

**INTER-**

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
INDEX OF AUTHORITIES.....	5
I. Cases .....	5
1. Inter-American System of Human Rights.....	5
1.1. Opinions.....	5
1.2. Cases .....	5
1.2.1. IACtHR.....	5
1.2.2. IACHR .....	7
2. Other international courts .....	7
II. Legal Books and Articles.....	8
III. Reports .....	9
1. IACHR .....	9
2. Other international organizations.....	10
IV. Other contributions of international organizations .....	10
STATEMENT OF THE FACTS .....	12
LEGAL ANALYSIS.....	15
I. Admissibility.....	15
1. Exhaustion of domestic remedies .....	15
2. Timeliness of submission.....	16
3. Jurisdiction <i>ratione personae</i> : the Legal Clinic’s competence to file a petition .....	17
4. The alleged necessity of individually identifying the victims .....	17
II. Request for provisional measures .....	18





## INDEX OF AUTHORITIES

### I. Cases

#### 1. Inter-American System of Human Rights

##### 1.1. Opinions

<i>Advisory Opinion OC-5/85, Compulsory Membership in an Association</i> , IACtHR, (1985).....	39
<i>Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies</i> , IACtHR, (1990).....	15,16
<i>Advisory Opinion OC-17/02, Juridical Status and Human Rights of the Child</i> , IACtHR, (2002).....	37,38,39
<i>Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration And/Or in Need of International Protection</i> , IACtHR, (2014).....	23,26,38
<i>Advisory Opinion OC-25/18, The Institution Of Asylum And Its Recognition As A Human Right In The Inter-American System Of Protection</i> , IACtHR, (2018).....	24,26,27

##### 1.2. Cases

###### 1.2.1. IACtHR

<i>Anzualdo-Castro v. Peru</i> , IACtHR, (Preliminary Objection, Merits, Reparations and Costs), 22 September 2009.....	31
<i>Atala Riffo v. Chile</i> , IACtHR, (Merits), 24 February 2012.....	45

<i>Expelled Dominicans and Haitians v. Dominican Republic</i> , IACtHR, (Preliminary Objection, Merits, Reparations and Costs), 28 August 2014.....	28,30,37,38,40,43,44,46,47
<i>Fornerón and daughter v. Argentina</i> , IACtHR, (Merits, Reparations and Costs), 27 April 2012.....	37,38,39
<i>Gelman v. Uruguay</i> , IACtHR, (Merits and Reparations), 24 February 2011.....	38,39
<i>Heliodoro-Portugal v. Panama</i> , IACtHR, (Preliminary Objection, Merits, Reparations and Costs), 12 August 2008.....	22
<i>Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago</i> , IACtHR, (Merits, Reparations and Costs), 21 June 2002.....	22
<i>J. v. Peru</i> , IACtHR, (Preliminary Objections, Merits, Reparations and Costs), 27 November 2013.....	43
<i>Juan Humberto Sánchez v. Honduras</i> , IACtHR, (Preliminary Objection, Merits, Reparations and Costs), 7 June 2003.....	43
<i>Juvenile Reeducation Institute v. Paraguay</i> , IACtHR, (Preliminary Objections, Merits, Reparations and Costs), 2 September 2004.....	35
<i>La Cantuta v. Peru</i> , IACtHR, (Merits, Reparations and Costs), 29 November 2006.....	30
<i>Las Palmeras v. Colombia</i> , IACtHR, (Merits), 6 December 2001.....	17
<i>Loayza-Tamayo v. Peru</i> , IACtHR, (Merits), 17 September 1997.....	35,42
<i>Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal v. Guatemala</i> , IACtHR, (Preliminary Objection, Merits, Reparations and Costs), 30 November 2016.....	30
<i>Nadege Dorzema et al. v. Dominican Republic</i> , IACtHR, (Merits, Reparations and Costs), 24 October 2012.....	28,47



<i>Khlaifia v. Italy</i> , ECtHR, 15 December 2016.....	29
<i>Maaouia v. France</i> , ECtHR, 12 -ly,	



Derluyn, Ilse; Mels, Cindy; Broekaert, Eric. “Mental Health Problems in Separated Refugee Adolescents”, <i>Journal of Adolescent Health</i> (July 2008), 291-297.....	21,39
Fegert J.M. “Psychosocial problems in traumatized refugee families: overview of risks and some recommendations for support services”, <i>Child. Adolesc. Psychiatry Ment. Health</i> (2018).....	39
Garcia, Lindsay. “American Cockroaches, Racism, and the Ecology of the Slave Ship.” <i>Arcadia</i> (2017) <a href="https://doi.org/10.5282/rcc/8048">doi.org/10.5282/rcc/8048</a> .....	20,46
Jorgensen, Carlyn M. “A Case Study Analysis of Dehumanization in Rwanda and Darfur.” Ph.D. diss., Nova Southeastern University, 2016. <a href="https://nsuworks.nova.edu/shss_dcar_etd/50">https://nsuworks.nova.edu/shss_dcar_etd/50</a> .....	46
Sweeney M. “Fact or Fiction: ‘The Legal Construction of Immigration Removal for Crimes’”, <i>Yale Journal on Regulation</i> (2010).....	43
Vermeulen, Marthe Lot. <i>Enforced Disappearance: Determining State Responsibility under the IACFD</i> . Antwerp: Intersentia, 2012, 549p.....	20

### **III. Reports**

#### **1. IACHR**

IACHR. <i>Admissibility Report Christian Daniel Domínguez Domenichetti</i> (2003).....	16
IACHR. <i>Report on Immigration in the United States: Detention and Due Process</i> (2010).....	32
IACHR. <i>Admissibility Report Mossville Environmental Action Now</i> (2010).....	15
IACHR. <i>Admissibility Report Undocumented Workers</i> (2011).....	15
IACHR. <i>The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas</i> (2013).....	21,27,38
IACHR. <i>Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico</i> (2013).....	32,33

IACHR. <i>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</i> (2015).....	27
IACHR. <i>Admissibility Report Families displaced from the Hacienda Bellacruz</i> (2018).....	17
IACHR. <i>Precautionary Measures in Migrant Children affected by the ‘Zero Tolerance’ Policy regarding the United States of America</i> (2018).....	20,21

**2. Other international organizations ...** G(s)-1-1(14 0 T( )a1( )ITJ 0 R4(s)ep1( )o1(af)-25EMC /s



## 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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.

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<sup>1</sup> Hypothetical, §2-7.

<sup>2</sup> *Ibid.*, §7,14,15.

<sup>3</sup> *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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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

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.<sup>7</sup>

His bereaved family members turned to the Legal Clinic for Displaced People, Migrants



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.*”<sup>14</sup> Therefore, resorting to those remedies becomes a “*senseless formality*”.<sup>15</sup>

Even if the domestic remedies are adequate and effective, indigent petitioners are exempt from exhausting them.<sup>16</sup> Neither the victims nor the Legal Clinic had the financial resources to pay mandatory filing fees or secure legal representation.<sup>17</sup> 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.*”<sup>18</sup> 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.

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<sup>14</sup> *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §68.

<sup>15</sup> *Ibid.*

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

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

<sup>18</sup> 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.<sup>19</sup> Since forced disappearances are a continuing violation<sup>20</sup>, 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 Waira<sup>21</sup>, 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.<sup>22</sup>

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*<sup>23</sup>, the IACtHR has accepted that a petition may be lodged in favor of an indeterminate group of people<sup>24</sup>, and the IACHR has recently reiterated this in *Hacienda Bellacruz*<sup>25</sup>. Judge Cançado Trindade also observed that international

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

<sup>20</sup> *Radilla Pacheco v. Mexico*, IACtHR, (2009), §15.

<sup>21</sup> Hypothetical, §30.

<sup>22</sup> *Ibid.*, §35.

<sup>23</sup> *Las Palmeras v. Colombia*, IACtHR, (2001), §5.

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

<sup>25</sup> IACHR. *Admissibility Report Hacienda Bellacruz*, (2018), p.1.



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.<sup>31</sup> *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



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,

**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 law<sup>46</sup> draws directly from the Convention relating to the Status of Refugees<sup>47</sup> (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.<sup>48</sup>

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-Refoulement<sup>49</sup>, in the 1992 Handbook on the Status of Refugees<sup>50</sup>, and in a 1997 Note on the Exclusion Clauses<sup>51</sup>.

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



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.<sup>58</sup> 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 grave<sup>59</sup>; nonetheless, it is important to remember the mitigating circumstances outlined above. Since the victims risked death and/or torture, it is



*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 [...].*<sup>63</sup>

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.*”<sup>64</sup> This idea is even explicitly enshrined in Article 13(4) IACPPT, which Arcadia has signed<sup>65</sup>. 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.<sup>66</sup> In *Wong Ho Wing*, the IACtHR confirmed that the State has an obligation to examine arguments regarding torture in refoulement cases.<sup>67</sup> If expulsion exposes the petitioner to a real risk of torture, Article 5 ACHR and 13(4) IACPPT have been violated.<sup>68</sup> 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 torture<sup>69</sup> and ensure the victims’ right to physical integrity<sup>70</sup>. 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.

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<sup>63</sup> *Pacheco Tineo Family v. Bolivia*, IACtHR, (2013), §135.

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

<sup>65</sup> Hypothetical, §9.

<sup>66</sup> *Cruz Varas v. Sweden*, ECtHR, (1991), §82.

<sup>67</sup> *Wong Ho Wing v. Peru*, IACtHR, (2015), §132.

<sup>68</sup> *Ibid.*, §166.

<sup>69</sup> *Wong Ho Wing v. Peru*, IACtHR, (2015), §132.

<sup>70</sup> *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.<sup>71</sup> 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 w*





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.<sup>88</sup>

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

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.<sup>94</sup> Any limitation of this right should be exceptional and meet certain requirements in order to avoid arbitrariness.<sup>95</sup>

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.<sup>96</sup> Merely referring to the existence of a criminal record does not justify immigration detention.<sup>97</sup> Since Arcadia failed to outline the particular reasons to consider each petitioner a threat to national security<sup>98</sup>, it was in no way established that the detained persons were “*a genuine, present and sufficiently serious threat.*”<sup>99</sup>

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 deport(i)-6(n)-4(al)-6( r)-1(eco)-4(r)-

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

Furthermore, the detention does not meet the standards of necessity and proportionality<sup>103</sup> regarding Arcadia's stated purpose of ensuring their presence and/or deportation<sup>104</sup>. Firstly, the relevant statutory provision and the administrative authorities did not prescribe a maximum time limit for the detention.<sup>105</sup> This made the duration of the detention unpredictable and therefore deprived the victims of a safeguard against arbitrary detention duration.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> Economic hardship does not justify non-compliance with these obligations.<sup>109</sup>

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<sup>102</sup> *Wong Ho Wing v. Peru*, IACtHR, (2015), §250.

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

<sup>104</sup> CQ, §15.

<sup>105</sup> *Ibid.*, §11.

<sup>106</sup> *Wong Ho Wing v. Peru*, IACtHR, (2015), §255; *Vélez Loor v. Panama*, IACtHR, (2010), §117; IACHR. *Human*







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

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.<sup>125</sup> 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.<sup>126</sup> In removal proceedings, it is the State's duty to examine the best interest of the deportee's children.<sup>127</sup> 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.<sup>128</sup> Therefore, Arcadia has an obligation to adopt all positive measures required to ensure the protection of children pursuant to Articles 17 and 19 ACHR.<sup>129</sup>

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

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

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

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

<sup>128</sup> 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.

<sup>129</sup> *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.<sup>130</sup> However, that power is limited by the State's obligation to respect and guarantee human rights.<sup>131</sup> In this instance, the deportation also affects the deportees' children.<sup>132</sup> Therefore, the State must weigh the children's best interests<sup>133</sup> against Arcadia's migration policy and the reasons for the deportation.<sup>134</sup> 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.<sup>135</sup> 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 temporary<sup>136</sup>. Abuse and neglect are the only two grounds on which separation can be necessary for the child's best interest.<sup>137</sup> This necessity needs to be reviewed at least every three months.<sup>138</sup> In the present case, there has been no abuse or neglect, and a criminal

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

<sup>131</sup> *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.

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

<sup>133</sup> *Fornerón and daughter v. Argentina*, IACtHR, (2017), §116; *Advisory Opinion OC-17/02*, IACtHR, (2002), §65; *Advisory Opinion OC*

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

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.**



without delay, a decision on the legality of the arrest or detention<sup>154</sup> and that they must establish whether there has been a human rights violation and ensure the necessary redress<sup>155</sup>.

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.<sup>156</sup>

The authorities did not consider the risk of torture and death<sup>157</sup> 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 law<sup>158</sup> that protects a person against a second sentence based on facts they have already faced trial for.<sup>159</sup> 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 sanction<sup>160</sup> 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

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<sup>154</sup> *Vélez Loor v. Panama*, IACtHR, (2010), §129.

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

<sup>156</sup> Hypothetical, §28.

<sup>157</sup> *Ibid.*, §23,28.

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

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

<sup>160</sup> *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,*



## 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.”<sup>164</sup> 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.”<sup>165</sup>

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.<sup>166</sup>

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

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<sup>164</sup> Hypothetical, §13.

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

<sup>166</sup> *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.<sup>167</sup> 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.<sup>168</sup> 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 proportionate<sup>169</sup> 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.

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

### 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 descent<sup>170</sup>, 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.<sup>171</sup> "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.<sup>172</sup> The same slur was used against Tutsis during the Rwandan genocide for the same purposes of dehumanization.<sup>173</sup>

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 other<sup>174</sup> – the idea that public awareness campaigns could achieve what daily lived experience cannot seems far-

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.*”<sup>176</sup> 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.<sup>177</sup> In the present case, the refugees who were coerced into gang violence were the most socio-economically vulnerable. Gang presence was

**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.