
**GONZALO BELANO ET AL.
(PETITIONER)**

V.

**REPUBLIC OF ARCADIA
(RESPONDENT)**

MEMORIAL FOR THE STATE

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Art. 9.4 I/A Court H.R., Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14, para. 274.

III. STATEMENT OF FACTS

The Republic of Arcadia, the respondent State (“the State”), a stable and prosperous nation, leads the Americas in the implementation of some of the most progressive immigration policies in the region, in accordance with the duties arising from its assumed international obligations. The respondent State is a party to the United Nations (“UN”) as well as the Organization of American States (“OAS”). Pursuant to its longstanding respect for the human rights of all peoples, the respondent state has ratified all of the human rights instruments of the universal system as well as most of those in the Inter-American system.¹ This includes the American Convention on Human Rights (“ACHR”) as well as the Convention Relating to the Status of Refugees and its Protocol (“1951 Convention.”)²

a. Background on Puerto Wairan immigration to the respondent State: an increasing history of migration

Socio-economic and political instability has plagued Puerto Waira ever since it underwent a military dictatorship from 1954-1996, culminating in an armed conflict. Since then, violence and poverty have steadily increased and the country is still dealing with the effects of the dictatorship twenty years later.³ According to the 2010 census the monetary poverty rate of Puerto Waira is 46.9% with 18% of the population living in extreme property.⁴ Due to the political and economic crisis, coupled with its institutional shortcomings, Puerto Waira stopped recording this data after 2010.⁵

¹ Hypothetical Case, para. 9.

² Hypothetical Case, para. 9.

³ Hypothetical Case, para. 2.

⁴ Hypothetical Case, para. 3.

⁵ Hypothetical Case, para. 3.

Although Puerto Waira held democratic elections in 1996, the country has been plagued with gang violence since the early 2000's after the mass deportations of young Wairans from the nearby Republic of Drimlandia in the late 1990s.⁶ According to the Minister of the Interior and Police, gang membership outnumbers the National Police 3 to 1.⁷ Correlating with the increase in gang activity and escalating conflict with police forces, Puerto Waira has become the most violent country in the Western Hemisphere since 2014.⁸

The government of Puerto Waira is attempting to put an end to this rise in crime and violence by stopping or eliminating gangs at all costs.⁹ However, impunity is a rampant problem in the country with up to 90% of violent crimes going unpunished.¹⁰ Emigration from Puerto Waira is common. The number one destination is the respondent State, where they are always well received.¹¹

Due to its prosperity and welcoming immigration policies, the respondent State has always had a substantial migrant population. The respondent State gained its independence in 1825 and has enjoyed a strong and stable democracy and economy ever since.¹² The unemployment rate has remained at around 5% in the last 5 years.¹³ However, between 2013 and 2015 there has been an 800% increase in asylum seekers from Puerto Waira.¹⁴ In response to the increase in migration, Arcadia has increased the number of people it recognizes as refugees in an attempt to meet the international need.¹⁵ Arcadia, in its constitution, recognizes the right to seek

⁶ Hypothetical Case, para. 4.

⁷ Hypothetical Case, para. 4.

⁸ Hypothetical Case, para. 4.

⁹ Hypothetical Case, para. 6.

¹⁰ Hypothetical Case, para. 7.

¹¹ Hypothetical Case, para. 7.

¹² Hypothetical Case, para. 8.

¹³ Hypothetical Case, para. 8.

¹⁴ Hypothetical Case, para. 10.

¹⁵ Hypothetical Case, para. 10.

and receive asylum through its Constitution as well as the Law on Refugees and Complementary Protection.¹⁶ The respondent State's legal schema guarantees the principle of non-refoulement and does not prosecute asylum seekers for their unlawful entry or stay.¹⁷

b. Mass migration of asylum seekers travel through Tlaxcochitlan to the respondent State's border

In 2014, due to the ever increasing insecurity within Puerto Waira, a caravan of asylum seekers organized a mass migration through neighboring Tlaxcochitlan and into the respondent State.¹⁸ Within months, more than 7,000 Puerto Wairans arrived to the Arcadian border. The migrants were swiftly accommodated by humanitarian and community groups attuned to the plight of the migrants there.¹⁹ At the Tlaxcochitlan/Arcadia border, the government of Tlaxcochitlan set up tents and spaces for the migrants to have shelter while waiting for entry into Arcadia.²⁰ At first, there was generalized support for the migrants as aid groups provided needed resources such as medical treatment, food, and shelter.²¹ In response to the mass influx of people at the border, the respondent State sent National Police officers to aid the officials from the National Migration Institute to get their asylum applications processed.²² Furthermore, migrants upon arrival were welcomed with food, clothing, shelter, and health brigades. Beyond that, some migrants, including pregnant women, turned to the country's health care services for long-term care.²³

¹⁶ Hypothetical Case, para. 11-12.

¹⁷ Hypothetical Case, para. 11.

¹⁸ Hypothetical Case, para. 14.

¹⁹ Hypothetical Case, para. 15.

²⁰ Hypothetical Case, para. 15.

²¹ Hypothetical Case, para. 16.

²² Hypothetical Case, para. 16.

²³ Hypothetical Case, para. 16.

After this massive spike in immigration, Arcadia held an “extraordinary” meeting with multiple government institutions, agencies in the UN system and UNICEF.²⁴ The purpose of the meeting was to determine the best course of action for accepting the Puerto Wairan refugees.²⁵ Shortly thereafter, Arcadian president Valverde announced that the State would open its borders to the safe entry of people from Puerto Waira and that all of the Puerto Wairans were to be presumed *Prima Facie* asylees. The government further established a procedure under which Puerto Wairans were to be individually processed and approved for asylum within 24 hours.²⁶ After the interview process was done the asylum seekers had their background checks done by the Ministry of Foreign Affairs and the Intelligence Service of the Ministry of the Interior in order to better guarantee national security and public order.²⁷

c. Relocation of migrants found ineligible, due to their violent criminal histories, to neighboring Tlaxcochitlan

Ultimately, over 800 Puerto Wairan individuals with criminal records consisting of “Serious non-political crimes” were detained while authorities reviewed each case individually.²⁸ The crimes for which the Puerto Wairans were convicted include the following: kidnapping, extortion, murder, sexual violence, drug trafficking, human trafficking, and forcible recruitment.²⁹ Due to the mass influx, the State gave women priority to stay in the immigration centers. The rest of the men were detained in correctional facilities and housed in separate immigration units in order to avoid any contact with persons detained on criminal charges.³⁰

²⁴ Hypothetical Case, para. 17.

²⁵ Hypothetical Case, para. 17.

²⁶ Hypothetical Case, para. 18.

²⁷ Hypothetical Case, para. 21.

²⁸ Hypothetical Case, para. 22.

²⁹ Clarification Question 2.

³⁰ Clarification Question 3.

When the news got out that there were so many Puerto Wairans with criminal records within the State, protests erupted demanding their deportation.³¹ In response to this social upheaval the respondent State launched awareness-raising campaigns to combat racism and xenophobia and to protect the migrants already admitted.³²

When the respondent State concluded that the State did not have the capacity to admit all of the migrants, President Valverde put out an international call soliciting support from other member nations to accept the Puerto Wairans found ineligible for admission.³³ After two months passed and no other nations responded to the State's call for cooperation, the State reached a written agreement with Tlaxcochitlan to secure the relocation of the ineligible migrants to Tlaxcochitlan.³⁴ At a meeting held between leaders of the two nations, the respondent State asked that the migrants not be deported due to the danger they faced in their home country. In exchange for admitting the Puerto Wairan migrants, the State agreed to send Tlaxcochitlan monetary support. The State gave Tlaxcochitlan the first half of the agreed-upon payment at the outset and withheld the latter half to ensure the fulfillment of the agreement. Later, Tlaxcochitlan breached that agreement and deported the migrants the respondent State removed. Due to Tlaxcochitlan's nonfulfillment of their earlier promise, the respondent State did not make the second payment.³⁵ All migrants who had not filed an appeal were returned to Tlaxcochitlan, while those who had were allowed to remain in the respondent State until a decision was made on their appeal.³⁶

³¹ Hypothetical, para. 25.

³² Hypothetical, para. 25.

³³ Hypothetical, para. 26.

³⁴ Hypothetical, para. 27.

³⁵ Clarification Question 66.

³⁶ Hypothetical, para. 27.

When the Puerto Wairans were in detention they were provided with information on how to request assistance from the consulate, but no one took advantage of it.³⁷ The State also provided detainees with contact information for different legal clinics and civil society groups that could provide legal assistance.³⁸

d. Gonzalo Belano's claim and the legal background of the petition before the Court

Gonzalo Belano's family sought legal aid at the University of Puerto Waira's migration and refugee legal clinic when he was killed after being deported from Tlaxcochitlan.³⁹ The clinic attempted to file a claim for reparations for Gonzalo Belano, and the other 807 migrants that were deported from Tlaxcochitlan ("the Petitioners,") with the respondent State's consulate.⁴⁰ The State argued, among other requirements, that administrative petitions must be filed directly with the court of competent jurisdiction.⁴¹ Thereafter, the clinic filed a complaint to the Inter-American Commission on Human Rights, which was approved for review.⁴²

IV. LEGAL ANALYSIS

A. PRELIMINARY OBJECTIONS

1. Statement of Jurisdiction

The Court has jurisdiction to hear this case. The respondent State of Arcadia ("the respondent State" or "the State") has ratified all the treaties of the universal system as well as most of the instruments of the Inter-American Human Rights System, including the American

³⁷ Clarification Question 9

³⁸ Clarification Question 9

³⁹ Hypothetical case, para. 30

⁴⁰ Hypothetical case, para. 32

⁴¹ Hypothetical case, para. 33

⁴² Hypothetical case, para. 34

Convention on Human Rights (“ACHR.”)⁴³ Articles 61 and 62 authorize the Court to adjudicate matters concerning issues arising out of the ACHR.

2. *Failure to Exhaust Domestic Remedies*

The Court should dismiss the case due to the fact that the petitioners failed to seek effective and available domestic remedies. The fourth instance formula defines the Inter-American Court of Human Rights as subsidiary to domestic judicial bodies, requiring petitioners to exhaust all available domestic remedies trying to bring a matter before the Court.⁴⁴ The majority of the petitioners, 591 people, did not file an appeal in the respondent State, which was made readily available to those who chose to do so.⁴⁵ Furthermore, only 217 people of the 808 filed an appeal and a writ of amparo and motion to reconsider the decision within the State’s legal system.⁴⁶ Lastly, the procedural requirements of the State’s laws are clear in stating that administrative lawsuits are to be filed directly with the competent court, which the petitioners failed to do here.⁴⁷

B. MERITS

1. *The respondent State fulfilled its legal obligations with regard to the right to seek asylum in accordance with Article 22 of the ACHR (in conjunction with Art. 1 and 2 of the ACHR)*

⁴³ Hypothetical Case, para. 9

⁴⁴ Case 11.597, *Emiliano Castro Tortrino (Argentina)*, Inter-Am. Comm. HR 54, para. 17, OEA/Ser.L/V/II.95, doc 7 rev. (2 March 1998).

⁴⁵ Hypothetical case, para. 27

⁴⁶ Hypothetical Case, para. 28

⁴⁷ Hypothetical Case, para. 35

Article 1 of the American Convention on Human Rights (“ACHR”) gives rise to affirmative duties on the respondent State to respect and ensure the protection of the human right of all migrants to seek asylum.⁴⁸ Pursuant to the prerogatives of the Inter-American Court, the State has assented to every applicable human rights instrument in the Universal system as well as most of the instruments provided in the Inter-American system.⁴⁹

In accordance with its assumed international responsibilities, the immigration policy directives of the respondent State were designed and executed with the utmost respect for the human rights of each Puerto Wairan migrant who presented themselves at the border.⁵⁰ This included the implementation of domestic law and policies that effectuated the protection of the rights contained therein. Here, the State has adopted asylum policies in its own constitution that were not only informed by its international obligations, but more extensive than those contained in the Conventions ratified by the state.

1.1. The right to seek asylum was ensured for all Puerto Wairan migrants, including the petitioners, pursuant to Art. 22(7) of the ACHR

Every one of the over 7,000 Puerto Wairan migrants that presented themselves to the respondent State’s border was freely permitted to seek refuge within its territory. The international community has recognized the particular vulnerabilities of migrants, such as the Puerto Wairans who presented at the State’s border, as well as the need for states to adopt special measures for their protection.⁵¹ In accordance with this special duty, the respondent state granted

⁴⁸ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

⁴⁹ Advisory Opinion OC-18/03. Juridical condition and rights of undocumented migrants. Resolution of September 17, 2003.

⁵⁰ *Id.*

⁵¹ United Nations, World Summit on Social Development held in Copenhagen in March 1995, Programme of Action, paras. 63, 77 and 78; United Nations, A/CONF.171/13, 18 October 1994, Report on the International Conference on Population and Development held in Cairo from 5 to 13 September 1994, Programme of Action,

Prima Facie refugee status to each Puerto Wairan migrant who presented at the border. The respondent state upheld the principle of non-rejection at the frontier by allowing all of the petitioners to enter the state.

1.2. The respondent State was within its lawful authority to have restricted the immigration of asylum seekers guilty of serious non-political crimes

The respondent State's own constitution enshrined a policy of asylum law more expensive than that required by its international obligations. Article 22(7) of the ACHR states that all migrants being pursued for political (or related) offenses have the right to seek asylum in accordance with domestic and international law.⁵² The 1951 Convention defines refugees as migrants with a well-founded fear of persecution based on religion, race, nationality, political opinion, or membership in a particular social group. Broadening the scope of its human rights obligations than that contained in the 1951 Convention, the State has incorporated into its asylum law migrants who have fled the country because their life, safety or freedom have been threatened by generalized violence and internal conflicts that have disturbed public order.

Article 22(7) establishes two restrictions on the right to seek asylum: (1) subject to the laws of the state, and (2) in accordance with the obligations arising out of international conventions.⁵³ Here, the State's constitution enabled the Ministry of the Interior to establish group guidelines in the event of a massive influx of migrants.⁵⁴ The only restriction to the right

Chapter X.A.10(2) to 10(20); United Nations General Assembly, A/CONF. 157/23, 12 July 1993, World Conference on Human Rights held in Vienna, Austria, from 14 to 25 June 1993, Declaration and Programme of Action, I.24 and II.33-35.

⁵² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

⁵³ Pacheco Tineo paragraph 142 citing IACHR. Report No. 51/96. Decision of the Commission as to the merits of Case No. 10,675. *Haitian Interdiction – Haitian Boat People*. United States. March 13, 1997, para. 151.

⁵⁴ Hypothetical Case, para. 13

to asylum in the State's constitution was pulled directly from the 1951 Convention, which states that migrants who have committed serious non-political crimes are to be excluded from asylum protections.⁵⁵ This policy is also in accordance with the requirements of Article 22 of the ACHR, which states that freedom of movement may be lawfully restricted by to prevent crime as well as protect public order and safety.⁵⁶ Therefore, the State enacted restrictions authorized by law.

States maintain discretion in determining their immigration policies so long as they do not disrespect the human rights of migrant peoples.⁵⁷ Article 22(3) allows for the legal restriction of the rights to freedom of movement in order to prevent crime, protect public order and safety, and protect national security.⁵⁸ Here, the respondent State was faced with a risk to the safety and order of its community when the discovery of the petitioners' violent convictions led to the nationwide uproar of the State's population. The civil unrest was severe enough to warrant amelioration through the public tolerance initiatives put in place in response by the respondent State. For these reasons the petitioners were processed in accordance with the State's international obligations.

1.3. The respondent state respected the principle of Non-Refoulement and removed only those excluded from its protection

⁵⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 25 March 2019]

⁵⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

⁵⁷ Cf. *Case of Velez Llor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 126, and *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra*, para. 140.

⁵⁸ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

The Non-refoulement is the cornerstone of international customary refugee law, prohibiting states from returning (refouler) refugees to countries where they will face persecution.⁵⁹ However, the principle is not without exception. Article 33(2) of the 1951 Convention provides that that migrants who have been convicted of particularly serious crimes constitute a danger to the community and are exempt from the benefits of non-refoulement.⁶⁰ The petitioners were each found to have been convicted for serious violent crimes sufficient to trigger Article 33. Article 1(c) of the 1951 Convention contains so-called cessation clauses, which exclude certain migrants from refugee protections.⁶¹ The cessation clauses of the 1951 Convention, due to their negative character, “are exhaustively enumerated” and “should therefore be interpreted restrictively.”⁶²

Article 22 of the ACHR prohibits the mass-expulsion of migrants, defined by the European Court as “any measure of the competent authorities compelling aliens as a group to leave the country, *except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.*” [emphasis added.]⁶³ The actions of the State did not constitute mass deportation because the petitioners’ serious criminal convictions did not lead to an arbitrary bar. Each petitioner was individually interviewed prior to their removal. As required in cases of large-scale influx, the

⁵⁹ Citation

⁶⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <https://www.refworld.org/docid/438c6d972.html> [accessed 25 March 2019]

⁶¹ *Id.*

⁶² UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992).

⁶³ Council of Europe: European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights - Prohibition of collective expulsions of aliens*, 30 April 2017, available at: <https://www.refworld.org/docid/592be3c84.html> [accessed 25 March 2019]

respondent state allowed the petitioners temporary protection pending adjudication of their claims.⁶⁴

The right to non-refoulement necessitates that asylum seekers be individually interviewed prior to being turned away at the border in order to determine the viability of their claims.⁶⁵ The respondent State did not base its determinations purely on criminal charges alone, but also the nature and circumstances of the charges. Given the greater context of the mass gang violence arising from Puerto Waira, individuals such as Gonzalo Belano were rightfully excluded due to their known gang affiliations. The mass arrival of gang-affiliated individuals into Puerto Waira in the 1990s set the stage for their current instability. That recent history coupled with the already present social upheaval in the respondent State were important factors the determination of their ineligibility.

In the case of a large-scale influx of migrants that places an unduly heavy burden on certain countries, states shall take all necessary measures to assist, at their request, those who bear the primary burden of admitting them.⁶⁶ States have a duty in such situations to adopt a framework of international solidarity and burden-sharing.⁶⁷ In this vein, the respondent state took the affirmative step to encourage international cooperation from the beginning by hosting an extraordinary meeting with international bodies and organizations at the outset of the migration crisis. Thereafter, the respondent State put out an international call requesting aid from the Inter-American community that was left unanswered for months. One component of burden-sharing is

⁶⁴ UN High Commissioner for Refugees (UNHCR), *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975-2009 (Conclusion No. 1-109), available at: <https://www.refworld.org/docid/4b28bf1f2.html> [accessed 25 March 2019]

⁶⁵ *Cf. Case of Pacheco Tineo Family v. Bolivia, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 153.

⁶⁶ *Id.*

⁶⁷ Citation

the obligation to provide resettlement possibilities in third countries, as appropriate.⁶⁸ Here, the respondent state took active measures to set up new arrangements and provide resources to ensure that the petitioners would be resettled in Tlaxcochitlan.

The human rights committee has stated that states have a responsibility not to expel migrants to states where they face a risk of torture.⁶⁹ In light of this responsibility, the respondent state took affirmative steps to ensure that the petitioners would not be returned to Puerto Waira, where it was known that they faced a high risk of danger. Had the State merely removed the petitioners to Tlaxcochitlan without assurances that they would not be returned to Puerto Waira, it may have been guilty of indirect refoulement.⁷⁰ However, the State specifically asked Tlaxcochitlan not to deport the petitioners, had their agreement memorialized in writing, and even withheld half the compensation at the outset to ensure said result.⁷¹ These steps imply that the State had a reasonable expectation that Tlaxcochitlan would not return the petitioners to Puerto Waira. The understanding was so strong that the State refused to complete the second payment upon Tlaxcochitlan's removal of the petitioners, because the deportation was considered a breach of the agreement.

The Geneva Convention, specifically Article 1F, sheds some light on the reasoning behind excluding asylum seekers guilty of serious, non-political crimes from the protection of non-refoulement.⁷² The *Travaux preparatoires* recognised the purpose of Article 1F as

⁶⁸ *Id.*

⁶⁹ *Cf. Case of Wong Ho Wing v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 30, 2015. Series C No. 297.

⁷⁰ Article 3 of the European Convention on Human Rights defines indirect refoulement as the removal to a third - intermediary - country from which the individual may then be removed to the country in which he faces a real risk of the proscribed ill-treatment.

⁷¹ Clarification Question 66

⁷² UN High Commissioner for Refugees (UNHCR), UNHCR public statement in relation to cases *Bundesrepublik Deutschland v. B and D* pending before the Court of Justice of the European Union, July 2009, available at: <https://www.refworld.org/docid/4a5de2992.html> [accessed 25 March 2019]

disqualifying otherwise eligible refugees in order to ensure the integrity of asylum as an institution.⁷³ In order to hold people responsible for their actions and guard against misuse, it is important to maintain the exclusion under international law.

2. The respondent State fulfilled all its legal obligations with regard to the juridical rights of the petitioners in accordance with Art. 8, 24, and 25 (in conjunction with Art. 1 and 2) of the ACHR.

Article 8(1) of the ACHR sets forth the standard for due process of law.⁷⁴ It states that every person has the right to a hearing in front of a competent, independent and impartial tribunal, within reasonable time and with certain guarantees. Further, article 24 guarantees that every person is equal under the law and should not be subject to discrimination and therefore entitled to equal protection.⁷⁵ In addition, article 25 of the Convention affords the right to an effective legal remedy to any person whose fundamental rights have been violated.⁷⁶

2.1 The respondent State indiscriminately provided equal, speedy, and accessible judicial and administrative resources to each detained and expelled migrant pursuant to Art. 24 and 25 of the ACHR.

In immigration proceedings, where the end result could be expulsion or deportation of migrants, the state must respect the basic guarantees outlined in Article 8 of the ACHR.⁷⁷ Generally, immigration proceedings that may lead to deportation must be individually evaluated and must guarantee the following minimum protections: (a) that migrants be expressly and formally informed of their charges and given the opportunity to present a defense. This includes

⁷³ *Id.*

⁷⁴ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Cf. Case of Pacheco Tineo Family v. Bolivia, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 252.

the opportunity to ask for legal assistance and translation or interpretation if needed; (2) the right to appeal an unfavorable decision; and (3) that the eventual deportation may only happen after a reasoned decision.⁷⁸

Asylum seekers must have access to proceedings to determine their status as refugees and therefore, in accordance with international law and the ACHR, states have the obligation to (a) guarantee the applicant necessary facilities and services of an interpreter as well as access to legal representation if appropriate. This includes providing the applicants with the necessary guidance with regard to the procedure in a way that the applicant can understand; (b) the request must be individually examined by a competent and clearly identified authority; (c) the decision must be duly and expressly founded; (d) all stages of the process must respect confidentiality to protect asylum seekers who may be in danger; (e) if applicant is denied refugee status, he should be given information on how to file an appeal and granted a reasonable amount of time to file and; (f) the appeal for review must suspend the prior finding and must allow the applicant to remain in the country while appeal is being decided.⁷⁹

First, the respondent States provided the applicant with the necessary facilities, materials, services and legal representation to defend their interests. From the beginning, the respondent State provided proper guidance on the legal procedure and provided the detained migrants with the resources necessary to navigate the system. The State authorities informed the detainees of their rights in writing. The State informed the detainees, verbally and in writing, that they could request legal assistance from both their country's consultation assistance as well as from legal clinic and organization, whose contact information they were also provided with.

⁷⁸ Cf. *Case of Pacheco Tineo Family v. Bolivia, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 133.

⁷⁹ *Id.*, para. 159.

Secondly, a competent and clearly identified authority adjudicated every detainee's request individually. The migrant's process began with obtaining *prima facie* refugee status, for this purpose, the interviews and determinations were conducted on an individual basis. Once the individual interviews were done, each case was reviewed by the Ministry of Foreign Affairs and the Intelligence Service of the Ministry of the Interior, to determine if the applicant had a criminal record. Furthermore, within the 45 days determined by law, the State examined the asylum claims of all of the detained migrants. This process was first outlined by the Arcadian Constitution and reiterated by the president in his address.

Thirdly, the decision must be founded in law and non-arbitrary. According to Article 48 of the Constitution, refugees not only enjoy the same protections as the State's citizens, they have special protection under the law guaranteeing full exercise of their rights. The Constitution further adds, in Article 30, that when a massive influx of a group of persons that leads to substantial increase in applications for refugee status the Ministry of the Interior may establish guidelines to deal with the situation that they deem fit. In addition, in order to protect incoming migrants and existing citizens, article 40 of the Law on Refugee and Complementary Protection states that there are some instances in which refugee status shall not be granted. Refugee status shall not be granted if after and individual investigation there are reasonable grounds for considering that applicant has committed a serious non-political crime outside of the country or "a crime against peace, genocide, crimes against humanity, or war crimes." In the present case, there was indeed a mass influx of migrants that substantially increased the applications for refugee status, triggering the State's existing law. Lastly the detention came only after a full examination of the application and it was established that these migrants had committed the qualifying crimes.

Any process involving the migrants must be kept confidential in order to protect those asylum seekers in danger. In the fact pattern, there is no evidence pointing to a violation or fulfillment of the confidentiality prong of this test.

If applicant is denied refugee status, she should be given information on how to file an appeal and granted a reasonable amount of time to file. As migrants were transported to Tlaxcochitlan, Arcadia made accommodations for those who had filed a judicial or administrative appeal to stay in the country to process their claims.

Lastly, the appeal for review must suspense the prior finding and must allow the applicant to remain in the country while appeal is being decided. In addition to permitting migrants who filed an appeal to stay in the country, their application for a *writ of amparo* was respected. The immigration court ordered that the deportation orders be suspended until their cases were adjudicated.

In the present case, the respondent State not only fulfilled the requirements set by the Convention but it surpassed them in its efforts to accommodate the migrants.

2.2. The respondent State lawfully detained migrants in adherence to Art. 7 of the ACHR.

Article 7 of the Convention protects against arbitrary arrest and detention, however, it is not an absolute right.⁸⁰ In cases where the deprivation of liberty is permitted, the State must insure the rights of the detainees.⁸¹

The OAS has stated that “In the case of immigration detention, the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought

⁸⁰ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

⁸¹ *Id.*

not to be construed as criminal offenses.”⁸² According to AOS detention is only permitted after an individual evaluation has been made into each case and the detention serves a legitimate purpose of the State, which have been previously outlined in its law.⁸³

During detention, migrants must remain separate from people imprisoned for criminal activity due to the different purposes for detention.⁸⁴ When a migrant is detained for immigration reasons the detention needs to be proportional to the situation and for the shortest amount of time while claims are being processed.⁸⁵ The 1951 Convention further adds that “such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”⁸⁶

By virtue of its status as a migrant destination, the State has put safeguards in its domestic law allowing it to efficiently provide for the needs of migrants and asylum seekers. In accordance with Article 7 of the Convention, the State recognized the petitioner’s rights to personal liberty by opening its borders and allowing the petitioners to be in the country while their asylum claims were being processed. In addition, in accordance with the guidelines given by the OAS to the United States, in the Article 48 of the State’s Constitution states that asylum seekers are never subject to criminal penalties for their unlawful entry or stay.

⁸² Inter-American Commission on Human Rights (IACHR), Report on Immigration in the United States: Detention and Due Process, 30 December 2010, OEA/Ser.L/V/II. Doc. 78/10, available at: <https://www.refworld.org/docid/4d83010d2.html> [accessed 26 March 2019], para. 38

⁸³ Inter-American Commission on Human Rights (IACHR), Report on Immigration in the United States: Detention and Due Process, 30 December 2010, OEA/Ser.L/V/II. Doc. 78/10, available at: <https://www.refworld.org/docid/4d83010d2.html> [accessed 26 March 2019], para. 39

⁸⁴ Cf. *Case of Velez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 126, and *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra*, para. 205.

⁸⁵ *Id.*

⁸⁶ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 25 March 2019]

Further, in accordance with international understanding of detention as a last resort, the State met with various international organizations, including the United Nations High Commissioner for refugees, to deal with the mass influx of asylees. Detention was only considered after each of the more than 7,000 asylum claims were individually revised and background checks were completed. As previously established in State's Law on Refugees and Complementary Protection, the state determined that in this mass influx of people their last resort was to detain those with criminal records while their immigration status was determined in order to protect public order and the more than 6,000 migrants that had already been admitted.

The State further fulfilled the guidelines established by the Court by separating the detained migrants from detainees serving criminal sentences. The government first placed the detained migrants in pre-determined immigration facilities, but due to the unprecedented number of migrants that the State was dealing with, the rest of the detainees were placed in a separate immigration unit within a correctional facility.

Lastly, the National Convention outlines that migrants should only be detained until their status is sorted out, or until they gain access into a third country. The State did not keep migrants longer than was necessary to determine their situation, and Arcadia actively worked out a deal on behalf of the migrants to secure them access to a third country.⁸⁷

3. *The respondent State fulfilled its legal obligations with regard to the rights of the families and children of ineligible migrants in accordance with Art. 17(1) and Art. 19 of the ACHR (in conjunction with Art. 1 and 2) of the ACHR*

Article 17(1) of the ACHR broadly outlines that the family unit is entitled to protection by the state.⁸⁸ Further tied into family life, Article 19 calls for the protection of children based on

⁸⁷ Hypothetical Case, para. 27.

⁸⁸ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 26 March 2019]

their status as children. In immigration proceedings the above articles have special importance and the Commission recognizes that as part of their sovereign powers states are entitled to develop their own immigration policy as long as it respect the above principles and human rights.⁸⁹ In cases such as immigration, the Court decided that neither the state interest nor the rights of the migrant to family life are absolute, instead the interests of both are weighed in light of the circumstances.⁹⁰

3.1. The respondent state did not implement any policies that impeded the development of the family unit in accordance with Art. 17

Article 9 of the Convention on the Rights of the Child (“CRC”) allows for family separation in cases of deportation as an exceptional measure.⁹¹ In the CRC, where decision-making involves the potential separation of a family, there must be a pressing need to protect public order and family separation must be a proportional mean to that end.⁹² With the mass influx of migrants into the State there was a pressing need to protect public order, especially since the crimes the petitioners had committed were serious non-political crimes that included kidnapping, murder, and sexual violence among others.

⁸⁹ IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status, para. 166; IACHR, Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families, para. 6; IACHR, Report on Terrorism and Human Rights, para. 377; IACHR, Report on Immigration in the United States: Detention and Due Process, para. 32; IACHR, Application to the Inter-American Court of Human Rights, Case No. 12,688, Nadege Dorzema and others: Slaughter of Guayubín (Dominican Republic). February 11, 2011, para. 208. I/A Court HR., Case of Vélez Lóor v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, paras. 97 and 169.

⁹⁰ I/A Court H.R., Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 282, para. 417

⁹¹ Art. 9.4 I/A Court H.R., Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14, para. 274.

⁹² IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status. OEA/Ser.L/V/II.106 doc.40 rev., February 28, 2000, para.166, Citing Eur.Ct.H.R., Berrehab v. the Netherlands, Ser. A No. 138, 11 E.H.R.R. 322 (1988) (finding that enforcement of national immigration policy is not sufficient to override the need for contact between parent and child)

The State went further than required to try to protect the family unit. The European court has held that communication of family must be guaranteed when parents and children are separated because coexistence between parents and children is a fundamental element of family life.⁹³ The adults that were detained were able to receive visits by friends and family members including access to phone communication.

3.2. The respondent state instituted measures to address the special needs of the children of ineligible migrants pursuant to Art. 19 of the ACHR

Article 19 of the Convention guarantees children both the rights that are inherent to all persons as well as special rights that come from their vulnerable status as children.⁹⁴ Because of their special status, no child or adolescent was excluded from international protection, detained or deported from the respondent State. Further, once the State could contact the child's relatives in Arcadia they were placed in their care, other were placed in Child Protection Centers where they received food, health services, education and recreation time while the State took active efforts to reunite them with suitable relatives within the country.

4. The respondent State fulfilled all its legal obligations with regard to the right to life in accordance with Art. 4, 5, and 22(8) of the ACHR (in conjunction with Art. 1 and 2)

The right to life is a fundamental right that presupposes the enjoyment of all other human rights.⁹⁵ If states are unable to ensure the right to life, all other rights become meaningless.⁹⁶ Because of its inherent nature, any restrictive approach to this right is inadmissible.⁹⁷ By the

⁹³ Eur. Court H.R., Case of T and K v. Finland, Judgment of 12 July 2001, para. 168; Eur. Court H.R., Case of Scozzari and Giunta v. Italy, Judgment of 11 July 2000, para. 148; y Eur. Court H.R., Case of Olsson v. Sweden (no. 1), Judgment of 24 March 1988, Series A no. 130, para. 72.

⁹⁴ IACHR, Report on Merits No. 136/11, Case 12.474, Pacheco Tineo Family (Bolivia), October 31, 2011, para. 173.

⁹⁵ Cf. *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 63.

⁹⁶ *Id.*

⁹⁷ *Id.*

contrary, the right to life gives rise to special obligations in order to respect and guarantee the right to life, which includes both positive and negative duties. First, the State must adopt all necessary measures to protect and preserve the right to life of all individuals under their jurisdiction (positive.) Second, the State must ensure that no person be arbitrarily deprived of their lives (negative.)⁹⁸ Here, the respondent state detained the petitioners pursuant to law and, in the spirit of international cooperation, took all possible steps within their abilities to protect the lives of the petitioners upon removal.

4.1. The respondent State temporarily deprived the petitioners of their liberty pursuant to a transparent and pre-established procedure required by Art. 4, 5 and 22(8) of the ACHR

State obligations are determined by the particular needs of the individuals affected, owing to their personal and specific situations.⁹⁹ The duty of the states is one of “medium or behavior, not of results, to prevent in particular vulnerable peoples protected by the rights codified in the treaty.”¹⁰⁰ In other words, the standard which States are required to abide by is one of progressive implementation, whether or not they ultimately achieve the desired results.

The test the Court uses to evaluate whether the State violated this duty is (a) the existence of a situation of real and immediate risk for an individual or identifiable group; (b) the authorities knew or should have known of this risk; and (c) despite this, the authorities failed to adopt the necessary measures within its scope that could have been reasonably expected to prevent or avoid the risk.¹⁰¹ Here, there existed a situation where the petitioners faced a real and immediate

⁹⁸ Cf. *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 65.

⁹⁹ Cf. *Case of Pueblo Bello Massacre v. Colombia, Merits, reparations and costs.* Judgment of January 31, 2006. Series C No. 140, para. 111.

¹⁰⁰ Cf. *Case of Yarce et al v. Colombia, Preliminary Objection, merits, reparations and costs.* Judgment of November 22, 2016. Series C No. 325, para. 181.

¹⁰¹ *Id.*, para. 185.

threat if returned to Puerto Waira pursuant to respondent State law and the respondent State was aware of this risk. However, in response to this knowledge, the State adopted affirmative measures reasonably expected to avoid said risk.

When the respondent State concluded that it had insufficient capacity to accommodate the petitioners, the leadership of the State met with their counterparts at Tlaxcochitlan in order to devise a removal strategy that would avoid the State refouling the petitioners to the dangers they faced in Puerto Waira. To that end, Tlaxcochitlan signed an agreement accepting the petitioners removed from the respondent State in exchange for monetary support. Because of the good faith efforts made by the State to prevent the refouling of the petitioners to Puerto Waira, it cannot be said that they failed to adopt the necessary measures to avoid injury to the petitioners.

The right to life is not and has never been absolute, but rather is subject to an evolutionary interpretation.¹⁰² The right to life presupposes that no person be deprived of their life *arbitrarily*.¹⁰³ Here, the State implemented sufficiently transparent measures to process the Puerto Wairan asylum seekers to be deemed non-arbitrary. They were individually assessed and arranged to be removed to a safe, third state.

4.2. The respondent State took affirmative steps to ensure the petitioners were treated with dignity and decency pursuant to Art. 5 and 22(8) of the ACHR

The right to humane treatment is a fundamental right that is non derogable and specifically prohibits torture and other similarly cruel, inhuman, or degrading treatment.¹⁰⁴ In order to protect and ensure the right to life and humane treatment, the State has an inescapable

¹⁰² Cf. *Case of Artavia Murillo Et Al ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 245.

¹⁰³ *Id.*, para. 172.

¹⁰⁴ Cf. *Case of "Juvenile Reeducation Institute" v. Paraguay*, Preliminary objections, merits, reparations and costs. Judgment of September 2, 2004. Series C No. 112, para. 157.

obligation to provide conditions that preserve the human dignity of each person in the custody of the State.¹⁰⁵ Inter-American jurisprudence has defined Article 5 of the American Convention as incorporating the definition of torture under Article 2 for the Inter-American Convention to Prevent and Punish Torture (“ICCPT.”)¹⁰⁶ This is in accordance with Article 31 of the Vienna Convention, which requires treaty interpretation take into account both related treaties as well as the system of which they are a part.¹⁰⁷

Torture, whether physical or psychological, is absolutely prohibited as a rule of *jus cogens*.¹⁰⁸ Torture varies by degree and its consequences differ in intensity according to endogenous and exogenous factors that must be proven in each situation.¹⁰⁹ The elements of torture are (a) an intentional act, (b) causing severe physical or mental suffering, (c) committed with a purpose or aim.¹¹⁰ In terms of intentionality, the State detained and removed the petitioners deliberately. The State act of detaining the petitioners was made with the purpose of determining the best method of accommodating them in light of their ineligibility for asylum pursuant to law.

However, there was insufficient actual suffering resulting from the detention and removal of the petitioners to constitute torture under international law. When it comes to suffering, the Court takes into account the objective and specific factors of each case.¹¹¹ In determining

¹⁰⁵ Cf. *Case of “Juvenile Reeducation Institute” v. Paraguay, Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 159

¹⁰⁶ Cf. *Case of Bueno-Alves v. Argentina, Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 164, para. 78

¹⁰⁷ *Id.*

¹⁰⁸ Cf. *Case of Caso Ximenes Lopes v. Brasil, Merits, reparations and costs*. Judgment of Julio 4, 2006, Series C No. 149, para. 127.

¹⁰⁹ Cf. *Case of Santo Domingo Massacre v. Colombia, Preliminary objections, merits and reparations*. Judgment of November 30, 2012. Series C No. 259, para. 191.

¹¹⁰ Cf. *Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala, Merits*. Judgment of November 19, 1999. Series C No. 63.

¹¹¹ Cf. *Case of Bueno Alves v. Argentina, Case 11.597., Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 164, para. 83.

whether there was mistreatment, the Court considers the duration, the manner in which harm was inflicted, and the physical and psychological effects such harm may cause.¹¹² Nothing in the facts indicate that the petitioners were physically harmed during their time in detention. Nor is there evidence of psychological torture, which has been defined as methods causing mental anguish or “intended to obliterate the personality of the victim.”¹¹³ A recognized example of mental anguish sufficient to constitute mental torture is threatening to subject someone to severe physical harm.¹¹⁴ Another example would be when indigenous community members are forcibly separated from their traditional lands, causing suffering sufficient to give rise to a claim of torture.¹¹⁵ The facts of this case simply do not illustrate the same level of pain and suffering. According to the ICPPT, suffering that is an inherent consequence of lawful and nonarbitrary measures are not considered torture. Whatever discomfort the petitioners may have felt during their time in detention did not automatically trigger a violation of their right to personal integrity.

V. Prayer for Relief

Based on the aforementioned submissions, the respondent State respectfully requests that the Court either dismiss the case or declare a judgment in favor of the State that:

1. The State has not violated its obligations under Articles 4, 7, 8, 17, 19, 22, 24, or 25.
2. The State has not violated the 1951 Convention or the ICPPT.

¹¹² *Id.*

¹¹³ *Cf. Case of Bamaca-Velasquez v. Guatemala, Merits.* Judgment of November 25, 2000. Series C No. 70. para. 157

¹¹⁴ *Massacres of El Mozote v. El Salvador* para. 147

¹¹⁵ *Cf. Case of Santo Domingo Massacre v. Colombia, Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259.

Respectfully,

The respondent State of Arcadia.