aguirre v INS* 119 S.Ct. 1439, 1446 (1999) ("*Aguirre-Aguirre*"); *AH (Algeria)*; *Germany v B and D* C-57/09, C-101/09, [2010] ECR I-10979, [2012] 1 WLR 1076, ¶111
[129] *Aguirre-Aguirre*

Therefore, where the crimes committed have already been established to satisfy the requirement, as the crimes committed by the 808 Wairans were[130], no further assessment would be required.

ii. Arcadia is entitled to exclude convicted criminals who have served their sentences from international protection.

49. Arcadia is permitted under the *Law on Refugee and Complementary Protection*, which is in line with the *Refugee Convention*, to exclude fugitives and ex-convicts from refugee status. The suggestion that a distinction between fugitives and ex-convicts should be made to the effect that exclusion no longer applies to ex-convicts[131] should be firmly rejected. Nothing in the *Convention* nor the *travaux* suggests this and reading the aforementioned distinction into the provision is contrary to the intended purpose of the exclusionary provision.

50. Firstly, the ordinary meaning[132] of the exclusionary provision does not differentiate between fugitives and ex-convicts. On the contrary, the exclusionary provision explicitly states that it applies to "*any* person" who has "*committed*" such crimes. Furthermore, Article 40.III of the *Law on Refugees and Complementary Protection* was amended from the *Refugee Convention* to replace "been guilty of" with "has committed". This eliminates suggestions of a distinction between fugitives and ex-convicts based on the previous distinctions in the limbs of the exclusionary provisions in the *Refugee Convention.*[133] It is

[130] ¶17 above
[131] Guidelines, ¶73
[132] Article 31, *VCLT*
[133] Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed., 2007)

therefore without a doubt that the exclusionary provision applies equally to fugitives and ex-convicts.

51. Given the clear meaning of the provisions, and courts should be slow to depart from the plain text[134] and there is no further need for recourse to the *travaux*[135] of the *Refugee Convention*. Nonetheless, even if the *travaux* was consulted, it confirms that the ordinary meaning of the exclusionary provision applies[136]. The dual purposes of the exclusionary provisions, as set out by the *travaux,* support its equal application to fugitives and ex-convicts, to (1) ensure that refugee status is only granted to those who deserve it and; (2) uphold the legitimacy of the refugee system.

52. The *travaux* shows that States intended for the exclusionary provision to define those undeserving of refugee protection.[137] The States did so by specifying the gravity of the crimes that would warrant exclusion, and not by whether they were fugitives or ex-convicts. In fact, the *travaux* reveals that the exclusionary provision was intentionally altered[138] from its original inspiration, Article 14(2) of the *Universal Declaration of Human Rights*. The departure from Article 14(2) was to clarify that the exclusionary provision was concerned with the broader issue of "whether criminals should be granted refugee status",[139] and to distance itself from the focus on fugitives in Article 14(2).[140]

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[134] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, ¶4
[135] Article 32, *VCLT*
[136] Article 32, *VCLT*
[137] *Travaux*, p 13, statement of the French delegate; A/Conf.2/SR.29, p. 16, statement of the Yugoslavian delegate
[138] Then Article 1E, *Travaux*
[139] *Travaux*, A/Conf.2/SR.29, p 17, statements of the Yugoslavian delegate; *see also* Grahl-Madsen, *The Status of Refugees in International Law* vol 1 (1966) ("*Grahl-Madsen*"), 290; *Zrig v Canada (Minister of Citizenship and Immigration)* (2003) 229 DLR (4th) 23 (FCA) at ¶67 and ¶126
[140] *Travaux*, pp 16-17, statements of the Swedish delegate

53. Moreover, the *travaux* reveals that the exclusionary provisions further served to uphold the legitimacy of the refugee system,[141] to ensure '*the necessary public support for its viability*'.[142] States therefore agreed on excluding criminals, fugitives and ex-convicts alike, to prevent refugee status from being discredited by granting refugee status to ex-convicts.

b. Arcadia complied with its procedural obligations under the right to seek and receive asylum in excluding the 808 Wairans

54. Arcadia has complied with its obligations under Article 22(7) read with Article 8 and Article 25 of the Convention to ensure that the 808 Wairans had adequate procedural guarantees during the determination of their refugee status.

55. Arcadia provided procedural safeguards regardless of whether it was in granting *prima facie* status or ordinary refugee Status. In accordance with the requirement that States provide an adequate procedural framework for the processing of asylum applications,[143] Arcadia established a framework with the National Commission for Refugees for the granting of *prima facie* refugee status.[144] Potentially excludable persons were also separated for examination under ordinary refugee status proceedings within the 45 business

[141] *Travaux*; *B (Area of Freedom, Security and Justice*) (2008), BVerwG 10 C 48.07, OVG 8 A 2632/06.A; recognized in Commission for a Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection of 12 September 2001, KOM(2001) 510 final, p. 29
[142] *Febles* at ¶36
[143] *Case of Pacheco Tineo Family v Plurinational States of Bolivia*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013 ("*Pacheco Tineo*"), ¶154.
[144] Hypothetical, ¶20

day period established by law.[145] Additionally, the 808 Wairans were granted individual hearings[146] as has been held necessary in the determination of their exclusion from refugee status.[147]

56. Arcadia also provided the 808 Wairans with information on how to appeal the decision to exclude them from refugee status, and even the contact information of civil society organizations and legal clinics from whom they may seek help.[148] The 217 Wairans who appealed were also allowed to remain in the country until a final decision was made,[149] as the Pima Immigration Court suspended the order for deportation.[150]

3. Arcadia has ensured that the 808 Wairans had equal protection of the law

57. Arcadia accorded with its obligations under Article 24, which provides that all persons are "*entitled, without discrimination, to equal protection of the law*".[151] Article 24[152] does not demand the same outcome for all persons, merely that the law is applied without discrimination.[153] Therefore, differentiation based on substantial factual differences would not amount to discrimination if there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule.[154]

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[145] Hypothetical, ¶23
[146] Clarification, Q69
[147] *Haitian Interdiction Case*; *John Doe et al v. Canada*, Report N. 78/11 - Case 12.586, Inter-American Commission on Human Rights (IACHR), 21 July 2011, ¶92
[148] Clarification, Q9
[149] *Pacheco Tineo*
[150] Hypothetical, ¶28
[151] Convention
[152] Convention
[153] *Haitian Interdiction Case*, ¶174
[154] Advisory Opinion OC-17/2002, "Juridical Condition and Human Rights of the Child", OC-17/2002, Inter-American Court of Human Rights (IACrtHR), 28 August 2002, ¶47

58. It is manifestly reasonable for Arcadia to differentiate the 808 Wairans convicted criminals from over 6,192 meritorious refugees to ensure that refugee status is only granted to those deserving of international protection, as well as to uphold the legitimacy of the refugee system. Further, the different treatment of criminals from the 6,192 meritorious refugees for such purposes is sanctioned under the Refugee convention[155] and applied across jurisdictions.[156]

59. Moreover, the petitioners have not shown that the different treatment of the 808 Wairans was for a contrary objective and was arbitrary, so as to amount to a breach of Article 24.

4. Arcadia did not breach the Convention when it transferred the 808 Wairans to UST

a. Arcadia did not breach the principle of non-refoulement encapsulated in Art. 22(8) of the Convention

60. Arcadia did not breach the principle of non-refoulement under Article 22(8) of the convention for three reasons. Firstly, Arcadia was not the state that refouled the 808 Wairans to Puerto Waira. Secondly, Arcadia did not refoul the 808 Wairans when it transferred them to UST. Lastly, the 808 Wairans have not established that they fell within the ambit of protection under Article 22(8).

[155] Refugee Convention
[156] Article 12, *EC Directive*; S 98, *Canadian Act*; §1158(2)(A)(ii), *US Code*; S 5H(2)(b), *Australian Act*; s 198(1)(c)(ii), *NZ Act*

i. UST's deportation of the 808 Wairans to Puerto Waira cannot be attributed to Arcadia

61. It was UST, not Arcadia, who refouled the 808 Wairans to Puerto Waira. Arcadia has neither acknowledged nor adopted UST's conduct as its own.[157] Far from it, Arcadia denounced UST's actions and suspended further payments under the agreement. UST's deportation of the 808 Wairans cannot therefore be attributed[158] to Arcadia.

ii. Arcadia did not refoule the 808 Wairans when it transferred them to UST

(a) Arcadia not have foreseen that UST would deport the 808 Wairans to Puerto Waira

62. Arcadia did not indirectly refoul the 808 Wairans when it transferred them to UST. This Court has repeatedly emphasised that a state is only liable for indirect refoulement under Article 22(8)[159] if it transfers individuals to a receiving country and there is a "real risk"[160] that they will be returned to their country of origin where their lives or personal freedom are in danger. States must therefore be able to <u>foresee</u> the return of such individuals to their country of origin.[161]

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[157] Article 11, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 ("*ILC Articles*")
[158] Article 2, *ILC Articles*
[159]Article 22(8), Convention: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."
[160]A*dvisory Opinion OC-25/18 of 30 May 2018 requested by the Republic of Ecuador*, Inter-American Court of Human Rights (IACrtHR), 30 May 2018 ("*Advisory Opinion on Non-Refoulement*"), ¶196 and ¶239; *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrtHR) ("*Advisory Opinion on Rights of Children*"), at ¶212
[161]*Advisory Opinion on Non-Refoulement*, ¶239

63. Arcadia could not have foreseen that UST would deport the 808 Wairans to Puerto Waira when it transferred them to UST. UST specifically undertook not to deport the 808 Wairans to Puerto Waira.[162] This "*provide[s] strong evidence that the receiving state would respect the rights of the transferred individual*"[163], as noted by the court in *Husain*. This can be distinguished from cases where the claimants were at real risk of indirect refoulement as diplomatic assurances did not amount to a sufficient guarantee[*164*]. In contrast, it was a condition of the legally binding Agreement that UST did not *refoule* the 808 Wairans.[165]

64. Furthermore, there was nothing that suggested that UST would refoul the 808 Wairans. Instead, the fact that UST had set up camps near the southern border of Arcadia for the 7000 Wairans to take shelter was probative that UST respects the rights of the 808 Wairans. Under such circumstances, it was reasonable for Arcadia to believe that UST would comply with the prohibition on *refoulement.*[166]

iii. The 808 Wairans do not qualify for protection under Article 22(8) of the Convention

65. The 808 Wairans have not established[167] that their "*right to life or personal freedom is in danger of being violated*" (the "alleged danger") in Puerto Waira "*because of*"[168] their

[162] Clarification, Q66
[163] *The Queen on the application of Mr Husain Ibrahimi, Mr Mohamed Abasi v The Secretary of State for the Home Department* ("*Husain*"), ¶50
[164] *M.S.S v Belgium and Greece* [GC], Application No. 30696/09, ¶354
[165] Clarification, Q66
[166] *Pacheco Tineo* at ¶151 and ¶152, *Advisory Opinion on Rights of Children* , ¶81 and ¶212
[167] Office of the United Nations High Commissioner for Refugees Geneva, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, "*in refugee claims, it is the applicant who has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based*."
[168] *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225 (Aus. HC, Feb. 24, 1997), ¶ 240: "It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of

"*race, nationality, religion, social status, or political opinions*" (the "Convention grounds") under Article 22(8) of the Convention.

66. It is axiomatic that "not all persecution gives rise to [an] asylum claim"[169]. The requirement that the peril they face must be connected to a Convention ground before qualifying for protection under Article 22(8) ensures that there will not be an excessive strain on signatory states to undertake unlimited obligations to asylum seekers in advance.[170]

67. The 808 Wairans have not shown that the grounds of race, nationality, religion or political opinion are engaged. The fact that they did not wish to return to their gangs cannot be characterized as a political opinion, as "*[m]ere refusal to join a gang does not constitute political opinion*"[171] since it is merely an act of "*economic and personal preservation, not a political stance*."[172]

68. Furthermore, the 808 Wairans have not identified a social status that puts them at risk of being persecution. To establish membership of a particular social status, the petitioners must prove that they:

(i) share an *immutable innate characteristic*; and

(ii) are *perceived as being different by the surrounding society*.

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persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group."

[169] *Fornah v. Secretary of State for the Home Department*, [2007] 1 AC 412 (UKHL, Oct. 18, 2006), 462

[170] Mr. Henkin of the United States: UN Doc. E/AC.32/SR.3 (Jan. 26, 1950), at 13

[171] *Mejilla-Romero v. Holder, (2010) 600 F.3d 63* (USCA, 1st Cir., Apr. 6, 2010)

[172] *Tobias Gomez v. Canada (Minister of Citizenship and Immigration*), (2011) 397 FTR 170 (Can. FC, Sept. 23, 2011)

69. Criteria (i) and (ii) function as principled limiting criteria on the beneficiaries of Article 22(8), reflecting cogent state practice on the meaning of "particular social group" under Article 1 and Article 33(1) of the Refugee Convention. They have been endorsed by the European Parliament and the Council of the European Union in Article 10(1)(d) of its Qualification Directive[173] and affirmed by the Court of Justice of the European Union[174], and are also widely accepted in many jurisdictions outside the EU.[175] Given that Article 22(8) is founded upon Article 33(1) of the Refugee Convention,[176] these criterion are similarly required for the purposes of establishing membership of a social status under Article 22(8) of the Convention.

70. The 808 Wairans here do not satisfy the two criteria for the purposes of establishing a social status. As persons who do not wish to return to their gangs, persons who oppose gang violence and some of them are women in Puerto Waira, they are not members of established social statuses based on prevailing authorities.

71. On the first ground of "persons who do not wish to return to their gangs", the United States Court of Appeals for the First Circuit in *Mendez - Barrera v. Holder*[177] expressly rejected the ground of "person(s) who refuse recruitment by gang members" on the basis that it

[173] Directive 2011/95/EU of The European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
[174] *Z v. Minister voor Immigratie en Asiel* (C-201/12) (Nov. 7, 2013), ¶45
[175] 1st Circuit (*Scatambuli v. Holder*, (2009) 558 F.3d 53 (USCA, 1st Cir., Feb. 25, 2009), at 59–60; 2nd Circuit (*Ucelo-Gomez v. Mukasey*, (2007) 509 F.3d 70 (USCA, 2nd Cir., Nov. 21, 2007), at 74); 8th Circuit (*Davila-Mejia v. Mukasey*, (2008) 531 F.3d 624 (USCA, 8th Cir., Jul. 7, 2008), at 629
[176] Documents of the 1969 Inter-American Conference on Human Rights (Travaux préparatoires), pg. 244
[177] *Mendez- Barrera v. Holder*, (2010) 602 F.3d 21 (USCA, 1st Cir., Apr. 15, 2010) ("*Mendez*") at 23

lacks the requisite particularity and visibility (i.e. criterion (ii)). The court found that it was "*impossible to identify who is or is not a member*."[178] Moreover, the type of conduct that may be considered "*recruit[ment]*", and the degree to which a person must display "*resist[ance]*" is unclear.[179] Similarly, it is impossible to identify who is or is not a gang member in Puerto Waira. Both the type of conduct that induces the 808 Wairans to return to their gangs and the degree to which they should display resistance is unclear.

72. The second ground of "person(s) who oppose crimes" has been rejected by the Federal Court in *Lozano Navarro, Victor v. M.C.I,*[180] who found that reporting to the authorities and refusing to cooperate with the cartel extorting them was not an immutable part of the claimants' past such that they fulfil criterion (i). Likewise, the 808 Wairans' refusal to cooperate with their former gang does not constitute an innate characteristic that fulfils criterion (i).

73. On the final ground of "women in Puerto Waira", the cases suggesting that *gender* can provide the basis for a particular social status can be distinguished from the present case. There, the claimants were able to adduce cogent documentary evidence that they face an elevated risk of sexual violence and rape. Accordingly, a causal connection between their status as "women in a particular society" and their fear of persecution in the form of sexual violence was established.

[178] *Mendez*, 27
[179] *Mendez*, 28
[180] *Lozano Navarro, Victor v. M.C.I.* (F.C., no. IMM-5598-10), Near, June 24, 2011; 2011 FC 76*8*

74. Where the Court has recognized the social status of women as targets of sexual assault and rape, the claimant adduced satisfactory and cogent evidence proving so.[181] The Petitioners have not established that the 89 women are at risk of torture in the forms of sexual violence or rape nor adduced documentary evidence to demonstrate that the 89 women would experience an elevated risk of sexual violence and rape in Puerto Waira. Although there were reports of sexual violence committed by Puerto Wairan gangs since the early 2000s, they cannot be considered probative considering the Puerto Wairan government's hardline policy to eradicate criminal activities of gangs[182].

75. Therefore, the 808 Wairans have not demonstrated that they qualify for protection under Article 22(8) of the Convention on any of the canvassed grounds.

b. Arcadia did not violate the 808 Wairans' right to life under Article 4 of the Convention

76. Arcadia did not breach the 808 Wairans' "*right to have [their] life respected*" under Article 4 of the Convention because it has complied with this Court's direction in *Velásquez Rodriguez v. Honduras* "*to take reasonable steps* to *prevent human rights violation*s."[183] In situations where the individuals concerned faced real or imminent danger, the duty of the State extends only to adopting measures that could be "reasonably expected to prevent or avoid such danger."[184]

[181] *Dezameau Elmancia v. M.C.I.* (F.C. no., IMM-4396-09), Pinard, May 27, 2010; 2010 FC 559 ("*Dezameau"*), ¶34 – 35
[182] Hypothetical, ¶6.
[183] *Velásquez*, ¶174
[184] *Pueblo Bello Massacre v. Columbia*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan 31, 2006), ¶123-124

77. Arcadia has persistently called upon all other states to admit the 808 Wairans for three months. When Arcadia received no response from the other states. it entered into the Agreement with UST to ensure the protection of the 808 Wairans. Simply put, Arcadia has "*maximised its efforts and used all its available and relevant resources*"[185] to protect the 808 Wairans.

78. Furthermore. Arcadia would only be in breach of Article 4 if it "*were aware or should have been aware*"[186] that the 808 Wairans' life were in real or imminent danger. As outlined in ¶65-67, Arcadia did not foresee that UST would deport the 808 Wairans to Puerto Waira.

79. In any event, Article 4 does not prohibit States from expelling individuals who cannot establish that their right to life or personal liberty is in danger pursuant to one of the five Convention grounds. Otherwise, any alien would be entitled to remain in Arcadia by alleging that he or she faces a real risk of serious harm that has no connection with one of the five Convention grounds, rendering Article 22(8) of the Convention completely otiose. It would also lead to a "*fragmented interpretations*" of the provisions contrary to the interpretation of treaties[187]

[185] *Luna López v. Honduras*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 269 (Oct 10, 2013), ¶12.4
[186] *Velásquez*, ¶174
[187] Art 37, VCLT; *Advisory Opinion on Rights of Children*, ¶228

c. Furthermore, Arcadia respected the due process rights of the 808 Wairans pursuant to Articles 8 and 25 of the Convention

80. In the proceedings to transfer the 808 Wairans to UST, Arcadia complied with the necessary due process guarantees under Articles 8 and 25 of the Convention.[188]

81. First, Arcadia expressly and formally informed the 808 Wairans of the charges against them and the reasons for the deportation.[189] It informed them verbally and in writing that they had criminal records and were not eligible for refugee status. They were also told that they would be detained and subject to ordinary asylum proceedings in accordance with the Article 40.II of the *Law on Refugees and Complementary Protection*.[190]

82. Second, Arcadia provided information to them on the possibility of presenting the reasons why they should not be deported[191] when it sent all 808 a list containing their rights.[192]

83. Third, Arcadia notified them the possibility of requesting and receiving legal assistance[193] by providing them with a list of contact information of civil society organizations and legal clinics that could advise and represent them legally.[194]

[188] *Pacheco Tineo*, ¶133
[189] *Pacheco Tineo*, ¶133
[190] Clarification, Q50
[191] *Pacheco Tineo*, ¶133
[192] Clarification, question 24
[193] *Pacheco Tineo*, ¶133
[194] Clarification. Q50

84. Fourth. Arcadia further informed them of their right to submit the case to review before the competent authority[195] by informing them of the remedies available to challenge their detention and outcome of their proceedings.[196]

85. Finally, they were sent to UST following a reasoned decision that is in accordance with the law and duly notified[197] since, as outlined above, they were lawfully denied refugee status.

5. Arcadia did not breach Article 17 or 19 of the convention when it separated the 808 Wairans from their family members

a. Arcadia is entitled to deny refugee status to family members who should be excluded from refugee status

86. Article 17[198] of the Convention, which encapsulates the principle of family unity, does not prohibit Arcadia from denying refugee status to the 808 Wairans who fall within the ambit of the exclusionary provisions.[199] Hence, Arcadia did not breach Article 17 of the Convention when it denied the 808 Wairans refugee status.

[195] *Pacheco Tineo,* ¶133
[196] Clarification, question 50
[197] *Pacheco Tineo,* ¶133
[198] Article 17(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."
[199] Clarification, Q15

b. Separating the 808 from their families was necessary in a democratic society

87. Arcadia did not breach Articles 17 or 19[200] of the Convention when it separated the 808 Wairans from their families. This Court has held that Articles 17 and 19 may be restricted where *"necessary in a democratic society"*[201]. A measure is necessary in a democratic society if it satisfies the requirements of (a) legality (b) suitability, (c) necessity and (d) proportionality outlined by this Court in the *Advisory Opinion on Rights of Children.*[202]

88. The requirement of legality stipulates that the restriction of Article 17 must be "*clearly established by law...in the formal and material sense*."[203] The removal of the 808 Wairans from Arcadia was legal since it was carried out by Arcadian courts and Arcadian authorities in accordance with Article 22(8) of the Convention.[204]

89. The requirement of suitability entails the restriction of Article 17 to have a legitimate "purpose" as recognized in other provisions of the Convention.[205] The 808 Wairans' presence in Arcadia had generated huge social unrest and severely compromised Arcadia's ability to promote the integration of the refugees.[206] Accordingly, the purpose of removing the them from Arcadia was to protect public order and safeguard the rights of the other

[200] Article 19: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."
[201] *Case of Castañeda Gutman v. United Mexican States,* Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Aug 6, 2008), ¶185
[202] *Advisory Opinion on Rights of Children*, ¶275
[203] *Advisory Opinion on Rights of Children*, ¶276.
[204] Hypothetical, ¶26 - 28
[205] *Advisory Opinion on Rights of Children*, ¶276
[206] Hypothetical, ¶25.

refugees, as recognized in Article 12(3)[207] (Freedom of Conscience and Religion) and Article 32[208] (Relationship between Duties and Rights) of the Convention.

90. Sending the 808 Wairans to UST was also necessary because Arcadia could adopt no other measure to protect their families.[209] They cannot remain in Arcadia because Arcadia did not have the capacity to take them in as a result of the mass influx of asylum applicants. Furthermore, Arcadia could not send them and their family members to other safe states since the other states were not willing to admit them. Arcadia had no choice but to transfer them to UST and separate them from their families.

91. Finally, transferring the 808 Wairans to UST is proportionate to the interests of Arcadia since it is the measure that "*least restricts*" the 808 Wairans and their family's right to family life and is "*closely adapted to the achievement of*" protecting public order and safeguarding the rights of the other refugees.[210] Although the familial separation does harm the best interest of the their children, Arcadia has ensured that it "*does not lead to an abusive or arbitrary interference in the family life of [their children]*"[211] by taking two measures.

[207] Article 12(3), Convention: "Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect **public safety, order, health**, or morals, or the **rights or freedoms of others**." (emphasis added)
[208] Article 32(2), Convention: "The rights of each person are limited **by the rights of others, by the security of all**, and by the just demands of the general welfare, in a democratic society." (emphasis added)
[209] *Advisory Opinion on Rights of Children*, ¶277
[210] *Advisory Opinion on Rights of Children*, ¶278
[211] *Advisory Opinion on Rights of Children*, ¶278

92. First, Arcadia sought to "*trace the members of [the children's] family*" and "*reunify [the children] with their families as soon as possible*"[212] by placing the children in the care of their closest relatives in Arcadia or in Child Protection Centers while waiting for relatives who could take care of them to be contacted.[213]

93. Second, Arcadia has ensured the "*care, protection and safety of the [children]*",[214] their "*right to health*" and "*right to education*"[215] by providing food, health, services, education and recreation to the children placed in Child Protection Centers.[216] Put simply, Arcadia has rigorously pursued the best interest of the children and minimized the scope of harm caused by the familial separation. The familial separation is hence proportionate to Arcadia's interests in protecting public order and safeguarding the rights of the other refugees.

94. Given the foregoing, the familial separation was thus *necessary in a democratic society* and Arcadia did not breach Article 17 or Article 19 of the Convention.

c. <u>Arcadia did not violate the children's right to be heard under Article 19 of the Convention</u>

95. Arcadia is not obliged to grant the 808 Wairan's children the right to be heard. This is because a child's right to be heard is necessary insofar as it assists the state in determining

[212] *Advisory Opinion on Rights of Children*, ¶105; UN Committee on the Rights of the Child (CRC Committee), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para.1)*, 29 May 2013, CRC /C/GC/14 ("*CRC General Comment No. 14*), ¶65
[213] Clarifications, Q21
[214] CRC General Comment No. 14, ¶71
[215] CRC General Comment No. 14, ¶77-79
[216] Clarifications, Q21

the measure more "*appropriate to his or her best interest*"[217]. For the reasons outlined in ¶97-98, Arcadia adopted the measure most appropriate to the children's best interest. It would be perfunctory for Arcadia to grant the children the right to be heard.

96. In any event, the Petitioners have not shown that Arcadia compromised the children's right to be heard under Article 19 of the Convention. Arcadia need not hear the children in court because their right to be heard must be tailored to their "*age and maturity*"[218] and children "*cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age*."[219] The fact that Arcadia was able to place the children in either the care of their closest relatives or in Child Protection Centers while waiting for relatives who could take care of them to be contacted is probative that Arcadia had heard the children. Therefore, the petitioners have not shown that Arcadia violated the children's right to be heard under Article 19.

IV REQUEST FOR RELIEF

97. Based on the aforementioned submissions, Arcadia respectfully requests this Honourable Court to declare and adjudge that the petition is inadmissible or in the alternative, hold that:

(i) Arcadia did not violate its obligations under Article 4, 7, 8, 22.7, 22.8, 17, 19, 24 and 25 in conjunction with Article 1(1); and

(ii) Dismiss the claim for reparations

[217] *Advisory Opinion on Rights of Children*, ¶282
[218] *Advisory Opinion on Rights of Children*, ¶277
[219] UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12; *Sahin v Germany* [GC] No 30943/96, ECHR 2003VIII: "[i]t would be going too far to say that domestic courts are always required to hear a child in court".