

INTER-AMERICAN COURT OF HUMAN RIGHTS

Gonzalo Belano and 807 Other Wairan Persons

Petitioners

v.

The Republic of Arcadia

Respondent

REPRESENTATIVES OF THE VICTIMS

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STATEMENT OF THE FACTS

The Republic of Puerto Waira (hereafter: Puerto Waira) is a fragile democracy with a turbulent past that suffers from immense security issues, extreme poverty and brutal gang violence. Gang practices such as kidnapping, extortion, torture, rape, murder and forced disappearances are endemic in virtually the entire country, but their presence is highest in impoverished and marginalized neighbourhoods. Gangs exploit this precariousness by focusing on recruiting children from poor and homeless families and pressuring them into committing horrible crimes.¹

This omnipresent danger has pushed many vulnerable persons to flee to Arcadia. To reach Arcadia, those refugees face many ordeals, notably during the five-week trek through the neighboring State of Tlaxcochitlán, where human rights violations against undocumented migrants are frequent. To minimize those abuses, in 2014, over 7.000 Wairans decided to travel together as a caravan.²

When the caravan arrived at Arcadia's border, President Valverde announced that Arcadia would open its borders and recognize all the Wairan persons as *prima facie* refugees after they went through a procedure of recognition. This procedure consisted of an application and a short interview, followed by an examination of whether the applicant had a criminal record. Arcadia found 808 persons with a criminal record; they had been recruited by gangs as children and had served their sentence back in Puerto Waira. These persons were automatically held in custody.³

Of this group, 490 men and women were detained together in an immigration detention center with a capacity of 400. The remaining 318 men were all held in separate penitentiary units. Children whose parents were detained were placed with relatives or in Child Protection Centers.

¹ Hypothetical, §2-7.

² *Ibid.*, §7,14,15.

³ *Ibid.*, §18-21; CQ, §26,33.

After an examination of their applications, 729 detained persons were found to be at “high risk” of torture or death if returned to Puerto Waira; the other 79 faced a “reasonable likelihood” of the same.⁴

Meanwhile, discontent grew among the public regarding the perceived disturbances the refugees caused in Arcadia. Elections were imminent and nationalist parties were particularly virulent against the refugees. False news spread quickly through media outlets and social networks, where the Wairan refugees were even called slurs such as “scum” and “cockroaches.” Several marches adamantly demanding the deportation of the 808 refugees with criminal records were organized, despite the knowledge that they would face torture and death in Puerto Waira.⁵

Due to these events, the Valverde administration declared that Arcadia did not have the capacity to take those 808 persons in. Arcadia therefore struck a deal with Tlaxcochitlán to expel the 808 Wairan persons without any diplomatic assurances against their deportation to Puerto Waira. To appeal this decision, 217 refugees filed a writ of *amparo*; the other 591 were immediately deported to Tlaxcochitlán. Domestic courts denied the writs of *amparo* and subsequent motions for reconsideration, despite the terrible risks deportation would expose the refugees to. The refugees who appealed were eventually also expelled to Tlaxcochitlán. Their children, like the children of the previously deported persons, were left behind.⁶

Predictably, Tlaxcochitlán did expel the 808 Wairan persons back to Puerto Waira. Shortly after their deportation, thirty refugees were murdered, and seven others disappeared. Mr. Gonzalo Belano is a telling example: forcibly recruited into a gang at fourteen, he was pressured into extorting people, a crime for which he spent three years in jail. Upon his release, he decided he

⁴ Hypothetical, §22-23; CQ, §3,21.

⁵ Hypothetical, §16,24,25.

⁶ *Ibid.*, §26-28; CQ, §21,66.

could not go back to the gang and fled to Arcadia. Shortly after his deportation to Puerto Waira, he was found murdered in the street.⁷

His bereaved family members turned to the Legal Clinic for Displaced People, Migrants and Refugees of the National University of Puerto Waira (hereafter: Legal Clinic), which filed a claim alleging administrative irregularities and seeking comprehensive reparations of harm in Arcadia. Due to the Legal Clinic's limited resources and the poverty of the persons it represented, the claim was filed with the Arcadian consulate, but was dismissed due to failure to comply with the domestic requirements.⁸

Since the Legal Clinic and the victims were indigent, it was impossible for them to access other domestic remedies. Consequently, the Legal Clinic filed a petition with the Inter-American Commission on Human Rights (hereafter: IACHR) on behalf of the 808 victims. The IACHR declared the case admissible and found violations of Articles 4, 7, 8, 22(7), 22(8), 17, 19, 24 and 25 *juncto* Articles 1(1) of the American Convention on Human Rights (hereafter: ACHR). Arcadia failed to comply with the recommendations of the IACHR. The case was therefore submitted to the Inter-American Court of Human Rights (hereafter: IACtHR or the Court), alleging the same violations.

⁷ Hypothetical, §29-31.

⁸ *Ibid.*, §30-33.

LEGAL ANALYSIS

I. Admissibility

1. Exhaustion of domestic remedies

At the admissibility stage, the State alleged the failure to exhaust domestic remedies – in particular with respect to the 591 Wairan persons who did not file an appeal in Arcadia – and non-compliance with the domestic legal requirements.⁹

Before filing a petition with the IACHR, a petitioner must indeed exhaust the domestic remedies¹⁰, but only those that are deemed adequate and effective¹¹. It is the position of the petitioners that it was not required for the 808 Wairan persons to exhaust domestic remedies because they were ineffective.

To be effective, domestic remedies must be “*capable of producing the result for which they were designed.*”¹² A domestic remedy is considered ineffective if it can be shown that the proceedings before the domestic courts have no reasonable prospect of success.¹³ The deportation was appealed by 217 people due to the high risks awaiting them in Puerto Waira. Nevertheless, their writ of *amparo* and motion for reconsideration were denied. All 808 refugees had criminal records and risked the same type of danger in Puerto Waira; there was no inherent difference between the refugees who appealed the deportation and those who did not. Therefore, there was no reason to expect a different outcome. The domestic remedy would have been equally ineffective for the 591 other Wairan persons.

⁹ Hypothetical, §35.

¹⁰ Art. 31(1) IACHR Rules of Procedure; Art. 46(1)(a) ACHR.

¹¹ IACHR. *Admissibility Report Undocumented Workers*, (2011), §27.

¹² *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §66; *Advisory Opinion OC-11/90 Exceptions to the Exhaustion of Domestic Remedies*, IACtHR, (1990), §36.

¹³ IACHR. *Admissibility Report Mossville Environmental Action Now*, (2010), §32.

As these 217 Wairan persons were deported without an examination of the merits (cf. III.2. and III.5.), Article 46(2)(b) ACHR – which provides for an exception to the exhaustion of domestic remedies – is applicable. According to this provision, domestic remedies are not accessible when it is shown that they “*are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government.*”¹⁴ Therefore, resorting to those remedies becomes a “*senseless formality*”.¹⁵

Even if the domestic remedies are adequate and effective, indigent petitioners are exempt from exhausting them.¹⁶ Neither the victims nor the Legal Clinic had the financial resources to pay mandatory filing fees or secure legal representation.¹⁷ Therefore, it was impossible for the petitioners to exhaust domestic remedies as prescribed by Arcadian law.

2. Timeliness of submission

Based on Article 46(1)(b) ACHR and Article 32(1) Rules of Procedure of the IACHR (hereafter: Rules of Procedure), the petition must be lodged with the IACHR within six months of the notification of the final judgment at the domestic level.

However, under Article 32(2) Rules of Procedure, when an exception to the mandatory exhaustion of domestic remedies is applicable, the petition must be lodged “*within a reasonable period of time as determined by the date of the alleged violations and the circumstances of the case.*”¹⁸ Since there is an exception to the exhaustion of domestic remedies in the present case (cf. I.1.), the rule of “*reasonable period of time*” is applicable.

¹⁴ *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §68.

¹⁵ *Ibid.*

¹⁶ *Advisory Opinion OC-11/90 Exceptions to the Exhaustion of Domestic Remedies*, IACtHR, (1990), §22.

¹⁷ *Hypothetical*, §32; *Advisory Opinion OC-11/90 Exceptions to the Exhaustion of Domestic Remedies*, IACtHR, (1990), §30.

¹⁸ IACHR. *Admissibility Report Christian Daniel Domínguez Domenichetti*, (2003), §48.

Moreover, neither the six-month rule nor the reasonable time test bars admissibility when the violation is ongoing at the time the petition is filed.¹⁹ Since forced disappearances are a continuing violation²⁰, the petition is not subject to time limits concerning the seven named victims of forced disappearance.

3. Jurisdiction *ratione personae*: the Legal Clinic’s competence to file a petition

According to Article 44 ACHR “any [...] nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

Since the Legal Clinic is run by the National University of Puerto Waira²¹, it is legally recognized by a member state of the Organization of American States (hereafter: OAS). Therefore, it has competence to file a petition with the IACHR.

4. The alleged necessity of individually identifying the victims

The State filed a preliminary objection alleging the failure to individually identify 771 alleged victims before the IACHR.²²

Under Article 28(e) Rules of Procedure, the petition addressed to the IACHR shall contain the name of the victim “*if possible*”. In *Las Palmeras*²³, the IACtHR has accepted that a petition may be lodged in favor of an indeterminate group of people²⁴, and the IACHR has recently reiterated this in *Hacienda Bellacruz*²⁵. Judge Cançado Trindade also observed that international

¹⁹ IACHR. *Admissibility Report Christian Daniel Domínguez Domenichetti*, (2003), §48.

²⁰ *Radilla Pacheco v. Mexico*, IACtHR, (2009), §15.

²¹ Hypothetical, §30.

²² *Ibid.*, §35.

²³ *Las Palmeras v. Colombia*, IACtHR, (2001), §5.

²⁴ See also *Provisional Measures in Peace Community of San José de Apartadó v. Colombia*, IACtHR, (2000), §1-2.

²⁵ IACHR. *Admissibility Report Hacienda Bellacruz*, (2018), p.1.

law has recognized “*a right of action without having to prove an individual harm or an individual substantive interest, distinct from the general interest.*”²⁶

The 771 unnamed victims have the same specific characteristics as the thirty-seven named victims: they have all been expelled from Arcadia based only on previous criminal records and are all at risk of torture, forced disappearance and death.²⁷ Consequently, the fact that they are unnamed does not form an obstacle to the admissibility of the petition.

II. Request for provisional measures

The petitioners request the IACtHR, in accordance with Article 63(2) ACHR, to order provisional measures – the content of which will be explained below – to be taken by Arcadia, regarding the deported Wairan persons. The petitioners will also demonstrate that the conditions for provisional measures – extreme gravity, urgency and a risk of irreparable harm to persons²⁸ – are met.

Firstly, the petitioners request the IACtHR to order Arcadia to take the necessary bilateral diplomatic steps towards Puerto Waira to provide for immediate police protection of the deported victims. *Primo*, since the victims face a “high risk” or “reasonable likelihood” of torture and death or forced disappearance in Puerto Waira²⁹, the real danger being evidenced by the fact that certain deportees have already been killed or disappeared upon their return³⁰, their deportation has extremely grave consequences related to the right to life (Article 4 ACHR), humane treatment (Article 5 ACHR), personal liberty (Article 7 ACHR) and juridical personality (Article 3 ACHR). *Secundo*, these consequences are imminent. Given the above-mentioned risks they face and the deaths and disappearances that have already taken place, the victims will remain in grave danger

²⁶ *Provisional Measures in Dominicans and Haitians v. Dominican Republic*, IACtHR, (2000), Concurring Opinion, §19.

²⁷ Hypothetical, §23.

²⁸ Article 63(2) ACHR.

²⁹ Hypothetical, §23.

³⁰ *Ibid.*, §31.

as long as they lack effective protection. Intervention is therefore very urgent. *Tertio*, if immediate protection is not provided, the victims risk undeniable irreparable harm under Articles 3, 4, 5 and 7 ACHR.

Secondly, regarding the disappeared victims, the petitioners request the IACtHR to order Arcadia to take the necessary diplomatic steps towards Puerto Waira, to ensure the immediate adoption of more effective measures to investigate these crimes in order to apprehend, prosecute and punish the perpetrators, and to provide adequate protection in Puerto Waira.³¹ *Primo* and *secundo*, as long as the seven disappeared persons are not found, their lives, personal integrity, personal liberty and juridical personality are in grave and imminent danger. *Tertio*, the State must therefore adopt urgent measures in order to prevent irreparable harm under Articles 3, 4, 5 and 7 ACHR. Regarding the persons that have been killed, the petitioners request the IACtHR to order Arcadia to take the necessary diplomatic steps towards Puerto Waira, to ensure the immediate adoption of more effective measures to investigate these crimes in order to apprehend, prosecute and punish the perpetrators³², thereby reinstating its previous and long-standing practice until 2006³³ in that regard.

Thirdly, regarding the deported Wairan persons separated from their children, the petitioners request the IACtHR to order Arcadia to take the necessary diplomatic steps towards Puerto Waira to provide for the parents' immediate provisional repatriation to Arcadia with a view to reunification. Arcadia should also immediately guarantee an appropriate, free, and regular communication between the children and their families, as well as adequate psychological

³¹ *Peace Community of San José de Apartadó v. Colombia*, IACtHR, (2000). Concurring Opinion A. Abreu Burelli and S. García Ramírez §3; Vermeulen, M.L. *Enforced disappearance: Determining State Responsibility under the ICPPED*, Intersentia, (2012), p.469.

³² *Ibid.*

³³ Burbano-Herrera C. *Medidas provisionales en situaciones de vida o muerte*, Porrua (2012), p.260.

assistance for the children, in accordance with their best interests.³⁴ *Primo*, while the victims' children were placed in the care of their closest relatives in Arcadia or in State Child Protection Centers³⁵, there is worldwide consensus within the scientific community that refugee children separated from their parents often suffer from trauma, emotional and behavioral problems and mental health issues³⁶ – in other words, extremely grave psychological harm, which can be related to a child's right to a dignified life, as well as the right to humane treatment. *Secundo*, the risk of such harm is imminent, as the separation has been in effect for several years³⁷, and will increase as further years pass by³⁸; the urgency is therefore undeniable. *Tertio*, a child's right to a dignified life is inherently linked to their development, in which family plays an essential role.³⁹ Separating the children from their families therefore causes irreparable damage that affects the children's short- and long-term health, particularly in the form of psychological harm, related to Articles 4, 5 and 19 ACHR.⁴⁰

A group must only be sufficiently limited and identifiable for the IACtHR to order provisional measures; it is possible to grant provisional measures to a group consisting entirely⁴¹ or partly⁴² of unnamed beneficiaries, which is the case here.

³⁴ IACHR. *Precautionary Measures in Migrant Children affected by the 'Zero Tolerance' Policy regarding the United States of America*, (2018), §39(b).

³⁵ CQ, §21.

³⁶ Derluyn I. *et al.* "Mental Health Problems in Separated Refugee Adolescents", *Journal of Adolescent Health*, o.s. 44 (2008), p.293-294.

³⁷ Hypothetical, §28.

³⁸ IACHR. *Precautionary Measures in Migrant Children affected by the 'Zero Tolerance' Policy regarding the United States of America*, (2018), §26.

³⁹ *Ibid.*, §27-28; IACHR. *Report No. 54/13, The right of girls and boys to a family. Alternative care. Ending institutionalization in the Americas* (2013), §104; *Gelman v. Uruguay*, IACtHR, (2011), §151.

⁴⁰ *Reggiardo Tolosa v. Argentina*, IACtHR, (Provisional Measures), (1993); Derluyn I. *et al.* "Mental Health Problems in Separated Refugee Adolescents", *Journal of Adolescent Health*, o.s. 44 (2008), p.293-294.

⁴¹ Burbano-Herrera, C. *Provisional Measures in the Case Law of the Inter-American Court of Human Rights*, Intersentia, 2010, p.71.

⁴² *Ibid.*, p.80; IACtHR, *Expansion of the Provisional Measures in Álvarez et al.*, (1998), p.2-3.

In case of non-compliance by Arcadia with the provisional measures, the petitioners request the IACtHR, instead of finding an aggravated violation of the substantive provisions concerned, to further develop its case law by coming to the only logical conclusion which can be deduced from the legally binding character of provisional measures, namely establishing an autonomous violation of Article 63(2) *juncto* 1(1) ACHR.⁴³

III. Arguments on the merits

1. Application of the *iura novit curia* principle

The IACtHR has often used its judicial power under the *iura novit curia* principle to analyze possible violations of the ACHR that were not included in the filed petitions or briefs.⁴⁴ This is to ensure that a party will not lose the case simply by failing to invoke the correct legal ground. The IACtHR concluded in *Hilaire, Constantine and Benjamin et al.* that it had “*the power and the duty to apply juridical provision relevant to a proceeding, even when the parties do not expressly invoke them.*”⁴⁵

The petitioners would like to invoke the following rights: the obligation of domestic legal effects (Article 2 ACHR); the right to juridical personality (Article 3 ACHR); the right to humane treatment (Article 5 ACHR); the prohibition of collective expulsion (Article 22(9) ACHR); the effect of provisional measures (Article 63(2) ACHR); and non-refoulement (Article 13(4) IACPPT).

⁴³ In this sense: Burbano-Herrera, C.; Haec, Y. “Letting States off the Hook? The Paradox of Legal Consequences following State Non-Compliance with Provisional Measures in the Inter-American and European Systems”, *Netherlands Quarterly of Human Rights*, (2017), p.332.

⁴⁴ *Heliodoro-Portugal v. Panama*, IACtHR, (2008), §105; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, IACtHR, (2002), §107,187; *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §163.

⁴⁵ *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, IACtHR, (2002), §107,187; see also *Nicaragua v. US*, ICJ, (1986), §29.

2. The State violated the victims’ right to juridical personality, life, humane treatment, personal liberty, non-refoulement and the prohibition of collective expulsion under Articles 3, 4, 5, 7, 22(8) and 22(9) *juncto* 1(1) ACHR, and Article 13(4) IACPPT

2.1. The right to non-refoulement as applied to persons with a criminal record

The applicable domestic law⁴⁶ draws directly from the Convention relating to the Status of Refugees⁴⁷ (hereafter: Refugee Convention) regarding the exclusion from refugee status and expulsion of persons who have committed a “serious non-political crime”. The provisions in those instruments of international refugee law should nonetheless be applied in accordance with their interpretation by other international organs. The IACtHR has issued two advisory opinions considering the Refugee Convention’s exclusion clauses. In these advisory opinions, the IACtHR stresses that the State has an obligation to interpret these exclusion clauses restrictively and in relation to non-derogable rights.⁴⁸

The IACtHR does not provide further guidelines regarding such a restrictive interpretation, but other international human rights bodies do elucidate this question. The UN High Commissioner for Refugees (hereafter: UNHCR) has examined these exclusion clauses in a 1977 Note on Non-Refoulement⁴⁹, in the 1992 Handbook on the Status of Refugees⁵⁰, and in a 1997 Note on the Exclusion Clauses⁵¹.

In these documents, the UNHCR finds an obligation to take all the circumstances of the

⁴⁶ Article 40 Arcadian Law on Refugees and Complimentary Protection; Hypothetical, §13.

⁴⁷ Art. 1(F) and 33(2) 1951 Convention Relating to the Status of Refugees.

⁴⁸ *Advisory Opinion OC-21/14 on the Rights And Guarantees Of Children In The Context Of Migration And/Or In Need Of International Protection*, IACtHR, (2014), §211; *Advisory Opinion OC-25/18 The Institution Of Asylum And Its Recognition As A Human Right In The Inter-American System Of Protection*, IACtHR, (2018), §99.

⁴⁹ UNHCR. *Note on Non-Refoulement*, (1977).

⁵⁰ UNHCR. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1992).

⁵¹ UNHCR. *Note on the Exclusion Clauses*, (1997).

case into account.⁵² In the present case, the mitigating circumstances are obvious. Firstly, the crimes in the victims' criminal records were committed when they were children and should not carry the same consequences as acts committed by adults⁵³. Secondly, forcible child recruitment is endemic in Puerto Waira. The victims were pressured into committing these acts at an impressionable age and would likely have faced severe consequences had they refused to do so. Thirdly, Puerto Waira's high poverty rate and the strong gang presence in poor and marginalized neighborhoods make it probable that many of the Wairan persons did not have any other prospects or opportunities. Consequently, forcible gang recruitment during childhood and socio-economic precariousness are undeniable mitigating circumstances that Arcadia failed to take into account.

The UNHCR also explicitly mentions the need to assess the possibilities of rehabilitation and reintegration.⁵⁴ It is extremely relevant that the victims fled Puerto Waira instead of returning to the gangs.⁵⁵ Knowing they would face heavy repercussions for leaving the gangs, they decided to escape to Arcadia in order to build a new, crime-free life. Such an obvious desire to change their ways, so strong that they faced the ordeals of migration, should undoubtedly have been taken into account in the assessment of their possible rehabilitation and reintegration.

Furthermore, the UNHCR notes that the fact that an applicant has already served their sentence limits the application of the exclusion clauses.⁵⁶ In the present case, all victims had already served their sentence. The IACtHR stresses that asylum should never lead to impunity and that *“the protection provided through asylum and the prohibition of extradition [...] cannot be designed to protect persons seeking to evade their responsibility.”*⁵⁷ Consequently, one can infer

⁵² UNHCR. *Note on Non-Refoulement*, (1977), §14; UNHCR. *Handbook on the Status of Refugees*, (1992), §157.

⁵³ Art. 40(3) Convention on the Rights of the Child.

⁵⁴ UNHCR. *Note on Non-Refoulement*, (1977), §14.

⁵⁵ Hypothetical, §30.

⁵⁶ UNHCR. *Handbook on Status of Refugees*, (1992), §157.

⁵⁷ *Advisory Opinion OC-25/18*, IACtHR, (2018), §91-92.

that if there is no risk of impunity, as in the present case, the State can and should grant the victims the protection of refugee status and guarantee the right to non-refoulement.

Lastly, the UNHCR calls for a balancing test to ensure that the harm caused by the exclusion is not greater than the harm warranted by the gravity of the offence.⁵⁸ A well-founded fear of severe persecution requires a very grave crime in order for exclusion to be justified. In the present case, the crimes committed are certainly grave⁵⁹; nonetheless, it is important to remember the mitigating circumstances outlined above. Since the victims risked death and/or torture, it is clear that their lives and physical integrity were at stake. In such circumstances, the UNHCR states that only an “*extremely grave offence*”⁶⁰ will justify exclusion, and that it has been found to apply “*chiefly to fugitives from justice, and not to those who have already served their sentences, unless they are regarded as continuing to constitute a menace to a new community.*”⁶¹ The UNHCR also calls for a balancing test regarding the threat to the new community: “*In keeping with the general legal principle of proportionality, the danger for the host country must outweigh the risk of harm to the wanted person as a result of refoulement.*”⁶² Considering the very specific circumstances in which the crimes were committed and the victims’ desire to escape criminality, the hypothetical threat to Arcadia cannot possibly weigh up against the very concrete danger the victims face. Consequently, the exclusion clause of Article 33(2) Refugee Convention was not applicable.

However, even if the exclusion clauses under international refugee law were applicable, non-refoulement is a much broader right under international human rights law. The IACtHR has recognised this in *Pacheco Tineo Family*, stating that “*the right of any alien, and not only refugees*

⁵⁸ UNHCR. *Handbook on Status of Refugees*, (1992), §156; UNHCR. *Note on the Exclusion Clauses*, (1997), §18.

⁵⁹ CQ, §2.

⁶⁰ UNHCR. *Note on the Exclusion Clauses*, (1997), §19.

⁶¹ *Ibid.*

⁶² UNHCR. *Submission in S.A.V. v. FYROM*, (2010), §5.2.9.

*or asylees, to non-refoulement is recognized, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation [...].*⁶³

The IACtHR recently expanded on this by stating that without the right to non-refoulement, the prohibition of torture loses effectiveness: “*as an obligation derived from the prohibition of torture, the principle of non-refoulement in this area is absolute and also becomes a peremptory norm of customary international law; in other words, of ius cogens.*”⁶⁴ This idea is even explicitly enshrined in Article 13(4) IACPPT, which Arcadia has signed⁶⁵. In this case, the victims’ right to non-refoulement was indeed intrinsically linked to the prohibition of torture, since Arcadia found a “high risk” of torture in the vast majority of cases, and a “reasonable likelihood” of torture for the remaining victims. As established by the ECtHR in *Cruz Varas*, refoulement to a country where the petitioner risks torture violates the prohibition of torture.⁶⁶ In *Wong Ho Wing*, the IACtHR confirmed that the State has an obligation to examine arguments regarding torture in refoulement cases.⁶⁷ If expulsion exposes the petitioner to a real risk of torture, Article 5 ACHR and 13(4) IACPPT have been violated.⁶⁸ The present victims’ deportation has exposed them to an established “high risk” or “reasonable likelihood” of torture and murder. Consequently, Arcadia not only violated their right to non-refoulement, but also failed in its duty to prevent torture⁶⁹ and ensure the victims’ right to physical integrity⁷⁰. Therefore, the petitioners respectfully request that the Court find a violation of Articles 4, 5 and 22(8) *juncto* 1(1) ACHR, and of Article 13(4) IACPPT.

⁶³ *Pacheco Tineo Family v. Bolivia*, IACtHR, (2013), §135.

⁶⁴ *Advisory Opinion OC-25/18*, IACtHR, (2018), §181; *Advisory Opinion OC-21/14*, IACtHR, (2014), §225.

⁶⁵ Hypothetical, §9.

⁶⁶ *Cruz Varas v. Sweden*, ECtHR, (1991), §82.

⁶⁷ *Wong Ho Wing v. Peru*, IACtHR, (2015), §132.

⁶⁸ *Ibid.*, §166.

⁶⁹ *Wong Ho Wing v. Peru*, IACtHR, (2015), §132.

⁷⁰ *Advisory Opinion OC-25/18*, IACtHR, (2018), §181.

2.2. Indirect refoulement without diplomatic assurances from Tlaxcochitlán

Arcadia deported the victims to Tlaxcochitlán and the Tlaxcochitlán authorities were the ones to deport them to Puerto Waira. Nonetheless, a transfer to an intermediate country does not free the sending State from its responsibility.⁷¹ This prohibition of indirect refoulement is applicable in the present case.

In *Hirsi Jamaa*, the ECtHR ruled that the sending State “*must ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced*”⁷² and that “*the [State] authorities [should ascertain] how the [intermediary country] authorities fulfilled their international obligations in relation to the protection of refugees*”⁷³. In *Wong Ho Wing*, the IACtHR stated that information the sending State should have known influences the responsibility of the sending State.⁷⁴ Arcadia did not investigate the treatment of refugees or the existence of an asylum procedure in Tlaxcochitlán, and did not demand any diplomatic assurances that the Wairan persons would not be deported to Puerto Waira. Therefore, it was impossible for Arcadia to make an informed decision about the deportation.

The IACtHR also stated that if the sending State finds “*a real risk of irreparable harm*”, such as torture or death, expulsion is prohibited.⁷⁵ In the present case, the victims did risk such irreparable harm. Considering the risk of death and torture in Puerto Waira, the absence of information about the treatment of refugees in Tlaxcochitlán and the lack of guarantees of non-refoulement, it must be concluded that Arcadia should never have deported the victims to

⁷¹ *T.I. v. UK*, ECtHR, (2000), §146; *Advisory Opinion OC-25/18*, IACtHR, (2018), §197.

⁷² *Hirsi Jamaa v. Italy*, ECtHR, (2012), §147,157; *Mohammadi v. Austria*, ECtHR, (2014).

⁷³ *Ibid.*

⁷⁴ *Wong Ho Wing v. Peru*, IACtHR, (2015), §140.

⁷⁵ *Ibid.*, §132.

Tlaxcochitlán and is therefore responsible for indirect refoulement.

Furthermore, diplomatic assurances can only be accepted if they eliminate the risk of torture.⁷⁶ To do so, they must, *inter alia*, be specific, binding for the authorities of the receiving State, and must have been evaluated by the courts of the sending State.⁷⁷ The informal verbal agreement between Arcadia and Tlaxcochitlán certainly does not comply with these conditions. Even if there had not been a risk of torture, the sending State should still have made sure there was an asylum procedure in the receiving State.⁷⁸ Since no information was gathered about the asylum system in Tlaxcochitlán⁷⁹, Arcadia violated Article 22(8) *juncto* 1(1) ACHR.

2.3. Lack of objective and reasonable assessment of the victims' individual situations amounting to collective expulsion

In *Nadege Dorzema et al.*⁸⁰ and *Expelled Dominicans and Haitians*⁸¹, the IACtHR has found that the lack of an objective analysis of the individual circumstances of each alien is the fundamental factor to determine the “collective” nature of an expulsion, referring to the need for a “*reasonable and objective examination of the particular cases of each individual alien of the group.*”⁸²

The Arcadian authorities interviewed the victims and drew individual conclusions about the risks they would face if returned to Puerto Waira. However, an individual assessment becomes utterly meaningless if the State does not act on its conclusions. Deporting all victims regardless of the outcome of the assessment nullifies the individuality of the procedure. This is further compounded by the fact that they were expelled based on a collective characteristic (i.e. having a

⁷⁶ UNHCR. *Note on Diplomatic Assurances*, (2006), §37.

⁷⁷ *Ibid.*, §33,36; *Othman (Abu Qatada) v. UK*, ECtHR, (2012), §189.

⁷⁸ *Othman (Abu Qatada) v. UK*, ECtHR, (2012), §189.

⁷⁹ CQ, §73-74.

⁸⁰ *Nadege Dorzema et al. v. Dominican Republic*, IACtHR, (2012), §171-172.

⁸¹ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §361.

⁸² *Ibid.*

criminal record) without performing an examination of individual circumstances as called for by the UNHCR⁸³. It is also particularly telling that no distinction was made between those who faced a “high risk” or “reasonable likelihood” of death and torture.

In *Khlaifia*, the ECtHR ruled that an assessment must pass a two-fold test in order to be truly individual: (i) whether the petitioners had the opportunity to notify the authorities of any reason why they should not be deported and (ii) whether such arguments were considered by the competent authority.⁸⁴ Since the Arcadia deported the victims, knowing the risks this exposed them to, it is blatantly clear that the second condition of this test was not met.

The ILC’s Draft Articles on the Expulsion of Aliens state that an individual examination of grounds for expulsion must be “*assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular [...] the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.*”⁸⁵ As demonstrated under III.2.1., these circumstances were not taken into account. Therefore, the conditions for an individual assessment have not been met.

Additionally, even if the decision had been sufficiently reasoned and individual, the deportation would still have fallen under the definition of a collective expulsion. According to *Nadege Dorzema et al.*⁸⁶ and *Expelled Dominicans and Haitians*⁸⁷, an individual assessment does not suffice; the examination must also be reasonable and objective. Arcadia’s decision was neither. Following the reasoning under III.2.1., it cannot be considered reasonable to knowingly send a refugee to their death. The objectivity of the examination is also questionable, as the Valverde

⁸³ UNHCR. *Note on Non-Refoulement*, (1977), §14; UNHCR. *Handbook on the Status of Refugees*, (1992), §157.

⁸⁴ *Khlaifia v. Italy*, ECtHR, (2016), §237-241.

⁸⁵ ILC. *Draft Articles on the Expulsion of Aliens*, (2014), 9§3, 5§3, Commentary on draft Article 9 §4.

⁸⁶ *Nadege Dorzema et al. v. Dominican Republic*, IACtHR, (2012), §171.

⁸⁷ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §361.

administration only decided that Arcadia would not take the victims in following the pressure of widespread public protest in the lead-up to imminent elections.⁸⁸

Given the lack of objective and reasonable individual assessment of the victims' circumstances, Arcadia violated the prohibition of collective expulsion under Article 22(9) *juncto* 1(1) ACHR.

2.4. Loss of life and forced disappearances upon return to Puerto Waira

Upon their return to Puerto Waira, thirty victims were murdered. Seven others disappeared and have not been found yet. Arcadia was aware of these risks. Nonetheless, it chose to expel the Wairan persons to Tlaxcochitlán, without any certainty that they would not be returned to Puerto Waira. Consequently, thirty-seven people died or disappeared. This offers the final and dire proof that Arcadia should never have resorted to deportation.

Arcadia is not only responsible for the loss of life and forced disappearances⁸⁹ under Article 4 ACHR, but also for the multiple other violations embodied by forced disappearances. The IACtHR has found that forced disappearances by definition violate the right to liberty, since they involve kidnappings.⁹⁰ The prolonged isolation⁹¹ and inherent feelings of fear and defenselessness⁹² breach the right to humane treatment. Most recently, the IACtHR acknowledged that forced disappearances also violate the right to juridical personality, since they remove the victims from the protection of the law and even deny their existence.⁹³ By deporting the victims despite the risks they faced, Arcadia indirectly caused all these violations. Therefore, the

⁸⁸ Hypothetical, §24-26.

⁸⁹ *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §188; *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal v. Guatemala*, IACtHR, (2016), §159.

⁹⁰ *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §150.

⁹¹ *Ibid.*, §148,156,187; *Juan Humberto Sánchez v. Honduras*, IACtHR, (2003), §98.

⁹² *La Cantuta v. Peru*, IACtHR, (2006), §113; *Villagrán-Morales et al. v. Guatemala*, IACtHR, (1999), §162-163.

⁹³ *Anzualdo-Castro v. Peru*, IACtHR, (2009), §90; *Chitay-Nech et al. v. Guatemala*, IACtHR, (2010), §102.

petitioners respectfully ask the Court to find a violation of Articles 3, 4, 5 and 7 *juncto* 1(1) ACHR.

3. The State violated the victims’ right to life, personal liberty and humane treatment under Articles 4, 5 and 7 *juncto* 1(1) ACHR

3.1. Arbitrary detention

Article 7 ACHR recognizes every person’s right not to be arbitrarily deprived of their liberty. This includes administrative deprivation of liberty concerning migrants.⁹⁴ Any limitation of this right should be exceptional and meet certain requirements in order to avoid arbitrariness.⁹⁵

Regarding the victims’ deprivation of liberty, the competent legal authority should have verified the principles of necessity and proportionality on a case-by-case basis, using a reasoned and objective legal explanation.⁹⁶ Merely referring to the existence of a criminal record does not justify immigration detention.⁹⁷ Since Arcadia failed to outline the particular reasons to consider each petitioner a threat to national security⁹⁸, it was in no way established that the detained persons were “*a genuine, present and sufficiently serious threat.*”⁹⁹

In *Wong Ho Wing*, the IACtHR stressed that it cannot be presumed that a refugee will refuse to appear during their migration proceedings or try to escape deportation.¹⁰⁰ Such a possibility requires a case-by-case verification.¹⁰¹ By holding certain individuals in custody to

⁹⁴ Antkowiak T.; Gonza A. “The American Convention on Human Rights: Essential Rights”, OUP, (2017), p.142.

⁹⁵ *Ibid.*, p.148.

⁹⁶ *Vélez Loor v. Panama*, IACtHR, (2010), §116; IACHR. *Report on Immigration in the United States: Detention and Due Process*, (2010), §39; IACHR. *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, (2013), §443.

⁹⁷ IACHR. *Report on Immigration in the United States: Detention and Due Process*, (2010), §39.

⁹⁸ *Ibid.*

⁹⁹ *J.N. v. Staatssecretaris van Veiligheid en Justitie*, CJEU, (2016), §65-67.

¹⁰⁰ *Wong Ho Wing v. Peru*, IACtHR, (2015), §250.

¹⁰¹ *Ibid.*; *Norín Catrimán et al. v. Chile*, IACtHR, (2014), §312.

ensure their presence, solely based on the existence of criminal records, Arcadia treats preventive detention as a rule and not as the exception.¹⁰²

Furthermore, the detention does not meet the standards of necessity and proportionality¹⁰³ regarding Arcadia's stated purpose of ensuring their presence and/or deportation¹⁰⁴. Firstly, the relevant statutory provision and the administrative authorities did not prescribe a maximum time limit for the detention.¹⁰⁵ This made the duration of the detention unpredictable and therefore deprived the victims of a safeguard against arbitrary detention duration.¹⁰⁶ Secondly, an assessment should have been conducted of whether less restrictive or coercive alternatives to detention, such as reporting conditions, electronic tagging or home curfew, were available.¹⁰⁷ Since the detention was not necessary and proportionate, it was arbitrary and violated Article 7 *juncto* 1(1) ACHR.

3.2. Detention Conditions

Under Article 5 ACHR, persons deprived of their liberty have the right to be detained in conditions compatible with their humanity and inherent personal dignity. The State has the obligation to ensure minimum humane conditions during detention, thereby guaranteeing the detainees a dignified life and humane treatment.¹⁰⁸ Economic hardship does not justify non-compliance with these obligations.¹⁰⁹

¹⁰² *Wong Ho Wing v. Peru*, IACtHR, (2015), §250.

¹⁰³ *Wong Ho Wing v. Peru*, IACtHR, (2015), §248; *Vélez Loor v. Panama*, IACtHR, (2010), §166; *Norín Catrimán et al. v. Chile*, IACtHR, (2014), §312.

¹⁰⁴ CQ, §15.

¹⁰⁵ *Ibid.*, §11.

¹⁰⁶ *Wong Ho Wing v. Peru*, IACtHR, (2015), §255; *Vélez Loor v. Panama*, IACtHR, (2010), §117; IACHR. *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, (2013), §444.

¹⁰⁷ UNHCR. *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (2012), §35-39; CPT/Inf 16 *11th General Report* (2001), §28.

¹⁰⁸ *Boyce et al. v. Barbados*, IACtHR, (2007), §88; *Womah Mukong v. Cameroon*, UN Human Rights Committee, (1994), §9.3; IOM. *International Standards on Immigration Detention and Non-Custodial Measures*, (2011), p.4-5.

¹⁰⁹ *Ibid.*

In the present case, the State detained the victims in an overcrowded immigration detention center and in separate penitentiary units.¹¹⁰ The detention center had a capacity of 400 detainees, but was inhabited by 490 refugees.¹¹¹ A prison's "official capacity" indicates the "*total number of detainees that it can accommodate while respecting minimum requirements [including a full range of services], [...], in terms of floor space per inmate or group of inmates*".¹¹² This is an important criterion to determine whether the detention conditions are compatible with the applicable international standards.¹¹³ Allowing the State to exceed the official capacity would deprive this concept of its purpose of ensuring the minimum basic needs of the detainees. In *Vélez Loor*, the IACtHR expressed that "*a population density higher than 120% [...] reaches dangerous levels*".¹¹⁴ In the present case, the population in the immigration center was almost one-fourth higher than its maximum capacity (122,5%). Even though the victims had access to certain basic needs such as food, education and health services, it is common for overcrowding to affect those most essential services. The IACtHR also emphasized that the conditions in overcrowded centers can indeed endanger the routine performance of those services.¹¹⁵ In *Pacheco Teruel*, the IACtHR even held that "*[o]vercrowding is, in itself, a violation of personal integrity*".¹¹⁶

Moreover, men and women were not properly separated during their detention, as they were detained together in the immigration detention center.¹¹⁷ UN standards emphasize the

¹¹⁰ Hypothetical, §22.

¹¹¹ Hypothetical, §22.

¹¹² ICRC. *Report on Water, Sanitation, Hygiene and Habitat in Prisons Supplementary Guidance*, (2013), p.41-42.

¹¹³ *Vélez Loor v. Panama*, IACtHR, (2010), §203; IACHR. *Resolution 1/08 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, (2008), Principle XVII.

¹¹⁴ *Vélez Loor v. Panama*, IACtHR, (2010), §203.

¹¹⁵ *Ibid.*; CPT/Inf 3 *2nd General Report* (1992), §46; CPT/Inf 10 *7th General Report* (1997), §12-15; CPT/Inf 16 *11th General Report* (2001), §28.

¹¹⁶ *Pacheco Teruel et al. v. Honduras*, IACtHR, (2012), §67.

¹¹⁷ CQ, §3.

vulnerability of women and the importance of gender-specific needs.¹¹⁸ Similarly, the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* stress the need for separation and proper accommodation for women.¹¹⁹ By detaining men and women together, the State disregarded the specific needs of women deprived of their liberty, which CEDAW has found to be discriminatory against women.¹²⁰

When determining whether an act is inhuman and degrading, the IACtHR has relied upon ECtHR jurisprudence stating that “*even in the absence of physical injuries, psychological and moral suffering [...] may be deemed inhuman treatment*”.¹²¹ It should be stressed that the inhuman and degrading aspect of the treatment can be aggravated by the personal circumstances and vulnerability of the detained persons.¹²² When analyzing the victims’ detention conditions, their vulnerable state after their long journey, the traumatic experiences they endured in their country¹²³ and the vulnerability of the arbitrarily detained women should have been taken into account. In failing to do so, Arcadia violated the right to humane treatment under Article 5 ACHR.

The State should also have taken additional measures to provide specific psychological support to address the issues caused by the victims’ traumatic experiences. As outlined above, overcrowding affects the efficiency of such essential services. The absence of psychological assistance appropriate to these circumstances not only affects the detainees’ wellbeing during the detention itself, but also significantly impacts their development and further life plans.

¹¹⁸ UNODC. *UN rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, (2010); UNHCR. *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (2012), §48.

¹¹⁹ IACHR. *Resolution 1/08 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, (2008), Principle XII and XIX.

¹²⁰ Articles 1, 2, 5 and 12 CEDAW; CEDAW. *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, (2014), §34.

¹²¹ *Loayza-Tamayo v. Peru*, IACtHR, (1997), §57.

¹²² *Rosario Congo v. Ecuador*, IACHR, (1997), §157,159.

¹²³ Hypothetical, §15.

Overpopulation consequently jeopardizes the victims' ability to live a dignified life under Article 4 ACHR.¹²⁴

In conclusion, the State did not effectively take enough measures guaranteeing minimum humane detention conditions compatible with the victims' humanity and inherent personal dignity under Articles 4 and 5 *juncto* 1(1) ACHR.

4. The state violated the rights of the child and the family under Articles 17 and 19 *juncto* 1(1) ACHR

4.1. Correlation between Articles 17 and 19 ACHR

The IACtHR has considered that deportation has consequences for family life.¹²⁵ Due to the importance of family in the child's life, the right to a family is closely related to the effective exercise of the rights of the child.¹²⁶ In removal proceedings, it is the State's duty to examine the best interest of the deportee's children.¹²⁷ This interest is directly related to the right to protection of the family and, in particular, to the enjoyment of family life while maintaining the family unit as much as possible.¹²⁸ Therefore, Arcadia has an obligation to adopt all positive measures required to ensure the protection of children pursuant to Articles 17 and 19 ACHR.¹²⁹

¹²⁴ *Juvenile Reeducation Institute v. Paraguay*, IACtHR, (2004), §164-166; *Vélez Loor v. Panama*, IACtHR, (2010), §215.

¹²⁵ *Wayne Smith, Hugo Armendariz et al.*, IACtHR, (2010), §48.

¹²⁶ IACHR. *The right of girls and boys to a family. Alternative care. Ending institutionalization in the Americas*, (2013), §57.

¹²⁷ *Wayne Smith, Hugo Armendariz et al.*, IACtHR, (2010), §57; *Maslov v. Austria*, ECtHR, (2008), §82; *Üner v. Netherlands*, ECtHR, (2006), §58.

¹²⁸ IACHR. *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*, (2015), §346.

¹²⁹ *Advisory Opinion OC-17/02*, IACtHR, (2002), §87.

4.2. Separation of the children from their family and the State's migration policy

It is generally recognized that a State has the sovereignty to determine its migration policy.¹³⁰ However, that power is limited by the State's obligation to respect and guarantee human rights.¹³¹ In this instance, the deportation also affects the deportees' children.¹³² Therefore, the State must weigh the children's best interests¹³³ against Arcadia's migration policy and the reasons for the deportation.¹³⁴ As argued above under III.2.1., Arcadia's migration policy violates human rights. Consequently, there was no need to weigh the separation of the family against this policy.¹³⁵ Even if the balancing test had been required, it would still have failed, for the reasons outlined in the following sections.

4.2.1. Separation of children from their family

First of all, separating a child from their family is only justified when done in their best interest and when exceptional and temporary¹³⁶. Abuse and neglect are the only two grounds on which separation can be necessary for the child's best interest.¹³⁷ This necessity needs to be reviewed at least every three months.¹³⁸ In the present case, there has been no abuse or neglect, and a criminal

¹³⁰ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §417.

¹³¹ *Ibid.*, §417; IACHR. *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*, (2015), §348; *Chitay Nech et al. v. Guatemala*, IACtHR, (2010), §156; *Gelman v. Uruguay*, IACtHR, (2011), §125.

¹³² *Wayne Smith, Hugo Armendariz et al.*, IACtHR, (2010), §48.

¹³³ *Fornerón and daughter v. Argentina*, IACtHR, (2017), §116; *Advisory Opinion OC-17/02*, IACtHR, (2002), §65; *Advisory Opinion OC-21/14*, IACtHR, (2014), §273; *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §416.

¹³⁴ *Wayne Smith, Hugo Armendariz et al.*, IACtHR, (2010), §57; *T and K v. Finland*, ECtHR, (2001), §168; *Scozzari and Giunta v. Italy*, ECtHR, (2000), §148.

¹³⁵ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §418.

¹³⁶ *Advisory Opinion OC-17/02*, IACtHR, (2002), §75; *Fornerón and daughter v. Argentina*, IACtHR, (2012), §116; *Advisory Opinion OC-21/14*, IACtHR, (2014), §273.

¹³⁷ *Advisory Opinion OC-17/02*, IACtHR, (2002), §77.

¹³⁸ IACHR. *The right of girls and boys to a family. Alternative care. Ending institutionalization in the Americas*, (2013), §174.

past is no reason for separating parents and children.¹³⁹ This separation was consequently not in the children's best interest and cannot be justified.

Furthermore, the separation could not be temporary: deporting the parents and keeping their children in Arcadia made it impossible to reunite them as quickly as possible.¹⁴⁰ Since separation was a collective measure applied to all children whose parents had a criminal record, it cannot be seen as exceptional. Consequently, Arcadia failed its obligations regarding the rights of children and their families under Articles 17 and 19 *juncto* 1(1) ACHR.

4.2.2. *Weighing the best interests of the child against the migration policy*

Even when deportation and subsequent separation of a family is prescribed by a migration policy, it is still essential that this measure is suitable, necessary and proportionate.¹⁴¹ Proportionality means that the measure should restrict the protected rights as little as possible.¹⁴²

Measures of expulsion, such as the ones taken by Arcadia, have been shown by different studies to have a high negative impact on the mental health, wellbeing, and development of the child. This impact is caused by the separation from their parents and the ignorance of whether they will ever see them again, especially when their parents are at risk of torture and even death.¹⁴³ A State's migration policy cannot possibly justify such a high negative impact on the wellbeing of children.

¹³⁹ *Ibid.*, §215.

¹⁴⁰ *Ibid.*, §173; *Advisory Opinion OC-17/02*, IACtHR, (2002), §75.

¹⁴¹ *Advisory Opinion OC-17/02*, IACtHR, (2002), §77; *Fornerón and daughter v. Argentina*, IACtHR, (2012), §116.

¹⁴² *Advisory Opinion OC-5/85 on Compulsory Membership in an Association*, IACtHR, (1985), §46.

¹⁴³ Fegert J.M. "Psychosocial problems in traumatized refugee families: overview of risks and some recommendations for support services", *Child. Adolesc. Psychiatry Ment. Health*, (2018); Derluyn I. *et al.* "Mental Health Problems in Separated Refugee Adolescents", *Journal of Adolescent Health*, (2008), p.293-294.

Therefore, Arcadia clearly did not strike the right balance between their migration policy and the rights of deportees and their children under Articles 17 and 19 *juncto* 1(1) ACHR.

5. The State violated the victims' right to fair trial, judicial protection and asylum under Articles 8, 22(7) and 25 *juncto* 1(1) ACHR

5.1. The asylum procedure

In *Expelled Dominicans and Haitians, Pacheco Tineo Family* and *Nadege Dorzema et al.*, the IACtHR ruled that due process must be respected in proceedings that may result in expulsion or deportation.¹⁴⁴ Any national authority whose decisions may affect human rights is required to take such decisions in strict compliance with due process' guarantees.¹⁴⁵ A State should particularly take into account the need to provide protection for individuals or groups in situations of vulnerability, such as foreigners detained in a different social and juridical environment than their own.¹⁴⁶ In the context of the deportation to Puerto Waira, the victims are even more vulnerable because of the risk of torture or death.¹⁴⁷

The IACtHR has emphasized the importance of an individualized assessment in deportation proceedings.¹⁴⁸ Since Arcadia only took into account whether each person had a criminal record, without consideration for other individual circumstances, it failed to comply with this

¹⁴⁴ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §351; *Pacheco Tineo Family v. Plurinational State of Bolivia*, IACHR, (2013), §132; *Nadege Dorzema et al. v. Dominican Republic*, (2012), §159.

¹⁴⁵ *Vélez Loor v. Panama*, IACtHR, (2010), §142.

¹⁴⁶ *Ibid.*, §152.

¹⁴⁷ Hypothetical, §23.

¹⁴⁸ *Pacheco Tineo Family v. Bolivia*, IACtHR, (2013), §133; *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §356; *Vélez Loor v. Panama*, IACtHR, (2010), §98; *Nadege Dorzema et al. v. Dominican Republic*, IACtHR, (2012), §175.

requirement.¹⁴⁹ Consequently, the State did not guarantee due process in the proceedings culminating the deportation of 808 Wairan persons.

In *Pacheco Tineo Family*, the IACtHR has held that States have positive obligations under Article 22(7) ACHR. This includes, *inter alia*, access to legal assistance and representation.¹⁵⁰ This essential element of the right to fair trial was not respected. While it is true that the victims received information about legal clinics and civil society, those did not have the capacity to provide legal assistance to all 808 of them.¹⁵¹ As a result, no appropriate legal assistance was provided to the Wairan deportees.

The IACtHR also stressed the importance of the non-refoulement principle by determining that an individual cannot be sent back if the danger of torture and death is verified. If a State nonetheless does so, it automatically violates due process.¹⁵²

The IACtHR further indicated that States' obligations to respect and ensure the rights under Article 22(7) ACHR must be analyzed in relation to the guarantees established in Articles 8 and 25 ACHR.¹⁵³ The right to asylum is therefore inherently linked to the right to fair trial and judicial protection. Consequently, a violation of Articles 8 and 25 ACHR in asylum proceedings also violates Article 22(7) *juncto* 1(1) ACHR.

5.2. The appeal procedure against the deportation orders

The right to judicial protection entails that everyone has the right to simple, prompt and effective recourse. In *Vélez Loor*, the IACtHR emphasized that remedies must not only formally exist in the legislation, but must also be effective. This entails that they must fulfill the objective of obtaining,

¹⁴⁹ Hypothetical, §21-23,27.

¹⁵⁰ *Pacheco Tineo Family v. Bolivia*, IACtHR, (2013), §159.

¹⁵¹ CQ, §9.

¹⁵² *Pacheco Tineo Family v. Bolivia*, IACtHR, (2013), §136.

¹⁵³ *Ibid.*, §155.

without delay, a decision on the legality of the arrest or detention¹⁵⁴ and that they must establish whether there has been a human rights violation and ensure the necessary redress¹⁵⁵.

Remedies against the deportation decision, as formally established in Arcadian law, were, in fact, ineffective. When 217 people filed a writ of *amparo* against deportation, alleging that their lives were in danger, the domestic court denied protection and upheld the deportation orders. The motion for reconsideration of this decision was also denied.¹⁵⁶

The authorities did not consider the risk of torture and death¹⁵⁷ and therefore ignored the right to non-refoulement. By ignoring this blatant human rights violation, they also failed to provide the necessary redress. Consequently, their decisions cannot possibly have been duly reasoned or effective. Arcadia therefore violated the right to judicial protection under Article 25 *juncto* 1(1) ACHR.

5.3. *Ne bis in idem*: the punitive aspect of expulsion

The principle of *ne bis in idem* under Article 8(4) ACHR is a general principle of law¹⁵⁸ that protects a person against a second sentence based on facts they have already faced trial for.¹⁵⁹ It is the opinion of the petitioners that the nature of the present expulsion violates this principle.

The view that deportation is an administrative measure rather than a punitive sanction¹⁶⁰ cannot be upheld in light of the circumstances of this case as established under III.2.1. The decision was not individualized, did not respect the non-refoulement principle and did not take into account the fact that the victims had already served their sentence in Puerto Waira. Considering the impact

¹⁵⁴ *Vélez Loor v. Panama*, IACtHR, (2010), §129.

¹⁵⁵ Antkowiak T.; Gonza A.. *The American Convention on Human Rights: Essential Rights*, OUP, (2017), p.220.

¹⁵⁶ Hypothetical, §28.

¹⁵⁷ *Ibid.*, §23,28.

¹⁵⁸ Art. 20 Rome Statute of the International Criminal Court; Art. 14(7) ICCPR.

¹⁵⁹ *Loayza-Tamayo v. Peru*, IACtHR, (1997), §66; *Zolotukhin v. Russia*, ECtHR, (2009), §40,79.

¹⁶⁰ *Üner v. Netherlands*, ECtHR, (2006), §56; *Maaouia v. France*, ECtHR, (2000), §39.

of the present expulsion on human rights – the victims were at risk of being tortured or killed – its nature is clearly punitive.

In *Expelled Dominicans and Haitians*, a case with a similarly non-individualized expulsion, the IACtHR cites an expert opinion which states that “*the expulsion is evidently punitive in nature*” because the State had not “*ensure[d] all the procedural guarantees in order to respect and guarantee the rights that may be at risk in each case*” of which “*a key element is the adoption of the mechanisms to be applied in each individual case in order to examine in detail the offense attributed to the person, the evidence and other elements of the case and, evidently, to ensure the person’s right of defense.*”¹⁶¹ As outlined above, Arcadia failed to comply with these positive obligations of individualization and examination of personal circumstances. We cannot possibly pretend that knowingly sending refugees to their death or to be tortured on the sole basis that they have committed crimes is not a punishment for said crimes. Therefore, the expulsion evidently had a punitive nature and cannot be considered a mere administrative consequence of failing to meet the asylum requirements.¹⁶²

In conclusion, the expulsion must be considered a violation of the *ne bis in idem* principle under Article 8(4) ACHR, as (i) the applicants have already served their sentence for their crimes, (ii) as a result of a final judgment in the State of origin and (iii) the decision for expulsion was grounded on the same facts.¹⁶³

¹⁶¹ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), footnote 396.

¹⁶² In this sense: Sweeney M. “Fact or Fiction: ‘The Legal Construction of Immigration Removal for Crimes’”, *Yale Journal on Regulation*, (2010), p.69.

¹⁶³ *J. v. Peru*, IACtHR, (2013), §262.

6. The State violated the victims' right to equal protection, the prohibition of discrimination and the obligation of domestic legal effects under Articles 24 *juncto* 1(1) and 2 ACHR

6.1. Legality: discrimination caused by the lack of clarity in domestic legislation

Article 40(II) of the Arcadian Law on Refugees and Complimentary Protection (hereafter: Law on Refugees) states that “[r]efugee status shall not be granted to any person with respect to whom, upon examination of the application, there are reasonable grounds for considering that [...] [h]e has committed a serious non-political crime outside the national territory prior to his admission to that territory.”¹⁶⁴ In view of Articles 24 *juncto* 1(1) and 2 ACHR, this provision is discriminatory. Indeed, in *Expelled Dominicans and Haitians*, the IACtHR found that “States must abstain from implementing measures that, in any way, are addressed, directly or indirectly, at creating situations of discrimination *de jure* or *de facto*.”¹⁶⁵

Arcadia does create situations of discrimination. In *Thlimmenos*, the ECtHR established that treating people in significantly different situations the same way without objective and reasonable justification also constitutes discrimination.¹⁶⁶

Arcadian law does not provide for any distinction between the possibly differing situations of persons who have committed serious non-political crimes. The circumstances in which the crimes have been committed may vary, there may be mitigating circumstances, the person may or may not have served a sentence before becoming a refugee, etc. The victims' situation is significantly different from that of persons who have committed serious non-political crimes as adults, without any mitigating circumstances, and who have not faced justice or served their

¹⁶⁴ Hypothetical, §13.

¹⁶⁵ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §263.

¹⁶⁶ *Thlimmenos v. Greece*, ECtHR, (2000), §44; *Pretty v. UK*, ECtHR, (2002), §87.

sentence. By not providing for such distinctions in domestic law, Arcadia has failed to differentiate between persons in significantly different situations. Consequently, the State has created a situation of *de facto* discrimination and has enacted that discrimination upon the victims, in violation of Articles 24 *juncto* 1(1) and 2 ACHR.

6.2. Necessity in a democratic society of unspecified “serious non-political crime” as a ground for exclusion from the right to asylum

The discrimination caused by the lack of differentiation in Arcadian law is not necessary in a democratic society. The UNHCR states that when refugees have committed criminal offences, a balancing test must be performed between the nature of the offence and the right to non-refoulement.¹⁶⁷ If the feared persecution is more severe than the offence committed, as in the present case, the person’s refugee character outweighs their criminal character.¹⁶⁸ This confirms that depending on the weight of the criminal status and the refugee status, refugees with a criminal record can find themselves in significantly different situations.

Arcadia’s domestic law fails to take this into account when providing for the expulsion of refugees with a criminal background. It can hardly be considered suitable, necessary and proportionate¹⁶⁹ to expose refugees to a significant risk of death and torture without performing such an individual balancing test. Such a vague legal provision does not comply with the requirement of necessity in a democratic society and therefore violates Articles 24 *juncto* 1(1) and 2 ACHR.

¹⁶⁷ UNHCR. *Handbook on the Status of Refugees*, (1992), §156.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Atala Riffo v. Chile*, IACtHR, (2012), §164.

6.3. Discrimination on racial grounds due to the victims' African descent

The victims' expulsion caused discrimination on racial grounds. Since 95% of the refugees in the caravan were of African descent¹⁷⁰, the proportions must be very similar among the victims. We cannot discount the possibility that the hostility and protests against the victims were prompted by racism. Despite Arcadia's efforts to prevent and combat racism, Wairan refugees were called "cockroaches" in media outlets and on social networks.¹⁷¹ "Cockroach" has a long history as a racial slur. Cockroaches were ubiquitous on slavers' ships, and despite the role those insects played in the African slaves' horrible suffering, white people in the Americas soon equated the pests that are cockroaches with the "pests" they considered Afro-descendants to be, contributing to their ongoing dehumanization.¹⁷² The same slur was used against Tutsis during the Rwandan genocide for the same purposes of dehumanization.¹⁷³

The use of such a racial slur is a strong indicator of the role of racism in the Arcadians' attitude towards the Wairan refugees. In *Expelled Dominicans and Haitians*, the IACtHR even found that different groups of Afro-descendants can be racist against each other¹⁷⁴ – the idea that public awareness campaigns could achieve what daily lived experience cannot seems far-fetched.

Presidential elections were imminent, and the presence of the Wairan refugees was ubiquitous in the political debate.¹⁷⁵ Therefore, it seems probable that the presence of criminal records gave the Arcadian authorities the opportunity to give ear to the population's racist anger and avoid losing votes, without being overtly racist themselves. In doing so, Arcadia violated the

¹⁷⁰ Hypothetical, §1.

¹⁷¹ *Ibid.*, §24.

¹⁷² Garcia L. "American Cockroaches, Racism, and the Ecology of the Slave Ship.", *Arcadia*, (2017).

¹⁷³ Jorgensen C.M. "A Case Study Analysis of Dehumanization in Rwanda and Darfur", *Nova Southeastern University*, (2016).

¹⁷⁴ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §159.

¹⁷⁵ Hypothetical, §24.

prohibition of discrimination under Article 24 *juncto* 1(1) ACHR.

6.4. Indirect discrimination on socio-economic grounds due to the victims' precarious socio-economic background

In *Nadege Dorzema et al.*, the IACtHR defined indirect discrimination as “*the disproportionate impact of laws, actions, policies or other measures that, even though their wording is or appears to be neutral, or has a general and undifferentiated scope, have negative effects on certain vulnerable groups.*”¹⁷⁶ In the present case, Arcadia’s policies disproportionately and discriminatorily affected the most socio-economically vulnerable refugees.

The IACtHR referred to the link between racial and socio-economic discrimination in *Expelled Dominicans and Haitians*: impoverished persons of African descent face more discrimination than their wealthier counterparts.¹⁷⁷ In the present case, the refugees who were coerced into gang violence were the most socio-economically vulnerable. Gang presence was highest in poor and marginalized neighborhoods¹⁷⁸, and the victims likely had very little to no other option than joining gangs to escape such socio-economic precariousness – a situation exploited by gang recruitment tactics¹⁷⁹. By expelling them, Arcadia targeted the most socio-economically vulnerable among the refugees. While this might not have been Arcadia’s intent, it still amounts to indirect discrimination¹⁸⁰. Therefore, Arcadia violated Articles 24 *juncto* 1(1) and 2 ACHR.

¹⁷⁶ *Nadege Dorzema et al. v. Dominican Republic*, IACtHR, (2012), §235; *D.H. and Others v. Czech Republic*, ECtHR, (2007).

¹⁷⁷ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §159.

¹⁷⁸ Hypothetical, §5.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR, (2014), §263.

REQUEST FOR RELIEF

The petitioners respectfully request this Honorable Court to declare the present case admissible and to rule that the State has violated Articles 2, 3, 4, 5, 7, 8, 17, 19, 22(7), 22(8), 22(9), 24 and 25 *juncto* 1(1) ACHR, Article 13(4) IACPPT, as well as Article 63(2) *juncto* 1(1) ACHR in case of non-compliance with the provisional measures. Additionally, the petitioners respectfully request the Court to order Arcadia to:

- a. Investigate the crimes regarding the twenty-nine murder victims and the seven disappeared persons and identify, prosecute and punish those responsible;
- b. Identify and repatriate the mortal remains of the deceased victims;
- c. Permit the surviving victims to return to Arcadia;
- d. Reunite the separated families in situations compatible with the rights of the child;
- e. Place the victims in centers specifically intended for asylum seekers, which meet the minimum standards compatible with humane treatment and a dignified life;
- f. Provide the victims with an appropriate assessment of their asylum request in Arcadia;
- g. Provide the victims with a refugee document and a work permit;
- h. Provide free medical and psychological care to the victims and their relatives;
- i. Adapt the domestic legislation and migration policy in accordance with international human rights standards;
- j. Ensure that the Arcadian authorities who perform immigration functions receive an intensive training to ensure that they respect and protect everyone's human rights without any discrimination;
- k. Pay a fair compensation for the physical and moral damage suffered by the victims and their relatives;

- l. Publish the full judgment in the Arcadian Official Gazette and a national newspaper;
- m. Publicly acknowledge the State's responsibility.