
IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

Case of Gonzalo Belano and 807 Other Wairan Persons

Petitioners

V

Republic of Arcadia

Respondent

MEMORIAL FOR THE STATE

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III. STATEMENT OF FACTS

Arcadia is a developed country characterized by sound democracy, clear separation of powers, and strong public institutions.¹ Due to Arcadia's strong economy, political stability, low levels of crime and violence, and its integration policies for migrants and refugees, the country has traditionally been a destination for migrants. Though there has been a gradual increase in the number of asylum seekers and refugees since the mid-2000s, from the year 2012 the number has increased significantly. In 2012 there were 5,500 refugees and by 2015, 18,000 refugees.²

Arcadia has ratified all the treaties of the universal human rights system, and most instruments of the Inter-American Human Rights System.³ The Constitution of the Republic of Arcadia recognizes the right to seek and receive asylum in accordance with the law and international human rights instruments.⁴ Additionally, the Law on Refugees and Complementary Protection (LRCP) lays down the criteria and procedures for determining refugee status, providing for procedures to be established in the event of massive influxes.⁵

A few days after August 15th, 2014, about 7000 people from Puerto Waira, who joined a caravan through social media networks, were waiting to cross the Arcadia – Tlaxcohitlan border. Due to the massive influx into the small border towns and villages in its southern border, the Arcadian government provided support through the National Police officers to officials from the National Migration Institute, who are responsible for immigration and border management. Citizens and organizations of Arcadia offered what limited resources they had in humanitarian assistance including food, clothing, shelter and even health brigades for the Wairans. Despite their

¹ Hypothetical, para 8

² Clarification Q&A 43

³ Hypothetical, para 9

⁴ Hypothetical, para 11

⁵ Hypothetical, para 13

best efforts, the large influx led to disturbances in the towns and the Wairans who arrived with medical conditions began to turn to the public health services of the communities.⁶

Undeterred Arcadian authorities held an extraordinary meeting with multiple government institutions as well as with agencies of the UN Systems to explore a comprehensive, multisectoral response. It was announced that State's intention, in accordance with the Constitution and the LRCP, was to facilitate and expedite the process by recognizing all the Wairans as *prima facie* refugees except for those falling within any of the cases covered by Art 40.⁷ The President of Arcadia reaffirmed the State's commitment to providing a safe haven and all necessary assistance. Due to the large influx, Arcadia faced serious challenges to guaranteeing all the economic, social and cultural rights of the Wairans. Resultantly, the Arcadian government called for the solidarity and shared responsibility of the international community and beseeched the Arcadian population and civil society organizations to provide humanitarian assistance.⁸

After commencing the registration and documentation process of Puerto Wairans that sought *prima facie* refugee status, Arcadian authorities identified 808 individuals with criminal records. To guarantee national security and preserve public order, Arcadia detained 490 of these 808 individuals in an immigration detention center and the remaining in separate penitentiary units.⁹ The Wairans had access to food, health services, education, variety of recreational activities, were able to receive visits from family members, friends, and their legal representatives, as well as to communicate with them by telephone.¹⁰ Within the 45 business days establish by law, it was discovered that although the individuals qualified for refugee status, they were excluded from

⁶ Hypothetical, para 16

⁷ Hypothetical, para 18

⁸ Hypothetical, para 19

⁹ Hypothetical, para 22

¹⁰ Clarification Q&A 18

protection according to the LRCP and the 1951 Convention Relating to the Status of Refugees (The 1951 Convention) as a result of their past criminal involvement which ranged between forcible recruitment, drug trafficking, extortion, human trafficking, sexual violence, kidnaping, and even murder.¹¹ Amongst the individuals is Gonzalo Belano who committed the crime of extortion. News of this, as well as the spread of propaganda and false information caused unrest amongst the citizens of Arcadia. Nevertheless, the Arcadian Authorities launched awareness raising campaigns to promote integration and prevent racism to protect Wairans in Arcadia.

Despite best efforts, Arcadian authorities concluded that they did not have capacity to accommodate everyone. After a regional call to accommodate migrants, in keeping with the principle of shared responsibility and non-refoulement went unanswered, Arcadia published an Executive Decree ordering deportation of the 808 individuals, prioritization of the most vulnerable persons and their desire to prevent crimes and further weakening of their social fabric.¹² After another unanswered plea, an agreement was struck with the United States of Tlaxcochitlán (UST) to accept and protect the 808 individuals with special emphasis that they not be deported back to the Puerto Waira.¹³

591 of the excluded individuals were later sent to the UST, while the remaining 217 persons who filed a writ of amparo had their deportation order stayed while their cases were heard before the Pimi Immigration Court.¹⁴ After the conclusion of proceedings and appeals, the remaining individuals were sent to UST. UST after holding the 808 individuals for a little over a month, in direct contravention with their agreement with Arcadia, sent them back to Puerto Waira, where Gonzalo Belano and 29 others were killed and 7 disappeared. After the UST reneged on its

¹¹ Clarification Q&A 2

¹² Hypothetical, para 26

¹³ Clarification Q&A 66

¹⁴ Hypothetical, para 28

agreement concerning the 808 Wairans, Arcadia suspended the second payment once the individuals had been deported, claiming the agreement between the parties had been breached.

On June 28, 2015, the family of Gonzalo Belano, a Wairan who died after deportation, sought legal advice from the Legal Clinic for Displaced Persons, Migrants, and Refugees of the National University of Puerto Waira. A claim was brought alleging administrative irregularities and seeking comprehensive reparation of the harm in Arcadia. The Clinic's claim however, was dismissed for failure to comply with the requirements set forth in Arcadian law, specifically that lawsuits in administrative matters must be filed directly with the court of competent jurisdiction.¹⁵

On January 20, 2016, the Legal Clinic filed a petition with the Inter-American Commission on Human Rights on behalf of the 808 deportees. At the admissibility stage, Arcadia alleged failure to exhaust domestic remedies with respect to the 591 person who did not file an appeal in Arcadia; as well as failure to individually identify 771 alleged victims in the case before the IACHR. The IACHR declared the petition admissible and in its merits report, attributed international responsibility to Arcadia for the violation of the rights to life (art 4), personal liberty (Art 7), a fair trial (Art 8), to seek and be granted asylum (Art 22.7), non-refoulement (Art 22.8), family unity (Art 17), the best interest of the child (Art 19), equal protection (Art 24) and judicial protection (Art 25) to the detriment of Gonzalo Belano and 807 other Wairans. Because of Arcadia's failure to comply with the Commission's recommendations, the case was submitted to the jurisdiction of the Inter-American Court of Human Rights on November 5, 2018, alleging the violation of the same articles established in the IACHR's report on the merits.

¹⁵ Hypothetical, para 33

IV. LEGAL ANALYSIS

A. ADMISSIBILITY

Failure to individually identify 771 of the alleged victims

According to Art 35(1) of the Rules of Procedure of the Inter-American Court of Human Rights, the case shall be presented to the Court through the submission of the report to which Art 50 of the Convention refers, which must establish all the facts that allegedly give rise to a violation and identify the alleged victims.

In the *Case of The Juvenile Re-education Institute v Paraguay*¹⁶, the Court stated that in its jurisdictional function, and pursuant to Art 62 of the ACHR, it has jurisdiction over “*all cases concerning the interpretation and application of the provisions of the Convention*” for the purpose of establishing the international responsibility of a State party to the Convention for alleged violations of the human rights of persons subject to its jurisdiction. Hence, the Court deems that proper identification, by name, of the person whose right or freedom is alleged to have been breached is essential.¹⁷

Additionally, to guarantee the *effet utile* of Art 23 of the Rules of Procedure and effective protection of the rights of the alleged victims, the latter must be properly identified and named in the application that the IACHR files with the Court.¹⁸

¹⁶ IACtHR, *Case of the “Juvenile Reeducation Institute” v. Paraguay*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 112 Judgment 2 September 2004

¹⁷ *Case of The Juvenile Re-Education Institute* (supra) para 107

¹⁸ *Case of The Juvenile Re-Education Institute* (supra) para 109

Failure to individually identify 771 of the alleged victims thus constitutes a violation of Art 35(1) of the Rules of Procedure. The case must therefore be processed regarding Gonzalo Belano and the 36 other alleged victims identified in the application only.¹⁹

Failure to exhaust local remedies

a. Failure of 591 individuals to file for an appeal

For a petition to be admitted, domestic remedies must be pursued and exhausted in accordance with general principles of international law.²⁰ The court has held that “*the [S]tate is principle guarantor of human rights and that, as a consequence, if a violation ... occurs the State must resolve the issue in a domestic system and redress the victim before resorting to international forums... Domestic courts and state authorities have the duty to guarantee the implementation of the American Convention at the domestic level.*”²¹ It is not up to the Court or the Commission to identify domestic remedies to be exhausted; that duty falls upon the State to label them and their effectiveness during the admissibility stage before the Commission.²²

A Petitioner is only exempted if it is demonstrated that the remedies are inadequate, inappropriate and/or ineffective to remedy the type of violation alleged and that they are unavailable to the victims.²³ Adequate domestic remedies are those which are suitable to address an infringement of a legal right and an effective remedy is one capable of producing the result for which it was designed.²⁴

¹⁹ *The Juvenile Re-education Institute v Paraguay (supra)*, para 110

²⁰ ACHR Art 46 1(a)

²¹ IACtHR, *Case of Acevedo - Jaramillo et.al v. Peru (Interpretation of Judgment on Preliminary Objections, Merits and Costs)* November 24, 2006, para 66.

²² IACtHR, *Case of Chocrón Chocrón v. Venezuela (Preliminary Objection, Merits, Reparations and Costs)*, July 1, 2011, para.23

²³ IACtHR, *Case of Chitay – Nech et al. v. Guatemala (Preliminary Objections, Merits, Reparations, and Costs)*, May 25, 2010, para 31

²⁴ Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4 para. 64

Art 25(1) of ACHR gives expression to the procedural institution known as amparo, a prompt remedy designed for the effective protection of fundamental rights. Amparo can be applied to rights mentioned in Art 77(2) of ACHR, which are non-derogable in emergency situations.²⁵ Amparo is a rapid, adequate and effective to question the possible violation of the rights recognized in Art 22(7) and 22(8) of the Convention, or in the Constitution and laws of each State. Moreover, such remedy may, in certain circumstances, be effective to partially or totally remedy the situation that violates such rights and, perhaps, to allow a reassessment of the administrative procedures.²⁶

Arcadia provides for constitutional remedies which seeks to protect the fundamental rights of individuals in cases involving direct violations of the constitution and the international treaties to which the State is a party. This includes the amparo proceedings, which may be filed before any court that refers the matter to the competent Amparo judge.²⁷

The State therefore request the Court to declare that the failure of the 591 individuals to file a writ of amparo in Arcadia resulted in a failure to exhaust domestic remedies which renders their petition inadmissible.

b. Failure to comply with Arcadia's local procedures.

Under Art 1(1) of ACHR, States Parties have a positive obligation to ensure the free and full exercise of rights recognized by the Convention to every person subject to its jurisdiction. The obligation implies the duty of States to organize the governmental apparatus and all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.²⁸

²⁵ IACtHR, *Habeas Corpus in Emergency Situations* (Arts 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8

²⁶ IACtHR, *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*. (Preliminary Objections, Merits, Reparations and Costs) Judgment of November 25, 2013, para 160

²⁷ Clarification Q&A 10

²⁸ Velásquez Rodríguez Case, (supra), para. 166

The Court has stated that Art 8 ACHR requires that legal counsel be provided when it is necessary for a fair hearing. Additionally, an indigent does not have to exhaust relevant domestic remedies when his indigency prevents him from obtaining counsel necessary to effectively protect a right.²⁹

Arcadia domestic laws provide for two administrative routes for challenging the decision of exclusion from refugee status with the competent court.³⁰ Firstly, the motion for reconsideration consists of the review of an administrative decision considered to be unlawful or that has affected the legal interest of persons concerned. It is filed with the same authority that issues the contested decision and adjudicated by the most senior member of the institution.³¹ The second administrative route is a motion for administrative cassation which consists of challenging an administrative decision before a court specialized in the matter.³² Additionally, Arcadian authorities informed the individuals that they could request legal assistance and representation,³³ which includes free legal assistance in criminal matters, as well as a separate proceeding in accordance with the State's obligation under the Convention.³⁴

The State therefore submits that the petitioner's failure to comply with the domestic legal procedures resulted in failure to exhaust local remedies.

²⁹ IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para 31

³⁰ Hypothetical, para 35

³¹ Clarification Q&A 10

³² Clarification Q&A 10

³³ Clarification Q&A 9

³⁴ Hypothetical, para 35

B. MERITS

Article 4 - the right to life

The right to life is a fundamental human right, the full enjoyment of which is a prerequisite to the enjoyment of all other human rights.³⁵ Unless it is respected, all other rights will be meaningless.³⁶ The duty to guarantee the right in Art 4, in conjunction with Art 1(1) of the ACHR presupposes that no person may be arbitrarily deprived of his life, as well as imposes an obligation on States to adopt any and all necessary measures to protect and preserve the right of individuals under their jurisdiction.³⁷ This obligation extends beyond the State's primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breach of such provisions. It may also imply an obligation on authorities to take preventative measures to protect an individual whose life is at risk from the criminal act of another individual.³⁸ Additionally, this obligation extends beyond the relationship between the State agents and the persons subject to their jurisdiction but also includes the obligation to prevent third parties, in the private sphere, from violating the protected legal rights.³⁹

In this regard, the ECHR has stated that the obligation imposed by Art 4 must be interpreted in a manner which does not impose an impossible or disproportionate burden on the authorities. Accordingly, for a positive obligation to arise, it must be shown that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified

³⁵ IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*, (Merits, Reparations and Costs) Judgment 31 January 2006 Series C No. 140

³⁶ *Case of The Juvenile Re-education Institute (supra)*

³⁷ IACtHR, *Case of Escué-Zapata v. Colombia (Merits, Reparations and Costs)* Judgment of July 4, 2007. Series C No. 165

³⁸ ECtHR, *Osman v United Kingdom* [1998] EHRR 101 p 115

³⁹ IACtHR, *Case of the "Mapiripán Massacre" v. Colombia*, Judgment of September 15, 2005. Series C No. 134 para. 111

individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their power which, judged reasonably, might have been expected to avoid that risk.⁴⁰

The Court has acknowledged that a State cannot be responsible for all the human right violations committed between individuals within its jurisdiction. States Parties obligation to adopt preventative and protective measures is conditioned by the awareness of a situation of real and imminent danger for individuals and the reasonable possibilities of preventing or avoiding that danger. Thus, though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, it is not automatically attributable to the State, because the specific circumstances of the case and the execution of the guarantee obligations must be considered.⁴¹

The State submits that it is a disproportionate and impossible burden imposed on Arcadia to prevent against any possible threat to the lives of the individuals in another country that it has no control over. Firstly, Arcadia made an agreement with the United States of Tlaxochitlan, requesting that the people not be deported because of the danger they faced.⁴² Secondly, the failing economic and social situation of Arcadia as a result of the large influx made it unreasonable for Arcadia to provide additional means of protection, as it would be a gross misjustice to the Arcadians and the other Wairans already recognized as refugees. Furthermore, Arcadia called for the solidarity and shared responsibility of the international community to aid in the protection of these individuals' rights, which included their right to life, to which there was no avail.⁴³ Arcadia

⁴⁰ *Osman v UK* (supra) p 116

⁴¹ *Case of the Pueblo Bello Massacre* (supra), para 123

⁴² Clarification Q&A 66

⁴³ Hypothetical para 26

took reasonable measures within its scope of power to ensure the protection of the right to life of the individuals, thus, there was no breach of the right to life.

Article 7 - the right to personal liberty

The essence of Art 7 of the ACHR is the protection of the liberty of the individual from arbitrary or unlawful interference by the State and the guarantee of the detained individual's right of defense.⁴⁴ In this regard it must be noted that there is a difference between detention with respect to criminal proceedings, and detention with respect administrative proceeding with the view to the deportation of an individual. The Commission has established that any deprivation of the liberty of an individual must be informed by the rules prescribed in Art 7 ACHR, and that those rules are not limited to detentions involving the investigation and punishment of crimes but also extend to other spheres in which the State can administer its authority.⁴⁵ Such spheres include the detention of individuals for purposes of controlling the entry and residence of foreigners within the State's borders, or for reasons having to do with their physical or mental health, and during occupations governed by international humanitarian law that may require the internment of the civilian population as a security measure or for compelling safety reasons.⁴⁶

The Commission has stated that an individual must be informed by the rules prescribed in Art 7 ACHR. Firstly, Art 7(1) establishes that every person has the right to personal liberty and security. The State however, in certain circumstances, has the power to infringe on this right so long as the requirements set out in the Convention are satisfied. Secondly, Art 7(2) states that no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established

⁴⁴ Case of The Juvenile Re-education Institute (supra)

⁴⁵ IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 210.

⁴⁶ IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 210.

pursuant thereto. Art 7(2) has a formal aspect that requires strict adherence to the procedures objectively set forth in the law of the State in question,⁴⁷ therefore a person's right to personal liberty can only be affected by the law.⁴⁸ The Court defined a law as a general legal norm closely related to the general welfare, enacted by the democratically elected legislative bodies established by the constitution. The law must also have been established prior to the arrest of the individual.⁴⁹ An arrest would therefore be lawful once the State has followed the proper procedure set out by their properly created domestic laws that existed prior to the detention of the person.

The ACHR does not limit the extent, purpose or modes of detention in immigration cases⁵⁰ and in accordance with international standards, the deprivation of liberty was carried out in strict compliance with the procedures established under its domestic law. The 808 individuals, who were excluded from protection in accordance with the LRCP and the 1951 Convention,⁵¹ were detained on the basis of section 111 of the General Immigration Act.

After a case-by-case assessment, the 808 individuals with criminal records, were detained by Arcadian authorities to ensure their appearance for their case because they had criminal records.⁵² Arcadian authorities determined that the detainees were slated to be deported, based on the Executive decree as they fell within the exclusion clauses of the LRCP and 1951 Convention.⁵³ The steps adopted by Arcadia were in conformity with the specified procedure and therefore met their international obligations.

⁴⁷IACHR *Gangaram Panday v Suriname*, Merits, January 21,1994, Series C No.16 para 47

⁴⁸ IACtHR, *Case of Chaparro Alvarez and Lapo Inniguez v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Judgment 21 November, 2007 Series C No. 170

⁴⁹ IACHR, Advisory Opinion OC-6 86, The Word 'Laws' in Article 30 of the American Convention on Human Rights, May 9,1986, Series A No.6 para. 38

⁵⁰ IACHR, Report No. 19-02, Petition 12.379 *Mario Alfredo Lares-Reyes, Vera Allen Frost and Samuel Segura (United States)*, February 27, 2002

⁵¹ Hypothetical para13

⁵² Clarification Q&A 15

⁵³ Clarification Q&A 15

Art 7(3) states that no person shall be subject to arbitrary arrest or imprisonment. The ICC has, on numerous cases, reiterated that there is a distinct difference between an unlawful arrest and arbitrary arrest. An arrest can be lawful but still arbitrary in nature. In *Gangaram Panday* the Court held that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed incompatible with the respect for the fundamental rights of the individual because among other things, they are unreasonable, unforeseeable or lacking in proportionality.⁵⁴ The concept was stated intelligibly in *Tibi* when the court stated that deprivation of liberty must be '*indispensable in a democratic society*.'⁵⁵ In *Chaparro Alvarez Iniguez v Ecuador*⁵⁶ the Court established four requirements that must be satisfied for an arrest not to be considered arbitrary:

- (i) the purpose of the measures that deprive or restrict liberty is compatible with the convention and is a legitimate purpose.
- (ii) that the measures adopted are appropriate to achieve the purpose sought.
- (iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought.
- (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.⁵⁷

The Court further elaborated that ensuring that an accused does not prevent the proceedings from occurring or evade the judicial system is a legitimate purpose in accordance with the first

⁵⁴ *Ganagram Panday* (supra) para 47

⁵⁵ IACtHR, *Tibi v Ecuador*, (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 7, 2004 para 196

⁵⁶ *Chaparro Alvarez Iniguez v Ecuador* (supra)

⁵⁷ *Chaparro Alvarez Iniguez* (supra) para. 93

requirement.⁵⁸ This was also reiterated in *Tibi* where the Court stated that the only reasons that justified the imposition of preventative detention were risks of flight and the obstruction of the investigation.⁵⁹ In determining whether there was an arbitrary arrest the Court may also take the time detained before trial into consideration.⁶⁰

The LRCP in Arcadia articulates that refugee status shall not be granted to any person with respect to whom, upon examination of the application, there are reasonable grounds for considering that firstly, he has committed a crime against peace, genocide, crimes against humanity, or war crimes, as defined in the international instruments to which Arcadia is a party; a serious non-political crime outside the national territory prior to his admission to the territory or acts contrary to the purposes and principles of the United Nations.⁶¹

The crimes committed by 808 Wairans were classified as “serious non-political crimes” and therefore, they fell to be excluded from claiming refugee status.⁶² The level of detention was proportionate as the Wairans were being held in an immigration detention center,⁶³ an establishment built for the particular purpose of holding non-citizens. Additionally, the 318 individuals held in penitentiary units were housed in separate units so that they were not in contact with person detained on criminal charges.⁶⁴ Further, the detainees were arrested not to be criminally prosecuted, but rather it was an administrative detention to determine their entitlement to refugee status. The purpose of the arrest was not to exercise the punitive power of the State to prosecute them criminally; rather it was to determine whether it was proper to legalize their immigration status or return them to another country.

⁵⁸ Chaparro Alvarez Iniguez (supra) para 93

⁵⁹ *Case of Tibi* (supra) para. 180

⁶⁰ IACHR, *Acosta Calderon v Ecuador* (Merits, Reparations and Costs), Series C No. 129, June 24, 2005, para 70

⁶¹ Hypothetical para 13

⁶² Clarification Q&A 2

⁶³ Hypothetical para 22

⁶⁴ Clarification Q&A 3

Art 7(4) states that anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. It establishes a mechanism to avoid the unlawful or arbitrary conduct from the very act of deprivation of liberty, and to ensure the defense of the detainee.⁶⁵ Furthermore, the detainee and the legal representatives have the right to be informed of the motives of and reasons for the detention and about the rights of the detainee.⁶⁶ After a detainee is deprived of his liberty he must be informed of his right to establish contact with another person, kin or attorney, and inform them that he has been taken into custody.⁶⁷ In the case of consular notification, the Court has pointed out that the Consul may assist the detainee in various acts of defense such as granting or hiring legal counsel, obtaining evidence in the country of origin, corroborating the conditions under which the legal assistance is provided and observing the situation of the accused while he is in prison.⁶⁸

The Arcadian authorities informed the 808 individuals verbally and in writing that they would not be eligible for prima facie refugee status because they had criminal records and would therefore be detained and subject to ordinary asylum proceedings in accordance with the LRCP.⁶⁹ They were then informed of their rights during the detention and asylum process, particularly regarding the possibility of requesting free legal assistance and contacting their consulate, if they so wished.⁷⁰ Additionally, the individuals were informed that they had a number of remedies available to challenge their detention and the outcome of their asylum proceedings, if unfavorable.⁷¹ At the

⁶⁵ IACtHR, *Case of Gomez Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) Judgment of July 8, 2004, para 92

⁶⁶ Gomez Paquiyauri (supra), para 92

⁶⁷ IACtHR, *Case of Bulacio v Argentine* (Merits, Reparations and Costs), Judgement of September 18, 2003, para 130

⁶⁸ Bulacio (supra), para 130

⁶⁹ Clarification Q&A 50

⁷⁰ Clarification Q&A 50

⁷¹ Clarification Q&A 50

time of their arrest, they were immediately brought before the administrative authority and transferred to the places where they remained in custody.⁷²

Further, Art 7(5) states that any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. A detainee must be brought promptly before a judge or competent before a judge or competent judicial authority, in accordance with the principles of judicial control and procedural immediacy.⁷³ The Court has articulated that the term immediately must be interpreted according to the special characteristics of each case, no situation no matter how serious empowers the authorities to unduly extend the detention period.⁷⁴

The State submits that Arcadian authorities acted in accordance with its obligations under Article 7.

Article 8 and Article 25 – Right to fair trial and Judicial Protection

Both the Court and the Commission have indicated that Art 8 recognizes the concept of due process of law as a necessary prerequisite to ensure the adequate protection of those persons whose rights or obligations are pending determination before the court or tribunal. The Court also recognizes that the concept of due process as articulated in the Convention is applicable to all the judicial grantees referred to in the Convention.

⁷² Clarification Q&A

⁷³ Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case-law and Commentary*, (Oxford New York: Oxford University Press 2011)

⁷⁴ IACtHR, *Case of Maritza Urrutia v Guatemala* (Merits, Reparations and Costs), Series C No. 103, Judgement of November 27, 2003, para 73

According to the IACHR, while migrant workers risk is significant, it is not the same thing as personal liberty or the possibility of losing it for several years, which is what is at stake in a criminal proceeding. Therefore, the Commission itself has maintained that not all of the guarantees required for a fair trial in criminal matters are applicable to deportation or exclusion.⁷⁵

Art 8(1) states that every person has the right to a hearing with due guarantees and within reasonable time, by a competent, independent, and impartial tribunal, previously established by law. Art 8(2) provides that a person accused of criminal offences has the right to be presumed innocent so long as the guilt has not been proven according to the law.

Due process is an integral part of any judicial process. The IACHR, and IACtHR, can determine whether in a given case due process has been complied with. In these cases the Commission have made it explicitly clear that they are not concerned with whether the court decision itself was in fact correct, but whether the principles of due process have been followed.⁷⁶ The Commission acknowledges the fact that domestic courts are better suited to properly apply their domestic law and that it is not within its competence to decide whether domestic law had been properly applied by the domestic court.⁷⁷

A key feature of Art 8(1) is that the court or tribunal be competent, independent and impartial. In the case of *Castillo Petruzzi*, the Court held that a basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law.⁷⁸ States are not to create tribunals that do not use the duly established procedures of the legal process to displace the jurisdiction belonging to the

⁷⁵ *Migrant Workers and their Families in the Hemisphere*, page 98

⁷⁶ IACHR, Report N 74/90, Case 9850 (Argentina), October 4, 1990

⁷⁷ Report N 74/90 (supra)

⁷⁸ IACtHR, *Castillo Petruzzi v Peru*, (Merits, Reparations and Costs), May 30, 1999, Series C No. 52, para 128

ordinary court's judicial tribunal.⁷⁹ This means that a court or tribunal is only allowed to rule on matters that fall within its jurisdiction and failing that the tribunal would be acting *ultra vires*.⁸⁰

The Commission has stated that “*Decisions in the area of migration cannot be left to non-specialized administrative or police officials. [...] Conferring the power on administrative officials is compatible with international human rights law. Nonetheless, the requirements of impartiality and accountability mentioned above must be met.*”⁸¹

Additionally, the Commission has emphasized that the doctrine of separation of powers is a primary rationale in determining whether the tribunal or court meets Convention standards. The maintenance of separation of powers and the rule of law appear to be the main criteria when considering Art 8(1). The Commission also emphasized, that the irrevocability of judges must be considered a necessary corollary of their independence. In the *Palamara case* the Court held that when considering independence and impartiality it must be ensured that the judge or court hearing a case does so based on the utmost objectivity.⁸²

Article 8(2) provides that every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. Art 8(2) (a)-(h) articulate minimum guarantees that every person, with full equity, is entitled. Equality in this case means that there must be no discrimination on the grounds established by Art 1(1) of the Convention. Amongst these guarantees there are two major requirements that have been developed that are applicable to all categories of cases, while respecting the specific of each.⁸³ The first requirement is that the case should be brought within a reasonable time, and the second

⁷⁹ *Castillo Petruzzi (supra)* para 128

⁸⁰ IACtHR, *Loayza Tamayo v Peru*, (Merits) September 17, 1997, Series C No.33, para 61

⁸¹ Report on Migrant Workers and their Families in the Hemisphere, para. 99(a)

⁸² IACtHR, *Palamara Iribarne v Chile* (Merits, Reparations and Costs) November 22, 2005, Series C No 135, para 145-6

⁸³ The Inter-American Court of Human Rights: Case Law and Commentary

requirement is that adequate means should be provided for the defense, so that the parties have equality of arms. Due its subjective nature there is no existing definition of ‘reasonable time’, however the Court has come up with a three elements to assist in determine what is a ‘reasonable time’ according to the circumstances: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities.⁸⁴ The second requirement is self-explanatory, however slightly differs when a foreigner is involved. When a foreigner is arrested, at the time he is deprived of his freedom and before he makes his first statement before the authorities, he must be notified of his right to establish contact with consular official and inform the latter that he is in custody of the State.⁸⁵ The right to consular notice however, pertains solely to the individual and not the sending State.⁸⁶ The IACtHR has also held that the right to consular notification is conditioned solely upon the wishes of the interested person.⁸⁷

It has been established by the IACtHR that Art 25(1) can be likened to a general provision that encompasses the procedural institution of *amparo* or the protection of human rights.⁸⁸ The Court further established that under this article, States have an obligation to offer effective judicial remedy, for persons that fall within their jurisdiction, for acts that violate their fundamental rights recognized in both the ACHR and their respective constitutions.⁸⁹ The remedy cannot be illusory, the State must ensure that the procedural means or instruments designed to guarantee such rights are truly effective in establishing whether there has been a breach of a person’s human rights and providing a suitable remedy for that breach. In determining whether these obligations have been

⁸⁴ Palamara Iribarne (supra) para 145-6

⁸⁵ Chaparro Alvarez v Ecuador (supra) para. 164

⁸⁶ IACtHR., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 82.

⁸⁷ IACtHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 90.

⁸⁸ Habeas Corpus in Emergency Situations

⁸⁹ IACtHR, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No 9, para. 23.

met the Court has asked whether the judicial power is sufficiently independent and impartial and has the means to carry out its judgments.⁹⁰ A sign of ineffectiveness would be seen in situations that constitute a denial of justice such as unjustified delay in decision, or a denial of access to judicial remedy.⁹¹ Even in deportation proceedings where the person is undocumented, effective remedies that enable the person to request the protection of his rights, must be offered.⁹² The conjoined effect of Art 22 of the International Convention on the Protection of Migrant Workers and Art 25 of the ACHR, parties shall have the right to assert the grounds for their opposition to their removal, as well as to submit their case to the proper authority for review, unless there are compelling national security reasons against it.⁹³ While they await a decision, a stay of execution of the removal order may be requested.⁹⁴ The IACHR has articulated that that in the situation where the deportation decision was made in the administrative sphere, there must be an opportunity for the judicial review of decisions.⁹⁵ The judges of the State must maintain a minimum of supervision with respect to the legality and reasonableness of the decisions of the administrative authority.⁹⁶

Arcadia has a sound democracy, a clear separation of powers, and should therefore be no doubt of their Judicial branch's independence and impartiality. The Court's suspension of the deportation order of the 217 detainees, and to allow writ of *amparo* to be heard is further indicative of Arcadia's judicial branch's independence and impartiality,⁹⁷ as they acted in opposition of the executive branch to ensure the protection of the 217 Puerto Wairan's rights. It is also within the

⁹⁰ Judicial Guarantees in States of Emergency, (supra) para. 24.

⁹¹ Judicial Guarantees in States of Emergency, (supra) para. 24.

⁹² Migrant Workers and their Families in the Hemisphere, para. 77

⁹³ Migrant Workers and their Families in the Hemisphere, para. 99(e).

⁹⁴ Report on Migrant Workers and their Families in the Hemisphere

⁹⁵ Report on Migrant Workers and their Families in the Hemisphere, para. 99(e).

⁹⁶ Report on Migrant Workers and their Families in the Hemisphere,

⁹⁷ Hypothetical para 28

Pima Immigration Courts jurisdiction to order the suspension of the deportation order as matters of deportation fall directly within the purview of immigration matters and therefore the Immigration Court. The principal duty of the State is the protection of its citizens, and that to those ends it is justified in deciding that certain categories of crimes are a threat per se to the safety and welfare of the community, without it meaning that the State has failed in its duty to admit defenses against the legal consequences of having committed such a crime. Additionally, the month between the issuance of the claim and the commencement of court proceeding was reasonable time for the parties to come forth with a proper defense while not unnecessarily delaying the matter. There is nothing in the Convention that indicates that the State must provide legal counsel free of cost to all foreigners who may be subject to deportation. In line with their obligations, Arcadian authorities informed the detained individuals both verbally and in writing of their right to request legal assistance and provided a list with contact information for civil society organizations and legal clinics that could advise and represent them legally.⁹⁸ The detained individuals also had the option of challenging the decision of their exclusion from refugee status through administrative or constitutional means, however only 217 people challenged the decision using the constitutional route by filing for a claim of *amparo*.⁹⁹ Additionally, though the 217 detainees challenged the appeals, which were not favorable, Arcadia still met its obligation under the ACHR to provide an effective judicial remedy.

Article 17 and 19 – Right of the Family and Rights of the Child

Art 19 ACHR states that 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. A child is an object of protection. It is also a subject of rights, which include the right to due process and the right to life.

⁹⁸ Clarification Q&A 47

⁹⁹ Hypothetical para 28

This reiterates the principle that children have special rights which correspond to the specific duties owed to them by their family, society and the State.¹⁰⁰ The Court has established the cardinal principle of the protection of the child, called the ‘regulating principle’, which states that the State and public authorities should always act in the child’s ‘best interest’ – said to be of paramount importance.¹⁰¹ The State also has a positive obligation to protect children, a duty to protect their right to life. When it is the very life of the child at risk the State must ‘*adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.*’ Additionally, Art 17 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Art 17 and 19 are linked as the child has the right to live with their family whose role is to provide material affective and psychological support.¹⁰²

Arcadia, in an attempt to accommodate all those that travelled to their border seeking asylum, recognized all Wairans, except those within the exclusion clause, as *prima facie* refugees. Arcadia expended incredible effort and resources to accommodate all refugees including families and children. When Arcadia reached capacity, Arcadia still established that bases of most vulnerable persons, who do not have criminal records, would be prioritized. Even though children were not specified they, without a doubt, fall under the vulnerable persons category. Arcadian authorities also did not deport or deny entry to any Wairan children. Although the deportation of the 808 Wairans resulted in the separation of families, it was a necessary measure to ensure the national security of Arcadia. Arcadian Authorities still acted in the children’s best interest as they made every effort to ensure the wellbeing of the children while locating relatives that could take care of

¹⁰⁰ IACtHR, *Las Dos Erres Massacre v Guatemala* (Preliminary Objections, merits, Reparations and Costs) November 24, 2009, Series C no. 2011, para 184

¹⁰¹ IACtHR, Advisory Opinion OC-17 Juridical Condition and Human Rights of the Child, August 28, 2002, para 56.

¹⁰² The Inter-American Court of Human Rights: Case-law and Commentary

them. If no relatives could be found Arcadian authorities placed the children in the Custody of the State where they had facilities and resources available to them to ensure their continued growth and development in a safe and healthy environment while they awaited to get into contact with relatives that could take of them.

Article 22.7 – right to seek and be granted asylum

Art 22(7) ACHR provides that “*Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the States and international conventions, in the event he is being pursued for political offenses or related common crimes.*” According to the Commission in the *Case of Haitian Interdiction – Haitian Boat People (United States)*,¹⁰³ Art XXVII of the American Declaration, of which Art 22(7) of the ACHR on Human rights bares similar formulation,¹⁰⁴ requires that two criteria must be satisfied. The right to seek and receive asylum on foreign territory must firstly, be in “*accordance with the laws of each country*” and secondly, “*in accordance with international agreements.*” Thus, in order for the right to seek and receive asylum in foreign territory to exist, it must be in accordance with both international agreements and the domestic laws of the country in which refuge is sought. In this regard, the Commission has noted that “international agreements” refers to the 1951 Convention and its 1967 Protocol.¹⁰⁵

Art 48 of the Constitution of Arcadia recognizes the right to seek and receive asylum in accordance with the law and international human rights instruments.¹⁰⁶ Additionally, under Art

¹⁰³ IACHR, Report on Merits No. 51/96, Case 10.675, Haitian Interdiction – Haitian Boat People (United States), March 13, 1997

¹⁰⁴ Haitian Boat People (United States), para. 154

¹⁰⁵ Haitian Boat People (United States), para. 155

¹⁰⁶ Hypothetical, para 11

48, Refugees shall enjoy special protection guaranteeing the full exercise of their rights and the State shall respect and guarantee the principle of non-refoulement, in addition to emergency humanitarian and legal assistance.¹⁰⁷ Arcadia's conformance to international standards is reflected in LRCP, of which Art 12¹⁰⁸ and 40¹⁰⁹ bares a similar formulation of the articles found in the 1951 Convention and its 1967 Optional Protocol.

a. Arcadia acted in accordance with a State Party's obligation under the right to seek and receive asylum in a situation of Mass Influx

The Court in the *Case of the Pacheco Tineo Family* stated that in accordance with the principles established in Art 22(7) and 22(8) of the ACHR, read in conjunction with Arts 8 and 25, and taking into account the UNHCR guidelines and criteria, asylum seekers must have access to proceedings to determined this status that permit a proper examination of their request in keeping with the guarantees contained in the ACHR.¹¹⁰ However, the UNHCR has recognized that mass displacement usually makes individual refugee status determination impracticable.¹¹¹

Art 30 of the LRCP allows for the Ministry of the Interior to establish guidelines to be followed in the event of a massive influx in order to deal with them as a group¹¹². According to UNHCR Protection of Refugees in Mass Influx Situations: Overall Protection Framework¹¹³, *prima facie* determination or acceptance on a group basis is a traditional response to mass influx of individuals in a country. According to the UNCHR Handbook, recourse can be had to "group-determination" of refugee status whereby each member of the group is regarded *prima facie* as a refugee in

¹⁰⁷ Hypothetical, para 11

¹⁰⁸ Hypothetical para 12

¹⁰⁹ Hypothetical para 13

¹¹⁰ *Pacheco Tineo Family*, para 159

¹¹¹ Protection of Refugees in Mass Influx solutions: Overall Protection Framework, EC/GC/01/4, February 19, 2001, para 3

¹¹² Hypothetical, para 13

¹¹³ *Pacheco Tineo Family*, para 159

circumstances where there is need to provide urgent assistance and individual determination is impractical to carry out.¹¹⁴

According to Conclusion No. 22,¹¹⁵ in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out in the Conclusion. This includes the requirement that the asylum seekers are to be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity. Additionally, due to difficulties to provide full standard of treatment foreseen under the 1951 Convention, the minimum standard of immediate treatment provided for in Conclusion No 22¹¹⁶ adopted in 1981 has been accepted as an important yardstick against which to measure treatment in situation of large-scale influx.¹¹⁷

The State submits that Arcadia recognized all the individuals as *prima facie* refugees,¹¹⁸ in accordance with applicable international standards of fair and efficient asylum procedures.¹¹⁹ This includes access and availability of information on the procedures and a clearly identified authority, CONARE, with responsibility for examining requests for refugee status and taking a decision in the first instance and who conducted a short interview. Additionally, the Wairans obtained both a refugee document and work permit within 24 hours.¹²⁰

Furthermore, the treatment of the mass influx of Wairans by Arcadia reflected the minimum basic standards set out in Conclusion No. 22. This includes not being penalized or exposed to any

¹¹⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979 (re-edited 1992), para. 44

¹¹⁵ Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) - 1981

¹¹⁶ Conclusion No. 22

¹¹⁷ Protection of Refugees in Mass Influx solutions: Overall Protection Framework, para 8

¹¹⁸ Hypothetical, para 18

¹¹⁹ United Nations High Commissioner for Refugees, Fair and Efficient Asylum Procedures: A non-exhaustive overview of applicable international standards, September 2, 2005

¹²⁰ Hypothetical, para 20

unfavourable treatment solely on the ground that their presence in the country was considered unlawful;¹²¹ the Wairans enjoyed the fundamental civil right internationally recognized which includes the use of public health services;¹²² the Wairans received all necessary assistance and were provide with the basic necessities of life which include food, shelter and even health brigades.¹²³ In this respect, Arcadia also called for the solidarity and shared responsibility of the international community to provide humanitarian assistance and meet the basic needs of the Wairan. Additionally, the Wairans were not subjected to cruel, inhuman or degrading treatment and the importance of their situation was reflected in actions of the President who committed to providing all necessary assistance to the Wairan people and opened its borders for the orderly and safe entry of people from Puerto Waira.¹²⁴ Furthermore, Arcadia launched awareness-raising campaigns as part of its policies to promote integration and prevent racism and xenophobia.¹²⁵ In addition, enjoyed free access to Arcadia's courts of law and other competent administrative authorities.

b. 808 Wairans with criminal records are excluded from protection

Art 40 of The LRCP provides that refugee status shall not be granted to any person with respect to whom, upon examination of the application, there are reasonable grounds for considering that: (a) he has committed a crime against peace, genocide, crimes against humanity, or war crimes defined in the international instruments to which Arcadia is a party; (b) he has committed a serious non-political crime outside the territory prior to his admission to that territory

¹²¹ Hypothetical, para 11

¹²² Hypothetical, para 16

¹²³ Hypothetical, para 16

¹²⁴ Hypothetical, para 18

¹²⁵ Hypothetical, para 18

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹²⁶ This is also reflected under Art 1F of the 1951 Convention.

According to the UNHCR Handbook¹²⁷, the competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status. For the clauses to apply, it is sufficient to establish that there are “*serious reasons for considering*” that one of the acts described has been committed. Formal proof of previous penal prosecution is not required¹²⁸.

The aim of the exclusion on the basis of having committed serious non-political crimes is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime of a less serious nature or has committed a political offence.¹²⁹ What constitutes a “serious” non-political crime for the purposes of the exclusion clause under the 1951 Convention is said to be difficult to define, especially since the term “crime” has different connotations in different legal systems. A “serious” crime however, must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Art 1F(b) even if technically referred to as “crimes” in the penal law of the country concerned.¹³⁰

The crimes committed by 808 Wairans amounts to includes kidnapping, extortion, murder, sexual violence, drug trafficking, human trafficking and forcible recruitment, amounting to

¹²⁶ Hypothetical, para 13

¹²⁷ UNHCR Handbook , para. 44

¹²⁸ UNHCR Handbook, para 149

¹²⁹ UNHCR Handbook, para 151

¹³⁰ UNHCR Handbook, para 155

“serious non-political crimes.”¹³¹ The 808 Wairans are therefore excluded from protection in accordance with the LRCP the 1951 Convention.

Article 22.8 – Principle of Non-refoulement

a. The 808 Wairans are excluded from protection under the non-refoulement principle of the 1951 Convention

Under Art 33 (1) of the 1951 Convention no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The protection against refoulement under Art 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Art 1A(2) of the 1951 Convention, whether or not the person concerned has been formally recognized as a refugee,¹³² and does not come within the scope of one of its exclusion provisions.¹³³ It applies not only in respect of return to the country of origin but also with regard to forcible removal to any other country where a person has reason to fear persecution related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to his or her country of origin.¹³⁴

The 808 individuals, convicted for serious non-political crimes,¹³⁵ fall under the exception provided for in Art 40 of LRCP, which mirrors the exclusion clauses under Art 1F of the 1951

¹³¹ Clarification Q&A 2

¹³² UNHCR, Note on Non-Refoulement (EC/SCP/2) para 15

¹³³ UNHCR, *Advisory Opinion on the Extraterritorial Application on Non Refoulement Obligations under 1951 Convention and its 1967 Protocol*, January 26, 2007

¹³⁴ UNHCR, Note on Non-Refoulement (EC/SCP/2) para 4

¹³⁵ Clarification Q&A 2

Convention,¹³⁶ as a result, the non-refoulement protection under Art 33 of the 1951 Convention is unavailable to the 808 individuals.

b. Non-refoulement under the Convention Against Torture

Art 3 of CAT states that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. The prohibition of refoulement to a risk of torture is also part of customary international law and has attained the rank of a peremptory norm of international law, or *jus cogens*.¹³⁷ It imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments.¹³⁸

According to A Handbook on State Obligations under United Nations CAT,¹³⁹ a violation of Art 3 of the CAT does not affect the decision of the competent national authority concerning the grant or refusal of asylum. The finding of a violation of Article 3 has a declaratory character. State parties however, have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of Art 3, non-refoulement provision, of the Convention. The solution may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him or her in its turn).¹⁴⁰

The Wairans excluded from protection under Art 40 of the LRCP were allowed to remain in Arcadia two months before Arcadia proceeded to publish an Executive Decree which further called upon the international community, based on the principles of international cooperation and right

¹³⁶Hypothetical, para 23

¹³⁷ *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Tribunal For the former Yugoslavia (ICTY), 10 December 1998

¹³⁸ UNHCR Note on Diplomatic Assurances and International Refugee Protection, paragraph 16

¹³⁹ Lene Wendland, 'A Handbook on State Obligations under United Nations Convention Against Torture'

¹⁴⁰ A Handbook on State Obligations under United Nations Convention Against Torture para 75

not to be returned, to admit the individuals into their countries. Furthermore, Arcadia allowed the 808 Wairans to remain in the country an additional month pending a response from the international community to offer assistance in guaranteeing the protection of the individuals.¹⁴¹

Additionally, in accordance with Conclusion No. 22, States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist other States, who has requested assistance and that have admitted asylum seekers in large-scale influx situations.¹⁴² Conclusion 22¹⁴³ recognizes that a mass influx may place unduly heavy burdens on certain countries; therefore, international co-operation is required to achieve a satisfactory solution of a problem, international in scope and nature. In this regard the administration of President Javier Valverde published an Executive Decree which called upon the international community to accommodate the individuals in their countries¹⁴⁴.

In light of the above actions the State submits that Arcadia took all necessary legal measures to find solutions which ensured compliance with its responsibility under Art 3 of the CAT.

c. Diplomatic assurances

The term “diplomatic assurances,” refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State, or more generally, in keeping with its human rights obligations under international law.¹⁴⁵ The use of diplomatic assurances is not confined to the area of extradition and may be sought in the context of removal procedures such as expulsion or deportation.¹⁴⁶

¹⁴¹ Hypothetical, para 26

¹⁴² Conclusion No. 22

¹⁴³ Conclusion No. 22

¹⁴⁴ Hypothetical para 26

¹⁴⁵ UNHCR Note on Diplomatic Assurances and International Refugee Protection, para 1

¹⁴⁶ UNHCR Note on Diplomatic Assurances and International Refugee Protection, para 3

The ECHR held that in a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.¹⁴⁷ Additionally, the IACHR has recognized the different nature of diplomatic assurances provided in relation to non-application of the death penalty and those provided when there is a risk of torture and other forms of cruel, inhuman or degrading treatment.¹⁴⁸ The Court has acknowledged that there are critiques and difficulties regarding to use and support of diplomatic assurances when there is a possible risk of torture¹⁴⁹, however, the ECHR considers that it is not for courts to reject the possibility of their use, when they constitute a usual practice of States, even though their value and degree of reliability depend on the particular circumstances of the case, and the assurances offered¹⁵⁰.

The State submits that after the deadline of the Executive decree had expired, and in the absence of any response from other states, the authorities from Arcadia signed an agreement with their counterparts from the UST to allow Arcadian authorities to return to the UST person who had attempted to enter the country illegally.¹⁵¹ During this meeting Arcadia requested that people not be deported because of the danger they faced.¹⁵² In return, Arcadia pledged to increase its

¹⁴⁷ ECHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09. Judgment of January 17,

¹⁴⁸ IACtHR, *Case of Wong Ho Wing v. Peru*. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2015, para 182

¹⁴⁹ *Wong Ho Wing v. Peru (supra)*, para 182

¹⁵⁰ *Othman (Abu Qatada) (supra)*, para. 142

¹⁵¹ Hypothetical, para 27

¹⁵² Clarification Q&A 66

support for migration control activities and its contributions to development cooperation for the UST.

Article 24 - No breach of right to equal protection

Art 24 of ACHR stipulates that all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law. The Court has stated that the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law; it has entered the domain of *jus cogens*¹⁵³ and it entails obligations *erga omnes*.¹⁵⁴ Consequently, States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws.¹⁵⁵

The Court, however, has made a distinction between the equality clause of Art 24 and Art 1(1). The difference between the two articles lies in that the general obligation contained in Art 1(1) refers to the State's duty to respect and guarantee "non-discrimination" in the enjoyment of the rights enshrined in the ACHR, while Art 24 protects the right to "equal treatment before the law."¹⁵⁶ The Court has held that "Art 1(1) of ACHR, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein 'without any discrimination.' On the other hand, Art 24 of ACHR 'prohibits all discriminatory treatment originating in a legal prescription'. The prohibition against discrimination so broadly proclaimed in Art 1(1) with regard to the rights and guarantees enumerated in the ACHR thus extends to the domestic law of the States

¹⁵³ IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, OC-17/02 of August 28, 2002. Series A No. 17, para. 101

¹⁵⁴ *Juridical Condition and Rights of Undocumented Migrants*, para 109

¹⁵⁵ *Juridical Condition and Rights of Undocumented Migrants*, para 88

¹⁵⁶ IACtHR., *Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Judgment of August 5, 2008. Series C No. 182, para 209

Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the ACHR, have undertaken to maintain their laws free of discriminatory regulations.¹⁵⁷

In compliance with the obligation that arises from the principle of equality and non-discrimination, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, colour or other reasons.¹⁵⁸ In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.¹⁵⁹

Not all differences in treatment, however, are in themselves offensive to human dignity.¹⁶⁰ IACHR has recognized that in democratic societies it is considered appropriate for States to treat aliens differently from others within the State's jurisdiction; however, it has made clear that States must demonstrate that every distinction of this kind is reasonable and proportionate to the aim of the circumstances.¹⁶¹

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature

¹⁵⁷ IACtHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, paras. 53 & 54.

¹⁵⁸ *Juridical Condition and Rights of Undocumented Migrants*, para. 103

¹⁵⁹ *Juridical Condition and Rights of Undocumented Migrants*, para. 104

¹⁶⁰ *Juridical Condition and Rights of Undocumented Migrants*, para 89

¹⁶¹ IACHR, Report No. 51-01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), April 4, 2001, para. 239.

of things. It follows therefore, that there would be no discrimination in difference of treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.¹⁶²

A State Party therefore, cannot discriminate based on immigration status of a person, however, it is permissible in the context of immigration policy to make certain distinction between citizens and foreigners or people in different immigration categories, provided that the objectives and treatments meet certain standard.¹⁶³

Arcadia acknowledges that whilst detention of the 808 Wairans with criminal records pending his or her immigration status amounted to difference in treatment, detention was done for the purpose of guaranteeing national security and preserve public order.¹⁶⁴ The criterion, sex, used for determining each person's place of detention was not discriminatory but rather, Arcadia acting in accordance with its International obligations under CEDAW.¹⁶⁵ Furthermore, it was necessary to hold certain individuals in custody to ensure their appearance because they had criminal records and the detainees were slated to be deported based on the Executive Decree and because they fell within the exclusion clauses of the 1951 Convention.¹⁶⁶ The State contends that the distinctions created by law are reasonable, objective and proportionate, and do not constitute discriminatory treatment. Furthermore, Arcadia has developed various measures to prevent and combat discrimination and xenophobia, including public awareness campaigns and training for public servants.¹⁶⁷

¹⁶² IACtHR, Advisory Opinion OC-17/2002, Legal Status and Human Rights of the Child, August 28, 2002, para. 47

¹⁶³ IACHR Report on Right of Migrants, Refugees, Stateless Persons, para 190

¹⁶⁴ Hypothetical, para 21

¹⁶⁵ Hypothetical, para 10

¹⁶⁶ Clarification Q&A 15

¹⁶⁷ Clarification Q&A 71

V. REQUEST FOR RELIEF

In light of the aforementioned submission, the State of Arcadia respectfully requests that this Honourable Court adjudge and declare that:

1. The State has not violated its obligations under Arts 4, 7, 8, 17, 19, 22.7, 22.8, 24 and 25 in conjunction with Art 1(1) of the ACHR, in relation to Gonzalo Belano and 807 other Wairans.
2. The petitioners absorb the costs of the current proceedings.