
INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSÉ, COSTA RICA

GONZALO BELANO AND 807 OTHER WAIRAN PERSONS

Petitioners

V.

THE REPUBLIC OF ARCADIA

State

MEMORIAL FOR THE REPRESENTATIVES OF THE STATE

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III. STATEMENTS OF FACTS

1. Background on the Republic of Puerto Waira

[1] Puerto Waira is a Central American country, bordered on the north by the United States of Tlaxcochitlán[1]. Puerto Waira suffered from insecurity and violence from "criminal acts committed by gangs, whose regular practices include threats, extortion, the recruitment of

[1] Hypothetical §1.

children, torture, rape, murder, and forced disappearances"[2]. Faced with the inability of police to maintain public order and security, many people – mainly people living in poverty – decided to emigrate from Puerto Waira Arcadia[3].

2. The general context in Arcadia

[2] Arcadia has a solid economy and is a developed country with a sound democracy[4]. Arcadia has ratified all the treaties of the universal system including the Convention on the Rights of the Child (1989), the 1951 Convention Relating to the Status of Refugees and the American Convention on Human Rights (1969)[5]. Between 2013 and 2015, there was an 800% increase in asylum seekers from Puerto Waira[6]. Faced with this situation, Arcadia has also increased the number of people it has recognized as refugees by 20% during the same period[7]. In Arcadia, the Law on Refugees and Complementary Protection establishes the procedure for the recognition of refugee status, which is determined on an individual basis[8]. The Article 40 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: (i) 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; (ii) he has committed a serious non-political crime outside the national territory prior

[2] Hypothetical §4.
[3] Hypothetical §7.
[4] Hypothetical §8.
[5] Hypothetical §9.
[6] Hypothetical §10.
[7] Hypothetical §10.
[8] Hypothetical §13.

to his admission to that territory; (iii) he has committed acts contrary to the purposes and principles of the United Nations[9].

3. The case of the mass migration of people from Puerto Waira to Arcadia

[3] A caravan of more than 7,000 Wairans began their journey to Arcadia, where they expected to enter en masse[10]. In response to the massive influx of Wairans, the Arcadian authorities arranged to have the National Migration Institute to organize people to register on a list and apply for asylum by turns[11]. "On August 16, 2014, Arcadia held and extraordinary meeting with multiple government institutions at different levels, as well as with agencies of the UN System"[12], to find a response to the massive influx of Wairans. As nothing was made, "Arcadia called for the solidarity and shared responsibility of the international community"[13] to provide humanitarian assistance.

[4] The procedure for obtaining prima facie refugee status contains a brief interview and then the services of the Ministry of Foreign Affairs ascertains whether the person had a criminal record[14]. "If so, in order to guarantee national security and preserve public order, the person would be held in custody pending a decision on his immigration status"[15]. Arcadia identified 808 individuals with criminal records and detained 490 of them in the immigration detention center and the remaining 318 in separate penitentiary units[16].

[9] Hypothetical §13.
[10] Hypothetical §14.
[11] Hypothetical §16.
[12] Hypothetical §17.
[13] Hypothetical §19.
[14] Hypothetical §21.
[15] Ibid.
[16] Hypothetical §22.

Arcadia sent the detainees a list containing their rights and informed them they could request legal assistance and representation[17]. Arcadia found that in 729 of the 808 cases, the individuals would face a high risk of torture and that their lives would be in dabger if they were returned or deported to Puerto Wairans; the remaining 79 had a "reasonable likelihood" of the same[18]. "Thus, it was decided that these individuals had a well-founded fear of persecution, but were excluded from protection, in accordance with the Law on Refugees and Complementary Protection and the 1951 Convention Relating to the Status of Refugees"[19]. No child or adolescent was excluded from international protection, detained or expelled from Arcadia[20].

[5] "The administration called upon the other countries of the region to help accommodate the migrants, in keeping with the principle of shared responsibility and non-refoulement. After two months with no reply from the States of the region, on January 21, 2015, Arcadia published an Executive Decree ordering the deportation of the individuals who had been excluded from refugee status because they had committed crimes in their country"[21]. After the deadline specified in the decree, Arcadia authorities convened a meeting with their counterparts from Tlaxcochitlán. "At that meeting, an agreement was signed to allow Arcadian authorities to return to Tlaxcochitlán persons who had attempted to enter the country illegally. In return, Arcadia pledged to increase its support for migration control activities and its contributions to development cooperation for the United States of Tlaxcochitlán. Two weeks later, the Arcadian authorities proceeded to return to

[17] Clarification Q&A 24.
[18] Hypothetical §23.
[19] Ibid.
[20] Clarification Q&A 21.
[21] Hypothetical §26.

Tlaxcochitlán the 591 people who had been excluded for having a criminal record and who had not filed any kind of judicial or administrative appeal"[22].

[6] "On February 10, 2015, 217 people filed a writ of *amparo* to stop the deportation, alleging that their lives were in danger and that they should not be returned to Puerto Waira. On February 20, 2015, the Pima Immigration Court ordered their deportation to be suspended until the merits of the case were adjudicated. Subsequently, on March 22, 2015, the court denied protection and upheld the deportation orders. The people filed a motion for the reconsideration of the decision, which was also denied and resulted in the deportation orders being affirmed on April 30, 2015. Finally, on May 5, 2015, the government of Arcadia proceeded to return the remaining 217 people to Tlaxcochitlán"[23]. On June 15, 2015, Tlaxcochitlán deported them to Puerto Waira[24].

4. Proceedings in the Inter-American Human Rights System

[7] The Legal Clinic filed a petition with the Inter-American Commission on Human Rights on behalf of the 808 deportees, alleging violations of the rights enshrined in the American Convention on Human Rights[25], namely; Article 4 (right to life), Article 7 (personal liberty), Article 8 (a fair trial), Article 22.7 (to seek and be granted asylum), Article 22.8 (non-refoulement), Article 17 (family unity), Article 19 (best interests of the child), Article 24 (equal protection) and Article 25 (judicial protection) of the American Convention on

[22] Hypothetical §27.
[23] Hypothetical §28.
[24] Hypothetical §29.
[25] Hypothetical §34.

Human Rights, all in relation to Article 1.1 thereof, to the detriment of Gonzalo Belano and 807 other Wairans[26].

[8] The Commission declared the petition admissible[27]. Arcadia failed to comply with any of the recommendations of the Commission so the case was subsequently submitted to the ACtHR[28].

IV. LEGAL ANALYSIS

A. Admissibility

[9] In 1971, Arcadia ratified the American Convention on Human Rights (1969)[29] and further recognized the Court's contentious jurisdiction. Pursuant to Articles 61 and 62[30], the Court can examine claims relating to the ACHR against State Parties, thus the Court is competent to rule on this case.

1. The non-exhaustion of legal domestic remedies by Gonzalo Belano and 807 Other Wairan persons

[10] The exhaustion of domestic judicial remedies is established in Article 46 of the American Convention on Human Rights. The IACtHR states explicitly that the petitioners should exhaust all available domestic remedies, including extraordinary remedies before initiating a procedure in front of the Commission, according to the cases *Cantarol-*

[26] Hypothetical §36.
[27] Hypothetical §35.
[28] Hypothetical §37.
[29] Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994.
[30] Articles 61 and 62 of the American Convention on Human Rights.

Benavides v. Peru[31] and in *Diaz Pena v. Venezuela*[32]. As said in the *Velasquez Rodriguez v. Honduras case*[33], the State should have the opportunity to settle the matter and to rectify the possible irregularities in the domestic sphere before it is brought to this Court.

[11] The exhaustion of domestic judicial remedy only includes those which are adequate and effective[34]. To be adequate, it should be "suitable to address the infringement of the specific legal right allegedly violated" as established in *Velazquez Rodriguez v Honduras*[35]. Furthermore, the State domestic remedies also need to be effective. As established in *Palamara Iribarne v Chile*[36], the Court states that it should be capable of producing the result for which it was designed and not be a senseless formality.

[12] In Gonzalo Belano and 807 Other Wairan persons, two types of remedies were available to the people excluded from the refugee status that lead to their deportation[37]. Firstly, an administrative appeal divided in two routes, a motion of administrative cassation which would have allowed for a challenge by a specialized court and a motion of reconsideration[38].

[13] Secondly, a constitutional remedy could be chosen, aiming at "the protection of fundamental rights of individuals"[39] which could be used to redress violation of

[31] Case of Cantarol-Benavides v Peru, (Merits), September 3, [1998], IACtHR.
[32] Case of Díaz Peña v. Venezuela, (Preliminary objection, merits, reparations and costs), Judgment of June 26, [2012], IACtHR.
[33] Case of Velásquez-Rodríguez v. Honduras, (Merits), Judgment of July 29, [1988], IACtHR.
[34] Admissibility Report No. 134/11, Petition 1190-06, Undocumented Workers (United States), October 20, [2011], IACtHR, §27.
[35] Case of Velásquez-Rodríguez v. Honduras, (Merits), Judgment of July 29, [1988], IACtHR.
[36] Case of Palamara-Iribarne v. Chile, (Merits, reparations, and costs), Judgment of November 22, [2005], IACtHR
[37] Clarification Q&A §10.
[38] Clarification Q&A §10.
[39] Clarification Q&A §10.

international treaties. It included an *amparo*[40]. Financial reparation can also be sought in compensation for State's irregular administrative activity[41].

[14] The administrative appeal and the constitutional remedy both could reverse the decision of exclusion from protection by Arcadia and deportation, thus they are effective remedies, meaning that they could undo the act that was challenged.

[15] Moreover, the remedies available to the 808 Wairans were adequate as the administrative appeal could examine the decision to not include the Wairan into the protection of the State and the acts of deportation. Furthermore, the constitutional remedy aimed at redressing any fundamental rights, meaning that these remedies were adequate to find any violation of the rights guaranteed by the American Convention on Human Rights.

[16] In our case, by March 16, 2015, 591 people did not file an appeal, it being administrative or constitutional[42]. On February 10, 2015, only 217 people filed a writ of *amparo*, which is a constitutional remedy[43] to stop their deportation. The fact that 217 people out of 808 could file a writ of amparo and that ten days later on February 20, 2015, the Pima Immigration Court ordered their deportation to be suspended until the merits of the case were adjudicated is a proof that the constitutional remedy is not a senseless formality as it aims at protecting the rights if a violation has been made. Moreover, on March 22, 2015, the court denied protection and upheld the deportation orders: this also shows that the domestic legal remedies are effective as a court gave a judgment. Thus, the 591 other Wairans were able to exhaust legal remedies which could lead to a judgment of violation by a court, in the sole case where a violation was actually made. Thus, on the 807

[40] Clarification Q&A §10.
[41] Clarification Q&A §10.
[42] Hypothetical §27.
[43] Hypothetical §28.

supporting this claim, 591 persons did not exhaust the domestic judicial remedies and thus are rendering the case inadmissible.

B. Merits

1. The State has fulfilled its obligations regarding the Article 4 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

[17] The right to life contained within the Article 4 of the ACHR requires State Parties « to take reasonable steps to prevent situations which are truly harmful to the rights protected »[44]. The State has a negative obligation to prevent people subject to its jurisdiction to be deprived arbitrarily from their right to life[45] and also a positive obligation to take measures to protect people. The State has fulfilled all the obligations under Article 4 in conjunction with Article 1(1) of the ACHR.

1.1. The State did not return Gonzalo Belano and 807 Other Wairan persons to Puerto Waira where they were facing a high risk for their lives

[18] The right to life plays a major role in the ACHR. States have a positive obligation to ensure that there are no violations of this inalienable right by preventing their agents from violating the right to life or from allowing, by "their acquiescence, tolerance or omission, private parties to violate that right"[46]. The Court has notably highlighted that

[44] *Vélasquez-Rodriguez v. Honduras* (Merits), Judgment of July 29, [1998], IACtHR, Series C No. 4 §187.
[45] *Case of the Pueblo Bello Massacre* (Merits, Reparations and Costs) Judgment of January 31, [2006], IACtHR, Series C No. 140 §120.
[46] *Case of González et al. ("Cotton Field") v. Mexico* (Merits, Reparations and Costs), Judgment of November 16, [2009], IACtHR, Series C No. 205 §245.

Article 4, in conjunction with Article 1(1) of the ACHR, contained a negative obligation that requires that no one shall be arbitrarily deprived of his/her life but also a positive obligation according to which the States must adopt all the appropriate measures to protect and preserve the right to life[47].

[19] In our case, Arcadia, after examining each of the asylum claim of detainees, determined that in 729 of the 808 cases, the individuals would face a "high risk" of torture and that their lives would be in danger if they were returned or deported to Puerto Waira ; whereas the 79 remaining cases had a "reasonable likelihood" of the same[48]. However, these individuals had a well-founded fear of prosecution[49] if they were sent to Puerto Waira. Nevertheless, Arcadia cannot be found responsible to send them back to Puerto Waira as the State sent them to the United States of Tlaxcochitlán. Thus, the State took steps to ensure that Tlaxcochitlán would not return the 808 deportees to Puerto Waira because authorities from Arcadia convened a meeting with their counterparts from the United States of Tlaxcochitlán where an agreement was signed to allow Arcadian authorities to return to Tlaxcochitlán persons who had attempted to enter the country illegally[50]. In return, Arcadia pledged to increase its support for migration control activities and its contributions to development cooperation for the United States of Tlaxcochitlán. Two weeks later, on March 16, 2015, the Arcadian authorities proceeded to return to Tlaxcochitlán the 591 people who had been excluded for having a criminal record and who

[47] *The "Street Children" v. Guatemala* (Merits, Reparations and Costs), Judgment of November 19, [1999], IACtHR, Series C No. 63, §144 and *Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), Judgment of November 25, [2006], IACtHR, Series C No. 160 §75.
[48] Hypothetical §23 and Clarifications Q&A 22.
[49] Ibid.
[50] Hypothetical §27.

had not filed any kind of judicial or administrative appeal[51]. Arcadia has no reasonable reason to believe that Tlaxcochitlán would return the migrants to Puerto Waira because the agreement between the two States did not mention this possibility. It is important to mention that during the meetings held with the United States of Tlaxcochitlán Arcadia asked that people not be deported because of the danger they faced[52]. In addition, Arcadia only made half of the payment promised at the beginning of the agreement and suspended the second payment once the individuals had been deported, on the grounds that the agreement between the parties had been breached[53]. Moreover, on August 2014, while people from the caravan were waiting at the Arcadia-Tlaxcochitlán border to enter Arcadia to seek asylum, the authorities of Tlaxcochitlán had already helped the migrants by setting up camps in the border town of Ciudad Zapata with tents and spaces for people to have a place to take shelter and rest near the southern border of Arcadia[54]. This constitutes a proof that Tlaxcochitlán was a State keen to help the migrants. Tlaxcochitlán decided to return the migrants without the agreement of Arcadia. Thus, one cannot blame Arcadia where it is the United States of Tlaxcochitlán and the State of Puerto Waira which violated the Article 4 of the ACHR.

2. The State has fulfilled its obligations regarding the Article 7 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

[51] Ibid.
[52] Clarifications Q&A 66.
[53] Ibid.
[54] Hypothetical §15.

[20] The right to personal liberty is not absolute and can be restricted under certain circumstances[55]. The detention must be lawful and not arbitrary. Moreover, the conditions in which the detention is made should be consistent with human dignity.

2.1.The State did not detain Gonzalo Belano and 807 Other Wairan persons arbitrarily

[21] The right to personal liberty goes with the right of legal certainty since no one should be dispossessed of his liberty in an arbitrary way[56]. To avoid arbitrariness of deprivation of liberty, the authorities must offer any credible and substantiated explanation for the whereabouts and fate of the person after she was detained. The right to personal liberty includes the right not to be deprived of liberty unlawfully or arbitrarily; to know the reasons for detention and charges brought against the detainee; to judicial control of the deprivation of liberty and to contest the lawfulness of detention.

[22] A lawfully deprivation of liberty means that the cases or circumstances of deprivation of liberty must be expressly defined by law[57].

[23] An arbitrarily detention implies that "no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality"[58]. For the deprivation of liberty of migrants not to be considered arbitrary,

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[55] ACHR, Article 7 §2.
[56] *Kurt v. Turkey* (Merits and Just Satisfaction), Judgment of May 25, [1998], ECtHR, §122.
[57] *Gangaram-Panday v. Suriname* (Merits, Reparations and Costs), Judgment of January 21, [1994], IACtHR, Serie C n°16 §47.
[58] Ibid.

the detention must meet the requirements that it has legitimate purpose, it is prescribed by law and proportionate and necessary[59].

[24] In our case, Arcadia detained 808 individuals with criminal records: 490 of them were placed in the immigration detention centre and the remaining 318 in separate penitentiary units in the border town of Pima, given the inadequate capacity to hold them in immigration detention[60]. However, Wairans with a criminal record were detained on the basis of section 111 of the General Immigration Act, which provides that custodial measures may be imposed "against foreigners who cannot prove their legal presence in the country in order to ensure their appearance at proceedings to determine their immigration status, to guarantee the enforcement of an expulsion order and, on an exceptional basis, when the person is deemed to pose or may pose a threat to public safety"[61]. Thus, the detention of the individuals who had a criminal record shall be considered as lawful as the General Immigration Act was into force when the Wairans arrived in Arcadia. Furthermore, it must not be viewed as arbitrary because it was necessary to prevent public safety and foreseeable as this law was enacted before their arrival. Moreover, the goal of this detention is to protect Arcadian citizens from migrants who could challenge public order: thus, the decision to put them in detention is proportionate with the objective.

[59] *Vélez Loor v. Panama*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 23, [2010], IACtHR, Series C No. 218, §170.
[60] Hypothetical §22.
[61] Clarifications Q&A 11.

2.2. The State has fulfilled its obligations under Article 7 in conjunction of Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons regarding the conditions of detention

[25] According to Article 7.4, there is a right for the people to be informed promptly of the reasons for the arrest and of the charges against them. The Court looks at whether the guarantee to be "brought promptly before a judge or other officer authorized by law to exercise judicial power" contained within the Article 7.5 has been respected meaning the person detained must appear personally before the judge. In the *Bayarri v. Argentina* case[62], the Court then devoted a whole title to the second guarantee protected by the Article 7.5, which states that if a person is not trialled within a reasonable time, that person accused must be "*be released without prejudice to the continuation of the proceedings*"[63]. The legal limit established by law (which sets a maximum of three years) has been exceeded, as well as the duration, which has been clearly excessive[64]. Moreover, in *J.R. and Others v. Greece*[65], the European Court found that even though the applicants, who were asylum seekers, complained about the length of their detention in the centre, regarded as arbitrary and for not receiving any information about the reasons for their detention, the Court held that there had been no violation of Article 5.1 (right to liberty and security) of the ECHR. The Court was of the view that the one-month period of detention, whose aim had been to guarantee the possibility of removing the applicants under the EU-

[62] *Bayarri v. Argentina* (Preliminary objections, Merits, Reparations and Costs), Judgment of October 30, [2008], IACtHR, §75.
[63] Case-law of the Inter-American Court of Human Rights, Chronicle for the Year 2008, Marie Rota, p. 129-138.
[64] Case-law of the Inter-American Court of Human Rights, Chronicle for the Year 2008, Marie Rota, p. 129-138.
[65] *J.R. and Others v. Greece*, Judgment of January 25, [2018], ECtHR, Application no. 22696/16.

Turkey Declaration, was not arbitrary and could not be regarded as "unlawful" within the meaning of Article 5.1(f)[66]. The European Court held that there has been no violation of Article 5.1 of the ECHR in a case concerning an asylum-seeker who was placed and kept in detention for security reasons and held on that basis for approximately 13 months[67].

[26] In our case, the Arcadian authorities sent the detainees a list of their rights and informed them verbally and in writing that they could request legal assistance and representation. To this end, they provide them with a list of contact information for civil society organizations and legal clinics[68]. They could request free legal assistance if they wished so. Furthermore, during their detention, the Wairans had access to food, health services, education, and a variety of recreational activities[69]. They were able to receive visits from family members, friends and their legal representatives, as well as communicate with them by telephone[70]. Moreover, the authorities informed the 808 persons 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 Law on Refugees and Complementary Protection[71]. At the time of their arrest, they were immediately brought before the administrative authority and transferred to the places where they remained in custody[72]. Thus, the Arcadian authorities respected the Article 7.4 of the ACHR.

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[66] *J.R. and Others v. Greece*, Judgment of January 25, [2018], ECtHR, Application n°22696/16, §112.
[67] *K.G. v Belgium*, Judgment of November 6, [2018], ECtHR, Application n°52548/15, §88.
[68] Clarifications Q&A 9.
[69] Clarifications Q&A 18.
[70] Ibid.
[71] Clarifications Q&A 50.
[72] Ibid.

3. The State has fulfilled its obligations regarding the Article 22.7 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

[27] Asylum is "a form of protection given by a State on its territory based on the principle of non-refoulement and internationally or nationally recognized refugee rights. It is granted to a person who is unable to seek protection in his or her country of nationality and/or residence in particular for feat of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion"[73].

3.1. The State has respected its obligations regarding the proceedings to seek asylum in relation to Gonzalo Belano and 807 Other Wairan persons

[28] The term 'asylum' remains an ambiguous concept in international law[74]. Indeed, the term manifests different meanings. Two types of asylum exist: territorial asylum which refers to the protection that a State provides in its territory to persons who are nationals or habitual residents of another State where they are persecuted for political reasons, because of their beliefs, opinions or political affiliation or because of acts that may be considered to be political crimes or related ordinary crimes[75]; and diplomatic asylum which is dealing with the protection provided by a State within its legations, warships, military aircraft and camps, to persons who are nationals or habitual residents of another State where they are

[73] Glossary on Migration, n°25, 2nd Edition (2011), International Organization for Migration, p. 11.
[74] Advisory Opinion OC-25/18 of May 30, [2018], IACtHR, §64.
[75] Ibid §67(i).

persecuted for political reasons, for their beliefs, opinions or political affiliation or for acts that may be considered political offences or related common crimes[76].

[29] To be granted asylum, a person must demonstrate that he or she is a "refugee". According to Article 1 of the Refugee Convention, a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"[77]. State sovereignty gives States the ability to define their immigration laws and policies and therefore, decide legally on the entry, stay and removal of foreigners within their borders[78]. When applying for refugee status, the State must observe minimum guarantees of due process, including a personal interview with the individual seeking refugee status; the objective examination of the request by a competent and clearly identified authority; and, if the request is denied, a reasonable amount of time to appeal[79].

[30] However, in our case, Arcadia announced that the procedure for obtaining prima facie refugee status consist of visiting the offices of the National Commission for Refugees (CONARE) submitting an application for recognition of refugee status, undergoing a brief

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[76] Ibid §67(ii).
[77] Article 1-A-2 of the 1951 Refugee Convention.
[78] *Velez Loor v. Panama* (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 23, [2010], IACtHR, Series C No. 218, §97; *Pacheco Tineo Family v. Bolivia* (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 25, [2013], IACtHR, Series C No. 272, §168.
[79] *Pacheco Tineo Family v. Bolivia* (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 25, [2013], IACtHR, Series C No. 272, §159.

interview, and obtaining a refugee document and work permit within no more than 24 hours[80]. Once the interview had been conducted and the asylum-seeker's statement had been received, Arcadian authorities will ascertain whether the person had a criminal record and if so, the person would be held in custody pending a decision on his or her immigration status[81]. Arcadia examined each of the asylum claims of detainees alleged to have criminal records[82]. Thus, Arcadia cannot be said to have violated Article 22.7 of the ACHR since the State allowed migrants, including those with a criminal record, to file an asylum claim. Moreover, the State conducted an individual interview of each of the asylum seeker. By doing so, it should be pointed out that Arcadia recognized 5,500 refugees in 2012, while at the end of 2015, there were 18,000 refugees[83].

3.2. The State has proceeded the claims in accordance with both its domestic and international immigration laws in relation to Gonzalo Belano and 807 Other Wairan persons

[31] To the extent that Article 22.7 refers to domestic legislation or international conventions in order to integrate their content more specifically, the right to seek and receive asylum is not an absolute right[84]. Indeed, the reference to domestic legislation and international conventions was introduced in Article XXVII of the American Declaration and is literally reflected in the American Convention[85]. According to Article 1(F) of the

[80] Hypothetical §20.
[81] Hypothetical §21.
[82] Hypothetical §23.
[83] Clarifications Q&A 43.
[84] Advisory Opinion OC-25/18 of May 30, [2018], IACtHR.
[85] Ibid §139.

Refugee Convention, there are three exclusion clauses from the refugee status including the fact that, as mentioned in the Article 1(F)(b), "the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: […] he has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a refugee"[86]. A serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Moreover, the Article 14(2) of the Universal Declaration on Human Rights provides that the right to seek and to enjoy asylum, as guaranteed in Article 14(1), "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations"[87]. This article represents an "exclusion" provision: it means that persons who flee persecution can be denied international protection as refugees because of their involvement in certain serious crimes.

[32] In our case, the crimes for which the Wairans were convicted are considered "serious non-political crimes" under Arcadian domestic law and include the following: kidnapping, extortion, murder, sexual violence, drug trafficking, human trafficking, and forcible recruitment[88]. The State followed its law and procedure under the Law on Refugees and Complementary Protection as Article 40 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: he has committed a crime against peace, genocide, crimes against humanity, or war crimes; he has committed a serious non-political

[86] Article 1(F) of the 1951 Refugee Convention.
[87] Article 14(2) of the Universal Declaration of Human Rights, December 10, 1948.
[88] Clarifications Q&A 2.

crime outside the national territory prior to his admission to that territory; or he has committed acts contrary to the purposes and principles of the United Nations[89]. Thus, Arcadia is allowed to exclude from refugee status the 808 Wairans who had a criminal record as the crimes they committed are considered to be "serious non-political crimes".

4. The State has fulfilled its obligations regarding the Article 22.8 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

[33] The principle of non-refoulement is a fundamental right and the cornerstone of the international protection of refugees and asylum-seekers[90]. This principle is codified in Article 33(1) of the 1951 Convention[91]. The Court recalls that the principle of non-refoulement is fundamental, not only for the right to asylum, but also as a guarantee of several non-derogable human rights, since it is in fact a measure aimed at preserving life, freedom and the integrity of the protected person[92]. The principle of non-refoulement has been recognized as a customary rule of international law[93] binding on all States, whether or not they are parties to the 1951 Convention or the 1967 Protocol[94].

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[89] Hypothetical §13.
[90] Case of the Pacheco Tineo Family v. Bolivia, citing the United Nations High Commissioner for Refugees (UNHCR), Executive Committee, General Conclusions on International Refugee Protection, UN Doc. 65 (XLII)-1991, issued 11 October 1991, § c, and Advisory Opinion OC-21/14.
[91] Article 33(1) of the 1951 Refugee Convention.
[92] Advisory Opinion OC-21/14, IACtHR, August 19, 2014 §211.
[93] *Pacheco Tineo Family v. Bolivia* (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 25, [2013], IACtHR, Series C No. 272, §151.
[94] United Nations High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, §15.

4.1.The State has respected its obligations regarding the principle of shared responsibility in relation to Gonzalo Belano and 807 Other Wairan persons

[34] The principle of non-refoulement applies to any conduct resulting in the removal, expulsion, deportation, return, extradition, rejection at the frontier or non-admission, etc. that would place a refugee at risk. The principle of non-refoulement is not subject to territorial restrictions: it applies wherever the state in question exercises jurisdiction. It applies to all refugees, including those who have not been formally recognized as such, and to asylum-seekers whose status has not yet been determined. This principle is an autonomous and encompassing concept, may include a variety of State conduct involving placing the person in the hands of a State where his or her life, security and/or freedom are at risk of violation because of persecution or threat, as well as where he or she risks being subjected to torture or other cruel, inhuman or degrading treatment, or to a third State from which he or she may be sent to a State where he or she may run such risks (indirect refoulement)[95].

[35] However, the principle of non-refoulement is not absolute. The Article 33(2) of the Refugee Convention provides that the benefit of the provision may not "be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"[96]. Article 33(2) has always been considered as a measure of last resort, taking precedence over and above

[95] *Pacheco Tineo Family v. Bolivia* (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 25, [2013], IACtHR, Series C No. 272, §190.
[96] Article 33(2) of the 1951 Refugee Convention.

criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum[97].

[36] The *Case of Wong Ho Wing v. Peru*[98] is related to the receiving and weighing of diplomatic or other assurances that the death penalty, torture or cruel, inhuman or degrading treatment will not be applied. The State of Peru was found guilty of violating rights recognized in the American Convention in the context of the detention in Peru and the extradition proceeding in response to a request from the People's Republic of China[99]. The ECtHR also found that a State can be liable for foreseeable consequences or risk (in this case, the death penalty) that an individual would face in a third State in the case of an extradition[100].

[37] The ECtHR underlined the vulnerability of the asylum seekers (and not irregular migrants) since they form "a particularly underprivileged and vulnerable population group in need of special protection"[101]. Moreover, in *Hirsi Jamaa and others v. Italy*[102], the ECtHR highlighted the vulnerability of the applicants while assessing the violation of Article 3 of the ECHR in relation to the risk of arbitrary repatriation to Somalia and Eritrea. In another case regarding the principle of non-refoulement, the ECtHR found inconsistent the Dublin II Regulation with the European Convention on Human Rights if the Swiss

[97] UNHCR's Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, 4 September 2003) p. 5.
[98] *Case of Wong Ho Wing v. Peru* (Preliminary Objections, Merits, Reparations and Costs), Judgment of June 30, [2015], IACtHR.
[99] Ibid.
[100] *Soering v. the United Kingdom*, Judgment of July 7, [1989], ECtHR, Application No. 14038/88, §86.
[101] *Case of M.S.S. v. Belgium and Greece*, Judgment of January 21, [2011], ECtHR, Application no. 30696/09, §251.
[102] *Case of Hirsi Jamaa and Others v. Italy*, Judgment of February 23, [2012], ECtHR, Application no. 27765/09, §85.

authorities send an Afghan couple and their six children back to Italy without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together[103].

[38] Moreover, the Executive Committee of the UNHCR, in its conclusions regarding the protection of asylum-seekers in situations of large-scale influx, found that "a mass influx may place unduly heavy burdens on certain countries"[104] and that "a satisfactory solution of a problem, international in scope and in nature, cannot be achieved without international co-operation"[105]. Thus, "States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum-seekers in large-scale influx situations"[106]. The Executive Committee adds that "The measures to be taken within the context of such burden-sharing arrangements should be adapted to the particular situation. They should include, as necessary, emergency, financial and technical assistance, assistance in kind and advance pledging of further financial or other assistance beyond the emergency phase until durable solutions are found, and where voluntary repatriation or local settlement cannot be envisaged, the provision for asylum-seekers of resettlement possibilities in a cultural environment appropriate for their well-being"[107].

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[103] *Case of Tarakhel v. Switzerland*, Judgment of November 4, [2014], ECtHR, Application no. 29217/12, §120.
[104] Conclusions no. 22 (XXXII), Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981, adopted by the Executive Committee of the UNHCR Programme. Conclusions on International Protection, 1975-2017 (Conclusion No. 1-114), Office of the United Nations High Commissioner for Refugees Division of International Protection, October 2017, p. 50 IV §1.
[105] Ibid.
[106] Ibid.
[107] Ibid p. 50 IV §4.

[39] In our case, "given the number of Wairans wishing to enter the country and the difficulty of ensuring that they would be able to wait under minimum humane conditions, on August 16, 2004, the government of Arcadia held an extraordinary meeting with multiple government institutions at different levels, as well as with agencies of the UN System, including representatives of the United Nations High Commissioner for Refugees, the International Organization for Migration and UNICEF, to explore a comprehensive, multisectoral response to the massive influx of Wairans into its territory"[108].

[40] To manage this exceptional situation, these officials recommended the States at the meeting to (i) guarantee the right to seek and receive asylum; (ii) the right to non-refoulement; (iii) respect the right to enter territory and not be refused entry at the border; (iv) implement mechanisms to identify persons in need of international protection and special protection needs; (v) provide humanitarian assistance to persons; (vi) guarantee the economic, social and cultural rights of persons[109]. However, after the meeting, the international inaction left Arcadia authorities deal alone with the massive influx of migrants. Arcadia decided to call upon other countries of the region to help accommodate the migrants, in keeping with the principle of shared responsibility and non-refoulement[110].

[41] After 2 months with no reply from the States of the region, on January 21, 2015, Arcadia published an Executive Decree ordering the deportation of the individuals who had been excluded from refugee status because they had committed crimes in their country[111]. Arcadia has limited resources and is unable to support all of the people who have been forced to flee Puerto Waira: thus, notice was given that if another State does not

[108] Hypothetical §17.
[109] Clarifications Q&A 6.
[110] Hypothetical §26.
[111] Ibid.

send word that it will guarantee their protection within one month of the publication of this decree, persons with a criminal record will have to be returned to Puerto Waira[112]. Once the deadline specified in the decree had expired, and in the absence of any response from other States, on March 2, 2015, authorities from Arcadia convened a meeting with the United States of Tlaxcochitlán[113]. "At that meeting, an agreement was signed to allow Arcadian authorities to return to the United States of Tlaxcochitlán persons who had attempted to enter the country illegally. In return, Arcadia pledged to increase its support for migration control activities and its contributions to development cooperation for the United States of Tlaxcochitlán. Two weeks later, on March 16, 2015, the Arcadian authorities proceeded to return to Tlaxcochitlán the 591 people who had been excluded for having a criminal record and who had not filed any kind of judicial or administrative appeal. The authorities of Arcadia's National Migration Institute (NMI) returned these people by bus to the city of Ocampo, the capital of Tlaxcochitlan"[114]. Thus, the 808 Wairans who were deported were those that Arcadia knew they had a criminal record. They were considered as a danger to the security of the country and Arcadia could not deal with all this influx of migrants. Arcadia needed to prevent crime within its borders. After asking several times for international or regional help, Arcadia made sure by signing an agreement with Tlaxcochitlán that "the 808 Wairans will not be sent back to Puerto Waira. Moreover, it is important to mention that during the meetings held with the United States of Tlaxcochitlán, Arcadia asked that people not be deported because of the danger they faced. In addition, Arcadia only made half of the payment promised at the beginning of the

[112] Ibid.
[113] Hypothetical §27.
[114] Ibid.

agreement and suspended the second payment once the individuals had been deported, on the grounds that the agreement between the parties had been breached"[115]. Tlaxcochitlán did not follow its commitment by deporting the 808 Wairans to Puerto Waira on June 15, 2015[116]. Thus, Arcadia could not be held responsible for violating the Article 22.8 of the ACHR.

5. The State has fulfilled its obligations regarding the Articles 17 and 19 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

5.1. The State followed the international guidelines regarding the safeguards of family unity and the protection of the child

[42] The Article 17 protects the family as a natural and fundamental group unit of society and is entitled to the protection of the state[117]. But immigration policies are under the sovereignty of the state, thus staying in its margin of appreciation. The Article 6 of the Convention on the Status of Aliens illustrates that principle in establishing that "for reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory."[118]. Therefore, the sovereignty of the State regarding its immigration policies weighs on the principle of family unity.

[115] Clarifications Q&A 66.
[116] Hypothetical §29.
[117] Article 17 of the American Convention on Human Rights.
[118] Article 6 of the 1928 Convention on the Status of Aliens.

[43] But the Court placed a restriction of states' margin of appreciation. In fact, the State has to put into balance its legitimate interests, notably regarding public order and security, with those of the families impacted by those measures. The scale includes notably the situation of the child. The Inter-American Court of Human Rights (IACtHR) stated in its jurisprudence *Nadege Dorzema and al. v. Dominican Republic*[119] that each family specific circumstances had to be put into weight against the sovereignty of the state, notably in stating "that the expulsion of one or both parents does not lead to an abusive or arbitrary interference in the family life of the child". These circumstances should include the immigration history, the duration of the stay and ties of the parent to the host country, the children's nationality, and the harm and disruption of the child's life that would occur if the family were divided "to weigh all these circumstances rigorously in light of the best interest of the child in relation to the essential public interest that should be protected"[120].

[44] This balance of the sovereignty and the right to family unity should never exceed the threshold of human rights, especially in implementing their own migration policies. In its jurisprudence, the Court has established that the State should encourage "the development and the strengthening of the family unit"[121].

[45] The Article 17 should be read in conjunction with the Article 19 that protects the children by ensuring that they get protection by the society and the state[122]. Thus, the weigh in of those rights also includes the specific situation of the child, particularly in evaluating

[119] *Nadege Dorzema and al. v. Dominican Republic*, Judgment of October 24, [2012], IACtHR p.279 and 280.
[120] Ibid.
[121] *Case of Expelled Dominicans and Haitians v. Dominican Republic*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of August 28, [2014], IACtHR Series C No. 282, §414.
[122] Article 19 of the American Convention on Human Rights.

the best interest of the child[123], which is the main focus of the protection of family unity. Any Member State of the Organization of American State is obligated to respect this norm with respect to child's life survival and development by measures adapted to the child needs[124]. This is intrinsically linked to the principle of non-discrimination, examined later in the protection by the Article 24, that should center the protection of child migrants[125].

[46] Obligation of protection of the family unity arises notably in the cases of asylum seekers. The IACHR provided that no child should be refused entry into a country and that every measure should be taken to ensure the priority of the child and its safety, morally and physically[126].

[47] Although, the best interests of the child in a central focal point of the protection, it does not exceed the sovereignty of the state, mainly in implementing its own migration policies, if those are in check with the human rights standards[127].

[48] In certain circumstances, family separation is a violation of the right of those included in this unit[128]. But the Convention on the Rights of the child refers to the possibility of family separation when deportation of one of the parents is necessary, in its

[123] *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 of August 19, [2014], IACtHR, Series A No.21, §155.
[124] *Committee on the Rights of the Child*, General Comment No. 14 (2013), May 29, [2013], sixty-second session, §48-84.
[125] *Legal condition y and human rights of the children*. Advisory opinion AO-17/02, August 28, [2002], IACtHR, §66.
[126] *Committee on the Rights of the Child*, General Comment No. 14 (2013), May 29, 2013, sixty-second session, §48-84.
[127] *Case of Expelled Dominicans and Haitians v. Dominican Republic*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of August 28, [2014], IACtHR, Series C No. 282, §417.
[128] *Case of the Pacheco Tineo Family v. Bolivia*, (Preliminary Objections, Merits, Reparations and Costs), Judgement of November 23, [2013], IACtHR, §226. and *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), Judgment of August 28, [2014], IACtHR, Series C No. 282 p.414.

Article 9(4)[129]. This disposition states that family separation can be done in respect to some legal safeguards[130].

[49] In Gonzalo Belano and 807 Other Wairan persons, the massive afflux of migrants is a special circumstance that had to be weigh in examining the necessity of deportation of the migrants with criminal records. In the case against the Dominican Republic[131], the State was condemned for family separation as the deportation did not seek a lawful purpose, was not kept within the legal requirements, was not carried within the frameworks of immigration proceedings under the domestic law and did not follow the basic procedural guarantees required by domestic law. Thus, the Dominican Republic did not weigh in the protection of family unity and the interests of the family against their sovereignty.

[50] The State of Arcadia did provide a balance test of the right of the families which included deported members. Firstly, the deportation decision was made on a lawful purpose of public order[132]. The deported migrants had criminal records of serious non-political crimes, being gang related in the case of Gonzalo Belano[133].

[51] Secondly, Gonzalo Belano and the 807 other Wairan persons had access to "legal clinics that could advise and represent them legally"[134] and information about their

[129] Article 9.4 of the 1989 Convention on the Rights of the Child.
[130] *Case of Expelled Dominicans and Haitians v. Dominican Republic,* (Preliminary Objections, Merits, Reparations and Costs), Judgment of August 28, [2014], IACtHR, Series C No. 282, §417.
[131] Ibid.
[132] Hypothetical §21.
[133] Clarification Q&A 2.
[134] Clarification Q&A 9.

rights[135]. Moreover, they were informed that they could request that legal assistance and representation[136].

[52] Thirdly, their detention was carried within the framework of immigration proceedings under domestic law as laid down by the General Immigration Act which provides at its section 111[137] that detention might be ordered to ensure appearance at deportation.

[53] Furthermore, regarding the detention, a case-by-case assessment was made[138] and the decision to detain was made to ensure appearance at deportation, risk being taken relatively to their criminal records[139].

[54] Finally, when in detention, the Wairans could receive visits from family members, friends and also call them on the phone[140]. Thus, the State of Arcadia put measures into place to ensure that the family unity would be preserved.

[55] Thus, the family separation that occurred due to the deportation fell within the margin established by international instruments. Moreover, no more than one of parents from a child or other persons relative to their care was deported[141]. If children fell within that category, they were placed with other relatives that could provide for their care or "in the custody of the State, in Child Protection Center"[142]. If they were placed, they were

[135] Ibid.
[136] Ibid.
[137] Clarification Q&A 11.
[138] Clarification Q&A 15.
[139] Ibid.
[140] Clarification Q&A 18.
[141] Clarification Q&A 21.
[142] Ibid.

provided with "food, health service education, and recreation while waiting for relatives who could take care of them to be contacted"[143].

[56] The State of Arcadia did protect the family unity and the best interests of the child according to the Articles 17 and 19.

6. The State has fulfilled its obligations regarding the Article 24 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

6.1. The State conducted its assessment of refugee status grounded on non-arbitrary basis

[57] The Article 24 of the Convention protects every person as equal in front of the law[144]. It lays down a principle of non-discrimination. But this principle does not mean that all distinction between people are illegal under international law. Differentiations are legitimate when they follow a purpose based on objective reasons or difference of situation. The Manual in human Rights for Judges, Prosecutors and Lawyers of the IACHR states that the difference in treatment needs to "pursue a legitimate aim such as affirmative action to deal with factual inequalities, and are reasonable in the light of their legitimate aim"[145].

[58] This reasoning was adopted by the Court in its opinion on the revision of the constitution of Costa Rica. It stated that "not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity"[146]. The European Court of Human Right also followed this line of

[143] Ibid.
[144] Article 24 of the ACHR.
[145] *Human rights in the administration of justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Office of the High Commissioner for Human Rights in cooperation with the international bar association, United Nations [2003], p.454.
[146] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, [1984], IACtHR Series A, No. 4, p. 104, §56.

thinking, noting that to be illegal a difference in treatment needs "to ha(ve) no objective and reasonable justification"[147]. This was reaffirmed by the court in *Thlimmenos v. Greece*[148], where the European Court detailed its understanding of discrimination. The decision exposed that to be a discrimination, a treatment differing between two persons should be based on a difference of facts, situation.

[59] But, the European Court also accepts that member states can use their margin of appreciation "in assessing whether and to what extent differences in otherwise similar situations justify a different treatment"[149]. If the difference of treatment is based on gender or birth out of wedlock, it will need very weighty reasons as established in *Van Raalte v. the Netherlands*[150].

[60] The difference between Wairan having protection or being detained and deported from the territory of Arcadia is based on their criminal records. Having a criminal record is seen as a difference of situation between people. Thus, the difference in the treatment is based on objective reasons meaning a difference of situation. In fact, the case-by-case examination of refugee status meant that differentiation was taken after examination of their criminal records, meaning after deportation was decided by an administrative authority.

[147] Ibid §57.
[148] *Case of Thlimmenos v. Greece*, Judgment of April 6, [2000], (unedited version of the judgment), ECtHR, §44.
[149] *Case of Karlheinz Schmidt v. Germany*, Judgment of July 18, [1994], ECtHR, Series A, No. 291-B, pp. 32-33, §24.
[150] *Case of Van Raalte v. the Netherlands*, Judgment of February 21, [1997], ECtHR, p. 186, §39.

7. The State has fulfilled its obligations regarding the Article 25 and the Article 8 in conjunction with Article 1(1) of the ACHR in relation to Gonzalo Belano and 807 Other Wairan persons

7.1. The State has assessed the claims in accordance with the principle of due process of law and allowed to challenge the exclusion from refugee status and the deportation acts

[61] The Article 25 of the Convention states that every person should be assured a hearing, by a competent tribunal, following the law[151]. The Article 8 establishes the right to recourse for protection against violations of fundamental rights[152]. This should ensure a judicial remedy by a competent authority in the State and that the remedies asked for can be granted by this authority.

[62] The judicial protection and right to a fair trial are treated together, as they are linked in their appreciation. As established by judge Cançado in the case Trindade Almonacid Arellano and others v. Chili[153], these rights are intertwined into each other as they represent the right of access to justice, established as a *jus cogens* imperative.

[63] The general guidelines to protect rights under the Article 8 have been established in the case *Genie Lacayo v. Nicaragua*[154], notably in situation of migration. The proceedings to ensure the non-violation of these articles start with the respect of the due process of law[155]. This is allowed by having a non-discrimination policy during procedure, permitting an effective protection of fair trial rights.

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[151] Article 25 of the ACHR.
[152] Article 8 of the ACHR.
[153] *Case of Almonacid Arellano et al. v. Chili*, (Preliminary Objections, Merits, Reparations and Costs), Concurring opinion of Judge A.A. Cançado-Trindade, Judgement of September 26, [2006], §24.
[154] *Genie-Lacayo v. Nicaragua*, Judgment of January 29, [1997], IACtHR.
[155] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 on the "", p122.

[64] A specific protection is also required for deportation. In the case of *Expelled Dominicans and Haitians v. Dominican Republican*[156], the Inter-American Court established that the proceedings must be individualized to allow inclusion of personal circumstances. This also means that collective expulsions are prohibited under the Convention[157].

[65] Moreover, the proceedings should not discriminate based on race, religion, color, nationality, sex, language, political opinion, social origin or others, in accordance with the principle of equality laid down in the Article 24. The basic guarantees established in that case are the right to be informed expressly and formally of the charges and the reasons of expulsion. This safeguard is also asked in any proceedings regarding immigration related proceedings or detention[158]. This includes having a right to amount defense to those charges and the possibility of requesting legal advice, consular assistance and translation services if appropriate. Secondly, a right to appeal should be available and effective to every person.

[66] Finally, the decision of expulsion should be motivated, following the law.

[67] Therefore, the right to due process of law comprises multiples obligations for State to respect, which exceed the safeguard planned for deportation.

[68] Firstly, the right to be brought promptly before an officer of the law was developed in the *case of Vélez Loor v. Panama* as including that "the competent authority must hear

[156] *Case of Expelled Dominicans and Haitians v. Dominican Republic*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of August 28, [2014], IACtHR, Series C No. 282.
[157] Ibid §361.
[158] *Case of Vélez Loor v. Panama*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 23, [2010], IACtHR, Series C No. 218, §166.

the detained person personally and evaluate all the explanations that the latter provides, in order to decide whether to proceed to release him or to continue the deprivation of liberty"[159].

[69] Secondly, the obligation of reasonable delay in hearing includes the right to defense for the migrant[160]. Thus, he should be able to have access to his full case examination even before the decision to make an appeal.

[70] Thirdly, the assessment should be conducted by an independent and impartial adjudicator, if part of an administrative branch, he should be specialized in this domain and acting in accordance to law[161].

[71] Fourthly, the migrant should be assisted with a translator or interpreter[162]. The objective pursed is for every person to understand the proceedings and thus to be able to make decisions regarding his status and to ensure his right to defense.

[72] Fifthly, every person has the right to be assisted by legal counsel. This right has to be ensured by providing an attorney except in cases of non-criminal procedures where the legal representation is not necessary to due process[163]. In the special cases of migrants, a specialized advice should be offered by the state[164], as established by the Advisory opinion

[159] Ibid p109.
[160] Report on Admissibility No. 09/05, Petition 1/03, *Elías Gattas Sahih (Ecuador*), February 2, [2005], IACtHR
[161] Case of the Constitutional Court v. Peru. Judgment of January 31, [2001], IACtHRn Series C No. 71, §104.
[162] *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, IACtHR, §99C.
[163] *Case of Vélez Loor v. Panama*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 23, [2010], IACtHR, Series C No. 218, §145. and *Exhaustion of Domestic Remedies*, Advisory Opinion OC- 11/90 of August 10, [1990], IACtHR, Series A No. 11, §28.
[164] *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, IACtHR, §99D.

0C-21/14[165] and the Report of the Rapporteurship on Migrant Workers and members of their families of the Inter-American court, and free of charge[166].

[73] Sixthly, the right to appeal the decision before a higher court is recognized both by the Commission and the Inter-American Court[167], more specifically in the case of migrants where summary interdiction et repatriation is prohibited as a violation of their human rights. The Commission considers that to be effective, an appeal to a migratory decision must have suspensive effect[168].

[74] Finally, the migrants have to have a right to information and an effective access to consular assistance. This means that during administrative process, consular assistance should be available to protect the right to defense of the migrant, especially in pending immigration proceedings. The Commission stated that the lack of consular assistance is placing the migrant in a disadvantageous position, mainly by the inability to speak the language, the lack of knowledge concerning the legal system or the difficulty of collecting evidence from his home state[169]. In its advisory opinion OC-16-99 on the right to information on consular assistance in the framework of the guarantees of due process[170], four guarantees have been established to protect the right to information: right to consular

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[165] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14 of August 19, [2014], IACtHR, Series A No. 21, §131.
[166] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, [2003], IACtHR, Series A No. 18, §126.
[167] Report on Merits No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz (Mexico)*, April 13, [1999], IACtHR, §81-82 and *Case of Vélez Loor v. Panama*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 23, [2010], IACtHR, Series C No. 218, §179.
[168] Report on Merits No. 64/12, Case 12.271, *Benito Tide Méndez et al.* (Dominican Republic), March 29, [2012], IACtHR and Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia), October 31, [2011], IACtHR and *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of January 21, [2011], ECtHR, §293.
[169] *Human mobility Inter-American Standards: Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, *Inter-American Commission on Human Rights*, IEA, Série L, V, II, Doc. 46/15, §327
[170] *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], IACtHR, Series A No. 16.

information, right to consular notification, right to consular assistance and the right of consular communication.

[75] In the case of Gonzalo Belano and 807 Other Wairan persons, the decision of deportation and detention was taken after a case-by-case assessment notably to evaluate personal circumstances of every person[171] by a competent adjudicator the CONARE (National Commission for Refugees) which is an administrative branch specialized in immigration matters[172]. The State did not deport any person in an extreme vulnerability status[173], as they conducted an examination of the cases, notably regarding the vulnerability of migrants. Moreover, no child was facing a deportation charge or detained[174], following the exclusion of people in situation of vulnerability from deportation.

[76] The decision of deportation was taken on objective foundations pursuing a rightful motive. In fact, the reasoning grounds itself on the criminal records of the migrants[175], thus not falling into the discriminatory grounds. The Wairans had access to legal counsel, as they were provided with the contacts of legal clinics which could provide specialized advice for migrants[176]. This is reinforced by the possibility for the families to get legal counsel for the alleged violation of their right caused by the deportation of the Wairans[177]. Moreover, the State proposed consular assistance to every Wairan who was facing deportation charges but none of them chose to reach out to the embassy[178].

[171] Clarification Q&A 15.
[172] Hypothetical §20.
[173] Clarification Q&A 17.
[174] Clarification Q&A 21.
[175] Clarification Q&A 11.
[176] Hypothetical §20.
[177] Clarification Q&A 9.
[178] Ibid.

[77] The State of Arcadia respected the right to appeal of every Wairan by suspending the deportation of those having filed one, in respect of international law standards. Furthermore, the Wairans facing deportation who filed an *amparo* had them reviewed by the Pima Immigration Court[179] and the appeal of this decision was examined and also denied by the jurisdiction. The appeals were examined on a case-by-case basis, with a deeper look into personal circumstances, notably the risk of torture, and the context of their origin countries. Thus, the migrants had access to legal counsel and an effective appeal, even if it was denied by a competent court.

[78] The State of Arcadia also followed international guidelines to the right to a translator or interpreter as there was no indication that the Wairans spoke a different language.

[79] Thus, the State has fulfilled its obligations regarding Articles 8 and 25 of the ACHR.

V. REQUEST FOR RELIEF

Based on the aforementioned submissions, the State of Arcadia requests this Honourable Court to adjudge and declare:

The State fulfilled its obligations regarding Articles 4, 7, 8, 22.7, 22.8, 17, 19, 24, 25 all in relation to Article 1.1 of the ACHR.

[179] Clarification Q&A 69.